

MEMORANDUM

TO: ANDREW TISCHLEDER DATE: JANUARY 4, 2022
FROM: RICHARD A. DAVIS III 
RE: TRANSFER FEE

Andrew,

The Board recently voted to suspend that portion of the transfer fee which exceeds \$125 and to implement a program to refund the transfer fee payments previously received in excess of this amount. This action was taken by the Board following receipt of legal advice from our firm. We understand that certain community members have questioned the Board's action, particularly since some of the current Board members may be eligible for a refund. While it would be inappropriate to disclose our attorney-client privileged communications, you have requested our firm to provide some context to the matter in order to assist in responding to questions the Board has received.

SVCA assesses the transfer fee upon the sale of a lot within Sudden Valley. While it is normally paid by the buyer, the buyer and seller may negotiate for the seller to pay some or all of the fee. Over the years, SVCA has received complaints and questions concerning the legitimacy of the transfer fee.

Homeowners Associations (HOAs) such as SVCA are governed by RCW 64.38. An HOA is entitled to assess its members in order to fund the services for its members. HOAs primarily derive their revenue from member approved regular and special assessments. Some HOAs have ancillary revenue sources, e.g., golf membership fees, lease payments, moorage charges, etc. Generally speaking, these ancillary revenue sources are contractual in nature and voluntarily entered into between the HOA and the contracting party. RCW 64.38 also allows an HOA to charge fees for use of its common areas, thereby providing another statutory source of revenue. RCW 64.38.020(10).

Nothing in RCW 64.38 or other statutes expressly authorizes an HOA to assess a transfer fee. This, in and of itself, does not mean that an HOA lacks the authority to charge a transfer fee. However, if the amount of the transfer fee significantly exceeds the HOA's administrative costs associated with a change in membership, it is prudent for the governing documents to expressly authorize the transfer fee. A member-authorized amendment to the governing documents (e.g., Bylaws) prior to enacting such a fee, would greatly immunize the transfer fee from collateral attack by a party charged with paying the fee.

Given that, prior to enacting the additional transfer fee of $\frac{1}{4}$ of 1% of the sale price of lots and homes, no bylaw amendment was passed by a vote of the membership to allow the additional transfer fee, we counseled that the conservative approach to avoiding potential litigation with an uncertain outcome would be to suspend that portion of the transfer fee which exceeds \$125 and to implement a program to refund the transfer fee payments previously received in excess of this amount.

Lastly, I understand that some concerns have been raised that those board members who paid the transfer fee upon purchasing their lots had a conflict of interest and were ineligible to vote to refund the transfer fees. I do not agree with this position. It is worth noting that because board members are also community members, board members always benefit from any motions made by the board to the same extent as other members. For example, in the early stages of the pandemic, some HOAs voted to waive assessments; while board members benefited from this action, they did not benefit disproportionately. A conflict arises when a board member's loyalty to the association is compromised because they may benefit from an undisclosed interest that would not inure to the rest of the membership. Here, any refund program instituted by the Board would apply to all members, not just board members who may have paid the transfer fee.

Richard