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Vermont Housing & Conservation Board Comments

Federal Housing Finance Agency, 8/16/2010 Notice

Guidance on Private Transfer Fee Covenants No. 2010-N-11

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Executive Summary

Vermont Housing and Conservation Board opposes the Guidance on Private Transfer Fee Covenants proposed by the Federal Housing Finance Agency (“FHFA”) as published in the Federal Register (Volume 75, No. 157 on Monday, August 16, 2010). States and agencies like VHCB should be able to negotiate fees to further legitimate public purposes such as affordable housing, farmland conservation and stewardship and wetlands mitigation. If transfer fees providing purely private benefits to select market participants are a problem, such fees can be regulated at the state level. However, for FHFA to treat all transfer fees the same and prohibit them is totally inappropriate. If disclosure and alienation, marketability and valuation of real estate used as security for residential mortgages is a concern, FHFA may want make sure that such fees are fully disclosed so that Banks include them in mortgage underwriting. Where states develop housing or conservation programs that are funded by transfer fees, FHFA should not interfere. Finally, since the 50 states define and treat “transfer fees” differently, this is not a problem that lends itself to a national solution. One size does not fit all.

Vermont Housing and Conservation Board

Created in 1987, the Vermont Housing and Conservation Board (“VHCB”) is a public instrumentality of the state of Vermont which provides federal, state and foundation funds to nonprofits to develop and steward permanently affordable housing for Vermonters and conserve the working and natural landscape under the Vermont Housing and Conservation Trust Fund Act.¹ VHCB grants and loans awarded to nonprofit organizations with tax exempt status under the Internal Revenue Code have allowed Vermont’s nonprofit network to assist in the development of 10,000 affordable homes, permanently conserve 387,000 acres of land and rehabilitate 55 outstanding historic buildings for community use. The homes range from shelters and transitional housing for the homeless to permanent affordable housing, both rental and owned.

¹ Chapter 15 of Title 10 of Vermont Statutes Annotated, 10 VSA 301-325a.

Recipients of state and federal funds administered by VHCB are generally non-profit housing developers and conservation land trusts which collectively serve every county of Vermont.² Conservation projects funded by VHCB consist of the purchase of conservation easements on working farms, fee purchase of woodlands used for forestry, natural areas and public recreation areas and preservation easements on historic buildings in Vermont's cities, towns and villages.

Affordable Housing. Despite limited state resources for affordable housing, helping lower-income Vermonters become homeowners remains an important element of VHCB's housing program. Including resales, since 1987 VHCB has helped nearly 1000 Vermont households become homeowners, most for the first time. The resale restrictions that accompany VHCB down-payment grants limit owner's share of appreciation (at the time of resale) and thereby insure that the house will remain affordable to future generations of homebuyers. Along with shared appreciation, VHCB grants remain with the home so that subsequent buyers can purchase a home for significantly less than market value. After 25 years, Vermont housing nonprofits, especially community land trusts like the Champlain Housing Trust, have demonstrated that shared appreciation, subsidy retention, good stewardship and community involvement are the cornerstones of a successful state housing policy³.

Land Conservation and Historic Buildings. Vermont has enjoyed similar success protecting its natural and historic resources through permanent fee acquisition or conservation/preservation easements. Since the Act requires VHCB to invest in buildings and land that will be available, accessible and affordable to future generations of Vermonters, VHCB and its nonprofit partners are making investments that will require stewardship of natural resources and historic buildings **forever**. Though VHCB's primary stewardship partners at the Vermont Land Trust, Upper Valley Land Trust and Preservation Trust of Vermont do not currently include private transfer fees in easements on agricultural and forest land, **in the future**, such a fee could provide a source of revenue for monitoring compliance and enforcing easements on these lands. Public instrumentalities and private conservation land trusts are making investments in perpetuity. Since such protection requires professional staff, no commercially fair and reasonable means of raising stewardship revenue should be prohibited by FHFA. In Vermont, the Legislature has challenged the common law notions of unreasonable restraints on alienation and the rule against perpetuities by instructing VHCB to purchase permanent interests in homes and land. Where private transfer fees promote this policy of permanence, FHFA has no business interfering with them. Where this poses issues for bank and regulators, the banks can include transfer fees in normal underwriting and Attorney Generals can protect consumers from unfair practices, if any.

