

## MINUTES OF THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

The meeting was called to order by Chairman Ruth Teichman at 9:30 a.m. on March 5, 2009, in Room 136-N of the Capitol.

All members were present.

## Committee staff present:

Bruce Kinzie, Office of the Revisor of Statutes  
Melissa Calderwood, Kansas Legislative Research Department  
Terri Weber, Kansas Legislative Research Department  
Beverly Beam, Committee Assistant

## Conferees appearing before the Committee:

Melissa Calderwood, Principal Analyst, Research Department  
Luke Bell, KAR Vice President of Governmental Affairs, Kansas Association of Realtors (Attachment 1)  
Martha Neu Smith, Executive Director, Kansas Manufactured Housing (Attachment 2)  
Kathleen Olsen, Kansas Bankers Association, (written only) (Attachment 3) and (Attachment 4)

## Others attending:

See attached list.

The Chair called the meeting to order.

Hearing on

**HB 2092 - Prohibiting transfer fee covenants.**

Melissa Calderwood, Principal Analyst, Research Department, gave an overview of **HB 2092**. Ms. Calderwood stated that **HB 2092**, as amended, would enact new law to specify that transfer fee covenants recorded on and after July 1, 2009 shall not run with the title to real property and would not be binding or enforceable in law or in equity against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise. Additionally, the bill would declare transfer fee covenants, on and after the effective date of this act, to be against public policy and any such covenant would be void and unenforceable. She said the bill was introduced by the House Committee on Financial Institutions at the request of the Kansas Association of Realtors whose representative indicated that a private transfer fee covenant is essentially a sophisticated extortion scheme that robs a homeowner of the equity in his or her home by holding clear and marketable title to the property hostage. She said **HB 2092** would have no fiscal effect on state revenues or expenditures.

Luke Bell, Kansas Association of Realtors, testified in support of **HB 2092**. Mr. Bell said **HB 2092** would prohibit the use of private transfer fee covenants in real property deeds. He said private transfer fees are a relatively new scheme where the original owner of a property adds a covenant to the deed that requires all future owners of the property to pay a large "transfer fee" to the original owner of the property or a designated third party whenever they transfer ownership of the property. Mr. Bell said unless future owners of the property pay the large transfer fee to the original owner of the property, they will not be able to transfer marketable title to the property to another party, which means that potential buyers will not be able to obtain title insurance and mortgage financing. He said his association believes a private transfer fee covenant is essentially a sophisticated extortion scheme that robs a homeowner of the equity in his or her home by holding clear and marketable title to the property hostage. He added that this legislation would prohibit private transfer fee schemes by reinforcing existing Kansas common law prohibitions against unreasonable restraints on alienation and against covenants that do not "touch and concern" the land. He added that if adopted, this statute would make these private transfer fee covenants unenforceable against future owners of the property, thereby preserving the marketability and transferability of real property in this state. (Attachment 1)

CONTINUATION SHEET

Minutes of the Senate Financial Institutions And Insurance Committee at 9:30 a.m. on March 5, 2009, in Room 136-N of the Capitol.

The Chair asked Mr. Bell to get for the Committee copies of testimony from John Peterson. Mr. Bell said he would do so.

The Chair closed the hearing on **HB 2092**.

Hearing on

**HB 2091 - Exempting modular homes from Kansas manufactured housing act.**

Melissa Calderwood gave an overview of **HB 2091**.

Ms. Calderwood stated that this bill would amend existing law to clarify that the provisions of the Kansas Manufactured Housing Act will not apply to modular homes. She said a “modular home” is defined elsewhere in the Act to mean “a structure which is transportable in one or more sections; designed to be used as a dwelling on a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems contained therein; and certified by its manufacturer as being constructed in accordance with a nationally recognized building code.”

