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VIA FIRST-CLASS MAIL

The Honorable Alfred M. Pollard
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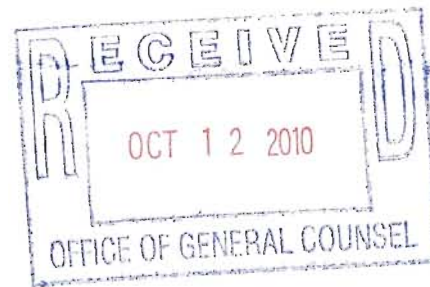
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October 05, 2010

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**RE: Comments on Proposed Guidance on Private Transfer Fee Covenants
Kingstowne Residential Owners Corporation, Alexandria, Virginia**

Dear Mr. Pollard:

This firm serves as counsel to the Kingstowne Residential Owners Corporation in Fairfax County, Virginia.

Kingstowne is a not-for-profit, master community association of over 5,000 dwelling units, all of which have title subject to a Declaration of Covenants, Conditions and Restrictions. Under this Declaration, the owners of these dwelling units are members of Kingstowne with voting rights, which, among other things, permits these owners to elect a Board of Trustees with the responsibility to deliver a variety of services to the owners, which primarily relate to the care of the common facilities and infrastructure of the community. In order to fund those services, the Board has the right and responsibility to levy a variety of fees against the owners of the dwelling units in accord with an approved budget, and the owners have a corresponding obligation to pay.

In short, any proposed guidance or rule adopted by the Federal Housing Finance Agency affecting this system of Kingstowne's governance is of significant concern to the Board of Trustees.

In this regard, the purpose of this comment is to register the major objections of the Board of Trustees with FHFA's Notice of Proposed Guidance on Private Transfer Fee Covenants published in the *Federal Register* on August 12, 2010. If enacted, this Guidance would have a significant, adverse effect on the governance of Kingstowne in ways that the FHFA does not appear to have contemplated or adequately reviewed when preparing the Notice.



The Board of Trustees is aware that FHFA's principal reason for proposing to prohibit Fannie Mae, Freddie Mac, and the Federal Home Loan Banks from investing in mortgages with private transfer fee covenants is related to concerns about a practice of a very small number of developers who have created private transfer fee covenants which require one of the parties involved in the sale-purchase of the property to make a payment at the time of settlement to parties unaffiliated with the community association and for a purpose unrelated to the community association at the time of settlement.

The Board of Trustees of Kingstowne shares this concern. Under the common law interpreting covenants, this type of covenant appears to run counter to the longstanding principle of law that covenants must involve privity of estate between the party claiming the benefit of the covenant and the party carrying the burden of the covenant. Furthermore, in order for covenants to be enforceable, a rational relationship between the related obligation of the covenant and the protection, preservation, or proper operation of the underlying property must exist. This does not appear to be the case with these private transfer fee covenants that benefit private investors with no direct connection to the property. In this regard, the proposed Guidance follows well-settled law and serves a public purpose; however, the reason why the Board of Trustees does not support this proposed Guidance, and strongly objects to it, is because it contains sweeping verbiage that reaches significantly beyond these types of private transfer fees. Instead of skillfully using a surgical scalpel, FHFA has chosen to use a bludgeon. As presently drafted, the proposed Guidance would effectively invalidate a number of covenants that the Declaration of Covenants has empowered the Board of Trustees of Kingstowne to rely upon since 1987. These covenants have been and still are necessary to raise the revenue related to the operation and capitalization of the communities' common facilities and infrastructure.

These provisions in the covenants of Kingstowne were drafted in careful calibration with their component parts. For example, Kingstowne has the right to charge the developer a fee payable at settlement each time the developer sells a lot to a builder. It also has the right to charge the builder a fee payable at settlement each time the builder sells the lot to a new owner. The income generated by these fees has significantly helped the Board of Trustees keep the general assessment payable by its members as low and stable as possible over the years when the community remained under development. The Board of Trustees regularly enforces these provisions when a new developer and builder want to annex property into Kingstowne.

The Declaration also empowers the Board of Trustees to charge new members with a transfer fee payable at settlement for the purpose of capitalizing the vast array of private trails, fitness centers, pools, and other recreational facilities under the care of Kingstowne. Given that the proposed Guidance would potentially affect about 90 to 95% of the mortgage market, the Board of Trustees is deeply concerned that enactment of the proposed Guidance would effectively cut off sources of revenue for Kingstowne that it has relied upon since 1987.

At a time when many federal entitlement programs are seriously underfunded and on an unsound actuary basis, it is very ironic that a federal agency would unwittingly propose a Guidance that would have the effect of undermining the ability of a community association to properly fund its operations and save for the future by capitalizing its reserves.



While the proposed Guidance appears to be based upon the noble purposes of promoting the marketability and value of property, those noble purposes would not be achieved at Kingstowne. The effect that this proposed Guidance would have upon Kingstowne is entirely negative. Under the careful calibration of the covenants expressed in the Declaration, Kingstowne is not at liberty to simply undo or waive its rights regarding the enactment or enforcement of its transfer fees payable at settlement and then to correspondingly raise general assessments in order to recapture its lost revenue stream. The Declaration caps the amount of increases that the Board can make to the other fees that the Declaration authorizes the Board to levy. So, if enacted in its present form, the proposed Guidance may have the effect of causing the Board to seek approval from the membership in order to amend the Declaration in order to remove those caps on the general assessment, a hugely expensive, time-consuming, and even uncertain process.

In its own comments, the FHFA commented that purchasers may not receive proper disclosure of these types of fees before becoming obligated to pay them. While Kingstowne cannot speak to state laws other than Virginia, it strongly objects to any blanket application of this point. In Virginia, the state code requires Kingstowne to prepare and issue a disclosure packet each time an individual property within Kingstowne is placed under contract. In that disclosure packet, Kingstowne must specifically disclose every fee that Kingstowne charges. Under the state code, the purchaser has 3 days from his/her receipt of the disclosure packet to decide whether to proceed with the contract. If the purchaser chooses to rescind the contract, the purchaser may do so without explanation or penalty. The ends of transparency and full disclosure are fully achieved under this system mandated by state law.

In closing, the Board of Trustees strongly believes that the FHFA did not adequately research or properly consult with the community association market before it proposed the Guidance. By not distinguishing between private transfer fee covenants that are designed to benefit the affected property and related community association from the transfer fees designed to benefit unaffiliated private investors who do not owe the community any duties, the FHFA has proposed to shove a lot of different-sized feet into one shoe without awareness or due consideration of all of the negative impact and ramifications of such an effort.

The Kingstowne covenants have been in effect since 1987. During that time, the Board is proud to say that the real estate market within Kingstowne has been liquid, efficient, competitive, and resilient. The Board believes that the opposite may occur if the FHFA enacts the Guidance as drafted. It respectfully requests the FHFA to either withdraw or revise the Guidance.

Regards,
REES BROOME, PC

By: 

Lisandra E. Santiago