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October 15, 2010

VIA COURIER & ELECTRONIC MAIL

Alfred M. Pollard, Esq.
General Counsel
Attention: Public Comments "Guidance on Private Transfer Fee Covenants, (No. 2010-N-11)"
Federal Housing Finance Agency
Fourth Floor
1700 G Street, N.W.
Washington, D.C. 20552

Re: Notice of Proposed Guidance — No. 2010-N-11, Private Transfer Fee Covenants, 75 Federal Register 49,932 (August 16, 2010)

Dear Mr. Pollard:

On behalf of Freehold Capital Partners (Freehold Capital), Patton Boggs LLP (Patton Boggs) submits the following comments in response to the notice of proposed guidance concerning *Private Transfer Fee Covenants* (Proposed Guidance) published by the Federal Housing Finance Agency (FHFA) in the Federal Register on August 16, 2010.[1]

Based in New York, N.Y., Freehold Capital works with real estate developers, homebuilders, and community organizations across the country to infuse private capital into real estate developments by creating private covenants referred to as capital recovery fee covenants.

I. SUMMARY OF RESPONSE TO THE PROPOSED GUIDANCE

Freehold Capital believes FHFA's Proposed Guidance is misdirected and will inevitably result in significant harm to homeowners. By essentially banning private transfer fees, the Proposed Guidance will negatively impact homeowner and condominium associations, as well as numerous nonprofit organizations. Further, the Proposed Guidance will eliminate the option for developers to employ the use of capital recovery fee covenants to lower the initial purchase price of a home by removing the significant costs of a community's common infrastructure and, thereby, spreading these costs more equitably over the life of the property.

[1] Private Transfer Fee Covenants, 75 Fed. Reg. 49,932 (Aug. 16, 2010).

The Proposed Guidance unnecessarily eliminates an effective tool for (1) financing home construction; (2) attracting homebuyers with lower prices; (3) generating much-needed capital for developers to use to jump-start stalled projects; and (4) creating jobs. Freehold Capital appreciates FHFA's need to balance consumer protection with housing market stimulation. Therefore, rather than eliminating this tool, Freehold Capital urges FHFA to adopt a policy that addresses FHFA's concerns by both protecting consumers and providing a market-driven solution to the vexing issues facing our housing market.

Instead of preventing the FHFA-regulated entities from purchasing or investing in mortgages encumbered by private transfer fees, Freehold Capital urges FHFA to adopt a policy that requires all such properties to be subject to a rigorous disclosure regime. This alternative is a measured and effective way to address FHFA's stated objections to private transfer fees. Freehold Capital fully supports the implementation of such a national disclosure regime and suggests FHFA look to the private transfer fee disclosure framework set forth in H.R. 6332, the Homebuyer Enhanced Fee Disclosure Act of 2010 (Enhanced Fee Disclosure Act), which closely tracks legislation enacted by the State of California following extensive debate and analysis.[2] Proper disclosure is the best way to ensure that all parties are fully aware of the fees at sale and re-sale, while allowing a private sector solution to prevail.

The economy will continue to languish as long as dormant projects lie unfunded and under water – diverse and alternative funding sources are critical to a successful market recovery. The nation's housing and construction sectors are at their lowest point in years and will only rebound if all parties in the value chain, including private investors, builders, real estate agents, and title agents, work together to re-start private investment. As written, the Proposed Guidance will be a significant step backward, sending a negative signal to private capital.

II. OVERVIEW OF PRIVATE TRANSFER FEE COVENANTS

The use of private transfer fees in residential real estate is a longstanding practice. Homeowners and condominium associations have used such fees extensively to fund the maintenance and replacement costs for a community's common infrastructure. Similarly, environmental organizations and other non-profits have used private transfer fees to support a variety of public purposes.

Capital recovery fee covenants are a type of private transfer fee that helps to reduce negative equity, thereby assisting in restarting failed development projects and creating jobs. These fees have been utilized like homeowner association fees, but rather than providing for the cost of maintenance and upkeep of common infrastructure, capital recovery fees are used to spread the cost of the development and construction of common infrastructure over the life of the property.

This infrastructure, including streets, utilities, and similar improvements, constitutes a considerable portion of the expense involved in developing a modern master-planned community. Traditionally, these costs are absorbed by initial buyers entering the community, who pay a higher purchase price, higher transaction costs, and higher carrying costs. The use of capital recovery fees provides relief

[2] *See* Exhibit A.

to homeowners by spreading the cost of a community's common infrastructure across the life of the community, rather than requiring payment for the full infrastructure cost to be recouped in the initial purchase price of the home. This allows homeowners to purchase the home at a lower cost and reduces the size of their mortgage. The lessons of the recent mortgage crisis demand a new paradigm for home mortgage and development finance. Simply forcing homeowners to take out larger mortgages is not an acceptable solution to rising construction costs – the current economic crisis has proven this not a sustainable model.

In addition to helping the homeowner relieve the pressure to "over borrow," capital recovery fee covenants help to reduce the negative equity that has halted many construction projects and plagues bank balance sheets. Monetizing the value of the future stream of revenue from capital recovery fees will allow developers to use that capital to reduce balances on loans of pending and dormant projects, allowing such projects to go from negative equity ("under water") to positive equity, thereby allowing those projects to be restarted, creating jobs. While capital recovery fees are not the solution to all market, lending, and jobs issues, such fees have considerable potential to aid in boosting economic recovery.

A developer creates a capital recovery fee covenant by filing a Declaration of Covenant in the public records. This document provides notice to all parties, including future buyers, closing agents, and title companies, that the property is encumbered by the fee. This process is identical to that used in the creation of homeowner association regulations, dues, and assessments. Typically, these covenants, which run with the land, create a stated right in the developer to receive a fee (typically one percent of the gross sales price) each time real property transfers during a stated period (usually 99 years). On average, a home will sell eight to ten times in 99 years and, therefore, the total fee recovered is eight to ten percent paid out over the 99-year term.[3] Despite assertions to the contrary, capital recovery fees are not hidden from the parties to the real estate transaction. Current industry practices provide for critical disclosure, making the parties to the transaction aware of fee through the title commitment, which is the customary method of disclosing encumbrances, such as homeowner association dues, assessments, and other rights and obligations that bind the real property.

In addition to the customary disclosure of capital recovery fee covenants in the title commitment, Freehold Capital recently entered into a written agreement with Fidelity National Title Group, which operates a considerable percentage of the title insurance market, requiring Fidelity to obtain a signed separate disclosure at closing.[4] The mandated disclosure form mirrors that required under California law, a disclosure model that Freehold Capital fully supports. Further, the Enhanced Fee Disclosure Act would, if enacted, mandate a disclosure regime modeled after that required in California.

Regardless of one's views on the adequacy of current disclosure, Freehold Capital strongly believes that more can and should be done to ensure homebuyer and seller awareness of all private transfer fees, thereby ensuring timely, accurate, and sufficient disclosure to all parties. The goals of transparency and appropriate disclosure can be achieved through the issuance of guidance providing that any mortgage the FHFA-regulated entities purchase containing private transfer fee covenants meet rigorous disclosure standards like those mandated in California and the Enhanced Fee Disclosure Act. Freehold Capital would go even further and suggest that such fees be disclosed on

[3] *See* U.S. Census Bureau, Statistical Information Office, *Geographical Mobility by Tenure: 1987-2006.*
[4] *See* Exhibit B.

the property listing documents, allowing prospective homebuyers the opportunity to properly compare price and value between homes encumbered by such fees and those not so encumbered, where all of the common infrastructure costs are embedded in the price.

