AMERICAN LAND TITLE ASSOCIATION

October 15, 2010

Mr. Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
Fourth Floor
1700 G Street NW.
Washington, DC 20552

ATTENTION: Public Comments "Guidance on Private Transfer Fee Covenants, (No. 201O-N-11)"

Dear Mr. Pollard:

On behalf of the more than 3,800 member companies of the American Land Title Association (ALTA), we applaud the Federal Housing Finance Agency (FHFA) for its guidance to the enterprises on the growing use of private transfer fee covenants and their effect on Fannie Mae, Freddie Mac and Federal Home Loan Bank mortgage purchases, but especially consumers. Private transfer fee covenants provide no benefit to consumers, real estate or the public, but rather cost consumers' money, complicate the safe, efficient and legal transfer of real estate and depress home prices[1].

ALTA, founded in 1907, is the national trade association and voice of the real estate settlement services, abstract and title insurance industry. With more than 8,000 offices throughout the country, ALTA members operate in every county in the United States to search, review and insure land titles to protect home buyers and mortgage lenders who invest in real estate. ALTA members include title insurance companies, title agents, independent abstracters, title searchers and attorneys, ranging from small, one-county operations, to large national title insurers.

Real property is the greatest source of wealth in the United States, and access to that wealth is only possible because of a strong set of property rights that determine how property is used and owned. By establishing legal rights to property, economies have the surety necessary to use it as collateral in order to create additional capital. American law bundles property rights into a title that describes the asset and its owner. Titles are tracked by a recording system that gives the public notice of who possess what property rights. Private transfer fee covenants directly threaten this property rights system.

There are two hallmarks of our property rights system: liens and lien priority. A lien is a claim against a property for the payment of a debt. A lien gives a creditor the security to know

[1] We use the term "home" and "consumer" in this letter, however, private transfer fee covenants affect all types of real property, including single family and multifamily residential and commercial properties.

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that a debt will be satisfied. Lien priority is the legal structure that determines which creditor has the right to be paid in which order when a property must be sold in order to satisfy a debt. This structure assures creditors of their rights when property is used to secure a debt.

What is a Private Transfer Fee Covenant?

A private transfer fee is commonly established when a developer[2] agrees to add a covenant to the title of each new home in a development, or a homeowner agrees to add a covenant to an existing home, that requires future owners of the property to pay a percentage of the selling price (usually 1%) to a designated trustee for the next 99 years. In the most widely promoted version of this arrangement, the developer obtains licensed documents and advice on creating private transfer fee covenants from the firm Freehold Capital Partners ("Freehold"). Freehold purports to be awaiting a business method patent[3] and has indicated that it is attempting to securitize and monetize private transfer fee covenants as well in exchange for a percentage of the transfer fees.

Proceeds from a transfer fee are typically collected by a trustee who retains a portion of the 1% fee for expenses and distributes the remainder to the developer, Freehold, and sometimes other parties, all of whom have no ownership interest in the property. Under one arrangement, the private transfer fee covenant is split between Freehold (30%), Developer (60%) and the trustee (10%) for the first 30 years it is in effect. For the remaining 69 years, the PTF covenant is split between Freehold (90%) and the trustee (10%).

If a consumer does not pay the private transfer fee covenant, a lien is established against their property in the amount of the unpaid fee, plus interest and costs. Before the property can be sold or refinanced, that lien must be satisfied or the property will be unmarketable.

To illustrate this system, consider a new-construction real estate development called Ocean View. The developer of Ocean View records a covenant on each parcel of property in the Ocean View subdivision. The covenant requires that upon resale of each piece of property in the development the consumer pay a private transfer fee of 1% of the sale price.

In some cases, the developer might lower the initial sale price by 2% and exempt the first purchase from the requirements of the covenant[4]. This helps to camouflage the covenant and its requirements by suggesting the covenant is a benefit to the consumer, thus assisting the developer to initially sell the property. When the initial owner sells the property to buyer #2 for $250,000, the terms of the covenant require that the seller (initial buyer) pay the developer a private transfer fee covenant in the amount of $2,500. The initial owner may either pay the private transfer fee or challenge its legality in court (thus clouding the property's title and

[2] We use the term developer to encompass all possible covenanters. The only commonality between all types of covenanters is that they must have owned the real property when they recorded the private transfer fee covenant in the local public records. Developers are not the only people placing these covenants. Trade organizations representing developers have warned their members about the potential legal risks associated with private transfer fees and advised them to seek advice of counsel. See Attachment 6.

[3] See Attachment 4, page 6.

[4] A Freehold covenant is attached as Attachment 3. This covenant exempts the first sale of the property from the developers to the consumer.

preventing its sale) or buy out the covenant according to the terms of the covenant. Regardless, the owner will be required to pay someone with no ownership interest in *their* property for the ability to sell *their* real property.

This scenario would play out again when owner #2 makes improvements and then sells to buyer #3 for $350,000, generating a $3,500 PTF covenant and continue until the covenant expires after 99 years.

Brief History of Private Transfer Fee Covenants

Private transfer fee covenants are a relatively new occurrence originating in California and Texas over the last decade. One of the first reported covenants was created to meet the demands of the Sierra Club and Audubon Society for environmental protections during the development of Fiddyment Farm in Roseville, California, which imposed a 20-year covenant with the proceeds going to preservation of open spaces.

Freehold Capital Partners has been the largest and most public champion of a licensed private transfer fee covenant system. The company entices developers to record these covenants by claiming that they are going to securitize and monetize private transfer fee covenants, to provide capital to developers. According to Freehold over $600 billion in real estate in 45 states have private transfer fee covenants attached to them[5].

State Legislative Response

At the beginning of 2010 only six states had banned or restricted private transfer fee covenants (California, Florida, Kansas, Missouri, Oregon and Texas.) However, this year an additional twelve states have banned the covenants: including, Arizona, Delaware, Hawaii, Iowa, Illinois, Louisiana, Maryland, Minnesota, Mississippi, North Carolina, Ohio, and Utah. In 2011 we expect a number of addition states will legislation banning or severely limiting the use of private transfer fee covenants. Only California and Texas (where private transfer fees are more often used) have restricted and regulated the creation and enforcement of the covenants, instead of banning them.

California passed a private transfer fee law in 2007. California Civil Code § 1098.5 struck a balance between those who sought a total ban and the California Building Industry Association and environmental groups who sought to keep these types of covenants legal. The law requires explicit disclosure of the covenant to all concerned parties by the placement of a document in conspicuous font indicating, "Payment of Transfer Fee Required" in the public record. California's disclosure rule mandates: 1) a clear statement regarding the fee amount, 2) examples of actual cost, 3) the covenants expiration date, 4) the covenants purpose and 5) the name of the entity to be paid. The goal of this law is to provide the homebuyer with information necessary to make an informed purchase. We believe the California law fails to achieve this goal.

[5] A cursory look at Freehold's agreement with developers (Attachment 4) shows that Freehold requires its partners to send them the location and legal description of every property encumbered by a private transfer fee covenant. Freehold does not make this information public.

Texas passed a private transfer fee covenant law in 2007. Texas Property Code § 5.017(b) prohibits covenants that require the buyer of real property to pay a private transfer fee. It has been debated whether the Texas law only bans a buyer (but not a seller) from paying the fee and whether all residential private transfer fees are illegal. Most property law experts believe that the Texas law bans all residential private transfer fee, while Freehold takes the position that the seller, rather than the buyer, can be made to pay a fee under the Texas law. We expect that Texas will seek to clarify their law in 2011.

The other states to act on private transfer fee covenants have all banned their creation after the effective dates of the laws, leaving the enforceability of covenants created prior to enactment up to the courts. These states all recognized that private transfer fees stand in opposition to public policy favoring the marketability of real estate. See Ariz. Rev. Stat. § 33-442 (Arizona); Del. Code tit. 25, § 319 (Delaware); Fla. Stat. Ann § 689.28 (Florida); HRS § 501 (Hawaii); 765 ILCS 155/10 (Illinois); Iowa Code § 558.48 (Iowa); K.S.A. § 58-3822 (Kansas); La. Rev. Stat. Ann. § 9:3131 through 3136 (Louisiana); Md. Code, Real Prop. Law § 10–708 (Maryland); Minn. Stat. § 513.73 (Minnesota); Gen. Laws Miss. 2010 Ch. 348 (Mississippi); Mo. Rev. Stat. § 442.558 (Missouri); N.C.G.S. § 39A (North Carolina); Ohio Rev. Code § 5301.057 (Ohio); 2009 Oregon Laws Ch. 298 (Oregon); and Utah Code § 57-1-46 (Utah).

Federal Response

The Federal Housing Administration (FHA) recognizes the growing concern surrounding private transfer fees. In letter dates April 14, 2010, (see Attachment 2), FHA confirmed that it will not insure mortgages with private transfer fee covenants attached to the title because private transfer fees clearly violate HUD's regulations prohibiting legal restrictions on conveyance and requiring lenders to convey clear, marketable title. Federal law prohibits FHA from conducting transactions that limit, "the amount of sales proceeds retainable by the seller[6]." FHA's guidance recognizes that private transfer fees take the home equity and sales proceeds from consumers and gives them to a third party who is not connected to the property or transaction.

House Financial Services, Subcommittee on Housing and Community Opportunity Chairwoman Maxine Waters (D-CA) introduced HR 6260, "The Homeowner Equity Protection Act of 2010" to ban the payment of a private transfer fees in connection with a federally related mortgage under the Real Estate Settlement and Procedures Act (RESPA). Like other provisions of RESPA, state attorneys general and insurance commissioners would have the authority to protect consumers from these fees. Co-Sponsor Congressman Albio Sires (D-NJ) recognizes that "These damaging and often hidden private transfer fees ruin home equity, depress home prices, and undermine homeowners' right to keep all the funds from the sale of their home."

Securitizing Private Transfer Fee Covenants

In an emerging scheme, Freehold is marketing the covenants as an investment vehicle. The company intends to "bundle" private transfer fee covenants so that they can be securitized and resold on the open market in order for developers to more quickly monetize these streams of

[6] 24 C.F.R. § 203.41(a)(3)(v).

revenue[7]. To do this, the developer pays Freehold a commission in exchange to create a financial security (essentially a collateralized bond) in the amount of the estimated value of the future revenues that are expected to be generated by the private transfer fee covenant of its 99-year existence. In return for creating the covenants underlying the value of the securities, the developer is provided with an upfront, lump-sum payment.

While Freehold has not been successful in securitizing private transfer fee covenants, if this does occur, then the use of private transfer fee covenants will increase exponentially, and the incentive for developers to place these covenants onto properties will likewise increase.

PRIVATE TRANSFER FEES HARM CONSUMERS

Private transfer fee covenants create myriad problems for consumers and lenders alike. When attached to a property, these fees infect every part of a real estate transaction, including the issuance of a mortgage. These problems present serious consumer protection issues and safety and soundness issues for lenders. For the reasons discussed below, they create unnecessary risk in real estate process for consumers, real estate, the land title industry and the public.

Private transfer fees force consumers to pay more for a less secure land transfer system and provide no added benefit to consumers. They harm consumers by stealing equity from their home, increasing the cost of buying or selling real estate and reducing the marketability of their property by making it more difficult to determine the property's value. Even further, they reduce transparency for consumers by exploiting the complexity of real estate transactions.

Private Transfer Fee Covenants Steal Equity from Consumers

Contrary to the assertions of private transfer fee proponents, the covenants do not save consumers money but rather they steal equity from homeowners.

Private transfer fee covenants are typically paid by the seller and compel them to pay a third party for the right to sell their own home. These covenants require that homeowners pay a portion of the equity they built in their home to a third party who has no ownership interest in the property and did nothing to assist in the maintenance or improvement of the property during the time of the consumer's ownership of the property. In essence, private transfer fee covenants are *private taxes* that benefit third parties with no right to the revenue. The net result is that sellers earn *less* money on their most important investment. They are a method for transferring home equity from its rightful owner to a third party.

Some argue that private transfer fee covenants allow the developer to share in the appreciation in property values which is attributable to the developer's role in designing and building the community. They argue that this allows developers to more fairly distribute the costs of building a home to all of those owners that benefit from its construction. The reality is

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[7] Freehold sales brochure discusses their attempts to pool the streams of transfer fees together and create a collateralize bond that would be sold to investors. If Freehold is successful in securitizing the fees it will become exponentially harder for consumers and real estate professionals from unwinding these covenants. Attachment 5, page 4.

that private transfer fee covenants are not tied to any increase in property values that can be attributed to the developer or to any specific costs that are incurred by the developer. Consumers are required to pay this fee at the time they sell their property whether the value of their property has appreciated or is underwater.

Private Transfer Fee Covenants Cost Consumers Money

Proponents of private transfer fee covenants claim that the main benefit to consumers is a lower sales price and therefore lower cost of homeownership for consumers. When developers place a covenant on a property, they supposedly lower the initial purchase price of the property by 2%. This purported sale price reduction allegedly results in the buyer having to finance a smaller mortgage thus saving money on the mortgage principal, interest, insurance premiums and other closing costs.

Freehold's marketing material[8] claims that, "a buyer will always pay less for property encumbered by a 1% fee than for the same property without the fee. No matter what a buyer pays, he would have paid more without the reconveyance [private transfer] fee." Despite Freehold's assurance, there is no guarantee that consumers receive a price reduction. There is no way for consumers to price the effect of the covenant. As discussed below, the private transfer fee covenant scheme exploits the complexity of a real estate transaction and the pro-cyclicality of real estate market. Consumers: 1) are never offered a choice of a property for full price and no fee or the same property at a reduced price with the fee and 2) generally only become aware of the fee at closing when they have less of an incentive to ensure they receive a price reduction from the previous owner.

Private Transfer Fee Covenants Depress Home Prices

We can see the effects of a private transfer fee on a property when we consider a situation where there are two identical properties: one with a covenant attached and one without a covenant attached. Assume an average resale rate of 7 years, and an annual average appreciation rate of 1.7% compounded annually for each property.

	Initial Value	**Sale 1 (7years)**	**Sale 2 (14 years)**	**Sale 3 (21 years)**	**Total**
Non-Private Transfer Fee Property Sale Price	$250,000.00	$281,310.98	$316,543.46	$356,188.60	
Private Transfer Fee Property Sale Price	$245,000.00	$275,684.76	$310,212.59	$349,064.83	
Transfer Fee Paid by Consumer	$0.00	$2,756.85	$3,102.13	$3,490.65	$9,349.62
Lost Appreciation	$0.00	$626.22	$704.65	$792.90	$2,123.77
Total Cost to the Consumer	$0.00	$3,383.07	$3,806.78	$4,283.55	$11,473.39

[8] Attachment 5, page 3.

When the property with a covenant attached is sold for $245,000 – the mythical 2% discount – the initial sale price is depressed by $5,000. However the appreciation in the property's value is also depressed; resulting in consumers purchasing a property with a private transfer fee attached earning lower return on investment in the property than consumers purchasing a property without a covenant. Overall, the first four owners of a property with a private transfer fee covenant lose $2,124 in value and must pay $9,350 in fees, resulting in a total cost to those consumers of $11,473.

Private Transfer Fee Covenants Have No Positive Effect on Consumers' Property Tax Liability

The financial benefit provided to the developer, Freehold and others comes at the expense of the community. If the artificially low sale prices are used for tax assessment purposes, the real property tax base for a community will be unnaturally lowered. Governments will have to either raise taxes or cut spending on crucial public education, infrastructure and community services to account for the property value that is siphoned off to the developer and Freehold.

While a property's sale price is a major measure of a property's value, it is not the only factor used to determine the value. When local governments appraise real property for taxation assessment purposes, they look to a number of factors to determine the tax rate. Tax assessors will compare a property with a covenant attached to a recently-sold comparable property that does not have a covenant attached. Since the properties do not differ other than the presence of the covenant, they will be valued and taxed equally, negating the artificial decrease in the property's value. This will impose a higher tax bill on consumers than the property's sale price would suggest.

Other Forms of Private Transfer Fee Covenants

While the types of private transfer fee covenants promoted by Freehold do not benefit the property's owners, valuation, marketability, or title, a private transfer fee payable to a homeowners or condo association or to a co-op benefit the consumer and do not cause the same problems as the fees described above. The transfer that provide a net tangible benefit to the consumer and community and should be excluded from FHFA's final guidance.

Private transfer fee covenants or portions of the proceeds from these covenants have been used to fund a variety of programs that benefit homeowners, consumers and the community at large. These transfer fees increase the value of the consumers' property by making their home or community a more desirable place to live, and consumers often seek out these added benefits when purchasing a home. In these instances, the buyer pays the fee to homeowners' associations, or community organizations. These organizations then use the fees to fund projects which benefit the burdened property or the surrounding community, either directly or indirectly.

In cases where the covenants are used to help fund homeowners' association activities, the transfer fee support the association's general or reserve fund, much like yearly or monthly association assessments, and are used to fun common improvements benefiting all the properties in the subdivision. The benefits of these fees flow through the association and back to the consumer in the form of higher property values from community improvements, lower association dues and generally more desirable communities.

Some transfer fees to fund community organizations like community centers, performing arts centers or parks. In these communities, the developer builds the community center and then transfers ownership of the center to a properly established non-profit 501(c)(3) organization. The transfer fees then go to the non-profit 501(c)(3) organization to help funds its mission. These covenants also helps provide desirable services to the consumer and community, and makes the consumer's home more valuable because of those services.

In California, private transfer fees have been used as tools to ease environmental concerns posed by groups opposed to new construction development. In these cases, the transfer fee is used to provide a service or fund organizations that are generally recognized as positive influences the community, such as open space preservation, environmental offsets, or clean water mitigation. The services funded through these transfer fees help reduce taxes and other costs while providing beneficial services to the consumer and the community.

As mentioned earlier, one of the first reported private transfer fee covenants was created to meet the demands of the Sierra Club and Audubon Society for environmental protections during the development of Fiddyment Farm in Roseville, California[9]. The Fiddyment Farm development imposed a 20-year PTF covenant with the proceeds going to preservation of open spaces.

Private transfer fee covenants have also been used as tools to ease affordable housing concerns posed by groups opposed to new construction development or for grants to support local affordable housing initiatives. Companies such as Lennar Corporation have placed covenants on some of its properties as a way to fund its charitable foundation, the Lennar Charitable Housing Foundation ("LCHF")[10]. LCHF uses the funds to issue grants to local non profits to provide affordable housing throughout the states of Lennar's operations. Although Lennar originally only used private transfer fee covenants in California, the company has started to use them in developments in Arizona and New Mexico as well.[11]

Unlike Freehold Capital Partner's private transfer covenants, transfer fees flowing to homeowners' associations or other non-profit organizations help fund important services in the community that benefit the consumer. Private transfer covenants that only benefit an individual developer, company or similar third party do not provide any useful services to the community at large or the consumer. Freehold Capital Partner's business model, which indicates that 5% of the transfer fee revenue is forwarded to an unnamed non-profit, does not legitimize the 95% that is pulled out of a consumer's earned equity. Lastly, unlike Freehold's covenants, those that benefit

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9 See Kelly Quigley, Front Lines: Private Transfer Taxes, Realtor Magazine (September 1, 2007). Available at http://www.realtor.org/archives/frontlinesledesep07?presentationtemplate=rmo-design/pt_articlepage_migratedcontent_print&presentationtemplateid=06ad608049e7ba93ab3dab87f8d337ee.

[10] See Carl Larson, *Helping The Homeless Added To Cost Of Homes*, The San Diego Union Tribune (April 14, 2005). Available at http://legacy.signonsandiego.com/uniontrib/20050414/news_1n14lennar.html.

[11]See Jeff Collins, *Lennar's Charitable Fund Raising Opposed*, Orange County Register (May 14, 2007). Available at http://www.ocregister.com/articles/lennar-8458-fee-private.html.

homeowners' associations or other charitable organizations are legally enforceable according to common law which requires that covenants must "run with the land."

UNINTENDED CONSEQUENCES FOR THE TRANSFER OF REAL PROPERTY

In addition to these serious concerns for consumers, private transfer fee covenants harm economic growth by hindering the legal, secure and efficient transfer of property. Discovery of a covenant during a title search and real estate settlement, especially as covenants remain in place for up to 99 years, add time required to close a transaction and may result in a cloud on a property's title, reducing the efficiency of the real estate transfer system.

Private transfer fee covenants introduce unnecessary risk into the land transfer process. These encumbrances cloud title and make the transfer of real property more costly and less certain. The covenants create risk in the settlement of home sales in five key ways: 1) by reducing transparency and exploiting the complexity of the real estate transaction, 2) by enhancing the pro-cyclicality of real estate markets 3) by creating lien issues for lenders, and 4) by risking the legality of the property transfer itself.

How Real Property is Transferred

The land title industry consists of thousands of title insurance agents and abstracters, underwriters, real estate settlement service providers, and attorneys who work together to ensure that real estate is safely, efficiently and legally transferred by searching, reviewing and insuring land titles to protect home buyers and mortgage lenders who invest in real estate.

Land title professionals assist consumers in the purchase of real property by auditing public records to establish legal ownership of the property being sold, curing any title or public record defects (one third of all transactions reveal a defect), accounting for and transferring all money related to the sale to the proper parties and insuring the transaction against any mistakes, fraud, risk or defect, whether it is known or unknown. The net result is a system that provides consumers and lenders the fastest loan closure and title transfer in the world. The land title system in the United States works so well that most consumers never take the opportunity to learn how or why it works.

This work ensures that buyers are willing to purchase property and lenders are willing to make loans. Unlike other forms of insurance, which accept that risk will occur and focus resources on paying claims, title insurance seeks to protect consumers by identifying and eliminating risk in order to prevent consumers and policy holders from being harmed.

Private Transfer Fee Covenants Reduce Transparency and Exploit the Complexity of Real Estate Transactions

The private transfer fee covenant is opaque and confusing for consumers. Even if the covenants were beneficial to consumers as proponents claim, those benefits are hidden behind a lack of choice and the veil of legal documents. Supposedly, consumers benefit from private transfer fees because in exchange of the future transfer fees, the original developer can sell the property at a discount. However, consumers are not allowed the choice to decide if they want a property with a covenant attached or not.

Private transfer fee covenants are often buried in a stack of documents in the chain of title called the Covenants, Conditions and Restrictions (CC&R). These covenants are a proverbial twelve page needle[12] in what can be a two hundred page haystack. Consumers are not given the CC&R until at or right before closing and many people do not read, much less comprehend them before closing. The obscurity of the covenant in this dense document could lead consumers to remain unaware of the covenant until they are at the closing table or worse, when they go to sell their home.

Separate conspicuous disclosure of a private transfer fee covenant in the land records would not inform consumers, and disclosing to consumers that someone with no right to the property has a right to a portion of their equity does not legitimize this transfer of wealth.

A title search is routinely performed after the consumer enters into a contract to purchase the home. Discovery of a disclosure would thus not occur until a time in the real estate closing process when a transaction is all but complete, giving a consumer a disincentive to delay the process in order to make an informed decision regarding the effect of the covenant on the property. These extremely complex covenants will have to be explained to the consumer at the closing table, when they have the least incentive to walk away from the deal. Finally, the covenants are not written in plain language, and can often be difficult for even experienced professionals to comprehend, much less explain accurately to consumers.

Simply put, Freehold Capital Partner's private transfer fee covenants are designed to provoke as little resistance as possible. Disclosure would also be ineffective because consumers still cannot shop comparable properties to determine if a private transfer fee is beneficial to them. There is no choice available to select a home with a covenant attached at a slightly lower price or select a home without a covenant attached at market price. The buyer cannot actually calculate and compare any savings. Without the choice, consumers also cannot be certain that the sale price of the property is actually being discounted. The ability to shop and compare is essential for consumers when purchasing a home and an informed decision rests on consumers' ability to compare prices and services.

Home buying is an already a difficult, time consuming and confusing process, and private transfer fee covenants make it more confusing for consumers. The process of buying a home is a rare experience for most consumers, and is often the only time that they come in contact with the terms of real property law. These concepts can be difficult for consumers to grasp and the complexity of the covenants add further, unnecessary confusion.

Private Transfer Fee Covenants Increase Pro-cyclicality of Real Estate Markets

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[12] A typical Freehold covenant (Attachment 3) is 11 pages and is written at a Graduate degree grade level on the Flesh-Kincaid scale.

Real estate is a pro-cyclical investment, which means that property values and sales rise and fall with the overall economy. This as a boom and bust market cycle, and it is marked by volatility in prices. Private transfer fee covenants accentuate the pro-cyclicality of the housing market by affecting the incentives for consumers to purchase property during the up and down periods of the market cycle.

During a rising market private transfer fee covenants and their impact on real estate are effectively hidden from consumers. Even if a buyer could readily discover the covenant, evaluate its implications and accurately price its effect, consumers are unable to factor in the cost of the covenant into the price of the property in a rising market. The result is that property sells more quickly and at a higher price than during a down market.

However, during a down market, consumers are forced to lower the price of the property and assume costs of the covenant on behalf of the new buyer. The incentive to lower prices further in a falling market are likely to render many properties unmarketable – an unreasonable restraint on the alienation of the property.

Private Transfer Fee Covenants Create Lien Issues for Lenders

Before a lender will lend money, it must be assured that it can look to the property in the case of a default. To do this, the lender requires that its security interest in the property have priority and be in the first lien position. Private transfer fees threaten a lenders lien priority, making funding mortgages on those properties less safe.

Private transfer fee covenants remove the assurance lenders require that they will have the first right to the real property in the event of default. A consumer's failure to pay a private transfer fee covenant constitutes a lien against the property which must be paid before a new mortgage can be issued on the property. When a prior private transfer fee is unpaid, that puts the fee's beneficiary in the first lien position ahead of the lender[13]. An unpaid covenant creates a gap in the lenders security interest making a mortgage on the property more risky and likely more costly. Lenders will not lend money until any issue created by the unpaid private transfer fee is resolved. This heightened risk to the lenders' security interest affects underwriting and may require the consumer to bring even more out-of-pocket money to the closing.

FHFA recognized this problem in its proposed guidance, which acknowledges that the risks created by these covenants can be so great that the government sponsored entities ("GSE") Fannie Mae, Freddie Mac and the Federal Home Loan Banks should not lend money on a property that has a private transfer fee attached.

Private Transfer Fee Covenants May Not Be Legal

The most fundamental tenet of property law is alienation, or the ability for property to be sold or transferred from one party to another. The ultimate property right is fee simple title, and the hallmark of fee simple title is the ability for an owner to transfer the property at their will, or

[13] A copy of a Freehold covenant (Attachment 3) shows the lien creating language on page 5.

unrestrained alienation. Although property may be subject to reasonable restraints on alienation, private transfer fee covenants erode fee simple title, and therefore courts are likely to find the covenants are an unreasonable and impermissible restraint on alienation.

As Marjorie Bardwell and James Durham noted in a 2007 article in the American Bar Association's Property & Probate magazine[14], private transfer fee covenants may also be subject to legal challenge as a non-possessory interest. Courts have been generally unwilling to recognize or create new interests in land. The Restatement on Property defines an estate as an interest in land that "is or may become possessory." A private transfer fee covenant contains a lien clause that allows the beneficiary to foreclose and take possession of the property. Traditionally courts are loath to allow landowners to create new estates not recognized in the common law. If a private transfer fee is an attempt to create a new estate, courts would find them to be suspect because the common law does not recognize them. Further, private transfer fee covenant rights are likely to be viewed as an attempt to retain some part of title without having any right to present or future possession, and courts have been hesitant to find that these rights to exist.

In addition, the existence of a private transfer fee covenant could be interpreted as a failure to grant the proper estate as required by the purchase agreement and deed. A seller that promises to grant fee simple title but gives title encumbered by a private transfer fee could be in breach of the purchase agreement and the warranties they provided in the deed. Further, a reservation of a private transfer fee covenant in a deed granting fee simple title may violate the standard instructions from the consumer's lender regarding acceptable exceptions to title.

Legal tests have shown similar restraints on alienation to be illegal. Several state courts found a due-on-sale clause promulgated in the 1970s to be unreasonable and therefore an invalid restraint on alienation, since they had no business purpose except to increase the company's return on investment.

If a private transfer fee is to be a common law covenant, then it may not be enforceable against subsequent owners of the property because it does not touch and concern the land. Covenants are legally enforceable agreements granting the right to use property without possession or the right to preclude a possessory owner from using their property in certain manner. While similar to a contract, a covenant differs because the covenant has the power to bind future owners or "run with the land." Since covenants have a great power to bind future entities not party to the original negotiations, courts have limited the situations in which these covenants can "run" with the land.

Touch and Concern Test

Common law sets out a number of factors for a covenant to bind a successor, but the most important is that the benefit and burden of the covenant must touch and concern the land[15]. The touch and concern test, while sometimes hard to define, has been summarized as requiring that

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[14] See Attachment 8.

[15] The other elements are 1) the intent of the parties that the servitude bind future owners, 2) a writing sufficient to appease the statute of frauds, and 3) privity of estate

the covenant must affect the owner's physical enjoyment of the land.[16] This standard for touch and concern requires that the benefit and the burden of the covenant not be personal to the parties, but rather be intimately tied to their physical use of their property. This means to burden future owners of land, you must benefit them.

As University of Missouri Law Professor R. Wilson Freyermouth correctly points out in his 2010 article in the American Bar Association's Property & Probate magazine "Putting the Brakes on Private Transfer Fee Covenants[17]," the key to the touch and concern test is the nature of the benefit or burden. Traditionally. when the benefit and burden are payments of money, courts have held that the covenant is personal and does not touch and concern the land. There are extremely limited exceptions to this rule which generally benefit homeowners' associations.

