



CELEBRATING  
55 YEARS

# nerej

## **FHFA issues revised draft regulation governing private transfer fees**

June 02, 2011 - Owners Developers & Managers

Thanks to efforts by CAI members, the Federal Housing Finance Agency (FHFA) has issued a revised draft regulation governing so-called private transfer fees. Originally proposed in August of 2010, the FHFA regulation would have banned any federally backed mortgage for property that contained a deed-based transfer fee. For community associations, the impact would have been devastating, as up to 49% of all community associations charge a deed-based transfer fee. These communities would have been unable to qualify for most federally backed mortgages under the regulation as drafted. However, due to the strong feedback from CAI members across the country, the FHFA has revised its proposal, excluding transfer fees charged by community associations.

Investor vs. Association

Transfer Fees

FHFA took action on growing concern over the use of deed-based transfer fees payable to investors. Under this model, deed-restrictions require a transfer fee payable at the time of sale to the original developer or landowner for up to 99 years. As such, these transfer fees pull money out of communities and allow investors to obtain the benefits of equity or investments made by subsequent home owners. Unfortunately, the FHFA also included deed-based fees charged by community associations in its original draft regulation.

In its revised draft, FHFA specifically excludes deed-based transfer fees payable to a community association. It allows such fees when used to provide a direct benefit to the property upon which the transfer fee is levied. Under the draft, such fees may be used to support maintenance and improvements to encumbered properties, as well as cultural, educational, charitable, recreational, environmental, conservational or other similar activities that exclusively benefit the real property encumbered by the private transfer fee covenants. Such benefits must flow to the encumbered properties and its common areas or to adjacent or contiguous property. This shift in FHFA's proposal, brought about by CAI member activism, is a critical shift in policy and one that will benefit CAI members by ensuring access to affordable and fair mortgages.

Of course, the devil is always in the details, and CAI continues to work with FHFA to ensure the final regulation, when adopted, provides associations the greatest flexibility allowed in using a variety of tools, including monthly assessments, special assessment and deed-based transfer fees to balance the financial burden of maintaining the association. For now, residents in associations with deed-based transfer fees can sleep easy knowing that a potential regulatory disaster was averted.

As part of our ongoing Mortgage Matters program, CAI is working to protect homeowners in community associations and to ensure access to fair and affordable mortgage products for all current and potential community association residents. You can follow our work and share your

thoughts at [www.caimortgagematters.org](http://www.caimortgagematters.org). CAI will continue to monitor and participate in shaping the development of the final FHFA transfer fee rule to ensure the perspective of community associations is heard. If you have any questions about the FHFA Transfer Fee Proposal and how it could affect your community, e-mail [government@caionline.org](mailto:government@caionline.org) with FHFA Transfer Fee Proposal in the subject line.

## Bill to Amend the Maine Condominium Act Reported out of Committee

On May 9th the Judiciary Committee voted in favor of the Condominium Homeowner Protection Act, proposed by the MELAC with two amendments. Those amendments would make the six-month "priority" lien prospective and would also remove attorney fees from covered amounts under the lien. All other provisions of the bill met with no controversy or debate. As of this publication date, the MELAC waits for the bill to be reported out of committee. The act if adopted by the legislature will implement best practices, improve a condominium association's ability to collect assessments, clarify a condominium owner's rights to participate in association governance, and eliminate inconsistencies. Provisions of the amendment include:

Allow Associations to more easily borrow money to address association repairs, improvement and replacement projects.

Currently, many Maine condominium associations are unable to borrow funds because their condominium documents do not expressly authorize the associations to grant security to the lender. Obtaining an amendment to the documents for that authority in this environment is difficult at best, and usually requires a 2/3 vote of members. The proposed amendment to the Act would allow associations to grant security to lenders if approved by a majority of unit owners.

Eliminate inconsistencies between the Maine Condominium Act and the Nonprofit Corporation Act related to association records, retention and review.

Currently, the Condominium Act and the Nonprofit Corporation Act provide conflicting guidance on the question of record-keeping and access to records. The amendment clearly establishes what records need to be retained by associations and for what period of time. In addition, subject to certain privacy and other legal considerations, the amendment clarifies a unit owner's right of access to records

Extend association liens from three years to five years.

The amendment will extend the duration of the association's lien from 3 years to 5 years. This will help associations protect their liens for unpaid assessments during the extended foreclosure proceedings now being witnessed in Maine, resulting from an increase in foreclosure sales driven by a slumping economy and combined with a court backlog,.

Provide condominium homeowners protection from foreclosing unit owners by providing associations the ability to collect assessments for common expenses and recover foreclosure expenses.

The devastation of a condominium foreclosure extends well beyond the foreclosed owner. In a condominium, all unit owners are assessed condominium fees to cover the common expenses of the property including insurance premiums, snow removal, overhead, security, common utilities as well as maintenance and repair of the buildings and amenities. Unit owners who default on their mortgage payments generally also default on their monthly condominium fees and the shortfall is passed on to the remaining unit owners through increased monthly fees or supplemental

assessments.

To provide a measure of protection for remaining owners, the amendment will establish a six month common charge priority over any first mortgages. This "six month" priority has been a working compromise between associations and lenders including Fannie Mae and the secondary mortgage market and has been adopted by states throughout the country including the New England states of Massachusetts, Rhode Island, Connecticut, Vermont and most recently New Hampshire.

Allow associations to limit access to suspend certain privileges of unit owners that fail to pay assessments.

Common interest communities require all owners to contribute to the common expenses of the property including amenities such as pools, tennis courts, etc. When owners do not pay their assessments, other owners must pick up the shortfall. The amendment would provide associations the ability to suspend any right or privilege of a unit owner that fails to pay an assessment. However, the amendment specifically provides that associations may not deny a unit owner access to the owner's unit or withhold services that would lead to endangering the health, safety or property of any person.

Clarify the unit owners' rights to attend and receive notice of meetings of the association board.

Currently, unit owners have no right to receive notice of association board meetings or to participate in the meetings, unless the condominium documents specifically grant such rights. The amendment requires boards to give notice of their board meetings to owners and gives owners the right to attend meetings of the board, subject to rules established by the board. Specific circumstances under which an executive session may be held and which owners may be restricted or prohibited from attending are defined.

Fix the initial date of a foreclosure sale as the date that assessments for common expenses shall accrue free from the lien of the foreclosing bank.

In this economy, the proceeds of a foreclosure sale are insufficient to pay the debt to the bank and there are not funds to pay the condominium association for unpaid assessments. To add insult to injury, banks often postpone auction dates or delay the process of transferring title to the purchaser. Until title the association's lien remains subordinate to the mortgagee's lien. Under the amendment, the association's lien will be binding on the new title holder from the initial date of sale forward.

Special thanks to members of the Maine Legislative Action Committee(MELAC) including chair Bruce McGlaflin, Esq.; Pete Garrett, CMCA, AMS, PCAM; Bob Keegan, CMCA, AMS, PCAM; Jeff Martin; Debra Nugent, CMCA, AMS, PCAM and Gordon Weeks who presented testimony and provided information as requested by the Judiciary Committee. In addition, special thanks to the many association board members, owners and professional managers who contacted their legislators in support of the bill and submitted testimony for the public hearing held on May 5th.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540