

## **BILL ANALYSIS**

Senate Research Center  
82R7830 PMO-D

S.B. 1459  
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Business & Commerce  
5/5/2011  
As Filed

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

The Texas Legislature, in a recent legislative session, enacted legislation to prohibit a real estate practice whereby a private entity could create a real estate transfer fee payable over a long period of time by placing a deed restriction on a property requiring such a fee in connection with a future transfer of the property. Current law includes certain exemptions, creating a situation that has resulted in substantial efforts by certain persons to circumvent the law through creative interpretation of the language. S.B. 1459 seeks to close loopholes in current law by prohibiting future private transfer fees on real property with certain exemptions, and providing clarity and notice requirements to properties with existing private transfer fees.

As proposed, S.B. 1459 amends current law relating to prohibiting certain private transfer fees and the preservation of private real property rights and provides penalties.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Chapter 5, Property Code, by adding Subchapter G, as follows:

#### **SUBCHAPTER G. CERTAIN PRIVATE TRANSFER FEES PROHIBITED; PRESERVATION OF PRIVATE REAL PROPERTY RIGHTS**

Sec. 5.201. DEFINITIONS. Defines "lender," "payee," "private transfer fee," "private transfer fee obligation," "subsequent owner," "subsequent purchaser," and "transfer" in this subchapter.

Sec. 5.202. CERTAIN PRIVATE TRANSFER FEE OBLIGATIONS VOID. (a) Provides that except as provided by this subchapter, a private transfer fee obligation is not binding or enforceable against a subsequent owner or subsequent purchaser of an interest in real property and is void.

(b) Provides that for purposes of this subchapter, the following payments are not considered private transfer fee obligations:

(1) consideration paid by a purchaser to a seller for an interest in real property transferred, including, as applicable, a mineral interest transferred, including additional consideration paid to a seller for the property's appreciation, development, or sale after the interest in the property has been transferred to the purchaser, if the additional consideration is paid only once and that payment does not bind successors in interest to the property to any private transfer fee obligation;

(2) a commission paid to a licensed real estate broker under a written agreement between a seller or purchaser and the broker, including an

additional commission for the property's appreciation, development, or sale after the interest in property is transferred to the purchaser;

(3) interest, a fee, a charge, or another type of payment to a lender under a loan secured by a mortgage on the property, including:

(A) a fee payable for the lender's consent to an assumption of the loan or transfer of the property subject to the mortgage;

(B) a fee or charge payable for an estoppel letter or certificate;

(C) a shared appreciation interest or profit participation; or

(D) other consideration payable in connection with the loan;

(4) rent, reimbursement, a fee, a charge, or another type of payment to a lessor under a lease, including a fee for consent to an assignment, sublease, encumbrance, or transfer of a lease;

(5) consideration paid to the holder of an option to purchase an interest in property, or to the holder of a right of first refusal or first offer to purchase an interest in property, for waiving, releasing, or not exercising the option or right when the property is transferred to another person;

(6) a fee payable to or imposed by a governmental entity in connection with recording the transfer of the property;

(7) dues, a fee, a charge, an assessment, a fine, a contribution, or another type of payment to a property owners' association, as defined by Section 209.002 (Definitions), under a declaration or other covenant or under law, including a fee or charge payable for an estoppel letter or certificate issued by the association or an authorized agent of the association, provided that no portion of the fee or charge is required to be passed through to a third party designated or identifiable in the declaration or other covenant or law or in a document referenced in the declaration or other covenant or law; or

(8) dues, a fee, a charge, an assessment, a fine, a contribution, or another type of payment for the transfer of a club membership related to the property.

Sec. 5.203. NOTICE REQUIREMENTS FOR CONTINUATION OF EXISTING PRIVATE TRANSFER FEE OBLIGATIONS. (a) Requires a person who receives or collects a private transfer fee under a private transfer fee obligation created before the effective date of this subchapter, on or before January 31, 2012, to file for record a "Notice of Private Transfer Fee Obligation" as provided by this section in the real property records of each county in which the property is located.

(b) Requires multiple payees of a single private transfer fee under a private transfer fee obligation to designate one payee as the payee of record for the fee.

(c) Requires that a notice under Subsection (a):

(1) be printed in at least 14-point boldface type;

(2) state the amount of the private transfer fee and the method of determination, if applicable;

(3) state the date or any circumstance under which the private transfer fee obligation expires, if any;

- (4) state the purpose for which the money from the private transfer fee obligation will be used;
- (5) notwithstanding Subsection (b), state the name of each payee and each payee's contact information;
- (6) state the name and address of the payee of record to whom the payment of the fee must be sent;
- (7) include the acknowledged signature of each payee or authorized representative of each payee; and
- (8) state the legal description of the property subject to the private transfer fee obligation.

(d) Requires a person required to file a notice under this section to:

- (1) refile the notice described by this section on or before January 31 of each year in which a private transfer fee may be collected or received; and
- (2) amend the notice to reflect any change in the name or address of any payee included in the notice not later than the 30th day after the date the change occurs.

(e) Requires a person who amends a notice under Subsection (d)(2) to include:

- (1) the recording information of the original notice filed as required by this section; and
- (2) the legal description of the property subject to the private transfer fee obligation.