To illustrate this point, consider a covenant requiring all homeowners in a development to only use a certain contractor for home improvements. Under this scenario, the benefit is personal to the contractor since it benefits their business interests and not any property interest. While it burdens the consumer's land, it does not benefit the contractors use of their land but rather makes their business more profitable. Almost all covenants for the payment of money are personal to the beneficiary and therefore they do not touch and concern the land. The weight of judicial opinion prevents covenants from binding successive owners when the benefit is personal or in gross[18].

Contrast this with the homeowner's association scenario where all home owners covenant to pay a fee to a homeowners association. This covenant would bind future owners of the property in this division because the homeowners association's activities affect the property owner's physical enjoyment of the land. The benefit and the burden of the covenant touch and concern the land because as a badge of land ownership, the homeowners are burdened with the payment but they also benefit from the associations activities and requirements[19]. It is widely viewed that homeowners associations increase the value of property, and benefit all the owners by providing common spaces or other valued amenities. Therefore the benefit and the burden are tied to the physical enjoyment of all the homeowners' lands.

Typically private transfer fee covenants are payable to a third party that is not a homeowners' association. The benefit of the fee goes to a third party's business interest, typically funding either a developers or Freehold's business. Further, when the first transfer fee is owed, the developer has usually sold their interest in the development and has no more legal interest in any property in the development (outside the interest in the revenue from the private transfer fee) and Freehold never had any connection to the property outside the transfer fee. Therefore, the benefit of the covenant is personal to the developer and Freehold, since it is not

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[16] See *Mercantile-Safe Deposit & Trust Co. v. Mayor & City Council*, 308 Md. 627, 521 A.2d 734 (1987).
[17] See Attachment 7
[18] *See, e.g., Garland v. Rosenshein*, 649 N.E.2d 75 (Mass. 1995); *Bremmeyer Excavating, Inc. v. McKenna*, 44 Wash. App. 267, 721 P.2d 567 (1986); *Caullett v. Stanley Stilwell & Sons, Inc.*, 67 N.J. Super. 111, 170 A.2d 52 (1961).
[19] See the landmark case *Neponsit Property Owners' Ass'n, Inc. v Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

intimately tied to their enjoyment of the land in the development but is rather tied to their business interests.

Difficulties in working with an amorphous concept like the touch and concern test has led legal academia to rethink their approach to covenants. The American Law Institute's *Restatement (Third) of Property: Servitudes*[20] abandons the touch and concern test for an inquiry into whether the covenant is "arbitrary, spiteful, capricious[21]" or an "unreasonable restraint on alienation[22]" or "unconscionable[23]". Professor Susan French, the Restatement's Reporter, suggested that the most important inquiry is whether the covenant violates public policy[24]. Further, she suggested the Restatement's goal is to reach the same conclusions as a court using the touch and concern test, but with great transparency of thought.

For the reasons discussed ALTA strongly supports FHFA's clear guidance to the enterprises and the public on private transfer fee covenants and stands ready to assist stakeholders in protecting consumers, the mortgage finance industry, and the smooth and efficient transfer of real property ownership.

Sincerely,

Mark E Winter

Mark Winter
President

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[20] The American Law Institute's restatements are a serious of compilation of the generally accepted common laws throughout the country. The ALI further attempts to clarify the common law and occasionally suggests changes to the common law. While the restatements are never formally attempted by state legislatures, they are extremely influential in courts and are cited frequently.
[21] *Restatement (Third) of Property: Servitudes* § 3.1(1) (2000).
[22] *Restatement (Third) of Property: Servitudes* § 3.1(3) (2000).
[23] *Restatement (Third) of Property: Servitudes* § 3.1(5) (2000).
[24] *Restatement (Third) of Property: Servitudes* § 3.2 cmt. a (2000)

ATTACHMENT 1

The New York Times

Resale Fees That Only Developers Could Love

By JANET MORRISSEY

REBECCA AND TRENT DUPAIX of Eagle Mountain, Utah, spent a year searching for their dream home. The couple, who have five children, considered 15 to 20 houses before finding "the one."

They were thrilled when they closed on a $227,000, rock-and-stucco home with five bedrooms and two and a half baths in March 2009.

But four months later, when a local television reporter was doing a story on housing taxes in their subdivision, the Dupaixs discovered that their sales contract included a "resale fee" that allows the developer to collect 1 percent of the sales price from the seller every time the property changes hands — for the next 99 years.

Mrs. Dupaix, 34, says she and her husband had no clue about the fee when they closed on the house. "Of course we were upset," she says. "We didn't know about it, and our closer at the title company didn't know about it."

Other buyers gutsy enough to venture into the battered housing market in the hope of scoring a bargain might be wise to check the fine print before popping open the Champagne and signing on the dotted line.

A growing number of developers and builders have been quietly slipping "resale fee" covenants into sales agreements of newly built homes in some subdivisions. In the Dupaix contract, the clause was in a separate 13-page document — called the declaration of covenants, conditions and restrictions — that wasn't even included in the closing papers and did not require a signature.

The fee, sometimes called a capital recovery fee or private transfer fee, has been gaining popularity among companies that have been frantically searching for new ways to gain access to cash in the depressed housing market.

"Developers are desperate," says David Steffensen, a lawyer and a former developer in Salt Lake City. "They're facing projects that are upside down" because the property value has fallen below the loan balance and lenders are refusing to refinance. "It's a ticking time bomb," he adds.

Freehold Capital Partners, a real estate financing firm founded by the Texas developer Joseph B. Alderman III, has been leading the charge. According to William White, Freehold's chief operating officer, the firm has signed up more than 5,000 developers who are adding the covenant to developments worth hundreds of billions of dollars that will be built out over the next decade in 43 states.

Many developers see the resale fee as a creative way to get new financing. They are hoping to one day use the trickle of cash from these fees as collateral for a loan, or to get cash up front if pools of the fees are packaged into securities to be bought and sold on Wall Street. Freehold has begun shopping the idea of securitizing the resale fees, much as subprime loans were packaged and sold to investors.

Someone selling a home for $500,000, for example, would have to pay the original developer $5,000. If the home sold again two years later for $750,000, the second seller would have to pony up $7,500 to the developer, and so on. Even if a home declines in value, the seller still must pay the 1 percent fee. Freehold gets a cut of the resale fee; if the fees are securitized, it retains a percentage of the cash generated from the securitization.

Freehold's principals and lawyers have been aggressive in sales pitches to developers, but have declined to give details on their clients, securitization efforts or the company itself. Freehold moved its corporate office from Round Rock, Tex., to New York this year as it stepped up efforts to securitize the resale fees.

Mr. White characterizes the resale fee as a win-win deal for the developer and the home buyer. The fees let developers spread out the cost of building the roads, utilities and other infrastructure across all homeowners in a subdivision, rather than just the initial buyers. As a result, he said, the developer can lower the initial price of a home to the first buyer.

For example, he says, a typical $250,000 home may be able to sell for about $5,000 less. "The fee is a fair and equitable way to spread development costs, and results in lower costs to the average consumer," Mr. White says.

Ted Thieman, founder of the real estate developer Thieman Enterprises in Vandalia, Ohio, sees Freehold's securitization plan as the holy grail that will provide him with badly needed cash. He signed up with Freehold last year after lenders refused to provide financing for him to develop land in Dayton, Ohio.

"People are going bankrupt out here, and there's no cash flow in our developments anymore," he says. "This is the only source that's available to us."

Jeff Moseley, founder of Badger Creek Development in Brunswick, Ga., says he signed up with Freehold after watching his business tank with the economy. "I can't sleep at night," he says, adding that he had laid off all 32 of his employees.

He is hoping Freehold's resale fee program will breathe new life into his business. "I thought it was an intriguing and compelling story," says Mr. Moseley, who owns two development projects, encompassing about 220 lots.

Under his deal with Freehold, he will get about two-thirds of the revenue from the securitized fees while Freehold and other parties will get one-third.

Some developers are skeptical. Qualico, a Canadian company that owns Reytex Homes of Austin, Tex., turned down Freehold's sales pitch when it was buying land from a Freehold affiliate in Texas. Qualico wanted to use the land to build entry-level homes and didn't think the fee would fly with that market segment. First-time buyers are more likely than others to trade up and quickly sell a home, so the home often has little time to appreciate enough to offset the fee.

The resale fee "has disaster written all over it," says Rick Akin, partner of the law firm Akin & Chardavoyne, which represented Qualico.

MR. ALDERMAN, 45, has a history in the real estate industry, dating back to 1990, that includes a few bumps in the road. In March 1994, he filed for Chapter 7 bankruptcy protection for businesses that operated as Alderman Homes Inc. and First Quality Homes Inc., which had offices in Texas and Florida.

He has also held positions as either a senior executive or registered agent for seven other businesses, many of which the Texas Comptroller of Public Accounts lists as "not in good standing" — a designation applied when a company has either not paid franchise taxes or failed to file a tax report or both.

Mr. Alderman says that the businesses were deemed not in good standing because he or his accountant didn't file reports by the deadline and that no franchise fees are due. "My credit is perfect," he adds.

Negotiations involving Mr. Alderman have sometimes been contentious. Mr. Akin says he had "tortured negotiations" with Mr. Alderman in 2006, when Qualico was trying to buy two parcels of land near Austin from Mr. Alderman's development company. Mr. Akin says Mr. Alderman haggled over issues including who would pay to extend sewer and water services to the land tracts, as well as who would be reimbursed for building parks and streets in the subdivisions through the city's Public Improvement District program.

"He wanted to be reimbursed for the money that we were going to spend for public improvements," says Mr. Akin.

He says Mr. Alderman also did not resolve issues like easements and back taxes that affected the legal claim to the title. When Mr. Akin decided to cancel the purchase agreement on the second tract of land over title issues, he says he had to sue Mr. Alderman's company to get back his client's $1 million deposit. "In the over 25 years that I've been doing this, he was one of the most difficult sellers I've ever dealt with," says Mr. Akin.

The dispute was settled out of court. Mr. Alderman says Qualico wanted to back out of both land purchases, but was allowed out of only one. He says the $1 million deposit wound up being applied to the first tract's purchase. "If Mr. Akin believes that is hard negotiating, then so be it," he says.

A COALITION of real estate trade groups, including the National Association of Realtors, the American Land Title Association and the Center for Responsible Lending, opposes resale fees and is lobbying federal and state authorities to ban them.

"The idea that someone who has no ownership stake or interest can continue to collect revenue off of a property that they may have built up to 99 years ago exploits an already complex transaction and doesn't pass the smell test," says Justin Ailes, director of government affairs at the land title association. The fee could hurt real estate values in the future if buyers are reluctant to purchase properties that have a 1 percent fee attached.

The coalition wrote to the Treasury secretary, Timothy F. Geithner, and to the Department of Housing and Urban Development, the Federal Housing Finance Agency, the Federal Trade Commission and others, urging them to bar the fees or use the consumer protection agency — to be created by the financial overhaul — to fight them.

Often, the fee is within dozens or hundreds of pages of documents, and for some buyers, like the Dupaixs, it may be in a separate declaration that does not require a signature. Buyers may not be aware of the fee until the closing — or, worse, when they try to sell the home years later and the fee shows up in the title search, Mr. Ailes says. If the seller won't pay the fee, he says, a lien is slapped on the property.

"I am yet to find an owner that reads 300 or 400 pages" at closing time, says Charlie Orden, a broker and owner of the realty office Re/Max Town Centre in Orlando. And even if they do see it at closing, few buyers are going to walk away from a home at that point. He says he has started looking for the clause to warn potential clients well in advance.

Opponents have made some headway. The Department of Housing and Urban Development recently issued a letter indicating that the fees violated its regulations and that the agency would not insure mortgages on properties that included them.

The Federal Housing Finance Agency is considering a proposal to prohibit the transfer fees on all mortgages financed by Fannie Mae, Freddie Mac and the Federal Home Loan Banks. And 17 states have either banned or placed conditions on the practice.

Some bankers say Freehold will have a tough time selling the idea to Wall Street. The uncertain economy and housing market have made it next to impossible to predict when and how often a home will sell, or where home prices are headed — information that is needed to estimate cash flows to value the securities.

And some worry that an all-out ban of resale fees by states or the federal government could make the securitized paper worthless.

Dave Ledford, a senior vice president at the National Association of Home Builders, says he's not sure Freehold can deliver on its big promises. "It's almost in the category of 'too good to be true,' " Mr. Ledford says.

Mr. White dismisses the criticism as sour grapes. He contends that Realtors oppose the fee because homebuyers might pressure them to lower their commissions to offset it. “Apparently 6 percent to a Realtor is justified, yet 1 percent to pay for roads and utilities isn’t,” Mr. White says. He says he believes title companies are worried that they might face legal claims if they miss the fee during a search.

As for bundling the future cash flow into securities, Mr. White sees little risk. The fee represents “a stable passive income stream,” he says, that will be generated whether home prices go up or down. Even if the federal government or other states ban the fees, the ban would most likely apply only to future developments, not existing ones, he says.

Mr. White says his firm encourages full disclosure of the fees. However, he was unwilling to disclose the names of the developers and residential developments that currently charge the fees.

In fact, Freehold was the financing company behind the fee in the Dupaix contract. Even the home builder, Prestige Homes, wasn’t aware of the fee, and demanded that the developer, Development Associates Inc., remove the clause from the paperwork, says Michael Cameron, the real estate agent who handled the sale for Prestige.

Mr. Cameron says Development Associates amended the “covenants, conditions and restrictions” document without the knowledge of the builder or buyer, and didn’t present the amended document at closing. He says Prestige pulled out of the subdivision after the incident. “It’s not good for the buyers, it’s not good for our reputation, and quite honestly, we thought it was unethical,” he says.

Nate Shipp, owner of Development Associates, says he signed up with Freehold on the condition that Freehold securitize income from the fees and then pass on some of that revenue to his company so it could lower the price for buyers. But so far, Mr. Shipp says, he has not received any money from the arrangement.

He says Freehold insisted that he add the resale covenant into the sales documents on all lots in his subdivision to qualify for its program. Because Mr. Shipp hadn’t received cash from a securitization, he has been deleting the clause from the sales contract as each home is sold. He says the fees on the Dupaix property and about 11 others were accidentally left in. “It was an honest mistake,” he says.

AS for Mrs. Dupaix, she says a resale fee wouldn’t necessarily turn her off of a home if the price were right.

If she had known of the fee in advance, she says, “we would have negotiated to get the price lower.”

Forbes.com

Proponent Of New Real Estate Fee Exempts His Own House

By Stephane Fitch
August 24, 2010

What does it mean when the most energetic proponent of a controversial new type of real estate financing gimmick decides to remove it from the deed of his own home?

The gimmick in question is called a "reconveyance fee." Its energetic promoter--the fellow has even filed a patent on his methods--is a Texas real estate investor named Joseph B. Alderman. Forbes has learned that Alderman took steps last year to exempt his own home near Austin, Texas, from the fee before he put it up for sale.

The question of why Alderman, the Johnny Appleseed of reconveyance fees, would exempt his own house may be of interest to lawmakers across the country as they debate whether such fees should be banned. A dozen states are now considering whether to follow the lead of North Carolina, Louisiana and 13 other states that have banned reconveyance fees outright. For now, they're still apparently legal in most places, including New York, Massachusetts and Virginia.

What's a reconveyance fee, anyway? (Alderman, by the way, prefers to call them "capital recovery fees.") Here's how it works: A homeowner--frequently a builder of houses--allows Alderman's New York-based firm, Freehold Capital Partners, to append to the title of a home a special rider, or covenant. It requires anyone who buys the home to agree to convey 1% of the sales price to the beneficiary of the fee when they later sell the house.

The beneficiary, in the deals promoted by Alderman, is his company, Freehold Capital. Freehold splits the cash with the original builder or homeowner who added the fee to the deed.

Alderman argues that the arrangement is a boon for all, especially homebuilders desperate to defray the upfront cost of building sewers, streets and other infrastructure when they develop new neighborhoods. Supporters claim that the fees also allow individuals selling a home to accept a lower price, knowing they'll receive an additional payment later. In California, which opted to make these schemes legal as long as they were properly disclosed to homebuyers, a portion of the fees are paid to environmental groups.

But the fees have many critics, ranging from Realtors to academics. Vanderbilt Law School Professor Kelly Lise Murray argues the fees raise serious questions of fairness. "Say the new owner gives a big boost to the value of a home by upgrading the bathrooms and doing a big addition," says Murray. "They'd be obliged to share that appreciation, via the reconveyance, with people who didn't contribute at all."

Realtors and title insurance companies complain that the fees make it impossible for a homeowner to get free and clear title to a home. If a homebuyer doesn't carefully review the title for a property in the scheme, he may not notice the fee. Even if he does, he may not appreciate exactly how expensive that 1% fee will someday be--it's a cut of the gross value of the home, no matter the direction that value has taken since the previous purchase

Then there's the question of whether the fees are legal or enforceable in the 33 states which haven't explicitly permitted or explicitly banned them. Lawyers who deal with commercial real estate sales say that they have seen occasional reconveyance fees for many years on commercial properties. They consider them a nuisance, but enforceable.

Yet it's not absolutely clear that reconveyance fees in residential housing sales are enforceable in the vast majority of states, where they're not expressly banned but haven't been explicitly allowed. The authors of a 2007 American Bar Association analysis observed that the fees were vulnerable to legal challenge on at least four fronts. For one, courts in some states "may find the agreement unenforceable because it does not ‘touch and concern' the land," which is an important technical matter in some states' laws regarding property titles. A homeowner who proved the future fee wasn't fully disclosed when he bought his property might be able to wriggle out of paying it when he sells, citing federal standards for fee disclosures.

The fees are opposed by housing industry interest groups representing realty agents and title insurance companies; they have formed a group that is lobbying state and federal lawmakers to ban them. On August 12 the Federal Housing Finance Agency said it would seek to prevent Fannie Mae, Freddie Mac and the Federal Home Loan Banks from making loans to any property encumbered by a reconveyance fee. They "run counter to the important mission of the housing GSEs to increase liquidity, affordability and stability in the nation's housing finance system," said FHFA Acting Director Edward J. DeMarco.

In an e-mail to Forbes, Alderman says the reconveyance arrangement "really is beneficial to the homeowners, the developers and to the community." He and his company, Freehold Capital Partners, have been promoting the idea of using the fees widely in sales to ordinary residential homebuyers, especially those purchasing homes from developers who are looking for new ways to defray the cost of building infrastructure--new streets, sewage and the like.

Alderman sometimes argues that the arrangements are appropriate for homes that aren't newly developed. He told Ohio legislators this year that, given the choice, buyers would be happy to forgo 1% of the sale price on their home later if by doing so they're able to acquire a new home for less now. When Texas lawmakers considered a ban on the arrangements, however, Alderman insisted that Freehold didn't put reconveyance fees on homes that aren't part of new developments.

But Alderman's own home wasn't part of a new development. According to documents filed in Williamson County, Texas, he originally set up the fee scheme on his opulent nine-bedroom home in Round Rock, a suburb of Austin, in 2005, the year that it was built. The covenant

Alderman affixed to his title in November that year was pretty typical. It stated that any buyer of the home in the future would have to agree to shell out to Alderman and his company, Freehold Capital, "a Transfer Fee equal to one percent (1%) of the ‘Gross Sales Price'" of the home. The fee would be due when the home was resold.

Alderman removed the arrangement last year. In a notarized document titled "Release and Termination of Declaration of Covenants, Conditions and Restrictions" and submitted to the Williamson County clerk on May 19, 2009, Alderman sought to "terminate and forever discharge the Declaration of Covenants" he'd filed in November 2005 on his house. Shortly thereafter, he and Tara Alderman put the nine-bedroom property up for sale at Owners.com, a for-sale-by-owner website. It's now listed at $1.395 million.

So was Alderman insincere when he said Freehold didn't put reconveyance fee arrangements in place on homes that aren't part of new developments? The confusion over that question, says Alderman, is exactly what led him to cancel the reconveyance fee on his own home. He says during the legislative fight in Texas the lobbyists for the National Association of Realtors "suggested that I was a liar" because, after all, his home was built in 2005 but it wasn't part of a new development and hadn't required the construction of significant new infrastructure.

"I pulled the document off my home, and the NAR then came back and said that I didn't like the product enough to have it on my own home," says Alderman. "Damned if I do and damned if I don't."

Texas ultimately opted not to ban reconveyance fees. And Freehold says it's been signing up plenty of new homebuilders interested in the fee arrangements. Freehold announced last week that it had "partnered with a major developer on a real estate project in Washington" state--the name of the developer wasn't disclosed--to put reconveyance fees on houses in a $47 million project. Freehold said last month that it had an agreement with a developer (again unnamed) of "a real estate project in South Carolina" worth $42 million. A scheme on a $78 million project in Alabama was announced in May.

Alderman says he's even decided to put the arrangement back into place on his Texas home: "I have decided to put it back on my house, because it seems the lesser of two evils, and because some of our large developers have in fact put it on their own homes as well." Besides, he adds, "It showed my faith in the instrument, and I liked owning the asset."

Here's a tip if you're a shopping for a home in Round Rock, Texas. If the gorgeous digs at 3214 Bay Hill Lane capture your fancy, read the title closely before you make an offer.

CNNMoney.com
A Service of CNN, Fortune & Money

The latest real estate rip-off?

By Les Christie
August 23, 2010

NEW YORK (CNNMoney.com) -- Would you be willing to pay the original builder a fee when you resell your home? That's an obligation some developers are trying to slap on homeowners in their communities.

Many condo and townhouse dwellers are already familiar with the "flip tax," more formally known as a resale fee. Typically calculated as a percentage of the sale price, it's a fee due to the condo association or community when an owner sells. These charges fund common-area maintenance or provide a boost to reserve funds, which benefits the association's homeowners.

But in some new developments, homebuilders are including in contracts a 1% fee to be paid to them every time the house is sold -- for 99 years. And the money doesn't go for improvements or upkeep: It's just money in the builders' pockets.

That has the real estate industry and consumer protection groups up in arms.

"It's of no benefit to consumers," said Kathleen Day, of the Center for Responsible Lending. "It's another innovative way to price gouge. Every extra dollar they suck out of people's wallets takes away from other spending. It's not good for the economy."

The issue has attracted the attention of Washington, where Rep. Brad Sherman, D-Calif., is leading a charge against the fees. "Consumers are not in a position to deal with another level of complexity, one that pits plain vanilla homes against ones that come with fees," he said.

Freehold Capital Partners, the New York-based financial company that is developing the program, claims it has already signed up thousands of developers nationwide, representing hundreds of billions of dollars of development.

The company's plan is to monetize that future income -- essentially allowing developers to get paid now rather than later. To do that, Freehold would bundle together the estimated income from the future fees and sell that package to investors. It claims this new "asset" would be worth about 5% of the original home prices.

One company that is working with Freehold is Thieman Enterprises, a developer based in Ohio. "I think it's a fantastic program," said owner Ted Thieman. "I can get my development going again."

He said he needs the upfront cash to fund the building of infrastructure -- roads, sewers and other essentials. Working with Freehold to sell the fee package on to investors would potentially give him enough cash to get projects going and land construction loans more easily.

Ohio, though, has banned the practice. Thieman thinks that removing this potential funding source will discourage development. He said he will relocate one of his development plans to West Virginia, where he has acquired land. He's disappointed for his home state.

"We can bring billions into Ohio and jump-start the economy," he said.

A Utah builder, Development Associates, initiated a similar program several years ago in order to recover some of the up-front costs of its developments. But after complaints from homebuyers, who said they were unaware of the fees, the company withdrew them.

Some developers regularly include "transfer fees" in their sales contracts, including Lennar, one of the nation's largest builders. But the fees Lennar collects go to local housing-assistance organizations and charities, not back into its own pocket. That has helped keep the practice off lawmakers' radar.

Still, most real estate experts are against these fees. A coalition of real estate industry organizations and community groups recently sent a letter to Treasury Secretary Tim Geithner recommending that he not allow Freehold's securitization plan to go forward.

In the letter, the coalition quoted Rep. Sherman, who called the fees "a new predatory scheme."

In the past month, the Federal Housing Finance Agency proposed restricting Fannie Mae and Freddie Mac from buying or backing any mortgages that include home resale fees.

Freehold, of course, defends the program. Chief Operating Officer William White argues that the 1% resale fee will actually benefit consumers by lowering home prices: "No one will pay the same for a home with a [resale fee] as they would for the same home without the fee," he said.

That would make buying a home easier -- but reselling one at a profit harder. Meanwhile, builders could offset their lower initial selling prices by either collecting on the back-end income stream from future sales, or selling those future earnings off to investors.

No securitization package has yet been created, according to White. But he's optimistic: "We have been pleased with Wall Street's response to date."

Whether the program will ever gets off the ground is an open question: 18 states have already banned or restricted the practice, and if the FHFA proposal goes through, it could derail it entirely.

Sherman does not think the idea is dead. Not yet.

"We've wounded the beast, but we haven't put a stake through its heart," he said.

The Washington Post

Diverse coalition targets home transfer fees

By Kenneth Harney
August 6, 2010

WASHINGTON - Can you name a housing controversy that pulls Iraq and Afghanistan veterans, consumer advocates, labor unions representing transport workers and government employees, the title insurance industry, the National Council of La Raza, libertarian and property rights groups, and the National Association of Realtors all together into a protest coalition demanding quick action from the Obama administration?

A more unlikely collection of real estate bedfellows is hard to imagine. Yet at the end of July, 11 groups with widely divergent agendas and memberships formed something called the Coalition to Stop Wall Street Home Resale Fees.

The target of their protest: Private transfer fees being attached as liens on homes and requiring successions of property owners to pay a fee every time the house or lot resells during the coming 99 years. Though proponents say the concept helps real estate developers raise capital for projects by bringing in Wall Street investors, critics contend the liens amount to a perpetual money machine that lowers equity values for unsuspecting consumers and complicates real estate sales.

Here's how the plan works. Say you buy a $300,000 house in a subdivision where the developer is participating in a private transfer fee program and has recorded liens on every lot. What the developer may not have disclosed to you, however, is that when you later sell the property, you will be required to pay a fee of 1 percent of the price you receive. The money must be disbursed out of the closing proceeds and sent to a trustee representing investors. Those investors fronted cash to the developer in exchange for the right to receive streams of payments for decades as individual houses sell and resell.

To illustrate: If you buy a house this year for $300,000 and resell it for $325,000 a few years from now, you will owe $3,250 at closing. Even if the house drops in value, you will still owe the 1 percent fee. And if you refuse to pay it, the deal will not close because a lien has been recorded that runs with the title to the property and mandates that every seller pay.
Your purchaser might not like the fee requirement, either, and might demand a lower price as compensation. When your purchaser later goes to sell, the same rules will kick in. And so on,

through successions of sales until 2109, when the covenant recorded in 2010 disappears. Along the way, assuming modest appreciation in real estate values, investors and their estates stand to reap huge amounts of cash.

In the words of Kurt Pfotenhauer, chief executive of the American Land Title Association, "it's a pretty slick way to make money, but it's bad public policy and bad for consumers."

Pfotenhauer's group and the National Association of Realtors have spearheaded drives directed at state legislatures to ban or restrict private transfer fees. But now the focus has shifted to the federal level, where the 11- member coalition wants the Obama administration to prohibit transfer fees on all mortgages purchased or backed by Fannie Mae, Freddie Mac and the Federal Housing Administration.

The FHA has already indicated that the fees violate its rules, according to the coalition in a July 29 letter to Treasury Secretary Timothy Geithner. If Fannie Mae and Freddie Mac, which both operate under federal conservatorship, follow suit, the underlying mortgage-financing fuel supply powering transfer-fee programs effectively will be shut off. Along with the FHA, Fannie and Freddie now account for an estimated 95 percent of all mortgage financings.

The principal advocate for the private transfer fee concept, Freehold Capital Partners of New York, did not respond to repeated requests to comment for this column. In an e-mail sent to me earlier this year, Curtis Campbell, a spokesman for Freehold, said that "private transfer fees represent an adaptation in how to pay for development costs" incurred by builders "at a time when funding is not available" to them on "reasonable terms."

On its website, Freehold claims that major real estate development firms controlling "hundreds of billions of dollars in real estate projects nationwide," including some of the "largest, most well respected," have participated in the program. However, the company has declined to identify any of them.

Members of the new anti-fee coalition said they have very specific reasons for joining. For example, Jon Soltz, co-founder and chairman of VoteVets.org, said military families generally move every three years, and have been disproportionately hard hit by the real estate bust. Because of their frequent moves, "these fees hurt the military more than anyone," he said, and "take advantage of unsuspecting homeowners and buyers."

Write to Ken Harney at P.O. Box 15281, Chevy Chase, MD 20815 or via e-mail at kenharney@earthlink.net.

THE WALL STREET JOURNAL

Home-Resale Fees Under Attack

By Robbie Whelan
July 30, 2010

A coalition of real-estate industry groups is asking the government to ban a new type of fee on property transactions they say unfairly strips equity from property owners, including homeowners, and redistributes the funds to developers.

The group, led by the National Association of Realtors and the American Land Title Association, has asked U.S. Treasury Secretary Timothy Geithner to use the consumer-protection agency created by the recent financial-reform legislation to outlaw "capital recovery fees."

The fees, also known as re-conveyance fees, are inserted by developers into covenants governing newly built subdivisions and commercial real-estate developments. They require sellers of a property to pay a percentage, often 1%, of the selling price to the original developer of the property every time it changes hands, for up to 99 years.

Municipalities have long used similar fees, called transfer taxes, to raise revenues or recoup public subsidies for private development projects, but private transfer fees are relatively new.

