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Private Transfer Fees

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INTRODUCTION

Certain developers recently started imposing Private Transfer Fees (PTFs) on newly-built subdivisions. These PTFs require subsequent purchasers of real property to pay a fee to a private entity upon future sales of the property. Several bills were proposed in the California legislature to modify existing laws relating to PTFs, and Assembly Bill 980 was signed into law on October 14, 2007. This new law defines new disclosure and recording obligations regarding PTFs.

This legal article provides general information about private transfer fees and the impact of the new legislation on the real estate industry. The following questions and answers are necessarily general in nature, and are not intended to cover every fact situation. Accordingly, members are advised to consult their own attorneys or the C.A.R. Member Legal Services Hotline for specific questions related to PTFs.

Q 1. *What are private transfer fees (PTFs)?*

A Private transfer fees (PTFs) are fees imposed by private parties which require the payment of a specified amount of money (usually a percentage of the sales price) upon subsequent sales of the real property. Such fees are normally recorded on new common interest subdivisions by the developer to pay either the developer or a third party entity (sometimes created by the developer).

Q 2. *How do PTFs affect REALTORS®?*

A PTFs could substantially increase the cost for buyers to purchase property.

In the event that a buyer discovers the existence of such a fee, and discovers that thousands of additional dollars must be paid in order to purchase the property, the buyer may choose to cancel.

Q 3. *How are PTFs calculated?*

A An illustration may best explain how PTFs are calculated. For this example, if a developer imposes a 1% PTF in perpetuity on a new development and indicates that the fee will be paid to a newly formed LLC. The original purchaser buys the new home for \$500,000, then that buyer sells the property for \$750,000 in ten years. The second buyer would need to pay \$7,500 to the LLC upon the purchase, or a lien would be recorded against the property. If the second buyer then sells the property for \$1,000,000 in fifteen years, then the third buyer would need to pay \$10,000 to the LLC, or another lien would be recorded. Some PTFs continue forever, while others expire a certain number of years after the first sale of the property.

Q 4. *What types of fees and taxes are not considered PTFs?*

A The following are specifically not considered PTFs:

- Government Imposed Fees and Taxes;
- Lender Fees, Charges and Required Payments;
- Common Interest Association Assessments, Charges, Penalties and Fees which are properly authorized (e.g. homeowner association dues), and association transfer fees;
- Mechanic's Lien Fees;
- Court-Ordered Transfers, Payments and Judgments;
- Divorce or Separation Related Fees;
- Probate and Trust Administration Fees, Charges and Payments; and
- Fees, Charges and Payments for Failing to Comply with Obligations to Construct Residential Improvements.

(Cal. Civ. Code § 1098.)

Q 5. *Why were PTFs formed?*

A Some of these fees were created in response to litigation over the environmental impacts that a proposed development would have, and as a

means of mitigating some of the effects of the development. However, nothing in the law specifically requires that PTFs be used to address or reduce the effects of development.

Q 6. *How prevalent are PTFs?*

A Currently, only a few housing developments in California have PTFs. Many new developments built by Lennar Homes and Freehold Development have these PTFs. In addition, several other developments (Westpark Project in Roseville, Gray's Crossing in Truckee, Martis Camp in Placer County, El Rancho San Benito in San Benito County) have also imposed PTFs. C.A.R. will be establishing a link on C.A.R.'s website which contains updated information on all PTFs that C.A.R. knows about, including the name of the development, the location, the amount of the PTF, and who will be receiving money from the PTF. Because C.A.R. may not know of all existing properties affected by PTFs, members are encouraged to send information to C.A.R. regarding any PTFs that they are aware of so that the information on the website can be as comprehensive as possible.

Q 7. *How much are PTFs?*

A Currently, PTFs range from 0.05% of the purchase price to 1.75% of the purchase price. PTFs can also be a flat amount that is not dependent upon the purchase price. There is no legal limitation on the amount of or method of calculation of any PTF.

Q 8. *Why was the new PTF legislation passed?*

A Assembly Bill 980 (AB 980)--adding California Civil Code Sections 1098, 1098.5, and 1102.6e-- was passed in order to make a PTF unenforceable unless a document describing the PTF is separately recorded, and also to require clear disclosures to all purchasers of properties which have PTFs. The intent of this law is to ensure that once PTFs are recorded their existence will be obvious to current and prospective purchasers of the property. Developers will be held accountable for such fees, and such open disclosure should help to curb potential abuses. Furthermore, buyers will be able to make more informed decisions about the costs of purchasing the property prior to concluding their due diligence.