III. SPECIFIC RESPONSE TO THE PROPOSED GUIDANCE

The Proposed Guidance directs Fannie Mae and Freddie Mac to refrain from purchasing or investing in mortgages encumbered by private transfer fee covenants or securities backed by such mortgages.[5] Further, the Proposed Guidance instructs the Federal Home Loan Banks not to purchase or invest in mortgages or securities so encumbered or hold them as collateral for advances.[6]

FHFA outlines several specific concerns regarding private transfer fee covenants, indicating that such covenants may (1) increase the costs of homeownership, thereby hampering the affordability of housing and reducing liquidity in both primary and secondary mortgage markets; (2) limit property transfers or render them legally uncertain, thereby deterring a liquid and efficient housing market; (3) detract from the stability of the secondary mortgage market, particularly if such fees will be securitized; (4) expose lenders, title companies, and secondary market participants to risks from unknown potential liens and title defects; (5) contribute to reduced transparency for consumers because they often are not disclosed by sellers and are difficult to discover through customary title searches, particularly by successive purchasers; (6) represent dramatic, last-minute, non-financeable out-of-pocket costs for consumers and can deprive subsequent homeowners of equity value; (7) complicate residential real estate transactions and introduce confusion and uncertainty for homebuyers.[7] Further, the Proposed Guidance suggests that the risks and uncertainties for the housing finance market that are represented by the use of private transfer fee covenants are not counterbalanced by sufficient positive effects, and to the extent that private transfer fee covenants benefit unrelated third parties, one cannot claim that a service or value is rendered to the relevant property owner or community.[8]

The following address the specific concerns identified by FHFA in the Proposed Guidance.

Concern 1: Private transfer fee covenants may increase the costs of homeownership, thereby hampering the affordability of housing and reducing liquidity in both primary and secondary mortgage markets.

Capital recovery fee covenants do not increase the cost of homeownership. Rather, spreading infrastructure costs across the life of the property lowers the price of the home below that of a comparable home unencumbered by the fee, resulting in savings for homebuyers. As a result of the lower purchase price, homeowners pay lower closing costs and interest, which amounts to considerable savings over the course of the loan.

Since the covenant attaches to newly constructed homes, developers of encumbered communities have a pricing advantage over competitive projects that must recoup the entire cost of the common

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[5] *See* Private Transfer Fee Covenants, 75 Fed. Reg. at 49,934.
[6] *See id.*
[7] *See* Private Transfer Fee Covenants, 75 Fed. Reg. at 49,933.
[8] *See id.*

infrastructure in the price of the home. If a homebuyer receives a four to five percent reduction in the initial home purchase price, paying a one percent transfer fee upon sale still results in a significant financial benefit. It is also important to note that the seller almost always pay these fees at settlement, not the buyer.

Mello-Roos, a form of infrastructure financing used by municipalities to cover the high cost of certain development projects through a tax assessed annually on the properties improved, provide a useful case study on the market's pricing of properties encumbered by similar fees. Examinations of Mello-Roos suggest that developers lower the price of the properties in the affected district, because homebuyers demand a discounted price for a property encumbered by a fee.[9]

If the Proposed Guidance is adopted, millions of properties already encumbered with transfer fees will experience an immediate devaluation and the homeowner's ability to sell their property will be impaired, as the pool of prospective buyers for such properties will shrink to those who are willing and able to obtain non-conforming loans in order to purchase the encumbered property. To compensate for the higher "non-conforming" interest rates, sellers will be forced to list their homes at lower sales prices. Moreover, the Proposed Guidance does not distinguish between future purchases and dealings in mortgages encumbered by the transfer fees and current or completed purchases or investments in such mortgages. Accordingly, to the extreme detriment of both homeowners and the administration of the regulated entities, millions of currently conforming loans will become "non-conforming" if the Proposed Guidance is adopted.

As a result of this ambiguity, the Proposed Guidance violates the Equal Protection component of the Fifth Amendment to the U.S. Constitution by creating two classes of homeowners: (1) homeowners whose alienability rights are substantially impaired by FHFA's requirement that the regulated entities not deal in mortgages subject to private transfer fee covenants; and (2) homeowners whose alienability rights are unaffected or possibly even enhanced by the absence of such covenants. FHFA's Proposed Guidance imposes competitive disadvantages on homeowners with properties subject to transfer fees and substantially reduces the liquidity of such properties. The Equal Protection violations here are particularly egregious because the injured parties are not the entities over which FHFA has regulatory authority but the very same homeowners the Proposed Guidance purports to protect.

Requiring FHFA-regulated entities to cease dealing in mortgages on properties that are subject to transfer fees violates the FHFA's regulatory mission of "foster[ing] liquid, efficient, competitive, and resilient national housing finance markets."[10] Given the Equal Protection violations presented by the Proposed Guidance and the contravention of FHFA's statutory mandate, adoption of the Proposed Guidance would be arbitrary and capricious and not in accordance with the law, and vulnerable also under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).[11]

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[9] *See* A. Quang Do & C.F. Sirmans, *Residential Property Tax Capitalization: Discount Rate Evidence from California*, Vol. 47, no. 2, NATIONAL TAX JOURNAL, 341 (1994); *see also* Tom McPeak, Ph.D., *The Economics of Private Transfer Fee Covenants*, PRNEWSWIRE, April 22, 2010.

[10] 12 U.S.C. § 4513(a)(1)(B).

[11] *See Venetian Casino Resort, L.L.C. v. Equal Employment Opportunity Commission*, 530 F.3d 925, 931 (D.C. Cir. 2008) (holding that agency's guidance document was final agency action reviewable under APA).

Concern 2: Private transfer fee covenants may limit property transfers or render them legally uncertain, thereby deterring a liquid and efficient housing market.

Those opposed to capital recovery fees suggest such fees constitute an unreasonable restraint on alienation and fail to satisfy the enforceability test for equitable servitudes, rendering property transfer legally uncertain.

First, as it pertains to the unreasonable restraint on alienation argument, there are two types of restraints on alienation: direct and indirect. Direct restraints include, among other prohibitions, absolute prohibitions on some or all types of transfers, prohibitions on transfers without the consent of another, and prohibitions on transfers to particular persons.[12] Such restraints are enforceable only if they are reasonable.[13] The courts rely on a fact-intensive analysis to determine the reasonableness of any challenged property restraint. The Restatement (Third) of Property, however, identifies factors that are indicative of reasonable, enforceable restraints including (1) whether the enforcement of the restraint accomplishes a worthwhile purpose; and (2) whether the restraint is limited in duration. Here, the Freehold Capital fee is reasonable since it is limited in duration, benefits the buyer by allowing such buyer to negotiate a lower sales price, and benefits the community in that a portion of the fee is specifically allocated for the betterment of the community. Indirect restraints, instead, include transfer fees and other servitudes that affect the value or marketability of property.[14] Indirect restraints are treated with a much lighter touch and are enforceable if they bear a rational basis for such enforcement.[15] Capital recovery fees bear a rational basis for enforcement including, among other reasons, the fact that they are directly related to the improvement of the property. Under either characterization, a restraint is valid if it is limited and reasonable.[16]