Freehold Capital Partners, a New York-based firm founded by Joseph B. Alderman, a developer from Texas, has taken the lead in the market, entering agreements with both commercial developers and home builders since 2007 to levy the fees. The company claims it so far has about $600 billion in real estate subject to the fees. Some firms on Wall Street are skeptical of that number; Freehold declined to disclose the names of its clients.

The new-home market is set to be worth $94.5 billion in 2010, according to the National Association of Home Builders.

Private transfer fees were being levied before the emergence of Freehold. Between 2001 and 2006, home-builder Lennar Corp. built fees into the sale of 13,000 homes in California. Lennar has used the proceeds to add $3.8 milllon to the Lennar Charitable Housing Foundation.

Freehold says its next step is to create securities backed by the income stream generated by the fees. The company argues this will provide upfront cash that will help builders fund new projects at a time when construction loans are hard to come by. Freehold said it had approached several Wall Street banks to develop the securities, but has not yet struck a deal.

The Coalition to Stop Home Resale Fees charges that the fees amount to "Wall Street lining their pockets while stealing equity from homeowners."

Kurt Pfotenhauer, chief executive of the American Land Title Association, said the fees would slow the economic recovery by further depressing house prices. And the fees, he said, were deceptive. "Consumers are rarely aware of these covenant fees," when they buy a house, he said.

William White, a Freehold spokesman, said the American Land Title Association and the NAR were trying to protect their members' profits at the expense of home buyers and developers.

Government response has been mixed. Ed DeMarco, acting director of the Federal Housing Finance Administration, which regulates mortgage-finance giants Fannie Mae and Freddie Mac, said Thursday, "I remain very troubled by what the agency is learning about private transfer fees. We continue to investigate the implications for [Fannie and Freddie] and the housing finance system."

But the fees are gaining traction in some states, including California, where they survived a review by the state senate in 2007, and Texas, where state law restricts fee covenants but does not ban them. Ohio, however, became the 11th state to outlaw the fees in June, prompting one home builder, Ted Thieman of Vandalia, Ohio, to take his investment dollars to West Virginia. Mr. Thieman had hoped to build a $75 million housing community near Dayton with upfront cash from the sale of the revenue from the fees to Freehold.

"If [Freehold] can't sell these instruments, then there's no funding," he said.

—Jessica Holzer contributed to this article.

THE DENVER POST

Transfer fees of home sales under fire

By Margaret Jackson
July 30, 2010

The practice of imposing transfer fees on home sales is coming under scrutiny as developers and outside investors use them as a new income stream.

On Thursday, a new coalition launched to discourage the practice, and the issue could come up in the state legislature.

Often unnoticed by consumers, private-transfer fees are recorded by covenant or written into the sales contract of a home. The fees require a percentage of a home's sale price to be paid to a private third party each time the property is sold, typically for a period of 99 years.

"Pretty slick way to make money," said Kurt Pfotenhauer, president of the American Land Title Association, which is among the organizations forming the Coalition to Stop Wall Street Home Resale Fees. "Consumers are rarely aware of these covenant fees."

The coalition is urging U.S. Treasury Secretary Tim Geithner to ban the fees. Other members of the coalition include the National Association of Realtors, the Center for Responsible Lending, the Property Rights Alliance and the Institute for Liberty.

There are 17 states that restrict the use of transfer fees. While Colorado still permits them, legislation to regulate them could be proposed next year.

But crafting a bill is tricky because sometimes transfer fees are used to benefit the communities in which they're imposed, said Chris Payne, an attorney with Ballard Spahr LLP who likely will author the bill.

"An association of homeowners can charge a transfer-fee assessment for the benefit of the project," Payne said. "Homebuilders can impose transfer fees for other beneficial purposes like supporting a wildlife fund or a fund that can be used for conservation efforts."

Leading the push to add fees to home-purchase contracts is New York-based Freehold Capital Partners. The company partners with real-estate developers and homebuilders to structure a 1 percent "Capital Recovery Fee" by filing Declaration of Covenant or Private Transfer Fee Covenant in the real property records.

In May, the company announced it had a deal involving a $360 million real-estate project in Colorado but did not name the developer or the project.

Freehold representatives did not return phone calls for comment. The company's website says developers using its "patent pending" system can recover development costs and keep home prices lower.

"When financing for development is tight, it is viewed as an alternate source of financing to get projects done," said Tom DeVine, a real-estate attorney with Faegre & Benson LLP. "A developer can sell his interest in the transfer fee to Freehold, which will sell it on Wall Street. The objection (to legislation) is that if we prohibit these fees, it will remove a potential source of financing for homebuilders and developers."

Margaret Jackson: 303-954-1473 or mjackson@denverpost.com

HeraldTribune.com

Some states ban private transfer fees

July 4, 2010

Private transfer fees that require home buyers to pay a percentage of the selling price to a designated beneficiary have now been banned in 11 states.

Ohio is the latest to prohibit the fees that contractually force a buyer to pay a designated third party a set percentage of the purchase price. The charge, typically 1 percent, is over and above the usual and normal settlement fees that also are paid at closing.

States are actively trying to get a handle on the huge growth in appraisal management companies (AMCs), the conduits many lenders are using as a way to comply with the Home Valuation Code of Conduct (HVCC). To date, 18 states have enacted laws that, among other things, require AMCs to register with state appraisal boards.

A private transfer fee, sometimes called a "property transfer fee," occurs when the builder adds a covenant to the deed of each new home. Sometimes the recipient of the fee is a charity or government agency, which provides housing for low-income families. But sometimes builders themselves pocket the money as pure profit.

In Placer County, Calif., one builder agreed to impose the fee, effective for 20 years, as part of a deal to placate two environmental groups, the Sierra Club and the Audubon Society.

In some cases, though, the covenant runs with the deed for 99 years, meaning that each time the house changes hands, subsequent buyers must also pay the fee. And because the charge is a covenanted mandate, it is difficult to reverse once in place.

"It's the gift that keeps on giving," Mansfield, Ohio, real-estate attorney Robert Franco told the Columbus (Ohio) Dispatch.

Moreover, most buyers often don't realize they are paying the fee. The builder or seller (if a subsequent seller even knows of it) doesn't tell them about it, and because they pay so little attention to the closing statement, it escapes their view altogether. But even if they do question the charge, there isn't anything they can do about it short of backing out of the deal.

"It's like the Wild West at this point," says Gerry Allen, communications manager in the community and political-affairs section at the National Association of Realtors (NAR). "There's no limit on how much that can be charged."

NAR and the American Land Title Association (ALTA) are leading a campaign to ban private transfer fees; both groups have complained to federal authorities that not only does the hidden charge increase the cost of ownership, but there is little or no oversight on how the proceeds are disclosed, how they are spent or how long the tax may be imposed.

NAR and ALTA have asked Federal Housing Administration commissioner David Stevens to clarify the government's position on the fees, which they say "do little more than generate revenue for developers or investors and provide no service to home buyers."

So far, there has been no formal response from the feds, only a few public utterances expressing consternation. But opponents of what they call a "stealth tax" on home buyers are having better luck at the state level.

To date, Arizona, Florida, Iowa, Kansas, Maryland, Minnesota, Missouri, Ohio, Oregon and Utah have enacted total bans on the fees, and three other states -- Hawaii, Illinois and Louisiana -- have sent bills to their governors that would do the same. Texas, meanwhile, has banned the fees on residential transfers only, and California requires that the fee be disclosed to the buyer.

One of the earliest mandatory-fee programs on record dates back nearly a decade, when Lennar Corp., the big Miami-based builder, began requiring buyers in its California subdivisions to contribute an amount equal to .05 percent of the purchase price to a foundation set up by the company to support local housing-assistance organizations.

The covenant ran with the house, so all future buyers were required to make the same contribution as long as the house was standing. The company made original buyers aware of the fee in its brochures and on fact sheets in model homes. But even if the original buyer knew of the charge, it's doubtful subsequent purchasers were cognizant of it.

On a $500,000 Lennar house, the charge was $250. But an NAR study found one instance in which the transfer fee was 1.75 percent, which amounts to $8,750 on a $500,000 house.

David Ledford, a vice president at the National Association of Home Builders, doesn't think the fees are prevalent. "A number of builders have contacted us about them, but the only ones I know about are being used to fund the community's homeowner association to benefit those who live there."

Wise home buyers would be smart to determine in advance whether the builder they are considering imposes a private transfer fee. It's also a good idea to find out if your state or local jurisdiction bans or otherwise restricts their use. And finally, you have to decide whether you are willing to pay it. Remember, even if you don't mind, the family who buys the place from you may object.

Home sellers: Fee might be hidden

By Jennifer Hiller - Express-News
Web Posted: 03/29/2010 6:03 CDT

Here's a new concept in real estate: Buy a house, and when you go to sell it years later, owe the original developer or builder 1 percent of the sales price.

Freehold Capital Partners, a company started in Texas, is selling developers across the country on a plan that would attach a private transfer fee to homes, allowing developers to profit for generations.

The fee, written into neighborhood restrictions, would encumber the property for 99 years and throw 1 percent of the sale price back to the developer — or his or her estate or another investor — and Freehold each time the home changes hands.

It's an idea that's drawn the attention of some state legislatures and real estate trade organizations, which are fighting to stop the transfer fees from gaining a spot in the market.

Critics say such fees could taint entire neighborhoods, making it difficult to sell homes, and could complicate title records for decades. If the fee is not paid by the seller, a lien is placed on the property and the title becomes muddy.

And then there's the basic question: "What it comes down to is, 20 years later, why is the developer still profiting?" asked Jeremy Yohe, director of communications with the American Land Title Association, the national association for title companies.

Freehold, which started in Austin, compares the transfer fees to mineral rights and calls land development a creative process on par with writing a book.

"Just like authors who write books and musicians who write songs that will be enjoyed for generations to come, those who improve property are also engaged in the creative process, and the economics of the transaction should reflect that reality," a Freehold brochure says.

Freehold says it has signed up developers, including many across Texas, who hold more than $500 billion in residential and commercial property — but it will not name any of them.

Because courthouse property records are filed by owner name, it's difficult to track the company's activities in Texas and know which developers have signed on to the program.

Title companies that have been watching Freehold say it's possible that a homeowner could have a transfer fee in a neighborhood covenant and not realize it until he or she resells a home. Even if a transfer fee were to turn up in a title search, few people read all the neighborhood covenants and restrictions before signing.

A spokesman for Freehold says the company favors clearly disclosing private transfer fees in a standalone document. But in Texas, there's no legal requirement to do so. And under the standard real estate contract in Texas, home buyers agree to accept any restrictions that are common to the subdivision.

Freehold founder Joe Alderman refused requests for an interview, and spokesman Curtis Campbell would only answer questions by e-mail.

In response to the company's sales pitch, Texas lawmakers have passed restrictions on private transfer fees, but they are not banned. Some other states have banned such fees outright.

The American Land Title Association and the National Association of Realtors wrote model legislation banning private transfer fees that members can present to legislators. And last week, the trade groups asked the U.S. Housing and Urban Development Department to clarify that it prohibits the use of private transfer fees on government-insured mortgages.

“It's a limit on property. If you don't pay the fee, the property doesn't transfer, and you don't have clear title,” said Gerry Allen, community outreach manager with the National Association of Realtors. “There's nothing to say that anybody who owns a home can't attach this to their property. You could have a whole chain of these.”

Legislative efforts

Florida, Oregon, Missouri and Kansas have banned transfer fees in recent years. This month, Utah legislators banned them, and a bill to do the same is pending in Louisiana.

Texas law restricts private transfer fees but says some groups can collect them, including charities, property owner associations or governmental entities.

Freehold has interpreted this to mean that if a slice of the transfer fee — 5 percent — goes to charity, the developer and Freehold can collect the rest.

“This industry felt like they could create a nonprofit and get around it,” said Trent Thomas, chief of staff for state Rep. Drew Darby, R-San Angelo. Darby owns a title company and has sponsored legislation to try to further restrict private transfer fees.

After the California Association of Realtors learned about transfer fees, the trade group took the issue to state lawmakers in 2007.

“I could put one in my deed that would require every future (seller) to pay a fee to me personally,” said Alex Creel, senior vice president of government affairs for the group. “We used to joke that you could create a college fund."

But developers aligned with environmental groups and affordable housing advocates, promising that a percentage of the fee would help set aside open space or create affordable housing. It proved an unbeatable coalition, and CAR settled for a law that requires clear disclosure of transfer fees.

"We had 210,000 members at the time, we have a big PAC, lots of money, lots of resources, four lobbyists. We have a very sophisticated operation. We couldn't beat it," Creel said. "We couldn't believe it. It just seemed like such a bad idea."

The largest private transfer fee Creel has seen was 1.75 percent in a community where homes sell in the range of $800,000 to the low millions — meaning homeowners will have to pay a fee of around $17,500 when they sell their homes.

Patent pending?

Freehold was based in Austin before moving its headquarters to New York this year to be at the "heart of the financial markets."

While the company says it has a patent pending, the U.S. Patent and Trademark Office denied the patent last year and lists the application as "abandoned."

Company spokesman Campbell said by e-mail that Freehold has filed a continuation patent to pick up the claims of the first patent.

The company name makes reference to English law — "freehold" essentially means outright property ownership.

A few years ago, a predecessor company called Freehold Licensing tried to sell individual homeowners, as well as builders and developers, on the idea of transfer fees.

"Maybe you planted a tree, added on a room or rehabbed a home," the Web site said in 2007. "Fifty years from now, when a family is enjoying the property that you improved, and making a profit by selling the property you improved, why shouldn't you benefit? Of course you should."

Founder Alderman put a transfer fee on his own nine-bedroom home in Round Rock in 2005, according to public records. He took it off in 2009 when the home was listed for sale.

An e-mail from Campbell said the timing was coincidental. But, he said, "one of the things we like about our program, and which resonates well with developers, is that they can terminate the instrument if they decide to do so."

Today, Freehold markets to large landholders — not individuals — and says it will create a secondary market for selling the rights to transfer fees.

The idea is that developers would get money upfront from investors, who would get a 99-year income stream.

The pitch

The Freehold pitch sounds good to many in the industry who need money now to finance a project.

“It's a phenomenal plan,” said Greg Blume, a Houston-based developer who plans to use transfer fees in the Savannah Plantation development in Brazoria County. “It's just one more way of trying to finance and fund any type of real estate project.”

Selling transfer fee rights to investors would mean a developer could add more amenities to a neighborhood or sell for less than the competition — or both. “It just makes sense,” Blume said. “You can do more for the project and have less debt.”

Blume said developers in all the state's major markets are signing up with Freehold. There's no cost to sign up, but because there's no secondary market, no one has seen any money.

San Antonio subdivision developer Norman Dugas talked to Freehold representatives a few years ago. But he decided such fees would create too much of a marketing hurdle.

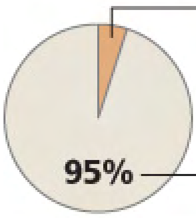
“The guy across the street, the competition, is going to say, ‘Those guys are sticking you with this transfer fee,'” Dugas said. “I just don't quite think it's going to go over. For the fee to work, it would have to be so desirable or attractive a property that people just had to get in there.”

Transfer fees in Texas

Texas law restricts private transfer fees but says some groups can collect them:

- Charities
- Property owner associations
- Governmental entities

INTERPRETING THE LAW

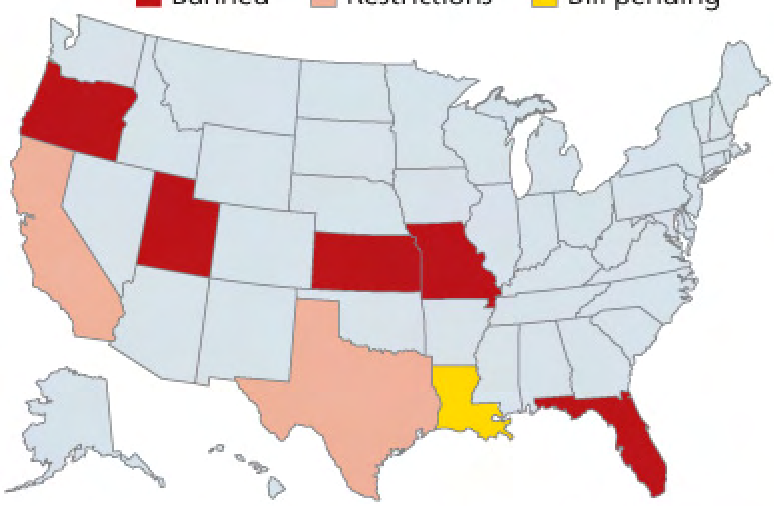


Freehold Capital Partners has interpreted this to mean that if a portion of the fee — 5 percent — goes to charity...

...the developer and Freehold can keep the rest.

STATES' LAWS CONCERNING PRIVATE TRANSFER FEES

Banned | Restrictions | Bill pending



Source: Texas Property Code, section 5.017, American Land Title Association

EXPRESS-NEWS GRAPHIC

The Washington Post

A new real estate cost to watch for: Developer's private transfer fee

By Kenneth Harney
March 6, 2010

How about this for a new and ingenious real estate money machine? Every time a house sells during the next 99 years, 1 percent of the price goes back to the original developer or is shared among investor partners. Ka-ching!

The levy won't be subject to haggling between future buyers and sellers, either. That's because it's a covenanted mandate -- a novel type of lien on the underlying real estate -- called a private transfer fee. It's not a government transfer tax. Nor is it a homeowner association or environmental protection covenant. It's purely a private requirement that runs with the land. If a seller refuses to pay it to a third-party trustee at closing, the sale won't proceed.

Sounds like a great deal -- provided that you're on the collecting end of a near-perpetual revenue stream. Apparently, the idea has been attractive enough that substantial numbers of developers and builders are signing up with a New York-based company that has devised what it calls a "patent pending" system to tap into real estate transactions into the next century.

Manhattan-based Freehold Capital Partners declines to identify any clients or participants in its private-transfer-fee program, but it claims on its Web site that as of late 2009, "the owners of an estimated $488 billion in real estate projects nationwide, including some of the country's largest, most well-respected companies, have partnered with Freehold."

The company says it is negotiating with institutional investors to "securitize" pools of transfer fees -- essentially creating bonds based on future cash flows that can be sold to deep-pocket money managers.

Freehold's activities have stoked legislative controversies in several states, and real estate trade groups that oppose the private-fee concept plan to fight it across the country in the coming months.

The National Association of Realtors and the American Land Title Association, for example, are asking their members to persuade legislators to prohibit or limit the use of investor-oriented private-transfer-fee programs. Even the National Association of Home Builders, some of whose members reportedly have signed up to participate in the transfer fee program, isn't convinced that the idea is sound.

"It's a very creative concept," said David Ledford, the builder association's senior vice president for housing finance, "but it's largely untested and controversial politically."

For its part, Freehold maintains that its transfer-fee covenants are good for consumers and good for cash-strapped builders. Curtis Campbell, a spokesman for the firm, said in an e-mail that "private transfer fees represent an adaptation in how to pay for development costs" incurred by builders "at a time when funding is not available" to them on "reasonable terms."

Freehold's system allows developers and builders to recoup some of their infrastructure costs -- project amenities, environmental protection and land-use requirements imposed by local governments -- without lumping them onto the price paid by the first buyer of a house.

By creating future revenue streams -- which builders can monetize upfront by selling to investors -- the plan allows developers to sell houses for lower prices than they otherwise could, Campbell said.

Critics charge that the program will taint houses encumbered with transfer fees for decades, lowering their values and making them harder to sell. Real estate attorney Robert A. Franco, of Mansfield, Ohio, said the concept is also "certain to lead to litigation" years from now, "since many buyers may not be aware" of the fees. Future buyers may also challenge their legal validity in court, balk at settlements and jeopardize property sales, Franco said.

According to a white paper prepared by the American Land Title Association, six states have limited or restricted private transfer fees: California, which requires upfront disclosures; Texas, which prohibits the fees in certain circumstances; and Kansas, Oregon, Florida and Missouri, which ban them.

A Utah developer who signed up with the program but has since withdrawn said the underlying purpose is worthwhile. Nate Shipp, managing partner of Development Associates Inc., said in an interview that many builders and developers would like to be able to receive compensation for some of the heavy upfront costs they bear in creating a new community.

But DAI "pulled off" the covenants attached to recent home sales, he said, in part because they bothered some purchasers and because DAI "never received anything" in exchange. One of DAI's home buyers, Camber Keiser of Eagle Mountain, Utah, said the fee "was not disclosed" at the time of purchase, "so yes, we were surprised to learn of it" and pleased that DAI removed it.

Most states still have no restrictions on the fees, and most home buyers are likely to be unaware of them. So look for them before signing any contract.

ksl.com

Hidden transfer fees tied to real estate; payout lasts 99 years

By Lori Prichard
July 13, 2009

SALT LAKE CITY -- If you plan on buying or selling a house, industry experts warn there's a new hidden fee out there that could cost you thousands of dollars; and not just you, but the person who eventually buys the house from you in the future.

It's no secret the housing industry is in crisis. Land developers and home builders are sitting with excess supply and little demand, but there is a way to make more money off of you.

We've uncovered hundreds of these documents filed on property throughout Salt Lake and Utah counties, most filed in the last year. Already, some are sounding the alarm.

"It wasn't passing the smell test," Salt Lake County Recorder Gary Ott said. "Is it legal? Yeah."

"We're unanimously opposed to these types of transfer fees," said Cort Ashton, president of the Utah Land and Title Association.

Transfer fees tacked on to subdivisions, condominiums, even single homes. Buyer beware: You could have these fees tied to your property.

If you do, when you go to sell you will owe someone -- either the developer, Builder, or the most recent homeowner - 1 percent of your gross sale price.

"Is it legal? Yeah," said Satl Lake County Recorder Gary Ott. "If it's a $400,000 house, 1 percent makes a difference."

But that's not all, there's also a 99-year payout. KSL saw hundreds of documents filed on thousands of acres of property across the Wasatch Front: all span 99 years. That means not only will you owe 1 percent of the gross sale price, but so will the person you sell to and the next, and the next for 99 years.

We took what we found to State Rep. Curt Webb, who also owns a title company.

"There's no way. I was really surprised that the concept would even fly," Webb said.

But Webb agrees it has "flown" well. He argues those who buy today, 50 years, 75 years down the road are just paying more for a house, and developers and builders stand to make millions.

"There's something inequitable about this," Webb said.

But Salt Lake attorney David Steffensen disagrees.

"What the developer can do is say: ‘I created value that will last for years. I will create an income stream that will last for years,'" Steffensen said.

Steffensen is an agent for Texas-based company Freehold Licensing. Freehold trademarked this concept.

"After all, it's just 1 percent," Steffensen said.

But others argue 1 percent could mean thousands, and many believe buyers don't even know about these fees.

"I think it is fair because these are recorded instruments. They are put in place -- in the front door, out the front door. A buyer is on notice that this is in place," Steffensen said.

We went knocking on doors to find out what homebuyers did or didn't know about transfer fees.

"We had never heard of it until you knocked on the door," recent homebuyer Dan Keiser said.

Rebecca Dupaix, who also recently bought her home, said, "It's ridiculous, I think. They should at least tell us what's going on."

There's an interesting twist to the story: These homeowners have had transfer fees filed against their Silver Lake property in Utah County, but the developer told us these buyers didn't know about the transfer fees because he removed them.

DAI wouldn't talk to us on camera but said the transfer fees were taken off because, at this point, they're not sure how buyers will react.

"There is going to be somebody really, really mad when they have to pay that," Ott said.

Mad because many believe buyers who aren't lucky enough to get the fees removed simply aren't being told up front about the fees they will eventually have to pay.

"Joe Buyer isn't used to looking and reading the CC&Rs. They're something that most people don't pay that much attention to some of those details at the time of closing," Ashton said.

CC&Rs are Covenants, Conditions and Restrictions. If you're buying property, read carefully.

"There should be better disclosure. Like you said, screaming disclosure is a good word for it. Otherwise, it will slip by," Webb said.

Two years ago, California's legislature made sure there was better disclosure to the buyer. Recently, Texas, Missouri and Florida have limited the use of private transfer fees. Here in Utah, we fully expect this issue to come to a head in the next legislative session.

Bottom line: If you plan on buying a home, insist that your title company provide you with a copy of all the Covenants, Conditions and Restrictions tied to the house. Comb through those documents. If you see a transfer fee on the home you want to buy, either negotiate to buy the house for less, demand that the transfer fee be removed or walk away.

E-mail: lprichard@ksl.com

ATTACHMENT 2

OFFICE OF HOUSING

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

Mr. Mark E. Winter
President
American Land Title Association
1828 L Street, N.W., Suite 705
Washington, DC 20036-5107

Dear Mr. Winter:

On behalf of Assistant Secretary Stevens, thank you for your letter of March 23, 2010, regarding the Federal Housing Administration's (FHA) position on prohibiting the use of private transfer fees.

The Department of Housing and Urban Development recognizes the growing concern with the impact of private transfer fees. HUD agrees that this fee unnecessarily increases the cost of homeownership, and in most cases the homebuyer is unaware of its existence. Our General Counsel has confirmed that private transfer fees would clearly violate HUD's regulations at 24 CFR 203.41, which prohibit "legal restrictions on conveyance," defined to include limits on the amount of sales proceeds retainable by the seller. HUD also requires lenders to convey clear marketable title in exchange for insurance benefits. Mortgage lenders are well aware of the risk these fees would pose to their insurance benefits, and therefore, private transfer fees have not had an impact on FHA's programs to date.

Thank you for taking the time to keep us informed on critical issues that affect our nation's housing programs. If you need more information, please contact Susan Cooper, Acting Director, Home Mortgage Insurance Division at (202) 402-2121.

Sincerely,

Margaret E. Burns

Margaret E. Burns
Director, Office of Single Family
Program Development

ATTACHMENT 3

When Recorded
Return To:
Freehold Capital Partners
P.O. Box 6193
Round Rock, TX 78683

NOTICE: THIS DOCUMENT MAY REQUIRE PAYMENT OF A FEE IN CONNECTION WITH A TRANSFER OF TITLE

Closing Information: Seller shall pay one percent (1%) of the Gross Sales Price (see ¶5 & ¶6). To obtain an Estoppel Letter (see ¶8) or contact Trustee for assistance with closing (see ¶10 & ¶14).

DECLARATION OF COVENANT

STATE OF NEW YORK

KNOW ALL MEN BY THESE PRESENTS

COUNTY OF NEW YORK

This Declaration of Covenant (this "Declaration") is made by **SAMPLE COMPANY, LLC., A NEW YORK LIMITED LIABILITY COMPANY**, whose mailing address is 100 Anywhere Street, New York, NY 10022 (hereinafter "Declarant") for the purposes herein set forth as follows:

WITNESSETH:

WHEREAS, Declarant is the owner of that certain real property ("Property") located in New York County, State of New York, described as follows:

The real property described in Exhibit "A" attached hereto and incorporated herein for all purposes.

NOW THEREFORE, Declarant hereby declares that the Property shall be transferred, held, sold and conveyed subject to this Declaration and all matters set forth in this Declaration, which shall be deemed covenants running with the land and the title to the Property and shall be binding upon all parties having or acquiring any right, title or interest in the Property or any part thereof:

1. DEFINITIONS. In addition to words and phrases defined elsewhere in this Declaration, the following words when used in this Declaration shall have the following meanings:

a. "Beneficial Interest" shall refer to an undivided ownership interest in the rights, interest, ownership and privileges in and to this Declaration, apportioned pursuant to section 17 and thereafter in accordance with section 18 or as otherwise provided herein.

b. "Beneficiary" shall refer to the owner of a Beneficial Interest.

c. "Closing Agent" or "Settlement Agent" shall have its customary meaning within the real estate industry, and generally shall refer to the party responsible for conducting and/or facilitating a closing of a conveyance of all or any portion of the Property; usually either a title company, attorney or escrow agent who prepares paperwork and conducts a closing related to the Conveyance.

d. "Consideration" and “Gross Sales Price” mean the price actually paid or required to be paid for the real property or interest therein, including payment for an option or contract to purchase real property, whether or not expressed in the Conveyance Instrument and whether paid or required to be paid by money, property, or any other thing of value. It shall include the cancellation or discharge of an indebtedness or obligation. It shall also include the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to.

(i) In the case of a creation of a leasehold interest or the granting of an option with use and occupancy of real property, Consideration shall include (without limitation) the value of the rental and other payments attributable to the use and occupancy of the real property or interest therein, the value of any amount paid for an option to purchase or renew and the value of rental or other payments attributable to the exercise of any option to renew.

(ii) In the case of a creation of a subleasehold interest, Consideration shall include (without limitation) the value of the sublease rental payments attributable to the use and occupancy of the real property, the value of any amount paid for an option to renew and the value of rental or other payments attributable to the exercise of any option to renew less the value of the remaining prime lease rental payments required to be made.

(iii) In the case of a Controlling Interest in any entity that owns real property, Consideration shall mean the fair market value of the real property or interest therein, apportioned based on the percentage of the ownership interest transferred or acquired in the entity.

(iv) In the case of an assignment or surrender of a leasehold interest or the assignment or surrender of an option or contract to purchase real property, Consideration shall not include the value of the remaining rental payments required to be made pursuant to the terms of such lease or the amount to be paid for the real property pursuant to the terms of the option or contract being assigned or surrendered.

