



March 13, 2009

The Honorable Richard Durbin  
U.S. Senate  
309 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Durbin:

Community Associations Institute (CAI), representing the more than 60 million Americans who live in community associations across the country, wants to ensure that H.R. 1106 helps distressed homeowners without placing costly and unintended burdens on communities and their homeowners.

Community associations may be condominiums, cooperatives, planned communities or homeowners associations. They are distinguishable from other residential units in that the owners in these communities are contractually obligated to support common elements of the community through monthly assessments. These assessments pay for a broad range of infrastructure that ranges from roads, parks, and clubhouses to sewer services, other utilities like water and power, and maintenance to common structures. Most community associations are organized as nonprofit corporations.

Community associations allow for growth in the available housing stock by shifting many of the costs associated with building and maintaining the community from the local government to the residents who will be the primary users of the neighborhood infrastructure. This allows for the expansion of housing stock with minimal impact on local government budgets. In fact, since association residents still pay all applicable state and local taxes for services that they are often providing themselves, this frees up state and local resources for other purposes. In 2007, community association residents assessed themselves roughly \$41 billion dollars for operations and maintenance, along with more than \$35 billion for longer term capital replacement costs.

Community associations range in size and scope so generalizations are difficult. At one extreme you have the typical association found in the District of Columbia and many other cities that consists of two, three or four units in a divided row house. Each resident has ownership of their unit, but shares the ownership of the common elements – walls, roof, elevator, yard, etc. – and is obligated to pay a share of the cost of maintaining these elements. On the other end of the spectrum are large-scale communities in which hundreds or thousands of residents pay assessments that

225 Reinekers Lane  
Suite 300  
Alexandria, VA 22314

703.548.8600 MAIN  
703.684.1581 FAX

[www.caionline.org](http://www.caionline.org)

A M E R I C A ' S   A D V O C A T E   F O R   R E S P O N S I B L E   C O M M U N I T I E S

The Honorable Richard Durbin  
March 13, 2009  
Page 2

provide for roads, maintenance of common areas, parks, recreational facilities and even services such as security, traffic enforcement, sewers and public transportation.

Regardless of an association's size, assessments assure an association is properly funded and are critical to maintaining viable communities, protecting property values for all residents and preventing costs from being shifted back to local governments. The assessment funding stream is considered so vital to maintaining properties in common-interest communities that assessment delinquency rates are part of mortgage underwriting criteria used by Fannie Mae and Freddie Mac. Congress has also recognized their importance and acted to specifically protect association assessment obligations under Chapter 11 section 523(A)(16) of the bankruptcy code.

In addition to these federal protections, some states have super-priority liens that place the debts owed to an association in a position superior to the primary mortgage on the property, while others provide for assessment liens that are subordinate to the primary mortgage. As the mortgage modification process created by H.R. 1106 seeks to protect homeowners and communities from the negative impacts of foreclosure, the process should not prejudice the limited ability of associations to secure payment for delinquent assessments that would otherwise be available.

Attached you will find a Florida-based study that discusses the challenges faced by community associations from delinquent homeowners, specific examples from other states and a recent article on the impact of the housing crisis on our members. This information supports the concerns outlined in this letter.

We feel that with minor changes, the provisions of H.R. 1106 could be improved to assure that homeowners facing financial crisis can benefit from the modification process—but without inadvertent and unintended burdens being placed on their community association and their fellow homeowners. .

#### CAI's Concerns:

Amendments to H.R. 1106, as adopted by the House, make important reference to the President's Home Affordability and Stability Plan. Specifically, H.R. 1006 references the elements considered to be essential to a sustainable payment. They include amounts for principle and interest, mortgage insurance premiums, homeowner association dues, ground rent and special assessments. CAI strongly supports this express list of associated expenses that need to be included in calculating the modified payment for affected homeowners. We are concerned however, that as written, the definition of debtor's payment in H.R. 1106, Section 100 opens the door to modification of expenses beyond the mortgage or at the very least, creates confusion as to what expenses can be modified by the court.

### Definition of "Payment"

Specifically as written H.R. 1106 in section 100 uses a parenthetical to define payment as to include such expenses as real estate taxes, hazard insurance, mortgage insurance premiums, homeowners association dues, ground rent and special assessments. It is clear from reviewing the President's homeowner affordability plan that the intent is to reduce the mortgage payment to a level that, when these other expenses are added to the base payment, they meet specific income threshold requirements. We feel that the statute, as drafted, would be ambiguous and could be interpreted to allow for the modification of the various enumerated non-mortgage costs.

