

National Association of Home Builders

NAHB Regulatory Affairs Group

1201 15th Street NW
Washington, DC 20005

T 800 368 5242 x8265
F 202 266 8333
dledford@nahb.org

www.nahb.org



April 11, 2011

VIA electronic mail to RegComments@fhfa.gov, and Federal Rulemaking Portal:
<http://www.regulations.gov>

Mr. Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
1700 G Street, NW, Fourth Floor
Washington, D.C. 20552

**Re: Comments by the National Association of Home Builders Regarding
Notice of Proposed Rulemaking; Request for Comment on Private
Transfer Fee Covenants (RIN 2590-AA41)**

Dear Mr. Pollard:

On behalf of the National Association of Home Builders, I thank you for the opportunity to submit comments in response to the above-referenced Notice of Proposed Rulemaking (Proposed Rule) issued by the Federal Housing Finance Agency (FHFA) and published in the Federal Register on February 8, 2011.¹

The National Association of Home Builders (NAHB) is a Washington, D.C. based trade association whose mission is to enhance the climate for housing and the building industry. A federation of more than 800 state and local associations, NAHB has over 160,000 members who construct approximately 80 percent of the new homes built each year in the United States. NAHB's members are engaged in all facets of the building industry, including single family and multifamily housing, remodeling, and other aspects of residential and light commercial construction.

¹ Private Transfer Fees, 76 Fed. Reg. 6702 (proposed February 8, 2011) (to be codified at 12 C.F.R. pt. 1228).

Background

FHFA initially addressed PTFs through a Proposed Guidance published in the Federal Register on August 16, 2010.² The Proposed Rule on private transfer fees (PTFs) addresses comments received in response to FHFA's Proposed Guidance that would limit Fannie Mae, Freddie Mac and the Federal Home Loan Banks (Regulated Entities) from dealing in mortgages on properties encumbered by PTF covenants and related securities. In its Proposed Rule, FHFA notes that the more than 4,210 comments received in response to the Proposed Guidance generally fell into five categories:

1. A complete ban on PTFs;
2. PTFs for condominiums, cooperatives, and homeowners associations (HOAs);
3. PTFs for tax-exempt non-profit organizations providing activities that directly benefit the encumbered property;
4. PTFs for general welfare purposes, even if they do not benefit the encumbered property; and,
5. PTFs paid to for-profit entities that would securitize and sell the PTF income streams to investors.

NAHB filed comments in response to the Proposed Guidance on October 15, 2010. In those comments, NAHB urged FHFA not to prohibit the regulated entities from dealing in mortgages with properties that have existing voluntarily established PTF covenants, or where the voluntarily established PTF is clearly disclosed, and where such fees are used to benefit:

1. a property owners' association that manages the subdivision;
2. a nonprofit that meets Internal Revenue Code tax-exempt requirements; or,
3. a government entity.

FHFA states that in response to the many comments received on the Proposed Guidance it is issuing the Proposed Rule with a narrower focus and specified exceptions. The Proposed Rule specifies that the regulated entities are not permitted to purchase, invest in or accept as collateral any mortgages on properties encumbered by PTF covenants, securities backed by such mortgages or securities backed by the income stream from PTFs. Exceptions are provided for entities similar to HOAs and tax-exempt organizations that use PTF proceeds for the direct benefit of the encumbered properties. The rule also would exclude PTF covenants created prior to February 8, 2011 (the date of the Federal Register notice).

NAHB Comments

NAHB generally supports FHFA's Proposed Rule. Overall, it appears that the Proposed Rule is designed to restrict PTFs payable to third parties, while recognizing that PTFs can be used for beneficial purposes as part of a subdivision development. FHFA's decision to recognize those PTFs that provide benefits for the encumbered property will allow builders and developers flexibility in developing communities that can continue to fund maintenance projects and offer services to homeowners for the long term.

² Private Transfer Fee Covenants, 75 Fed. Reg. 49,932 (proposed August 16, 2010).