(v) In the case of (i) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the cooperative corporation or cooperative plan sponsor and (ii) the subsequent conveyance by the owner thereof of such stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold for a cooperative unit other than an individual residential unit, Consideration shall include a proportionate share of the unpaid principal of any mortgage on the real property of the cooperative housing corporation comprising the cooperative dwelling or dwellings. Such share shall be determined by multiplying the total unpaid principal of the mortgage by a fraction, the numerator of which shall be the number of shares of stock being conveyed in the cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold and the denominator of which shall be the total number of shares of stock in the cooperative housing corporation.

e. "Controlling Interest" means (i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity.

f. "Conveyance" means the transfer or transfers of any Real Property Interest by any method, including but not limited to sale, exchange, assignment, surrender, foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a Controlling Interest in any entity with a Real Property Interest. Transfer of a Real Property Interest shall include the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all of the premises constituting the portion of the Property that is the subject of the conveyance. Notwithstanding the foregoing, Conveyance shall not include a conveyance pursuant to devise, bequest or inheritance; the creation, modification, extension, spreading, severance, consolidation, assignment, transfer, release or satisfaction of a mortgage; a mortgage subordination agreement, a mortgage severance agreement, an instrument given to perfect or correct a recorded mortgage or deed of trust; or a release of lien of tax. Except as otherwise exempted by section 6, a Conveyance which would not otherwise be a Conveyance for purposes of this Declaration, but which is subject to a transfer tax, documentary stamps or similar tax that is (1) assessed by a governmental entity, (2) computed on the sales price or consideration given in connection with the conveyance, and (3) payable in connection with a transfer of title (a "Transfer Tax"), shall also be a Conveyance for purposes herein and the Consideration used for calculation of the Transfer Tax shall also be the Consideration for purposes of this Declaration.

g. "Conveyance Instrument" shall mean the instrument of Conveyance, which shall include (without limitation): warranty deed; trustee deed; quit claim deed; executor's deed; administrator's deed; court order; assignment; or similar instrument recorded in the OPR (as defined below). A Grantee's assumption of the obligations and benefits of ownership of the Property shall constitute acceptance of the Conveyance Instrument for purposes herein.

h. Where context, statute or custom requires, the term "County" shall be interchangeable with the terms "Parish", "Borough" or similar administrative subdivisions within a State.

i. "Estoppel Certificate" shall mean a document, in recordable form, signed by the Trustee, that sets forth whether or not there exists, at the time of issuance of the Estoppel Certificate, any amount due under, or defaults in connection with, this Declaration, as the same relates to the Property that is the subject of the Estoppel Certificate.

j. "Grantor" means the Person making the Conveyance.

k. "Grantee" means the Person who obtains the Real Property Interest as a result of a Conveyance.

l. "Lender" shall mean any bank, government sponsored entity, savings and loan association or similar entity that is engaged in the business of owning, servicing or providing mortgage financing on real property and is licensed to engage in such business if required by applicable law.

m. "Of Record" shall mean filed in the OPR.

n. "OPR" shall mean the Office of Public Records (also known as, and also referred to herein as, "official public records", "real property records", "deed records", "county recorder's office", "county clerk's office" and "public records") of the county, municipality, parish, township, town or similar political subdivision in which the Property is located; the recorder's office for recording of deeds, liens and similar real property records. All documents required under this Declaration to be filed in the OPR shall be filed in recordable form, with all filing fees paid, and with a copy to the Trustee by certified mail.

o. "Owner" shall mean the record owner(s) holding fee simple title to all or any part of the Property that is subject to this Declaration.

p. "Parties to this Declaration" shall mean persons, firms and entities then holding rights or having obligations under this Declaration and their successors and assigns.

q. "Person" means an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, any combination of individuals, and any other form of unincorporated enterprise owned or conducted by two or more persons.

r. "Property" shall mean the real property described on page one of this Declaration, including (i) any and all buildings, structures, easements, alleys, drives, common areas, rights of way and improvements now or hereafter appurtenant thereto (collectively the "Improvements"); SAVE AND EXCEPT any portion of the Property owned by a governmental entity (whether state, local, city, municipality, federal, or otherwise, hereinafter "Public Property"). This Declaration shall not apply to Public Property. Where the context requires it, the term Property shall refer to that portion of the Property that is sold or acquired in connection with a Conveyance.

s. "Real Property Interest" includes title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, or any other interest with the right to use or occupancy of all or any portion of the Property or the right to receive rents, profits or other income derived from all or any portion of the Property. It shall also include an option or contract to purchase all or any portion of the Property, to the extent that such option or contract gives the Grantee use and occupancy rights of the real property. It shall not include a right of first refusal to purchase all or any portion of the Property.

t. "Reconveyance Fee" shall mean the fee described in section 5 of this Declaration, together with interest, costs and fees associated with an Unpaid Reconveyance Fee as otherwise described in this Declaration.

u. Where the context, statute or custom requires, the term "State" shall be interchangeable with the term "Commonwealth" or "District".

2. TERM. Except as otherwise provided herein, this Declaration and the covenants contained herein shall become binding upon the Property and the Parties to this Declaration upon filing of this Declaration in the OPR

and shall expire at midnight GMT on December 31, 2114.

3. CONSENT. By acceptance of the Conveyance Instrument or Conveyance, each Owner of such Real Property Interest covenants, acknowledges, consents and agrees to the terms, conditions, promises, stipulations, grant of rights and authority, covenants, charges, liens, obligations, duties and restrictions contained in this Declaration, intending to be legally bound by same to the maximum extent allowed by law, and to the same extent as if expressed in the Conveyance Instrument, and takes and conveys such Real Property Interest subject to the provisions of this Declaration. Each Owner acquiring the Real Property Interest, whether expressed in the Conveyance Instrument or not, covenants and agrees to payment of the Reconveyance Fee upon a Conveyance by such Owner of such Real Property Interest.

4. CONSIDERATION FOR BENEFITS AND BURDENS. By acceptance of a Conveyance Instrument or Conveyance, whether expressed therein or not, each Owner consents and agrees (a) that Declarant has caused one or more tangible and intangible improvements to, impressed benefits upon, or created common areas and easements appurtenant to, the Property; (b) this Declaration is an essential component to the future viability of the community and the Property and will allow the Property to be used for other purposes by initial and subsequent owners; (c) the Consideration paid by Owner was based in whole or in part upon the existence of this Declaration; (d) that this Declaration benefits the land within the community in which the Property is located, and, by extension, the Property itself and (e) that the foregoing benefits the Property and the Owner, (said benefits and consideration in "a-e" jointly and singularly "Property Benefits"). In addition, each Owner expressly covenants, acknowledges and agrees (i) that the Property Benefits all and singularly, jointly and severally, are appurtenant to the Property; (ii) the Reconveyance Fee is, in whole or in part, compensation for the Property Benefits, the Consideration, and for the rights granted herein and the benefits flowing therefrom, and (iii) that in consideration therefore, and for other good, valuable, independent and adequate consideration, the receipt and sufficiency of which is intended, acknowledged, stipulated and accepted by Owner's acceptance of a Conveyance Instrument, and as a covenant running with the Property and any portion thereof, the Owner shall be bound by the terms and conditions of this Declaration.

5. AMOUNT DUE. Except as otherwise provided herein, contemporaneous with, and as an encumbrance in connection with a Conveyance, the Grantor shall pay to Trustee, as trustee for Beneficiaries, a fee (the "Reconveyance Fee") equal to one percent (1%) of the Consideration paid by or on behalf of the Grantee in connection with the Conveyance.

6. EXEMPTIONS. The Reconveyance Fee shall not be assessed or payable in connection with a Conveyance (a) by the Declarant; (b) made by the Owner in connection with a mortgage or deed of trust where the Conveyance is for the sole purpose of securing the indebtedness of the Owner; (c) resulting from death or legal disability of an Owner, including transfers by will or probate; (d) by or to a Lender or Lender's designated trustee when the Conveyance is by or to a Lender in connection with a mortgage made, held or serviced by a Lender. *(The foregoing 6(d) shall be broadly construed, and shall include dispositions made by a Lender post-foreclosure, including dispositions made as a result of acquisition of title by a Lender arising out of a deed in lieu of foreclosure)*; (e) by or to a governmental entity or agency (whether local, state, federal or otherwise) or 501(c)(3) entity; (f) made by a Grantor with a Controlling Interest in the Grantee, where the Grantee owns a Controlling Interest in the Grantor, or where a Person owns a Controlling Interest in both the Grantor and Grantee (an "Affiliate Transaction"); (g) made by order of a court (whether in connection with bankruptcy, divorce or otherwise, but excluding an order for specific performance); (h) where the Trustee cannot be identified by reference to this Instrument or the OPR; or (i) occurring prior to 01/01/2012. Exemptions pursuant to section 6(c), 6(d), 6(f) or 6(h) shall be supported by Grantor's written affidavit under oath that the foregoing exemption(s) apply, which shall be filed in the OPR in connection with the Conveyance.

7. RESERVATION. This Declaration and the premises and promises contained herein are intended to be a covenant running with the land and title to the real property and as a deed restriction (whether stated in the Conveyance Instrument or not) and shall be binding upon each Owner and its successors and assigns. Whether expressed therein or not, a Conveyance Instrument conveying a Real Property Interest shall be deemed to contain therein a reservation providing that the Conveyance is expressly subject to this Declaration. Parties acquiring any portion of the Real Property Interest take title subject to this Declaration and the reservations herein provided. In the event of any conflict between the provisions of this Declaration and any Conveyance Instrument, this Declaration shall control.

8. ESTOPPEL CERTIFICATE. Within 2 business days after Trustee's receipt of a written request ("Estoppel Request") from an Owner or their designated representative, including any mortgagee or Closing

Agent (the “Requesting Party”), the Trustee shall furnish to such Requesting Party an Estoppel Certificate, and:

a. an Estoppel Request shall identify with reasonable specificity (i) this Declaration; (ii) the then-current Owner and (iii) the Requesting Party’s name, address and contact information. **(See www. CovenantClearinghouse.com)**

b. an Estoppel Certificate delivered by the Trustee shall be conclusive and binding upon the Trustee and Beneficiaries, and the Property described in the Estoppel Certificate shall not be subject to liens or claims arising out of this Declaration for any amounts or defaults (including, without limitation, Unpaid Reconveyance Fees) that may have accrued prior to the date of the Estoppel Certificate and which are not otherwise described within the Estoppel Certificate.

c. if the Trustee fails to timely respond to a written request made pursuant to this provision, then after four (4) business days notice of intent to file a Substitute Estoppel Certificate ("Substitute Estoppel Notice") with a copy of said Substitute Estoppel Certificate contained therein, delivered to Trustee by certified mail, return receipt requested, and provided that the Trustee fails to provide an Estoppel Certificate within said 4 day period, it shall be conclusively deemed that there are no unpaid amounts or defaults as of the date of the request, and the Requesting Party shall have the right to record an affidavit (attaching all prior requests for an Estoppel Certificate) to such effect (a "Substitute Estoppel Certificate") in the OPR, provided that same is recorded within fourteen (14) days from date of mailing of the Substitute Estoppel Notice.

9. LIEN AND PRIORITY; LIABILITY; COLLECTION. To the extent permitted by law, a Reconveyance Fee that is not paid when due ("Unpaid Reconveyance Fee") shall thereupon become a continuing lien and charge ("Lien") upon the portion of the Property that was the subject of the Conveyance giving rise to the Unpaid Reconveyance Fee (“Lien Property”), which Lien shall thereafter be binding upon such Lien Property, and:

a. the Lien is effective from the date the Unpaid Reconveyance Fee became due.

b. the Lien shall secure the Unpaid Reconveyance Fee as well as interest and all reasonable costs and attorney's fees incurred incident to the collection process.

c. the Lien shall be subordinate to a Lender’s first mortgage lien or first deed of trust secured by the Property (a “First Mortgage”). The foregoing subordination shall not apply to Unpaid Reconveyance Fees (i) arising from the Conveyance that gave rise to the First Mortgage or (ii) described in a Notice of Lien filed at least 21 days prior to the date of recordation of the First Mortgage.

d. as a condition precedent to foreclosure of a Lien, the Trustee shall execute and file in the OPR written notice of Unpaid Reconveyance Fees (a “Notice of Lien”). To be valid, a Notice of Lien must identify the Lien Property, the Owner or last known Owner, the name and address of the Trustee, the amount due, and the method and manner of payment. A copy shall be mailed to the Lien Property address.

e. with the prior written consent of the Beneficiaries then holding 51% or more of the Beneficial Interests (which consent shall include instructions pertaining to payment of enforcement costs and disposition of Lien Property ultimately acquired at any foreclosure) the Trustee may bring an action, in its name or on behalf of one or more Beneficiaries, to foreclose the Lien for Unpaid Reconveyance Fees, together with such other sums incident thereto, in the manner a mortgage of real property is foreclosed in the jurisdiction where the property is located (including a power of sale and non-judicial foreclosure if applicable) and may also bring an action to recover a money judgment for such unpaid amounts. The Trustee is entitled to recover from the Owner of the Lien Property (including from the proceeds of the sale, if any) reasonable attorney's fees incurred in either a foreclosure action or an action to recover a money judgment for Unpaid Reconveyance Fees.

f. for the benefit of the Beneficiaries, the Trustee has the power to purchase the Lien Property at the foreclosure sale and to then hold, lease, mortgage, or convey it.

g. except as otherwise set forth herein, the Lien Property shall remain subject to Unpaid Reconveyance Fees and any party acquiring title to Lien Property is liable for, and shall promptly pay to the Trustee, all Unpaid Reconveyance Fees accrued prior to the acquisition of the Lien Property by such party. This liability is without prejudice to any right that such party may have to seek contribution or indemnity from prior Grantor (s) or owner(s) of the Lien Property.

h. the Trustee shall be a proper party to intervene in any foreclosure proceeding related to Lien Property.

i. foreclosure of a Lien, First Mortgage or other similar lien shall not extinguish this Declaration.

j. any proceeding under one remedy shall not constitute an election of remedies. Failure to proceed under any remedy shall not be deemed a waiver of that remedy.

k. unpaid sums due under this Declaration shall bear interest at the lesser of the maximum non-usurious lawful rate allowed by law or 10 percent per year. Interest shall not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law; any interest in excess of that maximum amount shall be credited on the principal of the debt or, if that has been paid, refunded. This provision overrides other provisions, demands or actions to the contrary.

l. except as provided under 11(c), payment received by the Trustee shall be applied first to any permissible accrued interest, then to any costs and reasonable attorney's fees incurred in collection, and then to the Unpaid Reconveyance Fee. The foregoing shall be applicable notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment.

m. within ten (10) business days from date of receipt of a written request from Trustee, an Owner shall promptly provide information reasonably requested by the Trustee related to a Conveyance to or from an Owner, including date of Conveyance, the Grantor and Grantee, the Consideration, and a copy of any closing statement prepared in connection therewith (redacted as to each tax identification number and date of birth appearing therein). By acceptance of a Conveyance Instrument, each Owner does thereby irrevocably authorize each Closing Agent involved in closing a Conveyance to comply with the foregoing, and does release said Closing Agent(s) from liability of whatever kind and of whatever nature arising out of or related to a Closing Agent's compliance with this provision. Notwithstanding the foregoing, a Closing Agent shall have no liability for failure or refusal to provide the requested information.

n. to the extent the foregoing conflicts with any applicable statute, the statute shall apply.

10. TRUSTEE AND SUCCESSORS. The following shall serve as Trustee:

Covenant Clearinghouse, LLC
a Nevada limited liability company
900 Third Avenue
New York, NY 10022
(including any successor Trustee, the "Trustee").
See also **WWW.COVENANTCLEARINGHOUSE.COM** (the "Trustee Site")

The Trustee shall act on behalf of the Beneficiaries in accordance with the rights, privileges and duties granted in this Instrument together with any separate agreement as contemplated herein. Licensor shall have the sole and exclusive authority to appoint (and enter into binding agreements with) successor Trustees, succeeding to all rights and responsibilities of Trustee, including the right to bifurcate and designate the Trustee rights and duties herein into more than one person or entity. A Trustee shall be entitled to appoint a successor Trustee, but such appointment shall be subordinate (and subject) to Licensor's aforementioned right of appointment. Upon Licensor's or Trustee's request, parties to this Declaration shall promptly join in execution of any documents deemed by Trustee or Licensor as reasonably necessary to effectuate this provision, provided however that the failure of one or more parties to do so shall not invalidate same. To the extent permitted by law, all Parties to this Declaration jointly and severally waive any and all claims against Licensor and Trustee which arise out of or which are related to the appointment of a Trustee made pursuant to this section.

11. NON-JUDICIAL FORECLOSURE. To the extent permitted by law, each Owner, by acceptance of the Conveyance Instrument, whether expressed therein or not, hereby expressly vests in the Trustee the power to bring all actions against such Owner personally for the collection of unpaid amounts due hereunder and the power to enforce any Liens by all methods available for enforcement of such Liens, including judicial and non-judicial foreclosure of Lien Property by an action or proceeding brought in the name of the Trustee or Beneficiaries in the manner provided for in the laws of the jurisdiction where the Lien Property is located for mortgage or deed of trust liens on real property, and Owner expressly grants the Trustee a power of sale of the Lien Property. In connection with a non-judicial foreclosure, and subject to any requirements imposed by applicable law, the Trustee shall:

a. give notice of default, and notice of the foreclosure sale, to the Owner of the Lien Property;

b. sell and convey the Lien Property to the highest bidder for cash, with conveyance subject to valid prior liens, and other valid and prior exceptions to conveyance and warranty, and to this Declaration; and

c. from the proceeds of the sale, pay, in this order:

i. expenses of foreclosure, including a commission to the Trustee of 3% of the bid;

ii. to a non-profit made pursuant to 13(b), five percent of the sums remaining after deducting 11(c)(i);

iii. to Beneficiaries, all sums due and unpaid, in accordance with their Beneficial Interest;
iii. any amounts required by law to be paid before payment to Owner; and
iv. to the Owner of the Lien Property prior to foreclosure, any balance.

Recitals in any Trustee's deed conveying the Lien Property will be presumed true. Foreclosure of sums due and secured by the Lien shall not discharge this Declaration. Trustee is authorized to undertake any lawful action necessary to effectuate this provision.

12. TRUSTEE RIGHTS. To the maximum extent permitted by law, Beneficiaries jointly and severally grant unto Trustee the right to undertake on behalf of Beneficiaries, as agent thereof, any action Trustee deems reasonably necessary or appropriate to prosecute, defend, administer and exercise rights and obligations arising out of or related to this Declaration, including, but not limited to, the right to:

a. collect and disburse sums in connection with this Declaration;

b. undertake or defend, including retaining others to undertake and defend, legal, arbitration and administrative proceedings;

c. execute Estoppel Certificates and similar documents;

d. re-file this Declaration (or an abstract thereof) as a renewal and continuation of this Declaration, and without extinguishment thereof, provided, however, that the re-filed Declaration shall not extend the original Term.

e. with respect to each Conveyance retain, as its fee, three percent (3%) of (i) the Reconveyance Fee and (ii) other sums collected by the Trustee pursuant to the terms of this Declaration, together with any reimbursements due Trustee under this Declaration. (Notwithstanding the foregoing, the Trustee shall not be entitled to collect a fee for the sale of a Beneficial Interest);

f. be reimbursed by Beneficiaries (or retain from any sums due Beneficiaries under this Declaration), on a prorata basis in accordance with each Beneficial Interest, amounts necessary to reimburse Trustee for reasonable and necessary expenses incurred in initiating or defending legal proceedings in connection with this Declaration, recordation fees (including fees associated with filing of notice of successor Trustee), and such other fees and expenses as Trustee shall reasonably incur in connection herewith;

g. decline to undertake action under 12(b) until such time as the Beneficiaries have made suitable financial arrangements with Trustee for costs and expenses related to same.

13. TRUSTEE DUTIES. The Trustee shall, to the maximum extent allowed by law, and as agent for Beneficiaries:

a. hold in trust for, and not more than ninety days from date of receipt pay to, the Beneficiaries, in proportion to their respective Beneficial Interests, Reconveyance Fees (after permitted deductions and distributions otherwise described herein), arising out of or related to this Declaration;

b. retain in a separate escrow account five percent (5%) of the Reconveyance Fee and within ninety days from date of receipt of same pay said funds to one or more non-profit or not-for-profit entities ('non-profit' or 'charity') engaged in non-political, non-religious activities for the direct or indirect benefit of the community within which the Property is located, it being the intention of this Declaration, the Beneficiaries and each owner that a portion of the Reconveyance Fee arising from the Property be reinvested in the community for the direct or indirect betterment of the Property and land within the community. The Parties to this Declaration, including each Owner (by acceptance of a Conveyance Instrument) acknowledge, agree and stipulate that (i) non-profit organizations build better communities and enhance property values; (ii) the foregoing allocation is good, independent and sufficient consideration for this Declaration and the Reconveyance Fee due hereunder and (iii) the foregoing touches and concerns the land. In no event shall a non-profit (aa) obtain rights or interests in this Instrument as a result of this section 13(b), and (bb) as a condition of acceptance of funds under this section 13(b), be required to segregate or trace the funds to the Property or the community. The Trustee's discretion and determination as to the interpretation and application of this section 13(b) shall be conclusive and no Beneficiary shall have a right or claim to the aforementioned funds or authority as to the disbursement of same, provided however that Licensor shall have the superior right (but not the obligation) to designate the non-profit(s) for receipt of funds pursuant to, and for the purposes stated in, this section 13(b) and such designation shall be binding;

c. exercise the rights and duties assigned hereunder;

d. maintain records of Trustee's receipts and disbursements related to this Declaration;

e. execute Estoppel Certificates and similar documents reasonably requested by Requesting Parties;

f. exercise the Trustee Rights when reasonable or necessary to do so;

g. comply with any other written agreements between Trustee and Beneficiaries;
h. accept as agent for each Beneficiary service of process and other notices related to this Declaration; and
i. have (and is hereby granted) authority to undertake the foregoing as agent for the Beneficiaries.

Notwithstanding the foregoing, Trustee shall have no obligation to (i) issue payment to a non-profit or Beneficiary until the gross sum due and unpaid thereto exceeds One Hundred Dollars $100.00 or (ii) pay or distribute interest accrued or collected on funds held by Trustee in accordance with this Declaration.

14. CLOSING ADMINISTRATION. In connection with any Conveyance:

a. neither the Grantor nor a Closing Agent shall have any obligation to investigate or ascertain the location of a Trustee or any other information related to this Declaration by means other than by reference to the OPR.
b. if for any reason the Trustee cannot be located by reference to the OPR, the Grantor shall (1) remit to each Beneficiary that can be located through reference to the OPR each Beneficiary's prorata portion of the Reconveyance Fee, as determined by reference to the OPR, and (2) administer the balance of the Reconveyance Fee applying applicable state escheatment rules.
c. upon tender of payment to Trustee of sums due under this Declaration, or upon a Closing Agent's agreement to hold the Estoppel Certificate in trust and unrecorded until tender of payment of such sums to the Trustee, the Grantor shall be entitled to, and Trustee shall issue, an Estoppel Certificate;
d. where permitted by law, a Closing Agent shall be and hereby is entitled to withhold from each Reconveyance Fee paid in connection with a Conveyance, and retain as a fee, the greater of $100.00 or two percent (2%) of the Reconveyance Fee collected. Acceptance of the foregoing fee shall not create a duty or contractual relationship, expressed or implied, on the part of the Closing Agent;
e. when in doubt as to duties or liabilities related to disbursement of funds, the Grantor shall (i) deposit said funds with the clerk of any court of competent jurisdiction in New York County, New York, and (ii) provide written notice of same to Trustee, and shall thereafter have no liability with respect to the deposited sums;
f. the Grantor and the Closing Agent shall be entitled to rely solely upon information contained in the OPR and are hereby released as to claims resulting from information not contained in the OPR;
g. it is understood that a Closing Agent shall be under no obligation to invest any funds deposited with it, nor shall it be accountable for any incidental benefit attributable to the funds which may be received by Closing Agent while it holds such funds;
h. the Trustee shall act in the place and stead of the Beneficiaries. Payment to the Trustee shall constitute payment in full to the Beneficiaries, jointly and severally. An estoppel, certification or similar document made by the Trustee shall be binding upon, and shall be deemed the act and deed of, all Beneficiaries, jointly and severally. A Closing Agent shall have no liability arising out of or related to any act, or failure to act, on the part of the Trustee; and
i. a Closing Agent shall be entitled to rely upon information contained on the Trustee Site, including but not limited to an Estoppel Certificate obtained by means of the Trustee Site.

This section 14 grants the Closing Agent certain rights and accommodations in connection with facilitating a Conveyance. However, nothing herein shall be deemed to impose an obligation upon a Closing Agent to undertake any act or deed. It shall be the Owner's responsibility to remit the Reconveyance Fee in accordance with the terms and conditions of this Declaration, and to undertake all acts, deeds and responsibilities incident thereto. Each Beneficiary, by acceptance of a Beneficial Interest in this Declaration, waives all claims arising out of and related to this Declaration (in law and in equity) against each Closing Agent and title insurance company undertaking any act, or failing or refusing to undertake any act, in connection with this Declaration. The foregoing shall not waive the Beneficiaries' rights against an Owner, Grantor or the Property.

15. PAYMENT AND NOTICE. Payment shall be deemed made to the Beneficiaries when received by the Trustee in good and collected funds.

16. ADDITIONAL RECONVEYANCE FEES PROHIBITED. During the term of this Declaration no additional Reconveyance Fee or similar fee payable in connection with a Conveyance shall be imposed upon the Property as a covenant running with the land; provided, however, that the foregoing shall not prohibit fees, charges or assessments of whatever kind or of whatever nature payable to and for the benefit of a homeowner's association, governmental entity or non-profit organization.

17. BENEFICIARIES. All rights, interest, ownership and privileges in and to this Declaration, SAVE AND EXCEPT "Declarant's Right to Terminate" under section 25, and rights assigned to Licensor, belong to and are hereby vested in the following Beneficiaries, who/which are each hereby declared the owner(s) of Beneficial Interests in the percentages shown below:

a. Sample Company, LLC., a New York limited liability company, 100 Anywhere St., New York, NY 10022 (50%)

b. Freehold Licensing, Ltd., a Texas limited partnership, P.O. Box 6193, Round Rock, TX 78683 (33%)

c. Jim Doe, 100 Pierce Drive, Suite 150, Chamblee, GA 30341 (10%)

d. Jane Doe Capital, LLC, P.O. Box 100, Buford, GA 30515 (7%)

18. BENEFICIARY SALE/ASSIGNMENT. Each Beneficiary is entitled to sell, convey, assign, pledge, subordinate, hypothecate, bequeath and devise, in whole and in part, their Beneficial Interest, provided however, that in order to be capable of acceptance, an arms length offer to acquire all or part of the Beneficial Interest described in 17(a), made within five years from the date this Declaration was recorded in the OPR, shall include an equal offer per one percent interest for all remaining Beneficial Interests. Licensor shall have the sole right (but not the duty) to waive or terminate this section 18.

19. BENEFICIARY DUTIES. Each Beneficiary shall:

a. provide notice of a purchase, sale, pledge, assignment or similar conveyance of all or part of a Beneficial Interest by filing notice of same in the OPR, with a copy to Trustee, and in a form and content acceptable to Trustee. Any person, firm or entity who acquires (by sale, assignment or otherwise), in whole or in part, a Beneficial Interest shall, by taking such assignment, have consented and agreed to the terms of this Declaration; and

b. maintain with Trustee the method and manner of payment to be used for distributions to Beneficiary (" Payment Instructions").

Where neither Payment Instructions nor notice of sale or assignment have been made pursuant to section 18 have been received, Trustee shall pay to the name and address shown in section 17. Payments unclaimed for ten years from date of Trustee's receipt shall be forfeited by the Beneficiary and paid prorata to the remaining Beneficial Interests.

20. LICENSE. This Declaration was prepared under license from Freehold Capital Partners, LLC., a Nevada limited liability company (together with its heirs, successors, predecessors, controlled entities, affiliates, and assigns "Freehold" and "Licensor").

21. LICENSOR'S AUTHORITY. If Licensor should discontinue operations and cease to exist (as evidenced by forfeiture of Licensor's corporate charter), and provided that the rights and authority granted Licensor under this Declaration ("Licensor's Authority") have not otherwise been assigned, Licensor's Authority shall thereafter be exercisable by Beneficiaries (whether one or more) holding at least 51% of the Beneficial Interests. Reinstatement of Licensor's corporate charter following forfeiture shall reinvest Licensor's Authority solely in Licensor.

22. IMPAIRMENT OF CONSIDERATION. Each Owner, by acceptance of a Conveyance Instrument, whether expressed therein or not, stipulates and agrees that neither destruction nor obsolescence of, nor defect in, Improvements or Property Benefits shall directly or indirectly diminish, impair or invalidate this Declaration in any way. No party holding rights in and to this Declaration, as a Beneficiary thereof, shall have an obligation to construct, maintain, warranty, modify, add to, or transfer additional improvements or Property Benefits to the Property beyond the date of recordation of this Declaration, in order for this Declaration to be in full force and effect.

23. BENEFIT AND BURDEN. It is the intent of the Parties to this Declaration, and each Owner (by acceptance of a Conveyance Instrument), that this Declaration and the benefits, burdens, premises and promises contained herein run with the land and shall be binding upon and shall inure to the burden and benefit of each Owner and the Beneficiaries, together with their respective successors, heirs and assigns.

24. SAVINGS CLAUSE. In the event any provision in this Declaration, including any modification thereto, is adjudicated impermissible or unenforceable, then the offending provision shall be deemed modified to the extent possible and necessary to comply with applicable law and to preserve each Beneficiary's right to consideration equal to the consideration originally contemplated under this Declaration.