² For more information on VHCB, FHFA can download the 2009 VHCB Report to the General Assembly, <http://www.vhcb.org/pdfs/ar2010.pdf>

³ See the Champlain Housing Trust's 2009 performance evaluation of its homeownership program authored by John Davis and Alice Stokes entitled, LAND IN TRUST, HOMES THAT LAST, http://www.champlainhousingtrust.org/assets/files/Lands-In-Trust_Homes-That-Last.pdf

Nationwide: Chapel Hill, NC Uses Private Transfer Fees to Fund Permanently Affordable Housing

According to the National Community Land Trust Network, a good example of using private funds to further community purposes is Chapel Hill, NC which requests private transfer fees from developers to support permanently affordable housing through the Community Land Trust (“CLT”) model. This effective combination is providing ongoing workforce housing opportunities in a community where the average price of homes exceeds \$300,000. These fees, like those of other CLTs, do not adversely affect liquidity, affordability, and stability in the housing finance market. Instead, this municipality has developed a proven method of allowing developers to build market-rate housing while insuring that CLT homes are affordable to working families. Where municipalities choose this mechanism to expand housing options for low and moderate income households, FHFA should not adopt a Guidance which makes residential mortgages less available to qualified borrowers.

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The FHFA Guidance on Transfer Fees May Have a Negative Impact on Vermonters

Though the use of private transfer fees is not widespread in Vermont, both the City of Burlington and the State of Vermont have established by zoning bylaw⁴ and Act 250 Land Use Permit⁵ legal mechanisms that might be considered private transfer fees. These include:

1. By **Inclusionary Zoning Ordinance, the City of Burlington** requires private developers of housing projects of more than 5 units to set aside 15%-25% of rental or homeownership units to be designated as “affordable inclusionary units” to be rented or sold at a price set in the Ordinance. Such units must remain affordable for at least 99 years and are usually controlled by the City or a housing agency designated by the City.⁶ In unusual cases, the inclusionary ordinance could be met by making private transfer fees to the housing trust fund rather than designating inclusionary affordable units in the market-rate development.
2. **Act 250 Permits for expansions of Vermont ski areas** require the developer to address the need for affordable housing by charging the buyer of each market-rate building lot, cabin, condominium, detached luxury home or time share unit a fee to that is paid to the Vermont Housing and Conservation Board to fund affordable housing in ski area towns where housing costs are high and wages are low. These fees are currently charged to the first buyer only but, in

⁴ The City of Burlington has adopted inclusionary zoning provisions which requires developers of residential projects to designate 15 to 20% of the units as affordable ones who sale is managed by the Champlain Housing Trust as permanently affordable homes or, in the alternative, make a payment into the Burlington Housing Trust Fund to support CLTS and permanently affordable housing.

⁵ Act 250 is a state land use law that requires developers to obtain a State Permit prior to beginning construction on commercial development projects. See 10 VSA Chapter 151.

⁶ All the designees are tax-exempt entities: Burlington Housing Authority, Champlain Housing Trust (CLT) and Cathedral Square Corporation.

the future, fees could be charged to future buyers. VHCB uses Act 250 affordable housing fees to leverage private, public and philanthropic funds which are used by housing nonprofits to construct or rehabilitate workforce housing near the ski area. Since 1995, VHCB has combined \$500,000 in Act 250 housing mitigation funds with federal and state resources work with regional nonprofits to build 50 permanently affordable homes in mountain communities.

