



October 14, 2010

Mr. Alfred M. Pollard
General Counsel, Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW
Washington, DC 20552

Subject: 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 Covenants (the "Guidance") which was published in the Federal Register on August 16, 2010. This letter is sent on behalf of the undersigned members of the Coalition to Save Community Benefits (the "Community Benefits Coalition" or "Coalition"). The Coalition includes a wide range of national, regional and local stakeholders from both the nonprofit and private sectors, including major environmental and conservation organizations, land owners, affordable housing interests, and private development and housing companies from across the country. Please see ***Exhibit A*** identifying the members of the Coalition.

Collectively, the Coalition partners represent millions of constituents nationwide. While these constituencies are diverse, they share a common interest in ensuring that communities can organize for their collective well-being. This includes the ability to use private transfer fees ("PTFs" or "transfer fees") to promote diverse, sustainable, livable communities. Many of the members of the Coalition are currently participating in one or more community-benefits fee arrangements and each has experience with community-benefits fees, ranging from those that fund affordable housing and community resources and services to those that provide conservation lands and transportation services. Based on the Coalition members' expertise and experience, the Coalition seeks the exception of certain community-benefits transfer fees ("community-benefits fees") from the Guidance, as described below.

In addition, as an immediate measure, the Coalition urges that the Federal Housing and Finance Administration ("FHFA" or "Agency") **extend the comment period to January 31, 2011.** During this time the Coalition asks that FHFA provide additional clarification, to allow for a thorough and transparent review and analysis of this important issue. Specifically, the Coalition asks the FHFA to:

- Clarify that the Guidance is being promulgated as a rule under the Administrative Procedure Act. Because the Guidance does not leave the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie

Mac") (collectively, the "Enterprises") and the Federal Home Loan Banks ("Banks") with discretion to make case-by-case decisions in whether to deal with a mortgage on a property encumbered with a PTF, the proposed policy must be undertaken as a rulemaking. *See Cowell v. Dept of Health and Human Services*, 558 F.3d 1112 (9th Cir. 2009); *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002).

- Provide the critical factual material and analysis on which the Guidance is based. *See Chamber of Commerce of the United States v. SEC*, 433 F.3d 890, 899 (D.C. Cir. 2006) (requiring that an agency must provide for public review the most critical factual material that is used to support the agency's policy position); *see, also Penobscot Indian Nation v. United States Department of Housing and Urban Development*, 539 F.Supp.2d 40, 48-49 (D.C. Dist. 2008) (requiring disclosure of technical studies and data upon which the agency relies in a rulemaking context). Without this information, the Coalition and its members cannot ascertain the rationale for, or adequately respond to, the Guidance.

The Coalition notes further that an extension of the comment period will allow legislation that has already been introduced to be considered. Proceeding with an administrative action that will have the immediate effect of directing the Enterprises and Banks to desist in dealing in mortgages on properties with PTF covenants at the same time that legislation is pending to allow such activities would be highly disruptive not only to individual homeowners and communities, but also to the housing finance markets which depend on regulatory consistency.

I. The Coalition Urges the FHFA to Except Community-Benefits Fees from the Scope of the Guidance.

The Coalition urges FHFA to preserve the use of community-benefits fees by excepting them from the Guidance. The Guidance recognizes that PTFs are, in some instances, used to provide revenue to fund homeowner associations, affordable housing, environmental protections and charitable organizations; yet, the Guidance takes an over-broad regulatory approach by prohibiting the Enterprises and Banks from dealing in mortgages on properties with *any* PTF covenants. Not all transfer fees are the same. A more tailored approach--one that distinguishes between community-benefits fees that create and enhance value for homeowners and communities and those fees that benefit only developers--would avoid disrupting existing arrangements, maintain a valuable funding tool for communities, and be consistent with FHFA's mission to achieve liquidity and stability in the home finance market.

A. The Proposed Guidance Would Result in Severe and Adverse Consequences to Homeowners, Communities, Non-Profit Organizations and Others, Unless the FHFA Modifies the Proposal.