Martha Neu Smith testified on behalf of Kansas Manufactured Housing Association in support of **HB 2091**. Ms. Smith stated that the Association requested the introduction of **HB 2091** to provide statutory clarification within the Kansas Manufactured Housing Act in light of a recent bankruptcy case that was brought by the Kansas Bankers Association. She said the bankruptcy case involved a lender, which had taken a mortgage on a modular home and the land it was attached to; the Bankruptcy Trustee tried unsuccessfully to argue that since the lender had not perfected its lien on the certificate of title that the lender had not properly perfected its lien according to the Kansas Manufactured Housing Act. She noted that the Manufactured Housing Act was designed to provide state regulation of the mobile and manufactured housing industry and part of the regulation is the issuance of a certificate of title for these two forms of housing. She said this titling requirement is due to the fact that both mobile and manufactured housing have been engineered to be either an improvement to the real estate or personal property. She added that the Kansas Manufactured Housing Act only mentions “modular home” within the definitions. She said as defined in the act, modular homes are built to local codes and must be on a permanent foundation. She noted that modular homes are never considered personal property; consequently, they are not issued a certificate of title. In conclusion, she said the Association believes the Bankruptcy Court ruled correctly in judgment for the lender, but to forgo any future confusion we believe it would be good to clarify that the requirements of the Kansas Manufactured Housing Act do not apply to modular housing. She said the new language in **HB 2091** only provides clarification but does not make any change to the current regulations of mobile or manufactured housing. (Attachment 2)

Kathleen Olsen, Kansas Bankers Association, presented written testimony only. (Attachments 3 and 4)

The Chair closed the hearing on **HB 2091**.

Action on

**SB 260 - No cause of action for recovery of certain loss while operating uninsured motor vehicle.**

Senator Kelsey moved to pass SB 260 out favorably. Senator Barnett seconded. Motion carried.

Action on

**HB 2091 - Exempting modular homes from Kansas manufactured housing act.**

Senator Steineger moved to pass HB 2091 out favorably. Senator Brownlee seconded. Motion carried.

Action on

CONTINUATION SHEET

Minutes of the Senate Financial Institutions And Insurance Committee at 9:30 a.m. on March 5, 2009, in Room 136-N of the Capitol.

**HB 2092 - Prohibiting transfer fee covenants.**

Senator Steineger moved to pass HB 2092 out favorably. Senator Brownlee seconded. Motion carried.

The next meeting is scheduled for March 10, 2009.

The meeting was adjourned at 10:30 a.m.





To: Senate Financial Institutions and Insurance Committee  
From: Luke Bell, KAR Vice President of Governmental Affairs  
Date: March 5, 2009  
Subject: **HB 2092** – Prohibiting Private Transfer Fees in Real Property Deed Covenants

Chairperson Teichman and members of the Senate Financial Institutions and Insurance Committee, thank you for the opportunity to appear today on behalf of the Kansas Association of REALTORS® (KAR) to offer testimony in support of **HB 2092**. KAR has faithfully represented the interests of the 9,000 real estate professionals and over 700,000 homeowners in the State of Kansas for over 85 years.

Summary of the Legislation

**HB 2092** would prohibit the use of private transfer fee covenants in real property deeds. Private transfer fees are a relatively new scheme where the original owner of a property adds a covenant to the deed that requires all future owners of the property to pay a large “transfer fee” to the original owner of the property or a designated third party whenever they transfer ownership of the property.

Unless future owners of the property pay the large transfer fee to the original owner of the property, they will not be able to transfer marketable title to the property to another party, which means that potential buyers will not be able to obtain title insurance and mortgage financing. We believe that a private transfer fee covenant is essentially a sophisticated extortion scheme that robs a homeowner of the equity in his or her home by holding clear and marketable title to the property hostage.

This legislation would prohibit private transfer fee schemes by reinforcing existing Kansas common law prohibitions against unreasonable restraints on alienation and against covenants that do not “touch and concern” the land. If adopted, this statute would make these private transfer fee covenants unenforceable against future owners of the property, thereby preserving the marketability and transferability of real property in this state.

*FI&I Committee  
3-5-09  
Attachment 1*



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## Overview of the Basic Private Transfer Fee Scheme

The private transfer fee scheme normally begins when the original owner of a property (hereinafter "original owner") records a restrictive covenant in the deed to his or her property. This restrictive covenant is recorded on a copyrighted form provided by a company (hereinafter "the company") headquartered in Texas that claims to have patented the basic private transfer fee scheme.

The actual text of this restrictive covenant requires all future owners of the property to pay the company a "transfer fee" whenever they sell or transfer the property. This transfer fee is normally specified in the restrictive covenant as 1.0% to 2.0% of the sales price or fair market value of the property at the time of the transfer. For example, the owner of a home valued at \$150,000 would have to pay a \$1,500 to \$3,000 transfer fee to the company upon any sale or transfer of that home.

