Why Charging for Status Letters May Be a Bad Idea

Does your community association charge either the seller or the buyer (or both) a fee for a status letter upon the sale of the lot, unit, or co-operative apartment? If the governing documents do not expressly provide for that charge, the association may wish to amend the documents to do so, or at least understand the consequences of charging such a fee without an express provision.

In 2011, the Michigan Legislature enacted MCL §565.891, et. seq. The Act defines transfer fees, provides that transfer fee covenants executed on or after the date of the Act are unenforceable, provides for certain exemptions, and grants a person aggrieved by such a fee or covenant the right to sue to void the fee, including the right to recover "actual reasonable attorney fees."

A "transfer fee" is "a fee or charge payable upon the subsequent sale, gift, conveyance, assignment, inheritance, or other transfer of an ownership interest in residential real property located in this state, or payable for the right to make or accept such a 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 given for the transfer." The Legislature perceived it an abuse, for example, for the developer of a subdivision or condominium to provide in the documents that the developer is paid a fee every time a lot or unit changes hands (including all subsequent purchasers), in perpetuity.

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The Act provides that a transfer fee does not include "any fee, charge, assessment, fine, or other amount payable to a homeowners', condominium, cooperative, mobile home, or property owners' association pursuant to a declaration or covenant or law applicable to such association, including but not limited to, fees or charges payable for estoppel letters or certificates issued by the association or its authorized agent." Note that this exemption requires that such fee or charge be payable "pursuant to a declaration or covenant or law." In other words, if there is no "declaration or covenant or law" which authorizes the charge, then it is an unlawful transfer fee.

The Michigan Condominium Act contains a provision allowing the purchaser of a unit to request a written statement from the association setting forth the amount of unpaid charges against the seller. That provision does not expressly allow a condominium or its agent to charge a fee for the statement, although it is becoming common for associations or management companies to charge a fee for preparing the statement. Some associations also charge a fee for preparing a response to the prospective purchaser's mortgagee's request for information. In the author's opinion, the charges for providing the statement or preparing the response fall within the meaning of transfer fees under the Act and are impermissible absent a declaration or covenant or law authorizing them.

The Michigan Nonprofit Corporation Act has a chapter on consumer cooperatives, but it does not contain a provision that authorizes a fee to be charged upon the transfer of membership or shares in the cooperative. The author has seen some cooperative bylaws which provide for a fee to be paid to the cooperative upon transfer of the membership or shares; in the author's opinion, the bylaws are a "declaration or covenant" (contract) between the cooperative and its members and such

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fees are exempt under the Act when specifically authorized in the bylaws.

Michigan does not have a comprehensive statute governing homeowner associations. Some subdivisions have a Declaration of Covenants, Conditions, and Restrictions providing purchasers a right similar to that granted under the Michigan Condominium Act to request a statement of the seller's account balance; however, to date, the author has not seen a Declaration that contains a provision authorizing a fee for preparing the statement. If a Declaration were to contain such a provision, it would be exempt under the Act.

> *"What are the consequences for charging a transfer fee in the absence of a 'declaration or covenant or law' authorizing a fee? Your association or its managing agent may get sued."*

If your Master Deed, Declaration of Restrictions, or Bylaws do not contain an express authorization for charging a transfer fee, you should consider amending your documents to provide for one. What are the consequences for charging a transfer fee in the absence of a "declaration or covenant or law" authorizing a fee? Your association or its managing agent may get sued. If the plaintiff is successful, he or she may recover costs and "actual reasonable attorney fees" under the Act. Is charging a fee without proper authorization worth the risk? ■

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