Although a capital recovery fee is simply a fee and, therefore, arguably only an indirect restraint on the property, conservative interpretations of the theory may hold this covenant to be a direct restraint on alienation. Under this view, the effect of the covenant is a direct restraint because it limits transferability of title (rather than marketability) by encumbering the property with a lien. However, liens are traditionally exempt from the limitations imposed on direct restraints.[17] Indeed, a lien inhibits transfer of title, yet it does so only to the extent necessary to secure an indirect restraint (that of the obligation to pay money). Another example would include a mortgage or deed of trust, which restrains an owner's ability to transfer title, but only to the extent of any obligation under the note. Where a direct restraint is simply imposed to secure an otherwise permissible indirect restraint, that restraint should not be considered unreasonable. The common law rule against unreasonable restraints requires a case-by-case analysis that measures the reasonableness of the restraint by its price,[18] its purpose,[19] whether it is limited in duration,[20] whether it allows a variety of types of transfers,[21] and whether it is limited with respect to the number of persons to whom the transfer is

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[12] Restatement (Third) of Property, § 3.4 cmt. b (2000).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Tovrea v. Umphress*, 556 P.2d 814 (Div. I 1976).
[17] Examples may include various judgment, tax, construction, mechanic's, and other common liens.
[18] *Wildenstein & Co., Inc. v. Wallis*, 595 N.E.2d 828 (N.Y. 1992).
[19] *Id.*
[20] *Urquhart v. Teller*, 958 P.2d 714 (Mont. 1998).
[21] *Id.*

prohibited.[22] Many restraints, including spendthrift trusts[23] and due on sale clauses,[24] have been upheld as reasonable restraints.

Additionally, opponents of capital recovery fee covenants argue that such covenants do not satisfy the enforceability test for equitable servitudes. In order for an equitable servitude to be enforceable (1) the original parties must intend for the burden to run with the land (i.e., intend that the burden be enforceable by successors-in-interest); (2) subsequent purchasers must have actual or constructive notice of the burden; and (3) the burden must touch and concern the land.[25] The first two requirements are easily satisfied by the recording of the Declaration of Covenant in the applicable real property records. It has long been established that instruments recorded in the real property records provide constructive notice to the public, which includes all purchasers of real estate.[26] However, many who criticize capital recovery fee covenants claim they do not touch and concern the land. Clearly, this is not the case. While the concept of touch and concern is difficult to identify with a precise definition, it has been summarized as requiring a reasonable nexus between the benefits, the burden, and the effect of the servitude upon enjoyment of the land.[27] Developers create benefits to land in the form of providing infrastructure development (e.g., sewer lines, water pipes, streets, utilities, etc.). In connection therewith, the developers impose capital recovery fee covenants for a given time period in order to recover those infrastructure costs. Therefore, a nexus satisfying the touch and concern requirement exists between the benefit (infrastructure development) and the burden (payment of the capital recovery fee covenants) of the equitable servitude.

The exact meaning and concept of touch and concern has been highly debated. Many courts throughout the United States have criticized strict adherence to the touch and concern requirement and have instead applied more liberal and flexible rules.[28] Various scholars and academics have also criticized the touch and concern concept as being vague, unpredictable, based upon obscure reasoning, and interfering with the intent of the parties.[29] In 1998, due to the amount of confusion created by the concept of touch and concern, the American Law Institute (ALI) eliminated the touch and concern requirement in the Restatement (Third) of Property: Servitudes. The Restatement (Third) of Property: Servitudes focuses more on contract principles and "takes the position that judges and lawyers will do a better job if directly asked the question why a particular servitude arrangement agreed to by the parties should not be enforced, rather than asked whether it touches or concerns the land."[30] More specifically, Section 3.1 of the Restatement (Third) of Property: Servitudes states that a servitude is valid unless it is illegal, unconstitutional, or violates public policy. Capital recovery fee covenants do not fall into any one of those three categories and,

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[22] *Id.*

[23] 76 Am. Jur. 2d, Trusts § 131.

[24] State restrictions on the enforceability of due-on-sale clauses were federally preempted by section 341 of the Garn-St. Germain Depository Institution Act of 1982 (the Garn Act).

[25] JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY, 867 (Richard A. Epstein et al. eds., Aspen Publishers, 5th ed. 2002).

[26] *See Westland Oil Dev. Corp v. Gulf Oil*, 637 S.W.2d 903, 908 (Tex. 1982).

[27] *See* A. Dan Tarlock, *Touch and Concern Is Dead, Long Live the Doctrine*, 77 Neb. L. Rev. 804 (1998).

[28] *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 256 (N.Y. 1938).

[29] Dukeminier & Krier, *supra* note 1, at 885.

[30] Susan F. French, *The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger*, 77 Neb. L. Rev. 653, 655 (1998).

thus, the capital recovery fee covenants satisfy both the traditional touch and concern requirement and the more recent concept set forth in the Restatement.

Currently, the market is illiquid, and the use of a capital recovery fee to address the negative equity problems facing banks and developers offers one of the few viable solutions to help restore a functioning market. When the significant infrastructure costs associated with a master-planned community can be spread across future beneficiaries, it results in a lower purchase price, smaller mortgage, and improved loan-to-value ratio and debt-to-income ratio, thus beginning a move toward improving the housing market.

Finally, by ensuring the existence of a very robust disclosure regime for transfer fees, the issue of "legal certainty" for any future homebuyer, seller, title insurer, or any other party to the real estate transaction is addressed at the outset of the process.

Concern 3: Private transfer fee covenants may detract from the stability of the secondary mortgage market, particularly if such fees will be securitized.

Capital recovery fee covenants neither create uncertainty in the secondary mortgage market nor amount to an uncertain investment in the secondary market.

There is no relationship between the secondary mortgage market and securitizing capital recovery fee income – the two issues are wholly unrelated. The first issue is the secondary mortgage market and the second is the secondary market for the monetization of the capital recovery fees themselves. The stability of the secondary mortgage market is dependant upon the value of the collateral securing the mortgage and the likelihood of default on that mortgage. Neither the existence of a capital recovery free covenant nor the actual payment of a capital recovery fee at closing impacts the likelihood that a particular mortgage or pool of mortgages will default. In addition, the one percent fee that the seller pays has only positive impact on the collateral value since the infrastructure costs are spread across the life of the property, and the developer is not forced to recoup those costs in the initial purchase price of the home. It can be argued that embedding such infrastructure costs into the price of the home upon construction actually hurts the secondary mortgage market by forcing the homebuyer to borrow more money to purchase the home.

In connection with the securitization of capital recovery fees, as compared to income streams backed by mortgages or similar commitments to pay, income streams backed by the transfer of real property provide a reliable investment alternative. Private transfer fees are subordinate to the mortgage on the home and, therefore, do not impact the priority of lien or the senior nature of the mortgage underlying the mortgage backed securities in the secondary market. Moreover, securities based on (1) income streams running with the land; (2) originally payable to the developer as a reimbursement for infrastructure costs; and (3) subsequently sold to investors have been issued in the billions of dollars and proven to be reliable investments. These payments do not rely on the credit worthiness of borrowers, but merely require a transfer of the property, making them extremely reliable as an income stream supporting securitized debt. Examples of these types of instruments include Public Improvement District bonds and Municipal Utility District bonds.

Concern 4: Private transfer fee covenants may expose lenders, title companies, and secondary market participants to risks from unknown potential liens and title defects.