Q 9. *What does the new PTF legislation require?*

A The new law provides that 1) any person or entity imposing a PTF must simultaneously record the instrument creating the PTF and a separate notice of "Payment of Transfer Fee Required," and 2) sellers of properties subject to PTFs must disclose the existence and nature of the PTFs to buyers. (Cal. Civ.

Code §§ 1098.5, 1102.6e.)

Q 10. *When must this new "Payment of Transfer Fee Required" document be recorded and what information must be on it?*

A For all PTFs imposed after December 31, 2007, the developer will be required to record, concurrently with recording the document creating the PTF, an information form with the title "Payment of Transfer Fee Required" in at least 14-point bold type. This document must include the following information: (1) the names of all current owners subject to the fee ; (2) the legal description and assessor's parcel number for the affected property; (3) the amount of the fee (either a dollar amount if it is a flat fee, or the percentage of the sales price); (4) the date such fee expires, if any; (5) the purposes for which the fee will be used; (6) the entity to whom the fee will be paid and the contact information for the entity; (7) the signature of the authorized representative of the entity receiving the fee; and (8) examples of the amount of the fee based on sales prices of \$250,000, \$500,000, and \$750,000 if the affected property is residential property. (Cal. Civ. Code § 1098.5(b).)

Q 11. *Must the form "Payment of Transfer Fee Required" be recorded for already existing PTF's?*

A Yes. For all PTFs imposed prior to January 1, 2008, the recipient of the fee must file this "Payment of Transfer Fee Required" form by December 31, 2008 in order to continue to collect the fee. (Cal. Civ. Code § 1098.5(a).)

Q 12. *What are the seller disclosure requirements for PTFs?*

A In addition to the above-described requirements for the recipient of the fee (usually the developer), under the new law, for all transfers which occur after December 31, 2007, sellers will have a duty to disclose certain information about PTFs on a separate disclosure statement at the same time the Transfer Disclosure Statement (TDS) is provided (Cal. Civ. Code § 1102.6e.)

This disclosure statement must include the following information: (1) notice of the required transfer fee; (2) the amount of the fee and basis for calculating the amount; (3) the entity to whom this fee will be paid; (4) the purposes for which the fee will be used; (5) the date such fee expires, if any; and (6) a notice that the final amount may be different if the fee is based on a percentage of the sales price (Cal. Civ. Code § 1102.6e.)

C.A.R. has prepared a new standard form, Notice of Transfer Fee (C.A.R. Form NTF), which can be used to disclose this information.

Q 13. *Are there specific factors that will make the existence of a PTF*

more likely on the seller's property?

A Yes. The following are a list of some factors which would increase the likelihood of a PTF:

- Properties built by those developers known to impose PTFs;
- Subdivision properties;
- Properties in developments where there is or has been litigation filed by a non-profit entity regarding the development where the property is located; and
- Properties built after 2000.

The presence of any of these factors will increase the likelihood that the property has a PTF, but will not be determinative. In other words, there may be properties with PTFs where none of these factors are present.

Q 14. *Are any sellers exempt from the new disclosure requirement?*

A Yes. The same disclosure exemptions that apply to the Transfer Disclosure Statement apply to the new disclosure statement for PTFs (e.g., probate sales, foreclosure sales, REO sales, bankruptcy sales, sales by certain trusts) (See Cal. Civ. Code § 1102.2). Sales of commercial property, industrial property, vacant land, and 5 or more residential unit property are also exempt from this disclosure requirement (Cal. Civ. Code § 1102(a)).

For an entire list of these exemptions, see the C.A.R. legal article, **Exemptions from the Transfer Disclosure Statement (TDS and MHTDS) Law**.

Q 15. *Will the seller be exempt from disclosure if the seller is unaware of a PTF?*

A Probably not. Nothing in the statute creates an exemption if the seller is unaware of a PTF. In other words, if the seller doesn't know if the property is subject to a PTF, the seller has a duty to investigate whether the property is subject to a PTF. In addition, as is the case with other statutorily mandated disclosures, the requirement to provide the separate disclosure statement cannot be waived. (On the other hand, if the seller makes a reasonable, good faith attempt to ascertain and disclose information about PTFs but makes an honest mistake, the seller will probably not be liable for any errors in the disclosure.) (Cal. Civ. Code § 1102.4(a).)