25. DECLARANT'S RIGHT TO TERMINATE. Notwithstanding any provision or term to the contrary herein, this Declaration shall terminate and be rendered null, void and of no force and effect in its entirety with respect to any portion of the Property that is the subject of a Termination (hereinafter defined). As used herein, a "Termination" shall refer to a written document that (i) describes the portion of the Property to be released and Exonerated from this Declaration ("Released Property"); (ii) contains a statement made under oath by the Party signing the Termination that "Undersigned does swear and affirm upon personal knowledge that none of the conditions described in 25 (x-z) of the Declaration of Covenant filed on [date this Instrument was filed in OPR]

have occurred"; (iii) is recorded in the OPR and (iv) is executed solely by Declarant without necessity of joinder of the Beneficiary(ies), the Trustee, an Owner, any non-profit designated in this Declaration or any other party affected by this Declaration (jointly and severally the "Affected Parties"). Declarant shall be free to record a Termination notwithstanding any duty or obligation to the Affected Parties and regardless of any financial or legal effect such Termination may have on Affected Parties. Notwithstanding the foregoing, Declarant shall have no right to record a Termination and no Termination shall be valid or effective after the earlier of the sale, conveyance, transfer, surrender or assignment, voluntarily or involuntarily, in whole or in part, of (x) Declarant's interest in the Released Property; (y) Declarant's Beneficial Interest in this Declaration, or (z) a Controlling Interest in Declarant. Within ten (10) days from date of filing a Termination, Declarant shall provide a copy of the filed Termination to the Trustee, by certified mail or overnight courier. If a valid Termination is recorded as provided above, the legal description of the Property, for purposes of this Declaration, shall be deemed amended, effective as of the date of recordation of the Termination, to exclude the Released Property. Upon Declarant's written request, the Trustee and Affected Parties shall execute any document(s) necessary to effectuate this provision. This right to terminate is personal to the Declarant and cannot be conveyed, assigned or otherwise exercised by another party (including, but not limited to, by any successor, heir or assign of Declarant).

26. MODIFICATIONS. Trustee shall be entitled to (and upon request of either Licensor or the holders of a majority of the Beneficial Interest shall) modify this Declaration for the purpose of securing or clarifying rights and obligations intended or contemplated in this Declaration, to correct clerical errors, to clarify ambiguity, to remove any contradiction in the terms hereof, or to make such other changes deemed reasonable or necessary to comply with applicable law or effectuate the purposes and intent of this Instrument; provided, however, that no such modification shall (i) change the percentage in section 5 of this Declaration, (ii) retroactively affect a Lender's lien priority; (iii) extend the Term of this Declaration nor (iv) make any modifications to substantive terms that change the intent of this Declaration. Any modification shall be made by instrument filed in the OPR. In the event the Declarant listed on page one is a Beneficiary holding a ten percent (25%) or greater Beneficial Interest at the time of any modification made pursuant to this section 26, said Declarant's consent thereto shall be required. All parties to this Declaration jointly and severally waive any and all claims against Licensor and Trustee which arise out of or which are related to any modification undertaken in good faith pursuant to this section.

27. NO GENERAL ASSIGNMENT. Any purported assignment of rights under this Declaration shall be invalid and of no force and effect unless said assignment specifically references this Declaration and is filed Of Record. In particular, but not by way of limitation, a general assignment by Declarant (whether by Conveyance Instrument, contract for sale, or otherwise), executed in connection with a sale of the Property or otherwise, shall not constitute a valid sale or assignment of Declarant's rights under this Declaration, or invalidate or modify this Declaration.

28. CONSTRUCTION. This Declaration shall be liberally construed in and for the interest, benefit and protection of Beneficiaries.

29. LIMITATION ON DAMAGES. Except as otherwise provided herein no party to this Declaration shall be entitled to recover from any other party to this Declaration, costs, including attorney fees, incurred in connection with legal proceedings arising out of or related to this Declaration. Each party to this Declaration, including Owner, and Beneficiaries, hereby jointly and severally waive all claims against each other for exemplary, punitive, consequential, and emotional damages arising out of or related to this Declaration.

30. APPLICABLE LAW. This Declaration shall be construed according to the laws of the State of New York. If any provision of this Declaration is found to be in violation or conflict with applicable law then said provision shall be amended only to the extent necessary to comply with the applicable law, but shall otherwise remain in full force and effect.

IN WITNESS WHEREOF, this Declaration is executed on the date indicated below.

DECLARANT

Sample Company, LLC., a New York limited liability company

____________________________, Managing Member

John Doe

STATE OF ______________________ §

ACKNOWLEDGMENT

COUNTY OF ____________________ §

Before me, the Undersigned Notary, on the _____ day of __________________, 20___, personally appeared ________________________________, __________________ of _____________________________________, signer of the foregoing instrument, proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged that s/he executed the same in the aforementioned capacity for the purposes therein contained.

____

Notary Public, State of ______________

ATTACHMENT 4

Overview - Reconveyance Fee Instruments (RFIs)

Reconveyance Fee Instruments exist in a variety of transactions including both residential and commercial real estate. For example, developers often use similar instruments to mitigate environmental issues, create revenue for HOAs and fund non-profit organizations.

Freehold Capital Partners has created a new high quality Reconveyance Fee Instrument (RFI) that can be placed on residential and commercial properties. The instrument creates a future cash flow realized as 1% of the selling price of a property every time it is sold over a 99 year period. The Freehold RFI is fully collateralized and has virtually no risk of default when perfected.

The placement of the RFI does not impede the future sale of the property.

Freehold has placed RFIs on tens of thousands of properties all across the U.S. and is able to create large pools of instruments that can be securitized and sold. The vast size and variety of each pool mitigates investor risk by creating a predictable cash flow.

A third party analysis of the instrument indicates that when included in a Freehold securitization the Net Present Value (NPV) of the landowner's portion of the instrument could be worth 4-6% of the fully improved value of the property. In the case of a standing building the value is simply 4-6% of the current value. The model for entitled land has significantly higher leverage. For example a property with 100 lots without homes is valued with the assumption of the homes being completed within a limited number of years. If the projected average home price is $300,000 the fully improved value of the property is 100 lots X $300,000 = $30 million. The landowner's NPV of the instrument is estimated to be in the range of $1.5 million (5%).

Freehold's plan was to create these large pools of instruments and take them to Wall Street for securitization. Currently, the securitization market is fully impeded. However, the federal government stimulus program offers an alternative monetization opportunity. The RFI is a safe investment for U.S. taxpayers since it has virtually no risk of default. In addition, the funds are distributed directly to the real estate industry, the hardest hit segment of the economy.

The instrument mandates that 5% of the Reconveyance Fee is given to a local non-profit. The 99 year cash flow can be significant.

The only cost to place the instrument is the cost to record it with the county offices. Because this is a public record, the title company can easily find it ensuring future fees are paid from each conveyance and delivered to a trustee for distribution. This process eliminates collection issues.

There is no risk for the land owner since he/she has the right to withdraw the instrument at any time before the RFI is sold or the property is sold with the instrument in place.

If the RFI is held over 1 year before being sold it may qualify for treatment under the long term capital gains guidelines.

RFIs are like kind with real estate in a 1031 exchange.

Summary

- Reconveyance Fee Instruments have existed in numerous forms on both residential and commercial real estate.
- Freehold has placed instruments on billions of dollars worth of U.S. property and built large pools that are eligible for securitization.
- The estimated value of the land owner's portion of the instrument is approximately 4-6% of the fully improved value of the property.
- Freehold is actively opening monetization markets through government stimulus programs.
- The instrument contributes to local non-profits.
- The cost to place the instrument is negligible and the land owner may remove it any time before it is sold.
- There is no risk to the land owner since they can remove the instrument at anytime before it is perfected.

If you would like more information or have questions please contact me.

Sincerely,

P Jason Luquire
Licensed Agent/Developer
Freehold Capital Partners
Luquire@sccoast.net
(843) 240-4774

Any projections or other forward-looking statements or opinions contained in this communication constitute estimates by us based upon sources deemed to be reliable, but the accuracy of this information is not guaranteed nor should you consider the information all-inclusive. This is neither an offer to sell nor an offer to buy or securitize securities. Readers should consult with competent legal and financial counsel of their own choosing regarding any information contained herein.

STANDARD FORM OF AGREEMENT
This is a legally binding agreement with important legal consequences

This Agreement ("Agreement") is by and between Freehold Licensing, Inc., *("Freehold" and "Licensor")* &
Name: *("Licensee")*
⊙ Individually O a ________________ OCorp. OLLC OLP OGP OTrust OOther:
Address:
Attn: Tel: Fax:
Email:

WHEREAS, Freehold licenses a unique business system (known as the *"Freehold Business System"* or "FBS") which seeks to create a long-term income stream by filing a legal instrument ("Instrument") that imposes a fee ("Reconveyance Fee") payable in connection with each transfer of title to real property, and

WHEREAS, Licensee now owns and/or may acquire real property (jointly and severally property owned or acquired by Licensee during the term of this Agreement, the "Subject Property"), and

WHEREAS, Licensee recognizes the benefits associated with, and desires to license, the *Freehold Business System*;

NOW THEREFORE, for sufficient consideration acknowledged and received, the parties further agree as follows:

TERMS AND CONDITIONS

1. **No Obligation**: All Reconveyance Fees created or imposed by Licensee on a "for profit" basis shall be undertaken in connection with this License. However, Licensee has *no obligation* to impose Reconveyance Fees. Reconveyance Fees payable solely to a 501(c)3, an HOA, or for similar non-profit use shall not be subject to this agreement.

2. **Right to Release**: Within the body of each Instrument, Licensee shall have the right to require that until such time as Licensee has sold or otherwise conveyed the Subject Property, Licensee shall have the right to release and discharge the Instrument. The right shall terminate upon Licensee's sale or transfer of title to all or part of (a) the Property or (b) the Reconveyance Fees.

3. **Fees and Expenses**: Freehold's compensation shall consist of a Participation Interest as specified in paragraph 6 below.

4. **Term and Scope of License**: Freehold hereby grants to Licensee (and Licensee accepts and agrees to be bound to) this non-exclusive, non-assignable license for ten (10) years to implement the Freehold Business System in connection with all Subject Property and in accordance with this Agreement.

5. **Instrument**: Each Instrument filed by Licensee shall impose a Reconveyance Fee of one percent (1%) of the gross sales price of the Subject Property, payable upon each non-exempt transfer of title, and shall be acceptable to Freehold as to form and content.

6. **Participation Interest**: Each Instrument filed by Licensee shall stipulate therein that beneficial ownership of the Reconveyance Fee Instrument shall be apportioned as follows: 50% to Licensee, 50% to Freehold and third parties designated by Freehold; provided however, that the foregoing Participation Interest to Licensee shall be increased by 1% for each one billion dollars in Subject Property upon which an Instrument subject to this Agreement and filed by Licensee is in existence, up to a maximum allocation to Licensee of 70% (e.g. $20B in Property). The aforementioned valuation shall be the estimated final improved value ("EFIV"), as estimated by the Licensee to the best of Licensee's reasonable knowledge and belief, subject to Freehold's right to have an independent "highest and best use" valuation undertaken, in which event said valuation will be used. The allocation shall be determined for each Instrument filed, at the time the Instrument is filed, based upon EFIV for previously filed Instruments then in existence together with EFIV for the Subject Property of the Instrument(s) to be filed, and shall not be applied retroactively to previously filed Instruments.

7. **Licensee Shall**:
   a. Upon request, provide Freehold with information reasonably related to the Business System and this license;
   b. Obtain the advice of licensed legal counsel of Licensee's own choosing regarding (i) Licensee's rights and obligations associated with the Business System and this License and (ii) each Instrument filed in connection therewith;
   c. Make an independent investigation of the information contained in each Instrument prior to filing of same; and
   d. Promptly notify Freehold of any challenge to this license, a Reconveyance Fee Instrument created in connection with this license, or any other component of the subject matter of this Agreement.

8. **Licensee Shall Not**:
   a. Modify or invalidate any Instrument filed in connection with this License, except as provided herein;
   b. Directly or indirectly seek to diminish, avoid or circumvent either this Agreement or Freehold's Participation Interest;
   c. Pledge, endorse, hypothecate, promise, reduce, obligate or restrict Freehold's Participation Interest, except per paragraph 2;
   d. Settle any third party claim filed in connection with the Business System, without Freehold's written consent, unless Freehold declines to defend said claims;
   e. Engage in, license, or sublicense any business or activity similar to the FBS. This provision survives expiration.

f. As to Subject Property, file any Instrument which imposes Reconveyance Fees on a for-profit basis, except pursuant to license from Freehold. Nothing herein shall prevent imposition of customary homeowner association dues or similar non-profit fees nor cover property acquired after expiration of this Agreement.
g. Rely upon representations made by Freehold (including its agents, officers, directors, attorneys, accountants and employees) regarding actual or potential income or value to be realized from the Business System; financial, tax or legal rights; business strategies; monetization potential; and consequences and obligations related to the Business System; or
h. Be liable to, or be indemnified by, Freehold for any act, claims, error or omission of any third party.

9. **Miscellaneous**:
a. Licensee does not acquire by virtue of this License sublicense rights to or in the Freehold Business System;
b. Licensee shall hold Freehold harmless from and against any and all claims *of Licensee* arising out of or related to the FBS; Freehold has the right, but not the duty, to defend any challenge to all or part of the Business System, including challenges to the Instrument for any specific Subject Property. Any failure to defend shall not constitute rescission or termination of this Agreement, regardless of the outcome of any claim, nor shall failure to defend constitute waiver of this right;
c. Each Instrument shall specify that five percent of the gross Reconveyance Fee received in connection with each future sale shall be distributed to a non-profit that benefits the community from which the funds originate.

10. **Legal**:
a. Except as provided by paragraph 2, neither termination, rescission, novation, voiding nor non-renewal of this License shall terminate Freehold's right to receipt of the Participation Interest based upon income which arises out of or which is related to Instruments filed of record by, or Subject Property acquired by, Licensee during the term of this License.
b. Invalidity or unenforceability of all or part of related patent claims (if any) shall not affect this License.
c. Licensee is not relying upon any representations of Freehold or its agents contained outside of this License.
d. Unenforceable provisions shall be modified where possible, otherwise severable, and all other provisions shall survive.
e. This License contains the entire agreement between the parties and may not be amended, altered or modified by either party except by written agreement signed by the parties hereto. A facsimile shall be as binding as an original.
f. Licensee acknowledges receipt of a copy of this Agreement at time of signing; multiple counterparts may be executed.
g. In connection herewith, neither Freehold nor its officers, agents, contractors or employees are engaged in the practice of law. Where an attorney affiliated with Freehold prepares an Instrument for filing, the attorney shall be deemed to represent Freehold and shall have no duty to Licensee, it being the intention of the parties that Licensee rely solely upon Licensee's own independent professionals. Licensee acknowledges that neither legal, tax, securities, brokerage, lobbying, nor financial advice, representations or services is heretofore or hereafter intended or given by Freehold.
h. Licensee acknowledges that all opinions, conclusions, estimates, analysis, goals, objectives and data heretofore or hereafter presented by Freehold are forward looking statements presented for general information purposes only, the accuracy and validity of which Licensee must independently determine, without reliance upon any information provided by Freehold.
i. This is neither an offer to sell nor an offer to buy securities in any jurisdiction where such an offer would be unlawful.

11. **No Warranties**: FREEHOLD MAKES NO WARRANTIES REGARDING THE FBS, AND HEREBY DISCLAIMS ALL WARRANTIES THAT MIGHT OTHERWISE BE IMPLIED, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

12. **No Representations**. STATUTES, LAWS AND COURT INTERPRETATIONS CAN VARY. THEREFORE, FREEHOLD SPECIFICALLY DISCLAIMS ANY REPRESENTATION AS TO WHETHER THE INSTRUMENT LANGUAGE OR THE FBS WILL CONFORM TO APPLICABLE LAWS. INSTEAD, LICENSEE MUST CONSULT WITH AND RELY SOLELY UPON COMPETENT LEGAL COUNSEL OF LICENSEE'S OWN CHOOSING.

13. **Limitation of Liability**: IN NO EVENT SHALL FREEHOLD BE LIABLE FOR DAMAGES ARISING OUT OF OR RELATED TO THIS LICENSE OR LICENSEE'S USE OF THE BUSINESS SYSTEM, INCLUDING, BUT NOT LIMITED TO, CONSEQUENTIAL, INCIDENTAL, INDIRECT, PUNITIVE OR SPECIAL DAMAGES (INCLUDING LOSS OF PROFITS), REGARDLESS OF WHETHER SUCH LIABILITY IS BASED ON BREACH OF CONTRACT, TORT, STRICT LIABILITY, BREACH OF WARRANTIES, FAILURE OF ESSENTIAL PURPOSE OR OTHERWISE.

AGREED, AND INTENDING TO BE LEGALLY BOUND as of the _______ day of _________________________, 20____.

LICENSEE	LICENSOR
	Freehold Licensing
By:_______________________________________, its ________	By: __________________________________, its _____
Printed Name:	

Agent: Phoenix Capital, LLC	ID# 1393	Date Rcvd:	Rec. Locator:	Lic. #

RECONVEYANCE FEE DOCUMENT ORDER FORM

PROPERTY OWNER

The Property Owner - Exactly As It Appears On The Deed: **EIN or SS#**

The Property Owner's Current Mailing Address Is:

The Property Owner is a/an:

O Individual(s) O a ________________ O Corp. O LLC O GP O LP O Other

If above is an LLC, the Managing Member is (and if Ltd. Partnership, the General Partner is):

If above is an LLC, the Managing Member is (and if Ltd. Partnership, the General Partner is):

If above is an LLC, the Managing Member is (and if Ltd. Partnership, the General Partner is):

The Reconveyance Fee Instrument Will Be Signed By:

1 Capacity/Title:

2 Capacity/Title:

GRACE PERIOD (If Any)

Exempt all sales thru: *(Maximum grace period is 5 years)*

BENEFICIAL OWNER

Person or entity that will own the Reconveyance Fee Rights, IF different from the Property Owner Described Above:

Name: *(if entity, incl. state of formation)*: Be sure to include full name (exa: ABC Inc., a Nevada corp.)

Address:

Tel: SS#/Tax ID:

LEGAL DESCRIPTION

You can either provide us with the legal description, or you can attach it as an Exhibit prior to filing the Instrument. The best source for the legal description is a title commitment. Alternatively, the **deed** where you acquired the property BUT if you have **sold or subdivided** any part of the property you must also include the legal description for those tracts.

O The legal description is Attached O Property Owner will attach legal description as an Exhibit prior to filing.

COUNTY	STATE	**NOTE: IF THE PROPERTY IS LOCATED IN CALIFORNIA, PLEASE ATTACH A LIST OF TAX ASSESSOR PARCEL ID NUMBERS.**

ACKNOWLEDGEMENT

By signature below, I acknowledge (a) that the above is true and correct to the best of my knowledge; (b) that any documents provided to me by Freehold or its agents are for review by my legal counsel; (c) that neither Freehold nor its agents are providing legal services to me and (d) that I am solely responsible for the accuracy of all documents filed of record.

x Date:

Return To: neworder@FreeholdLicensing.com or Fax to: 212-937-2332

PROPERTY DATA SHEET

PROPERTY OWNER			
PROPERTY ADDRESS			
Street	City	St	Zip
PROJECT NAME (IF APPLICABLE)			

This information is for Freehold's internal purposes only. You should use your reasonable judgment, taking into account all material factors, and assuming stable market conditions.	DESCRIPTION				
	If more than five different uses or phases, attach separate sheet.				
	Tract / Use / Phase #1	Tract / Use / Phase #2	Tract / Use / Phase #3	Tract / Use / Phase #4	Tract / Use / Phase #5
	Insert Number from Choices at Left or Type the Description.				
Use: 1=Residential 2=Commercial 3=Condo 4=Apartment 5=Townhome 6=Multifamily 7=Retail 8=Office Class A 9=Office Class B 10=Office Class C. 11=Other					
Zoning: (If zoned)					
Stage: 1=Prel. Plat 2=Final Plat 3=Recorded Plat 4=Developed Lots 5= Fully Developed 6=Other					
	Project Size *(When Completed)*				
Units: (Lots, SqFt. Acres, etc)					
No. of Units:					
	Present and Future Value				
Current Market Value:					
Estimated Market Value When Fully Improved:					
Est. Fully Improved Date:					

ACKNOWLEDGEMENT

By signature below, I represent (a) that the above is true and correct to the best of my knowledge (but without warranty or guarantee as to same); (b) that any documents provided to me by Freehold or its agents are for review by my legal counsel; (c) that neither Freehold nor its agents provide legal advice or legal services of any kind.

x Date:

Return To: neworder@FreeholdLicensing.com or Fax to: 212-937-2332

ATTACHMENT 5

FREEHOLD CAPITAL PARTNERS

Learn How Reconveyance Fee Instruments Can Help You

www.FreeholdCapitalPartners.com

THINK ABOUT YOUR REAL ESTATE IN A NEW & INNOVATIVE WAY

"The three keys to real estate used to be Location - Location - Location. However, in today's increasingly competitive environment, having a great location is not enough. Increased profits go to the innovative thinker."

Freehold Capital Partners works to help you extract more value from your real estate projects, dramatically increase liquidity and gain a **competitive edge**.

All you need to do is think about your real estate in a new and innovative way.

OVERVIEW

Freehold has become one of the fastest growing companies in the U.S. by showing developers and similar property owners that by partnering with Freehold they can...

- **APPORTION COSTS**
- **INCREASE LIQUIDITY**
- **PAY DOWN DEBT**
- **GAIN A COMPETITIVE EDGE**

...and that they can accomplish these goals in such a way as to make property more affordable while also building a better community.

Freehold accomplishes these goals through the creation of simple yet powerful Reconveyance Fee Instruments. Simply put, a Reconveyance Fee Instrument represents the right to receive 1% of the gross sales price each time a particular piece of real estate property sells. These rights represent a valuable, fully collateralized long-term income stream with no risk of default.

...Not only is a long-term income stream a valuable asset, but another compelling part of working with Freehold is the potential for selling the income stream in return for significant capital today...

... To the typical subdivision developer or commercial portfolio owner this could translate into significant additional value from the development, and additional project liquidity.

Through the use of a Reconveyance Fee Instrument, sellers can sell for less and buyers can buy for less. Buyers save on acquisition costs and carrying costs, and since they paid less they can sell for less.

In today's challenging real estate environment it is becoming increasingly important to explore all options, to maximize economic efficiencies, and to be willing to take an innovative look at business strategies that can generate liquidity, increase profits and provide a competitive advantage. Find out why the owners of hundreds of billions od dollars in real estate projects nationwide, including some of the countries largest, most well respected companies, have partnered with Freehold.

Increase profits. Increase Liquidity. Fairly Apportion Costs.

Gain a competitive EDGE

THE ECONOMICS OF **RECONVEYANCE FEES**

Traditionally a developer apportions 100% of the cost of improvements among initial buyers. Each buyer then has no choice but to pass along these costs to future buyers. However, creating reconveyance fees in a subdivision prior to the initial sale changes that. When a developer can impose a 1% reconveyance fee, and sell the rights for much-needed capital today, the developer can lower the price, the buyer can buy for less in return for paying a fee years down the road, and each buyer passes along the savings to future buyers.

Each and every buyer also saves on closing costs, carrying costs, etc., and gets to use the initial savings to reduce other more expensive debt such as credit cards, consumer loans, etc. This concept is similar to issuing school bonds to more fairly apportion the costs over future families instead of burdening initial taxpayers with 100% of the costs. It is an efficient financing tool for long-term improvements.

EXAMPLE: Consider two identical properties: One has a 1% Reconveyance Fee and sells for 2% less.

Which home would you rather buy?

OPTION A
$250,000

OPTION B
$245,000 + 1% when you sell

In return for agreeing to the 1% fee, Buyer "B"...

- Buys for less & can sell for less (a competitive advantage),
- Enjoys the exact same home as Buyer A, for $5,000 less,
- Saves on closing costs and sales expenses,
- Pays less mortgage interest, and
- Can use the savings to pay down credit card debt, etc.
- Developer sells the Reconveyance Fee Instrument for liquidity today, and investors earn long-term income.

By removing the cost of long-term improvements from the initial sales price, and financing the improvements through a reconveyance fee, property becomes more affordable and transaction/carrying costs are reduced.

Critics say there is no assurance that sellers will lower the price. This is a fallacious argument: a buyer will always pay less for property encumbered by a 1% fee than for the same property without the fee. No matter what a buyer pays, he would have paid more without the reconveyance fee.

"To the extent the existence of a [reconveyance] fee impacts the value of property... the market will adjust to the fee." (Cal. Senate Staff Analysis - 2007)

Reconveyance fees work equally well for commercial property, allowing buyers to defer a portion of the sales price, thus increasing operating income and ROI. Reconveyance fees represent an efficient way to restructure the economics of real property transactions.

THE POWER OF FREEHOLD

Freehold partners with property owners to create Reconveyance Fee Instruments, and it does this solely on a participation basis. Freehold's Portfolio covers an estimated half a trillion dollars of worth of real estate projects throughout the United States.

Freehold's business was built around the simple but powerful premise that.... 1. Freehold could help property owners build a long-term income stream with no meaningful risk of default; 2. Freehold could develop a portfolio large enough to allow modeling of the income stream, and 3. the income stream could then be sold, providing much needed liquidity to Freehold and its partners. The process is so powerful that it is the subject of patent filings covering Reconveyance Fees on a "for profit" basis.

Q: What are the benefits for commercial property buyers and sellers?

A: Lower acquisition costs + lower carrying costs = higher cash flow = higher cap. rate = higher ROI.

Q: Since hold on to our properties, our portfolio will never generate fees. Should we impose Reconveyance Fees?

A: Absolutely. Reconveyance Fee Instruments are valued based on actuarial modeling - not on a specific property or the present owner's intent.

Despite the current situation in the financial markets, demand for income-producing assets still exists: it is the risk of default that currently has little favor. Fortunately, Reconveyance Fee Instruments have virtually no meaningful risk of default. As a major Wall Street investment bank attorney once remarked, "Reconveyance Fee Instruments could help fill the void left by the subprime crisis."

In addition to efforts with major investment banks on Wall Street, Freehold is constantly working to open monetization channels through hedge funds, pension funds and similar institutions as well as the public markets.*

In particular, a significant number of institutional investors have to maintain a portion of their portfolio in asset-backed investments. Formerly this meant mortgage backed securities ("MBS"). However, recent economic events have lead to concerns about default risks associated with MBS. Reconveyance Fee Instruments offer an attractive alternative asset-class for those with a portfolio diversification strategy.

Freehold offers an ideal way to fairly and equitably restructure the economics of your real estate projects, particularly in these difficult times.

* Freehold does not act as a broker-dealer, nor does Freehold perform securitization services of any kind. Instead, as a partner in the ownership interest in the non-possessory real property ownership interest created by the Instrument, Freehold works to sell the asset. Any securitization, including pooling of Instruments and issuance or sale of securities backed by the Instruments, will only be undertaken by a licensed broker-dealer or in compliance with applicable laws or exemptions from registration.

THE POWER OF FREEHOLD (CONTINUED)

The process, and the concept, are simple:

1) Create a long-term income stream;

2) Segregate the income stream from the property;

3) Either keep the income stream;

4) or sell it for its present value, using the increased liquidity to reduce debt and increase the economic viability of the project.

5) Lower the sales price, benefiting future buyers and sellers alike.

In connection with each future sale the seller pays the fee in connection with the closing. A trustee then disburses the funds, including sending a portion to a non-profit within the community in which the property is located.

Once the Reconveyance Fee Instrument is recorded the process of working to aggregate and monetize the rights begins. You are free to accept or reject any offers.

Until such time as you have sold either the property or the Reconveyance Fee Instrument you can simply rescind the Instrument by filing a release. This right to rescind allows you to retain complete control over the Instrument.

Working with Freehold Capital Partners represents the best a joint venture has to offer. It combines your real estate project with Freehold's expertise in reconveyance fees, creating flexibility for sellers and buyers, all while generating either a long-term income stream or the possibility of significant capital today.

It is a true win-win scenario.

The process may be simple…

…but the impact is ***powerful***.

Although Freehold believes that all Reconveyance Fee Instruments can be sold, due to investor demand, interest rates, market acceptance, property type, property location, laws and regulations, and other factors, there is no guarantee that the rights to any particular tract of property can be sold for any particular price.

FREEHOLD'S PATENT FILINGS...

Freehold's system is the subject of patent applications filed with the U.S. Patent and Trademark Office. These filings cover the imposition of reconveyance fees on a for-profit basis. Sophisticated property owners of all types, including developers, home builders, investors and attorneys, and some of the largest U.S. companies, have all seen the benefits of partnering with Freehold to create Reconveyance Fee Instruments.

FREEHOLD PROJECTS

Freehold has created reconveyance fee rights to hundreds of billions of dollars worth of real estate projects across the United States, including Reconveyance Fee Instruments for...

- RESIDENTIAL SUBDIVISIONS
- MIXED-USE PROJECTS
- HOTELS/MOTELS
- APARTMENT COMPLEXES
- RETAIL CENTERS
- WAREHOUSE FACILITIES
- INDUSTRIAL FACILITIES
- CONDOMINIUMS
- OFFICE BUILDINGS
- AND MORE...

A Proposed 300,000 Square Foot Office Building in the Freehold Capital Partners' portfolio.

SEE WWW.FREEHOLDCAPITALPARTNERS.COM

CREATIVE **WORKS & ROYALTIES**

From initial layout to final vertical improvements, a significant amount of creativity goes into a real estate project.

