

1 SB178
2 125928-1
3 By Senator Marsh
4 RFD: Judiciary
5 First Read: 08-MAR-11

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8 SYNOPSIS: This bill would prohibit private transfer
9 fee obligations in deeds or other real property
10 instruments and would declare private transfer fee
11 obligations imposed prior to the effective date of
12 this act void under certain conditions.

13
14 A BILL
15 TO BE ENTITLED
16 AN ACT

17
18 Relating to private transfer fees; prohibiting the
19 creation of private transfer fee obligations; and requiring
20 certain procedures for notice and disclosure relative to
21 private transfer fee obligations imposed prior to the
22 effective date of this act in order for the obligations to be
23 valid.

24 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

25 Section 1. Article 18 is added to Chapter 4 of Title
26 35 of the Code of Alabama 1975, to read as follows:

27 Article 18.

1 §35-4-431. Intent.

2 The Legislature finds and declares that the public
3 policy of this state favors the marketability of real property
4 and the transferability of interests in real property free of
5 title defects or unreasonable restraints on alienation. The
6 Legislature further finds and declares that private transfer
7 fee obligations violate this public policy by impairing the
8 marketability and transferability of real property and by
9 constituting an unreasonable restraint on alienation
10 regardless of the duration of the obligation to pay a private
11 transfer fee, the amount of a private transfer fee, or the
12 method by which any private transfer fee is created or
13 imposed. Thus, the Legislature finds and declares that a
14 private transfer fee obligation should not run with the title
15 to property or otherwise bind subsequent owners of property
16 under any common law or equitable principle.

17 §35-4-432. Definitions.

18 (a) As used in this act, the following words have
19 the following meanings:

20 (1) ASSOCIATION. A association or unit owners'
21 association, as defined in Section 35-8A-103 of the Alabama
22 Uniform Condominium Act of 1991; an association as defined in
23 Section 35-8-2 of the Condominium Ownership Act; or a
24 nonprofit or cooperative membership organization composed
25 exclusively of owners of mobile homes, manufactured housing,
26 time-shares, camping resort interests, or other interests in
27 real property that is responsible for the maintenance,

1 improvements, services, or expenses related to real property
2 that is owned, used, or enjoyed in common by the members.

3 (2) PAYEE. The person or entity who claims the right
4 to receive or collect a private transfer fee payable under a
5 private transfer obligation. A payee may or may not have a
6 pecuniary interest in the private transfer fee obligation.

7 (3) PRIVATE TRANSFER FEE. A fee or charge payable
8 upon the transfer of an interest in real property, or payable
9 for the right to make or accept such transfer, regardless of
10 whether the fee or charge is a fixed amount or is determined
11 as a percentage of the value of the property, the purchase
12 price, or other consideration given for the transfer. The
13 following are not private transfer fees for purposes of this
14 article:

15 a. Any consideration payable by the grantee to the
16 grantor for the interest in real property being transferred,
17 including any subsequent additional consideration for the
18 property payable by the grantee based upon any subsequent
19 appreciation, development, or sale of the property, if such
20 additional consideration is payable on a one-time basis only
21 and the obligation to make such payment does not bind
22 successors in title to the property. For the purposes of this
23 paragraph, an interest in real property may include a separate
24 mineral estate and its appurtenant surface access rights.

25 b. Any commission payable to a licensed real estate
26 broker for the transfer of real property pursuant to an
27 agreement between the broker and the grantor or the grantee,

1 including, but not limited to, any subsequent additional
2 commission for that transfer payable by the grantor or the
3 grantee based upon any subsequent appreciation, development,
4 or sale of the property.

5 c. Any interest, charges, fees, or other amounts
6 payable by a borrower to a lender pursuant to a loan secured
7 by a mortgage against real property, including, but not
8 limited to, any fee payable to the lender for consenting to an
9 assumption of the loan or a transfer of the real property
10 subject to the mortgage, any fees or charges payable to the
11 lender for estoppel letters or certificates, and any shared
12 appreciation interest or profit participation or other
13 consideration and payable to the lender in connection with the
14 loan.

15 d. Any rent, reimbursement, charge, fee, or other
16 amount payable by a lessee to a lessor under a lease,
17 including, but not limited to, any fee payable to the lessor
18 for consenting to an assignment, subletting, encumbrance, or
19 transfer of the lease.

20 e. Any consideration payable to the holder of an
21 option to purchase an interest in real property or the holder
22 of a right of first refusal or first offer to purchase an
23 interest in real property for waiving, releasing, or not
24 exercising the option or right upon the transfer of the real
25 property to another person.

