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## **Vermont Housing & Conservation Board Comments**

### **Federal Housing Finance Agency, Proposed Rule**

#### **Private Transfer Fee Covenants**

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#### **I Introduction**

Vermont Housing and Conservation Board (“VHCB”) opposes the Proposed Rule on Private Transfer Fee Covenants published in the Federal Register on February 8, 2011 the Federal Housing Finance Agency (“FHFA”). **The FHFA proposed rule is a solution searching for a problem.** As such, FHFA should declare victory and indefinitely postpone any action on private transfer fees. **Unless regulated by state law, all private transfer fees should be permitted.** In the alternative, FHFA should go back to the drawing board and rewrite the rule for additional public comment.

#### **II Executive Summary**

States, agencies like VHCB and their nonprofit, tax exempt partners should be able to negotiate fees to further legitimate public purposes such as affordable housing, farmland conservation and stewardship and wetlands mitigation. If transfer fees providing purely private benefits to select market participants are a problem, such fees can be regulated at the state level. Though the Proposed Rule is substantially better than the Guidance proposed by FHFA on August 16, 2010), VHCB continues to believe that **FHFA should not regulate private transfer fees that involve public entities and nonprofits with tax-exempt status** under Section 501 of the Internal Revenue Code. If disclosure and alienation, marketability and valuation of real estate used as security for residential mortgages is a concern, FHFA may want make sure that such fees are fully disclosed so that Banks include them in mortgage underwriting. One size does not fit all and FHFA should take no action and leave it up to the states.

On a positive note, VHCB appreciates the changes that FHFA has made in the Proposed Rule **excluding “fees, charges or payments, or other obligations (2) imposed by or payable to the Federal government or a State or local government.”** See 12 CFR 1228.1 Definition of “private transfer fee”. However, VHCB contends that a **similar exclusion should be crafted for tax exempt nonprofits fulfilling legitimate public purposes like affordable housing, farmland conservation and stewardship and wetlands mitigation.**

### III Background on Vermont Housing and Conservation Board

Created in 1987, the Vermont Housing and Conservation Board (“VHCB”) is a public instrumentality of the state of Vermont which provides federal, state and foundation funds to nonprofits to develop and steward permanently affordable housing for Vermonters and conserve the working and natural landscape under the Vermont Housing and Conservation Trust Fund Act.<sup>1</sup> VHCB grants and loans awarded to nonprofit organizations with tax exempt status under the Internal Revenue Code have allowed Vermont’s nonprofit network to assist in the development of 10,000 affordable homes, permanently conserve 387,000 acres of land and rehabilitate 55 outstanding historic buildings for community use. Homes range from shelters and transitional housing for the homeless to permanently affordable ones, rental and owned.

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Recipients of state and federal funds administered by VHCB are generally non-profit housing trusts developers and conservation land trusts with tax-exempt status which collectively serve every county in Vermont.<sup>2</sup> Conservation projects funded by VHCB consist of the purchase of and stewardship of conservation easements on working farms, fee purchase of woodlands used for forestry, natural areas and public recreation areas and preservation easements on historic buildings in Vermont’s cities, towns and villages. VHCB’s primary nonprofit stewardship partners consist of Vermont Land Trust (“VLT”), Upper Valley Land Trust (“UVLT”) and Preservation Trust of Vermont (“PTV”) as well as the state Agency of Agriculture, Food and Markets (“AAFM”) and Agency of Natural Resources (“ANR”).

#### **Permanently Affordable Housing**

Despite limited state resources for affordable housing, helping lower-income Vermonters become homeowners remains an important element of VHCB’s housing program. Since 1987, VHCB has helped nearly 1000 Vermont households become homeowners, most for the first time. The resale restrictions that accompany VHCB grants limit the homeowner’s share of appreciation (at the time of resale) and insure that the house will remain affordable to future generations of homebuyers. VHCB grants remain with the home so that subsequent buyers can purchase a home for significantly less than market value. Vermont tax-exempt housing nonprofits, especially community land trusts like the Champlain Housing Trust, have

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<sup>1</sup> Chapter 15 of Title 10 of Vermont Statutes Annotated, 10 VSA 301-325a.

<sup>2</sup> For more information on VHCB, FHFA can download the 2009 VHCB Report to the General Assembly, <http://www.vhcb.org/pdfs/ar2010.pdf>

demonstrated that shared appreciation, subsidy retention, good stewardship and community involvement are the cornerstones of a successful state housing policy<sup>3</sup>.

