



Ohio Legislative Service Commission

Final Analysis

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Sub. H.B. 292

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(As Passed by the General Assembly)

- Reps.** Letson and Oelslager, Yuko, Phillips, Ujvagi, Harwood, Domenick, Stebelton, Chandler, Luckie, Foley, Batchelder, Blessing, Boose, Boyd, Brown, Bubp, Carney, Combs, DeBose, Evans, Garland, Garrison, Hackett, Harris, Huffman, Maag, Mallory, Mecklenborg, Murray, Pillich, Sayre, Snitchler, Stewart, Wagner, Winburn
- Sens.** Kearney, Buehrer, Carey, Faber, Fedor, Gibbs, Gillmor, Harris, Hughes, Niehaus, Patton, Schaffer, Schiavoni, Seitz, Turner, Wagoner, Wilson, R. Miller

Effective date: September 13, 2010

ACT SUMMARY

- Provides that a transfer fee covenant recorded in Ohio on or after the effective date of the act does not run with the title to real property and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise, and provides that any lien purporting to secure the payment of a transfer fee under such a transfer fee covenant is void.
- Authorizes a court of common pleas in a partition action, if no party elects to take the real property involved in the action and at the insistence of a party, to order the sale of the property at a public auction by the sheriff who executed the writ of partition or by a licensed auctioneer who is qualified to conduct an auction of real property.
- Requires that if the sale of real property is made by a licensed auctioneer, it must be made pursuant to the Auctioneers Law.
- Provides that the auctioneer must receive compensation and reimbursement for the expenses of advertising the public auction that the court finds reasonable and proper and that the compensation and advertising expenses must be charged as costs in the action or proceeding in which the sale is ordered.

- Generally eliminates the procedures relative to taking possession of or closing savings and loan associations and savings banks, and replaces them with the same procedures that apply to taking possession of or closing banks.

CONTENT AND OPERATION

Transfer fee covenant

The act provides that a "transfer fee covenant" recorded in Ohio on or after the effective date of the act does not run with the title to real property and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise. It further provides that any lien purporting to secure the payment of a "transfer fee" under a transfer fee covenant that is recorded in Ohio on or after the effective date of the act is void. (See "**Definitions**," below, for the definitions of the terms in quotation marks.) (R.C. 5301.057(B) and (C).)

Definitions

The act defines the following terms for purposes of its provisions pertaining to transfer fee covenants (R.C. 5301.057(A)):

"Transfer fee covenant" means a declaration or covenant recorded against the title to real property that requires or purports to require the payment of a transfer fee to the declarant or other person specified in the declaration or covenant or to their successors or assigns upon a subsequent transfer of an interest in the real property.

"Transfer fee" means a fee or charge required by a transfer fee covenant and payable upon the "transfer" (see definition below) of an interest in real property, or payable for the right to make or accept such a 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 transfer fees for purposes of this definition:

(1) Any consideration payable by the grantee to the grantor for the interest in real property being transferred. For the purposes of this provision, an interest in real property includes a separate mineral estate and its appurtenant surface access rights.

(2) Any commission payable to a licensed real estate broker for the transfer of real property pursuant to an agreement between the broker and the grantor or the grantee, including any subsequent additional commission for that transfer payable by the grantor or the grantee based upon any subsequent appreciation, development, or sale of real property;

(3) 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;

(4) Any rent, reimbursement, charge, fee, or other amount payable by a lessee to a lessor under a lease;

(5) 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;

(6) Any tax, fee, charge, assessment, fine, or other amount payable to or imposed by a governmental authority;

(7) 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 the association;

(8) Any payment required pursuant to an "environmental covenant" (see definition below).

"Transfer" means the sale, gift, conveyance, assignment, inheritance, or other transfer of an ownership interest in real property located in Ohio.

"Environmental covenant" means a servitude that imposes activity and use limitations on real property and meets the requirements of R.C. 5301.82 (see **COMMENT 1**).

Partition of real property

Background

R.C. Chapter 5307. sets forth the procedure for the partition of real property among tenants in common, survivorship tenants, and coparceners, upon a petition filed in the court of common pleas in the county in which the property is located. Upon a finding by the court that the plaintiff has a right to any part of the property, it must order the partition of the property in favor of the plaintiff or all interested parties, appoint a suitable disinterested person to be the commissioner to make the partition, and issue a writ of partition directed to the sheriff to cause to be set off and divided to the plaintiff or each interested party whatever part or proportion of the property that the court orders. If the commissioner or commissioners are of the opinion that the estate cannot be divided according to the writ of partition without manifest injury to its value, the commissioner or commissioners must return that fact to the court with a just

valuation of the estate. If the court approves the return and one or more of the parties elect to take the estate at the appraised value, the court must adjudge the estate to them upon their paying to the other parties their proportion of the appraised value. (R.C. 5307.01, 5307.02, 5307.04, 5307.05, and 5307.09--not in the act.)