26 f. Any tax, fee, charge, assessment, fine, or other
27 amount payable to or imposed by a governmental authority.

1 g. Any fee, charge, assessment, dues, fine,
2 contribution, or other amount payable to a homeowners',
3 condominium, cooperative, mobile home, or property owners'
4 association pursuant to a declaration or covenant or law
5 applicable to such association, including, but not limited to,
6 fees or charges payable for estoppel letters or certificates
7 issued by the association or its authorized agent.

8 h. Any fee, charge, assessment, dues, fine,
9 contribution, or other amount imposed by a declaration or
10 covenant encumbering real property, and payable solely to a
11 nonprofit or charitable organization for the purpose of
12 supporting cultural, educational, charitable, recreational,
13 environmental, conservation, or other similar activities
14 benefitting the real property subject to the declaration or
15 covenant or the community in which such real property is
16 located.

17 i. Any fee, charge, assessment, dues, fine,
18 contribution, or other amount pertaining solely to the
19 purchase or transfer of a club membership relating to real
20 property owned by the member, including, but not limited to,
21 any amount determined by reference to the value, purchase
22 price, or other consideration given for the transfer of the
23 real property.

24 (4) PRIVATE TRANSFER FEE OBLIGATION. An obligation
25 arising under a declaration or covenant recorded against the
26 title to real property, or under any other contractual
27 agreement or promise, whether or not recorded, that requires

1 or purports to require the payment of a private transfer fee
2 upon a subsequent transfer of an interest in the real
3 property.

4 (5) TRANSFER. The sale, gift, conveyance,
5 assignment, inheritance, or other transfer of an ownership
6 interest in real property located in this state.

7 §35-4-433. Prohibition.

8 A private transfer fee obligation recorded or
9 entered into in this state on or after the effective date of
10 this act does not run with the title to real property and is
11 not binding on or enforceable at law or in equity against any
12 subsequent owner, purchaser, or mortgagee of any interest in
13 real property as an equitable servitude or otherwise. Any
14 private transfer fee obligation that is recorded or entered
15 into in this state on or after the effective date of this act
16 is void and unenforceable. This section does not create a
17 presumption that a private transfer fee obligation recorded or
18 entered into in this state before the effective date of this
19 act is valid and enforceable.

20 §35-4-434. Liability for Violations.

21 (a) Any person who records or enters into an
22 agreement imposing a private transfer fee obligation in his or
23 her favor after the effective date of this act shall be liable
24 for:

25 (1) Any and all damages resulting from the
26 imposition of the private transfer fee obligation on the
27 transfer of an interest in the real property, including, but

1 not limited to, the amount of any transfer fee paid by a party
2 to the transfer.

3 (2) All attorney fees, expenses, and costs incurred
4 by a party to the transfer or mortgagee of the real property
5 to recover any private transfer fee paid or in connection with
6 an action to quiet title.

7 (b) Where an agent acts on behalf of a principal to
8 record or secure a private transfer fee obligation, liability
9 shall be assessed to the principal, rather than the agent.

10 §35-4-435. Disclosure.

11 (a) Any contract for the sale of real property
12 subject to a private transfer fee obligation shall include a
13 provision disclosing the existence of that obligation, a
14 description of the obligation, and a statement that private
15 transfer fee obligations are subject to certain prohibitions
16 under this article. A contract for sale of real property which
17 does not conform to the requirements of this section is not
18 enforceable by the seller against the buyer, nor is the buyer
19 liable to the seller for damages under such a contract, and
20 the buyer under the contract is entitled to the return of all
21 deposits made in connection with the sale of the real
22 property.

23 (b) Where a private transfer fee obligation is not
24 disclosed under subsection (a) and a buyer subsequently
25 discovers the existence of the private transfer fee obligation
26 after title to the property has passed to the buyer, the buyer
27 has the right to recover both:

1 (1) Any and all damages resulting from the failure
2 to disclose the private transfer fee obligation, including,
3 but not limited to, the amount of any private transfer fee
4 paid by the buyer, or the difference between:

5 a. The market value of the real property if it were
6 not subject to a private transfer fee obligation.

7 b. The market value of the real property as subject
8 to a private transfer fee obligation.

9 (2) All attorney fees, expenses, and costs incurred
10 by the buyer in seeking the buyer's remedies under this
11 subsection.

12 (c) Any provision in a contract for sale of real
13 property that purports to waive the rights of a buyer under
14 this section is void.

15 §35-4-436. Notice Requirements for Existing Private
16 Transfer Fee Obligations.