Private transfer fee covenants do not expose lenders, title companies, or secondary market participants to any greater risks from potential liens and title defects than any other routine encumbrances to title, including easements, deed restrictions, mechanic's and materialmen's liens, mortgages and deeds of trust, and judgments against the property. Title policies detailing encumbrances are required as a condition to the purchase of a mortgage. Such policies considerably limit the exposure of lenders, title companies, and secondary market participants to any perceived risk. The very purpose of title companies is to indentify such encumbrances to title, and any failure to do so should be solely attributed to negligence on the part of the title company, not any perceived peculiarity with the existence of the fee.

In States like California that mandate very robust disclosure and transparency, there is no excuse for title insurers or other parties to the transaction to be unaware of the existence of such covenants. For this reason, Freehold Capital believes that the California disclosure standard, as proposed in the Enhanced Fee Disclosure Act, should serve as the model for FHFA's Proposed Guidance, with the added requirement that the existence of such fees be included in the listing documents provided to prospective buyers by the real estate agent.

Concern 5: Private transfer fee covenants may contribute to reduced transparency for consumers because they often are not disclosed by sellers and are difficult to discover through customary title searches, particularly by successive purchasers.

As with all other encumbrances, capital recovery fee covenants are filed in the public record as a Declaration of Covenant, typically with a clear notice entitled "Payment of Transfer Fee Required" or similarly styled. For example, the Freehold Capital instrument includes a prominently styled **"NOTICE"** in bold 14-point font at the top of the first page.[31] These documents are easily identified through a public records search.

Customary title searches performed with ordinary due diligence should always reveal the existence of a private transfer fee. Recordation of instruments is deemed notice in all States and those taking title do so subject to all matters of record and are deemed to have knowledge of such matters.[32] Since title insurance is a requirement for all Fannie Mae and Freddie Mac loans, a title search will be conducted, and the buyer will obtain an owner's policy of title insurance insuring title to the property subject to all matters disclosed in the policy. This same method is used for disclosing all other forms of encumbrances including easements, deed restrictions, mechanic's and materialmen's liens, mortgages and deeds of trust, and judgments against the property.

Even when the transfer fee is assessed within the typical Covenants, Conditions and Restrictions that create the homeowner association, provided to prospective buyers prior to their purchase, the mechanism is exactly the same mechanism widely used to impose homeowner association dues, fees, and assessments. To conclude that a transfer fee contained within such documents is "hidden" requires an identical conclusion that homeowner association dues, requirements, conditions, and assessments are hidden – a conclusion that has no basis.

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[31] *See* Exhibit C.

[32] *See Westland Oil Dev. Corp v. Gulf Oil*, 637 S.W.2d 903, 908 (Tex. 1982).

To illustrate the process, when a buyer and a seller enter into a purchase agreement, the contract is receipted with the closing agent, usually a title company. The title company then sends a title commitment to the buyer. The transfer fee covenant is disclosed in the title commitment. A typical earnest money contract will allow the buyer to review the title commitment and make title objections. If the objections are not addressed to the buyer's satisfaction, the buyer then has a period of time to withdraw from the transaction, without penalty. A typical earnest money contract states:

> Within 20 days after the Title Company receives a copy of this contract, Seller shall furnish to Buyer a commitment for title insurance (Commitment) and, at Buyer's expense, legible copies of restrictive covenants and documents evidencing exceptions in the Commitment. ... Buyer may object in writing to defects, exceptions, or encumbrances to title.... If objections are not cured within such 15 day period, this contract will terminate and the earnest money will be refunded to Buyer unless Buyer waives the objections.[33]

To state that a private transfer covenant may contribute to reduced transparency for consumers because they often are not disclosed and are difficult to discover through customary title searches is disingenuous. The fee disclosure is guaranteed through the recordation in the public records, and locating the notices and covenants in the public records is the method used to provide notice of all kinds of encumbrances to title accepted in the real estate industry. This is the basis of the entire title insurance industry.

However, disclosure mandates can enhance this process, providing additional buyer safeguards. For example, after significant public debate in 2007, California rejected a proposed ban on private transfer fees and opted for a disclosure statute.[34] Under California law, the standard Seller Property Questionnaire now requires disclosure of a transfer fee by the seller.[35] A buyer has the opportunity to terminate without penalty after reviewing this form. Additionally, the California Residential Purchase Agreement now includes a provision for a private transfer fee.[36] As discussed above, in addition to State disclosure requirements, Freehold Capital Partners entered into a written agreement with Fidelity National Title Group, which represents a significant portion of the U.S. title insurance market, requiring these title insurers to obtain a separate disclosure, signed by the buyer and seller, prior to closing.

Additionally, the Enhanced Fee Disclosure Act, if enacted, would mandate a disclosure regime modeled after that of California. Freehold Capital strongly encourages FHFA to adopt guidance permitting the regulated entities to purchase mortgages that have such transfer fees attached *provided* the fee is disclosed to the homebuyer and all other parties to the transactions in a manner consistent with that mandated by California law. However, Freehold Capital would go even further in encouraging robust disclosure by suggesting FHFA require that the fee be disclosed in the property listing documents prepared by the real estate agent for prospective buyers, thereby providing for disclosure at the outset of the purchasing process.

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[33] Excerpt from Texas Real Estate Commission Standard Contract.
[34] *See* CAL. CIV. CODE §§ 1098-1098.5; *see also* Exhibit D.
[35] *See* Exhibit E.
[36] *See* Exhibit F.

Concern 6: Private transfer fee covenants may represent dramatic, last-minute, non-financeable out-of-pocket costs for consumers and can deprive subsequent homeowners of equity value.

A one percent fee does not constitute a dramatic cost, particularly given that the seller originally purchased the house at a discount because of the fee's attachment. Furthermore, a one percent transfer fee is far less than the typical broker fee of six percent or the typical premium for an owners and mortgagee policy of title insurance that Freddie Mac and Fannie Mae require. The fee is neither inserted nor should it be discovered at the "last minute" because, once placed on the property, it encumbers the property for a long period of time and is easily found in the title search, typically conducted during the first weeks of the due diligence period of a contract to purchase a property. Further, the fee is generally paid by the seller, who was aware of the fee from the time of purchase.

Typically, when a buyer and seller enter into a contract to purchase a property, the buyer is granted a free look period in which to conduct typical due diligence on the property. This involves a title search or a commitment for title insurance, survey, home inspection, environment audits and/or radon tests, termite inspections, etc. During this early period of time, the buyer has the right to back out of a contract if items arise during the review that the buyer does not like. The title insurance company's title search will itemize all encumbrances for the buyer's review. Prior to closing, the title company or attorney prepares a HUD-1 or a settlement statement setting forth the closing costs, including transfer fees, recording fees, attorney fees, title insurance premiums, flood insurance premiums, liens, claims, and encumbrances, all of which have to be satisfied at closing from the proceeds of the sale. Typically, a loan approval will require this itemization of closing costs prior to approval. Further, as the seller generally pays the fee, it is not typically an additional cost to be financed by the buyer. While Freehold Capital's existing disclosure practices are quite comprehensive, a national standard that provides a robust disclosure regime similar to that mandated by California will completely eliminate any possible element of "surprise."

