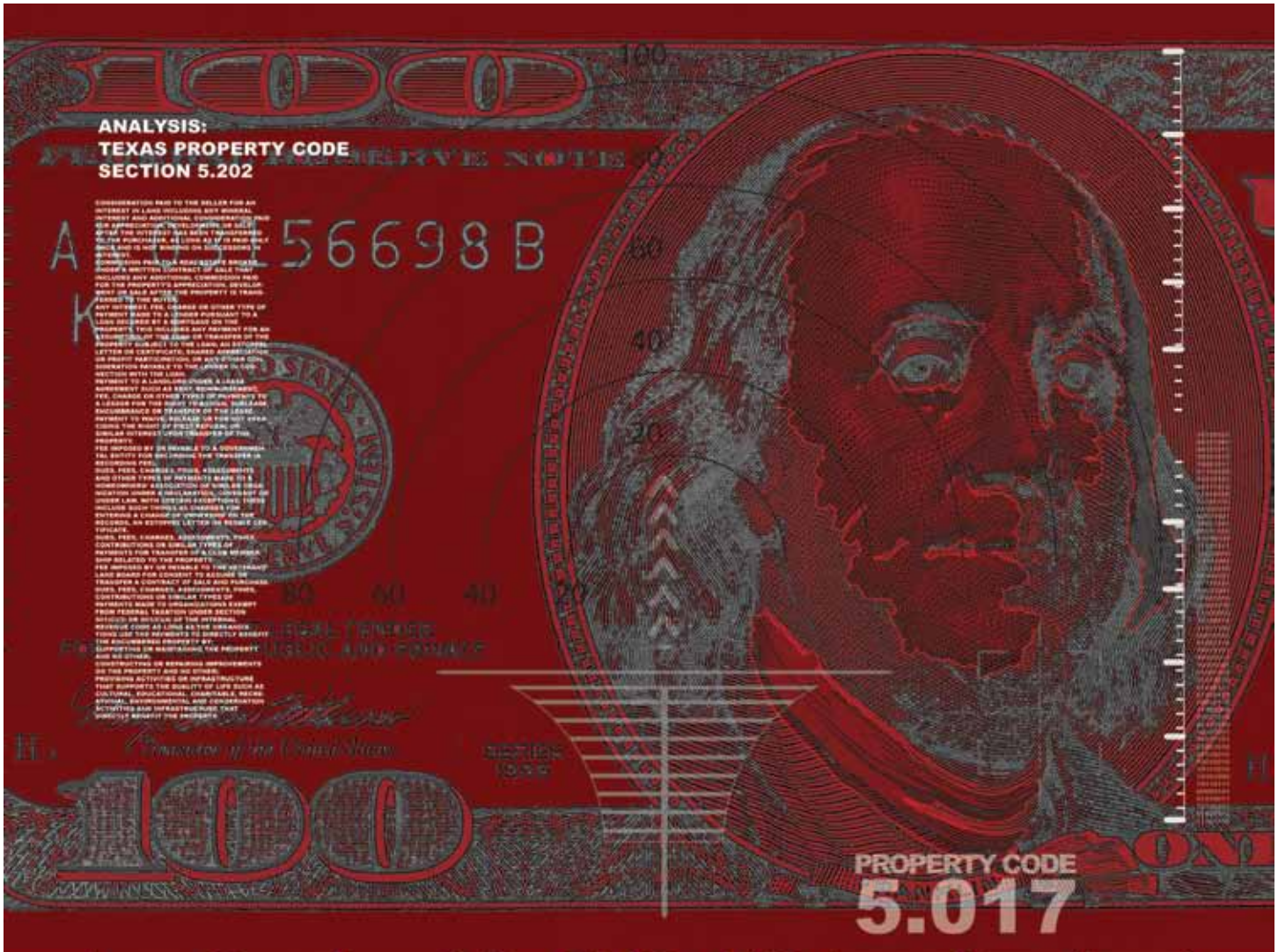


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TERMINATED

TRANSFER FEES OUTLAWED

BY JUDON FAMBROUGH

A new statute voids all future private transfer fee obligations created in Texas after June 17, 2011, and terminates existing transfer fees that do not comply with specific future obligations.

