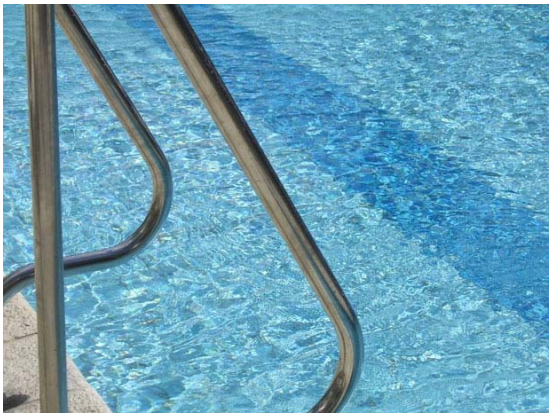
Community Developments

HYATT & STUBBLEFIELD, P.C.

Applicability of New ADA Regulations Affecting Pool Facilities Revised and Extended

Last fall we reported that the U.S. Department of Justice ("DOJ") issued revised regulations for the Americans with Disabilities Act ("ADA") that included new accessibility standards (the "2010 Standards"). Prior to the 2010 Standards, the regulations provided that new construction and alteration of existing construction had to meet the building codes and standards applicable at the time of the alteration or construction. A facilities owner did not have to "retrofit" or comply with newer standards unless they were building new facilities or modifying the existing facilities.



Under the 2010 Standards, however, recreational facilities that are considered to be "public accommodations" may have to comply with the barrier removal requirements of the new regulations if it is "readily achievable" to do so. While there is no hard and fast rule, "readily achievable" means easily accomplished without much difficulty or expense.

There is a "safe harbor" provision with respect to the obligation to modify some facilities, but the 2010 Standards provide that facilities for which no previous standards existed do not fall within the "safe harbor" provision. Specifically identified as not falling with the safe harbor of the 2010 Standard's are swimming pools, wading pools, and spas.

Pursuant to the 2010 Standards, swimming pools with 300 or more linear wall feet must have at least two accessible means of entry, and smaller pools must have at least one accessible entry. The 2010 Standards require that at least one entry be a sloped entry or a pool lift. The other entry may be a sloped entry, pool lift, transfer wall, or transfer system. Wading pools are required to have a sloped entry which extends to the deepest part of the wading pool. Spas must have at least one accessible means of entry.

Recreational facilities falling within the public accommodation classification were given until March 15, 2012 to remove barriers to the extent readily achievable and be brought into compliance with the 2010 Standards. However, the DOJ has since delayed the applicability date of the 2010 Standards for existing pools, wading pools, and spas until January 31, 2013.

(Continued on page 2)

In this Issue…

Volume XXVI Spring Edition 2012

(Continued from page 1)

Pools associated with private residential communities and clubs which are limited to the exclusive use of residents, members and guests are generally not covered by the ADA accessibility requirements. As the operator of a pool, however, the homeowners association or club must ensure that permitted use of the pool does not give rise to classification as a "public accommodation" and, thus, having the 2010 Standards apply.

There is no universal rule protecting a homeowners association or private club from application of or liability under the ADA. More specifically, a homeowners association cannot simply argue "we are a private community" and evade responsibility. The facts must support the claims. A court will look at access and activities held at the pool and, depending upon circumstances, may conclude that the facility located within a private residential complex is in fact a "public accommodation."

Title III of the ADA defines a "public accommodation" as a facility whose operation affects commerce and falls within one of the 12 specified categories in the ADA. Pools fall within the category of "places of exercise or recreation." While the ADA regulations do not single out homeowners associations, the occurrence of any of the following examples might make a homeowners association's pool a public accommodation:

- The homeowners association sells memberships to persons who are not lot owners within the community

- The homeowners association permits the general public access to the pool facility by walking up and paying a fee

- The homeowners association rents out the pool facility to members of the public

- The pool facility is made available for swim meets or swim practices

- Swim lessons are available to members of the general public

- The pool is not exclusively made available to members and their guests

- The homeowners association permits members of a neighboring association to use the pool facility under a shared use agreement

Those homeowner associations which are required to comply with the new pool accessibility standards now have until January 31, 2013 to make the required modifications so long as they are "readily achievable." Readily achievable means that it may be accomplished without much difficulty or expense. This is a flexible case-by-case analysis. For example, if a homeowners association does not have the funds necessary to make the modifications, they are not readily achievable and do not have to be made. However, the DOJ has made it clear that the flexibility of the new standard and the relatively low cost of providing accessibility will make it difficult to prove that making modifications is not readily achievable. The obligation to meet the 2010 Standards is a continuing one and the expectation is that steps will be taken over time to comply.