The Guidance would needlessly disrupt the housing finance market and injure homeowners, communities and others by instructing the Enterprises and Banks "not [to] deal in mortgages on properties encumbered by private transfer fee covenants." Notice of Proposed Guidance, Private Transfer Fee Covenant, 75 Fed. Reg. 49932 (Aug. 16, 2010). If adopted in its current form the Guidance will cause significant negative impacts, including among others:

- Elimination of a critically important finance tool that funds infrastructure, resources and services for the benefit of communities and homeowners.
- Disruption to real estate markets across the United States, by prohibiting the Enterprises and Banks from dealing in the mortgages of the estimated 11 million properties already encumbered with PTFs.
- Creation of hardship to the many millions of residents and property owners, who have properties encumbered with PTFs and who would be limited in their ability to sell or refinance the subject properties.
- Confusion and the potential inability of existing non-profit, homeowner and government organizations, which are funded by community-benefit fees, to perform their obligations (*e.g.*, provision of affordable housing, transportation improvements, habitat acquisition and management, homeowners association services and resources).

These far reaching and negative unintended consequences of the Guidance are not analyzed in the Guidance and cannot be reconciled with the mission of the FHFA to achieve liquidity and stability in the home finance market. In order to avoid these negative impacts, members of the Coalition believe that community-benefits fees should be excepted from the Guidance.

B. The Guidance Should Preserve Community-Benefits Fees Because Community-Benefits Fees Help Create Diverse, Livable and Sustainable Communities Without Burdening Cash-Strapped Municipalities.

Community-benefits fees are used extensively across the country to create and maintain diverse, sustainable, livable communities, and to provide other important services. Community-benefits fees are increasingly fashioned through a collaborative effort on the part of communities, elected officials, landowners, developers, and non-profit organizations to achieve a variety of community-wide goals. In many cases, the resources necessary to support these communities would not exist but for the availability of the community-benefits fees.

The following are examples of recent projects that have used community-benefits fees to establish and maintain livable communities:

- **Affordable Housing:** In Teton County, Wyoming, the Snake River Sporting Club Development agreed with the County to establish a community-benefits fee devoted to affordable and workforce housing and to help ensure local public school teachers can afford to live in the communities in which they teach.
- **Environmental/Affordable Housing:** In Maine, the initial owner/developer and all subsequent homeowners of the Moosehead Lake Project will pay community-benefits fees to provide long-term support for affordable housing, public recreation, and wildlife preservation. Funds from this community-benefits fee will be distributed as follows: 45% toward support of community affordable housing to be directed by state agencies; 45% to support community recreation opportunities (*e.g.*, public boat

launches and trails) to be distributed via a non-profit 501(c)(3) organization; and 10% to be distributed via state agencies to support wildlife programs.

- **Transit:** In Dublin, California, the Bay Area Rapid Transit District partnered with a private developer to establish a community-benefits fee that funds increased light rail service for a new, mixed income community and other local residents.
- **Affordable Housing and Redevelopment:** In Boston, Massachusetts, the Boston Redevelopment Agency, working with private developers, has established community-benefits fees on a number of projects, helping to fund affordable housing and blight reducing redevelopment efforts.
- **Environmental:** In Kern County, California, homeowners in a new master planned community will support the Tejon Ranch Conservancy through community-benefits fees to manage, restore and enhance the conservation values on over a quarter million acres of conservation lands adjacent to the community. Similar fee agreements have been used for preservation and restoration throughout California, including projects in the Martis Valley near Lake Tahoe, the Ballona wetlands in Playa Vista, and in the Central Valley in Placer County.
- **Conservation:** Dozens of land trusts across America use community-benefits fees to fund perpetual stewardship of voluntary conservation land. Landowners want to use these fees to ensure that their gifts of conservation lands stay conserved for the public benefit. Low Country Land Trust in South Carolina, for example, holds over 160 such conservation easements. Additionally, the Golden State Land Conservancy in California, Jackson Hole Land Trust in Wyoming and the Columbia Land Conservancy in New York are examples of dozens of other land trusts that rely on community-benefits fees to ensure that their charitable missions are fulfilled.

