

Alfred M. Pollard, Esq.
General Counsel
Attention: Public Comments. No. RIN 2590-AA41
Federal Housing Finance Agency
Fourth Floor
1700 G Street, N.W.
Washington, D.C. 20552

Re: Notice of Proposed Rule — No. RIN 2590-AA41, Private Transfer Fee Covenants.

Dear Mr. Pollard:

Thank you for the opportunity to respond to the proposed rule regarding **capital recovery fees** (also called **private transfer fees**). I urge you to reject the proposed rule.

Developers such as myself invest years, and millions of dollars, building modern master planned communities. We install infrastructure and improvements designed to last for decades, and which will be used by future homeowners who move into the communities we create. The issue is how to pay for these improvements. There are two choices:

One option (urged by opponents of private transfer fees) is for initial buyers to shoulder 100% of the burden, finance the long-term infrastructure costs in with their mortgage, pay interest each month, and then pass the costs along to the next buyer. In a bull market or real estate bubble, this can work.

Alternatively, we can assess each future buyer individually. Each buyer then pays less up front, saves on interest costs and transaction costs, and can then sell for less. The transaction and interest savings more than offset the 1% fee paid by the seller at the time of the future sale, **and each buyer in the chain of title over the 99 years pays less than they would otherwise.** This isn't just my opinion:

- *You can't put all of the costs on homebuyers and still sell at an affordable price.* California Building Industry Association. - 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.

- *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.

Consider the economics of a private transfer fee: A typical home will generate 8-10 sales over 99 years, which yields 8-10% in total transfer fees. **Compare this 8-10% that a developer will recover to the 70%-80% in fees charged by realtors and the title industry during this same period.**¹ The reasonableness of the fee is apparent, particularly when you consider that a portion of every private transfer fee goes to **non-profits operating within the community**, and the balance of the fee is to repay the developers for expenses they actually incurred.

Critics allege that there is no evidence that a homeowner will pay less for the home. However, no homeowner will pay the same for a home with a transfer fee as they would for the same home without a transfer fee. California's senate staff concluded:

“... as long as the fee is fully disclosed the market will adjust to the fee. A homebuyer who knows that she must pay such a fee upon subsequent resale will pay the developer less for the home than for a comparable property. Likewise, future buyers will pay less to the seller.”²

A University of Connecticut empirical study found that the market is very efficient at capitalizing fees. The non-partisan Center for Regulatory Effectiveness concluded that:³

“In a tight credit market, [private transfer] fees may provide consumers with the opportunity to purchase a home at low cost, which will increase demand and homeownership.” (pg. 7)

If a prospective buyer does not see the value proposition they simply buy elsewhere. **In other words, transfer fees are paid by sellers who willingly assumed the obligation, and negotiated their prices accordingly.** It is not a tax that is unwittingly placed upon a buyer who has no choice.

Critics allege that buyers are “surprised” at the last minute. The reality is that as soon as an earnest money contract is signed and receipted at the title company, the buyer receives a title commitment that clearly discloses the fee.⁴ Virtually every earnest money contract (including all promulgated real estate forms used by real estate agents), allows the buyer to back out after reviewing the title commitment. This disclosure happens very early in

¹ Realtor commission plus title insurance premium equals 7-8% in total fees per sale, times 8-10 sales over 99 years.

² http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0651-0700/sb_670_cfa_20070413_131835_sen_comm.html

³ <http://www.prnewswire.com/news-releases/center-for-regulatory-effectiveness-concludes-that-disclosure-is-appropriate-legislative-response-to-private-transfer-fee-covenants-114317784.html>

⁴ The title commitment also discloses all other encumbrances of record, such as CC&Rs that contain HOA dues and fees.

the process, and in states with specific disclosure statutes it happens before the contract is even signed.⁵ Interestingly, an estimated 12 million homes nationwide have a transfer fee of some kind, and most homes also have HOA dues and fees. These fees are all imposed, and disclosed, in the exact same manner as a private transfer fee. The only difference is where the money ultimately ends up.