As such, it is a rare developer who has not driven by projects developed in years gone by and **reflected upon the creative process of the past and the project's value today. However, despite the** fact that their creative work lasts (and will be used and enjoyed) for generations, those who improve property have traditionally accepted a lump sum payment for their work.

Just like authors who write books and musicians who write songs that will be enjoyed for generations to come, those who improve property are also engaged in the creative process, and the economics **of the transaction should reflect that reality.**

Reconveyance fees represent a fair and equitable **way to tie long-term funding to long-term benefits.**

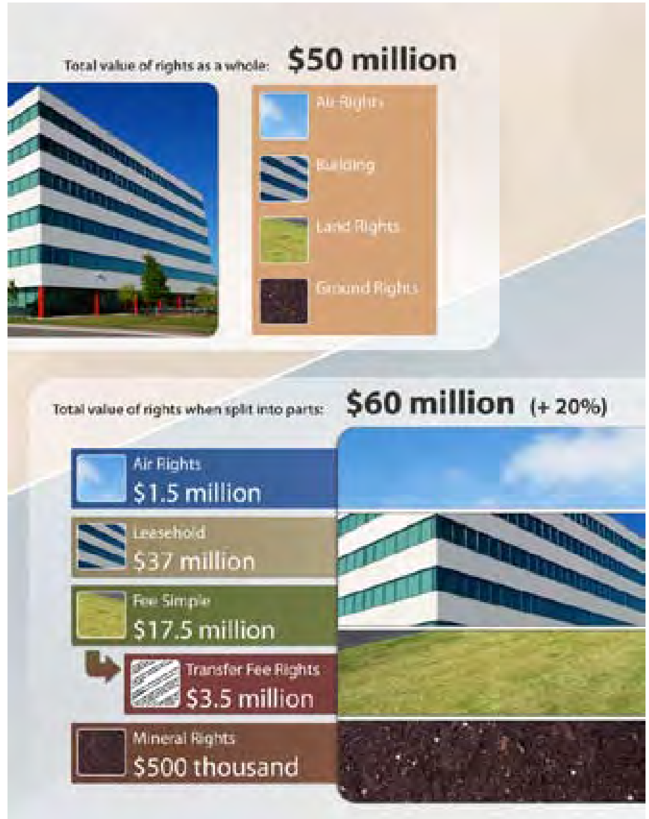
UNBUNDLING PROPERTY RIGHTS

Traditionally, "property" was thought of as a single economic unit. An investor acquired the land and everything above and below it. However, over time sophisticated property owners began to realize that "unbundling" these rights increased economic efficiency.

Modernly, it is not unusual to see different parties owning the surface rights, leasehold rights, air rights, water rights, mineral rights and of course reconveyance fee rights, to the same tract of land.

When a property owner "unbundles" the various property rights it usually results in the parts being worth more than the whole. The process is analogous to taking a large company and spinning off the various components into separate entities. The process is also referred to as "asset segregation" and it is a proven means of extracting additional value.

By creating and unbundling reconveyance fee rights with Freehold Capital Partners, property owners may find that the estimated value of the Reconveyance Fee Instrument plus the property itself exceeds the value of the property without reconveyance fees.



Reconveyance Fees Represent A Fair and Equitable Way To Extract Additional Value From Your Real Estate Portfolio While Lowering Acquisition And Transaction Costs For Your Buyers.

RESTORING ECONOMIC VIABILITY

Funding for many types of real estate projects is currently not available on commercially reasonable terms. However, the Freehold process offers the potential for injecting significant liquidity into real estate projects, lowering the debt-to-asset ratio and restoring balance sheets through significant debt reduction.

When a property owner can create a long-term income stream that shares many of the characteristics of a "bond" (but without the high transaction costs), and to potentially sell this valuable asset in return for liquidity today, distressed projects suddenly become economically viable.

This allows project owners to pay down debt, strengthen the balance sheet, restore jobs, reduce the sales price, and avoid what otherwise what might be significant losses.

BUILDING A BETTER COMMUNITY

Freehold believes in building strong communities, which is why every Reconveyance Fee Instrument created by Freehold irrevocably assigns a portion of the income stream to non-profit organizations. In connection with each future transfer of title to the property a portion of the reconveyance fee goes directly to non-profits, and this means significant long-term funding for...

green space initiatives, affordable housing,
parks, clean air/water and much more…

By helping to fund non-profits, reconveyance fees help relieve some of the burden from government and re-allocates resources back into the community. This creates a win-win for all parties because...

strong communities build strong property values,
which in turn generates Reconveyance Fees
to build even stronger communities.

Freehold's system of combining economic incentives for property owners with a charitable component means that total reconveyance fee income generated by Freehold is estimated to far outpace the income stream generated by reconveyance fees imposed in a pure "non-profit" basis.

it is about creating a cycle of growth & prosperity,
and bringing private solutions to public problems.

"...developers have used private reconveyance fees to purchase open space as environmental mitigation for a project or to support the development of affordable housing and homeless shelters."

- California Senate Staff Analysis 2007

WHAT OTHERS SAY

"Home builders ... look at the best way to absorb and spread ... costs and still sell their products. [Y]ou can't put all those costs on home buyers and still sell at an affordable price." ... "Transfer Fees represent an alternative to other financing mechanisms that can affect home affordability. If builders weren't allowed to pass along costs in a transfer fee, they'd have to make up for it by adding thousands of dollars to their homes' initial selling price, shutting out buyers." ... "REALTORS never complain that a house is too expensive, and that's precisely what happens when builders lump all of their costs into the price of the first home. Why shouldn't the second and third buyers share the costs?"

- Kimberly Dellinger, California Building Industry Association.
Source: Builders, Realtors square off ... May 16, 2007. Inman News.

"To the extent the existence of a [transfer] fee impacts the value of property, as long as the fee is fully disclosed the market will adjust to the fee."

- Source: California Senate Staff Analysis
http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0651-0700/sb_670_cfa_20070413_131835_sen_comm.html.

"...developers have used private transfer fees to purchase open space as environmental mitigation for a project or to support the development of affordable housing and homeless shelters."

- Ibid

"A bill backed by the Realtors failed to get a single vote. The defeat came at the hands of an alliance between developers and non-profits."

- Source: "Strange Bills, Stranger Bedfellows"
www.californiaprogressreport.com/2007/05/real_estate_tra.html

"Reconveyance financing...helps keep home prices low by spreading costs over all beneficiaries of a project."

- Julie Snyder.
Policy Director for non-profit Housing California.

"A bill to ban transfer fees, backed by the California Association of Realtors, was defeated in a Senate committee earlier this month. Private transfer fees, a relatively recent financing tool, are a way to bankroll multimillion dollar development concessions without necessarily affecting a home's initial purchase price."

- Jim Sanders, Sacramento Bee
(May 21, 2007)

"[T]he Freehold...System ... provides a very real opportunity to restructure the economic substance of the real estate transaction...in a way that can operate to the benefit of the initial seller as well as each buyer in the transaction chain. ...it accomplishes this by allowing a property owner to reduce the sales price in return for a future income stream. This...allows a buyer to acquire property with lower transaction costs, reduces carrying costs, and allows the buyer to pass along these benefits in a subsequent sale."

- Report by Dr. Tom McPeak, Ph.D. (Land Economist)

RECONVEYANCE FEES RIGHTS & THE LAW:
A PRIMER FOR LAWYERS

A covenant that runs with the land is a servitude, and few areas of the law are more complex and misunderstood. A few of the common issues are discussed below.

- Filing the Freehold Reconveyance Fee Instrument in the public records obligates future sellers to pay a 1% fee at the time of sale. The process is analogous to deed restrictions and common subdivision restrictions, though the Freehold instrument has been crafted with particularity to Reconveyance Fees.

- In order to constitute an UNREASONABLE RESTRAINT ON ALIENATION, the restraint must (a) be unreasonable and (b) actually restrain alienation. The mere obligation to pay money will generally not suffice to unreasonably restrain alienation because the sales price will adjust to account for the restraint. This is particularly true when the restraint is limited to a de minimus fee (e.g. 1%).

- The Freehold Reconveyance Fee Instrument does not violate the RULE AGAINST PERPETUITIES because the term is limited to 99 years and because the rights VEST immediately upon filing.

- If a state passes a law to ban Reconveyance Fees, not only must they ban them for charitable purposes (or run afoul of the constitution) but they must “GRANDFATHER” existing Reconveyance Fee Instruments or it would be an impermissible “TAKING”.

- Under common law both the BENEFIT AND BURDEN traditionally must “TOUCH AND CONCERN” the land. Modernly, and under RESTATEMENT (THIRD) of PROPERTY, the touch and concern doctrine has been largely abandoned in favor of a contract approach, focused mainly on disclosure. The Freehold Instrument satisfies both the traditional (“Touch and Concern”) requirement and the modern Restatement.

REPRESENTATIVE CASES

The Freehold system is based upon sound legal principals.

A few representative cases are:
An affirmative covenant, as opposed to a restrictive one, does not restrict the use of land in question, but instead, imposes a duty on a party to the agreement to perform an affirmative act. Bessemer, 381 So.2d 1344; Hills, 956 S.W.2d 349; Restatement (Third) of Property (Servitudes), section 1.3. In interpreting affirmative covenants, principles of contract law apply. Hills, supra; Spain, 622 S.W.2d 309. If the covenant is clear and unambiguous then the covenant is not subject to rules of contract “construction.” Mullikin, 142 S.W.3d 822. When a Covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed and it is improper to inquire into the surrounding circumstances or the objects and purposes of the restriction for aid in its construction. Publix Super Markets, 876 So.2d 652 (4th DCA 2004). Smith, 338 Ark. 65; Mullikin, supra; Roling, 851 S.W.2d 792.

The creation of a lien by acceptance of a deed relates back to the time of the filing of the covenant. In accepting a deed with actual or constructive notice of a lien provision of a declaration of restrictions, the property owner manifests the intent to let the real property stand as security for the obligation. Imperial Golf Club, 752 So.2d 653 (2nd DCA 2000); Bessemer, supra.

The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish. Carr, 210 W. Va. 240; Vesci, 909 S.W.2d 708; Roling, supra. The modern trend is to enforce covenants and avoid strict application of anti-alienability, so the benefit may need to be a token one, including a benefit that is traced only to the original grantee, whose successors in interest are thereby bound. Mercer Is., 816 P.2d 1224.

CREATING RECONVEYANCE FEE RIGHTS THROUGH

FREEHOLD CAPITAL PARTNERS

STEP 1:

UNDERSTANDING RECONVEYANCE FEE INSTRUMENTS

Consider the information, and consult with legal and financial counsel of your own choosing.

STEP 2:

AGREEMENT

Review and sign our simple 2 page agreement. There is no charge. Return it to Freehold and the process of creating Reconveyance Fees begins.

STEP 3:

REQUEST RECONVEYANCE FEE DOCUMENTS

Provide us with all of the necessary information and we will return draft documents for your legal counsel.

STEP 4:

REVIEW AND FILE RECONVEYANCE FEE DOCUMENTS

The documents are reviewed by you and your attorney, signed, and filed in the public records

STEP 5:

WHEN EACH FUTURE SALE OCCURS

The trustee and closing agent work together to insure a smooth transaction. The closing agent collects the reconveyance fee from the seller, and your portion is then distributed to you by the trustee.

STEP 6:

MONETIZATION POTENTIAL

Freehold will explore prospective ways to monetize the future income stream.

- Our agreement gives you the right, *but not the obligation*, to create reconveyance fees in partnership with us.

- Once you file a Reconveyance Fee Instrument you can still remove the Instrument at any time until such time as you have sold either (1) the property or (2) the Reconveyance Fee Instrument.

- No reconveyance fee will be assessed when you sell. You also can exempt all sales through a future date.

- Freehold's compensation is limited to a participation interest in the Reconveyance Fee Instrument. The "contingency" nature of our relationship insures that our interests are aligned.

- The only expenses you can expect to incur are nominal recording fees and fees paid to your own legal and professional advisors.

- Once you file your Reconveyance Fee Instruments, you own a long-term income stream. In connection with each future transfer of title the fee will be collected from the seller and your portion remitted to you.

- Not only will you own a long term income stream, but Freehold will explore prospective monetization channels.*

- Whether or not a satisfactory offer is received depends upon numerous variables such as property type and location, prevailing interest rates and similar factors.

If Instruments are aggregated into pools, and securities issued in connection therewith, same shall only be undertaken by a registered broker-dealer, or otherwise in compliance with, or pursuant to an exemption from, applicable laws. Freehold does not act as a broker-dealer, nor does Freehold create, underwrite, buy or sell securities.

THE POWER OF MONETIZATION

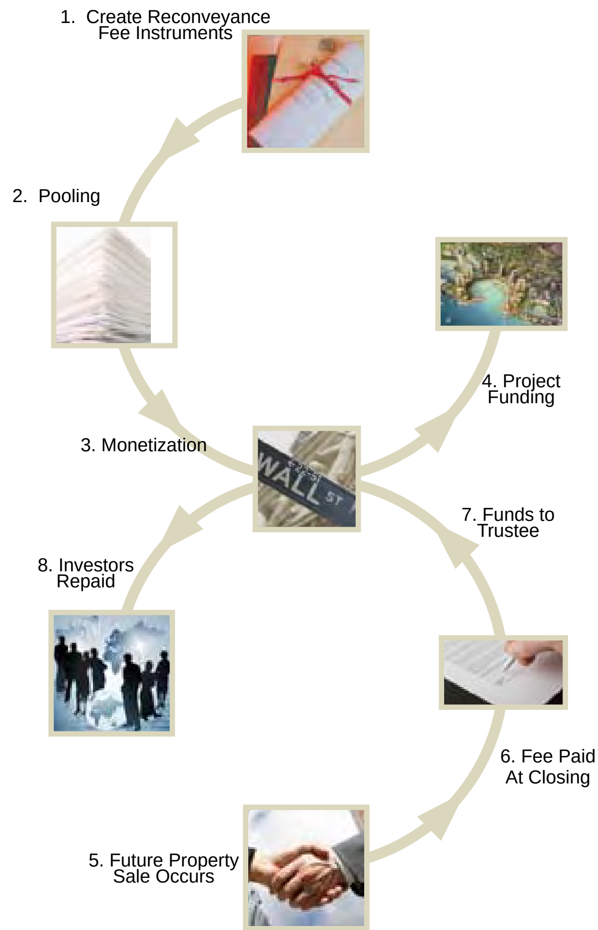
Reconveyance Fee Instruments represent a fully-collateralized financial instrument with no meaningful risk of default. These desirable characteristics led one major investment bank to remark, “Reconveyance Fee Instruments represent an ideal securitization vehicle.”

In a typical monetization scenario, the Instruments are originated, then aggregated into large “pools”, and securities backed by the pool would then be issued.

Developers originating the Instruments would receive the present value of the future income stream, using the proceeds to reduce debt, install infrastructure and lower the sales price.

Investors acquiring shares of a pool would own a long-term income-producing asset secured by a real property interest, and which carried no meaningful risk of default.

This is not an offer to sell, buy, market, offer, broker, act as broker-dealer or securitize Reconveyance Fee Instruments. There is no assurance that any particular Instrument will be suitable for sale or securitization or that a public market for Reconveyance Fee Instruments will develop, mature or persist.



THE POOLING PROCESS

In order for monetization of Reconveyance Fee Instruments to be feasible, the future income stream (derived from how often a particular class of property will sell, and at what price) has to be estimated with a reasonable degree of accuracy. Although extensive data on turnover and appreciation exists, the portfolio of properties must be very large, so that an actuarial analysis can be undertaken.

Freehold and its partners have created a portfolio of Reconveyance Fee Instruments sufficient for aggregating into very large pools, thus making realistic income predictions a realistic possibility, which in turn makes monetization feasible.

Our current Portfolio covers in excess of a half trillion dollars worth of real estate projects across the United States.

VALUING THE INCOME STREAM

Estimating reconveyance fee income is an actuarial analysis. Provided that the portfolio of properties is large enough, the future **sales price**, **sales frequency**, and resulting reconveyance fee **income**, should be predictable with a reasonable degree of accuracy simply by looking at widely available statistical data.

For partially improved projects, the character and location of the project is analyzed, and a model is developed as to the type and timing of final improvements. For example, if a residential subdivision is in an area that predominately develops out with an average home price of $250,000.00 when fully developed, income predictions can be made based upon this data. Obviously a discount will be applied for uncertainties. The development and income assumptions may or may not coincide with the current developer's plans for the property. However, since the property is not yet fully developed income must be modeled using historical data and actuarial analysis.

What makes this type of modeling possible is the aggregation of Reconveyance Fee Instruments into large portfolios. By way of further example, although the subdivision used in the above example may develop out at slightly more, or slightly less, than the predicted $250,000 per home, the pool *as a whole* should perform as modeled. In other words, although some tracts may fall short of the model, and some may exceed the model, the portfolio as a whole should perform consistent to the model. It becomes, in essence, an "actuarial" analysis.

A Reconveyance Fee Instrument is a fully-collateralized, asset-backed...

FUTURE INCOME STREAM

...with no meaningful default risk.

Reconveyance Fee Instruments represent an ideal investment opportunity for pension funds, mutual funds, insurance companies, endowments and others seeking long-term income with no meaningful risk of default.

In particular, the passive nature of the income stream, combined with the opportunity for built-in inflation protection that comes from the fact that property prices have historically correlated very favorably with **inflation, should make Reconveyance Fee Instruments ideally suited for today's risk-adverse institutional** investor.

ADDITIONAL INFORMATION CAN BE FOUND AT

WWW.FREEHOLDCAPITALPARTNERS.COM

All information, conclusions, opinions, historical data and estimates contained throughout this document are believed to be reliable, but no guarantee of accuracy is expressed or implied and no reliance shall be made thereupon. This is neither an offer to sell nor an offer to purchase securities in any jurisdiction where such an offer would be unlawful.

THE FREEHOLD TEAM

Freehold has an impressive team of approximately 700 highly qualified professionals* who work with the owners of substantial real estate portfolios, helping to educate them on the benefits of partnering with us to create a long term collateralized income stream.

Our team includes dozens of attorneys, MBAs, former bank officers, investment bankers, developers and commercial real estate agents and brokers, all with the in-depth knowledge necessary to help our clients.

These agents work with the owners of large real estate portfolios across the United States, helping to create a diverse portfolio of Reconveyance Fee Instruments.

Our corporate office is located in the heart of the financial markets in mid-town Manhattan.

Freehold's strength comes from its team of experienced professionals.

* Each agent is an independent representative.

Agent Locations

New York NY (Home Office) • Las Vegas NV • Atlanta GA • Los Angeles CA • Charlotte NC • Seattle WA • San Francisco CA • San Antonio TX • Bethleham CT • Phoenix AZ Houston TX Clearwater FL • Cambridge MA • Athens GA • Chicago IL • Washington DC • Laredo TX • Birmingham AL • Fresno CA • Fayetteville NC • Salt Lake City UT Bridgeport CT • Trenton NJ • Dallas TX • Tulsa OK • Wichita KS • Sandy UT • St. Augustine FL • Pittsburgh PA • Alexandria VA • Greenville MS • Destin FL • Springfield IL • Monroe CT • Fall River MA • Pittsburgh PA • Bronx NY • Baltimore MD • Savannah GA • Columbia SC • San Jose CA • Tampa FL • Asheville NC • Panama City FL • Jackson MS • Mesa AZ • Honolulu HI • Battle Creek MI • New Fairfield CT • Miami FL • Medford OR • Austin TX • Hartford CT • Sumter SC • Ft. Myers FL • Park City UT • Brooklyn NY Ft. Lauderdale FL • San Diego CA • Englewood NJ • Lake Tahoe CA and more

FAQs

What expenses will we incur? You can expect to incur expenses with your legal counsel, and nominal filing fees payable to the recorder's office. Freehold is compensated solely on a contingency basis.

Who are Freehold's clients? Some of the largest, most well-respected property owners in the United States.

How much property is in the Freehold portfolio? Approximately $600 billion in real estate projects in 43 states (as of Jan. 2010).

What types of real estate projects are eligible? Virtually any type of large real estate project, including (but not limited to) office, industrial, apartment, commercial, warehouse, subdivision, retail, office, mixed use, hotel, condominium, etc.

Who pays the Reconveyance Fee? Future sellers pay the fee at the time of sale.

Do future owners really benefit? Yes. Property encumbered by a 1% fee will sell for less than property without a fee. A buyer paying less at the time of purchase in return for paying 1% at the time of a future sale will have lower carrying costs, lower acquisition costs, etc. A buyer who buys for less can also sell for less, and thus has a competitive advantage.

Do future unwilling parties become obligated to pay the fee? No. Every seller paying the fee was a willing buyer who bought the property with full knowledge of the obligation to pay the fee at the time of their future sale. In return, they negotiated price and terms accordingly.

What about future owners claiming not to have been aware of the fee? The Reconveyance Fee Instrument is in the public records. A buyer receives notice in the same manner as ordinary deed restrictions. Courts routinely reject "lack of notice" claims when it comes to public documents. In addition, many states have disclosure laws.

Won't this interfere with our ability to sell property? The Reconveyance Fee is just one of numerous factors that influence a purchase decision. Experience says the modest 1% fee will not generally be deemed substantive by most buyers, particularly since they can adjust the purchase price and do not pay the fee until the time of their future sale (and can plan accordingly).

If the Reconveyance Fee Instrument does interfere with our ability to sell our property, can we terminate the Instrument? Yes.

If we terminate the Instrument, what will we owe Freehold? $0

Why shouldn't we just develop our own documents in lieu of partnering with Freehold? Why run the risk of running afoul of our intellectual property claims when you can partner with us solely on a partnership basis, which aligns our interests? More importantly, the likelihood of selling off your income stream is enhanced when the Instruments are bundled into large portfolios.

When we sell our project, will we pay a reconveyance fee? No. There are numerous exemption, including your own sale. In addition, Freehold will typically exempt all sales through a future date (typically 3-5 years, depending on the project type and stage of development).

How are we compensated? If you sell your Reconveyance Fee Instrument you receive a lump sum. If you retain the Instrument, at each future closing the closing agent collects the fee and forwards it to a third-party Trustee, who pays you.

Will Freehold sell or securitize our Instrument? No. As a partner with an ownership interest in the asset, Freehold will work to find a buyer. However, if the Instruments are pooled and securities issued, it will only be done by licensed broker-dealers or otherwise in compliance with applicable securities law.

Does a Freehold agreement cover every use of a Reconveyance Fee? No. Freehold's patent filings and business only cover "for profit" Reconveyance Fees. If the fee is truly for a non-profit use (100% charity-owned, government tax, co-op, HOA, etc.), it is exempt.

How is the Reconveyance Fee apportioned at the time of each sale? The largest portion to the property owner, with the balance typically to agents, brokers, the title company (where allowed by law), attorneys, non-profits and Freehold.

Do we need lender consent to file a Reconveyance Fee Instrument? Since a Reconveyance Fee will not be due until a future sale (at which time the lender is paid off), and since the fee is subordinate to the Lender (by the express terms of the Instrument), the Instrument should not be deemed an impairment of a lender's collateral or violation of a standard loan covenant.

However, loan terms vary, so be sure to have your attorney check your particular loan terms.

Can we set the fee higher than 1%? No.

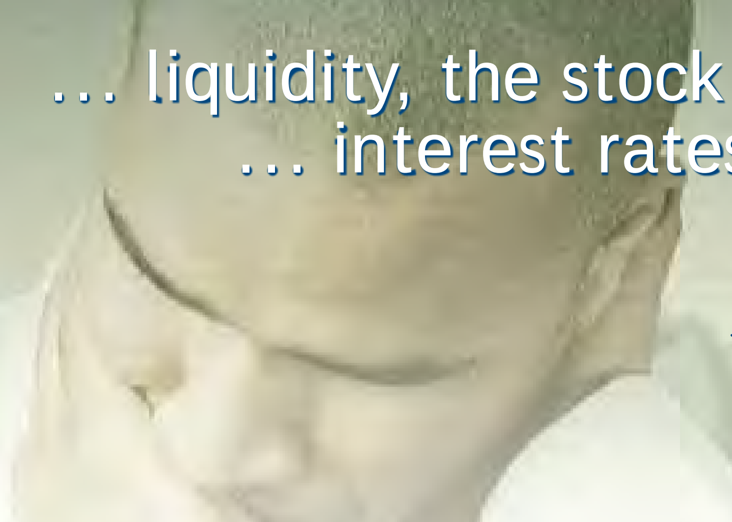
Can future owners also impose a Reconveyance Fee on the same property? No. Our Instrument prohibits "stacking" of multiple fees.

Can homeowners use this program to make money? Freehold does not license homeowners. Instead, Freehold works with large real estate projects. By enabling our clients to more efficiently structure the economics of their projects, and pay for infrastructure and other long-term improvements, buyers benefit from more amenities, lower prices and/or a better community.

Does a portion of every Reconveyance Fee go to a non-profit? Yes, a percentage of each Reconveyance Fee that arises from an Instrument created through Freehold benefits the community in which the property is located. This provides important long-term funding that benefits communities nationwide.

In order to partner with Freehold, do we have to consult with our own attorney? Yes. As a condition to partnering with us you must agree to have your attorney review and approve all documents.

Where do we start? Contact a Freehold independent agent in your area. Contact links can be found on our web site.



... liquidity, the stock market...
... interest rates, the economy...

ARE YOU WORRIED?

What do you think the future has in store for your business? Will the economy grow? Will interest rates rise? How will the real estate market perform over the next few years? What about inflation? Will lenders begin lending again?

Now imagine creating a valuable asset, gaining a competitive edge, generating liquidity and giving back to your community, all while adding flexibility in administering your real estate portfolio.

IF YOU'RE WORRIED, YOU'RE NOT ALONE.

FREEHOLD CAPITAL PARTNERS IS ONE OF THE FASTEST GROWING COMPANIES IN NORTH AMERICA.

Through a team of approximately 700 representatives across the United States, Freehold has helped create Reconveyance Fee Instruments to hundreds of billions of dollars worth of real estate projects.

If you would like to learn more about how Reconveyance Fee Instruments can help you, visit our web site or contact us today.

WHY CREATE RECONVEYANCE FEE INSTRUMENTS WITH FREEHOLD...

- Create a long-term income.
- The potential for much needed capital.
- More fairly apportion expenses over those who will benefit.
- Make your property more affordable.
- Help build a better community.
- Maximize economic efficiencies and unlock hidden value.
- Take advantage of Freehold's Intellectual Property.
- Fund ESOPs and similar employee benefit programs.
- Strengthen your balance sheet.
- Help close the gap between buyer and seller.
- Maximize your ROI.

Partnering with Freehold represents the best a joint venture has to offer.

It combines your real estate projects with our abilities as Reconveyance Fee specialists.

The process creates flexibility for sellers and buyers alike while generating either a long-term income stream or much-needed capital in today's challenging environment.

It is a true win-win scenario.

All information, conclusions, opinions, data, objectives and estimates contained in this document, the Freehold web site, and distributed by Freehold (whether written or orally) represent the estimates and opinions of Freehold, the validity and reliability of which each recipient must independently determine. No reliance shall be made upon any such information and Freehold specifically disclaims any guarantee of accuracy. No communication from Freehold shall be construed as legal, financial or tax advice or an offer to buy, sell or securitize securities. Each communication is provided under the express condition that recipients will rely solely upon legal and financial counsel of their own choosing. Information subject to change without notice.

WWW.FREEHOLDCAPITALPARTNERS.COM

ATTACHMENT 6

National Association of Home Builders

1201 15th Street NW
Washington, DC 20005

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F 202 266 8400

www.nahb.org

NAHB

ISSUE UPDATE: NEW DEVELOPMENTS IN REAL ESTATE TRANSFER FEES
September 9, 2010

NAHB staff has received inquiries regarding a new development financing strategy that creates private transfer fees as a means of producing an income or revenue stream presumably to provide amenities to a subdivision and/or to support nonprofit entities. This new private transfer fee program utilizes a third party to manage the process and promotes the possibility of producing upfront capital through sales of securities interests in the future revenue stream. In this backgrounder, staff in NAHB's Land Development Services and Legal Affairs Departments discuss the use of this approach, compare it to other forms of transfer fees, and analyze the public policy and legal issues surrounding real estate transfer fees.

Descriptions and Analysis of Real Estate Transfer Fees

The transfer fee concept has been in existence for quite some time in the public sector, usually in the form of a tax imposed by state or local jurisdictions on private property. The amounts range from extremely small (Colorado being the smallest at .01%) to a much larger burden (4 % charged in Pittsburgh, Pennsylvania).

A public transfer tax is usually based on the fair market value of the real estate. Most often, the tax is collected by the title company prior to the property deed being recorded. Most jurisdictions direct the tax revenues to the general fund. In some cases, the public sector dedicates the proceeds to support special initiatives such as open space, land conservation, school districts, municipal capital projects, and affordable or workforce housing initiatives.

Private real estate transfer fees are a concept that has been around for at least 15 years and used in 45 states. In recent years, however, private transfer fees have been more actively marketed and used more frequently by the development industry. The goal of these fees has generally been to create a future income or revenue stream for some purpose that would benefit the community that has paid those fees or, in a more recent application, other parties. Other terms in use for this concept include reconveyance fees, community enhancement fees and homeowners' association (HOA) transfer fees.

The biggest difference between public and private transfer fees is that, for the most part, the private transfer fees have little to no regulation governing their use. In most states, there is nothing that would prevent someone from putting a transfer fee on a property for personal benefit. There are also generally no constraints on the size of the development where the private transfer fee is used or the length of time it can be imposed on the property.

