From: Ab Conner <ab@connerbros.com>
Sent: Monday, April 11, 2011 5:32 PM
To: !FHFA REG-COMMENTS
Subject: RIN 2590-AA41

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency

RE: Reject Ban on Private Transfer Fees

Dear Mr. Pollard:

As residential developers and homebuilders, we oppose the Proposed Rule that would restrict FHFA regulated entities from dealing in mortgages on properties encumbered by Private Transfer Fees. Many of the reasons we object to this new rule are reflected in the attachment included with this email that was prepared in response to legislation introduced in Alabama, but the issues pertain to your proposal as well.

The present value of the PTF's will be sold to private investors and the money coming to us will be used exclusively to fund new streets, utilities and amenities for our residential communities. Upon competition, the streets and utilities will be conveyed to the City of Auburn, Alabama and the amenities conveyed to the community HOA's. These funds will create thousands of jobs, generate substantial Local, State and Federal taxes and jump start a severely depressed segment of our Alabama economy.

The Auburn area is growing rapidly and there a strong demand for new housing. Unfortunately, conventional bank financing is non-existent even for the most proven developers. We desperately need the new funding generated by PTF's to sustain our operations.

We support full and strict disclosure of any and all private Transfer Fees.

Sincerely,

J. Ab Conner, CEO
Conner Bros. Construction Co., Inc.
Auburn, AL 36830

HB 184: Bad for Realtors, Title Companies, Non Profits and Property Owners. Bad for ALABAMA

Issues

House Bill 184 creates significant problems. The bill is vague, ambiguous, and will cloud title. It also subjects realtors and title agents to potentially significant liability, and creates an unworkable situation for non-profits that currently rely on transfer fee funding.

§35-4-432(a)(3)(h) – Confusion and Liability for Non Profits

§35-4-432(a)(3)(h) exempt transfer fees *"payable solely to a nonprofit or charitable organization for the purpose of supporting cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefitting the real property subject to the declaration or covenant or the community in which such real property is located."* In responding to similar prohibitions contained within other proposed state bills, and within the proposed FHFA rule now open for comments, non-profits have pointed out the inherent difficulty in determining what exactly constitutes a "cultural" activity, a "recreational activity" or a "similar activity". Questions have arisen regarding whether or not the funds must be traced, whether the funds can be used for salaries, administrative expenses, etc. Under HB 184 a non-profit who runs afoul of these ambiguous standards faces significant liability. This will undoubtedly have a chilling effect on those who may be contemplating funding charitable works through transfer fees.

§35-4-434 – Liability for Title Agencies

§35-4-434 holds liable *"any person who records or enters into an agreement imposing a private transfer fee in his or her favor...."* Applying the rules of statutory construction, there are two potential defendants: (1) a person who records a private transfer fee or (2) someone who enters into a private transfer fee obligation in his or her favor. The former clearly applies to the recorder of deeds as well as any to any closing agent or attorney who files a transfer fee obligation, including "covenants, conditions and restrictions" that charge a fee that is later determined to be a private transfer fee; other contracts and agreements containing fees that are later adjudicated a private transfer fee, and scenarios not yet contemplated. Subsection (b) charges liability to the principal, and not the agent, yet the "principal" will not always be clear. Further, if the principal is held liable, the principal will almost certainly cross-claim against the agent, because in order to take advantage of the exemption in subsection (b), *the agent must admit the existence of an agency relationship.*

§35-4-435 – Killing Sales While Creating Liability for Realtors and Title Agents

Despite the fact that disclosure of every encumbrance of record already occurs through the title commitment (at which point the buyer can terminate the contract), §35-4-435 requires sellers to disclose all private transfer fee obligations in the sales contract. Failure to disclose allows the buyer to cancel the sale. Even more dangerous is the provision that allows a buyer who closes on a sale where disclosure did not occur to recover *"any and all damages ... including but not limited to ... a decreased market value, costs, fees, expenses"* and more." The potential defendants are not limited to the party that imposed the fee and,

even if it were, the failure of the realtor and/or title agent to ensure that disclosure occurred gives rise to foreseeable 3rd party liability for negligence.

§35-4-436(c-e) – A Regulatory Taking – Title Company Problem

Ownership of a transfer fee instrument constitutes a property interest of distinct worth.[1] It is a form of non-possessory ownership interest in land. §35-4-436 allows a third party to void this valuable property right, without notice, based on the mere allegation that a notice was not properly filed in the public records. More particularly, a single private transfer fee instrument can (and typically does) cover hundreds of lots. However, if a single lot is left out of the legal description, the statute would allow the owner of that lot to void *the entire instrument* – including the transfer fee rights related to properties that were clearly described in the notice. This onerous provision amounts to a state-sanctioned taking, and has important due process and equal protection implications.

