S T A T E O F N E W Y O R K

5203

2011-2012 Regular Sessions

I N S E N A T E

May 3, 2011

Introduced by Sen. LIBOUS -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the real property law, in relation to prohibiting private transfer fee obligations

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The real property law is amended by adding a new article 15 to read as follows:

ARTICLE 15

PROHIBITION AND DISCLOSURE OF PRIVATE TRANSFER FEE OBLIGATIONS

SECTION 470. SHORT TITLE.
471. INTENT.
472. DEFINITIONS.
473. PROHIBITION.
474. LIABILITY FOR VIOLATION.
475. DISCLOSURE.
476. NOTICE REQUIREMENTS FOR EXISTING TRANSFER FEE OBLIGATIONS.

SECTION 470. SHORT TITLE. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS THE "PRIVATE TRANSFER FEE OBLIGATION ACT."

S 471. INTENT. THE LEGISLATURE FINDS AND DECLARES THAT THE PUBLIC POLICY OF THIS STATE FAVORS THE MARKETABILITY OF REAL PROPERTY AND THE TRANSFERABILITY OF INTERESTS IN REAL PROPERTY FREE OF TITLE DEFECTS OR UNREASONABLE RESTRAINTS ON ALIENATION. THE LEGISLATURE FURTHER FINDS AND DECLARES THAT PRIVATE TRANSFER FEE OBLIGATIONS VIOLATE THIS PUBLIC POLICY BY IMPAIRING THE MARKETABILITY AND TRANSFERABILITY OF REAL PROPERTY AND BY CONSTITUTING AN UNREASONABLE RESTRAINT ON ALIENATION REGARDLESS OF THE DURATION OF THE OBLIGATION TO PAY A PRIVATE TRANSFER FEE, THE AMOUNT OF A PRIVATE TRANSFER FEE, OR THE METHOD BY WHICH ANY PRIVATE TRANSFER FEE IS CREATED OR IMPOSED. THUS, THE LEGISLATURE FINDS AND DECLARES THAT A PRIVATE TRANSFER FEE OBLIGATION SHALL NOT RUN WITH THE

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

TITLE TO PROPERTY OR OTHERWISE BIND SUBSEQUENT OWNERS OF PROPERTY UNDER ANY COMMON LAW OR EQUITABLE PRINCIPLE.

S 472. DEFINITIONS. 1. "TRANSFER" MEANS THE SALE, GIFT, CONVEYANCE, ASSIGNMENT, INHERITANCE, OR OTHER TRANSFER OF AN OWNERSHIP INTEREST IN REAL PROPERTY LOCATED IN THIS STATE.

2. "PRIVATE TRANSFER FEE" MEANS A FEE, CHARGE OR ANY PORTION THEREOF, REQUIRED BY A PRIVATE TRANSFER FEE OBLIGATION AND PAYABLE, DIRECTLY OR INDIRECTLY, UPON THE TRANSFER OF AN INTEREST IN REAL PROPERTY, OR PAYABLE FOR THE RIGHT TO MAKE OR ACCEPT SUCH 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 PRIVATE TRANSFER FEES FOR PURPOSES OF THIS SECTION:

(A) ANY CONSIDERATION PAYABLE BY THE TRANSFEREE TO THE TRANSFEROR FOR THE INTEREST IN REAL PROPERTY BEING TRANSFERRED, INCLUDING ANY SUBSEQUENT ADDITIONAL CONSIDERATION FOR THE PROPERTY PAYABLE BY THE TRANSFEREE BASED UPON ANY SUBSEQUENT APPRECIATION, DEVELOPMENT, OR SALE OF THE PROPERTY, PROVIDED SUCH ADDITIONAL CONSIDERATION IS PAYABLE ON A ONE-TIME BASIS ONLY AND THE OBLIGATION TO MAKE SUCH PAYMENT DOES NOT BIND SUCCESSORS IN TITLE TO THE PROPERTY. FOR THE PURPOSES OF THIS SUBPARAGRAPH, AN INTEREST IN REAL PROPERTY MAY INCLUDE 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 TRANSFEROR OR THE TRANSFEREE, INCLUDING ANY SUBSEQUENT ADDITIONAL COMMISSION FOR THAT TRANSFER PAYABLE BY THE TRANSFEROR OR THE TRANSFEREE BASED UPON ANY SUBSEQUENT APPRECIATION, DEVELOPMENT, OR SALE OF THE 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, INCLUDING, BUT NOT LIMITED TO, ANY FEE PAYABLE TO THE LENDER FOR CONSENTING TO AN ASSUMPTION OF THE LOAN OR A TRANSFER OF THE REAL PROPERTY SUBJECT TO THE MORTGAGE, ANY FEES OR CHARGES PAYABLE TO THE LENDER FOR ESTOPPEL LETTERS OR CERTIFICATES, AND ANY SHARED APPRECIATION INTEREST OR PROFIT PARTICIPATION OR OTHER CONSIDERATION AND PAYABLE TO THE LENDER IN CONNECTION WITH THE LOAN.