17 (a) The payee of a private transfer fee obligation
18 imposed prior to the effective date of this act shall record,
19 prior to December 31, 2011, against the real property subject
20 to the private transfer fee obligation, a separate document in
21 the office of the judge of probate for each county in which
22 the real property is located which complies with all of the
23 following requirements:

24 (1) The title of the document shall be "Notice of
25 Private Transfer Fee Obligation" in at least 14-point boldface
26 type.

1 (2) The amount, if the private transfer fee is a
2 flat amount, or the percentage of the sales price constituting
3 the cost of the private transfer fee, or such other basis by
4 which the private transfer fee is to be calculated.

5 (3) If the real property is residential property,
6 actual dollar-cost examples of the private transfer fee for a
7 home priced at two hundred fifty thousand dollars (\$250,000),
8 five hundred thousand dollars (\$500,000), and seven hundred
9 fifty thousand dollars (\$750,000).

10 (4) The date or circumstances under which the
11 private transfer fee obligation expires, if any.

12 (5) The purpose for which the funds from the private
13 transfer fee obligation will be used.

14 (6) The name of the payee and specific contact
15 information regarding where the funds are to be sent.

16 (7) The acknowledged signature of the payee, or a
17 representative of the payee.

18 (8) The legal description of the real property
19 purportedly burdened by the private transfer fee obligation.

20 (9) Where there is more than one person or entity
21 who claims the right to receive or collect a private transfer
22 fee under a private transfer fee obligation, those persons or
23 entities shall designate a single person or entity as the
24 payee for purposes of that private transfer fee obligation.

25 (b) The payee may file an amendment to the notice of
26 private transfer fee containing new contact information, but
27 such amendment must contain the recording information of the

1 notice of private transfer fee which it amends and the legal
2 description of the real property burdened by the private
3 transfer fee obligation.

4 (c) If a payee fails to file the notice required
5 under subsection (a)(1) prior to December 31, 2011, the
6 grantor or any real property burdened by the private transfer
7 fee obligation may proceed with the conveyance of an interest
8 in the real property to any grantee and in so doing shall be
9 conclusively deemed to have acted in good faith and shall not
10 be subject to any obligations under the private transfer fee
11 obligation. In that event, the private transfer fee obligation
12 is void and the real property thereafter shall be conveyed
13 free and clear of the private transfer fee and private
14 transfer fee obligation.

15 (d) If a payee fails to fully comply with subsection
16 (a) in filing the notice required thereunder, then the
17 grantor, on recording of an affidavit under subsection (e),
18 may convey an interest in the real property to any grantee
19 without payment of the private transfer fee and is not subject
20 to any further obligations under the private transfer fee
21 obligation. In that event, the private transfer fee obligation
22 is void and the real property thereafter shall be conveyed
23 free and clear of the private transfer fee and private
24 transfer fee obligation.

25 (e) If the payee fails to provide a written
26 statement of the private transfer fee payable within 30 days
27 of the date of a written request for the same sent to the

1 address shown in the notice of private transfer fee, then the
2 grantor, on recording of an affidavit under subsection (f),
3 may convey an interest in the real property to any grantee
4 without payment of the private transfer fee and is not subject
5 to any further obligations under the private transfer fee
6 obligation. In that event, the private transfer fee obligation
7 shall become null and void and the real property thereafter
8 shall be conveyed free and clear of the private transfer fee
9 and private transfer fee obligation.

10 (f) An affidavit stating the facts enumerated in
11 subsection (g) shall be recorded in the office of the judge of
12 probate for each county in which the real property is situated
13 prior to or simultaneously with a conveyance pursuant to
14 subsection (d) or (e) of real property unburdened by a private
15 transfer fee obligation. An affidavit filed under this
16 subsection shall state that the affiant has actual knowledge
17 of, and is competent to testify to, the facts in the affidavit
18 and shall include the legal description of the real property
19 burdened by the private transfer fee obligation, the name of
20 the person appearing by the record to be the owner of the real
21 property at the time of the signing of the affidavit, a
22 reference, by recording information, to the instrument of
23 record containing the private transfer fee obligation and an
24 acknowledgment that the affiant is testifying under penalty of
25 perjury.

1 (g) When recorded, an affidavit filed under
2 subsection (f) is prima facie evidence that either of the
3 following:

4 (1) The payee has failed to fully comply with
5 subsection (a) in the respects stated in the affidavit.

6 (2) A request for the written statement of the
7 private transfer fee was sent to the payee at the address
8 shown on the notice of private transfer fee, and the payee
9 failed to provide the written statement of the private
10 transfer fee payable within 30 days of the date of the notice
11 sent to the address shown in the notification.

12 Section 2. This act shall become effective
13 immediately following its passage and approval by the
14 Governor, or its otherwise becoming law.