

State of South Dakota

EIGHTY-SIXTH SESSION
LEGISLATIVE ASSEMBLY, 2011

553S0069

SENATE COMMERCE AND ENERGY ENGROSSED NO. **SB 70** - 2/1/2011

Introduced by: Senators Peters, Frerichs, Gray, Hansen (Tom), Holien, Hunhoff (Jean), Maher, Nelson (Tom), Novstrup (Al), Rave, Rhoden, Schlekeway, and Vehle and Representatives Gosch, Abdallah, Boomgarden, Carson, Cronin, Dryden, Fargen, Hawley, Hunhoff (Bernie), Hunt, Kirkeby, Lucas, Novstrup (David), Olson (Betty), Perry, Rausch, Solum, Street, Turbiville, Van Gerpen, Vanneman, and Wismer

1 FOR AN ACT ENTITLED, An Act to prohibit the creation of private transfer fee obligations
2 and to require certain procedures for notice and disclosure for existing private transfer fee
3 obligations.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

5 Section 1. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
6 follows:

7 For the purposes of this Act, the term, transfer, means the sale, gift, conveyance, assignment,
8 inheritance, or other transfer of an ownership interest in real property located in this state.

9 Section 2. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
10 follows:

11 For the purposes of this Act, the term, private transfer fee, means a fee or charge required
12 by a private transfer fee obligation and payable upon the transfer of an interest in real property,



1 or payable for the right to make or accept such transfer, regardless of whether the fee is a fixed
2 amount or is determined as a percentage of the value of the property, the purchase price, or other
3 consideration given for the transfer. The term, private transfer fee, does not include the
4 following:

5 (1) Any consideration payable by the grantee to the grantor for the interest in real
6 property being transferred, including any subsequent additional consideration for the
7 property payable by the grantee based upon any subsequent appreciation,
8 development, or sale of the property if such additional consideration is payable on a
9 onetime basis only and the obligation to make such payment does not bind successors
10 in title to the property. For the purposes of this subdivision, an interest in real
11 property may include a separate mineral estate and its appurtenant surface access
12 rights;

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

18 (3) Any interest, charges, fees, or other amounts payable by a borrower to a lender
19 pursuant to a loan secured by a mortgage against real property, including any fee
20 payable to the lender for consenting to an assumption of the loan or a transfer of the
21 real property subject to the mortgage, any fees or charges payable to the lender for
22 estoppel letters or certificates, and any shared appreciation interest or profit
23 participation or other consideration and payable to the lender in connection with the
24 loan;

- 1 (4) Any rent, reimbursement, charge, fee, or other amount payable by a lessee to a lessor
2 under a lease, including any fee payable to the lessor for consenting to an assignment,
3 subletting, encumbrance, or transfer of the lease;
- 4 (5) Any consideration payable to the holder of an option to purchase an interest in real
5 property or the holder of a right of first refusal or first offer to purchase an interest
6 in real property for waiving, releasing, or not exercising the option or right upon the
7 transfer of the property to another person;
- 8 (6) Any tax, fee, charge, assessment, fine, or other amount payable to or imposed by a
9 governmental authority;
- 10 (7) Any fee, charge, assessment, fine, or other amount payable to a homeowners',
11 condominium, cooperative, mobile home, or property owners' association pursuant
12 to a declaration or covenant or law applicable to such association, including fees or
13 charges payable for estoppel letters or certificates issued by the association or its
14 authorized agent;
- 15 (8) Any fee, charge, assessment, dues, contribution, or other amount pertaining to the
16 purchase or transfer of a club membership relating to real property owned by the
17 member, including any amount determined by reference to the value, purchase price,
18 or other consideration given for the transfer of the real property.

19 Section 3. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
20 follows:

21 For the purposes of this Act, the term, private transfer fee obligation, means an obligation
22 arising under a declaration or covenant recorded against the title to real property, or under any
23 other contractual agreement or promise, whether or not recorded, that requires or purports to
24 require the payment of a private transfer fee to the declarant or other person specified in the

1 declaration, covenant, or agreement, or to any successor or assign, upon a subsequent transfer
2 of an interest in the real property.

