Apples and Oranges: Avoiding the Forbidden Fruit by Understanding the Difference Between HOA "Disclosure Fees" and "Transfer Fees"

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When a buyer and seller strike up a sales contract, they typically employ an escrow agent to gather paperwork, information and facilitate transferring title through closing escrow. Under RESPA laws, a standard HUD-1 Settlement Statement is used to itemize the services and fees charged, and allocate the distribution of funds at closing. When an HOA is involved, the parties should expect line-item descriptions for HOA Assessments and Transfer Fees to be paid. Charges payable to an HOA might include a lien balance, assessments accruing through a stated assessment period and "transfer fees."

Resale Disclosure Fees and Transfer Fees are distinct, yet both may be generally referred to as "transfer fees" because they are only paid when title transfers to a new owner. However, they are different. If they are confused or unauthorized, either fee can result in hefty penalties. Arizona statutes were amended as of January 1, 2012, to regulate and limit fees charged by HOA's upon transfer. Before the amended laws, calling either of these charges "transfer fees" didn't really matter. That changed when the statutes were amended. Under the amended statutes, *these differing transfer fees became as distinct as apples and oranges.* The technical legal distinction opened the door for confusion for those in the industry who still generally call both of these "transfer fees." After all, both are fruit that the HOA gathers when title is transferred.

Generally calling either fee a "transfer fee" is still accepted; however, the legal distinctions created by the 2012 law changes can result in stiff penalties, prejudice and liability if HOA's collecting their fruits try to either overharvest from the tree, or unwittingly reach for the forbidden fruit. Because of the potential liabilities simply because of the unknown legal distinctions, HOA's, management companies, brokers, Realtors and title companies need to know their apples and oranges when it comes to charges claimed as "Resale Disclosure Fees" versus "Transfer Fees" as authorized and limited under current Arizona law.

RESALE DISCLOSURE FEES

HOA's and management companies (for planned communities and condominium associations) may charge fees for providing Resale Disclosure Statements and other required information for a pending transfer of title. (*See* A.R.S. § 33-1260(C) and § 33-1806(C).) The following is a summary of obligations and limitations regarding resale disclosure fees charged:

- Within ten (10) days of the HOA's receipt of written notice of a pending sale of a lot/unit the HOA must provide a "Resale Disclosure Statement" with specific information.

- Failure to provide disclosure within 10 days may result in the HOA's lien being extinguished.

- The written notice requesting disclosure may be provided by the purchaser, or the purchaser's agent (i.e., Realtor or escrow officer), and must contain the name and address of the purchaser.

- The following documents, information and statement must be provided by the HOA (either in paper form or electronic form):

  - Copies of the HOA's CC&R's, Bylaws, Articles of Incorporation and any Rules & Regulations; the current operating budget; most recent financial report/audit; most recent reserve study (if any); and, a summary of any pending litigation in which the HOA is named, excepting collection and foreclosure lawsuits.

  - The HOA must also provide the contact telephone number and address for the HOA (or community manager), the amount of regular assessments, any special or other assessments, the amount of unpaid assessments or lien balance payable from the seller, disclose whether any portion of the lot/unit is covered by HOA insurance, the total amount of HOA reserves, and list any existing violations for the property (i.e., unapproved alterations or improvements).

- A statement must also be provided, to be signed by the purchaser, with an acknowlement that the HOA documents are a contract, and an understanding that the HOA has a right to foreclose for any unpaid lien balance. (Generally, this form is part of the closing documents and forms provided and processed by the escrow agent.)

- **HOA's are permitted to charge a fee for preparing the statement, documents and information above, not to exceed $400 as an aggregate sum.**

  - Before the 2012 amendment, the statute vaguely authorized a "reasonable" fee, resulting in vast inconsistencies, variances and even exorbitant fees.

  - **<u>Beware of overharvesting</u>**. The fee cap of $400 is an aggregate sum to compensate for preparing and providing the statement, documents and information, and includes "any other services related to the transfer." HOA's should avoid charging additional fees above the $400 cap for supplemental services it offers in relation to the transfer, especially if not contemplated in the statute. Also, if the HOA was not charging at least $400 as of January 1, 2012, it is allowed a 20% annual increase in the amount charged in the prior year, and annually thereafter, until reaching the $400 cap.

  - The Resale Disclosure Fee may be charged either by the HOA or its management company (not both).

  - Resale Disclosure Fees may only be collected at the close of escrow, not sooner. And, the fees may only be charged once to a member for the transaction between the buyer and seller specified in the notice. An additional "rush" fee of not more than $100 may be added

if the statement must be provided within 72 hours. Also, an additional $50 may be charged to supplement a statement if 30 days or more have passed since the prior statement provided.

  - A civil penalty of up to $1,200 may be imposed for failing to follow the statute.

- The following title transfers are exempt from the statute and Resale Disclosure Fees:

  - A sale in which a public report is issued for new development;

  - Transfers recorded to subdivide lands for development (*see* A.R.S. § 32-2181.02); and

  - Transfers to family members for no or nominal consideration, and transfers for no or nominal consideration to the owner's business entity or trust.

PROHIBITED TRANSFER FEES

At the same time the resale disclosure fee statute was amended (January 2012), the state legislature also enacted A.R.S. § 33-442 to expressly prohibit any "transfer fee" that is either (1) not allowed in the resale disclosure statute (discussed above), or (2) expressly provided for in an HOA's CC&R's. This prohibition on transfer fees is not to be confused with the resale disclosure fees authorized in the planned community and condominium statutes. However, unless a transfer fee falls within these statutory provisions, the transfer fee is unlawful and prohibited.

In summary of this statute, only the following transfer fees are permitted to be charged and collected by an HOA upon transfer of title:

- The fee charged is expressly authorized and detailed in the HOA's recorded CC&R's.

  - Examples of this typically include mandatory working capital contributions, reserve contributions or other fees expressly detailed in the CC&R's as chargeable upon the transfer of title, and specifying the amount.

  - The amounts charged must be collected and used for the stated purpose.

- The fee charged must "touch and concern the land" (in the recorded CC&R's specifically restricting the lot and charged for the benefit of the lot and/or HOA), and

- The fee charged may not be payable to a third party or a declarant unless that third party is specifically authorized in the CC&R's to manage the plan of development.