Legislative Analysis

Mitchell Bean, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

PROHIBIT RESIDENTIAL & COMMERCIAL PROPERTY TRANSFER FEES

House Bill 4227
Sponsor: Rep. Paul Opsommer

House Bill 4228
Sponsor: Rep. Bruce Rendon
Committee: Regulatory Reform

Complete to 3-1-11

A SUMMARY OF HOUSE BILLS 4227 AND 4228 AS INTRODUCED 2-10-11

The bills would create new acts to prohibit the imposition of a capital recovery fee on either residential or commercial real properties, allow exemptions to the ban, and provide remedies.

Together, the bills would prohibit the owner or developer, or both, of residential or commercial real property from imposing, either directly or indirectly, by means of covenant or contract, a capital recovery fee, also known as a private transfer fee. "Capital recovery fee" would be defined to mean any legacy covenant fee or charge imposed upon a parcel of nonresidential or residential real property, for any period of time, that required any subsequent seller or transferor of that real property to pay a fee to the developer, whether a flat fee or a fee based upon a percentage of the selling price or other quantitative numerical figure or sum.

A person who was aggrieved by the imposition of a capital recovery fee, whether being the original or subsequent transferee or purchaser, could bring an action for clearing the title and voiding the fee, including any other equitable relief requested and granted by the court. The court could award costs to the person for bringing and completing the action and actual reasonable attorney fees.

The bill would also exclude numerous categories of private transfer fees from the definition of the term. For example, homeowners' associations, which use the fees to make improvements in the community that benefit all the owners in a subdivision, would be exempt from the ban imposed by the bills.

House Bill 4227 would apply to nonresidential or commercial properties. House Bill 4228 would apply to residential properties.

FISCAL IMPACT:

The bill would have no direct fiscal impact on the state or local units of government.

The issue of capital recovery fees, also known as private transfer fees, is one of longstanding practice, and of increasing interest nationally. The Federal Housing Finance Authority (FHFA) notes that "private transfer fee covenants may be attached to real property by the owner or another private party – frequently, the property developer – and provide for a transfer fee paid to an identified third party – such as the developer or its trustee – upon each resale of the property. The fee typically is stated as a fixed amount or as a percentage, such as one percent of the property's sales price, and often exists for a period of ninety-nine (99) years."[1] Others have noted that, "[c]apital recovery fee covenants are a type of private transfer fee that helps to reduce negative equity, thereby assisting in restarting failed development projects and creating jobs. These fees have been utilized like homeowner association fees, but rather than providing for the cost of maintenance and upkeep of common infrastructure, capital recovery fees are used to spread the cost of the development and construction of common infrastructure over the life of the property."[2] Under this second view, the future revenue from private transfer fee covenants can be securitized (or monetized) and used as a type of investment that provides the developer with an upfront payment.

In response to growing concern about the use of these covenants, the FHFA issued proposed rules on February 8, 2011, that restricts Fannie Mae, Freddie Mac, and the Federal Home Loan Banks from investing in mortgages with private transfer fee covenants, except for transfer fees paid to certain associations (homeowners, condominium, etc) for the direct benefit of the property encumbered by the private transfer fee covenant. The proposed rules would not affect state restrictions or requirements imposed on private transfer fee covenants, such as disclosure requirements or limitations on durations. Reportedly, 19 states have enacted legislation restricting the use of these fee covenants.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Mark Wolf

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

[1] Federal Housing Finance Authority, *Notice of Proposed Rule Making, Private Transfer Fees, RIN 2590-AA41*, http://www.fhfa.gov/webfiles/19672/76_FR_6702_2-8-11.pdf. In August, the FHFA issued proposed guidance on the use of private transfer fee covenants, http://www.fhfa.gov/webfiles/16484/75_FR_49932_8-16-2010.pdf. Together the proposed guidance and the proposed rules have generated thousands of written comments, which may be read at, http://www.fhfa.gov/Default.aspx?Page=89.

[2] See the testimony of Patton Boggs LLP on behalf of Freehold Capital Partners responding to the FHFA guidance, http://www.fhfa.gov/webfiles/19294/2521_Patton_Boggs_LLC_on_behalf_of_Freehold_Capital_Partners.pdf.