A private fee is attached to the property by the owner or another private party. A fee or a percentage of the gross sales price is distributed to a designated recipient each time the property sells or resells. The mechanisms for these private fees are typically created by a subdivision's developer and are part of the recordation of the covenants codes and restrictions associated with the property.

There are two main types of private transfer fees currently in use. Under one model, the developer or property owner creates the private transfer fees for the benefit of the community paying that fee. Ultimately, those homeowners also manage the fee proceeds. A more recent model uses a third party intermediary to create the transfer fee rights and manage them in the long term, with the fees going to private parties with ownership rights in the proceeds. There are significant differences in these two models of private transfer fees that impact their acceptance by the community as well as broader political viability.

1. **Nonprofit or Home Owner Association Private Transfer Fees**: The most commonly used model for private transfer fees involves developers creating private transfer fee mechanisms to fund programs, amenities and infrastructure (usually in the form of parks or open space) that have a direct benefit to the homeowners in the community paying the fees. In these cases, the money flows from the homeowners to their associations or a designated nonprofit and then back to the homeowners in the form of benefits. None of the private transfer fee revenues return to the developer or original property owner. This type of fee has been used for at least 15 years by some developers, and proponents assert that the added benefits can increase the value of those homes through making the home or community more desirable as a place to live.

   The property owner and/or developer creates a transfer fee that is collected upon sale. In most cases, funds collected from these private transfer fees are managed by the subdivision's HOA for either charitable purposes or additional amenities. Some HOAs use the revenues to defray costs normally paid by the annual dues structure while others use the funds to support designated nonprofit 501(c)(3) organizations.

   For example, a developer established a subdivision in Utah using a transfer fee set initially at a half a percentage point for the first sale (lots sold by the developer to home builders) and then a quarter of a percentage point for every sale thereafter. The developer then established a community council under the control of the homeowner's association to manage the proceeds which are collected into perpetuity through a nonprofit organization. Although the nonprofit has a degree of latitude as to where the funds can be used, the community council has been using the proceeds for special events that have been intended to build a sense of community in that area (i.e. community picnics, festivals, etc.). These funds augment the HOA's annual budget which is needed for more basic operating and maintenance issues.

   In California, nonprofit organizations such as affordable housing and environmental groups have long been beneficiaries of private transfer fee revenues. The most well-known is the Lennar Charitable Housing Foundation (LHCF), which was set up by the Lennar Corporation in California to assist local nonprofits through grants for the provision of affordable housing.

2. **Private Transfer Fees using a Third Party**: A more recent and controversial form of private transfer fee use involves a third party intermediary managing the transaction and the proceeds over the long term, with the intermediary receiving a portion of the proceeds in exchange for that management.

   A percentage (usually one quarter to one percent) of the gross sales price is distributed each time the property sells. In one approach being marketed currently, of the entire transfer fee collected, 30 percent of the fee is distributed to the intermediary, 60 percent to the developer or property owner, and 10 percent to the real estate broker. Each homeowner pays the fee upon sale but does not have a role in directing the ultimate use of revenues.

   This model is marketed as having the added benefit of creating private transfer fees that can be bundled and sold in the securities market. According to the sales materials, the third party intermediary projects the long-term income stream of the private transfer fees by estimating the future revenues from the home sales. The intermediary would then create an investment that is similar to a bond to be sold in the securities market. The developer or property owner would receive a lump sum payment from this transaction, which they could use as upfront capital for long-term improvements such as infrastructure or schools.

   NAHB has found no examples of such revenue streams being securitized to date or used to build infrastructure. In addition, although some marketing communications have implied that federal support for private transfer fee securitization is imminent, at this point there is no evidence that such a program is under consideration. Unless and until transfer fee instruments are securitized, the fees from each individual closing after the initial sale of each individual property would continue to be split between the developer or original property owner and the intermediary.

Questions that Should Be Considered by Builders and Developers before Using Private Transfer Fees

<u>Have you conducted due diligence on the proper use of private transfer fees?</u>

As with any new business method or financing alternative that you are not familiar with, if you are contemplating using this method, be sure to do your own research and due diligence. Due diligence will include taking the following steps: (1) ensure your state does not prohibit private transfer fee covenants; (2) determine whether there is any pending legislation that if passed, may affect such covenants in the future; (3) conduct a thorough review of your own business and business plan to determine the relative risks and benefits involved; and (4) consult with your own attorney to fully discuss any potential risks and benefits involved.

<u>Does your state allow the fee?</u>

Courts and state legislatures generally do not favor restrictions on the ability of owners to sell real property. From a public policy perspective, such restrictions could impair the marketability and transferability of real property. Restrictions such as private transfer fee covenants that run with the land are considered by some states to constitute an unreasonable restraint on alienation of property, regardless of the duration of such covenants, or the amount of such transfer fees.

As background, covenants that become part of the deed to real property are considered covenants that "run with the land." Running with the land means that a "right or obligation passes automatically to successive owners or occupiers of the land."[1] In that case, the obligation is considered a "burden" on the land itself.[2] When covenants create a burden on the ability sell property, courts will look at whether the land burdened by that covenant receives any benefit, such as paving a shared driveway, improving an adjoining road, or maintaining a fence or retaining wall. When burdens benefit third parties, and not the current owner or buyer, courts will look at whether the burden on the land is reasonable. Covenants that burden the land by requiring fees to be paid upon sale of the property, but do not benefit the current or future property owner, may well be found unreasonable by courts.

Most states do not regulate or restrict the use of private transfer fees. The lack of regulation in most cases means that if private transfer fees are used, there is no state oversight on where or how the money is spent, or how long fees can encumber the property.[3] However, that is changing, with some states adopting statutes that prohibit private transfer fees, or restrict how and when such fees can be used. Other states have pending legislation that, if adopted, will prohibit private transfer fees. Therefore, be sure to check your individual state laws. In states without statutes regulating private transfer fees, it is unclear how the state would treat such fees if laws are adopted after a covenant is in place; in some instances such fees may be void while in other jurisdictions, existing covenants may remain but no new covenants may be used. For example, in a few jurisdictions that have recently adopted legislation, these states specifically include language in their statutes that existing transfer fee covenants are not presumed valid and enforceable.

To date, 17 states have legislation addressing private transfer fee covenants. Sixteen states[4] prohibit or restrict the use of private transfer fee covenants because those state legislatures found that the fees are against public policy and place unreasonable restrictions on the ability to sell property in the future. *See, e.g.,* Ariz. Rev. Stat. § 33-442*,* Fla. Stat. § 689.28 (effective July 1, 2008); Kan. Stat. Ann. § 58-3821 (effective July 1, 2009); Illinois Public Act 096-1345 (effective January 1, 2011); Iowa Senate File 2192; La. Rev. Stat. § 9:3131 – § 9:3136; Maryland H.B. 1298 (May 2010) (to be codified at Md. Real Prob. Code Ann. § 10-708 **(**2010); Minn. Sess. Laws S.F. No. 3361 (to be codified at Minn. Rev. Stat. §§ 513.73 – 513.76); N.C. Sess. Law 2010-32 (Signed

[1] Restatement (Third) of Property § 1.1(a) (2000).
[2] *Id*. § 1.1(c).
[3] But keep in mind that in states that do not prohibit private transfer fee covenants, there may still be limits on how long a covenant can run with the land and in most cases, any restriction for longer than 99 years is often viewed as suspect.
[4] States prohibiting private transfer fee covenants include Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, North Carolina, Ohio, Oregon, Texas and Utah. Several articles have included Mississippi in the list of states prohibiting these fees, but as of this date, does not appear to have existing or pending legislation.

by the Governor on 7/1/2010); Ore. Rev. Stat. § 93.269 (2009); Utah Code Ann. § 57-1-46(2) (2010). The legislatures in several of these states specifically referenced the public policy reasons for prohibiting such transfer fee covenants as creating unreasonable restrictions on the marketability of real property. In Kansas, the statute applies to "any transfer fee covenant in existence on the effective date of the act." Kan. Stat. Ann. § 58-3821. Ohio introduced legislation to the same effect as Kansas, which the Governor signed in June 2010. *See* H.B. 292[5] § 5301.057(A)(4), 128th Gen. Assembly, Reg. Sess. (Ohio 2009-2010).

Texas prohibits the use of deed restrictions or other covenants placed on real property that requires the payment of a fee to a third party upon transfer of the property. Texas Prop. Code § 5.017(b). However, Texas recognizes three exceptions when the fee is payable to: (1) a property owner's association that manages the subdivision; (2) a nonprofit organization that meets certain Internal Revenue Code requirements; or (3) a governmental entity. Texas Prop. Code § 5.017(c).

The legislature in Hawaii has pending legislation that, if passed, would ban the use of private transfer fee covenants. *See* H.B. 1383, 25th Legis. (Hawaii, Jan. 27, 2009). In the states that prohibit private transfer fee covenants, each state statute does contain certain exceptions for traditional fees such as recording property transfers, real estate commissions, fees to governmental organizations/agencies, fees for homeowner associations, etc cetera.

The legislature in California rejected proposed legislation that would have prohibited private transfer fees. However, California did pass a bill that requires disclosure. *See* Ca. Civ. Code § 1098 (defining transfer fees); Ca. Civ. Code § 1098.5 (requiring either the receiver of the transfer fee, or the person imposing the transfer fee to record a document describing the specific terms of the transfer fee). For property that is subject to a transfer fee, Ca. Civ. Code § 1102.6(e) requires the transferor to provide the transferee with an additional disclosure statement containing all of the following information: (1) a notice that payment of a transfer fee is required upon transfer of the property; (2) the amount of the fee required for the asking price of the real property and a description of how the fee is calculated; (3) notice that the final amount of the fee may be different if the fee is based on a percentage of the final sale price; (4) the entity to which the fees will be paid; (5) the purposes for which funds from the fee will be used; and (6) the expiration date of the obligation to pay the fee, if any.

<u>How may third party transfer fees affect the availability of an FHA loan or marketability with government sponsored entities ?</u>

Another consideration is whether a potential homebuyer intends to apply for an FHA mortgage. A buyer would not be able to secure an FHA mortgage if the property has a third party transfer fee recorded in the deed. Mortgage loans through FHA require that property be freely assumable. 24 C.F.R. § 203.41. HUD's regulations prohibit "legal restrictions on conveyances" which include limits on the amount of sales proceeds retainable by the sellers. 24 C.F.R. § 203.41(a)(2)(v). Further, in exchange for insurance benefits, HUD requires that lenders convey clear marketable title. Every state that has adopted legislation prohibiting private transfer fees

[5] Available at http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_292.

has cited the public policy concern that such fees constitute an unreasonable restraint on alienation. *See, e.g.,* Fla. Stat. § 689,28; Kan. Stat. Ann. § 58-3822; Iowa Senate File 2192 (codified at § 558.48).

More recently, on August 16, 2010, the Federal Housing Finance Agency (FHFA) put out for comment proposed guidance on private transfer fee covenants that would restrict Fannie Mae, Freddie Mac and the Federal Home Loan Banks (the Banks) from purchasing or investing in mortgages encumbered by private transfer fee covenants or securities backed by private transfer fee revenue. *See* Private Transfer Fee Covenants, 75 Fed. Reg. 49932 (August 16, 2010) (Notice of proposed guidance; request for comments). The guidance would also extend to mortgages or securities acquired by the Banks as collateral for advances. Comments to the proposed guidance are due on October 15, 2010.

FHFA's ban would apply to all forms of transfer covenants including the third party intermediary approach described above, as well as covenants payable to HOAs, affordable housing groups and other community and non-profit organizations. Staff has received calls from some HBAs and NAHB members concerned about the broad scope of FHFA's proposed guidance. NAHB does not have policy on this issue. A resolution has been submitted for consideration at Fall Board to provide guidance to staff for an NAHB response to FHFA's proposal.

Before deciding whether to use private transfer fees, be sure to take into consideration how these fees could affect future marketability of the homes for downstream purchasers.

Should you use a third party intermediary to manage the transaction?

Based on past usage of private fees, it is apparent that the use of an intermediary to construct and manage a private transfer fee covenant is not necessary to implement this financing mechanism. Be mindful that by using a third party, some of the equity built up in the home over time will be apportioned to that third party upon sale of the home. It is important to ensure that the value of the third party's involvement in the transaction adds value to the home.

As with any new venture, be sure to conduct a thorough review of any third party intermediary you decide to use. If you decide to hire a firm to prepare the private transfer fee documents for your development, choose a reputable firm with experience in this field. In addition, consult with an attorney to ensure the documents achieve the results you are seeking, and because these documents will be recorded with the property or with the deed. Remember, any ambiguities in the documents are generally construed against the document drafter.

What are the opportunities to raise upfront capital through a private transfer fee program?

As noted earlier, no issues of securities providing interests in future cash flows from private real estate transfer fees have yet occurred. The private securities market has been severely impaired by the world financial crisis and shows no signs of returning to more normal operations in the immediate future. In addition, predicting future cash flows of securities assets has proved difficult and bleak recent experience in modeling subprime mortgage-backed securities will likely further dampen investor interest in securities relying on untested models attempting to predict the pace and price of future real estate transactions. Therefore, the prospects for raising upfront capital through private transfer fee securities are extremely dim in the near term and appear highly uncertain over the longer run.

What are some potential risks to the developer during the approval process?

The development approval process typically includes both a public comment period and a procedure for obtaining public approvals. Neighborhood, environmental, business and other organizations often weigh in on the merits of a proposed development. The private transfer fee model has some potential risks in that the beneficiary of the funds (i.e. an environmental group) could be an organization that withholds its support of the approval of the new development unless it receives funding from the private transfer fees.

This concern was raised several years ago in California when a subdivision agreed to attach private transfer fees for 20 years, with two environmental groups receiving the revenues. Some argued that this deal was a trade-off to win the support of organizations that otherwise would have stood in the way of the necessary approvals. Others argued that it relieved the builder from paying up-front costs for open space preservation that was necessary for the community.

What political arguments might be made regarding the use of the private transfer fee?

How a private transfer fee is ultimately used has the most impact on whether it is supported or opposed by property owners and whether it increases the marketability of the property over time. In the case of HOA control, supporters of such fees will argue that they are an important element to building up the necessary reserve funds for future repair, maintenance and community amenities. Those opposing private transfer fees argue that no amount of benefit outweighs the increased difficulty these fees cause when selling the homes because the encumbrance of the private transfer fee will make resale closing costs more expensive compared to similar properties without such a covenant. Some would argue that the existence of this covenant would actually depress the home's value due to the higher closing costs. Another argument involves the contention that such private transfer fees are against public policy because they unduly restrict and impair the marketability of private property. As noted earlier, a number of states have adopted legislation prohibiting private transfer fee covenants.

Are there buyer/resale implications of imposing deed restrictions and a potential for title defects?

Private transfer fees increase the complexity of the real estate transaction for consumers. According to the American Land Title Association (ALTA), they could create greater risk at settlement by creating lien issues for lenders, increasing title claim risk and possibly creating legal issues around the property transfer itself. A potential for title defects exists, as the fee must be collected at every subsequent closing and the encumbrance must be disclosed to each buyer.

What are some of the potential costs to the homeowner?

In many subdivisions using private transfer fees, one quarter of one percent of the purchase price is charged to the seller at closing. If a home is purchased for $700,000, the transfer fee paid at closing would be $1,750. A million dollar home would pay a transfer fee of $2,500. Although some marketing materials state that homes would be less expensive if the fee proceeds were used to lower the development costs, there is no requirement that such fees be used to reduce a home's sales price. In tougher economic times, higher closing costs will actually be a bigger disincentive to purchasing a home with this encumbrance if similar properties not subject to private transfer fees are available.

<u>Is there a way to reverse the private transfer fee once adopted?</u>

The most obvious way to prevent the collection of private transfer fees is if a particular state finds such covenants are against public policy and declares their enforcement void through the adoption of state statutes. Otherwise, restrictive covenants are generally difficult to remove once recorded in the public records for the property or included with the deed for each home sold in a particular subdivision that is subject to the restrictive covenants.

Individual states may have particular defenses to the enforcement of restrictive covenants, although NAHB has not undertaken a state-by-state analysis. Common law recognizes several defenses to the enforcement of restrictive covenants, although these will probably not be helpful in removing or canceling a private transfer fee covenant, particularly when the benefit (fee) is paid to a third party.

The following are possible routes to ending the collection of a private real estate transfer fee. First, a covenant may expire according to the duration specified by the express terms in the document creating it. If no expiration exists, then courts will generally set a reasonable term, as covenants that run in perpetuity are generally not favored because they unreasonably restrict the marketability of property. *See, e.g. Eagle Enterprises, Inc. v. Gross,* 349 N.E.2d 816 (N.Y. 1976) (finding covenant was undesirable because it imposed a burden in perpetuity).

Next, a covenant may be extinguished if the beneficiary of the covenant releases it to the party burdened by the covenant. Such a release must be in writing to comply with the Statute of Frauds.[6] It could also be extinguished if both parties agree to rescind the covenant. Merger may also remove a restrictive covenant. This occurs when the benefited and burdened properties are merged into common ownership.

A restrictive covenant could also be removed through abandonment, which occurs when the beneficiary of the covenant indicates his or her intent to abandon the benefit of the covenant. *See, e.g., Thodos v. Shirk,* 79 N.W.2d 733 (Iowa 1956). This would be an unlikely scenario in the context of the private fee transfer covenant because the beneficiary receives a sum of money each time the burdened property is sold.

[6] The Statute of Frauds requires that certain types of contracts be in writing. Contracts transferring an interest in land are one example.

Equitable defenses are also generally available, and include unclean hands, laches, relative hardship and changed conditions. In the case of "unclean hands, "Courts may refuse to enforce a restrictive covenant where the party who would benefit from its enforcement has engaged in conduct that breaches the common obligations of the plaintiff and defendant. "Laches" is a defense that precludes enforcement if the party seeking enforcement has stood by and not enforced his or her rights for a long enough time that enforcement now would be inequitable. "Relative hardship" occurs when a plaintiff would receive relatively little benefit when weighed against the significant hardship the defendant would incur; in that instance, a court may deny relief to the plaintiff. Finally, the defense of "changed conditions" arises when the character of a neighborhood has so changed, that there is a question over whether to enforce the covenant in light of changed realities. *See, e.g., Soussa v. Denville Township Planning Bd.,* 568 A.2d 1225 (N.J. Super. 1990).

Conclusion

The private transfer fee concept is an evolving area of financing. Expect that new state statutes and court decisions can and will affect how private transfer fee covenants can be used. This memo is intended as an overview of the issue to date, but it is not intended to provide a complete review of the law in this area. If you are interested in more information regarding private transfer fees, please contact:

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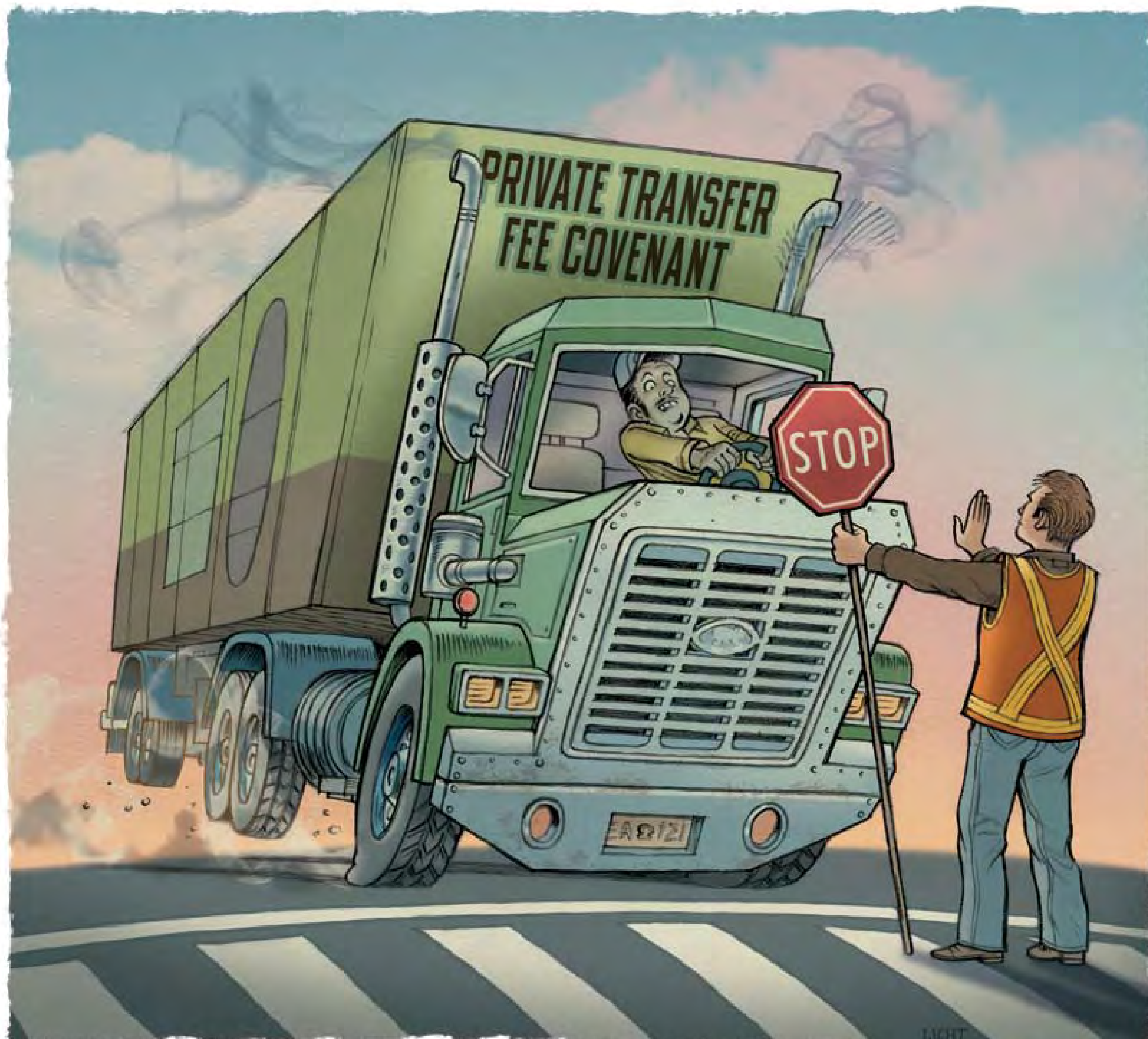
ATTACHMENT 7

PUTTING THE BRAKES ON PRIVATE TRANSFER FEE COVENANTS

By R. Wilson Freyermuth



Real estate developers are increasingly imposing private transfer fee covenants on real estate under development. A covenant of this type purports to allow a developer to collect a fee on each future resale of the affected land during the term of the covenant. But is a private transfer fee covenant valid and enforceable?

Three years ago in this magazine, Marjorie Bardwell and Jim Durham first highlighted the use of private transfer fee covenants in their article, *Transfer Fee Rights: Is the Lure of Sharing in Future Appreciation a Flawed Concept?*, Prob. & Prop. 24, May/June 2007. That article raised substantial questions about the validity of such covenants. Since that article, however, the imposition of these covenants has continued to grow exponentially. Companies now market private transfer fee covenant documentation to developers. Nevertheless, the legal basis for the enforcement of such covenants remains dubious and private transfer fee covenants are increasingly commanding the attention of state legislatures.

This article will discuss private transfer fee covenants, using one popular model as an example. After explaining how a private transfer fee covenant operates, the article will review the background legal principles relevant to its enforceability. As this article will argue, sound policy does not justify the enforcement of private transfer fee covenants. The article concludes with a discussion of recent state legislative efforts to invalidate private transfer fee covenants and highlights a new model statute that, if adopted, would declare such covenants void as contrary to public policy.

The Private Transfer Fee Covenant

Assume that ABC Land Co. is developing a 500-lot residential subdivision, known as Shady Acres, and wants to impose a transfer fee covenant on each lot. As in any typical development, ABC Land Co. records a declaration within the chain of title for each lot in Shady Acres. The declaration imposes a transfer fee covenant that purports to run with each lot and bind subsequent owners for a 99-year period. This covenant does not impose a fee on the first sale, so when ABC Land Co. sells a home to the initial homebuyer (whom we will call Jones), Jones pays no transfer fee. The covenant, however, provides that if Jones resells the home during the 99-year term of the covenant, Jones must pay a fee equal to 1% of the purchase price. As a result, if Jones resells the lot four years later for a price of $200,000, Jones must pay a $2,000 transfer fee to a trustee identified in the declaration. If Jones does not pay the fee, the declaration provides that the trustee has a lien on the land to secure the unpaid transfer fees and can foreclose that lien (including by nonjudicial process, to the extent permitted by other state law) to satisfy the fee payment obligation.

On collecting a transfer fee, the trustee divides the fee among the following persons:

- the developer (which typically retains at least 50% of the transfer fee right);
- the trustee (which retains a portion of the fee as compensation for tracking ownership of the transfer fee rights and handling transfer fee payments);
- the company that developed the private transfer fee documentation (which retains a portion of the fee as compensation for "licensing" the developer to use its documentation);
- in some cases, agents, brokers, and other professionals associated with the sale transaction; and
- in some cases, a community nonprofit organization identified by the developer (according to one source, such nonprofits may receive as much as 5% of the transfer fee right).

Most importantly, however, this declaration does not simply impose the transfer fee covenant only on the first resale by Jones. Instead, the declaration also imposes a 1% fee on the seller at the time of *each subsequent resale* of the parcel during the 99-year term. Thus, if the parcel is sold 11 times during the 99-year term (or every nine years, on average), the trustee could collect a 1% fee from each seller in each of the 11 sale transactions.

A developer could choose to retain its transfer fee rights and collect from the trustee its allocated share of the fee on each future resale during the term of the covenant. Alternatively, the developer could instead choose to sell its transfer fee right immediately. One company assists developers wishing to sell their transfer fee rights by pooling those rights and seeking secondary market buyers. Freehold Capital Partners, *Learn How Reconveyance Fee Instruments Can Help You*, at 11–12 [hereinafter Freehold Brochure], available at www.freehold-capitalpartners.com/forms/freehold_brochure.pdf (last visited Apr. 19, 2010).

The "Touch and Concern" Standard

A substantial question, however, is whether a private transfer fee covenant based on this model actually creates an enforceable legal right. Under traditional common law rules, the burden of a covenant did not run to bind a successor to the original covenantor unless *both the benefit and the burden* of the covenant "touched and concerned" land. Although the precise meaning of "touch and concern" has never been transparent, the standard was understood to protect against the creation and enforcement of covenants that could unreasonably restrain the alienability of land.

Historically, American courts struggled in applying this test to evaluate affirmative covenants to pay money. Both the benefit and the burden of an affirmative covenant to pay money can "touch and concern" land. *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank,* 15 N.E.2d 793 (N.Y. 1938). The best example is the typical owners' association assessment covenant, which imposes an assessment on each lot payable to an owners' association to fund the operation of the association and the maintenance of common facilities. These

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Max Licht

assessments benefit community residents directly (for example, by providing access to pools or parks) or indirectly (such as by preserving/raising property values because of the presence of valued amenities). Ever since the landmark *Neponsit* case, courts have held that both the burden and benefit of a lot assessment covenant "touch and concern" land and bind successor owners of that land. This result makes good sense doctrinally. Although the covenant does indirectly restrain alienation of the affected land, its practical effect on alienability is negligible. Because many buyers value the common facilities and amenities enough to accept the assessments needed to preserve them, the assessment covenant constitutes a reasonable and enforceable restraint.

By contrast, a private transfer fee covenant is payable only to private persons, not to an owners' association. By the time the developer collects a future transfer fee, the developer likely will have completed the sale of all affected lots and will have no legal interest (other than the transfer fee rights) in the community. As a result, the benefit of a private transfer fee covenant is personal to the developer; in the language of the common law, the benefit of the covenant is "in gross." Under the weight of common law authority, if the benefit of a covenant is in gross, the burden of that covenant does not run to bind successors to the original covenantor. See, e.g., *Garland v. Rosenshein*, 649 N.E.2d 756, 758 (Mass. 1995); *Bremmeyer Excavating, Inc. v. McKenna*, 721 P.2d 567 (Wash. Ct. App. 1986); *Caullett v. Stanley Stilwell & Sons, Inc.*, 170 A.2d 52, 56 (N.J. Super. Ct. App. Div. 1961).

The "touch and concern" standard essentially established a prophylactic rule against the running of covenants that created purely personal benefits. In other words, it did not matter whether the enforcement of a covenant in gross *actually* constituted an unreasonable restraint on alienation. Instead, courts viewed the *potential* burden on alienability posed by covenants in gross as warranting a per se rule prohibiting their enforcement against successors, regardless of actual harm. Under this traditional view, a developer could not enforce a private transfer fee covenant against subsequent owners of the affected land.

The Restatement of Servitudes

The status of the "touch and concern" standard has been called into some question by virtue of the new Restatement on Servitudes. The Restatement purports to abandon the "touch and concern" standard, instead substituting standards under which a covenant is enforceable against successors unless the covenant is "arbitrary, spiteful, capricious," imposes an "unreasonable restraint on alienation," imposes

The argument that a private transfer fee covenant is a reasonable restraint depends on a dubious assumption.

an "unreasonable restraint on trade or competition," or is "unconscionable." Restatement (Third) of Property—Servitudes, § 3.1(1), (3)-(5) (2000). If a covenant imposes only an indirect restraint on alienation, the Restatement suggests that the covenant does not unreasonably restrain alienation unless it "lacks a rational justification." Id. § 3.5(2).

