NATIONAL
COMMUNITY
REINVESTMENT
COALITION

NCRC

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September 7, 2012

Alfred M. Pollard, General Counsel
Office of the General Counsel
Federal Housing Finance Agency
400 Seventh Street NW
Washington, DC 20024

Re: No. 2012-N-11, The Use of Eminent Domain to Restructure Performing Loans

Dear Mr. Pollard:

The National Community Reinvestment Coalition has dedicated itself to the mission of building and protecting wealth in America's underserved communities for more than 20 years. For many families, a home is the single most important financial asset that they own. Therefore, questions of whether individuals can afford to remain in their homes and whether homes continue to serve as wealth-generating assets are core concerns for NCRC and our more than 600 member organizations. It is with these issues in mind that we respond to the Federal Housing Finance Agency's request for input on the use of eminent domain to acquire mortgages.

The notice indicates "FHFA has significant concerns about the use of eminent domain to revise existing financial contracts and the alteration of the value of Enterprise or Bank securities holdings."[i] NCRC firmly believes that these concerns are misplaced. Yes, eminent domain is an extraordinary power. But there can be little doubt that, when it comes to the housing crisis, states, municipalities, and communities across the country are facing extraordinary challenges. There is an urgent and immediate need to keep more families in their homes.

The size and scope of the problem cannot be overstated. Nearly 12 million homes are worth less than their mortgages.[ii] Of those underwater homes, more than 4 million are already seriously in default, in foreclosure, or foreclosed upon but not yet liquidated. Another 2.5 million of those mortgages are headed in the same direction with their owners being behind by two to four payments. In total, analysts predict that somewhere between 7.5 million to 9.5 million homes could be added to the inventory of our already depressed housing market just over the next few years. These are real problems and they require real solutions.

So far, Fannie, Freddie, and the mortgage industry's efforts to address these issues have been less than successful. The numbers speak for themselves. Since the beginning of the housing crisis, only 2.7 million mortgages have actually been modified. Forty percent of these modifications reduced payments by less than 10 percent. A mere 100,000 loans have been modified by reductions to principal and the majority of those reductions have come nowhere close to lowering the mortgage to near the home's actual value. Accordingly, anyone who has been paying attention will be not shocked to learn that less than half of the 2.7 million modified mortgages are currently performing.

In addition to homeowners, states and municipalities are bearing the brunt of these failures. A survey by the National League of Cities found that foreclosures and the declining housing market are among the leading causes of fiscal budget crises.[iii] Studies show that a single foreclosure can cost a local government between $5,000 to $34,000.[iv] In addition to the financial costs, researchers have also found a connection between foreclosures and criminal activity. One study reports that violent crime increases 2.33% for every 1% increase in foreclosures.[v]

In the face of these consequences, it should come as no surprise that states and municipalities are considering every option available to prevent additional foreclosures. It is NCRC's position that eminent domain should be considered as a tool among those options and that the decision of whether or not to exercise that authority rests solely with the state and local governments vested with the power. To put it simply, the use of eminent domain is a policy decision and one that should be made for communities by the local officials who were elected to govern them. We see no room for the Federal Housing Finance Agency to play a role in that decision process.

Moreover, to the extent that the FHFA has determined that action may be necessary to avoid a risk to safe and sound operations at Fannie, Freddie, and the Federal Home Loan Banks, NCRC is troubled by the FHFA's assessment of its safety and soundness obligations as both a regulator and a conservator. Financial institutions are not made safer or more sound by being allowed to continue to hide the true extent of their losses. To the contrary, the assignment of artificially high and inflated values to mortgage assets worth considerably less is exactly what got the market in trouble in the first place. Delaying the decision to deal with a problem does not make that problem disappear.

There is a legal distinction between eminent domain and an unjust taking that the FHFA's preliminary analysis appears to overlook. An unjust taking, which is unconstitutional under the Fifth Amendment, occurs when the government takes property without providing just compensation.[vi] The use of eminent domain, however, is predicated upon the notion that the government, out of public necessity, may lawfully compel the transfer of property in exchange for its fair market value.[vii] In the eyes of the Supreme Court, that right is inherent to the government and absolutely necessary:

> "[I]n every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large....This power, denominated

> "eminent domain" of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise."[viii]

It appears that the FHFA is somewhat uncomfortable with the idea that local governments could be forced to step in to compel the alteration and revision of the values of Fannie, Freddie, and the Banks' mortgage holdings. We find the idea uncomfortable and troubling too, but for a very different reason. For NCRC and our members, the really discomforting fact in this situation is that the FHFA is not already requiring Fannie, Freddie, and the Banks to perform principal correction as a matter of its own general policies. The decision not to do so represents a lack of leadership from an entity that is charged with the core mission of supporting the housing market. To the extent that state and local governments are considering whether to step up and fill that leadership void, we applaud their willingness to do so. NCRC firmly believes that the market will not recover unless struggling homeowners are given a real opportunity to remain in their homes. Principal reduction remains one of the best ways to accomplish that objective.

NCRC and our more than 600 member organizations appreciate the opportunity to share our views on the use of eminent domain and the FHFA's interest in soliciting input from the public. If you have any questions or need additional information regarding our comment, please do not hesitate to contact me or Mitria Wilson, Director of Legislative and Policy Advocacy, at (202) 464-2722.

Sincerely,

John Taylor
President and CEO

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[i] Federal Housing Finance Agency, No. 2012-N-11, Use of Eminent Domain to Restructure Performing Loans, Federal Register, Vol.77, No. 154.

[ii] The U.S. Housing Market: Current Conditions and Policy Considerations 10. Board of Governors of the Federal Reserve. January 2012.

[iii] Housing Finance and Foreclosure Crisis: Local Impacts and Responses. Christina McFarland and William McGahan, National League of Cities. April 2008.

[iv] The Municipal Cost of Foreclosures: A Chicago Case Study. William Agpar, Mark Duda and Rochelle Nawrocki Gorey, Homeownership Preservation Foundation. 2005.

[v] The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime. Daniel Immergluck and Geoff Smith, Federal Reserve Bank of Chicago, 2005.

[vi] *See, e.g. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985).
[vii] *Kelo v. City of New London, Conn.*, 545 U.S. 469, (2005).
[viii] *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U.S. 685 (1897).