### **Land Conservation and Historic Buildings**

Vermont has enjoyed similar success protecting its natural and historic resources through permanent fee acquisition or conservation/preservation easements. Since the Act requires VHCB to invest in buildings and land that will be available, accessible and affordable to future generations of Vermonters, VHCB and its nonprofit partners are making investments that will require stewardship of natural resources and historic buildings **forever**. Though VHCB's primary stewardship partners at the Vermont Land Trust, Upper Valley Land Trust and Preservation Trust of Vermont do not currently include private transfer fees in easements on agricultural and forest land, **in the future**, such a fee could provide a source of revenue for monitoring compliance and enforcing easements on these lands. Public instrumentalities and private conservation land trusts are making investments in perpetuity. Since such protection requires professional staff, no commercially fair and reasonable means of raising stewardship revenue should be prohibited by FHFA. In Vermont, the Legislature has challenged the common law notions of unreasonable restraints on alienation and the rule against perpetuities by instructing VHCB to purchase permanent interests in homes and land. Where private transfer fees promote this policy of permanence, FHFA has no business interfering with them. Where this poses issues for bank and regulators, the banks can include transfer fees in normal underwriting and Attorney Generals can protect consumers from unfair practices, if any.

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#### **IV If FHFA Does not Scrap it, the Permanent Rule Should Exclude Nonprofits that Fund Permanently Affordable Housing with Private Transfer Fees**

In VHCB Comments on the proposed Guidance, we noted that a good example of using private funds to further community purposes is Chapel Hill, NC which requests private transfer fees from developers to support permanently affordable housing through the Community Land Trust ("CLT") model. This effective combination is providing ongoing workforce housing opportunities in a community where the average price of homes exceeds \$300,000. These fees, like those of other CLTs, do not adversely affect liquidity, affordability, and stability in the housing finance market. Though the Proposed Rule may exclude this municipal program of using market-rate housing to support affordable homes for working families, FHFA should expand the exclusion so that the CLT could negotiate a similar arrangement with the developer

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<sup>3</sup> See the Champlain Housing Trust's 2009 performance evaluation of its homeownership program authored by John Davis and Alice Stokes entitled, LAND IN TRUST, HOMES THAT LAST, [http://www.champlainhousingtrust.org/assets/files/Lands-In-Trust\\_Homes-That-Last.pdf](http://www.champlainhousingtrust.org/assets/files/Lands-In-Trust_Homes-That-Last.pdf)

of market rate housing, if and when opportunities arise **OR** municipal leadership changes and the support for affordable housing disappears from the municipal agenda. So, where nonprofits choose to use private transfer fees to expand housing options for low and moderate income households, FHFA should not adopt a Rule which makes residential mortgages less available to qualified borrowers.

### **Proposed Rule on Transfer Fees May Have a Negative Impact on Vermonters**

The use of private transfer fees is not widespread in Vermont but there are land conservation and affordable housing programs that might be considered private transfer fees under the Proposed Rule. These include:

**A. By Inclusionary Zoning Ordinance, the City of Burlington** requires private developers of housing projects of more than 5 units to set aside 15%-25% of rental or homeownership units to be designated as “affordable inclusionary units” to be rented or sold at a price set in the Ordinance. Such units must remain affordable for at least 99 years and are usually controlled by the City or a housing agency designated by the City.<sup>4</sup> In unusual cases, the inclusionary ordinance could be met by making private transfer fees to the housing trust fund rather than designating inclusionary affordable units in the market-rate development. The Proposed Rule appears that to allow fees to be paid from the developer to the City of Burlington. However, as written, the Proposed Rule would not allow direct payment to or a nonprofit housing organization like CHT (as part of a deed restriction that runs with the home) where CHT plans to use the fee to develop affordable homes elsewhere in the city.

**B. Act 250 Permits for expansions of Vermont ski areas** require the developer to address the need for affordable housing by charging the buyer of each market-rate building lot, cabin, condominium, detached luxury home or time share unit a fee to that is paid to the VHCB or to tax-exempt local housing nonprofits to fund affordable housing in ski area towns where housing costs are high and wages are low. These fees are currently charged to the first buyer only but, in the future, fees could be charged to future buyers. Under the Proposed Rule, payments to VHCB are excluded. However payments to nonprofits like Gilman Housing Trust in the Northeast Kingdom and Windham Housing Trust are not permitted.

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<sup>4</sup> All the designees are tax-exempt entities: Burlington Housing Authority, Champlain Housing Trust (CLT) and Cathedral Square Corporation.

