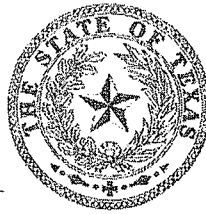


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ID # 48278

OPINION COMMITTEE STATE REPRESENTATIVE  
JAMES WHITE

CORRECTIONS - CHAIR  
INTERNATIONAL TRADE &  
INTERGOVERNMENTAL AFFAIRS

DISTRICT 19  
HARDIN, JASPER  
NEWTON, POLK, TYLER

January 8, 2018

RQ-0205-KP

The Honorable Ken Paxton  
Office of the Attorney General  
Attention Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

RE: Request for Opinion on Consequence of Failures related to Private Transfer Fee Obligations

Via email to [opinion.committee@oag.texas.gov](mailto:opinion.committee@oag.texas.gov)

Dear Attorney General Paxton:

I respectfully request an opinion on the consequences of failing to comply with requirements for continuation of existing private transfer fee (PTF) obligations as mandated in the Texas Property Code and the enforceability of a PTF on land that has changed from residential to commercial or when the use of the PTF proceeds has changed. I find these questions to be ones of public interest.

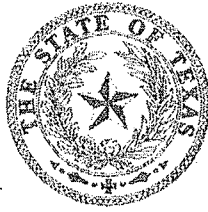
**If a person who receives a PTF fails to comply with the notice requirements of Texas Property Code § 5.203, is the PTF obligation void? Is the PTF enforceable against a subsequent conveyance of the property?**

**Is failure to meet just one requirement of Texas Property Code § 5.203 sufficient to void the PTF obligation?**

**Does the change in the use of the land affect the validity or enforceability of the PTF obligation?**

**What manner of disclosure of an existing PTF obligation is required to be given to a potential purchaser of real property that is encumbered by a PTF obligation under Texas Property Code § 5.205? When must this disclosure be made?**

Background



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STATE REPRESENTATIVE  
**JAMES WHITE**

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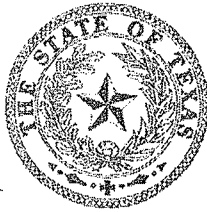
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A private transfer fee “means an amount of money, regardless of the method of determining the amount, that is payable on the transfer of an interest in real property or payable for a right to make or accept a transfer.” Tex. Prop. Code § 5.201(4). PTFs are covenants—typically for a term of 99 years—placed on real estate and that generally require a buyer to pay a fee, typically 1–2% of a sales price, to a builder, developer or other party prior to a property being transferred between owners during a real estate transaction. After PTFs came into existence, opposition grew against PTF covenants because these covenants transfer a less secure interest in the property to the purchaser and provide no added benefit to consumers.

To limit, and ultimately end, the many restraints imposed by PTFs, several states—including Texas—passed laws prohibiting or restricting PTFs. In 2011, the Legislature passed House Bill 8. The goal of HB 8 was to end the imposition of PTFs in Texas, and, in fact, the newly enacted law prohibits all future PTFs, with a few exceptions not relevant here. *See* Tex. Prop. Code § 5.202 (“a private transfer fee obligation created on or after [June 17, 2011] is not binding or enforceable against a subsequent owner or subsequent purchaser of an interest in real property and is void”).

Important here, HB 8 also added strict notice and disclosure requirements for continuation of existing private transfer fee obligations. *See* Tex. Prop. Code §§ 5.203–.204. Each person who received a PTF as of June 17, 2011 was required, on or before January 31, 2012, to file for record a “Notice of Private Transfer Fee Obligation.” *Id.* § 5.203(a). This notice must also meet certain specified criteria, including a minimum font size, the amount of the fee, contact information for the payee, and a legal description of the property subject to the PTF. *Id.* § 5.203(c). A person who receives a PTF must also refile the notice “not earlier than the 30th day before the third anniversary of the original filing date described by Subsection(a) and within a similar 30-day period every third year thereafter.” *Id.* § 5.203(d)(1). Such person must also “amend the notice to reflect any change in the name or address of any payee included in the notice not later than the 30th day after the date the change occurs.” *Id.* § 5.203(a). A PTF is void and payment may not be required “[i]f a person required to file a notice under this section fails to comply with this section.” *Id.* § 5.203(f).

