Kelley R. Carroll*†
Peter H. Cuttitta*
Steven C. Gross*
Brian C. Hanley*
Stephen C. Lieberman
James L. Porter, Jr.*
James E. Simon

Timothy D. Casey, *Of Counsel* **
Dennis W. De Cuir, A Law Corporation, *Of Counsel*
Joseph W. Tillson, *Of Counsel* †

† Certified Specialist in Estate Planning, Trust & Probate Law
** Also licensed in Nevada*
*** Also licensed in District of Columbia*

Reply to Truckee Office

April 1, 2011

VIA E-MAIL: RegComments@fhfa.gov
AND REGULAR MAIL

Alfred M. Pollard, General Counsel
ATTN: Comments/RIN 2590-AA41
Federal Housing Finance Agency
1700 G Street, N.W.
Washington, DC 20552

Re: Comments on Proposed FHFA Regulation Restricting Permissible Real Estate Private Transfer Fee Covenants (REVISED)

Dear Mr. Pollard:

Please accept the following comments on the proposed transfer fee covenant Regulation.

As a California real estate attorney, I represent several clients who pursued projects which included, as an element of the overall plan of development, the imposition of recorded transfer fee covenants. The covenants are all no more than one-half of one percent of the sales price. They all benefit our local (small town) community, by providing a source of financing for affordable housing, creek restoration and acquisition of nearby open space lands. None of the covenants my clients have recorded directly benefit the developer. Nor should they. I support the proposed prohibition against transfer fee covenants that directly benefit the developer.

I also appreciate that the proposed Regulation is to be prospective only. To make the Regulation retroactive would be disastrous for property owners with recorded covenants, who would be unable to finance their properties.

As the drafters of the proposed Regulation may know, California Civil Code section 1368(c) prohibits homeowner associations and "community service organizations" as defined, from receiving fees in connection with the transfer of title to property in a common interest (subdivision) development. In short, California law prohibits many of the categories of transfer fee covenants that would remain viable under the proposed FHFA Regulation.

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TRUCKEE 40200 Truckee Airport Road, Truckee, California 96161 phone (530) 587-2002 fax (530) 587-1316
RENO SOUTH LAKE TAHOE
www.portersimon.com

Below are some specific drafting recommendations for section 1228.1 (Definitions), designed to allow tax-exempt non-profit organizations to accept transfer fees and use those fees for the benefit of the owners of the encumbered properties or adjacent or contiguous properties.

I find the definition of "direct benefit" confusing. That said, the word "exclusively" should be replaced with "primarily" in the definition of "direct benefit." Any fee for improvements that purports to "exclusively" be a "direct benefit" to a property most certainly would benefit neighboring, but perhaps not "adjacent or contiguous" property. Under such circumstances, the fee covenant would be disallowed if the exclusive benefit requirements remain an element of the regulation's definition of "direct benefit." Or in the alternative, perhaps you could develop language like: "A direct and significantly measureable benefit to the encumbered property or neighborhood or local community."

The words "adjacent or contiguous property" as used in the "direct benefit" definition also seem unnecessarily restrictive and should be replaced with language that allows the benefit to extend to property in "reasonable proximity" to the encumbered property. By way of example, our small mountain community relies heavily on transfer fees for the acquisition of open space and preservation of trails that are close to the subdivision that is encumbered by the fee covenant but not always "adjacent or contiguous" – so the covenant would be impermissible under the currently proposed text of the regulation.

Language slightly broader than proposed in the Regulation would allow these community benefits (that benefit the encumbered property) to continue.

1,000 Yards. If the Regulation must include a "not to exceed" limit (which I question), it should be three or four miles, not 1,000 yards. For example, I represent a client who is desirous of restoring approximately four miles of watershed upstream of a proposed subdivision. The stream is a major contributor of sediment into the Truckee River. The subdivision, just downstream, is a perfect fit for the subdivision property owners to pay a transfer fee to restore the upstream watershed and stream that runs through their subdivision. The "1,000 yards" limitation prohibits that and yet to provide any meaningful and measurable benefit to upland stream purification and to the quality of waters flowing through the development, remedial work would need to include areas significantly in excess of 1000 yards.

I hope the Regulation drafters understand that local communities benefit from transfer fee covenant revenues.

California law mandates notice of transfer fee covenants, so purchasers acquire residential real estate with full knowledge of a recorded transfer fee covenant. Besides, the covenants are recorded. I personally know many buyers who eagerly purchased their burdened properties—proud to contribute to the community with their transfer fee payments.

Thank you for your consideration.

Very truly yours,

PORTER SIMON
Professional Corporation

JAMES L. PORTER, JR.
porter@portersimon.com

JLP/tc