As it relates to homeowner equity, capital recovery fees do not deprive subsequent homeowners of equity value, as they are similar to other fees charged to the seller at closing, including legal fees, recording costs, title insurance premiums, and brokerage fees. However, unlike those other fees, a capital recovery fee allows the homeowner to purchase the home at a lower price, because the cost of the home does not recoup the full expense of the community's common infrastructure. By purchasing a home at a lower cost, the homebuyer is able to reduce the size of their mortgage or increase their down payment – both result in more homeowner equity, not less.

Concern 7: Private transfer fee covenants may complicate residential real estate transactions and introduce confusion and uncertainty for homebuyers.

In reality, as it relates to capital recovery fee covenants, the process is simple: (1) a developer of a project invests in infrastructure such as roads, utilities, parks, community centers, trees, and other amenities; (2) instead of allocating the full amount of this infrastructure to the initial sales price of each home it allocates only a small percentage of those costs actually incurred; (3) the homes in the subdivision are sold to the first homebuyers at a significant discount as compared to the actual value of the home based on the actual infrastructure costs incurred by the developer; (4) as detailed above, a Declaration of Covenant and a bold, clear, and concise notice document are filed against the property when it is sold by the developer to the first homebuyer (that homebuyer generally does not

pay a capital recovery fee in connection with that purchase); (5) when the first buyer enters into a contract to sell his home to the second buyer, the second buyer's title search reveals both the Declaration of Covenant and the notice document, as it does all other encumbrances to title including other covenants, conditions, restrictions, utilities and other easements, and association and other monthly assessments; and (6) the first buyer sells the property to the second buyer and the title company remits a percent fee to the trustee of record, just as the title company pays off any existing mortgage impacting the property. The Declaration of Covenant does not specify who should pay the fee, and such amount should be left to the market to determine similar to all other closing costs.

As discussed in detail above, despite the millions of properties encumbered with private transfer fee covenants, there is no evidence that such fees inject risk and uncertainty in the housing finance market. Furthermore, to reiterate, if concerns about confusion or uncertainty remain, such issues are best addressed through the aforementioned robust and comprehensive disclosure requirements. Again, Freehold Capital strongly encourages FHFA to change the Proposed Guidance to ensure that any mortgage purchased by the regulated entities complies with such standards. The more a potential home buyer knows of and understands such fees, the more attractive an encumbered property will be – the homebuyer will recognize a price difference resulting from the developer spreading out the cost of common infrastructure across the life of the property.

Concern 8: The risks and uncertainties for the housing finance market that are represented by the use of private transfer fee covenants are not counterbalanced by sufficient positive effects.

As indicated above, private transfer fee covenants do not inject risk and uncertainty in the housing finance market. Rather, there is an absence of evidence, empirical or otherwise, to suggest that negative effects on the housing finance market exist despite the millions of homes across the country encumbered with private transfer fees.

Further, as discussed in detail above, capital recover fee covenants provide substantial benefits to the homeowner and the surrounding community, including a reduction of housing costs, the provision of a financing solution for stalled developments, and a revitalization of the construction industry. It is critical that FHFA encourage a reconsideration of the past paradigm of housing and development finance. If such fees are not accepted by the home-buying public, they will cease to be utilized, just as any product is evaluated in the free market.

By essentially banning the use of private transfer fees, FHFA will prevent the use of an important tool that could provide needed capital to developers to restart dormant projects and create jobs.

Concern 9: To the extent that private transfer fee covenants benefit unrelated third parties, one cannot claim that a service or value is rendered to the relevant property owner or community.

Developers are not unrelated third parties who render no value to the property owner or the community. To the contrary, developers spend years and millions of dollars installing long-term infrastructure and creating master-planned communities. Homeowners in these communities benefit from the use of roads, utilities, wastewater lines, and additional infrastructure.

The term "unrelated third parties" may refer to investors, underwriters, and others who securitize the income stream. However, suggesting that these parties render no value ignores the benefit

provided to homeowners and communities through the facilitation of the use of capital recovery fee covenants. Although a developer creates the funding stream and then sells the future income to investors, the fee was originally assessed as a way to pay for improvements that the homeowners will use and benefit from for the life of the covenant.

In some of the comment letters filed with FHFA, certain commenters request FHFA consider permitting the continuation of purchases of mortgages that are encumbered with private activity fees that are designed to support activities of homeowners associations, condominium associations, or non-profit organizations. While Freehold Capital fully supports the continued use of such fees by those organizations, no logical distinction can be drawn between fees for the ongoing maintenance and improvements of a community's common infrastructure and fees paying for the initial investment in the underlying infrastructure itself: the streets, utilities, and similar capital improvements that were paid for through the transfer fees provide ongoing benefits to the homeowners that use them. There is simply no rational basis to separate transfer fees paid to developers, investors, underwriters, or others who securitize the income stream from those paid to homeowners associations and any Guidance that did so would be subject to challenge under the Equal Protection component of the Fifth Amendment of the United States Constitution and the Administrative Procedure Act, 5 U.S.C. 706(2).

Concern 10: Even where such fees are payable to a homeowners association, unlike more typical annual assessments they are likely to be unrelated to the value rendered, and at times may apply even if the property's value has significantly diminished since the time the covenant was imposed.

In those instances where a private transfer fee is paid to a homeowners association, the fee covers the value rendered to the homeowner for the maintenance of the infrastructure during the homeowner's occupancy of the property. In the case of a capital recovery fee paid by the seller at

the time of closing, the homeowner has likewise benefitted from the common infrastructure the capital recovery fee was designed to finance over the life of the property. As noted previously, the remittance of this fee is counterbalanced by the initial, lower purchase price of the home, as the price did not include the full cost of the community infrastructure.

As to the relationship of the fee amount to the value rendered, the fee may vary by project, depending on the anticipated cost of the common infrastructure and the resultant price of the home. Furthermore, the fee is set based on analysis of those costs with the time-value of money (given that the fee is collected over the entire life of the property) and given assumptions about the turnover rate of ownership of the home. Freehold Capital believes that while those variables will impact the amount of the fee, such fees are based on a reasonable expectation and calculation that the amounts collected will cover the targeted infrastructure costs. As to the time-value of money, part of that calculation will be the anticipated value of the home at sale. If over the years the home appreciates less than anticipated, future fee levels will reduce accordingly. For fees already in place, since the fee is typically a percentage of the selling price, if the value of the home declines, the amount of the transfer fee conveyed at the time of closing will reduce accordingly.

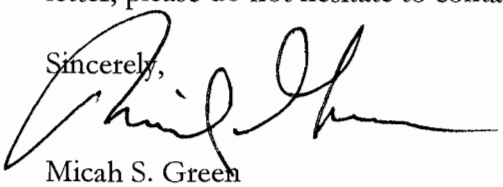
IV. CONCLUSION

FHFA acknowledges that a variety of alternatives exist for addressing private transfer fee covenants.[37] To best address FHFA's concerns outlined in the Proposed Guidance, Freehold Capital strongly urges FHFA to allow the regulated entities to continue to deal in mortgages on properties encumbered by private transfer fee covenants, *provided* the existence of the transfer fee is disclosed in the public record and that there is a disclosure regime similar to or more robust than that mandated by the State of California or proposed under the Enhanced Fee Disclosure Act (H.R. 6332). Freehold Capital firmly believes that an appropriately tailored disclosure regime will serve to address the concerns set forth by FHFA in the Proposed Guidance, while leaving intact a source of critical funding for master-planned communities, non-profits, and associations. FHFA should be promoting policies that will help to restart the housing market and policies that will provide the homebuyer more responsible financing options. Spreading out the cost of infrastructure through the utilization of capital recovery fee covenants will benefit the homebuyer, the seller, the local community, and the local and national economy.