Payments Not Considered Transfer Fee Obligations

The Texas Property Code lists ten payments associated with the transfer of real property that are *not* considered private transfer fee obligations and thus are not prohibited (Section 5.202). They are:

- Consideration paid to the seller for an interest in land including any mineral interest and additional consideration paid for appreciation, development or sale after the interest has been transferred to the purchaser, as long as it is paid only once and is not binding on successors in interest.
- Commission paid to a real estate broker under a written contract of sale that includes any additional commission

paid for the property's appreciation, development or sale after the property is transferred to the buyer.

- Any interest, fee, charge or other type of payment made to a lender pursuant to a loan secured by a mortgage on the property. This includes any payment for an assumption of the loan or transfer of the property subject to the loan; an estoppel letter or certificate; shared appreciation or profit participation; or any other consideration payable to the lender in connection with the loan.
- Payment to a landlord under a lease agreement such as rent, reimbursement, fee, charge or other types of payments to a lessor for the right to assign, sublease, encumbrance or transfer of the lease.
- Payment to waive, release or for not exercising the right of first refusal or similar interest upon transfer of the property.

- Fee imposed by or payable to a governmental entity for recording the transfer (a recording fee).
- Dues, fees, charges, fines, assessments and other types of payments made to a homeowners' association or similar organization under a declaration, covenant or under law. With certain exceptions, these include such things as charges for entering a change of ownership on the records, an estoppel letter or resale certificate.
- Dues, fees, charges, assessments, fines, contributions or similar types of payments for transfer of a club membership related to the property.
- Fee imposed by or payable to the Veterans' Land Board for consent to assume or transfer a contract of sale and purchase.
- Dues, fees, charges, assessments, fines, contributions or similar types of payments made to organizations exempt from federal taxation under Section 501(c)(3) or 501(c)(4) of the Internal Revenue Code as long as the organizations use the payments to *directly benefit* the encumbered property by:
 - ♦ supporting or maintaining the property and no other;
 - ♦ constructing or repairing improvements on the property and no other;
 - ♦ providing activities or infrastructure that supports the quality of life such as cultural, educational, charitable, recreational, environmental and conservation activities and infrastructure that directly benefit the property.

The statute qualifies the requirement that the activities or infrastructure must *directly benefit* the encumbered property. The benefits may *collaterally benefit* a community located next to the property or whose boundary lies within 1,000 yards of the property. Likewise, an organization may provide a *direct benefit* by meeting three qualifications:

- The organization provides activities or infrastructure to the general public.
- The activities or infrastructure substantially benefit the encumbered property as well as the general public.
- The governing body of the organization is controlled by the owners of the encumbered property and approves the payments for the activities or infrastructure annually.

Also, the organization may provide activities or infrastructure at no charge to another organization exempt from federal taxation under Sections 501(c)(3) or 501(c)(4) for small or insignificant usage without violating the requirement.

Requirements for Existing Transfer Fee Obligations to Continue

Although the statute grandfathers existing transfer fee obligations, it includes several requirements for their continued existence. Notably, a person or persons entitled to receive a transfer fee payment must file a "Notice of Private Transfer

Fee Obligation" on or before Jan. 31, 2012. The notice must be filed in the real property records of each county in which the property is located. If there are multiple payees of the fee, the notice must designate one person as the payee of record to receive the fee.

The notice must be printed in at least 14-point bold-face type and state the amount of the fee and the method used for its determination. In addition, the notice must contain the:

- date or circumstances under which the fee obligation expires, if any;
- purpose for which the fee will be used;
- name of each payee and his or her contact information even though only one person has been designated the payee of record;
- name and address of the payee of record to whom the fee must be sent;
- legal description of the property subject to the fee; and
- signature and acknowledgment of each payee or his or her authorized representative.

