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HB2768 – Transfer Fee Covenants – Simplified

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Many questions surround HB2768, Transfer Fee Covenants. For a copy of the bill as signed by the Governor, click [HERE](#). HB2768 creates a new statute, A.R.S. § 33-442 that addresses provisions in a “declaration, covenant or any other document relating to real property” that bind successors in title and obligate payment of a fee to a declarant or a third person on transfer. The statute bans such fees.

IT IS IMPOSSIBLE FOR THIS LAW FIRM TO SPECULATE ON THE ACCEPTABILITY OR APPROPRIATENESS OF A PARTICULAR ASSOCIATION CHARGE OR FEE WITHOUT REVIEWING THE GOVERNING DOCUMENTS OF A PARTICULAR ASSOCIATION DUE TO THE MYRIAD OF FEES AND ASSESSMENTS CHARGED BY COMMUNITY ASSOCIATIONS THROUGHOUT ARIZONA.

Having said that A.R.S. § 33-432 raises the following questions:

1. Will A.R.S. § 33-442 impact “transfer fees” or “resale disclosure statement fees” charged by condominium and planned communities?
2. Will A.R.S. § 33-442 impact monies due the condominium or planned community association on sale or transfer of the property that are in addition to “transfer fees” or “resale disclosure statement” fees (sometimes called “working capital”, “capital improvement”, “reserve contribution” and other similarly named “due on sale” assessments)?

Since “transfer fees” are statutory charges authorized in A.R.S. Section 10-3302(16), if the condominium or planned community association is incorporated as an Arizona Nonprofit Corporation, it does not appear that A.R.S. § 33-442 was intended to address those charges. (Note: the general thinking is that the “transfer fee” referenced in A.R.S. Section 10-3302(16) permits a transfer fee charge that does not exceed the cost of facilitating the transfer of the membership or ownership of the lot in the association’s records).

Since the “resale disclosure statement” fee is expressly permitted in the statutes that require the resale disclosure process and documentation by associations (A.R.S. § 33-1260 for condominiums and A.R.S. § 33-1806 for planned communities), it does not appear that A.R.S. § 33-442 was intended to address those charges.

What about monies charged at a closing or on an involuntary transfer (typically a lender foreclosure) that are not the "transfer fee" or "resale disclosure statement" fee referenced above? A.R.S. § 33-442 does address those charges and provides a specific exception that will generally permit existing "due on sale" fees or charges found in association documents (typically these are "due on sale" assessments, fees or charges and go by various names including "Working Capital", "Community Enhancement Fee", "Resale Assessment", Etc.).

By virtue of the exception, A.R.S. § 33-442 will not prohibit the enforcement of "transfer fee covenants" in governing documents if the fee or charge is payable to an association and is to be used "exclusively for the purpose authorized in the document" and both (1) the fee being charged "touches and concerns the land"; and (2) no portion of the fee or charge is required to be passed through to a third party or "declarant" unless the third party or declarant is authorized in the document to manage real property within the association or was part of an approved development plan. "Association" is defined in the statute to encompass condominium, planned community and most other homeowner associations with mandatory membership.

Note that there is another helpful exception in A.R.S. § 33-442 – any fee or charge that is imposed by a document and that is payable to a nonprofit corporation for the "sole purpose of supporting recreational activities within the association". This may cover some associations not otherwise covered by the first exception. There is also an exception for fees, charges, assessments, dues or other amounts related to the purchase or transfer of a "club membership" related to the real property.

If you have any questions, need a review of your documents, or wish to adopt a resale assessment amendment, contact Scott Carpenter or another attorney in the firm.

For a recent longer article entitled "The Three "Cs" of Getting the Best Results Out of your Association's Collections Provider in Any Economy" by J. Roger Wood, Esq., go to: http://www.carpenterhazlewood.com/assets/files/The_Three_Cs_Roger_Wood.pdf