Adoption of the proposed Guidance in its present form would not only call into question the viability of these and the thousands of other existing community-benefits fee arrangements, but would also eliminate the ability of communities to collectively address issues of livability and sustainability in a coordinated, concerted manner through the use of community-benefits fees.

C. The Guidance Should Except Community-Benefits Fees from its General Prohibition on the Enterprises' and Banks' Dealing in Mortgages on Properties Encumbered by PTFs.

The Community Benefits Coalition urges the FHFA to modify the Guidance to allow for the continued use of community-benefits fees. A narrowly-tailored exclusion for community-benefits fees would achieve this objective without raising the concerns that the FHFA is seeking to address through the Guidance. Such an exclusion could include the following elements:

- A recordation and notice requirement to ensure homebuyer and lender protection and awareness by title companies of the presence of a PTF encumbrance.

- A requirement that exempted fees are not payable upon foreclosure, including non-judicial foreclosure, to protect lenders and taxpayers.
- A requirement that recipients of excepted community-benefits 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 to ensure that the fees serve a community purpose.

For your consideration, model language that could serve as the basis for the exception is attached as ***Exhibit B***. The proposed modifications address the objectives identified in the Guidance, while at the same time avoid unintended and disruptive consequences.

II. The FHFA Should Withdraw and Revise the Guidance to Except Community-Benefits Fees, as an Insufficient Basis Has Been Articulated to Support the Policy.

As described above, an agency must provide the evidentiary basis for its regulations both so that the public may have a meaningful opportunity to comment and so that a reviewing court may discern the rationale for the Agency's action. *See Chamber of Commerce of the United States v. SEC*, 433 F.3d 890, 899 (DC Cir. 2006). Here, the FHFA has articulated opinions without establishing either the factual basis or analysis to justify a prohibition on the Enterprises or Banks dealing in mortgages on properties encumbered with community-benefits fee covenants. Evidence provided by these and other comments, which have not been considered by the FHFA, demonstrates the need to except community-benefits fees from the Guidance.

A. Community-Benefits Fees Have More Than a Twenty-Year Track Record and Have Not Been Shown to Pose Serious Risks to the Stability and Liquidity of the Housing Market.

The Guidance asserts that "[e]xpanded use of private transfer fee covenants poses serious risks to the stability and liquidity of the housing finance markets," without articulating a factual basis or analysis for this conclusion. 75 Fed. Reg. at 49933. The weight of experience, however, demonstrates that community-benefits fees do not pose serious risks or threaten the housing finance market. According to a September 2010 survey conducted by the Community Association Institute (the "CAI Survey"), transfer fee covenants have been in effect for more than a generation. *See CAI, Comment Letter No. 993, Attachment B, To: FHFA* (October 5, 2010). Indeed, of the 1,254 homeowners associations responding to the CAI survey, more than forty percent (40%) stated that the transfer fees provisions had been in place for more than ten (10) years. Additionally, the CAI Survey notes that the responding communities were located in forty (40) states across the country, demonstrating wide-spread use of transfer fees. This pervasive use, combined with the lack of any apparent disruption in financial markets caused by community-benefits fees, represents perhaps the strongest evidence that such transfer fees do not disrupt the housing finance market.

B. FHFA Offers No Evidence that the Positive Effects of Transfer Fees Are Outweighed by Alleged "Risks and Uncertainties" Posed by Transfer Fees.

The Guidance asserts that "[t]he risks and uncertainties for the housing finance market that are presented by the use of private transfer fee covenants are not counterbalanced by sufficient positive effect." 75 Fed. Reg. at 49933. This statement, however, is not supported by any evidence or analysis. An agency may not simply assert a conclusion without articulating a reasoned basis, particularly as here, where FHFA proposes to modify a long-standing practice that would have a profound implication on the housing finance market. Here, the Guidance wholly neglects to quantify, model, or even roughly compare the benefits associated with transfer fees to their potential adverse affects.