(D) ANY RENT, REIMBURSEMENT, CHARGE, FEE, OR OTHER AMOUNT PAYABLE BY A LESSEE TO A LESSOR UNDER A LEASE, INCLUDING, BUT NOT LIMITED TO, ANY FEE PAYABLE TO THE LESSOR FOR CONSENTING TO AN ASSIGNMENT, SUBLETTING, ENCUMBRANCE, OR TRANSFER OF THE 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 SUCH ASSOCIATION, INCLUDING, BUT NOT LIMITED TO, FEES OR CHARGES PAYABLE FOR ESTOPPEL LETTERS OR CERTIFICATES ISSUED BY THE ASSOCIATION OR ITS AUTHORIZED AGENT. NO AMOUNT SHALL BE PAID TO A HOMEOWNERS', CONDOMINIUM, COOPERATIVE, MOBILE HOME, OR PROPERTY OWNERS' ASSOCIATION FOR THE PAYMENT TO THE DECLARANT OF THE CONDOMINIUM OR THE CREATOR OF A HOMEOWN-

ERS', COOPERATIVE, MOBILE HOME OR PROPERTY OWNERS' ASSOCIATION, OR THEIR DESIGNEE.

(H) ANY FEE, CHARGE, ASSESSMENT, DUES, CONTRIBUTION, OR OTHER AMOUNT IMPOSED BY A DECLARATION OR COVENANT ENCUMBERING A COMMUNITY, AND PAYABLE TO A NOT-FOR-PROFIT OR CHARITABLE ORGANIZATION FOR THE PURPOSE OF SUPPORTING CULTURAL, EDUCATIONAL, CHARITABLE, RECREATIONAL, ENVIRONMENTAL, CONSERVATION, OR OTHER SIMILAR ACTIVITIES BENEFITING THE COMMUNITY THAT IS SUBJECT TO THE DECLARATION OR COVENANT.

(I) ANY FEE, CHARGE, ASSESSMENT, DUES, CONTRIBUTION, OR OTHER AMOUNT PERTAINING TO THE PURCHASE OR TRANSFER OF A CLUB MEMBERSHIP RELATING TO REAL PROPERTY OWNED BY THE MEMBER, INCLUDING, BUT NOT LIMITED TO, ANY AMOUNT DETERMINED BY REFERENCE TO THE VALUE, PURCHASE PRICE, OR OTHER CONSIDERATION GIVEN FOR THE TRANSFER OF THE REAL PROPERTY.

3. "PRIVATE TRANSFER FEE OBLIGATION" MEANS AN OBLIGATION ARISING UNDER A DECLARATION OR COVENANT RECORDED AGAINST THE TITLE TO REAL PROPERTY, OR UNDER ANY OTHER CONTRACTUAL AGREEMENT OR PROMISE, WHETHER OR NOT RECORDED, THAT REQUIRES OR PURPORTS TO REQUIRE THE PAYMENT OF A PRIVATE TRANSFER FEE TO THE DECLARANT OR OTHER PERSON SPECIFIED IN THE DECLARATION, COVENANT OR AGREEMENT, OR TO THEIR SUCCESSORS OR ASSIGNS, UPON A SUBSEQUENT TRANSFER OF AN INTEREST IN THE REAL PROPERTY.

S 473. PROHIBITION. A PRIVATE TRANSFER FEE OBLIGATION RECORDED OR ENTERED INTO IN THIS STATE ON OR AFTER THE EFFECTIVE DATE OF THIS SECTION DOES NOT RUN WITH THE LAND AND IS NOT BINDING ON OR ENFORCEABLE AT LAW OR IN EQUITY AGAINST ANY OWNER, PURCHASER, OR MORTGAGEE OF ANY INTEREST IN REAL PROPERTY AS AN EQUITABLE SERVITUDE OR OTHERWISE. ANY PRIVATE TRANSFER FEE OBLIGATION THAT IS RECORDED OR ENTERED INTO IN THIS STATE ON OR AFTER THE EFFECTIVE DATE OF THIS SECTION IS VOID AND UNENFORCEABLE. THIS SECTION SHALL NOT APPLY TO A PRIVATE TRANSFER FEE OBLIGATION RECORDED OR ENTERED INTO PRIOR TO THE EFFECTIVE DATE OF THIS SECTION.