A person or persons entitled to receive a transfer fee payment must file a "Notice of Private Transfer Fee Obligation" on or before Jan. 31, 2012.

Refiling and Amending the Notice

After the initial notice has been filed on or before Jan. 31, 2012, the payee of record must file the notice *every three years thereafter*. In particular, it must be filed no sooner than the 30th day before the expiration of the third anniversary date of the original filing.

In addition to filing the notice every third year, an amendment must be filed each time a payee changes. The amendment must be filed within 30 days after the change. The amendment must contain the information found in the original notice, the legal description of the property and the name and contact information of the new payee.

Failure to File Required Notices or Receive Payments

If the required notices are not filed on time, the transfer fee terminates. The statute states that if the person required to file the notices fails to do so, the following three things occur:

- payment of the private transfer fee may not be required for the conveyance of an interest in the property to a subsequent purchaser;
- the property is no longer subject to the private transfer fee obligation; and
- the private transfer fee obligation becomes void.

The statute also addresses the timely acceptance of the payment. If the payee of record fails to accept the private transfer fee within 30 days after being tendered, a similar fate awaits both the fee and the obligation. In that case:

- payment must be returned to the payor;
- payment of the fee is no longer required for a subsequent conveyance of an interest in the property; and
- property is no longer subject to the private transfer fee obligation.

If the payee of record fails to accept the private transfer fee within 30 days after being tendered, the property is no longer subject to the private transfer fee obligation.

New Contractual Requirement

Starting Jan. 1, 2012, the seller of real property that is or may be subject to a private transfer fee obligation must provide written notice to a potential purchaser that the obligation may be governed by Subchapter G of the Property Code. The statutory heading to this requirement indicates that the notice must be placed in the *contract for sale*. However, the text (or body) of the law does not indicate exactly how the notice must be conveyed. The language simply states the *potential purchaser* shall receive written notice of this fact.

Even more importantly, nothing in the statute addresses the legal consequences for failing to provide this written notice to a potential purchaser.

Waivers and Enforcement

The statute clearly discourages any attempts to waive its provisions. Any provision that purports to waive any rights given a purchaser under the statute is void.

The statute ends by giving the attorney general and the courts certain rights to enforce and punish those who violate its provisions. First, the attorney general is empowered to file an injunction or declaratory relief to restrain the violation of the statute. Second, the attorney general may institute an action

for civil penalties against a payee or the payee of record for failing to file the required notices. The civil penalty may not exceed twice the amount of the fee charged or collected.

Finally, if there is a pending action against a payee or the payee of record by the attorney general for failing to file the notices, and the court finds that the violations are so frequent that they constitute a pattern or practice, the court may assess a civil penalty no greater than \$250,000. If this is the case, the statute disallows the attorney general from collecting the civil penalty noted above. All the penalties collected must go to the comptroller and be deposited in the general revenue fund.

Unanswered Questions

The new statute raises several questions. For one, who checks compliance? If the payee fails to file an amendment within the required 30 days, who will know? Must an amendment be filed if there is a change in the contact information of a payee, but the payee remains the same? If the payee of record fails to accept the payment within 30 days after being tendered, how is this monitored and how are the 30 days calculated? Must the required tender occur by mail or in person?

What about the disclosure regarding the use of the payment? What are the consequences of giving false information? Does fraud affect the status of the transfer fee payment?

What are the consequences for failing to inform a potential purchaser that the property may be subject to the new statute after Jan. 1, 2012? The statute imposes rather stiff penalties on other violations, but it is silent on this one.

What happens if the payee does not file the Notice of Private Transfer Fee Obligation within the prescribed three-year period? Is the title company liable for withholding the transfer fee even though it has been statutorily terminated? Or, does the duty to check on the required filings fall on the potential purchaser?