If you would like more information about the 2010 Standards or would like to discuss whether the uses within your community could meet the public accommodation requirement under the ADA, please contact us.

Do Not Neglect the Association During the Developer Control Period

When there are just a few residents in the community, it is easy to overlook the homeowners or condominium association. Many developers think that, if there is nothing or nothing much for the association to do, the association does not have to hold meetings, enter into contracts, or otherwise be operational. While the developer is still in control of a project and the association, and will be for quite some time, why bother? This approach is a recipe for disaster. While developers may perceive their biggest risk as a weak real estate market, it actually can get worse if the developer, and in some cases, the developer representatives personally, have to face lawsuits for mismanaging the association.

The association is a separate legal entity with its own board of directors and legal requirements and must be treated as such from the date that the first lot is sold. Association operations may be minimal for a period of time (years even), but that does not mean that observing required corporate formalities may be neglected. Among other requirements, the association must hold meetings of its board of directors as frequently as the documents or state law require; must also hold an annual meeting of the members; and, most importantly, must prepare and pass a budget and levy assessments for the subsequent fiscal year.

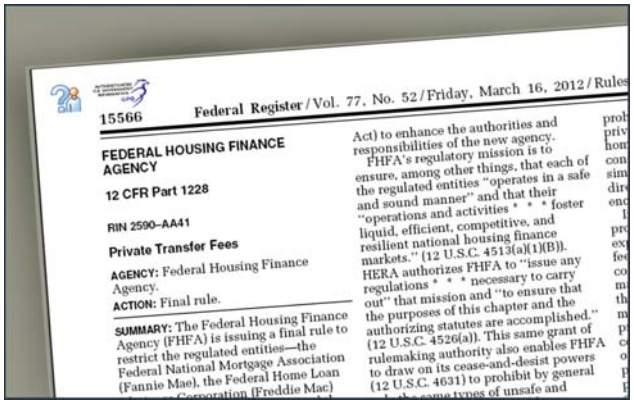
If you would like more information on the developer's obligation with respect to the operation of the association or need assistance in developing an operational roadmap, please contact us.

FHFA Publishes Final Rule on Private Transfer Fee Covenants

Last summer we reported that the Federal Housing Finance Agency (FHFA) had moved beyond proposed "guidance" and had proposed a final rule in its effort to restrict Fannie Mae and Freddie Mac and all federal home loan banks from purchasing mortgages on properties in communities with "private transfer fee covenants."

The proposed guidance broadly construed the term "private transfer fee covenant" to include essentially any kind of transfer fee payable on successive transfers of property regardless of who collects the fee or the intended use of the fee. This would have adversely impacted many communities with covenants that provide for collection of such fees as contributions to working capital or capital reserves, for community enhancement, or to fund nonprofit entities organized to promote cultural, educational, environmental conservation, historic preservation, and similar purposes.

FHFA's proposed final rule purported to exempt transfer fees paid to homeowner associations to be used for the direct benefit of the community. However, the language of the proposed final rule created numerous practical and interpretative issues reflecting a lack of understanding as to how such fees are really used. Due to the difficulty of determining when a transfer fee qualified for the exemption, the proposed final rule would have created major problems for financing of home purchases in communities with transfer fees.



15566 Federal Register / Vol. 77, No. 52 / Friday, March 16, 2012 / Rules

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1228

RIN 2590–AA41

Private Transfer Fees

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing a final rule to restrict the regulated entities—the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan

Act) to enhance the authorities and responsibilities of the new agency. FHFA's regulatory mission is to ensure, among other things, that each of the regulated entities "operates in a safe and sound manner" and that their "operations and activities * * * foster liquid, efficient, competitive, and resilient national housing finance markets." (12 U.S.C. 4513(a)(1)(B)). HERA authorizes FHFA to "issue any regulations * * * necessary to carry out" that mission and "to ensure that the purposes of this chapter and the authorizing statutes are accomplished." (12 U.S.C. 4526(a)). This same grant of rulemaking authority also enables FHFA to draw on its cease-and-desist powers (12 U.S.C. 4631) to prohibit by general

During the public comment period, we submitted comments suggesting changes and revisions to the proposed final rule to minimize its impact on communities with transfer fee covenants designed to benefit the community. On March 16, 2012, FHFA published its final rule which becomes effective July 16, 2012. It adopted many of our suggestions. You can find a copy of the final rule at www.gpo.gov/fdsys/pkg/FR-2012-03-16/pdf/2012-6414.pdf.

