

## **Recent Changes in FHA Certification and Re-Certification Requirements**

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On June 30, 2011, the FHA published a new 95 page Condominium Project Approval and Processing Guide (“Guide”). While the Guide primarily reiterates existing requirements for FHA certification and re-certification, the Guide also identifies a number of new requirements.

Some of the changes to the FHA requirements may enable some condominium projects that previously did not qualify for FHA certification or re-certification to obtain approval. For instance, in the past, to qualify for FHA certification or re-certification, no more than 15% of a project’s units could have delinquent assessments of more than 30 days. Now it is possible for a project that does not meet this condition to still obtain approval if no more than 20% of its units are delinquent by more than 30 days, provided additional conditions are met.<sup>1</sup> These conditions include providing evidence to the FHA that the project’s association has budgeted for the delinquencies and that the association’s reserve funds are sufficient to cover its replacement needs. Additionally, a project with commercial space exceeding 25% of the project’s total space may now qualify for FHA certification or re-certification provided the following conditions are met:

- 1) The commercial space does not exceed 35% of the total project space;
- 2) The project was completed at least one year ago; and,
- 3) Control of the project’s association has been transferred to the members.

(Previously, a project comprised of more than 25% commercial space would not qualify for FHA certification or re-certification.)

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<sup>1</sup> Please contact us if you would like a complete listing of these conditions.

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## **Issues with the New Requirements for FHA Certification/Re-Certification**

Unfortunately, some of the changes in FHA certification and re-certification requirements may also make it more difficult for projects to obtain FHA approval. Further, the new requirements fail to resolve some existing issues. For instance, bank owned units must still be included when calculating the percentage of delinquent units. Given that banks are notorious for being delinquent in the payment of assessments, this requirement could prevent projects that would otherwise qualify for FHA approval from obtaining approval.

The Guide also indicates that the FHA will not generally approve a project if any legal instrument related to that project contains a provision that would, among other things, cause a conveyance by the borrower to be the basis for contractual liability of the borrower. All associations have governing documents, which are legal instruments that impose obligations of a contractual nature (e.g., duty to comply with the CC&Rs, duty to pay assessments) against all units. Therefore, it is arguable that no project can satisfy this requirement.

## **Our Greatest Concern Regarding the New Guide**

Our greatest concern regarding the new Guide relates to a change to the FHA certification and re-certification application process.

According to the Guide, applications for FHA certification and re-certification must now be accompanied by a "Project Certification". This Project Certification requires the signer to certify that:

- “1. They have reviewed the project and it meets all State and local condominium laws and all FHA condominium approval requirements thereto applicable to the review of condominiums;
2. To the best of his or her knowledge and belief, the information and statements contained in the application are true and correct; and
3. The submitter has no knowledge of circumstance or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit in the project to become delinquent (including but not limited to: defects in construction; substantial disputes or dissatisfaction among unit owners about the operation of the project or the owners association; and disputes concerning unit owners, rights privileges, and obligations). The submitter understands and agrees that the submitter is under a continuing obligation to inform HUD if any material information compiled for the review and acceptance of this project is no longer true and correct.”

This document must be submitted on company letterhead and must be signed and dated by an authorized mortgagee representative, a representative of the association (e.g., board member), an authorized representative of the association (i.e., a

management company employee, project consultant or attorney) or, if appropriate, the authorized representative of the builder or developer.

Based on the language of the Guide, it appears that the FHA will not certify or re-certify a project unless a signed Project Certification is provided with the application.

There is great potential liability for any person who signs a Project Certification document and is later deemed to have “knowingly” and “willfully” provided false, fictitious or fraudulent attestations in the Certification. The person may be subject to a fine of up to one million dollars and/or up to 30 years in prison, as well as civil liability for any damages suffered by HUD. If an attorney is deemed to have acted in this manner, he or she may also be disbarred.

Our concern regarding the new Project Certification is two-fold. First, it would be extremely difficult for the manager, member of the board, legal counsel, or any other person connected with an association to know unequivocally whether the project complies with all state and local condominium laws, as well as all FHA certification/re-certification requirements. We say this because the manager and legal counsel are unlikely to know everything that is going on in the association or have access to all the information required to make a fully informed statement with regard to these issues. Similarly, board members may not be aware of all condominium laws or have access to all the information needed to know whether the project complies with all FHA certification/re-certification requirements.

Second, the Project Certification establishes an ongoing duty on the part of the signer to know and report to the FHA any decisions or changes in the circumstances of the project that would impact the project’s compliance with all state and local condominium laws and/or its compliance with all other FHA requirements. Given the likelihood that the submitter will not know if and/or when such issues arise, we do not think that any person should be required to accept such a duty.

The potential problem in accepting an ongoing duty to notify the FHA is even greater if, for instance, a manager or attorney signs the Project Certification and then that manager or attorney subsequently ceases working with that association. He or she will have no knowledge (or ability to know) whether the project is still in compliance with state and local condominium laws and/or all other FHA requirements. However, he or she will still have a duty to the FHA. Likewise, if a board member signs the Project Certification and later leaves the board, and perhaps even sells his or her unit within the project, he or she will have no ongoing knowledge of whether the project is in compliance with the law and all other FHA requirements. However, he or she will still have a duty to report any changes to the project that affect its compliance with the law and/or the other FHA requirements. Moreover, he or she will have potential liability for any failure to report such changes to the project to the FHA.

For the reasons discussed above (*i.e.*, our inability to know for certain whether a project is in compliance with all state and local condominium laws and all other FHA

certification/re-certification requirements, as well as our inability to accept in good faith an ongoing duty to notify the FHA of any changes to a project that will affect the same), Epsten Grinnell & Howell APC attorneys cannot sign the required Project Certification document for any project. Nor can Epsten Grinnell & Howell APC advise any other person (board member, manager or other) to sign this document. We have been in touch with many other attorneys throughout the United States who feel the same way. FHA is asking for a Certification that no one can realistically make without taking on great potential liability.

Going forward, if an association decides to pursue FHA certification or re-certification and the manager or other representative of the association decides to sign the Project Certification, we will still assist the Association in preparing the application package. Likewise, if an association decides to submit an application for FHA certification/re-certification without a signed Project Certification in the hope that the FHA will approve the project without this document, we will assist the Association in preparing the application.

### **Is There Another Way that a Project Can be FHA Certified or Re-Certified?**

The short answer to this question is yes. A qualified lender can endorse and, in fact, approve a project for FHA certification or re-certification. This means that if an owner is using a qualified lender to obtain re-financing or if a purchaser is using a qualified lender to obtain financing, that person's qualified lender can undertake the needed review of the project and provide it with FHA certification or re-certification as appropriate. FHA certification or re-certification obtained in this manner is no different than certification or re-certification obtained by an association through the FHA.

There are two important benefits to obtaining FHA certification or re-certification through a qualified lender. First, no authorized representative of the association is required to sign a Project Certification. Second, the expense to the association is likely to be substantially less than it would be if the association seeks FHA certification or re-certification with the assistance of an attorney or other third party. We say this because the only cost an association is likely to incur is the cost to provide any information or documents requested by the lender.