DMB

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October 15, 2010

The Honorable 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:

We appreciate the opportunity to provide comments on the proposed Guidance on Private Transfer Fee ("PTF") Covenants (the "Guidance") which was published in the Federal Register on August 16, 2010. Given the significant impacts of this Guidance if implemented as proposed, we respectfully request that the Federal Housing and Finance Administration ("FHFA") **extend the comment period to January 31, 2011** to allow for a thorough and transparent review and analysis of this important issue.

DMB Associates, Inc., ("DMB") is a diversified real estate company and developer of master planned communities. DMB's projects include signature commercial properties, resort, recreational and primary home communities in California, Hawaii, Arizona and Utah. Development of communities that are sustainable, live well over time and which are developed within the context of their physical and social environment are key considerations that define the unique character of each community. DMB also has a philosophy and culture of community engagement and believe that only through an open and honest collaboration with relevant stakeholders, will we be able to agree upon the approvals appropriate to meet our collective aspirations for a particular site.

Because our communities have a strong focus on community life, maintenance of physical features, and preservation of important environmental features, we have utilized community-benefit fees ("Community-Benefit Fees") to provide an on-going private revenue source to sustain these community benefits over time. Additionally, we have entered into multiple conservation agreements with major environmental organizations to fund open space purchases and habitat preservation, each funded with Community-Benefit Fees. We also have completed similar agreements for the provision of affordable housing. These Community-Benefit Fees are dedicated to third party entities including homeowner associations and non-profit entities. In these agreements, use of such funds is restricted by the receiving entity as articulated in a covenant or other such instrument that is recorded and which runs with the land.

DMB does not utilize nor support the use of PTFs in a manner as articulated in the Guidance whereby such fees are used as an on-going revenue stream and paid to the developer and such fees are used to fund purely private streams of income through securitized investment vehicles. In these situations, the funds generated by PTFs are not used to provide for purposes that benefit the assessed community.

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While the FHFA identifies some issues with the use of certain PTFs as noted above, the Guidance will cause significant negative impacts if adopted as proposed. It is important to note that the far reaching and negative unintended consequences are all in contradiction to the stated mission of the FHFA and the Guidance, in particular. The Guidance, as drafted will not only prohibit PTFs, but also Community-Benefit Fees, and will effectively eliminate the use of both. Without a thoughtful analysis, the risk is significant that many negative and unintended consequences will occur including:

1) Disruptions to real estate markets across the United States;

2) Negative impacts to the many thousands of residents and property owners in existing communities with Community-Benefit Fees who will no longer be able to sell, finance or re-finance their home;

3) Creation of uncertainty to the existing non-profit and governmental organizations including conservancies, affordable housing, transportation related organizations and others who are recipients of revenues generated from Community-Benefit Fees; and

4) The effective elimination of an important tool which provides critical and important funding for infrastructure, and other critical benefits as a result of the development.

DMB is also concerned that some of the information contained within the Guidance is not properly supported with empirical data or evidence. On the contrary, the appropriate and legitimate use of Community-Benefit Fees can and does provide significant benefit to property owners. Specifically, the FHFA raises concern about the proportionality of a PTF (or a Community-Benefit Fee) (and the benefit derived) without providing any evidence, data or information to support this concern. Community-Benefit Fees typically are assessed either as a fixed fee or as a percentage of the sale price of the property (commonly, ranges from .25% to 1%[1]) and are utilized for a variety of purposes, all which provide a community benefit and serve the public interest, including but not limited to supporting the community association and its residents, providing programs and events for residents of the community, providing for preservation of open space and conservation of unique lands, providing for environmental mitigation and protection of endangered species, providing for affordable housing initiatives, providing for transportation and transit facilities, and providing protection of archeological and historic features. These community purposes provide a benefit to residents of the community in a way that is directly proportional when considered as a levy on purchasers into the community. All buyers in the community are assessed the fee in the same manner, whether it be a fixed fee or percentage of sale. Furthermore, the funds generated by the Community-Benefit Fee benefit the community and the property owners by providing a needed, desired and beneficial community benefit. Providing property owners with the choice to live in a community that provides these community benefits can only be provided in many cases by having a Community-Benefit Fee.

