October 12, 2011

Ms. Carol Galante
Acting Assistant Secretary for Housing - Federal Housing Commissioner
US Department of Housing and Urban Development
Washington, DC 20410

Dear Ms. Galante:

On behalf of the more than 30,000 members of the Community Associations Institute (CAI)[1], I am contacting you to express our members' alarm over FHA's determination that deed-based transfer fees violate FHA regulations (24 CFR §203.41(a) (3) (v)). I respectfully request that FHA review this determination and provide a waiver of appropriate regulations until the requested review is complete and any subsequent regulatory adjustment is effective.

Unless FHA provides a waiver of its regulations regarding deed-based transfer fees, the flow of mortgage credit to community associations will be restricted, further damaging these housing markets and the financial interests of homeowners. Already, FHA is disqualifying entire condominium projects on the basis of deed-based transfer fees, thereby denying creditworthy homeowners access to FHA-insured mortgages. Enforcement of this determination will similarly restrict access to FHA-insured mortgages for millions of households in community associations across the country.

Deed Based Transfer Fees and the Law of Servitudes

It is not uncommon for property in America to be governed by deed and land use restrictions. This tradition has manifested itself in community associations through the use of deed-based transfer fees, referred to as community transfer fees, which are used to support the governance and operations of associations. In a survey of CAI members, 49 percent of associations reported that they levied a deed-based transfer fee at transfer of title to fund association needs.

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[1] CAI is the only national organization dedicated to fostering competent, well-governed community associations that are home to approximately one in every five American households. For nearly 40 years, CAI has been the leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI's 30,000 members include community association volunteer leaders, professional managers, community management firms, and other professionals and companies that provide products and services to community associations.

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CAI defines the term 'community transfer fee' to mean a covenant, including a deed-based fee, whether set forth in a deed, declaration or association bylaws, that is payable to a community association or other entity that is directly engaged in the governance, support, maintenance, enhancement or investment in the common interest community of which the mortgaged lot, home or unit is a part. This definition reflects the usage of community transfer fees by community associations and is based on the widely accepted legal principles found in the restatement of Servitudes.

Historically, any deed restriction must provide a direct benefit to the land upon which it is placed. A substantial body of jurisprudence supports the use of community transfer fees. These principles have been incorporated into a principle referred to as the burden versus benefits test.

Under this test, a deed-restriction is lawful if it benefits, or touches and concerns the land upon which it is placed. Community transfer fees epitomize this principle as the proceeds flow directly back to the community. Community associations have used community transfer fees for more than 50 years to provide critical governance and other services to homeowners. Transfer fees have the additional benefit of allowing an alternative funding mechanism for the community, which helps to moderate the burden of monthly association assessments.

Investor Attempts to Expand Use of Deed-Based Transfer Fees

Recently, certain parties have attempted to alter the fundamental purpose of deed-based transfer fees by using such fees to generate income streams that may be securitized and sold to investors. These investor or third-party transfer fees clearly violate the traditional interpretation of the Law of Servitudes and do not provide a direct benefit to an encumbered property. CAI is unequivocally opposed to investor transfer fees and the sale of rights to future income generated by these fees to investors.

Any deed-based transfer fee that does not provide a direct benefit to an encumbered property serves little other purpose than to require that a homeowner share the proceeds of the sale of property with an unrelated party having no interest in the transaction other than to collect the transfer fee. Such a deed-based restriction is so far out of established jurisprudence that CAI does not believe such a restriction would survive legal challenge.

States, FHFA, and Congress Recognize Community Transfer Fees are Different

CAI has worked in concert with other interested parties in several State legislatures over the past two years to impede the intrusion of these harmful third-party transfer fees into housing markets. These efforts have been largely successful, with more than 30 states enacting laws to prohibit third-party transfer fees. Notably, nearly all of these State legislatures have embraced the traditional interpretation of the Law of Servitudes by expressly stating that community transfer fees are permissible.

Further, the Federal Housing Finance Agency (FHFA) released proposed guidance in 2010 to prohibit the GSEs from purchasing or investing in mortgages on properties encumbered by a deed-based transfer fee. In its initial proposal, FHFA made a determination similar to FHA that

all deed-based transfer fees harmed borrowers or limited the value of GSE collateral. After careful consideration of several thousand individual comments on its proposed guidance, in 2011 FHFA proposed a rule on transfer fees that disallowed third-party transfer fees but protected the right of homeowners to choose a community transfer fee to fund operations of their community association.

Finally, members of Congress have also made a clear differentiation between third-party transfer fees and community transfer fees. In the 111th Congress, Rep. Maxine Waters introduced H.R. 6260, the "Homeowner Equity Protection Act of 2010." This legislation sought to prohibit transfer fees paid to third parties but importantly preserved the use of community transfer fees by community associations.

Revised Interpretation and Waiver Supports Homeownership and Market Continuity

CAI's members request that FHA review its current regulatory determination that a community transfer fee is harmful to a borrower. Community transfer fees provide a direct benefit to properties in a community association by supporting community governance, infrastructure, and maintenance. Rather than harming a homeowner, these activities promote community stability and amenities to which the owner would not otherwise have access.

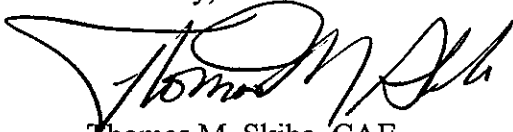
These benefits make it more likely that properties in a community association retain value. The finding that community transfer fees have a positive effect on valuation was a key basis for FHFA's determination that community transfer fees differed from third party transfer fees. CAI encourages FHA to reconsider its determination that community transfer fees limit the amount of proceeds a seller may retain in light of the fact that a community transfer fee's existence has at the very least protected the value of the seller's asset and therefore maximized their proceeds at sale.

Should FHA elect to retain its view that community transfer fees violate its regulations, CAI urges that FHA consider the long-standing and wide use of community transfer fees by community associations across the nation. CAI does not believe homeowners in these communities should have the value of their greatest asset placed in question not due to any physical impairment of the property, but simply due to a regulatory interpretation that is at the very least 40 years late. FHA has for several decades insured mortgages on properties with a community transfer fee, which is why a seemingly simple regulatory interpretation will have such significant and negative consequences for homeowners across the country.

If FHA believes that only a rule revision will be sufficient to permit the use of community transfer fees by homeowners to fund their associations, CAI urges that FHA issue a waiver that will permit FHA-insured mortgages for such properties until a rule revision becomes effective. Absent a waiver, CAI is concerned that lenders will refuse to extend mortgages on properties in a community association with a community transfer fee due to the potential liability for doing so. This will harm local economies and devastate borrowers trying to sell their home or refinance their current mortgage to take advantage of historically low interest rates. A waiver will provide the regulatory safe harbor that lenders will require to continue lending in community associations while FHA engages in the rule-making process.

On behalf of CAI, I appreciate your consideration of these important requests. If you have any questions or if CAI may provide any additional information, please do not hesitate to contact me or Mr. Andrew S. Fortin, Esq., CAI's vice president of government and public affairs, at (703) 970-9224.

Sincerely,



Thomas M. Skiba, CAE
Chief Executive Officer