

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

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4 ENGROSSED

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7 A BILL
8 TO BE ENTITLED
9 AN ACT

10
11 Relating to private transfer fees; prohibiting the
12 creation of private transfer fee obligations; and requiring
13 certain procedures for notice and disclosure relative to
14 private transfer fee obligations imposed prior to the
15 effective date of this act in order for the obligations to be
16 valid.

17 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

18 Section 1. Article 18 is added to Chapter 4 of Title
19 35 of the Code of Alabama 1975, to read as follows:

20 Article 18.

21 §35-4-431. Intent.

22 The Legislature finds and declares that the public
23 policy of this state favors the marketability of real property
24 and the transferability of interests in real property free of
25 title defects or unreasonable restraints on alienation. The
26 Legislature further finds and declares that private transfer
27 fee obligations violate this public policy by impairing the

1 marketability and transferability of real property and by
2 constituting an unreasonable restraint on alienation
3 regardless of the duration of the obligation to pay a private
4 transfer fee, the amount of a private transfer fee, or the
5 method by which any private transfer fee is created or
6 imposed. Thus, the Legislature finds and declares that a
7 private transfer fee obligation should not run with the title
8 to property or otherwise bind subsequent owners of property
9 under any common law or equitable principle.

10 §35-4-432. Definitions.

11 (a) As used in this act, the following words have
12 the following meanings:

13 (1) ASSOCIATION. A association or unit owners'
14 association, as defined in Section 35-8A-103 of the Alabama
15 Uniform Condominium Act of 1991; an association as defined in
16 Section 35-8-2 of the Condominium Ownership Act; or a
17 nonprofit or cooperative membership organization composed
18 exclusively of owners of mobile homes, manufactured housing,
19 time-shares, camping resort interests, or other interests in
20 real property that is responsible for the maintenance,
21 improvements, services, or expenses related to real property
22 that is owned, used, or enjoyed in common by the members.

23 (2) PAYEE. The person or entity who claims the right
24 to receive or collect a private transfer fee payable under a
25 private transfer obligation. A payee may or may not have a
26 pecuniary interest in the private transfer fee obligation.

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

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

19 b. Any commission payable to a licensed real estate
20 broker for the transfer of real property pursuant to an
21 agreement between the broker and the grantor or the grantee,
22 including, but not limited to, any subsequent additional
23 commission for that transfer payable by the grantor or the
24 grantee based upon any subsequent appreciation, development,
25 or sale of the property.

26 c. Any interest, charges, fees, or other amounts
27 payable by a borrower to a lender pursuant to a loan secured

1 by a mortgage against real property, including, but not
2 limited to, any fee payable to the lender for consenting to an
3 assumption of the loan or a transfer of the real property
4 subject to the mortgage, any fees or charges payable to the
5 lender for estoppel letters or certificates, and any shared
6 appreciation interest or profit participation or other
7 consideration and payable to the lender in connection with the
8 loan.

9 d. Any rent, reimbursement, charge, fee, or other
10 amount payable by a lessee to a lessor under a lease,
11 including, but not limited to, any fee payable to the lessor
12 for consenting to an assignment, subletting, encumbrance, or
13 transfer of the lease.

14 e. Any consideration payable to the holder of an
15 option to purchase an interest in real property or the holder
16 of a right of first refusal or first offer to purchase an
17 interest in real property for waiving, releasing, or not
18 exercising the option or right upon the transfer of the real
19 property to another person.

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

22 g. Any fee, charge, assessment, dues, fine,
23 contribution, or other amount payable to a homeowners',
24 condominium, cooperative, mobile home, or property owners'
25 association pursuant to a declaration or covenant or law
26 applicable to such association, including, but not limited to,

1 fees or charges payable for estoppel letters or certificates
2 issued by the association or its authorized agent.

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

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

19 (4) PRIVATE TRANSFER FEE OBLIGATION. An obligation
20 arising under a declaration or covenant recorded against the
21 title to real property, or under any other contractual
22 agreement or promise, whether or not recorded, that requires
23 or purports to require the payment of a private transfer fee
24 upon a subsequent transfer of an interest in the real
25 property.

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

4 §35-4-433. Prohibition.

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

17 §35-4-434. Liability for Violations.

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

22 (1) Any and all damages resulting from the
23 imposition of the private transfer fee obligation on the
24 transfer of an interest in the real property, including, but
25 not limited to, the amount of any transfer fee paid by a party
26 to the transfer.

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

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

8 §35-4-435. Disclosure.

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

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

26 (1) Any and all damages resulting from the failure
27 to disclose the private transfer fee obligation, including,

1 but not limited to, the amount of any private transfer fee
2 paid by the buyer, or the difference between:

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

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

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

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

13 (d) A real estate licensee shall have no duty to
14 discover the existence of any private transfer fee obligation.

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.

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Senate

Read for the first time and referred to the Senate
committee on Judiciary..... 08-MAR-11

Read for the second time and placed on the calen-
dar 1 amendment..... 31-MAR-11

Read for the third time and passed as amended 05-MAY-11

Yeas 26
Nays 0

Patrick Harris
Secretary