(f) Provides that if a person required to file a notice under this section fails to comply with this section:

- (1) payment of the private transfer fee is prohibited from being a requirement for the conveyance of an interest in the property to a purchaser;
- (2) the property is not subject to further obligation under the private transfer fee obligation; and
- (3) the private transfer fee obligation is void.

Sec. 5.204. ADDITIONAL COMPLIANCE REQUIREMENT: RESPONSE TO REQUEST FOR NOTICE. (a) Authorizes a person to send a written request to the payee of record at the payee's address of record requesting a copy of the most recently filed notice under Section 5.203 and a statement of the amount of the private transfer fee. Requires the payee to provide to the requesting party a copy of the notice and a statement of the amount of the private transfer fee not later than the 30th day after the date the party sends the written request to the payee of record.

(b) Authorizes a subsequent purchaser of property subject to the private transfer fee obligation, if the payee of record fails to comply with Subsection (a), to file an affidavit as provided by this subsection. Requires that the affidavit:

- (1) state that:
  - (A) a written request for a copy of the notice required under Section 5.203 and a statement of the amount of the private transfer

fee was sent to the payee of record at the address shown in the most recent notice filed on the date the request was sent; and

(B) the payee failed to provide a copy of the notice and a statement of the amount of the private transfer fee in a timely manner; and

(2) include:

(A) the legal description of the property subject to the private transfer fee obligation;

(B) the name of the record owner of the property on the date the affidavit is signed;

(C) recording information for the instrument of record, if any, imposing the private transfer fee obligation; and

(D) a description of the unrecorded contractual agreement or promise, if any, imposing the private transfer fee obligation.

(c) Provides that an affidavit filed for record under Subsection (b) is prima facie evidence that the payee failed to comply with Section 5.203.

(d) Provides that after the date an affidavit under this section is filed:

(1) payment of the private transfer fee may not be a requirement for the conveyance of an interest in the property to a purchaser;

(2) the property is not subject to further obligation under the private transfer fee obligation; and

(3) the private transfer fee obligation is void.

**Sec. 5.205. ADDITIONAL COMPLIANCE REQUIREMENT: TIMELY ACCEPTANCE OF FEES PAID UNDER EXISTING PRIVATE TRANSFER FEE OBLIGATIONS.** (a) Requires the payee of record on the date a private transfer fee is paid under a private transfer fee obligation subject to Section 5.203 to accept the payment on or before the 30th day after the date the payment is made.

(b) Provides that if the payee of record fails to comply with Subsection (a):

(1) the payment is required to be returned to the purchaser;

(2) payment of the private transfer fee is prohibited from being a requirement for the conveyance of an interest in the property to a purchaser;

(3) the property is not subject to further obligation under the private transfer fee obligation; and

(4) the private transfer fee obligation is void.

**Sec. 5.206. DISCLOSURE OF EXISTING TRANSFER FEE OBLIGATION REQUIRED IN CONTRACT FOR SALE.** (a) Requires that a contract for the sale of real property subject to a private transfer fee obligation authorized under this subchapter describe the obligation and state that the obligation is governed by this subchapter.

(b) Provides that if a contract for the sale of real property subject to a private transfer fee obligation authorized under this subchapter fails to comply with this section:

(1) payment of the private transfer fee is prohibited from being a requirement for the conveyance of an interest in the property to a purchaser;

(2) the property is not subject to further obligation under the private transfer fee obligation; and

(3) the private transfer fee obligation is void.

Sec. 5.207. WAIVER VOID. Provides that a provision that purports to waive a purchaser's rights under this subchapter is void.

Sec. 5.208. LIABILITY FOR IMPOSING PRIVATE TRANSFER FEE OBLIGATION. Provides that a person who imposes or enters into an agreement imposing a private transfer fee obligation in the person's favor in violation of this subchapter is liable for:

(1) damages resulting from the imposition of the private transfer fee obligation, including the amount of any private transfer fee paid; and

(2) attorney's fees, expenses, and costs incurred in an action to recover the private transfer fee paid or to quiet title to the real property.

Sec. 5.209. INJUNCTIVE OR DECLARATORY RELIEF; PROVIDING PENALTIES.

(a) Authorizes the attorney general to institute an action for injunctive or declaratory relief to restrain a violation of this subchapter.

(b) Authorizes the attorney general, in addition to instituting an action for injunctive or declaratory relief under Subsection (a), to institute an action for civil penalties against a payee for a violation of this chapter. Prohibits a civil penalty assessed under this section, except as provided by Subsection (c), from exceeding an amount equal to two times the amount of the private transfer fee charged or collected by the payee in violation of this subchapter.

(c) Authorizes the court, if the court in which an action under Subsection (b) is pending finds that a payee violated this subchapter with a frequency that constitutes a pattern or practice, to assess a civil penalty not to exceed \$250,000.

(d) Authorizes the attorney general, if the attorney general substantially prevails in an action for injunctive relief or a civil penalty under this section, to recover reasonable attorney's fees, costs, and expenses incurred in obtaining the relief or penalty, including court costs and witness fees.

(e) Requires the comptroller of public accounts to deposit to the credit of the general revenue fund all money collected under this section.

SECTION 2. Repealer: Section 5.017 (Fee for Future Conveyance of Residential Real Property and Related Lien Prohibited), Property Code.

SECTION 3. Effective date: upon passage or September 1, 2011.