

From: Marjorie Murray [info@calhomelaw.org]
Sent: Friday, October 15, 2010 3:42 PM
To: !FHFA REG-COMMENTS
Subject: COMMENT ON REGULATION OF PRIVATE TRANSFER FEES,

October 14, 2010

Stephen Cross, Deputy Director

Federal Housing Finance Agency (FHFA)
1700 G Street, NW, 4th Floor
Washington, DC 20552
202.414.3823 and email regcomments@fhfa.gov

Via fax

RE: Proposed Rule Change: Private Transfer Fees [2010-N-11]

Dear Mr. Cross:

The 9 million Californians living in the state's 47,000 common interest developments [aka 'homeowner associations'] would welcome not only guidance from FHFA but also federal restraints on the levying of private transfer fees. The power to levy such fees has been so abused in California that state lawmakers have introduced consumer protection legislation to curb the abuses. Transfer fees are typically an end-run around the California laws limiting the association's power to levy assessments.

California associations are governed by a set of statutes known as Davis-Stirling [California Civil Code 1350 et seq.] The statutes let an association levy three types of assessments:

- a.. regular assessments, which can be raised 20% annually without the consent of owners
- b.. special assessments, which are subject to a homeowner vote only if the total exceeds 5% of the current year's budgeted expenses, and
- c.. emergency assessments, which, by definition, require no homeowner approval. The statute does, however, define "emergency." [See California Civil Code 1366 et seq.]

Transfer fees, on the other hand, are subject to no statutory caps whatever; hence it is a power that it easily abused.

In addition, transfer fees in California are typically levied, not by the homeowner association corporation but, instead, by a separate corporation established by the developer – and sometimes by an association board -- specifically for the purpose of capturing additional monies from homeowners. Most often this separate corporation is called a

“community service organization or CSO,” but we have seen association boards create a “Landscaping Committee” or a “Recreational Committee” with corporate powers. The purpose of these “committees” is to levy additional fees on homeowners. Note that I use the word “fee” and not assessment, since if the CSO used the word “assessment,” then the monies would be subject to California’s statutory caps. Like the central association board, these corporate “committees” also have the power to foreclose if the homeowner doesn’t pay the “fee.” [See California Civil Code 1367.1 and 1367.4.]

Lack of transparency, accountability, and lack of disclosure

Proponents of the private transfer fee argue that the captured monies are put to a public purpose benefiting homeowners. We are skeptical of these assertions, since the financial records of the auxiliary corporations are closely-held. They are termed “private” or “confidential” by those entities that have custody of the records; thus the records are resistant to if not barred from homeowner scrutiny.

This issue of transfer fee monies was the subject of a 4.5 year battle in the California courts culminating in an Appellate decision in *Golden Rain Foundation v Franz et al* (2008) 163 Cal.App.4th 1141. Franz is a senior living in a senior community, Leisure World Seal Beach (Orange County.) She made multiple written requests to the Golden Rain Foundation, a community service organization, to inspect and copy the Foundation’s financial records. She made the request under California Civil Code 1365.2. When the Foundation refused, she (and other homeowners) sued in small claims court. They won multiple small claims suits in the Orange County courts, but the Foundation appealed the decisions in superior court. The Foundation lost every round of the legal battle, but appealed finally to the Fourth District Appeals Court, which published its opinion that the Foundation must open its financial records to the homeowners from whom they collected the transfer fees and other monies.

Franz herself learned only at close of escrow on purchasing her home that it was subject to a \$700 transfer fee whose purpose was to enable her to play golf, though she is not a golfer. A transfer fee is levied by the Golden Rain Foundation every time a Leisure World property is transferred.

The California Research Bureau, a wing of the California State Library, reports that California associations now collect more than \$200 million in assessments annually. The association industry itself annually publishes statistics on California common interest developments; it reported in 2009 that associations now control \$9.9 billion – in cash. These figures do not include monies collected by auxiliary corporations like the Golden Rain Foundation, which have under their control an unknown number of dollars comprising transfer fees. This was the quest of Ms. Franz and the other Leisure World seniors: to learn how much was in the Foundation’s coffers and to what use it was being put. Was it being used to benefit homeowners or was it being used for sky-high salaries, pension plans, lifetime health care benefits and a private van for the general manager, the management infrastructure, and perhaps the Foundation board itself?

Transfer fees are a particular burden to seniors or anyone in search of affordable housing which association living may offer. Seniors in particular buy into an association as part of their strategy to downsize into more affordable housing. First they are hit with a surprise transfer fee – like Ms Franz – and then they discover that they must pay continuing assessments to a second corporate entity disguised as fees payable to a “Landscaping” or “Recreational” committee

whose mission is a questionable one. The fees are subject to no statutory caps or else to unreasonable caps, e.g. 1% of the sales price. Finally, they are unable to find out how this “committee” or “CSO” is using their dollars, because the committee records are labeled “confidential.”

We agree with the comments contained in the proposed rule change that “To the extent that private transfer fee covenants benefit unrelated third parties, one cannot claim that a service or value is rendered to the relevant property owner or community.” The association industry has presented scant evidence that transfer fees directly benefit the homeowners – particularly seniors – who pay them. If the industry should present convincing evidence, then we would be more than happy to evaluate it. However, the evidence brought to us by California homeowners over the last ten years is to the contrary.

We urge FHFA to adopt the rule on private transfer fees as proposed.

Sincerely,

Marjorie Murray, President and CEO

Center for California Homeowner Association Law

A 501c3 nonprofit

1305 Franklin Street, Suite 201

Oakland, California 94612

www.calhomelaw.org

mmurray@calhomelaw.org