

PUBLISHED BY



New York State Bans Private Transfer Fee Obligations; Joins Majority

November 7, 2011 by Joanna K. Slusarz

On September 23, 2011, New York Governor Andrew Cuomo signed into law Senate Bill 5203A and Assembly Bill 7358A, codified as the "Private Transfer Fee Obligation Act" in Article 15 of the New York Real Property Law. The new law imposes a ban on all new private transfer fees ("PTFs"), and provides notice, disclosure and remedy procedures for existing private transfer fee obligations. With the passage of this law, New York has joined the majority of states which have enacted legislation that completely bans, limits and/or requires the disclosure of PTFs.

In practice, PTFs have also been dubbed "Wall Street home resale fees," "private transfer taxes," "reconveyance fees," "capital recovery fees," "residential transfer fees," and "transfer fee covenants." These charges, whatever they may be called, usually amount to one percent (1%) or more of the sales price and are automatically inserted into the contract of sale on real property, to be paid by the seller to the original developer of the property or their designee, oftentimes a third party that holds no ownership interest in the property, every time the property is transferred for up to 99 years. They are usually buried within dozens or hundreds of pages of documents, or, in some instances, are found in a separate declaration affecting the property filed by the original developer. Prospective buyers and owners may not be aware of these fees until closing or, worse, when they try to sell the home years later and the fee shows up in a document obtained in connection with a title search of the property. The failure to pay the PTFs at closing typically results in a lien being imposed on the property.

Unlike traditional deed covenants, PTFs run with and burden the land without benefiting it. Although the fees may benefit a homeowners' association, conservation land bank, non-profit organization, etc., they have been found to not be proportional or related to the purposes for which the fees were to be collected. Furthermore, PTFs are also used by builders and developers to provide themselves with an income stream long after a development is complete. The American Law Institute has described such PTFs as "unconscionable;" the U.S. Department of Housing and Urban Development has publicly opposed the use of PTFs, stating that "PTFs violate HUD'S regulations at 2 C.F.R. 203.41, which prohibit 'legal restrictions on conveyance,' defined to include limits on the amount of sales proceeds retainable by the seller." In addition, the Federal Housing Finance Agency, determining that "such covenants are adverse to the liquidity and stability of the housing finance market and to financial safety and soundness," has issued a proposed rule, published at 76 F.R. 6702 (Feb. 8, 2011), that would restrict the regulated entities – the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal Home Loan Banks – from investing in most mortgages on properties encumbered by PTFs.

Similarly, the New York State Legislature has determined that PTFs conflict with a preferred state public policy favoring "the marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation." The legislature also declared that "a private transfer fee obligation shall not run with the title to property or otherwise bind subsequent owners of property under any common law or equitable principle."

Real Property Law Section 472 defines a private transfer fee as "a fee, charge or any portion thereof, required by a private transfer fee obligation and payable, directly or indirectly, upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration give for the transfer." Expressly excluded from this definition are: (a) the purchase price of the real property being transferred; (b) any real estate broker commissions; (c) the interest, fees and charges associated with a loan secured by a mortgage against real property; (d) rent payable under a lease; (e) payments to holders of options to purchase and rights of first refusal or purchase; (f) any taxes, fees, assessments, etc. imposed by governmental authorities; (g) fees paid to homeowners',

condominium, cooperative, mobile home or property owners' associations that use them to directly benefit owners of the encumbered property; (h) fees payable for the benefit of certain non-profit organizations; and (i) fees pertaining to the purchase or transfer of a club membership relating to real property owned by the member. "Transfer" means "the sale, gift, conveyance, assignment, inheritance, or other transfer of an ownership interest in real property located in [New York] state."

The Private Transfer Fee Obligation Act prohibits entering into or recording PTFs after its effective date, and declares all such new PTFs void and unenforceable, not running with the land, and not binding on subsequent purchasers. Anyone who records or enters into an agreement imposing a private transfer fee obligation in their favor after the effective date would be liable for any damages resulting from that obligation, including the PTFs, attorneys' fees and other costs to quiet title. Notwithstanding this strict prohibition and repercussions, section 475 further underscores the significance of disclosing any PTFs by requiring the seller to furnish to the buyer, prior to closing, a written statement memorializing their existence, describing the PTFs and referencing the new law.

Moreover, PTFs entered into and/or recorded prior to the new law's effective date of September 23, 2011, are not to be presumed valid and enforceable. The new law requires the receiver of the PTFs to give notice to subsequent buyers by recording, within six months of the law's effective date, a document disclosing the existence of PTFs along with the additional information required under section 476, including the PTFs' amounts and purposes. Failure to record would result in the agreement being unenforceable, and the real property could then be conveyed free and clear of the PTFs.

The Private Transfer Fee Obligation Act also sets up a mechanism by which an individual transferor can free the property of private transfer fee obligations currently burdening his real property. If a receiver of the PTFs does not provide a written statement of their payment within thirty (30) days of the written request asking for such a disclosure, then the transferor, after recording an affidavit describing its efforts to reach the receiver, may convey any interest in the real property to any transferee without paying the PTFs. From that point on, the real property would be free and clear of the PTFs.

Supported by the New York State Association of REALTORS, New York Taxpayers for Economic Justice, Inc., Consumers Union, Consumer Federation of America, and the Coalition to Stop Wall Street Home Resale Fees (formed by the National Association of Realtors and the American Land Title Association), among many others, Private Transfer Fee Obligation Act became effective immediately.

Cole, Schotz, Meisel, Forman & Leonard, P.A.

Court Plaza North
25 Main Street
Hackensack, NJ 07601
Phone: (201) 489-3000

900 Third Avenue
16th Floor
New York, NY 10022
Phone: (212) 752-8000

500 Delaware Avenue
Suite 1410
Wilmington, DE 19801
Phone: (302) 652-3131

300 East Lombard Street
Suite 2000
Baltimore, MD 21202
Phone: (410) 230-0660

301 Commerce Street
Suite 1700
Fort Worth, TX 76102
Phone: (817) 810-5250