Critics say that transfer fees are hidden. However, if you repeat a lie often enough it does not suddenly become truth. In reality, (1) the fee is clearly disclosed through filing in the public records, and subsequent disclosure on Schedule B of the title commitment; (2) developers want buyers to know about the fee because *no developer would create a fee to help him recoup costs and then hide the fee*,⁶ and (3) over 12 million homes have transfer fees with virtually no reported problems.⁷

Nonetheless, the concern about “hidden fees” (to the extent one wishes to argue the position despite the complete absence of supporting evidence) is easily addressed by means of a disclosure (See Cal. Civil Code 1098.5; see also HR 6332 introduced in the 111th Congress).⁸

Money for development projects is simply not available on commercially reasonable terms. Most projects are underwater and the lender’s hands are tied, both by loan to value ratios as well as by regulatory constraints on percentage of loans to core capital. As foreclosures mount, prices drop even further, deepening the spiral. The construction sector now accounts for an estimated 20% unemployment, and until underwater projects can be restarted, the situation will not improve. In fact, it may get worse, particularly once lenders begin to foreclose again.

This is a balance sheet problem, and there are only three ways to fix the balance sheet of a real estate development. **(1) Foreclosure.** However, this creates a ripple effect throughout the community, impairs lenders, and pulls down the value of surrounding projects. In fact, the saying in the development community is that it isn’t necessarily your own project that gets you – it’s the other guy’s project. When a project goes under, it pulls everyone else’s project down with it. **(2) A significant rise in property values.** It is not unusual to find a project that has dropped 50% in value. This project will need to rise 100% in value just to get back to where it was before the collapse. This is unrealistic, absent another bubble. **(3) Sell off an asset.** When developers create capital

⁵ See Cal. Civil Code 1098.5

⁶ It is unreasonable to suggest that any developer would create a long-term income stream and then hide it. It would not be marketable to investors, nor would it serve its purpose of allowing recovery of development costs. In fact, there is not a scintilla of evidence to suggest that a single transfer fee has ever been hidden, yet this mantra is routinely repeated with complete disregard for the truth.

⁷ As reported by community associations in comments submitted to FHFA proposed guidance on private transfer fees.

⁸ <http://www.govtrack.us/congress/billtext.xpd?bill=h111-6332>

recovery fees (private transfer fees) we have created a long-term collateralized income stream with no credit risk.⁹ If we sell off the future income stream, the proceeds can be used to restore economic viability to our projects.

This is about JOBS. Capital recovery fees currently held by developers could generate billions of dollars in desperately needed funding for the construction sector, jump-starting hundreds of billions of dollars worth of projects nationwide. This money would pay down development loans, restart failed projects, and could literally create millions of jobs in the troubled real estate sector. Given the widespread use of capital recovery fees in this state, the impact on our construction sector – and this state’s economy in general - would be tremendous.

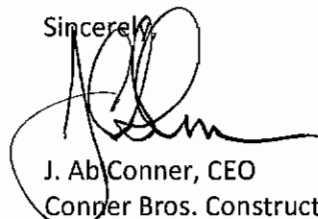
Every private transfer fee imposed by a developer allocates a portion to non-profits. Through this process we have created long-term sustainable funding for affordable housing, clean air, clean water, open space and other community benefits – bringing a private sector solution to public issues.

Given the complete absence of harm, the cost-savings to the consumer, the reasonable nexus between constructing long-term infrastructure and recouping these costs from an assessment, and the long tradition in favor of respecting private property rights, there is little reason to ban private transfer fees, and every reason not to.

The solution is disclosure. Preserving capital recovery fees will encourage and support significant investment dollars flowing into the construction sector, which in turn will ripple throughout the banks, the communities, non-profits, and the states.

I appreciate the opportunity to provide this viewpoint, and I hope you will consider rejecting the proposed rule regarding private transfer fee covenants.

Sincerely,



J. Ab Conner, CEO
Conner Bros. Construction Co.
739 Opelika Road
Auburn, AL 36830-3070

⁹ It does have an actuarial risk, but this is mitigated by combining fees to multiple projects.