Sale of estate if no party makes an election

Under prior law, if no election to take the estate was made, at the instance of a party, the court of common pleas could order a sale of the estate at public auction, by the sheriff who executed the writ of partition, or the sheriff's successor in office. Such a sale of an estate had to be made at the door of the courthouse, unless for good cause the court of common pleas directed it to be made on the premises. The sale had to be conducted as upon execution, except that it was unnecessary to appraise the estate; but it could not be sold for less than two thirds of the value returned by the commissioner or commissioners. *Unless by special order, on good cause shown, the court directed the entire payment to be made in cash, the purchase money had to be payable one third on the day of sale, one third in one year after the sale, and one third in two years after the sale, with interest.* On the sheriff's return of the proceedings to sell the estate, the court of common pleas had to examine them. If a sale was made, and the court approved it, the sheriff had to execute and deliver a deed to the purchaser on receiving payment of the consideration money, or taking sufficient security therefor, to the satisfaction of the court. (R.C. 5307.11, 5307.12, and 5307.13.)

The act modifies prior law (modified or added language is italicized) by providing that if no party elects to take the estate, at the *insistence* (instead of instance) of a party, the court of common pleas may order a sale of the estate at public auction by either (1) the sheriff who executed the writ of partition or the sheriff's successor in office or (2) *an auctioneer licensed under R.C. Chapter 4707. (Auctioneers Law) who is qualified under R.C. 4707.021 (see **COMMENT 2**) to conduct an auction of real property.* When the sale is made by a sheriff, the sale must be made at the door of the courthouse, unless for good cause the court of common pleas directs it to be made on the premises. That sale must be conducted as upon execution, except that it is unnecessary to appraise the estate. *When the sale is made by a licensed auctioneer, it must be made pursuant to the Auctioneers Law.* No property may be sold (by the sheriff, sheriff's successor, or auctioneer) for less than two thirds of the value returned by the commissioner or commissioners. On the return of the proceedings to sell the estate, the court of common pleas must examine them. The act makes no change to the last sentence described in the preceding paragraph requiring the sheriff to execute and deliver the deed. The act eliminates the provision in prior law italicized in the preceding paragraph dealing with the installment payment of the purchase money. (R.C. 5307.11, 5307.12, and 5307.13.)

Distribution of sale proceeds

Prior law provided that the money or securities arising from a sale of, or an election to take an estate, had to be distributed and paid, by order of the court of common pleas, to the parties entitled to them, in lieu of their respective parts and proportions of the estate, according to their rights in the estate. All receipts of such money or securities by the sheriff were in the sheriff's official capacity, and the sureties on the sheriff's official bond were liable for any misapplication thereof. (R.C. 5307.14.)

The act provides that the distribution of money or securities described in the first sentence in the preceding paragraph is subject to the provision added by the act as described in the following sentence. When a sale is made by a licensed auctioneer, the auctioneer must receive compensation and reimbursement for expenses as described in R.C. 2335.021 (see **COMMENT 3**) that the court must apportion as costs to the parties as the court finds reasonable and proper. All receipts of money or securities by the sheriff arising from a sale or election are in the sheriff's official capacity, and the sureties on the sheriff's official bond are liable for any misapplication of the money or securities. (R.C. 5307.14.)

Conveyance of property

Under prior law, when a conveyance of land sold, or elected to be taken in a proceeding for partition, was not made by the officer who made the sale, the court of common pleas on being first satisfied that such sale or election was regularly made, and that the purchase money was fully paid or secured, on motion, could order the sheriff of the county, or officer performing the duties of sheriff, to execute and deliver to the purchaser, or person electing to take the property, a deed for the property (R.C. 5307.16).

The act provides that when an officer *or auctioneer* (added by the act) has not conveyed land sold or elected to be taken in a proceeding for partition, the court of common pleas on being first satisfied that such sale or election was regularly made, and that the purchase money has been fully paid or secured, on motion, may order the sheriff of the county, or officer performing the duties of sheriff, to execute and deliver to the purchaser, or person electing to take the property, a deed for the property (R.C. 5307.16).