Finally, why is no private right of enforcement given to individuals? The only enforcement power mentioned in the statute belongs to the attorney general and the courts. And, if a failure to file a required notice terminates the transfer fee, why impose civil fines and penalties thereafter? ❖

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THE TAKEAWAY

Transfer fees, money paid for transferring interest in real property, were implemented in 2007 legislation. Four years later, that law was repealed, prohibiting any future transfer fees and terminating existing fees that do not comply with the new statutory requirements.

NEED TO KNOW

ANALYSIS:
SUBCHAPTER G
SECTION 5.201-5.207

In 2007, the Texas Legislature passed HB 2207, implementing Section 5.017 of the Property Code, which recognized transfer fees in limited situations.

(For details, see "Transfer Fees: More Than You Bargained For," <http://recenter.tamu.edu/pdf/1943.pdf>).

Four years later, the 82nd Texas Legislature repealed that law and enacted Sections 5.201 through 5.207, better known as Subchapter G of the Property Code.

The new law begins by defining relevant terms used throughout the statute.

TRANSFER

the sale, gift, conveyance, assignment, inheritance or other transfer of an ownership interest in real property.

PRIVATE TRANSFER FEE

an amount of money, regardless of the method of determining the amount, payable on the transfer of an interest in real property or payable for a right to make or accept a transfer.

PRIVATE TRANSFER FEE OBLIGATION

an obligation to pay a private transfer fee created under (1) a declaration or other covenant recorded in the real property records in the county where the property subject to the private transfer fee obligation is located or (2) a recorded or unrecorded contractual agreement or promise.

SUBSEQUENT OWNER

a person who acquires real property by transfer from a person other than the person who is the seller of the property on the date the private transfer fee obligation is created.

SUBSEQUENT PURCHASER

a person who purchases real property from a person other than the person who is the seller on the date the private transfer fee obligation is created. The term includes a lender who provides a mortgage loan to a subsequent purchaser.

