



CAR Successfully Limits Private Residential Transfer Fees

By: Dick Clark

CAR's Legislative Policy Committee chaired by REALTOR® Jack Beuse and CAR's Public Policy staff led by VP Rachel Nance successfully responded to concerns expressed by many REALTORS® across Colorado by working with a coalition of stake holders to encourage the Colorado Legislature to limit private residential transfer fees. When the legislature passed SB-234 in the 2011 Session, Colorado joined over twenty-five other states to ban private transfer-fee covenants recorded in the future and to regulate existing residential private transfer-fee covenants already recorded. The bill, which adds the new section 38-35-127 to Colorado Revised Statutes, was signed by Governor John Hickenlooper on May 23, 2011, which is the **effective date** of SB-234.

History

Residential property owners in Colorado encounter many different types of transfer fees that must be paid at closings to local governments, metro districts, homeowner and condominium associations, and certain nonprofit organizations. One type of transfer-fee covenant that has adversely affected the transferability and marketability of residential property is a covenant that creates a private transfer fee paid to a third party on *every* transfer of the property for as long as the covenant is in place, typically 99 years. Such fees, which range from one-percent to three-percent (e.g., \$4,000-\$12,000 on a \$400,000 home), reduce the seller's equity and often surprise buyers. These private transfer-fee covenants have become such a problem across the country that the Federal Housing Finance Agency is promulgating a new rule that precludes Fanny Mae and Freddy Mac from buying mortgages on homes that have such private transfer-fee covenants. To protect consumers in Colorado and to promote the transferability and marketability of property, the Land Title Association of Colorado, the Colorado Mortgage Lenders Association and the Real Estate Section of the Colorado Bar Association joined CAR in supporting, drafting and lobbying SB-234. Through the efforts of the primary sponsors, Senator Cheri Jahn (D – District 20) and Representative Tom Massey (R – District 60), the bill passed.

Prospective Ban

There are four portions to the new legislation. One portion bans these private transfer-fee covenants recorded on residential property in Colorado after the **effective date** of the legislation. *See* C.R.S. 38-35-127 (3)(a). If such private transfer-fee covenants are recorded after the **effective date** of the legislation, they are rendered void and unenforceable by the new legislation. Moreover, any person who records a banned transfer-fee covenant after the **effective date**, and who fails to release such covenant after receiving 30 days' written notice, is liable for actual damages, reasonable attorney's fees, and expenses. *See* C.R.S. 38-35-127 (3)(b).

Notice of Existing Covenants

For private transfer-fee covenants recorded prior to the **effective date** of the legislation, the person or entity who is to receive the fee must record a notice of transfer fee on the title to the property no later than October 1, 2011. *See* C.R.S. 38-35-127 (4)(a). The content of that notice is set forth in C.R.S. 38-35-127 (4)(b). If the person who is to receive the private transfer fee fails

to fully comply with paragraphs (4)(a) and (b), the private transfer covenant is deemed void and all conveyances, thereafter, shall be free and clear of the transfer fee and transfer-fee covenant. *See* C.R.S. 38-35-127 (5).

Owner's Right to Send Request

A third portion of the new legislation entitles an owner of residential property to send a request to the person or entity to whom the transfer fee is being paid, which asks for a written statement specifying the amount of the transfer fee. *See* C.R.S. 38-35-127 (6)(a). This provision is intended to give an owner an opportunity to clarify whether a private transfer fee will be due upon transfer of the property and, if so, how much must be paid. The process also assists real-estate brokers and mortgage lenders as they contemplate a prospective sale of a property. If the payee fails to provide a written statement within 30 days after the written request is sent, then the owner may execute and record an affidavit described in C.R.S. 38-35-127 (6)(b) which, when recorded on the title to the property, excuses that owner from paying the private transfer fee but *does not release* subsequent owners of the property from the private transfer-fee covenant.

Exclusions

The final portion of SB-234 excludes several types of transfer fees and covenants to permit a variety of groups in Colorado to continue to use transfer fees to fund programs that benefit the property owners and their communities, including homeowner and condominium associations, local governments, metropolitan and special districts, developers, homebuilders, and certain nonprofit organizations and foundations. *See* C.R.S. 38-35-127 (2)(b) and C.R.S. 38-35-127 (8). The new legislation does *not* make all of the exclusions valid or enforceable, since such exclusions must continue to comply with existing statutory and common law, including the "touch and concern" standard created under Colorado common law. *See* C.R.S. 38-35-127 (9). Most important, SB-234 relates only to residential private transfer-fee covenants, not to commercial. The new legislation applies to residential real property upon which residential improvements, as defined in C.R.S. 39-1-102 (14.3), are located, or upon which construction of such residential improvements has commenced. *See* C.R.S. 38-35-127 (2)(a.)

Conclusion

A complete description of SB-234 is beyond the scope of this article. Property owners, real-estate brokers, developers, lenders, homebuilders, title companies, and clerk and recorders are encouraged to contact their legal counsel for specific legal advice and training on SB-234.

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