

Ohio Governor Signs H.B. 292 Banning Private Transfer Fees

[Robert A. Franco](#), Source of Title

6/15/2010

Yesterday afternoon, Ohio Governor Ted Strickland signed H.B. 292 banning private transfer fee covenants. Private transfer fee covenants are recorded with the covenants, conditions and restriction to real property that purport to require the payment of a one-percent fee, usually to the developer, every time a home sells for 99 years. The law now says that "a transfer fee covenant recorded in this state [after the effective date of the law] does not run with the title to real property and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise."

At common law, a covenant that does not touch and concern the land, such a mere obligation to pay a sum of money, is considered personal in nature and does not run with the land. Modern trends in real estate law are abandoning the touch and concern approach in favor of a more contractual approach to servitudes. Because of the uncertainty surrounding the manner in which courts may interpret these types of covenants today, several Ohio organizations lobbied for this bill. Lending their support were the Ohio Bar Association, the Ohio Bankers League, the Ohio Association of Independent Title Agents, the Ohio Land Title Association, and the Ohio Realtors Association.

Ohio is the twelfth state to adopt such a ban and several other states are working on similar legislation.

[Transfer Fee Covenants ?](#)

Posted on July 22, 2010 by [Beth Farrell](#)

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Ohio House Bill 292, which prohibits the future creation of transfer fee covenants, was signed into law on June 14, 2010 and will become effective on September 13, 2010. **Transfer fee covenants in effect prior to September 13, 2010 are not affected by the new law.**

Transfer fee covenants create revenue streams for real estate developers. A transfer fee covenant is created by a seller (the "**Covenantor**"), usually a real estate developer or builder. It requires subsequent buyers of the Covenantor's grantee to pay a transfer fee back to the original Covenantor each time the property is sold. Transfer covenant fees generally range from 1% to 3% of the purchase price of the property and are payable to the Covenantor.

Covenants often provide for a lien in favor of the Covenantor if the transfer fees are not paid. If recorded, the lien makes financing for future purchasers difficult because the lien created by the transfer fee covenant takes priority over the interest of a subsequent lender.

Transfer fee covenants may create problems for subsequent owners. The covenants require subsequent owners to pay the transfer fee to the original Covenantor, but as time passes, it may be difficult to determine to whom and where the fee should be paid. Transfer fee covenants also pose potential title problems because the covenant may only be contained in the original deed and could be missed during a title exam if the exam covers a shorter period of time than the typical 99-year existence of a transfer fee covenant.

Creditors should obtain thorough title exams prior to issuing a loan or proceeding with a foreclosure action to avoid any potential problems created by existing permitted transfer fee covenants.

http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_292

Ohio Revised Code Sec. 5301.057

(A) As used in this section:

- (1) "Environmental covenant" means a servitude that imposes activity and use limitations on real property and meets the requirements of section 5301.82 of the Revised Code.
- (2) "Transfer" means the sale, gift, conveyance, assignment, inheritance, or other transfer of an ownership interest in real property located in this state.
- (3) "Transfer fee" means a fee or charge required by a transfer fee covenant and payable upon the transfer of an interest in real property, 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 following are not transfer fees for purposes of this section:**
 - (a) Any consideration payable by the grantee to the grantor for the interest in real property being transferred. For the purposes of division (A)(3)(a) of this section, an interest in real property includes a separate mineral estate and its appurtenant surface access rights.
 - (b) Any commission payable to a licensed real estate broker for the transfer of real property pursuant to an agreement between the broker and the grantor or the grantee, including any subsequent additional commission Sub. H. B. No. 292 128th G.A. 36 for that transfer payable by the grantor or the grantee based upon any subsequent appreciation, development, or sale of real property;
 - (c) Any interest, charges, fees, or other amounts payable by a borrower to a lender pursuant to a loan secured by a mortgage against real property;
 - (d) Any rent, reimbursement, charge, fee, or other amount payable by a lessee to a lessor under a lease;

- (e) Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon the transfer of the property to another person;
- (f) Any tax, fee, charge, assessment, fine, or other amount payable to or imposed by a governmental authority;
- (g) 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 the association;
- (h) Any payment required pursuant to an environmental covenant.**

(4) "Transfer fee covenant" means a declaration or covenant recorded against the title to real property that requires or purports to require the payment of a transfer fee to the declarant or other person specified in the declaration or covenant or to their successors or assigns upon a subsequent transfer of an interest in the real property.

- (B) A transfer fee covenant recorded in this state on or after the effective date of this section does not run with the title to real property and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise.
- (C) Any lien purporting to secure the payment of a transfer fee under a transfer fee covenant that is recorded in this state on or after the effective date of this section is void.