3 Section 4. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
4 follows:

5 Any private transfer fee obligation recorded or entered into in this state after June 30, 2011,
6 does not run with the title to real property and is not binding on or enforceable at law or in
7 equity against any subsequent owner, purchaser, or mortgagee of any interest in real property
8 as an equitable servitude or otherwise. Any private transfer fee obligation that is recorded or
9 entered into in this state after June 30, 2011, is void and unenforceable. No private transfer fee
10 obligation recorded or entered into in this state before June 30, 2011, is presumed valid and
11 enforceable.

12 Section 5. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
13 follows:

14 Any person who records or enters into an agreement imposing a private transfer fee
15 obligation in the person's favor after June 30, 2011, is liable for any damages resulting from the
16 imposition of the transfer fee obligation on the transfer of an interest in the real property,
17 including the amount of any transfer fee paid by a party to the transfer, and any attorney fees,
18 expenses, and costs incurred by a party to the transfer or mortgagee of the real property to
19 recover any transfer fee paid or in connection with an action to quiet title. If an agent acts on
20 behalf of a principal to record or secure a private transfer fee obligation, liability shall be
21 assessed to the principal, rather than the agent.

22 Section 6. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
23 follows:

24 Private transfer fee obligations shall be disclosed as follows:

1 (1) For transfers of real property subject to the disclosure requirements contained in
2 §§ 43-4-38 to 43-4-44, inclusive, disclosure of any private transfer fee obligations
3 shall be made using the property condition disclosure statement set forth in
4 § 43-4-44;

5 (2) For transfers of real property not subject to the disclosure requirements contained in
6 §§ 43-4-38 to 43-4-44, inclusive, each seller of real property shall furnish to any
7 purchaser a written statement disclosing the existence of any private transfer fee
8 obligation. This written statement shall include a description of the private transfer
9 fee obligation and include a statement that private transfer fee obligations are subject
10 to certain prohibitions pursuant to this Act. The written document must contain a
11 statement with the following language:

12 A private transfer fee obligation has been imposed with respect to this property. A
13 private transfer obligation may lower the value of this property. State law prohibits
14 the creation of private transfer fee obligations pursuant to section 4 of this Act and
15 requires certain notice procedures to be followed with respect to private transfer fee
16 obligations pursuant to sections 7 to 12, inclusive, of this Act.

17 Section 7. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
18 follows:

19 For any private transfer fee obligation imposed prior to July 1, 2011, the receiver of the fee
20 shall, prior to December 31, 2011, record in the office of the register of deeds in the county in
21 which the real property subject to the private transfer fee is located, a separate document that
22 meets all of the following requirements:

23 (1) The title of the document shall be “Notice of Private Transfer Fee Obligation” in at
24 least fourteen point boldface type;

- 1 (2) The amount, if the fee is a flat amount, or the percentage of the sales price
- 2 constituting the cost of the transfer fee, or such other basis by which the transfer fee
- 3 is to be calculated;
- 4 (3) If the real property is residential property, actual dollar-cost examples of the transfer
- 5 fee for a home priced at one hundred thousand dollars, two hundred fifty thousand
- 6 dollars, and five hundred thousand dollars;
- 7 (4) The date or circumstances under which the private transfer fee obligation expires, if
- 8 any;
- 9 (5) The purpose for which the funds from the private transfer fee obligation will be used;
- 10 (6) The name of the person to which funds are to be paid and specific contact
- 11 information regarding where the funds are to be sent;
- 12 (7) The acknowledged signature of the payee; and
- 13 (8) The legal description of the real property burdened by the private transfer fee
- 14 obligation.

15 Section 8. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
16 follows:

17 The person to whom the transfer fee is to be paid may file an amendment to the notice of
18 transfer fee containing new contact information, but such amendment shall contain the recording
19 information of the notice of transfer fee which it amends and the legal description of the
20 property burdened by the private transfer fee obligation.