Q 16. *How can sellers find out if their property is subject to a PTF?*

A The PTF should be listed as an exception on the preliminary title report. So, sellers or their agents should first obtain a copy of the preliminary report, and make sure it includes all the exceptions. For all new PTFs, the heading for the exception should be "Payment of Transfer Fee Required". Beginning in 2009, all PTFs described in the exceptions to the preliminary report should have that heading. For sales during 2008 of properties subject to existing, pre-2008 PTFs, however, the heading of the relevant exception on the preliminary report might be something else, such as "Community Benefit Fee" or "Lifestyle Fee", or "Endowment Fee on Transfer", so the seller and/or his/her agent should read all of the exceptions to see if any of them describe a fee that must be paid, on all future transfers, to a private entity.

Q 17. *Have a real estate agent's duties changed under the new law?*

A No. This new law does not specifically impose any additional duties on real estate agents or brokers. Of course both the listing agent and the selling agent have a duty to disclose any known material facts affecting the value or desirability of the property that was not otherwise within the buyer's diligent attention. Therefore, if either agent has actual knowledge of a PTF, then the agent may have a separate disclosure duty to the buyer, depending on the facts and circumstances regarding the transaction. In addition, the listing agent may have a fiduciary duty to the seller to assist the seller in investigating whether the property has a PTF.

Q 18. *Can real estate agents take any actions to reduce the likelihood of problems with PTFs?*

A Yes. Because of the new requirement of the seller to disclose this information, a prudent listing agent should provide a copy of the NTF to the seller and indicate to the seller that the seller has an affirmative obligation to disclose any PTF. A prudent selling agent should disclose to the buyer the potential of PTFs on the property, and to advise the buyer to investigate this issue. Both the Statewide Buyer and Seller Advisory (SBSA) form [see paragraph 31] and the Seller Property Questionnaire (C.A.R. Form SPQ - Question 25 on the form) contain references to PTFs.

Q 19. *In summary, how should sellers and their agents ensure that they are complying with the requirements of the new law?*

A The listing agent should make sure that the seller completes a Seller Property Questionnaire (C.A.R. Form SPQ). If the seller answers Question 25 affirmatively, indicating that the seller is aware of a PTF on the property, the listing agent should direct the seller to complete C.A.R. Form NTF. If the seller is not aware of a PTF, the listing agent and seller should examine the preliminary title report, including the exceptions, and should examine the

CC&Rs, if there are any, especially if the property being sold is part of a subdivision that is less than eight years old, and/or was built by a developer known to impose PTF's and/or the development was involved in litigation when it was being built.

If any of these documents indicate that there is a PTF, the seller should use the information found in the document (usually an exception on the preliminary title report) to complete a NTF form and deliver it to the buyer. Once again, sellers and agents should be aware that while by the end of 2008 all PTFs will be described on a form called "Payment of Transfer Fee Required", which should be easily identified as the heading of one of the exceptions on a preliminary report, at this time existing PTFs are not always described on a "Payment of Transfer Fee Required" form, and may not even be called a "transfer fee".

As noted, some are described using such terms as "Community Benefit Fees" or "Lifestyle Fees" or "Endowment Fees". Therefore, for all transactions that occur before 2009, sellers and agents should read all the exceptions on the preliminary title report carefully to see if there are any fees described that are payable, upon all future transfers, to a private entity (and which are not simply fees paid to the homeowner's association for the administrative expense of changing the ownership of a subdivision unit).

Q 20. *Where can I obtain additional information about this and related subjects?*

A This legal article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please visit C.A.R. Online at www.car.org.

Readers who require specific advice should consult an attorney. C.A.R. members requiring legal assistance may contact C.A.R.'s Member Legal Hotline at 213.739.8282, Monday through Friday, 9:00 A.M. to 6:00 P.M. C.A.R. members who are broker-owners, office managers, or Designated REALTORS® may contact the Member Legal Hotline at 213.739.8350 to receive expedited service. Members may also fax or e-mail inquiries to the Member Legal Hotline at 213.480.7724 or legal_hotline@car.org. Written correspondence should be addressed to:

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The information contained herein is believed accurate as of January 24, 2008. It is intended to provide general answers to general questions and is not intended as a substitute for individual legal advice. Advice in specific situations may differ depending upon a wide variety of factors. Therefore, readers with specific legal questions should seek the advice of an attorney.



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