Freehold Capital believes it is important for FHFA, policy-makers, and the public to recognize that some of the loudest voices opposing transfer fees have much to gain at the expense of the homeowner. Robust disclosure completely addresses the concerns raised by title insurers.

On behalf of Freehold Capital, I would like to thank you for the opportunity to comment on the Proposed Guidance concerning *Private Transfer Fee Covenants* and your consideration of the views expressed herein. If you need further information regarding any issue discussed in this comment letter, please do not hesitate to contact me at msgreen@pattobnboggs.com or (202) 457-5258.

Sincerely,



Micah S. Green
Patton Boggs LLP
on behalf of Freehold Capital Partners

[37] Private Transfer Fee Covenants, 75 Fed. Reg. at 49,933.

I

111TH CONGRESS
2D SESSION

H. R. 6332

To enhance disclosure of private transfer fees in real estate transactions.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 29, 2010

Mr. GINGREY of Georgia introduced the following bill; which was referred to the Committee on Financial Services

---

A BILL

To enhance disclosure of private transfer fees in real estate transactions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Homebuyer Enhanced Fee Disclosure Act of 2010''.

SEC. 2. CONGRESSIONAL FINDINGS.

The Congress finds that transfer fee covenants represent an important economic tool with the potential to make homeownership more affordable and benefit local communities by positively restructuring the economics of

real estate transactions by apportioning certain infrastructure and overhead costs over time.

SEC. 3. RECORDATION OF TRANSFER FEES.

(a) RECORDATION REQUIREMENT.—A transfer fee covenant recorded on or after the date of the enactment of this Act shall be void and unenforceable unless, at the time the document containing the transfer fee covenant is submitted for recording, a notice described in subsection (b) is contemporaneously submitted for recording in the office of the applicable county recorder.

(b) NOTICE REQUIREMENTS.—Notice required under subsection (a) shall—

(1) be titled, in boldface type, ''Payment of Transfer Fee Required'';

(2) include statements of—

(A) the name or names of the owner or owners of the affected property;

(B) the legal description of the affected property;

(C) the dollar amount or, if applicable, the percentage of sales price constituting the transfer fee required to be paid under the transfer fee covenant;

(D) the method and manner of payment of the transfer fee;

(E) in the case of affected property that is residential property, actual dollar-cost examples of the amount of the transfer fee for property priced at $250,000, $500,000, and $750,000; and

(F) if applicable, the date on which or circumstances under which the transfer fee covenant expires.

(c) PRESUMPTION OF VALIDITY.—A transfer fee covenant that imposes a transfer fee of not more than 1 percent of the gross sales price for the affected property, effective for a term of not more than 99 years, and which complies with the requirements under subsections (a) and (b) shall be presumed to be valid.

(d) LIMITATION.—No property shall be subject to more than one transfer fee covenant.

SEC. 4. DEFINITIONS.

For purposes of this section, the following definitions shall apply:

(1) AFFECTED PROPERTY.—The term ''affected property'' means, with respect to a transfer fee covenant, the real property that is encumbered by the transfer fee covenant.

(2) APPLICABLE COUNTY RECORDER.—The term ''applicable county recorder'' means, with re-

spect to affected property, the recorder of the county in which the affected property is located.

(3) TRANSFER FEE.—The term ''transfer fee'' means a fee, charge or payment imposed by a covenant, restriction, or similar document filed in the applicable county recorder's office and required to be paid in connection with or as a result of a transfer of title to affected property, but does not include fees, charges, payments, or other obligations that—

(A) are imposed by a court judgment, order, or decree;

(B) are imposed by or payable to the Federal Government or a State or local government;

(C) arise out of a mechanic's lien;

(D) arise from an option to purchase, or for waiver of the right to purchase, the affected property;

(E) are payable to a homeowners association, condominium association, or similar entity for the benefit of the owners; and

(F) are imposed by or payable to lenders or purchasers of loans.

(4) TRANSFER FEE COVENANT.—The term ''transfer fee covenant'' means a covenant, restric-

tion, or agreement filed with the office of the applicable county recorder that—

(A) affects real property; and

(B) obligates a future buyer or seller of the affected real property, other than a person who is a party to the covenant, restriction, or agreement, to pay a transfer fee.

○

PRIVATE TRANSFER FEE DISCLOSURE

1. The property which you are buying is encumbered by a covenant which requires payment by the seller of a transfer fee upon any transfer of the property. This fee is not imposed by any governmental entity.

2. The amount of the fee is one percent (1%) of the consideration paid for the transfer or $_____ and will be charged to the Seller. Any change in the Sales Prices will affect the fee owed by the Seller.

3. Failure to pay the fee will result in a lien on the Buyers' property.

4. Upon the Buyers' sale of the property in the future this fee will be charged again based upon the price at which the property is being sold and will have to be paid by Buyer.

5. The fee will be paid to the following entity(ies) or person(s): _____.

6. The terms of the covenant will not expire until the following date: _____.

7. Any title insurance policy issued on this property will have an exception for the covenant and any lien resulting from the covenant.

8. If you have questions concerning this fee you should consult an attorney.

Seller certifies that the information herein is true and correct.

Seller _____ Date _____

Seller _____ Date _____

Buyer certifies that the covenant and related fee have been disclosed to Buyer and that Buyers title policy will contain an exception for the covenant and fee.

Buyer _____ Date _____

Buyer _____ Date _____

EXHIBIT B

NOTICE OF CONFIDENTIALITY RIGHTS. IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

NOTICE: THIS DOCUMENT MAY REQUIRE PAYMENT OF A FEE IN CONNECTION WITH A TRANSFER OF TITLE

Closing Information: Seller shall pay one percent (1%) of the Gross Sales Price (see ¶5 & ¶6). To obtain an Estoppel Letter (see ¶8) or contact Trustee for assistance with closing (see ¶10 & ¶14).

DECLARATION OF COVENANT

This Declaration of Covenant was designed to comply with Tex. Prop. Code §5.017.

STATE OF TEXAS

KNOW ALL MEN BY THESE PRESENTS

COUNTY OF COLLIN

This Declaration of Covenant (this "Declaration") is made by **SAMPLE, LTD., A TEXAS LIMITED PARTNERSHIP**, whose mailing address is 100 Anywhere Street, Anywhere Texas 10001 (hereinafter "Declarant") for the purposes herein set forth as follows:

WITNESSETH:

WHEREAS, Declarant is the owner of that certain real property ("Property") located in Collin County, State of Texas, described as follows:

The real property described in Exhibit "A" attached hereto and incorporated herein for all purposes.

NOW THEREFORE, Declarant hereby declares that the Property shall be transferred, held, sold and conveyed subject to this Declaration and all matters set forth in this Declaration, which shall be deemed covenants running with the land and the title to the Property and shall be binding upon all parties having or acquiring any right, title or interest in the Property or any part thereof:

1. DEFINITIONS. In addition to words and phrases defined elsewhere in this Declaration, the following words when used in this Declaration shall have the following meanings:

a. "Beneficial Interest" shall refer to an undivided ownership interest in the rights, interest, ownership and privileges in and to this Declaration, apportioned pursuant to section 17 and thereafter in accordance with section 18 or as otherwise provided herein.

b. "Beneficiary" shall refer to the owner of a Beneficial Interest.

c. "Closing Agent" or "Settlement Agent" shall have its customary meaning within the real estate industry, and generally shall refer to the party responsible for conducting and/or facilitating a closing of a conveyance of all or any portion of the Property; usually either a title company, attorney or escrow agent who prepares paperwork and

§ 1098 Civ.