In order to ensure that the owner does not refuse to pay the transfer fee at the closing table, the covenant also imposes a lien against the property in the amount of the transfer fee. At closing, the closing agent is instructed to collect and remit the fees to the company. In order for the transaction to proceed to closing, the owner of the property must consent to the payment of the transfer fee.

Once the transfer fee is remitted by the closing agent to the company, the company keeps 30% of the transfer fee as an administrative commission and sends the remaining 70% of the transfer fee to the original owner of the property or a designated third party. On occasion, a portion of the transfer fee is also sent to another party like a real estate broker or attorney who helped arrange the placement of the restrictive covenant in the deed to the property.

## Fundamental Problems with Private Transfer Fee Schemes

As I stated earlier in this testimony, we believe that a private transfer fee covenant is essentially a sophisticated extortion scheme that robs a homeowner of the equity in his or her home by holding clear and marketable title to the property hostage. Unless future owners of the property pay the transfer fee, they will not be able to transfer marketable title to the property, which means that potential buyers will not be able to obtain the necessary title insurance and mortgage financing to purchase the property.

The private transfer fee covenant degrades the marketability of the title to the property and essentially reduces the fair market value of the property by the amount of the transfer fee. Prior to having knowledge of the transfer fee covenant, any potential buyers of the property assume that they are purchasing the full fee simple title to the property.

### ▪ **Private Transfer Fees Make the Property Unmarketable**

In situations where the deed is not encumbered by a transfer fee covenant, the purchase of the property entitles the buyer to a 100% interest in the value of any future appreciation of the property. However, in situations where there is a transfer fee covenant, the buyer of the property is forced to agree to surrender at least 1.0% to 2.0% of the future appreciation of the property.

Imagine you have purchased a property with a fair market value of \$100,000 that is not subject to a transfer fee covenant. In return for the payment of the purchase price of \$100,000, you now own a property that has a fair market value of \$100,000. If you choose to sell that home in the future, you can expect to receive the fair market value of that property (which should increase over time).

However, now imagine that you have purchased a similar property with a fair market value of \$100,000 that is subject to a transfer fee of 2.0%. If you choose to sell that home in the future, you will not receive the full fair market value for that property and will be forced to pay a \$2,000 transfer fee to the original property owner.

As a result, you have just paid \$100,000 for a property that is immediately worth 2.0% less than the price you paid for the property, which would be \$98,000. The private transfer fee covenant has stolen your equity in the home and you have not received the full fair market value of your purchase.

In these situations, the presence of the private transfer fee covenant makes it nearly impossible to market the property to potential buyers. Potential buyers are generally not interested in purchasing a property that is not worth the amount paid for the property.

In states where this practice is prevalent, these concerns have led to many failed transactions as buyers simply choose to walk away from the closing table and purchase an alternative property without a transfer fee covenant. The inclusion of the transfer fee covenant in the deed does in fact make the property nearly unmarketable.

#### ▪ **Private Transfer Fees Prevent Buyers from Obtaining Title Insurance and Financing**

Finally, private transfer fee covenants can cause major defects to the title to the property. When a seller conveys a property through a warranty deed to a buyer, they are warranting that the deed does not contain any restrictions that will interfere with the buyer's future use and enjoyment of the property.

The entire real estate transaction process hinges on the sanctity and enforceability of the title to the property. If the title has defects, numerous other essential pieces of the real estate transaction will fail. In other states where this practice is more prevalent, mortgage lenders and title insurance agencies are not willing to participate in transactions where the title is affected by a private transfer fee covenant.

If a potential buyer is unable to obtain mortgage financing or title insurance on the property, this will render the property even more unmarketable. By imposing obstacles to the acquisition of mortgage financing and title insurance, private transfer fee covenants reduce the transferability and marketability of titles to real property.



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TO: Senator Ruth Teichman, Chairman  
And Members of the Committee

FROM: Martha Neu Smith  
Executive Director

DATE: March 5, 2009

RE: HB 2091 – Modular Housing

Chairman Teichman and members of the Committee, my name is Martha Neu Smith and I am the Executive Director for Kansas Manufactured Housing Association (KMHA) and I appreciate the opportunity to comment on HB 2091.

KMHA is a statewide trade association, which represents all facets of the manufactured and modular housing industry including manufacturers, retail centers, community owners and operators, finance and insurance companies, service and supplier companies and transport companies.