The FHFA also claims in the Guidance, that PTFs/Community-Benefit Fees limit the marketability and salability of properties encumbered with such fees. We are unable to find tangible evidence that this is in fact the case. On the contrary, evidence points to the opposite conclusion. According to a survey conducted in the fall of 2010 by the Community Associations Institute (the "CAI Survey"), PTF covenants

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[1] Fees are typically placed in the covenants or other similar documentation and can commonly range from .25% to 1% and above.

have been in effect for more than a generation with more than forty percent (40%) of responding communities being in place for more than ten (10) years. Additionally, the CAI Survey notes that communities surveyed are located in forty (40) states.

This wide-spread and pervasive use of Community-Benefit Fees is evidence that they provide significant benefit to the assessed communities and property owners by maintaining and ensuring community facilities and communities maintain their value and livability over the long term. Further, these high quality communities tend to be highly desirable and typically have higher values than those of surrounding communities. For example, a comparison in one of our communities reveals that the DC Ranch community (has a Community-Benefit Fee) has a higher "sale price per square foot" ($214.14) when compared to the adjacent communities of Grayhawk and McDowell Mountain Ranch (no Community-Benefit Fees) ($196.08 and $185.17). Additionally, a 2009 survey by Robert Charles Lesser & Co. noted that at least five[2] of the ten top selling master planned communities in the country were communities which have Community-Benefit Fees.

On the contrary, given the inherent difficulties in changing or removing such Community-Benefit Fee covenants from a property, the marketability, salability and valuation of properties with Community-Benefit Fees would significantly decline if the proposed Guidance is adopted because these properties would be unable or severely limited in their ability to obtain financing upon a resale.

The FHFA also asserts that PTFs/Community-Benefit Fees are essentially detrimental to consumers because they are not disclosed. We are not aware of wide-spread problems related to this concern. In fact, the CAI Survey found that "community transfer fees are disclosed to potential purchasers in nearly all circumstances" and that the existence of the fee resulted in the loss of a sale of a property in less than one percent (1%) of reported transactions. Further, if Community-Benefit Fees are included as a covenant, disclosure of the existence of the fee will and should occur prior to completion of the transaction. Therefore, properly disclosed Community-Benefit Fees should not complicate a transaction and should be discoverable through a properly executed title search.

Several states have acted through the legislative process to require that proper disclosure occur for PTFs or Community-Benefit Fees. While we take issue with the FHFA's assertion that Community-Benefit Fees contribute to reduced transparency, we are supportive of efforts to ensure that proper disclosures are in place to make sure disclosures occurs. To that end, we support additional efforts whether through the Guidance or through legislative efforts at the state or federal level, to ensure that proper disclosure is in place.

Finally, we are concerned that the FHFA asserts that Community-Benefit Fees deprive consumers of equity value without providing any evidence or data to support this claim. As noted above, the existence of communities with Community-Benefit Fees can actually increase the value of properties thus providing increased equity. Further, with proper disclosure, such fees should not represent "dramatic, last minute, non-financeable costs." Again, the CAI Survey provided evidence that less than one percent (1%) of transactions are complicated or lost as a result of PTFs.

[2] These communities include Cinco Ranch, Telfair, Daybreak, Vistancia, Sienna Plantation and Rancho Sahuarita.

The Guidance should Preserve Community-Benefit Fees because they help Create Diverse, Livable and Sustainable Communities

While the FHFA recognizes and acknowledges that Community-Benefit Fees are used to provide revenues to fund homeowner associations, affordable housing, environmental groups or other charitable organizations, the proposed Guidance takes a broad and overreaching approach and directs that all PTFs should be subject to the restriction, even though the primary concerns of the FHFA are directed at those PTFs which go directly to a developer. This approach essentially "throws the baby out with the bathwater" and will have the effect of primarily impacting Community-Benefit Fees that provide a community benefit.