**If a person who receives a PTF fails to comply with the notice requirements of Texas Property Code § 5.203, is the PTF obligation void? Is the PTF enforceable against a subsequent conveyance of the property?**



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In order to maintain a PTF obligation that existed before HB 8, various notice requirements must be met. *See* Tex. Prop. Code § 5.203. Subsection (f) contemplates that the PTF obligation can be void and unenforceable for failure to comply with § 5.203. For example, the payee is required to amend the notice to reflect a change in the address of the payee by the 30th day after the date the change had occurred, as mandated by section 5.203(d)(2). If the payee did in fact amend this notice, but failed to do so by the 30th day, is the PTF obligation void and unenforceable?

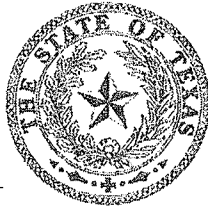
A notice must be printed in at least 14-point boldface type and the notice must state the legal description of the property subject to the private transfer fee obligation. *Id.* § 5.203(c)(1) & (c)(8). Is the PTF obligation valid and enforceable if parts of the notice are in the required 14-point font, but the legal description of the property is in font much smaller than 14-point? Is the PTF obligation valid and enforceable if the legal description of the property is not included in the notice itself, but attached separately, in multiple exhibits to the notice?

**Is failure to meet just one requirement of Texas Property Code § 5.203 sufficient to void the PTF obligation?**

Texas Property Code § 5.203 lists over a dozen separate requirements for a recipient of a PTF to continue an existing PTF obligation. These requirements range from deadlines, to specific inclusions, to font size. Subsection (f) provides consequences for when someone "fails to comply with this section". Is failure to meet just one of the requirements sufficient to void the obligation? For example, if all other requirements are met, but the deadline to amend the notice to reflect a change in the address of the payee is not met, is the PTF obligation associated with that notice void and unenforceable against any subsequent sale?

**Does the change in the use of the land affect the validity or enforceability of the PTF obligation?**

If, at the time the PTF obligation was created, the land it encumbers is used for residential purposes, does it affect the validity or enforceability of the PTF obligation if that land use is later changed to commercial use. What if the use of the PTF proceeds changes over time from what was put in the encumbrance creating the PTF obligation. For example, if the original PTF proceeds were stated as going to maintenance/upkeep of the property or for some other form of non-profit purpose, but later the proceeds from the PTF obligation are directed to supporting a for-profit endeavor, is the validity or enforceability of the PTF obligation affected?



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**What manner of disclosure of an existing PTF obligation is required to be given to a potential purchaser of real property that is encumbered by a PTF obligation under Texas Property Code § 5.205? When must this disclosure be made?**

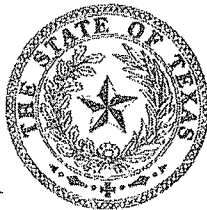
Texas Property Code § 5.205 requires that a “seller of real property that may be subject to a private transfer fee obligation shall provide written notice to a potential purchaser that the obligation may be governed by this subchapter.” What form should this disclosure take? Is it appropriate for this disclosure to be merely inserted somewhere within the voluminous documents, clauses, and disclosures that accompany real estate transactions in Texas? To ensure fair and adequate notice to the potential purchaser, is this disclosure required to be provided in a way that makes it impossible for the potential purchaser to not know of its existence? When should this disclosure be made to the potential purchaser? For example, is it proper that this disclosure can be made after a potential purchaser has invested money in their potential purchase? Is the PTF obligation void if this disclosure is not made properly?

**Conclusion**

In 2011, the Texas Legislature amended chapter 5 of the Texas Property Code and eliminated private transfer fee obligations (PTFs), establishing strict renewal and notice requirements for existing obligations. My constituents and other property owners across the state would benefit from guidance from the Attorney General regarding the consequences when certain requirements governing PTF obligations are not met. The relevant law is relatively new and little if any guidance or case law exists to provide home owners certainty as to their rights under the law.

Please advise if you require any clarification or additional information from my office in order to properly evaluate this request and issue your opinion. Thank you for your attention to this matter.

Sincerely,



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STATE REPRESENTATIVE  
**JAMES WHITE**

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For God and Texas,

A handwritten signature in black ink, appearing to read "J. White".

James White  
State Representative  
House District 19