S 474. LIABILITY FOR VIOLATION. ANY PERSON WHO RECORDS OR ENTERS INTO AN AGREEMENT IMPOSING A PRIVATE TRANSFER FEE OBLIGATION IN THEIR FAVOR OR IN THE FAVOR OF A THIRD PARTY AFTER THE EFFECTIVE DATE OF THIS SECTION SHALL BE LIABLE FOR (1) ANY AND ALL DAMAGES RESULTING FROM THE IMPOSITION OF THE TRANSFER FEE OBLIGATION ON THE TRANSFER OF AN INTEREST IN THE REAL PROPERTY, INCLUDING, WITHOUT LIMITATION, THE AMOUNT OF ANY TRANSFER FEE PAID BY A PARTY TO THE TRANSFER, AND (2) ALL ATTORNEYS' FEES, EXPENSES AND COSTS INCURRED BY A PARTY TO THE TRANSFER OR MORTGAGEE OF THE REAL PROPERTY TO RECOVER ANY TRANSFER FEE PAID OR IN CONNECTION WITH AN ACTION TO QUIET TITLE. WHERE AN AGENT ACTS ON BEHALF OF A PRINCIPAL TO RECORD OR SECURE A PRIVATE TRANSFER FEE OBLIGATION, LIABILITY SHALL BE ASSESSED TO THE PRINCIPAL, RATHER THAN THE AGENT.

S 475. DISCLOSURE. PRIOR TO THE SIGNING BY THE BUYER OF A BINDING CONTRACT FOR THE SALE OF REAL PROPERTY, THE SELLER SHALL FURNISH TO ANY PURCHASER A WRITTEN STATEMENT DISCLOSING THE EXISTENCE OF ANY PRIVATE TRANSFER FEE OBLIGATION. THIS WRITTEN STATEMENT SHALL INCLUDE A DESCRIPTION OF THE PRIVATE TRANSFER FEE OBLIGATION AND INCLUDE A STATEMENT THAT PRIVATE TRANSFER FEE OBLIGATIONS ARE SUBJECT TO PROHIBITIONS UNDER THIS SECTION.

S 476. NOTICE REQUIREMENTS FOR EXISTING TRANSFER FEE OBLIGATIONS. 1. FOR A PRIVATE TRANSFER FEE OBLIGATION IMPOSED PRIOR TO THE EFFECTIVE DATE OF THIS SECTION, THE RECEIVER OF THE FEE SHALL RECORD, PRIOR TO SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS SECTION, AGAINST THE REAL PROPERTY SUBJECT TO THE PRIVATE TRANSFER FEE OBLIGATION A SEPARATE DOCUMENT IN THE COUNTY RECORDS IN WHICH THE REAL PROPERTY IS LOCATED THAT MEETS ALL OF THE FOLLOWING REQUIREMENTS:

(A) THE TITLE OF THE DOCUMENT SHALL BE "NOTICE OF PRIVATE TRANSFER FEE OBLIGATION" IN AT LEAST 14-POINT BOLDFACE TYPE;

(B) THE NAMES OF ALL CURRENT OWNERS OF THE REAL PROPERTY SUBJECT TO THE TRANSFER FEE, AND THE LEGAL DESCRIPTION AND ASSESSOR'S PARCEL NUMBER FOR THE AFFECTED REAL PROPERTY.

(C) THE AMOUNT, IF THE FEE IS A FLAT AMOUNT, OR THE PERCENTAGE OF THE SALES PRICE CONSTITUTING THE COST OF THE TRANSFER FEE, OR SUCH OTHER BASIS BY WHICH THE TRANSFER FEE IS TO BE CALCULATED;

(D) IF THE REAL PROPERTY IS RESIDENTIAL PROPERTY, ACTUAL DOLLAR-COST EXAMPLES OF THE TRANSFER FEE FOR A HOME PRICED AT TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000), FIVE HUNDRED THOUSAND DOLLARS ($500,000), AND SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000);

(E) THE DATE OR CIRCUMSTANCES UNDER WHICH THE PRIVATE TRANSFER FEE OBLIGATION EXPIRES, IF ANY;

(F) THE PURPOSE FOR WHICH THE FUNDS FROM THE PRIVATE TRANSFER FEE OBLIGATION WILL BE USED;

(G) THE NAME OF THE PERSON OR ENTITY TO WHICH FUNDS ARE TO BE PAID AND SPECIFIC CONTACT INFORMATION REGARDING WHERE THE FUNDS ARE TO BE SENT;

(H) THE ACKNOWLEDGED SIGNATURE OF THE RECEIVER OF THE FEE; AND

(I) THE LEGAL DESCRIPTION OF THE REAL PROPERTY BURDENED BY THE PRIVATE TRANSFER FEE OBLIGATION.

2. THE PERSON OR ENTITY TO WHICH THE TRANSFER FEE IS TO BE PAID MAY FILE AN AMENDMENT TO THE NOTICE OF TRANSFER FEE CONTAINING NEW CONTACT INFORMATION, BUT SUCH AMENDMENT MUST CONTAIN THE RECORDING INFORMATION OF THE NOTICE OF TRANSFER FEE WHICH IT AMENDS AND THE LEGAL DESCRIPTION OF THE PROPERTY BURDENED BY THE PRIVATE TRANSFER FEE OBLIGATION.