Our research of the use of Community-Benefit Fees reveals that they are used extensively in the United States and in a manner that provides for increased livability for communities as well as providing important services or protecting critical features that would likely not occur if the Community-Benefit Fees were not available for use. Furthermore, these Community-Benefit Fees are typically the result of collaborative efforts on the part of communities, elected officials, non-profit organizations and developers, who have worked together to identify solutions to create livable and desirable communities. As noted previously, DMB has successfully utilized Community-Benefit Fees in several of our communities.

- **Tejon Ranch**: (California) The Tejon Ranch project is one of the most significant sites in California and is the subject of an historic land use agreement between the DMB and Tejon Ranch and the environmental community. The project consists of over 270,000 acres and as part of this agreement, 178,000 acres will be protected via the dedication of conservation easements. The environmental resource groups are granted an option to acquire conservation easements over an additional 62,000 acres, with the Community-Benefit Fees, bringing total conserved lands to 240,000 acres.

  240,000 acres will be protected via a conservation easement. Additional lands may be purchased with funds generated by the Community-Benefit Fee which is dedicated to a non-profit organization.

- **Martis Camp**: (California) In Martis Camp, the Community-Benefit Fee is provided for three (3) separate purposes with 0.25% dedicated to a non-profit for workforce housing, 0.5% dedicated to a non-profit that provides for open space acquisition and restoration and habitat management and restoration and 0.25% dedicated to a non-profit for Habitat/Forest Restoration and habitat management and restoration on sites within Placer County.

- **Ladera Ranch**: (California) Ladera is a master-planned community with a Community-Benefit Fee of .25%. These funds are transferred to the Community Council for cultural, social and environmental programs and programs that help foster a sense of community.

- **DC Ranch**: (Arizona) DC Ranch is a master-planned community in Arizona. Community-Benefit Fees consist of 1% and such funds are dedicated to the DC Ranch Community Council who may utilize funds for funding of educational, cultural, environmental and other such programs and preservation of open space.

- **Verrado**: (Arizona) Verrado is an 8,800 acre master-planned community. A Community-Benefit Fee of 1% is provided to the Verrado Assembly who must utilize the funds exclusively for purposes consistent with the mission of the Assembly including expenditures for programs with a focus of education, services to benefit Verrado residents and stakeholders, social programs and other such activities.

Adoption of the proposed Guidance would not only call into question the viability of these existing agreements, but will also eliminate the ability to provide these types of important community benefits in the future.

Recommendation for Revisions to Proposed Guidance

In addition to requesting an extension of the comment period for the Guidance, we urge the FHFA to modify the Guidance to allow for the continued use of Community-Benefit Fees. A properly tailored exclusion for Community-Benefit Fees would achieve this objective while allowing the FHFA to address the problematic uses of PTFs through the Guidance. Such an exclusion should include the following elements:

- A well-articulated recordation and notice requirement to ensure homebuyer protection and awareness by title companies of the presence of a PTF encumbrance.
- A requirement that recipients of excepted Community-Benefit Fees be limited to one or more of the following: government bodies and agencies, homeowners associations, and 501(c)(3) or 501(c)(4) organizations.
- A requirement that exempted fees are not payable upon foreclosure, including non-judicial foreclosure, to protect lenders and taxpayers.

We appreciate the opportunity to provide comment and respectfully request modification of the Guidance as proposed herein to 1) meet the objectives and mission of the FHFA and 2) to avoid creation of significant negative consequences and disruptions to the real estate market.

Respectfully submitted,

Eneas A. Kane
Chief Executive Officer

cc: The Honorable Jon Kyl
The Honorable Ed Pastor
The Honorable Gabrielle Giffords