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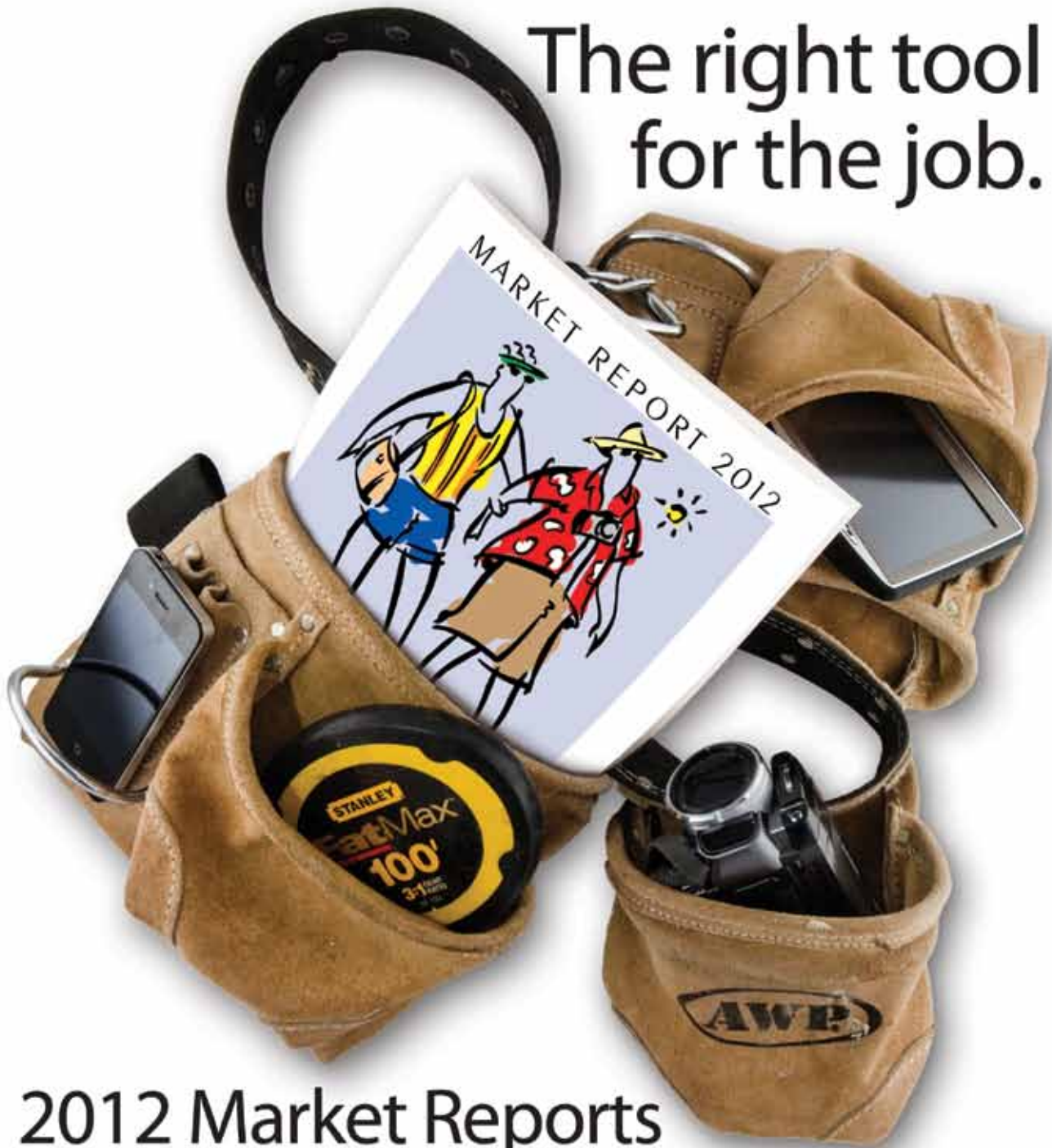
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Tierra Grande (ISSN 1070-0234) is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, \$20 per year. Views expressed are those of the authors and do not imply endorsement by the Real Estate Center, Mays Business School or Texas A&M University. The Texas A&M University System serves people of all ages, regardless of socioeconomic level, race, color, sex, religion, disability or national origin. Photography/Illustrations: JP Beato III, p. 1.



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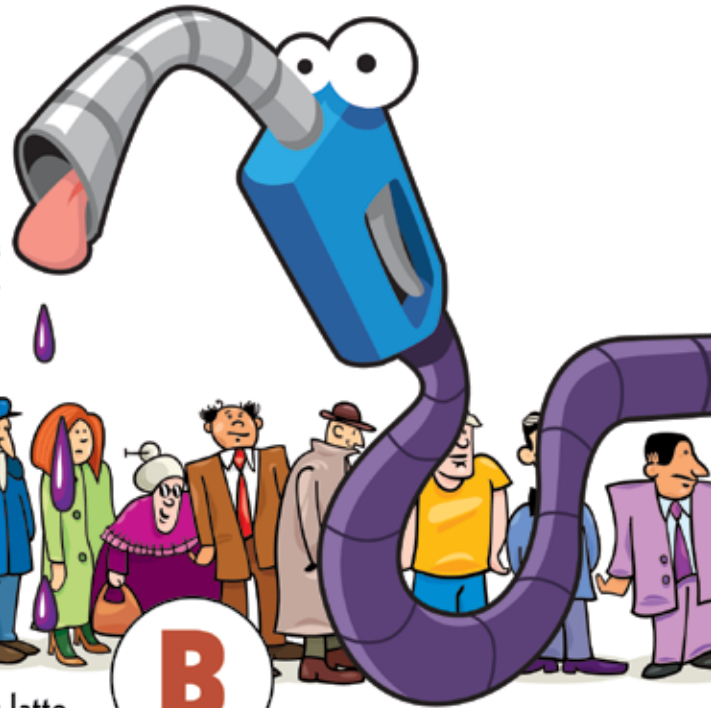
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C

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