Possession and closure of savings and loan associations and savings banks

(R.C. 1125.19, 1125.28, 1157.01, 1157.03 to 1157.06, 1157.09 to 1157.14, 1157.17 to 1157.30, 1157.33, 1165.01, 1165.03 to 1165.06, 1165.09 to 1165.14, 1165.17 to 1165.30, and 1165.33; R.C. 119.01 (conforming changes))

The prior procedures for taking possession of or closing a savings and loan association (R.C. Chapter 1157.) or savings bank (R.C. Chapter 1165.) were essentially the same. They differed, however, from the procedures for taking possession of or closing a bank (R.C. Chapter 1125.).

The act generally eliminates previously the existing procedures relative to savings and loan associations and savings banks and replaces them with the same procedures that apply to banks. Those procedures include the following:

--Voluntary liquidation under the continued supervision of the Superintendent of Financial Institutions (R.C. 1157.03 to 1157.06 and 1165.03 to 1165.06);

--Conservatorship until the financial institution resumes business or a receiver is appointed (R.C. 1157.09 to 1157.14 and 1165.09 to 1165.14);

--Appointment of a receiver by the Superintendent in the event of an involuntary liquidation (R.C. 1157.17 to 1157.30 and 1165.17 to 1165.30).

COMMENT

1. R.C. 5301.82(A), not in the act, requires an environmental covenant to contain all of the following:

(a) A statement that the instrument is an environmental covenant executed pursuant to R.C. 5301.80 to 5301.92;

(b) A legally sufficient description of the real property that is subject to the environmental covenant;

(c) A description of the activity and use limitations on the real property;

(d) Requirements for notice following transfer of a specified interest in, or concerning proposed changes in the use of, applications for building permits for, or proposals for any site work affecting contamination on, the property that is subject to the environmental covenant;

(e) The name or identity of every holder;

(f) Rights of access to the property granted in connection with implementation or enforcement of the environmental covenant;

(g) The signatures of the applicable agency, every holder, and, unless waived by the agency, every owner of the fee simple of the real property that is subject to the environmental covenant;

(h) An identification of the name and location of any administrative record for the environmental response project pursuant to which the environmental covenant is created.

In addition to the above required information, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed the environmental covenant. In addition to other conditions for an agency's approval of an environmental covenant, the agency may require those persons specified by the agency who have interests in the real property that is the subject of the environmental covenant to sign the covenant. (R.C. 5301.82(B) and (C).)

2. R.C. 4707.021, not in the act, provides that only an auctioneer who is licensed under R.C. Chapter 4707. (hereafter "licensed auctioneer") and who is licensed as a real estate broker or real estate salesperson under R.C. Chapter 4735. (hereafter "licensed real estate broker" or "licensed real estate salesperson") can sign an auction contract for the sale of real property at auction. A licensed real estate broker who is not a licensed auctioneer cannot sign an auction contract or conduct an auction, but may contract for the sale of real property at auction only if (a) the auctioneer who signs the auction contract and who conducts the auction is a licensed real estate salesperson and is associated with the real estate broker who contracts for the sale of real property, or (b) the real estate broker enters into a cooperative agreement with another licensed real estate broker with whom a licensed auctioneer is associated and the auctioneer is solely responsible for signing the auction contract and conducting the auction. An apprentice auctioneer who is a licensed real estate broker or licensed real estate salesperson may act as a bid caller in the sale of real property at auction if the sponsoring auctioneer is a licensed auctioneer and a licensed real estate broker or licensed real estate salesperson. Nothing in the above provisions may be construed to permit a business to contract for the sale of real property at auction through an individual who is not a licensed auctioneer and a licensed real estate broker or licensed real estate salesperson.

3. R.C. 2335.021, not in the act, permits any court of record to appoint an auctioneer licensed under the Auctioneers Law to conduct any public auction of goods, chattels, or lands required to be sold by an officer of the court. The auctioneer must receive compensation and reimbursement for the expenses of advertising the public auction that the court finds reasonable and proper. The compensation and advertising

expenses must be charged as costs in the action or proceeding in which the sale is ordered.

HISTORY

ACTION	DATE
Introduced	09-30-09
Reported, H. Civil & Commercial Law	12-10-09
Passed House (95-1)	02-03-10
Reported, S. Judiciary - Civil Justice	05-27-10
Passed Senate (32-0)	05-27-10
House concurred in Senate amendments (92-5)	06-02-10

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