The challenge confronting title companies will be to determine the state of title based upon the veracity of affidavits filed in connection with unrelated properties. This problem arises out of the fact that a single transfer fee instrument can cover numerous properties (and, in many cases, hundreds of properties). As such, the title company will be forced to check for affidavits for every property covered by a transfer fee instrument. Put another way, the absence of an affidavit on lot 10 does nothing the dispel the fact that the owner of lot 40 may have filed an affidavit in an unrelated transaction and thus discharged the entire instrument. Should the title company inadvertently collect the fee, they would likely be liable.

Reality Is Not Perception

Transfer fees are fully disclosed in the title commitment. According to comments submitted to FHFA, more than 12 million homes have a transfer fee, yet no problems have been reported. Comments during the public debate on transfer fees include:

- *To the extent the existence of a [transfer] fee impacts the value of property, as long as the fee is fully disclosed the market will adjust to the fee." (-Cal. Senate Staff Analysis. April 17, 2007).*

- *You can't put all of the costs on home buyers and still sell at an affordable price.* California Building Industry Association. Source: BUILDERS, REALTORS SQUARE OFF ON TRANSFER FEES. May 16, 2007. Inman News.

- *If builders weren't allowed to pass along costs in a transfer fee, they'd have to make up for it by adding thousands of dollars to their homes' initial selling price, shutting out buyers.* California Building Industry Association.

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[1] As one court noted: "Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and non-possessory. They can be defined in terms of sequential rights to possession (present interest—life estates and various types of fees—and future interests), and in terms of shared interests (such as the various kinds of co-ownership). There are specially structured property interests (such as those of a mortgagee, lessee, bailee, adverse possessor), and there are interests in special kinds of things (such as water, and commercial contracts)." *Florida Rock Indus. V. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994). *See also* Sexton v. Commissioner, 42 T.C. 1094 (1964); Fair v. Commissioner, 27 T.C. 866, 872 (1957). *See also* Dunes South Homeowners Ass'n v. First Flight Builders, Inc., 341 N.C. 125, 132, 459 S.E.2d 477, 481 (1995) ([a] restrictive covenant constitutes an interest in land in the nature of a negative easement"); Sheets v. Dillon, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942) ("The servitude imposed by restrictive covenants is a species of incorporeal right. It restrains the owner of the servient estate from making certain use of his property"); Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 544, 633 S.E.2d 78, 85 (2006) ("Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property"); Tull v. Doctors Building, Inc., 255 N.C. 23, 41, 120 S.E.2d 817, 829 (1961) ("[i]t is clear in our minds that residential restrictions generally constitute a property right of distinct worth...").

- *Transfer fees represent an alternative to other financing mechanisms that can affect home affordability.* California Building Industry Association.

- *"Reconveyance financing ... helps keep home prices low by spreading costs over all beneficiaries of a project."* Julie Snyder. Policy Director for non-profit Housing California.

- *REALTORS never complain that a house is too expensive, and that's precisely what happens when builders lump all of their costs into the price of the first home. Why shouldn't the second and third buyers share the costs?"* - California Building Industry Association.

The Law of Unintended Consequences

In a report to the American College of Real Estate Lawyers, a prominent University of Connecticut law professor wrote, *"legislative drafting at this time entails considerable risk. Drafting in the servitudes field is notoriously complex and risks an enactment that is either too broad, or not broad enough. Efforts to draft legislative prohibitions on transfer fees will simply encourage counsel for the home builder to draft around the statute, frustrating the drafters' purposes, likely having no substantive effect on the underlying transaction, and creating statutory confusion. But the converse is also true: the zealous drafter, in an effort to broadly ban the perceived 'evil' transfer fee, may instead inadvertently ban other forms of covenants that would interfere with arrangements that no one disputes."*

Other States Have Recognized the Problems That Exist in HB 184

A number of states considering similar bills have recognized the problems inherent in HB 184, and have made revisions accordingly, or they have simply killed the bill pending additional study.

Legislative counsel in other states has concurred with the problems identified in HB 184, including the issue of a regulatory taking, ambiguity, due process and equal protection.

HB 184 Attempts to Solve a Problem That Does Not Exist.

In attempting to solve a problem that does not exist, HB 184 creates significant problems for a number of parties, even including those who seek to ban this important funding method.