21 Section 9. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
22 follows:

23 If the payee fails to comply fully with section 7 of this Act, the grantor of any real property
24 burdened by the private transfer fee obligation may proceed with the conveyance of any interest

1 in the real property to any grantee and in so doing is deemed to have acted in good faith and is
2 not subject to any obligations under the private transfer fee obligation. In such event, the real
3 property thereafter shall be conveyed free and clear of such transfer fee and private transfer fee
4 obligation.

5 Section 10. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
6 follows:

7 If the payee fails to provide a written statement of the transfer fee payable within thirty days
8 of the date of a written request for such statement sent to the address shown in the notice of
9 transfer fee, the grantor, on recording of the affidavit required under section 11 of this Act, may
10 convey any interest in the real property to any grantee without payment of the transfer fee and
11 is not subject to any further obligation under the private transfer fee obligation. In such event
12 the real property shall be conveyed free and clear of the transfer fee and private transfer fee
13 obligation.

14 Section 11. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
15 follows:

16 An affidavit stating the facts enumerated under section 12 of this Act shall be recorded in
17 the office of the register of deeds in the county in which the real property is situated prior to or
18 simultaneously with a conveyance pursuant to section 10 of this Act of real property unburdened
19 by a private transfer fee obligation. An affidavit filed under this section shall state that the
20 affiant has actual knowledge of, and is competent to testify to, the facts in the affidavit and shall
21 include the legal description of the real property burdened by the private transfer fee obligation,
22 the name of the person appearing by the record to be the owner of such real property at the time
23 of the signing of such affidavit, a reference to the instrument of record containing the private
24 transfer fee obligation, and an acknowledgment that the affiant is testifying under penalty of

1 perjury.

2 Section 12. That chapter 43-4 be amended by adding thereto a NEW SECTION to read as
3 follows:

4 If recorded, an affidavit as described in section 11 of this Act constitutes prima facie
5 evidence that:

6 (1) A request for the written statement of the transfer fee payable in order to obtain a
7 release of the fee imposed by the private transfer fee obligation was sent to the
8 address shown in the notification; and

9 (2) The person listed on the notice of transfer fee failed to provide the written statement
10 of the transfer fee payable within thirty days of the date of the notice sent to the
11 address shown in the notification.

12 Section 13. That § 43-4-44 be amended to read as follows:

13 43-4-44. The following form shall be used for the property condition disclosure statement:

14 SELLER'S PROPERTY CONDITION DISCLOSURE STATEMENT

15 (This disclosure shall be completed by the seller. This is a disclosure required by law. If you do
16 not understand this form, seek legal advice.)

17 Seller _____

18 Property Address _____

19 _____

20 This Disclosure Statement concerns the real property identified above situated in the City of
21 _____ County of _____, State of South Dakota.

22 THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE
23 DESCRIBED PROPERTY IN COMPLIANCE WITH § 43-4-38. IT IS NOT A WARRANTY
24 OF ANY KIND BY THE SELLER OR ANY AGENT REPRESENTING ANY PARTY IN

1 THIS TRANSACTION AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR
 2 WARRANTIES THE PARTIES MAY WISH TO OBTAIN. Seller hereby authorizes any agent
 3 representing any party in this transaction to provide a copy of this statement to any person or
 4 entity in connection with any actual or anticipated sale of the property.

5 IF ANY MATERIAL FACT CHANGES BEFORE CONVEYANCE OF TITLE TO THIS
 6 PROPERTY, THE SELLER MUST DISCLOSE SUCH MATERIAL FACT WITH A
 7 WRITTEN AMENDMENT TO THIS DISCLOSURE STATEMENT.

8 I. LOT OR TITLE INFORMATION

9 1. When did you purchase or build the home? _____

10 If the answer is yes to any of the following, please explain under additional comments or on an
 11 attached separate sheet.

12 _____

13 2. Were there any title problems when you purchased the property?

14 Yes ____ No ____

15 3. Are there any recorded liens or financial instruments against the property, other than a first
 16 mortgage?