A "transfer fee" is any fee payment requirement imposed within a covenant, restriction, or condition contained in any deed, contract, security instrument, or other document affecting the transfer or sale of, or any interest in, real property that requires a fee be paid upon transfer of the real property. A transfer fee does not include any of the following:

(a) Fees or taxes imposed by a governmental entity.

(b) Fees pursuant to mechanics' liens.

(c) Fees pursuant to court-ordered transfers, payments, or judgments.

(d) Fees pursuant to property agreements in connection with a legal separation or dissolution of marriage.

(e) Fees, charges, or payments in connection with the administration of estates or trusts pursuant to Division 7 (commencing with Section 7000), Division 8 (commencing with Section 13000), or Division 9 (commencing with Section 15000) of the Probate Code.

(f) Fees, charges, or payments imposed by lenders or purchasers of loans, as these entities are described in subdivision (c) of Section 10232 of the Business and Professions Code.

(g) Assessments, charges, penalties, or fees authorized by the Davis-Stirling Common Interest Development Act (Title 6 (commencing with Section 1350) of Part 4).

(h) Fees, charges, or payments for failing to comply with, or for transferring the real property prior to satisfying, an obligation to construct residential improvements on the real property.

(i) Any fee reflected in a document recorded against the property on or before December 31, 2007, that is separate from any covenants, conditions, and restrictions, and that substantially complies with subdivision (a) of Section 1098.5 by providing a prospective transferee notice of the following:

(1) Payment of a transfer fee is required.

(2) The amount or method of calculation of the fee.

(3) The date or circumstances under which the transfer fee payment requirement expires, if any.

(4) The entity to which the fee will be paid.

(5) The general purposes for which the fee will be used.

(Added by Stats. 2007, c. **689**, § 1.)

§ 1098.5 Civ.

(a) For transfer fees, as defined in Section 1098, imposed prior to January 1, 2008, the receiver of the fee, as a condition of payment of the fee on or after January 1, 2009, shall record, on or before December 31, 2008, against the real property in the office of the county recorder for the county in which the real property is located a separate document that meets all of the following requirements:

(1) The title of the document shall be "Payment of Transfer Fee Required" in at least 14-point boldface type.

(2) The document shall include all of the following information:

(A) The names of all current owners of the real property subject to the transfer fee, and the legal description and assessor's parcel number for the affected real property.

(B) The amount, if the fee is a flat amount, or the percentage of the sales price constituting the cost of the fee.

(C) If the real property is residential property, actual dollar-cost examples of the fee for a home priced at two hundred fifty thousand dollars ($$250,000), five hundred thousand dollars ($$500,000), and seven hundred fifty thousand dollars ($$750,000).

(D) The date or circumstances under which the transfer fee payment requirement expires, if any.

(E) The purpose for which the funds from the fee will be used.

(F) The entity to which funds from the fee will be paid and specific contact information regarding where the funds are to be sent,

(G) The signature of the authorized representative of the entity to which funds from the fee will be paid.

(b) When a transfer fee, as defined in Section 1098, is imposed upon real property on or after January 1, 2008, the person or entity imposing the transfer fee, as a condition of payment of the fee, shall record in the office of the county recorder for the county in which the real property is located, concurrently with the instrument creating the transfer fee requirement, a separate document that meets all of the following requirements:

(1) The title of the document shall be "Payment of Transfer Fee Required" in at least 14-point boldface type.

(2) The document shall include all of the following information:

(A) The names of all current owners of the real property subject to the transfer fee, and the legal description and assessor's parcel number for the affected real property.

(B) The amount, if the fee is a flat amount, or the percentage of the sales price constituting the cost of the fee.

(C) If the real property is residential property, actual dollar-cost examples of the fee for a home priced at two hundred fifty thousand dollars ($$250,000), five hundred thousand dollars ($$500,000), and seven hundred fifty thousand dollars ($$750,000).

(D) The date or circumstances under which the transfer fee payment requirement expires, if any.

(E) The purpose for which the funds from the fee will be used.

(F) The entity to which funds from the fee will be paid and specific contact information regarding where the funds are to be sent.

(G) The signature of the authorized representative of the entity to which funds from the fee will be paid.

(c) The recorder shall only be responsible for examining that the document required by subdivision (a) or (b) contains the information required by subparagraphs (A), (F), and (G) of paragraph (2) of subdivision (a) or (b). The recorder shall index the document under the names of the persons and entities identified in subparagraphs (A) and (F) of paragraph (2) of subdivision (a) or (b). The recorder shall not examine any other information contained in the document required by subdivision (a) or (b).

(Added by Stats. 2007, c. **689**, § 2.)

Property Address: _____ Date: _____

TITLE, OWNERSHIP AND LEGAL CLAIMS: **ARE YOU (SELLER) AWARE OF...**

22. Any other person or entity on title other than Seller(s) signing this form . . . . . ☐ Yes ☐ No
23. Leases, options or claims affecting or relating to title or use of the Property . . . . . ☐ Yes ☐ No
24. Past, present, pending or threatened lawsuits, mediations, arbitrations, tax liens, mechanics' liens, notice of default, bankruptcy or other court filings, or government hearings affecting or relating to the Property, Homeowner Association or neighborhood . . . . . ☐ Yes ☐ No
25. Any private transfer fees, triggered by a sale of the Property, in favor of private parties, charitable organizations, interest based groups or any other person or entity . . . . . ☐ Yes ☐ No

Explanation: _____

NEIGHBORHOOD: **ARE YOU (SELLER) AWARE OF...**

26. Neighborhood noise, nuisance or other problems from sources such as, but not limited to, the following: neighbors, traffic, parking congestion, airplanes, trains, light rail, subway, trucks, freeways, buses, schools, parks, refuse storage or landfill processing, agricultural operations, business, odor, recreational facilities, restaurants, entertainment complexes or facilities, parades, sporting events, fairs, neighborhood parties, litter, construction, air conditioning equipment, air compressors, generators, pool equipment or appliances, or wildlife . . . . . ☐ Yes ☐ No

Explanation: _____

GOVERNMENTAL: **ARE YOU (SELLER) AWARE OF...**

27. Ongoing or contemplated eminent domain, condemnation, annexation or change in zoning or general plan that apply to or could affect the Property . . . . . ☐ Yes ☐ No
28. Existence or pendency of any rent control, occupancy restrictions or retrofit requirements that apply to or could affect the Property . . . . . ☐ Yes ☐ No
29. Existing or contemplated building or use moratoria that apply to or could affect the Property . . . . . ☐ Yes ☐ No
30. Current or proposed bonds, assessments, or fees that do not appear on the Property tax bill that apply to or could affect the Property . . . . . ☐ Yes ☐ No
31. Proposed construction, reconfiguration, or closure of nearby government facilities or amenities such as schools, parks, roadways and traffic signals . . . . . ☐ Yes ☐ No
32. Existing or proposed Government requirements affecting the Property **(i)** that tall grass, brush or other vegetation be cleared; **(ii)** that restrict tree (or other landscaping) planting, removal or cutting or **(iii)** that flammable materials be removed . . . . . ☐ Yes ☐ No
33. Any protected habitat for plants, trees, animals or insects that apply to or could affect the Property . . . . . ☐ Yes ☐ No
34. Whether the Property is historically designated or falls within an existing or proposed Historic District . . . . . ☐ Yes ☐ No