The final rule prohibits the "regulated entities" (Fannie Mae, Freddie Mac and all federal home loan banks) from purchasing, investing or otherwise dealing in mortgages secured by properties encumbered by a "private transfer fee covenant" - unless it is an "excepted" transfer fee covenant. Excepted transfer fee covenants include those which require the payment of the transfer fee to a "covered association" if the use of the transfer fee is limited exclusively to purposes which provide a "direct benefit" to the encumbered property. The term "covered association" includes condominium associations, homeowner associations, cooperatives, and any organization described in Section 501(c)(3) or (4) of the Internal Revenue Code. It does not include for profit entities such as a mandatory membership club owned and operated by a for profit entity.

To qualify as providing a "direct benefit," the transfer fee must be used exclusively to support maintenance and improvements to the encumbered property, or for acquisition, improvement, administration, and maintenance of property owned by a covered association of which the owner of the property is a member and used primarily for the benefit of such members. A direct benefit also includes cultural, educational, charitable, recreational, environmental, conservation, or other activities which are conducted in or protect the community or property which is adjacent or contiguous to the community or are conducted on other property that is used primarily by the residents of the community.

The direct benefit requirement disqualifies transfer fees used to benefit property which is not located adjacent to the community or used primarily for the benefit of the property owners who pay them. FHFA stated in its findings that transfer fees to fund preservation or environmental projects may be meritorious from the perspective of society as a whole; however, they do not contribute directly to the value of the property and contribute to the valuation concerns the rule is intended to address.

The rule in its final form does not prohibit private transfer fee covenants. Rather, the final rule simply prohibits the regulated entities from purchasing mortgages on properties burdened by a private transfer fee covenant. The prohibition only applies to private transfer fee covenants encumbering property after February 8, 2011. Mortgages on property encumbered by a private transfer fee covenant recorded before that date are "grandfathered in" and eligible to be purchased by such entities to the extent that they were valid prior to the effective date of the final rule.

The final rule does not affect covenants which impose the payment of "one time" fees. For example, a private transfer fee covenant which requires the payment of a transfer fee on only the first transfer, even if it is for a purpose

(Continued on page 4)

Inside News

- **Wayne S. Hyatt** has been awarded the Gurdon Hall Buck Award, the highest honor given by the Community Association Institute's College of Community Association Lawyers (CCAL). The award is given at the discretion of the CCAL Board of Governors in recognition of exceptional leadership in the field of community association law and a history of significant contributions in the areas of community association documentation, scholarly articles, legislative proposals, education, and mentoring of others. The award is named in honor of late ACREL member Gurdon Hall Buck, a pioneer and innovator in the field of community association law who passed away in 2008
- **David A. Herrigel** participated as a presenter in the May 17 webinar entitled "Condominium and Common Interest Developments: Legal Considerations." David's topic related to the formulation of governance structures and required documentation.

(Continued from page 3)

which does not provide a direct benefit or to an entity that is not a covered association, would not be disqualified for purchase by the regulated entities.

A community which is subject to a transfer fee covenant may need to amend its covenants to clearly state and limit the purposes for which the transfer fees can be used. The use of the transfer fee must be specifically limited to those permitted by the final rule in order to limit or avoid having lenders reject mortgage applications or title companies refuse to issue title policies.

In addition, 38 states have enacted laws regulating or prohibiting private transfer fee covenants. Many of the states' laws exempt transfer fees when paid to a community association. However, some states have banned them completely. Even in those states where a transfer fee covenant is permitted or prohibited but "grandfathered in," the community may need to take affirmative steps to perfect the transfer fee covenant either by recording or filing specific notice in the land records.

If you have any questions on the applicability of this new rule, how it will impact your community, or the status of transfer fee covenant legislation in your state, please contact us.

HYATT & STUBBLEFIELD, P.C.
ATTORNEYS AND COUNSELORS
Peachtree Center South Tower
225 Peachtree St., N.E., Suite 1200
Atlanta, Georgia 30303