However, NAHB believes that several sections within the Proposed Rule need clarification.

NAHB agrees with FHFA's position in the Proposed Rule to provide exceptions for beneficial transfer fees, such as those paid to covered associations, defined as HOAs and similar associations or tax-exempt non-profit organizations. NAHB specifically requested this exception in our previous comments so as not to undermine the viability of the well-established beneficial PTF model in future developments as well as not to impact negatively the numerous existing developments already employing such covenants. NAHB also appreciates that FHFA is now distinguishing between direct and indirect benefits, as this was one of NAHB's primary concerns addressed in its comments on the Proposed Guidance.

NAHB is concerned, however, with the scope of several of the definitions FHFA proposes in its rulemaking. NAHB's members have noted particular concern over the manner in which FHFA is defining "adjacent or contiguous property" and "direct benefit". NAHB is concerned that FHFA's proposed definitions are too narrow and could unintentionally restrict the ability of covered associations to manage their common areas, apply funds to improve facilities, and provide access to nonresidents.

First, the Proposed Rule's definition of "adjacent or contiguous property" prevents "property greater than one thousand (1,000) yards from the encumbered property" from being included in that term. FHFA has not adequately explained its rationale for selecting this 1,000-yard barrier, particularly when the burdened estate is within the covered community and any fees collected benefit the covered association. Nor has FHFA cited any legal authority to support this figure. While FHFA acknowledges that PTFs should benefit the encumbered property, nothing in the Proposed Rule explains why property outside the 1,000-yard barrier cannot be included within the scope of the definition. NAHB urges FHFA to clarify this definition so that it does not unintentionally restrict FHFA's identified exceptions.

Second, FHFA has not explained the restriction in the definition of "direct benefit" that the PTF "will be deemed to provide a *direct benefit* when members of the general public may use the facilities funded by the transfer fees in the burdened community and adjacent or contiguous property only upon payment of a fee[.]" NAHB is concerned that, without further explanation or rationale, such a restriction ignores current practice in covered communities throughout the country. NAHB urges FHFA to reconsider this restriction, as the agency has not adequately explained its inclusion in the defined term. Further, NAHB is concerned that such a restriction attempts to regulate impermissibly what covered associations may or may not do with community assets and impermissibly restricts who may use the community's property — a decision best left to the particular community association.

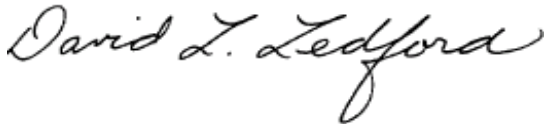
Moreover, NAHB has heard of no consumer or regulatory concerns regarding the manner in which covered association fees have been used and is unaware of any problems in the mortgage financing system resulting from the establishment of such beneficial fees. Accordingly, NAHB urges FHFA to clarify these definitions to maintain the viability of the well-established beneficial PTF model in future developments.

Conclusion

In summary, while NAHB supports the steps FHFA is taking to except beneficial PTFs in the Proposed Rule, NAHB reiterates its concerns that the noted definitions in Part § 1228.1 involving “adjacent or contiguous property” and “direct benefit” could chill well-accepted models currently utilized by covered associations. Clarification of the proposed definitions is critical to ensure that the Proposed Rulemaking does not preclude the use of PTFs for community benefits, thus removing a critical tool for building strong communities and dealing another blow to homeowners at a time when the markets are struggling to recover. Accordingly, NAHB urges FHFA to clarify these defined terms in a manner that does not unintentionally stifle the manner in which covered associations manage their communities.

NAHB appreciates the opportunity to provide comments. Please contact Kim Moore, (202) 266-8529; kmoore@nahb.org, if there are questions concerning our letter or if you require additional input.

Sincerely,

A handwritten signature in cursive script that reads "David L. Ledford". The signature is written in black ink and is positioned to the right of the typed name.

David L. Ledford
Senior Vice President
Regulatory Affairs