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October 12, 2010

VIA E-MAIL: regcomments@fhfa.gov

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

Re: Guidance on Private Transfer Fee Covenants (No. 2010-N-11)

Dear Mr. Pollard:

The American College of Real Estate Lawyers (“ACREL”) is pleased to present comments to the Federal Housing Finance Agency (“FHFA”) regarding the “Guidance on Private Transfer Fee Covenants” (No. 2010-N-11) (“Guidance”) as published in the Federal Register on August 16, 2010. For the reasons set forth in this letter, ACREL urges the FHFA to withdraw the Guidance.

ACREL is a non-profit organization whose objectives include improving real estate law and practice; making available to the bar and to the public authoritative educational materials dealing with real estate law and practice; informing its members of the most current developments in real estate law and practice; addressing issues of importance to real estate law and practice by participating in law reform matters and legislative, administrative, and judicial initiatives when appropriate; and cooperating and consulting with national, state, and local bar organizations, governmental agencies and other groups that have an interest in real estate law and practice.

ACREL is concerned that the Guidance, if adopted, would adversely affect the marketability and insurability of title to homes throughout the United States. One of the articulated purposes of the Guidance is to increase liquidity and stability in the housing finance market. However, the Guidance would likely have the exact opposite effect — it would create a cloud on the title to hundreds of thousands of homes in the United States and render them virtually unmarketable by restricting access to financing, resulting in a significant devaluation of

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Alfred M. Pollard, General Counsel
October 12, 2010
Page 2

these properties in the midst of perhaps the worst housing crisis since the Great Depression.

Although ACREL does not take any position or express any opinion on the propriety of transfer fee covenants or any particular use of them, the fact is that transfer fee covenants, as a legal concept, have been widely used in communities all across the country for many years for such things as:

- providing initial working capital to owners associations and helping fund capital reserves for future maintenance, repair, and replacement of community improvements, enabling the association to charge lower common expenses assessments and making the ongoing cost of living in the community more affordable for all;
- promoting the arts and cultural programs and providing educational, recreational, and social programs and services for the benefit of residents of those communities that are subject to the transfer fees;
- providing for environmental mitigation and protection of endangered and threatened species and wildlife habitat;
- protecting artifacts and archeologically significant features;
- funding nonprofit entities that provide ongoing monitoring and enforcement of historic facade easements and conservation easements; and
- helping to fund affordable housing initiatives.

As a result, a significant number of communities and homes that have transfer fee covenants in their chain of title would be adversely affected by the Guidance. In a 2010 membership survey conducted by the Community Associations Institute (“CAI”), over 600 communities encompassing more than 480,000 homes reported having transfer fee covenants in their chain of title. CAI estimates that these communities represent only a fraction of the total number of existing communities across the country that are subject to transfer fee covenants¹.

¹ Results of the Community Associations Institute (“CAI”) survey reporting on the scope of use of transfer fees by community associations across the country were published on September 27, 2010, in a document entitled “*For the Common Good: Use of Community Transfer Fees by Community Associations.*”



Alfred M. Pollard, General Counsel
October 12, 2010
Page 3

If the Guidance is adopted in its present form, owners of homes subject to transfer fee covenants will find it virtually impossible to sell their homes or refinance their mortgages, as no lender that desires to sell to Fannie Mae, Freddie Mac, or a Federal Home Loan Bank would consider making a mortgage loan to a prospective buyer. Even a cash buyer will be reluctant to purchase in a community where resale opportunities would be so limited.

In most cases, the homeowners (and even the owners associations of which they are a part) will be powerless to amend those covenants to remove the transfer fee provisions without the consent of a supermajority of the owners (which is often impossible to achieve even for noncontroversial amendments) and/or a third party beneficiary, who is unlikely to relinquish its right to collect the fees without substantial compensation, which neither the homeowners nor the association will be in a position to pay.

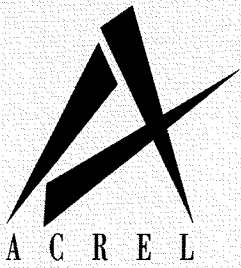
We are aware of a number of situations where these covenants have been imposed to satisfy requirements of local governments as a condition of development approval or to settle lawsuits by public interest groups relating to environmental mitigation, open space, and affordable housing initiatives. In other communities, the owners associations may have pledged transfer fee income to lenders to secure the funds needed to build or renovate community facilities. The homeowners cannot simply terminate or amend these covenants to restore marketability.

If implemented in its present form, the Guidance would have a widespread adverse impact on an already struggling housing market, denying home buyers access to mortgage financing, further eroding the market for those trying to sell their homes, and making it more costly for homeowners to live in communities that currently use transfer fees to offset the cost of various programs and services that benefit the community. Therefore, we respectfully request that FHFA withdraw the Guidance to avoid these far-reaching, and presumably unintended, consequences in contravention of FHFA's stated mission to support housing finance and affordable housing.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. Shepherd', is written over the typed name.

Kevin L. Shepherd
President



Alfred M. Pollard, General Counsel
October 12, 2010
Page 4

cc: ACREL Board of Governors
Jo Anne P. Stubblefield, Esquire
W. Foster Gaillard, Esquire
BA3:457608.1