3. **Act 250 Farmland Mitigation Fees.** By law⁷ the State of Vermont requires applicants for Act 250 permits who propose to develop primary agricultural soils, as defined 10 VSA 6086(a)(9)(B)(iv), to protect agricultural land located elsewhere in Vermont by paying an offsite mitigation fee to the Vermont Housing and Conservation Board. Such payments are calculated by multiplying acreage times a multiplier of between 1 and 3 by the “recent per-acre cost to acquire conservation easements for primary agricultural soils in the same geographic region as the proposed development ...” as determined by the Vermont Secretary of Agriculture. After receipt by VHCB, these private fees leverage public and philanthropic funds and are awarded to tax-exempt nonprofits like the Vermont Land Trust and Upper Valley Land Trust to purchase permanent conservation easements on farms in Vermont’s important agricultural regions. Importantly, Act 250 farmland mitigation fees are used by VHCB for the costs of acquisition, legal fees, staff costs and perpetual stewardship by the conservation land trust that closes the deal and monitors and enforces the farmland conservation easements.
4. **Community Land Trust Transaction Fees.** Some CLTs charge a fee to cover the substantial staff time that is invested in the resale of CLT home to qualified buyers and making sure that those buyers are successful homeowners. These fees are an important source of revenue for the nonprofit delivery system in Vermont to fulfill its promise that decent, safe and energy-efficient homes will remain affordable to future generations of Vermonters. After 25 years, community land trusts like the Champlain Housing Trust, have demonstrated that shared appreciation, subsidy retention, good stewardship and community involvement are the cornerstones of a successful state housing policy⁸. Part of this success is to insure that CLTs can retain qualified professionals to educate first-time homebuyers and facilitate re-sales of CLT homes. One revenue source used by Vermont CLTs is to charge buyers a fee based on a percentage of the fair market value of the home (provided that the remains affordable to them) and help them obtain mortgage financing. VHCB considers this to be a good example of a private fee that promotes Vermont’s highly-regarded and nationally-respected state housing policy of permanent affordability and partnership with nonprofit CLTs.

⁷ 10VSA 6093(a) (1).

⁸ See the Champlain Housing Trust’s 2009 performance evaluation of its homeownership program authored by John Davis and Alice Stokes entitled, LAND IN TRUST, HOMES THAT LAST, http://www.champlainhousingtrust.org/assets/files/Lands-In-Trust_Homes-That-Last.pdf

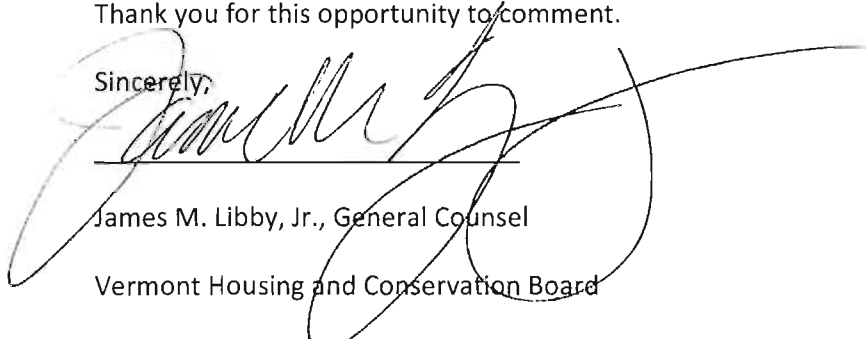
Since Vermont does not define or regulate private transfer fees, I cannot say with certainty that the proposed FHFA Guidance would affect the fees discussed above. However, since all of these private fees are paid at the time of a real estate transfer and support important policies of the State of Vermont, VHCB must go on record as opposing the proposed Guidance.

Conclusion

For all the reasons discussed above, the Vermont Housing and Conservation Board urges the FHFA not to adopt the proposed Guidance on private transfer fee covenants (No. 2010-N-11). Instead, FHFA should study this matter further and, if action is necessary, FHFA should regulate rather than prohibit the use of such fees. If necessary, such regulation of private transfer fees exempt fees paid to charitable organizations and transfer fees payable to, or imposed by, governmental entities.

Thank you for this opportunity to comment.

Sincerely,



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Vermont Housing and Conservation Board

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