17 Yes ____ No ____

18 4. Are there any unrecorded liens or financial instruments against the property, other than a
 19 first mortgage; or have any materials or services been provided in the past one hundred
 20 twenty days that would create a lien against the property under chapter 44-9?

21 Yes ____ No ____ Unknown ____

22 5. Are there any easements which have been granted in connection with the property (other
 23 than normal utility easements for public water and sewer, gas and electric service, telephone
 24 service, cable television service, drainage, and sidewalks)?

1 Yes ____ No ____ Unknown ____

2 6. Are there any problems related to establishing the lot lines/boundaries?

3 Yes ____ No ____ Unknown ____

4 7. Do you have a location survey in your possession or a copy of the recorded plat? If yes,
5 attach a copy.

6 Yes ____ No ____ Unknown ____

7 8. Are you aware of any encroachments or shared features, from or on adjoining property (i.e.
8 fences, driveway, sheds, outbuildings, or other improvements)?

9 Yes ____ No ____

10 9. Are you aware of any covenants or restrictions affecting the use of the property in
11 accordance with local law? If yes, attach a copy of the covenants and restrictions.

12 Yes ____ No ____

13 10. Are you aware of any current or pending litigation, foreclosure, zoning, building code or
14 restrictive covenant violation notices, mechanic's liens, judgments, special assessments,
15 zoning changes, or changes that could affect your property?

16 Yes ____ No ____

17 11. Is the property currently occupied by the owner?

18 Yes ____ No ____

19 12. Does the property currently receive the owner occupied tax reduction pursuant to SDCL 10-
20 13-39?

21 Yes ____ No ____

22 13. Is the property currently part of a property tax freeze for any reason?

23 Yes ____ No ____ Unknown ____

24 14. Is the property leased?

1 Yes ____ No ____

2 15. If leased, does the property use comply with local zoning laws?

3 Yes ____ No ____

4 16. Does this property or any portion of this property receive rent? If yes, how much \$ ____ and

5 how often ____?

6 Yes ____ No ____

7 17. Do you pay any mandatory fees or special assessments to a homeowners' or condominium

8 association?

9 Yes ____ No ____

10 If yes, what are the fees or assessments? \$ ____ per ____ (i.e. annually, semi-annually, monthly)

11 Payable to whom: _____

12 For what purpose? _____

13 18. Are you aware if the property has ever had standing water in either the front, rear, or side

14 yard more than forty-eight hours after heavy rain?

15 Yes ____ No ____

16 19. Is the property located in or near a flood plain?

17 Yes ____ No ____ Unknown ____

18 20. Are wetlands located upon any part of the property?

19 Yes ____ No ____ Unknown ____

20 21. Are you aware of any private transfer fee obligations, as defined pursuant to section 3 of this

21 Act, that would require a buyer or seller of the property to pay a fee or charge upon the

22 transfer of the property, regardless of whether the fee or charge is a fixed amount or is

23 determined as a percentage of the value of the property?

24 Yes ____ No ____ Unknown ____

1 If yes, what are the fees or charges? \$ _____ per _____ (i.e. annually, semi-annually,
 2 monthly)

3 II. STRUCTURAL INFORMATION

4 If the answer is yes to any of the following, please explain under additional comments or on an
 5 attached separate sheet.

6 1. Are you aware of any water penetration problems in the walls, windows, doors, basement,
 7 or crawl space?

8 Yes ____ No ____

9 2. What water damage related repairs, if any, have been made?

10 If any, when? _____

11 3. Are you aware if drain tile is installed on the property?

12 Yes ____ No ____

13 4. Are you aware of any interior cracked walls or floors, or cracks or defects in exterior
 14 driveways, sidewalks, patios, or other hard surface areas?

15 Yes ____ No ____

16 What related repairs, if any, have been made?

17 _____

18 5. Are you aware of any roof leakage, past or present?