VHCB and its nonprofit partners use these Act 250 affordable housing fees to leverage private, public and philanthropic funds to construct or rehabilitate workforce housing near ski areas. Since 1995, VHCB has combined \$500,000 in Act 250 housing mitigation funds with millions of dollars in federal, state, private and philanthropic funds to help VHCB's nonprofit partners build or rehabilitate over **50 permanently affordable homes in mountain communities.**

**C. Community Land Trust Transaction Fees.** Some CLTs charge a fee to cover the substantial staff time that is invested in the resale of CLT home to qualified buyers and making sure that those buyers are successful homeowners. These fees are an important source of revenue for the nonprofit delivery system in Vermont to fulfill its promise that decent, safe and energy-efficient homes will remain affordable to future generations of Vermonters. After 25 years, community land trusts like the CHT have demonstrated that shared appreciation, subsidy retention, good stewardship and community involvement are the cornerstones of a successful state housing policy<sup>5</sup>. Part of this success is to insure that CLTs can retain qualified professionals to educate first-time homebuyers and facilitate re-sales of CLT homes. One revenue source used by Vermont CLTs is to charge buyers a fee based on a percentage of the fair market value of the home (provided that the remains affordable to them) and help them obtain mortgage financing. VHCB considers this to be a good example of a private fee that promotes Vermont's highly-regarded and nationally-respected state housing policy of permanent affordability and partnership with nonprofit CLTs.

Since Vermont does not define or regulate private transfer fees and CLTs in Vermont and nationwide use different legal mechanisms to charge transaction fees, VHCB cannot say with certainty that the Proposed Rule would prohibit the fees discussed above. However, since all of these private fees are paid at the time of a real estate transfer and support important policies of the State of Vermont, VHCB must go on record as opposing the Proposed Rule.

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<sup>5</sup> See the Champlain Housing Trust's 2009 performance evaluation of its homeownership program authored by John Davis and Alice Stokes entitled, LAND IN TRUST, HOMES THAT LAST, [http://www.champlainhousingtrust.org/assets/files/Lands-In-Trust\\_Homes-That-Last.pdf](http://www.champlainhousingtrust.org/assets/files/Lands-In-Trust_Homes-That-Last.pdf)

**V. FHFA Should Scrap the Rule or Exclude or Except Private Transfer Fee Covenants that Fund the Permanent Protection or Stewardship of Conservation Lands**

Under the Proposed Rule, conservation nonprofits with tax-exempt status cannot negotiate and benefit from a private transfer fee covenant to conserve or steward important conservation or recreation or wild lands or natural areas not directly encumbered by the covenant unless the covenant is excepted or excluded. Though not customary in Vermont, nonprofit conservation groups across the country use fees paid by market rate development and real estate speculation to conserve and steward important lands which benefit the farmers, hunters, skiers, hikers, walkers, bird-watchers, flora, fauna and community at large. **Where this important work benefits the people and communities of states and counties with conservation land trusts, the federal government and FHFA should support these activities, especially at a time when federal, state and county resources and programs for conservation and wetlands mitigation are being cut.**

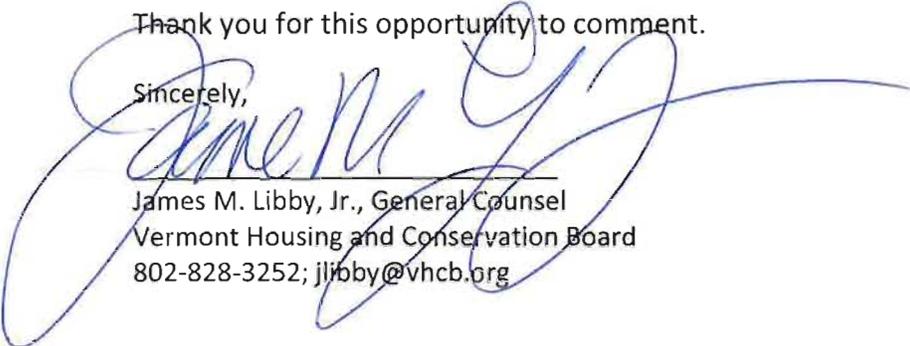
So, any **Rule should except or exclude private transfer fee covenants that benefit the land conservation, stewardship and wetlands mitigation off the property encumbered** by the covenant. If FHFA has concerns about openness or fairness of such covenants, **FHFA should issue guidance on how such covenants are disclosed, not issue a rule to regulate them.**

**V. Conclusion**

For all the reasons discussed above, the Vermont Housing and Conservation Board urges the FHFA not to **scrap the Proposed Rule on private transfer fee covenants**. Instead, FHFA should study this matter further and, if action is necessary, FHFA should require full disclosure of such fees but let regulation happen at the state level, if at all. **If FHFA proceeds with a Rule, housing and conservation nonprofit organizations with tax-exempt status should be allowed to use private transfer fees covenants to fulfill legitimate community purposes. In that case, such covenants should be exempt or excluded under a future FHFA Rule.**

Thank you for this opportunity to comment.

Sincerely,



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