Moreover, far from burdening properties, analysis shows that transfer fees can add value and support higher housing prices as compared to similar housing in the surrounding community without transfer fees. For example, an Arizona-based study showed that the DC Ranch community, which has a community-benefits fee, maintains a higher sale price per square foot (\$214.14) as compared to the adjacent communities of Grayhawk and McDowell Mountain Ranch (\$196.08 and \$185.17, respectively), which have no PTFs. Additionally, a 2009 survey by Robert Charles Lesser & Co. noted that at least five of the ten top selling master planned communities in Maricopa County have PTF covenants.

Rather than impeding the sale of properties or creating new risks, evidence shows that community-benefits fees can maintain and enhance property values; however, the Guidance does not appear to have taken this benefit into consideration. By contrast, the Guidance's proposed banning of the Enterprises and the Banks from dealing in the estimated 11 million mortgages on properties with transfer fees, including those with community-benefits fees, has the potential to cause substantial instability and illiquidity in the housing finance market.

C. FHFA Offers No Evidence to Support its Concern that Transfer Fees Contribute to Reduced Transparency for Consumers; Further, Narrowly Tailored Means Are Available to Address Any Concerns that FHFA May Have Regarding Notice and Recordation Issues.

Although the FHFA asserts that PTFs are detrimental to consumers based on lack of disclosure, the Agency does not offer any evidence that lack of disclosure is common or has created any problems for individuals, much less the housing finance market. 75 Fed. Reg. at 49933.

Systematic analysis of the issue reveals no wide-spread lack of disclosure. The CAI Survey including 1,254 respondent homeowners associations 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. Moreover, members of the Coalition are unaware of any wide-spread problems related to the lack of disclosure or recordation of transfer fees.

Nevertheless, should the Agency seek to address any potential recordation or disclosure issues, the FHFA could narrowly target the issue by proscribing the Banks or Enterprises from dealing in mortgages on properties encumbered with *undisclosed or unrecorded* transfer fees. Several states, including California, have acted through the legislative process to require proper disclose of PTFs. While the Coalition believes that PTFs are typically recorded and

disclosed, Coalition members support efforts to ensure that proper disclosure and recordation takes place.

D. FHFA Raises Concern that Transfer Fees Represent Dramatic, Last Minute, Non-Financeable Costs for Consumers and Can Deprive Subsequent Homeowners of Equity Value; However, No Evidence Is Offered in Support of These Statements, and Existing Evidence Does Not Support This Concern.

The Guidance expresses the concern that transfer fees "[r]epresent dramatic, last-minute, non-financeable out-of-pocket costs for consumers..." 75 Fed. Reg. at 49933. Members of the Coalition have not experienced such issues, and the Guidance offers no evidence that such costs complicate or derail transactions on a considerable basis. Indeed, as stated above, the CAI Survey found that less than one percent (1%) of transactions are complicated or lost as a result of PTFs. Nonetheless, to further smooth transactions, the Coalition supports full and proper disclosure and recordation of community-benefits fee covenants.

III. Conclusion.

For the reasons stated above, the Coalition to Save Community Benefits appreciates the opportunity to provide comment and respectfully requests extension of the comment period until January 31, 2011. The Coalition further requests modification of the Guidance as proposed herein and in *Exhibit B* to meet the objectives and mission of the FHFA, avoid creating significant negative consequences and disruptions to the real estate market, and continue to allow communities to self-finance infrastructure, resources, and services vital for diverse, livable, and sustainable communities.