Under the common law's prophylactic "if the benefit is in gross, the burden won't run" rule, a developer had little incentive to impose a private transfer fee covenant. By purporting to reject this prophylactic rule in favor of a "reasonableness" standard, however, the Restatement has encouraged the proliferation of private transfer fee covenants. In fact, companies marketing private transfer fee covenants characterize such covenants as "reasonable" restraints, and their promotional materials point to the Restatement for support. Transfer fee covenant advocates argue that:

- A 1% private transfer fee covenant has no practical burden on the alienability of land, but only slightly reduces the price at which a transfer will take place. Because the covenant is recorded, a buyer of an affected lot will reduce its offer price to account for the transfer fee obligation that the buyer will incur on resale. Thus, the covenant does not create an unreasonable restraint on alienation and should be enforceable as long as it has a rational justification.
- A 1% private transfer fee covenant has a rational justification because it benefits both the developer and the initial buyer. The covenant benefits the developer by allowing it to retain the transfer fee rights, thus assisting the developer's marketing efforts (that is, permitting the developer to sell its lots at a discounted price as compared to unrestricted land). In turn, the covenant benefits the buyer, who obtains the land at a discounted price as compared to unrestricted land. By lowering the buyer's acquisition costs, the covenant in turn reduces the buyer's transaction and carrying costs (that is, by lowering the value of the land, the covenant marginally reduces the buyer's borrowing costs, annual ad valorem tax obligation, and ultimately the buyer's brokerage commission on resale).

Certainly, some of the strong freedom-of-contract rhetoric in the Restatement's commentary offers some support for advocates of private transfer fee covenants:

> Many economic arrangements for spreading the purchase price of property over time and for allocating risk and sharing profit from property development can be attacked as indirect restraints on alienation. If such arrangements are not unconscionable and do not otherwise violate public policy, there is usually no reason to deny the parties freedom of contract. The parties are usually in a better position than judges to decide the economic trade-offs that will enable a transaction to go forward and enhance their overall value. The fact that the value that may be realized from a parcel of land

> that is part of a larger arrangement has been reduced does not justify legal intervention to nullify part or all of the agreed-on arrangement.

Restatement § 3.5 cmt. a.

Transfer Fees and Land Policy

Notwithstanding the ostensible justifications offered by those marketing this product, the enforcement of private transfer fee covenants constitutes unsound public policy. Courts should refuse to enforce these covenants against successors, for several important reasons.

Buyers Cannot Accurately "Price" the Effect of a Private Transfer Fee Covenant

The argument that a private transfer fee covenant is a reasonable restraint depends on a dubious assumption—that buyers can readily discover the covenant, fully understand and evaluate its implications, and adjust the offer price to account for its effect. Even buyers that know of the covenant cannot "price" its effect with precision, however.

First, because the amount of the buyer's future transfer fee obligation is a function of the land's value at a *future* date, the buyer's ability to "price" the appropriate discount is a function of both the expected future appreciation in the land's value and the appropriate "discount" rate (the rate used to convert the expected future transfer fee obligation into present dollars). There is little empirical evidence to suggest that the typical homebuyer can make an informed or accurate judgment about future rates of appreciation or an appropriate discount rate. Second, buyers lack perfect information about their holding periods. A buyer that expects to resell the house in only two to three years can readily appreciate the need to discount the offer price to account for the transfer fee that will be imposed on this expected transaction. By contrast, a buyer that expects to live in the house for 40 years may tend to disregard the fee, concluding that its effect in present dollars is *de minimis.* Because buyers lack perfect information about their likely holding period, they cannot accurately price the appropriate discount for the transfer fee covenant.

More importantly, in most real estate price negotiations buyers lack a way of evaluating the actual price reduction that results from the transfer fee covenant or its value in carrying cost reductions. It is correct to say that *if* a transfer fee covenant enables Jones to pay $2,500 less to acquire the land today—and thus allows Jones to borrow $2,000 less to finance the purchase—Jones will save $100–$120 in interest costs during the first year (and slightly less during each subsequent year as the principal balance amortizes). Jones, however, cannot be certain that $100–$120 per year will be saved in borrowing costs *unless Jones also knows that the purchase price of the property is $2,500 less because of the presence of the covenant*. Unfortunately, Jones cannot be so confident, unless the developer offers Jones a choice to purchase the land at either a "restricted" price (subject to the covenant) or an "unrestricted" price (not subject to the covenant). If the private transfer fee covenant is imposed on a "take it or leave it" basis, buyers do not have a meaningful "covenant or no covenant" choice. Further, because land is relatively unique, there is likely no identical "unrestricted" parcel with an identifiable price that the buyer can use as a baseline to calculate the incremental "burden" and "benefit" of the covenant.

Buyers who lack the ability to evaluate the financial effect of the covenant accurately are likely to underestimate the covenant's effect, and thus to not discount their offer prices sufficiently. If so, the covenant presents the developer with a profitable arbitrage opportunity, and promotional materials have touted this opportunity to developers. For example, the Freehold Brochure suggests that a 1% transfer fee covenant should reduce the buyer's offer price by approximately 2%. Freehold Brochure, at 3. Yet earlier editions of this brochure estimated the *value* of the transfer fee rights at approximately 5% of the improved value of the property. If buyers were truly informed and sufficiently sophisticated to price the covenant accurately, such a sizable gap would not be present. This may explain why—notwithstanding its freedom-of-contract rhetoric—the Restatement characterizes a private transfer fee covenant as potentially unconscionable. See Restatement § 3.7 cmt. c, illus. 3.

Transfer Fee Covenants Unreasonably Hinder the Alienability of Land

A private transfer fee covenant impedes future land transactions by imposing additional unwarranted transaction costs. Because the developer may have sold the right to collect future transfer fees, the seller may incur additional expense to locate and pay the holder of the transfer fee rights, and the fee may have to be escrowed if that person cannot be found. Although the developer can ameliorate this risk by designating a trustee to collect the fee, nothing prevents the developer from imposing a private transfer fee covenant that requires payment directly to the developer. Also, the seller and the buyer must incur additional costs negotiating responsibility for payment of the fee. The seller can incur additional costs in determining whether disclosure of the covenant is required (and, if so, ensuring that it makes proper disclosure). The buyer may incur additional time and expense negotiating with the title insurer over the form of the exception that the insurer will take for the covenant. Unless the covenant subordinates the developer's lien to the lien of future mortgage loans, the buyer can incur greater expense in obtaining financing if the buyer's mortgage lender insists on obtaining subordination of the transfer fee covenant lien. Finally, if private transfer fee covenants are enforceable, a buyer of the land may try to impose an additional transfer fee covenant (to permit the buyer to recoup the expected cost of having to pay the first transfer fee), thereby triggering multiple transfer fees on later resales. Over time, this "stacking" of transfer fees would create a needless complication and impediment to the transfer of the affected land.

Transfer Fee Covenants Reduce the Tax Base for the Benefit of Private Parties

Finally, and most important, any financial benefit that a private transfer fee covenant creates comes at the expense of the public. The enforcement of a private transfer fee covenant will reduce the value of the affected land, creating an artificial reduction in the community's ad valorem tax base. Incremental sums that would have gone to the local community to fund public education, infrastructure, and community services will instead be diverted to developers. Sound public policy should not permit private action, taken outside of the community's democratic processes, to create a diversion of the tax base for private benefit.

Recognizing these concerns, in October 2009 the Joint Editorial Board for Uniform Real Property Acts (JEBURPA) unanimously resolved that private transfer fee covenants create an unreasonable restraint on the alienability of land. The JEBURPA is comprised of representatives from the ABA's Real Property, Trust and Estate Law Section, the American College of Real Estate Lawyers, and the Uniform Law Commission, as well as liaison members from the American College of Mortgage Attorneys and the Community Associations Institute. The JEBURPA has issued a position paper expressing the view that state courts should not enforce private transfer fee covenants and that state legislatures should enact statutes declaring such covenants void as contrary to public policy.

Recent Legislative Activity

To date, 11 states have adopted statutory provisions directly addressing the enforceability of private transfer fee covenants. The only state that has explicitly validated private transfer fee covenants is California, which has adopted a "disclosure" model. In California, a transfer fee covenant is enforceable against successors as long as the person imposing the covenant records a document indicating "Payment of Transfer Fee Required" in the chain of title to the real estate. Cal. Civ. Code § 1098.5. This document must contain certain information, including (1) a clear statement of the amount or percentage of the fee; (2) for residential real estate, "actual dollar-cost examples of the fee" for a home priced at $250,000, $500,000, and $750,000; (3) the expiration date of the transfer fee covenant, if any; (4) the purpose for which the funds from the fee will be used; and (5) the name of the entity to which the fee must be paid (along with specific contact information).

By contrast, eight states—Arizona, Florida, Iowa, Kansas, Maryland, Missouri, Oregon, and Utah—have recently enacted statutes explicitly banning private transfer fee covenants. Fla. Stat. Ann. § 689.28 (2007); Mo. Rev. Stat. § 442.558 (2008); Or. Rev. Stat. § 93.269 (2009); Kan. Stat. § 58-3821 (2009); Ariz. Rev. Stat. § 33-442 (2010); Iowa Code § 558.48 (2010); Md. Real Prop. Code Ann. § 10-708 (2010); Utah Code Ann. § 57-1-46 (2010). In these states, private transfer fee covenants imposed after the effective dates of the relevant statutes are deemed contrary to public policy and void.

Likewise, in 2007, Texas adopted a statute that purports to prohibit the enforcement of a covenant imposing a transfer fee on a "transferee of residential real property or the transferee's heirs, successors, or assigns . . . in connection with a future transfer of the property . . . ." Tex. Prop. Code § 5.017(b). Transfer fee advocates may argue that private transfer fee covenants are enforceable under the Texas statute because they obligate the *seller* to pay the fee, not the buyer. This argument is of doubtful validity, however. First, it is inconsistent with a literal reading of the statute; even if a buyer is not liable for the fee that accrues when the land is acquired, the covenant still imposes on the buyer the obligation to pay "a fee in connection with a *future* transfer of the property" (that is, a future resale). Second, if the seller fails to pay the fee, it becomes a lien against the land that prevents the buyer from delivering clear title to a subsequent purchaser. Thus, the better view is that the Texas statute operates as a ban on private transfer fee covenants on residential real property.

Finally, while Louisiana does not have a statute directly addressing private transfer fee covenants, such a covenant would almost certainly be unenforceable under its civil law. The Louisiana Civil Code requires that a predial servitude (which is analogous to an easement appurtenant) provide a benefit to a dominant estate for that servitude to be enforceable. La. Civ. Code art. 647. Further, it allows personal servitudes (servitudes in gross) to be enforced only when they provide an "advantage" (such as an access right) that could be established as a predial servitude. Id. art. 640.

A Model Transfer Fee Covenant Statute

As the use of private transfer fee covenants has accelerated, both the National Association of Realtors (NAR) and the American Land Title Association (ALTA) have adopted comparable policy statements against the use and enforcement of private transfer fee covenants. ALTA's statement provides that "these covenants provide no benefit to consumers or the public, but rather cost consumers money, complicate the safe, efficient and legal transfer of real estate, and depress home prices." American Land Title Ass'n, *Private Transfer Fee Covenants*, www.alta.org/advocacy/docs/PrivateTransferFeeCovenant_OnePager.pdf (last visited Apr. 19, 2010). The NAR's statement argues that "such fees decrease affordability, serve no public purpose, and provide no benefit to property purchasers, or the community in which the property is located." National Ass'n Realtors, *Private Transfer Fees–Issue Summary*, http://realtorbenefits.org/fedistrk.nsf/c2c6e17e27e92119852572f8005cd953/8d538870711f2242852573d400721228?OpenDocument (last visited Mar. 31, 2010).

Consistent with their stated policy, both NAR and ALTA are currently seeking to introduce in state legislatures a model statute banning transfer fee covenants. This model statute appears on page 25. Section 1(b) of the model statute expresses state legislative findings that private transfer fee covenants violate public policy by creating an unreasonable impediment to the alienability of land, regardless of the duration of the covenant or the amount of the transfer fee. Section 1(c) would prospectively invalidate any transfer fee covenant recorded after the statute's effective date—making such a covenant unenforceable against the real property or any subsequent owner of the property. Section 1(c) also would invalidate any lien to the extent that it purports to secure the payment of a transfer fee.

Although the model statute would not apply to private transfer fee covenants recorded before the statute's effective date, section 1(d) does provide that the statute should not be interpreted to validate such covenants. Thus, in any state that adopts this model statute, a court facing a challenge to a pre-existing transfer fee covenant should evaluate its enforceability against successors based on the common law of covenants and servitudes—and ought to conclude that such a covenant does not run with the land to bind successors.

The model statute does recognize that a covenant might impose a transfer fee that is payable to an owners' association for the purpose of financing association operations and/or maintenance of common amenities. Such covenants (the "flip tax" often imposed by housing cooperatives, for example) would typically have satisfied the common law's "touch and concern" test, and thus section 1(a) of the statute excludes such covenants from the definition of a "transfer fee covenant." Likewise, in master planned communities, some amenities (community centers, recreational facilities, or performing arts centers, for example) may be financed in part by transfer fee covenants on land within the various common interest communities that comprise the larger development. Because such facilities provide an ostensible benefit to these common interest communities and the owners within these communities, covenants that create transfer fees to fund those amenities are likewise excluded from the coverage of the model statute.

Conclusion

Although advocates argue that private transfer fees are reasonable and benefit both developers and buyers, these arguments are unpersuasive. Private transfer fee covenants create an unjustified impediment to the transfer of affected real estate; further, enforcing private transfer fee covenants (and thereby lowering the value of the affected real estate) would permit a developer to divert a portion of the community's ad valorem tax base to the developer's private benefit—all outside the community's democratic processes. Accordingly, courts should refuse to enforce private transfer fee covenants against successors, and states should enact legislation (such as the model statute discussed above) making clear that private transfer fee covenants are void because they are contrary to public policy. ■

Model Private Transfer Fee Covenant Statute

SECTION 1. Prohibition on Transfer Fee Covenants.

(a) As used in this section:

(1) "Association" means a nonprofit, mandatory membership organization comprised of owners of homes, condominiums, cooperatives, manufactured homes, or any interest in real property, created pursuant to a declaration, covenant, or other applicable law.

(2) "Transfer" means the sale, gift, grant, conveyance, assignment, inheritance, or other transfer of an interest in real property located in this State.

(3) "Transfer fee" means a fee or charge imposed by a transfer fee covenant, but shall not include any tax, assessment, fee or charge imposed by a governmental authority pursuant to applicable laws, ordinances, or regulations.

(4) "Transfer fee covenant" means a provision in a document, whether recorded or not and however denominated, which purports to run with the land or bind current owners or successors in title to specified real property located in this State, and which obligates a transferee or transferor of all or part of the property to pay a fee or charge to a third person upon transfer of an interest in all or part of the property, or in consideration for permitting any such transfer. The term "transfer fee covenant" shall not include:

(A) any provision of a purchase contract, option, mortgage, security agreement, real property listing agreement, or other agreement which obligates one party to the agreement to pay the other, as full or partial consideration for the agreement or for a waiver of rights under the agreement, an amount determined by the agreement, if that amount:

(i) is payable on a one-time basis only upon the next transfer of an interest in the specified real property and, once paid, shall not bind successors in title to the property;

(ii) constitutes a loan assumption or similar fee charged by a lender holding a lien on the property; or

(iii) constitutes a fee or commission paid to a licensed real estate broker for brokerage services rendered in connection with the transfer of the property for which the fee or commission is paid;

(B) any provision in a deed, memorandum, or other document recorded for the purpose of providing record notice of an agreement described in subsection (a)(4)(A);

(C) any provision of a document requiring payment of a fee or charge to an association to be used exclusively for purposes authorized in the document, as long as no portion of the fee is required to be passed through to a third party designated or identifiable by description in the document or another document referenced therein; or

(D) any provision of a document requiring payment of a fee or charge to an organization described in Section 501(c)(3) or 501(c)(4) of the Internal Revenue Code, to be used exclusively to support cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefiting the real property affected by the provision or the community of which the property is a part.

(b) The Legislature makes the following findings:

(1) The public policy of this State favors the transferability of interests in real property free from unreasonable restraints on alienation and covenants or servitudes that do not touch and concern the property.

(2) A transfer fee covenant violates this public policy by impairing the marketability of title to the affected real property and constitutes an unreasonable restraint on alienation, regardless of the duration of the covenant or the amount of the transfer fee set forth in the covenant.

(c) A transfer fee covenant recorded after the effective date of this section, or any lien to the extent that it purports to secure the payment of a transfer fee, is not binding on or enforceable against the affected real property or any subsequent owner, purchaser, or mortgagee of any interest in the property.

(d) Nothing in this section shall imply that a transfer fee covenant recorded prior to the effective date of this section is valid or enforceable.

ATTACHMENT 8

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Other articles from this issue
Articles from other issues of Probate and Property

Transfer Fee Rights - Is the Lure of Sharing in Future Appreciation a Flawed Concept?

By Marjorie Ramseyer Bardwell and James Geoffrey Durham

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"Transfer fee rights," the new buzzwords on the real estate scene, describe a technique for reserving future interests in the appreciation of the value of real property that is being sold. "Sold," however, may be an imprecise term in this instance, especially if compared to its common use, because not all of the "fee simple" interest in the property is being conveyed. This article examines how these "transfer fee rights" to share in the possible future increase in value of the property are being severed from the property before or as part of a sale and then conveyed to others. The article also discusses title implications and why, in the authors' opinion, this new "product" may have considerable difficulty gaining acceptance under real property law.

A note of caution: according to a promoter of the concept, which seeks to purchase these interests, the system of transfer fee rights is covered by a comprehensive business method patent application, so do not try to duplicate it at home (see article on pages 26-27). The authors have noted such an offer by a potential licensor to obtain transfer rights. See the offer available at www.freeholdDevelopment.net. Similar offers may be using this device of which the authors are not aware.

How Transfer Fee Rights Are Supposed to Work

The transfer fee scenario described in the Internet citation mentioned above starts with an agreement that is to be recorded in the chain of title. This agreement purports to be a servitude that attaches to the title to the land and burdens future owners for 99 years. In simple terms, this agreement provides for 1% of any future sale to be divided among the original covenantor, the company that licensed the use of the system, and the real estate broker. But an analysis of the agreement reflects that in fact it is much more complicated. The analysis starts by identifying the parties:

• *Covenantor*: The original seller and the party that places the declaration of covenants, conditions, and restrictions (CCRs) onto the property.

• *Broker*: The original real estate broker, who traditionally represents the covenantor and, in addition, enjoys the future benefit reserved in the covenant.

• *Licensor*: The company that came up with this transfer fee technique, which also shares the future benefit.

In the traditional plain-vanilla real estate transaction, the seller contracts to deliver fee simple title to the buyer, subject to those matters of record that the buyer is willing to accept. These exceptions from the general warranty of title very often include CCRs of record. The CCRs for a subdivision or planned development commonly include limitations on use and enjoyment of the property, access restrictions, or building setback requirements. The transfer fee rights servitude (which will become part of the CCRs for the property) is a completely different animal. It provides that on any future sale (*after* the initial sale from the covenantor) the future parties must pay 1% of the future gross sales price back to the consortium that holds these "transfer fee rights." For the first 30 years, that 1% interest is split among the covenantor (60%), the licensor (30%), and the broker (10%); for the remaining 69 years of the 99-year life span of the covenant, only the licensor (90%) and the broker (10%) share in the proceeds.

To understand this device, it may be helpful to compare it with a profit-sharing tool used more commonly in leasehold transactions. As indicated in a companion article in this issue, leases often include provisions that allow the landlord to share in the profits if the tenant charges a higher rent on sublease or assignment. For a discussion of the issue in the leasehold context, see Sidney G. Saltz, *Landlord Impediments to Subleasing and Assignment: Recapture, Profit Sharing, and Restrictions on the Exercise of Options,* on page 42 in this issue. By using such a provision, the landlord reserves the right to any appreciation in the market value of the leasehold interest if the premises are subleased or assigned. The transfer fee servitude creates a similar result in the transfer of a fee simple interest by allowing a seller to claim the appreciated value in subsequent sales of the property.

How Transfer Fees Get Sold

At some point before the initial sale of the real property, the broker approaches the initial seller (the covenantor) with an offer to use the transfer fee servitude to give the covenantor a share of future appreciation in the property. The broker collects a commission from the covenantor for bringing this offer. In addition, the broker enjoys a share of the future benefit. (Whether this is a conflict of interest will remain to be seen; normally a fiduciary cannot participate in an activity that results in a benefit to itself at the expense of the principal without the understanding and consent of the principal. See *Restatement (Third) of Agency* §§ 8.02, 8.06 (2006).) The licensor pays for this interest with a note for an amount that is estimated to be the value of those future sums generated by the servitude. The amount of this note must float, because there is really no way to determine how often, if at all, the property will get resold. It appears that the covenantor has thus paid a current commission on the opportunity to share in possible future income, in exchange for a note that may or may not have any value (depending on the number of times the property is transferred in the future). The share that goes to the covenantor appears to be the payoff for the note. So what are the character and nature of the consideration tendered? The servitude provides that this obligation to share in the future proceeds shall be a lien on the property. Other marketing material from the licensor in the offer made on the Internet noted earlier in the article assures the covenantor and the broker that this will be collected on their behalf by the title company on all future transactions, so they can sit back, relax, and wait for the money to flow in.

How to Opt Out

The transfer fee servitude provides an exemption for the original sale from the covenantor to the first buyer. This exemption helps camouflage the purported reservation of a future interest. It will not be collectible until that buyer attempts to resell the property. At that point, the new seller has three choices: pay the transfer fee, buy it out (if five years have expired from the creation of the CCR), or grant an option in lieu of the payment (which may result in termination).

To pay the transfer fee, one needs simply to tender 1% of the gross sales price to the addresses shown in the recorded document. The gross sales price is defined as the total consideration for the property, including cash, any installment notes, trade, or agreement paid by the new buyer. To buy it out, five years must have expired, and the current owner can then give 30-days' notice to the holders of the interests and tender 5% of the gross sales price to them. The holders are then required to cooperate in executing any releases needed for the public record. If the future seller has some time and money to spare, the option route might be a choice. As described in the servitude, the seller, in lieu of payment of the fee, can grant the covenantor the right to buy the property at 90% of the lowest of

• the purchase price (a loss of 10% on the sale right off the top),

• the value of the property shown on the tax roll (depending on the area, this could be substantially less than the current value), or

• the value determined by an appraisal.

The covenantor has 90 days to accept or reject the offer. If not accepted, the seller can give written notice after 60 days declaring the servitude terminated, and file an affidavit to that effect in the public records. The seller then would be free to sell without the lien, albeit probably adding at least five months to the normal transaction time needed to convey complete simple fee title. If the covenantor elects this option to buy the property at the 90% figure, then the seller must provide a survey, a title policy showing only "standard exceptions," and a general warranty deed. If the seller fails to close, then 2% of the *greater* of the three bullet points above is owed to the covenantor, and the servitude remains.

Title Issues

As is often said, timing is everything. In this situation, timing plays a big role in the determination of the effect of the servitude and may leave the covenantor vulnerable to litigation before it has the opportunity to receive any future payments. If the covenantor signs a purchase agreement to sell fee simple title, and then attempts to reserve some of that title before closing, the contract has not been performed. Reliance on the standard language excluding CCRs of record may not protect the original seller because the transfer fee servitude may not be in the record at the time of the contract. Even if the servitude is recorded before the purchase agreement is signed, reliance on the "restrictions of record" language without clear disclosure to the buyer may be misplaced if the recording falls within the "gap" (the period of time that runs from the recording of the document to the actual time it is indexed and discoverable by a search of those records). The "gap" varies by recording jurisdiction but is often more than three weeks and can run in excess of 12 months. The buyer could claim it was misled by the covenantor who did not disclose this attempt to reserve an interest in the property, which, even if excluded by the carveout from the warranties language in the contract, was nevertheless hidden from the buyer because of the gap. The general understanding when one purchases fee simple land is that the buyer is not obligated to share future appreciation without clearly consenting to do so. In addition, if the transfer fee servitude is included with the closing package, it will violate the standard instructions from the lender on what are acceptable exceptions from title, as well as raise the issue of whether it violates the original contract.

Potential Legal Challenges

The transfer fee device could be attacked on several grounds. Here are four (there may be more), with the first two being based on whether a court views the device as an attempt by the covenantor to retain part of the fee simple and with the second two being based on whether a court views the device as an enforceable servitude:

• As observed at the beginning of this article, the authors view the transfer fee rights device as an attempt by the covenantor to retain part of the fee simple title without having any right of possession presently or in the future. The courts consistently have turned back attempts by landowners to create new estates in land beyond those recognized at common law, and any court that finds this retained interest to be the attempt to create a new estate should void it on that basis alone. See, e.g., *Johnson v. Whiton*, 34 N.E. 542, 542 (Mass. 1893) (Holmes, J.) ("A man cannot create a new kind of inheritance"). The *Restatement of Property* defines an estate as involving the present or future right to possession, and the transfer fee rights device attempts to create an interest in the fee simple without any right to possession. See *Restatement of Property* § 9 (1936) ("estate" means an interest in land that "is or may become possessory").

• If the device is not found to be an invalid attempt to create a new estate in land, many courts may still find it an impermissible restraint on alienation. Courts consistently hold that one of the key incidents of fee simple ownership is the ability to convey. Restraints on alienation are invalid when the restraint is inconsistent with the free alienability of the fee simple estate in property. See generally *American Law of Property* § 26.1 (1952). The device requires payment of a large sum of money (1% to 5% of the value of the fee simple interest) or gives the covenantor the right to buy the fee simple interest for 90% of its value. In the 1970s several state courts held the exercise of a due-on-sale clause by a lender unreasonable (with no business purpose except to increase return on investment) and therefore an invalid restraint on alienation. See, e.g., *Wellenkamp v. Bank of America*, 582 P.2d 970 (Cal. 1978). These cases were preempted by federal law in section 341 of the Garn-St Germain Depository Institutions Act of 1982. 12 U.S.C. § 1701j-3. In the due-on-sale clause cases, the seller was required to pay off the seller's mortgage loan on the property's sale in exchange for the lender's advancing the funds necessary for the future seller to buy the property.

With the transfer fee device, however, the future sellers of the land would be required to pay money on the sale that they arguably agreed to pay but for which they had received no benefit. The argument that the future sellers would have paid less for the land because the servitude was in place makes the point that the existence of the servitude has made the land more difficult to sell, hence the lower price, and thereby is a restraint on alienation. This differs from a landlord's prohibiting a sublease or assignment because the courts view the landlord's right of possession at the end of the lease as giving the landlord an interest in who occupies the premises during the lease, thereby giving a valid basis for the restraint on the alienation of the tenant's interest. See generally *American Law of Property* § 3.58 (1952).

• If a court approaches the device as a servitude under common law doctrines, then it may find the agreement unenforceable because it does not "touch and concern" the land. Typically, under common law principles, a court will enforce a servitude against a future owner of land only when three elements are present: (1) the contract must include the intent for the servitude to run, that is, to bind future owners; (2) the servitude (particularly the burden of the servitude) must "touch and concern" the land; and (3) there must be "privity of estate" (a real covenant running with the land) or notice (equitable servitude). See *Neponsit Prop. Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank,* 15 N.E.2d 793 (N.Y. 1938). There is no question that the agreement satisfies the first element (it clearly states that it applies to all future sales), and it likely complies with the third (without going into the details only a law professor could love, there would be privity of estate in most American states, and in all states the recording of the agreement would constitute notice). "Touch and concern," however, typically means that the agreement affects, or is bound up in, the use of land. The burden of the transfer fee servitude has no effect on the use of the land. Therefore, under the common law view, the agreement should be held not to touch and concern the land and should not be an enforceable servitude.

• The touch-and-concern requirement, however, is not rigidly enforced in many states. As the 20th century progressed, courts more easily found that servitudes touched and concerned land (for example, the burden of the obligation to pay homeowners' association assessments usually is held to touch and concern on the basis that the owner of the land receives the benefit of whatever the association undertakes to do in maintaining common areas or providing services). See generally *Candlewood Lake Ass'n v. Scott*, No. 01AP-631, 2001 WL 1654288 (Dec. 27, 2001). In addition, the *Restatement (Third) of Property: Servitudes* advocates doing away with the touch-and-concern requirement completely. *Restatement (Third) of Property: Servitudes* § 3.2 (2000). The reporter for the *Restatement on Servitudes* suggests that whether an agreement violates public policy is a more relevant inquiry in determining if it should be enforced as a servitude than whether it touches and concerns the land. Id. cmt. a. Although a court may engage in "touch-and-concern lite," or follow the *Restatement* and ignore the touch-and-concern requirement completely, if the court nonetheless examines the effect of the servitude on future owners, it may well find that this attempt to share equity (particularly in the case of a non-investor-owned single-family home) violates the public policy that encourages homeownership and free transferability. Id. §§ 3.2, 3.5, 3.7.

Conclusion

Regardless of what future litigation may find these future interests to be, real estate practitioners should think about a number of issues when presented with the transfer fee concept by a client, whether a covenantor, a broker, or the purchaser of a property burdened by a transfer fee agreement. The lending community is becoming increasingly aware of this issue and may not be willing to loan on properties subject to such agreements. The conflicts raised by the participation of all of the parties, the timing of recording the agreement after signing the contract to sell "fee simple title" and then attempting to reserve rights, the vulnerability to future litigation to determine the consequences of these "rights," and the effect on the marketability of title need to be understood and explained to the client. Finally, anyone relying on the future enforceability of the transfer fee servitude needs to be aware of the legal challenges that may be raised when enforcement is sought.