3. IF THE RECEIVER OF THE FEE FAILS TO COMPLY FULLY WITH SUBDIVISION ONE OF THIS SECTION, THE TRANSFEROR OF ANY REAL PROPERTY BURDENED BY THE PRIVATE TRANSFER FEE OBLIGATION MAY PROCEED WITH THE CONVEYANCE OF ANY INTEREST IN THE REAL PROPERTY TO ANY TRANSFEREE AND IN SO DOING SHALL BE DEEMED TO HAVE ACTED IN GOOD FAITH AND SHALL NOT BE SUBJECT TO ANY OBLIGATIONS UNDER THE PRIVATE TRANSFER FEE OBLIGATION. IN SUCH EVENT, THE REAL PROPERTY THEREAFTER SHALL BE CONVEYED FREE AND CLEAR OF SUCH TRANSFER FEE AND PRIVATE TRANSFER FEE OBLIGATION.

4. SHOULD THE RECEIVER OF THE FEE FAIL TO PROVIDE A WRITTEN STATEMENT OF THE TRANSFER FEE PAYABLE WITHIN THIRTY DAYS OF THE DATE OF A WRITTEN REQUEST FOR THE SAME SENT TO THE ADDRESS SHOWN IN THE NOTICE OF TRANSFER FEE, THEN THE TRANSFEROR, ON RECORDING OF THE AFFIDAVIT REQUIRED UNDER SUBDIVISION FIVE OF THIS SECTION, MAY CONVEY ANY INTEREST IN THE REAL PROPERTY TO ANY TRANSFEREE WITHOUT PAYMENT OF THE TRANSFER FEE AND SHALL NOT BE SUBJECT TO ANY FURTHER OBLIGATIONS UNDER THE PRIVATE TRANSFER FEE OBLIGATION. IN SUCH EVENT THE REAL PROPERTY SHALL BE CONVEYED FREE AND CLEAR OF THE TRANSFER FEE AND PRIVATE TRANSFER FEE OBLIGATION.

5. AN AFFIDAVIT STATING THE FACTS ENUMERATED UNDER SUBDIVISION SIX OF THIS SECTION SHALL BE RECORDED IN THE OFFICE OF THE COUNTY CLERK AND RECORDER IN THE COUNTY IN WHICH THE REAL PROPERTY IS SITUATED PRIOR TO OR SIMULTANEOUSLY WITH A CONVEYANCE PURSUANT TO SUBDIVISION FOUR OF THIS SECTION OF REAL PROPERTY UNBURDENED BY A PRIVATE TRANSFER FEE OBLIGATION. AN AFFIDAVIT FILED UNDER THIS SUBDIVISION SHALL STATE THAT THE AFFIANT HAS ACTUAL KNOWLEDGE OF, AND IS COMPETENT TO TESTIFY TO, THE FACTS IN THE AFFIDAVIT AND SHALL INCLUDE THE LEGAL DESCRIPTION OF THE REAL PROPERTY BURDENED BY THE PRIVATE TRANSFER FEE OBLIGATION, THE NAME OF THE PERSON APPEARING BY THE RECORD TO BE THE OWNER OF SUCH REAL PROPERTY AT THE TIME OF THE SIGNING OF SUCH AFFIDAVIT, A REFERENCE (BY RECORDING INFORMATION) TO THE INSTRUMENT OF RECORD CONTAINING THE

PRIVATE TRANSFER FEE OBLIGATION AND AN ACKNOWLEDGMENT THAT THE AFFIANT IS TESTIFYING UNDER PENALTY OF PERJURY.

6. WHEN RECORDED, AN AFFIDAVIT AS DESCRIBED IN SUBDIVISION FIVE OF THIS SECTION SHALL CONSTITUTE CONCLUSIVE EVIDENCE THAT:

(A) A REQUEST FOR THE WRITTEN STATEMENT OF THE TRANSFER FEE PAYABLE IN ORDER TO OBTAIN A RELEASE OF THE FEE IMPOSED BY THE PRIVATE TRANSFER FEE OBLIGATION WAS SENT TO THE ADDRESS SHOWN IN THE NOTIFICATION; AND

(B) THE ENTITY LISTED ON THE NOTICE OF TRANSFER FEE FAILED TO PROVIDE THE WRITTEN STATEMENT OF THE TRANSFER FEE PAYABLE WITHIN THIRTY DAYS OF THE DATE OF THE NOTICE SENT TO THE ADDRESS SHOWN IN THE NOTIFICATION.

S 2. This act shall take effect immediately.