The association requested the introduction of HB 2091 to provide statutory clarification within the Kansas Manufactured Housing Act in light of a recent bankruptcy case that was brought to my attention by the Kansas Bankers Association. The bankruptcy case involved a lender, which had taken a mortgage on a **modular home** and the land it was attached to; the Bankruptcy Trustee tried unsuccessfully to argue that since the lender had not perfected its lien on the certificate of title that the lender had not properly perfected its lien according to the Kansas Manufactured Housing Act.

The Manufactured Housing Act (K.S.A. 58-4201 to 58-4227) was designed to provide state regulation of the mobile and manufactured housing industry and part of the regulation is the issuance of a certificate of title for these two forms of housing. This titling requirement is due to the fact that both mobile and manufactured housing have been engineered to be either an improvement to the real estate (on a permanent foundation & title surrendered K.S.A. 58-4214) or personal property.

The Kansas Manufactured Housing Act only mentions "modular home" within the definitions. As defined in the act, modular homes are built to local codes and must be on a permanent foundation (an improvement to the real estate). Modular homes are never considered personal property; consequently they are not issued a certificate of title.

In the end, we felt the Bankruptcy Court ruled correctly in judgment for the lender, but to forgo any future confusion we felt it would be good to clarify that the requirements of the Kansas Manufactured Housing Act do not apply to modular housing. The new language in HB 2091 only provides clarification but does not make any change to the current regulations of mobile or manufactured housing.

Thank you again for the opportunity to comment and we would respectfully request the Committee's support of HB 2091.

*FI&I Committee  
3-5-09  
Attachment 2*





March 5, 2009

To: Senate Committee on Financial Institutions  
From: Kathleen Taylor Olsen, Kansas Bankers Association  
**Re: HB 2092: Private Transfer Fee Covenants**

Madam Chair and Members of the Committee:

Thank you for the opportunity to present written testimony on **HB 2092** which prohibits the practice of including private transfer fee covenants in real estate deeds. As you have already heard, this practice occurs when a party to a conveyance of land adds a covenant to the deed which attaches to the initial sale of the land and all future sales. The covenant provides for transfer fee – a percentage of the sales price to be delivered to the party involved in the initial sale.

This practice raises concern among the banking industry as it has the potential to create last-minute objections at the closing of a transaction. The buyer may not be aware of the fee until that moment and if he or she refuses to pay it, the closing will at the least, be postponed.

More importantly, there is the potential that such a covenant could cause problems with the title to the property. When financing the purchase of real estate, the lender financing the purchase for the buyer will want to assure that the seller is transferring fee simple title. If such a fee is attached to the real estate, the seller is not transferring fee simple title but something less. In essence, the seller has failed to live up to his or her promise under the contract. This could jeopardize the ability of the buyer to obtain title insurance, which would in turn, jeopardize the buyer's ability to find financing.

It is for these reasons that we support the effort to prohibit the practice of including private transfer fee covenants in real estate deeds. Thank you and we would respectfully request that the committee act favorably on **HB 2092**.

*FI&I Committee  
3-5-09  
Attachment 3*



March 5, 2009

To: Senate Committee on Financial Institutions

From: Kathleen Taylor Olsen, Kansas Bankers Association

**Re: HB 2091: Modular Homes**

Madam Chair and Members of the Committee:

Thank you for the opportunity to present written testimony in support of **HB 2091**, which amends K.S.A. 58-4203, by clarifying that modular homes are not subject to the Kansas Manufactured Housing Act.

The distinction between a modular home and a manufactured home is a very important one to the banking industry. Manufactured homes are issued a certificate of title. If the owner of a manufactured home does not surrender the title as provided in K.S.A. 58-4214, a lender must perfect its security interest in the manufactured home by having its lien noted on the title.

Modular homes are not issued a certificate of title. Lenders perfect their security interest on modular homes by filing a mortgage with the register of deeds. Not only should modular homes not fall under the scope of the Kansas Manufactured Housing Act, but it would be impossible to comply with many of the provisions due to the fact that a title is never issued for this type of home.

We support the effort to clarify this distinction. Thank you and we respectfully ask the Committee to act favorably on **HB 2091**.

*FI&I Committee  
3-5-09  
Attachment 4*