Explanation: _____

STATUTORILY REQUIRED OR RELATED: **ARE YOU (SELLER) AWARE OF...**

35. Within the last 3 years, the death of an occupant of the Property upon the Property . . . . . ☐ Yes ☐ No
36. An Order from a government health official identifying the Property as being contaminated by methamphetamine. (If yes, attach a copy of the Order.) . . . . . ☐ Yes ☐ No
37. Whether the Property is located in or adjacent to an "industrial use" zone. (In general, a zone or district allowing manufacturing, commercial or airport uses.) . . . . . ☐ Yes ☐ No
38. Whether the Property is affected by a nuisance created by an "industrial use" zone . . . . . ☐ Yes ☐ No
39. Whether the Property is located within 1 mile of a former federal or state ordnance location. (In general, an area once used for military training purposes that may contain potentially explosive munitions.) . . . . . ☐ Yes ☐ No

Explanation: _____

Buyer's Initials (_____) (_____)
Seller's Initials (_____) (_____)
Reviewed by _____ Date _____

Probate Purcha

EXHIBIT E

G. **VERIFICATION OF DOWN PAYMENT AND CLOSING COSTS:** Buyer (or Buyer's lender or loan broker pursuant to 3H(1)) shall, within **7 (or** ☐ _____ **) Days** After Acceptance, Deliver to Seller written verification of Buyer's down payment and closing costs. (If checked, ☐ verification attached.)

H. **LOAN TERMS:**

(1) **LOAN APPLICATIONS:** Within **7 (or** ☐ _____ **) Days** After Acceptance, Buyer shall Deliver to Seller a letter from lender or loan broker stating that, based on a review of Buyer's written application and credit report, Buyer is prequalified or preapproved for any NEW loan specified in 3C above. (If checked, ☐ letter attached.)

(2) **LOAN CONTINGENCY:** Buyer shall act diligently and in good faith to obtain the designated loan(s). Obtaining the loan(s) specified above **is a contingency** of this Agreement unless otherwise agreed in writing. Buyer's contractual obligations to obtain and provide deposit, balance of down payment and closing costs **are not contingencies** of this Agreement.

(3) **LOAN CONTINGENCY REMOVAL:**

(i) Within **17 (or** ☐ _____ **) Days** After Acceptance, Buyer shall, as specified in paragraph 14, in writing remove the loan contingency or cancel this Agreement;

OR (ii) (if checked) ☐ the loan contingency shall remain in effect until the designated loans are funded.

(4) ☐ **NO LOAN CONTINGENCY** (If checked): Obtaining any loan specified above is NOT a contingency of this Agreement. If Buyer does not obtain the loan and as a result Buyer does not purchase the Property, Seller may be entitled to Buyer's deposit or other legal remedies.

I. **APPRAISAL CONTINGENCY AND REMOVAL:** This Agreement is (or, if checked, ☐ is NOT) contingent upon a written appraisal of the Property by a licensed or certified appraiser at no less than the specified purchase price. If there is a loan contingency, Buyer's removal of the loan contingency shall be deemed removal of this appraisal contingency (or, ☐ if checked, Buyer shall, as specified in paragraph 14B(3), in writing remove the appraisal contingency or cancel this Agreement within **17 (or** _____ **) Days** After Acceptance). If there is no loan contingency, Buyer shall, as specified in paragraph 14B(3), in writing remove the appraisal contingency or cancel this Agreement within **17 (or** _____ **) Days** After Acceptance.

J. ☐ **ALL CASH OFFER** (If checked): Buyer shall, within **7 (or** ☐ _____ **) Days** After Acceptance, Deliver to Seller written verification of sufficient funds to close this transaction. (If checked, ☐ verification attached.)

K. **BUYER STATED FINANCING:** Seller has relied on Buyer's representation of the type of financing specified (including but not limited to, as applicable, amount of down payment, contingent or non contingent loan, or all cash). If Buyer seeks alternate financing, (i) Seller has no obligation to cooperate with Buyer's efforts to obtain such financing, and (ii) Buyer shall also pursue the financing method specified in this Agreement. Buyer's failure to secure alternate financing does not excuse Buyer from the obligation to purchase the Property and close escrow as specified in this Agreement.

4. **ALLOCATION OF COSTS** (If checked): Unless otherwise specified in writing, **this paragraph** only determines who is to pay for the inspection, test or service ("Report") mentioned; **it does not determine who is to pay for any work recommended or identified in the Report.**

A. **INSPECTIONS AND REPORTS:**

(1) ☐ Buyer ☐ Seller shall pay for an inspection and report for wood destroying pests and organisms ("Wood Pest Report") prepared by _____ a registered structural pest control company.

(2) ☐ Buyer ☐ Seller shall pay to have septic or private sewage disposal systems pumped and inspected _____.

(3) ☐ Buyer ☐ Seller shall pay to have domestic wells tested for water potability and productivity _____.

(4) ☐ Buyer ☐ Seller shall pay for a natural hazard zone disclosure report prepared by _____.

(5) ☐ Buyer ☐ Seller shall pay for the following inspection or report _____.

(6) ☐ Buyer ☐ Seller shall pay for the following inspection or report _____.

B. **GOVERNMENT REQUIREMENTS AND RETROFIT:**

(1) ☐ Buyer ☐ Seller shall pay for smoke detector installation and/or water heater bracing, if required by Law. Prior to Close Of Escrow, Seller shall provide Buyer written statement(s) of compliance in accordance with state and local Law, unless exempt.

(2) ☐ Buyer ☐ Seller shall pay the cost of compliance with any other minimum mandatory government retrofit standards, inspections and reports if required as a condition of closing escrow under any Law. _____.

C. **ESCROW AND TITLE:**

(1) ☐ Buyer ☐ Seller shall pay escrow fee _____.
Escrow Holder shall be _____.

(2) ☐ Buyer ☐ Seller shall pay for owner's title insurance policy specified in paragraph 12E _____.
Owner's title policy to be issued by _____.
(Buyer shall pay for any title insurance policy insuring Buyer's lender, unless otherwise agreed in writing.)

D. **OTHER COSTS:**

(1) ☐ Buyer ☐ Seller shall pay County transfer tax or fee _____.

(2) ☐ Buyer ☐ Seller shall pay City transfer tax or fee _____.

(3) ☐ Buyer ☐ Seller shall pay Homeowner's Association ("HOA") transfer fee _____.

(4) ☐ Buyer ☐ Seller shall pay HOA document preparation fees _____.

(5) ☐ Buyer ☐ Seller shall pay for any private transfer fee _____.

(6) ☐ Buyer ☐ Seller shall pay the cost, not to exceed $ _____, of a one-year home warranty plan, issued by _____, with the following optional coverages:
☐ Air Conditioner ☐ Pool/Spa ☐ Code and Permit upgrade ☐ Other: _____.
Buyer is informed that home warranty plans have many optional coverages in addition to those listed above. Buyer is advised to investigate these coverages to determine those that may be suitable for Buyer.

(7) ☐ Buyer ☐ Seller shall pay for _____.

(8) ☐ Buyer ☐ Seller shall pay for _____.