Respectfully submitted,

Save Community Benefits Coalition



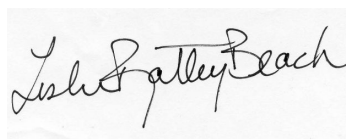
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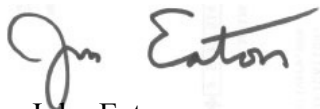
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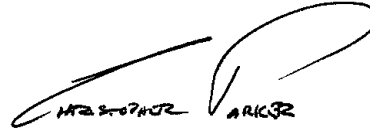
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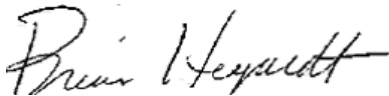
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Neil Cunningham
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Tahoe Mountain Resorts Foundation



Nicholas Targ
Partner
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Sincerely,



Ann Mesnikoff
Director, Green Transportation Campaign

Cc: Honorable Melody Barnes, Director, White House Domestic Policy Council
Honorable Lawrence Summers, Director, White House National Economic Council
Honorable Shaun Donovan, Secretary, Department of Housing and Urban Development
Honorable Ray LaHood, Secretary, Department of Transportation
Honorable Timothy Geithner, Secretary, Department of Treasury
Honorable Harry Reid, Majority Leader, United States Senate
Honorable Mitch McConnell, Minority Leader, United States Senate
Chairman, Ranking Member and Members of the Senate Banking Committee
Honorable Nancy Pelosi, Speaker, United States House of Representatives
Honorable John Boehner, Minority Leader, United States House of Representatives
Chairman, Ranking Member and Members of the House Financial Services Committee

Attachment (2): Exhibit "A", Membership of the Coalition to Save Community Benefits
Exhibit "B", Proposed Private Transfer Fee Rule

Exhibit A

Membership of the Coalition to Save Community Benefits

Audubon California	Natural Resources Defense Council
Back Country Land Trust of San Diego County	Pardee Homes
Bettencourt & Associates	Placer Land Trust
California Association of Community Managers	Plum Creek Timber Company, Inc.
California Redevelopment Association	Preserve Wild Santee
California Building Industry Association	Rancho Mission Viejo
Congress for the New Urbanism	Rancho Sahuarita
Conservation Trust for North Carolina	Reconnecting America
DMB Associates, Inc.	San Diego Housing Federation
Endangered Habitats League	Sequoia Riverlands Trust
Friends of Harbors, Beaches and Parks	Serenbe Institute
Green Valley Agricultural Conservancy	Sierra Club
Hills for Everyone	Tejon Ranch Company
Holland & Knight	Tejon Ranch Conservancy
Laguna Greenbelt, Inc.	The Kohn Law Firm
Land Trust Alliance	The Partnership for Working Families
Martis Fund	
Mountain Area Preservation Foundation	

Exhibit B

Proposed Definitions Incorporating Exceptions for Community-Benefits Fees

SECTION 1.

(a) “Association” means a nonprofit, mandatory membership organization comprised of owners of homes, condominiums, cooperatives, manufactured homes, or any interest in real property, created pursuant to a declaration, covenant, or other applicable law.

(b) “Transfer” means the sale, gift, grant, conveyance, assignment, inheritance, or other transfer of an interest in real property.

(c) “Transfer fee covenant” means a provision in a document, whether recorded or not and however denominated, which purports to run with the land or bind current owners or successors in title to specified real property, and which obligates a transferee or transferor of all or part of the property to pay a fee or charge to a third person upon transfer of an interest in all or part of the property, or in consideration for permitting any such transfer. The term “transfer fee covenant” shall not apply to a covenant contained in a recorded document if all of the following requirements are met:

(i) the third person to whom the fee or charge is payable is an Association, a governmental entity or agency, or an organization described in Section 501(c)(3) or 501(c)(4) of the Internal Revenue Code;

(ii) the recorded document, if recorded after the effective date of this rule, provides that such fee or charge is not payable upon a transfer resulting from a foreclosure (whether judicial or non-judicial) of a lien or security interest; and

(iii) the owner of the property (or prospective owner) has acknowledged in writing to the lender that the property is subject to such fee covenant.