19 Yes ____ No ____

20 Type of roof covering: _____

21 Age: _____

22 What roof repairs, if any, have been made, when and by whom? _____

23 Describe any existing unrepaired damage to the roof: _____

24 6. Are you aware of insulation in:

- 1 the ceiling/attic? Yes ____ No ____
- 2 the walls? Yes ____ No ____
- 3 the floors? Yes ____ No ____
- 4 7. Are you aware of any pest infestation or damage, either past or present?
- 5 Yes ____ No ____
- 6 8. Are you aware of the property having been treated for any pest infestation or damage?
- 7 Yes ____ No ____
- 8 If yes, who treated it and when? _____
- 9 9. Are you aware of any work upon the property which required a building, plumbing,
- 10 electrical, or any other permit?
- 11 Yes ____ No ____
- 12 If yes, describe the work: _____
- 13 Was a permit obtained? Yes _____
- 14 Was the work approved by an inspector? Yes ____ No ____
- 15 10. Are you aware of any past or present damage to the property (i.e. fire, smoke, wind, floods,
- 16 hail, or snow)?
- 17 Yes ____ No ____
- 18 If yes, describe _____
- 19 Have any insurance claims been made?
- 20 Yes ____ No ____ Unknown ____
- 21 Was an insurance payment received?
- 22 Yes ____ No ____ Unknown ____
- 23 Has the damage been repaired?
- 24 Yes ____ No ____

1 If yes, describe in detail: _____
 2 _____

3 11. Are you aware of any problems with sewer blockage or backup, past or present?

4 Yes ____ No ____

5 12. Are you aware of any drainage, leakage, or runoff from any sewer, septic tank, storage tank,
 6 or drain on the property into any adjoining lake, stream, or waterway?

7 Yes ____ No ____

8 If yes, describe in detail: _____
 9 _____

10 III. SYSTEMS/UTILITIES INFORMATION

	NONE/NOT		NOT
	INCLUDED	WORKING	WORKING
11			
12			
13	1. 220 Volt Service	_____	_____
14	2. Air Exchanger	_____	_____
15	3. Air Purifier	_____	_____
16	4. Attic Fan	_____	_____
17	5. Burglar Alarm and Security System	_____	_____
18	6. Ceiling Fan	_____	_____
19	7. Central Air - Electric	_____	_____
20	8. Central Air - Water Cooled	_____	_____
21	9. Cistern	_____	_____
22	10. Dishwasher	_____	_____
23	11. Disposal	_____	_____
24	12. Doorbell	_____	_____
25	13. Fireplace	_____	_____
26	14. Fireplace Insert	_____	_____
27	15. Garage Door/Opener Control(s)	_____	_____

1	16. Garage Wiring	_____	_____	_____
2	17. Heating System	_____	_____	_____
3	18. Hot Tub, Whirlpool, and Controls	_____	_____	_____
4	19. Humidifier	_____	_____	_____
5	20. Intercom	_____	_____	_____
6	21. Light Fixtures	_____	_____	_____
7	22. Microwave/Hood	_____	_____	_____
8	23. Plumbing and Fixtures	_____	_____	_____
9	24. Pool and Equipment	_____	_____	_____
10	25. Propane Tank	_____	_____	_____
11	26. Radon System	_____	_____	_____
12	27. Sauna	_____	_____	_____
13	28. Septic/Leaching Field	_____	_____	_____
14	29. Sewer Systems/Drains	_____	_____	_____
15	30. Smoke/Fire Alarm	_____	_____	_____
16	31. Solar House - Heating	_____	_____	_____
17	32. Sump Pump(s)	_____	_____	_____
18	33. Switches and Outlets	_____	_____	_____
19	34. Underground Sprinkler and Heads	_____	_____	_____
20	35. Vent Fan	_____	_____	_____
21	36. Water Heater - Electric or Gas	_____	_____	_____
22	37. Water Purifier	_____	_____	_____
23	38. Water Softener - Leased or Owned	_____	_____	_____
24	39. Well and Pump	_____	_____	_____
25	40. Wood Burning Stove	_____	_____	_____

26 IV. HAZARDOUS CONDITIONS

27 Are you aware of any existing hazardous conditions of the property and are you aware of any
28 tests having been performed?

