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Federal Housing Finance Agency
Fourth Floor, 1700 G Street, N.W.
Washington, DC 20552
Attn: Alfred M. Pollard, General Counsel

Re: Public Comments “Guidance on Private Transfer Fee Covenants, (No. 2010–N–11)” –
The guidance, as drafted, should NOT be adopted

To whom it may concern:

Our law firm specializes in representing community associations. These associations are tasked with governing and operating common interest communities, including condominiums, planned developments and cooperatives, in communities established by a developer or declarant. The general objective of these associations is to preserve and enhance the values of owners/members properties. Owners are made mandatory members of these associations by the documents that established the community. Those same documents include assessment obligations and, also sometimes, a transfer fee assessment or covenant.

On behalf of our clients, and as specialists in the area of community associations and common interest communities, we write to submit comments in opposition to the Federal Housing Finance Agency’s Notice of Proposed Guidance regarding private transfer fee covenants.

Colorado Expressly Allows Transfer Fees of Community Associations

In Colorado, a 3% transfer fee assessment, for community associations, is expressly allowed by statute. See C.R.S. 38-33.3-207(4)(A)(IV).

The Colorado Statute provides that:

“[t]he declaration may provide: . . . (IV) For assessments including, but not limited to, assessments on retail sales and services not to exceed six percent of the amount charged for the retail sale or service and real estate transfers not to exceed three percent of the real estate sales price or its equivalent;”

FHFA fails to draw any distinction between transfer fees that provide a direct benefit to the land and associations and those transfer fees that offer no benefit to the land.



The Draft Guidance is too broad

The justifications for the Guidance do not apply to community fees such as the one imposed in Colorado under the state statute referred to above. If FHFA implements the Guidance, FHFA should revise it to carve out community transfer assessments that are imposed through recorded master declarations/covenants. That carve out should also extend to fees paid or transferred to a non-profit organization and used for identified purposes that benefit the community where the fees are imposed.

Reasons for the Guidance, as proposed, do not apply to Associations in Common Interest Communities

In its proposed Guidance, FHFA raises several concerns about private transfer fee covenants. None of these apply to transfer assessments allowed in Colorado:

- These transfers assessments, in recorded declarations/covenants for common interest communities, do not limit property transfers and do not render them legally uncertain.
- These transfers assessments do not expose lenders, title companies or secondary market participants to risks from unknown potential liens and title effects. The title effects and risks from potential liens under common interest community declaration/covenants are well settled and established under Colorado law.
- Transfers assessments are no different from the requirements in declarations/covenants of a common interest community that property owners pay association dues and assessments.
- The transfer assessments are not “hidden” from the buyer. It is typically described clearly in the declaration/covenants. Obtaining a copy of all recorded documents is a routine part of any residential home transaction in Colorado. The fee is easily discovered and understood by the homebuyer upon reading the declarations/covenants. In addition, title companies in Colorado are very familiar with the existence of these fees and include it among the charges to be imposed at residential closings.
- It does not represent a dramatic, last minute, non-financeable out of pocket cost to the consumer.
- It does not complicate residential real estate transactions or introduce confusion or uncertainty for homebuyers. Again, the title company simply lists the fee on the buyer’s and seller’s settlement statements used at closing and withhold the fee amount along with other closing costs from the seller’s final settlement.



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We understand FHFA's concern that private transfer fees may be used to fund private continuous streams of income for select market participants either directly or through securitized investment vehicles. We agree those 'other' transfer fees destabilize the fragile home sales market.

Further Disruption of Real Estate Markets

The proposed Guidance, if adopted in its current form, will disrupt real estate markets in Colorado and across the country. The Guidance will impair the functioning of the secondary mortgage market. The Guidance will create substantial uncertainty at a time when the Colorado and national economies are struggling to recover. The Guidance will have a disproportionately negative impact on homeowners in community associations with transfer fee assessments.

Problems if the Guidance is adopted.

If adopted, the guidance not only will cause confusion and affect the marketability of existing homes in many large planned communities in Colorado, including Stapleton, Beaver Creek, Bachelor's Gulch, Telluride Mountain Village and more. The proposed Guidance will also call into question future home mortgage financing in communities with transfer assessments.

In addition, it will eliminate an important revenue stream for legitimate community projects at Stapleton.

Rejection or Reconsideration of the Guidance is requested.

We urge FHFA to reject the draft Guidance.

Alternatively, we urge FHFA to reconsider your proposed Guidance in light of transfer assessments allowed in Colorado.

If you choose to adopt the Guidance, we request that you revise it to provide a clear carve-out for community transfer assessments that are imposed through recorded declarations of common interest communities when the fees benefit the Community. We also request that you revise the draft Guidance when the fees go to a third party non-profit organization, used for identified purposes that benefit the community where the fees are imposed.

Thank you for your consideration.

Sincerely,

Jerry Orten

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