	EXISTING CONDITIONS		TESTS PERFORMED	
	YES	NO	YES	NO
1				
2				
3	1. Methane Gas	_____	_____	_____
4	2. Lead Paint	_____	_____	_____
5	3. Radon Gas (House)	_____	_____	_____
6	4. Radon Gas (Well)	_____	_____	_____
7	5. Radioactive Materials	_____	_____	_____
8	6. Landfill, Mineshaft	_____	_____	_____
9	7. Expansive Soil	_____	_____	_____
10	8. Mold	_____	_____	_____
11	9. Toxic Materials	_____	_____	_____
12	10. Urea Formaldehyde Foam Insulations	_____	_____	_____
13	11. Asbestos Insulation	_____	_____	_____
14	12. Buried Fuel Tanks	_____	_____	_____
15	13. Chemical Storage Tanks	_____	_____	_____
16	14. Fire Retardant Treated Plywood	_____	_____	_____
17	15. Production of Methamphetamines	_____	_____	_____

18 If the answer is yes to any of the questions above, please explain in additional comments or on
 19 an attached separate sheet.

20 V. MISCELLANEOUS INFORMATION

21 1. Is the street or road located at the end of the driveway to the property public or private?
 22 Public _____ Private _____

23 2. Is there a written road maintenance agreement?
 24 If yes, attach a copy of the maintenance agreement.
 25 Yes _____ No _____

26 3. When was the fireplace/wood stove/chimney flue last cleaned?
 27 _____

1 4. Within the previous twelve months prior to signing this document, are you aware of any of
2 the following occurring on the subject property ?

3 a. A human death by homicide or suicide? If yes, explain:

4 _____

5 Yes _____ No _____

6 b. Other felony committed against the property or a person on the property? If yes, explain:

7 _____

8 Yes _____ No _____

9 5. Is the water source public or private (select one) ?

10 6. If private, what is the date and result of the last water test?

11 _____

12 7. Is the sewer system public _____ or private _____ (select one)?

13 8. If private, what is the date of the last time the septic tank was pumped? _____

14 9. Are there broken window panes or seals?

15 Yes _____ No _____

16 If yes, specify: _____

17 10. Are there any items attached to the property that will not be left, such as: towel bars,
18 mirrors, swag lamps and hooks, curtain rods, window coverings, light fixtures, clothes lines,
19 swing sets, storage sheds, ceiling fans, basketball hoops, mail boxes, etc.

20 Yes _____ No _____

21 If yes, please list _____

22 11. Are you aware of any other material facts or problems that have not been disclosed on this
23 form?

24 Yes _____ No _____

1 If yes, explain: _____

2 VI. ADDITIONAL COMMENTS (ATTACH ADDITIONAL PAGES IF NECESSARY)

3 _____

4 _____

5 CLOSING SECTION

6 The Seller hereby certifies that the information contained herein is true and correct to the best
7 of the Seller's information, knowledge, and belief as of the date of the Seller's signature below.

8 If any of these conditions change before conveyance of title to this property, the change will be
9 disclosed in a written amendment to this disclosure statement.

10 SELLER _____ DATE _____

11 SELLER _____ DATE _____

12 THE SELLER AND THE BUYER MAY WISH TO OBTAIN PROFESSIONAL ADVICE
13 AND INSPECTIONS OF THE PROPERTY TO OBTAIN A TRUE REPORT AS TO THE
14 CONDITION OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS
15 IN ANY CONTRACT OF SALE AS NEGOTIATED BETWEEN THE SELLER AND THE
16 BUYER WITH RESPECT TO SUCH PROFESSIONAL ADVICE AND INSPECTIONS.

17 I/We acknowledge receipt of a copy of this statement on the date appearing beside my/our
18 signature(s) below. Any agent representing any party to this transaction makes no
19 representations and is not responsible for any conditions existing in the property.

20 BUYER _____ DATE _____

21 BUYER _____ DATE _____