Since the intent of the President's plan is to modify mortgages to establish a sustainable payment, we suggest that the language in this section be clarified by adding the words "advanced or paid by the mortgage holder" as presented below, or any other language that would make it clear in the statute that these associated non-mortgage costs are not subject to modification.

(A) reduces the debtor's payment (including principal and interest, and payments for real estate taxes, hazard insurance, mortgage insurance premium, homeowners' association dues, ground rent, and special assessments advanced or paid by the mortgagee) on a loan secured by a senior security interest in the principal residence of the debtor, to a percentage of the debtor's income in accordance with such guidelines, without any period of negative amortization or under which the aggregate amount of the regular periodic payments would not fully amortize the outstanding principal amount of such loan;

### Subordinate Interests

Our second concern is with the language in Section 103: Authority to Modify Certain Mortgages, subsection 11. The intent of this section is to provide authority to modify mortgage language found in the parenthetical which reads, "(and the rights of the holder of any claim secured by a subordinate security interest in such residence)." However, this language appears to authorize the modification of non-mortgage related subordinate liens. Is the intent of this section to modify only the rights of the mortgage holder, or is the intent to modify the rights of the mortgage holder and all subordinate security interests?

Our attorney member analysis indicates that this provision could be used to modify the rights of subordinate security interest holders that could include secured liens for such diverse items as association assessments, local real estate, school and other taxes, child support payments and other costs. In application, it may come to pass that most subordinate interests will not be satisfied due to the value of the property and superior interests. However, it seems prudent that if there is even a remote possibility of collecting these other amounts, that opportunity should not be prejudiced under this act. If the underlying concern is modifying the rights of the mortgager, we suggest the following language:

(11) notwithstanding paragraph (2), with respect to a claim for a loan originated before the effective date of this paragraph and secured by a security interest in the debtor's principal residence that is the subject of a notice that a foreclosure may be commenced with respect to such loan, modify the rights of the holder of such claim (and the rights of the holder of any claim secured by a subordinate mortgage interest in such residence)

### Excessive Fees

Our final concern is in section 104, Combating Excessive Fees. This section under subsection (3) creates a notice and filing process for any “fee, cost or charge” that is pending and arises from a debt secured by the principle residence.

Preventing fees and excessive charges from undermining the benefits of mortgage modification and preventing lenders for making up their losses on the fee side is understandable. However, as drafted this provision places an undue burden on all other legitimate debt holders to whom money is owed and which is secured by the property. While a for-profit enterprise may be able to pass the costs incurred through this filing process on to other clients, nonprofit associations run by homeowner volunteers cannot easily absorb this function or the associated expense. We believe this would also be true of local units of government and others with a debt interest secured by the property. Since we read this section as trying to prevent a mortgagee from recovering the loss on reformed mortgages through fees, we would support language to limit this requirement to mortgage debt secured by the property. The new subsection (3) under Section 104 would read:

(3) the debtor, the debtor's property, and property of the estate are not liable for a fee, cost, or charge issued or made by the mortgagee modified under this program that is incurred while the case is pending and arises from a debt that is secured by the debtor's principal residence except to the extent that—

### Conclusion

CAI recognizes that the housing market is facing challenges of historic proportions—challenges that require aggressive action to stem the tide of foreclosures by exploring alternative remedies that keep people in their homes. Many of our members are taking similar steps to work with individual homeowners at the community level to maintain families in their homes without creating additional burdens to other owners or the association itself.

We are encouraged by the inclusion of homeowners association assessments in the calculus of sustainable payments outlined in the President’ Home Owner Affordability Plan. However, because the financial health of community associations, the property value of homes within these communities and the personal financial well-being of every individual homeowner in a community is tied to each and every owner living up to their obligation to pay for common

The Honorable Richard Durbin  
March 13, 2009  
Page 5

expenses, we want to ensure that in the effort to address housing issues the ability of the association to collect assessments on a forward looking basis and the ability to collect past due assessments are not unduly compromised.

Such an outcome would have a substantial negative impact on a significant fraction of the housing market, would be counter-productive to the goals of the underlying legislation and could in fact cause additional homeowners and even entire community associations to experience financial failure.

We appreciate you hearing our concerns and stand ready to supply additional feedback and data to help ensure the final outcome of this process is a bill that addresses the underlying housing challenges without in advertently damaging the one in five homeowners who reside in community associations. I can be reached at 703-797-6338.

Sincerely,

A handwritten signature in black ink that reads "Thomas M. Skiba". The signature is written in a cursive style with a large, sweeping initial "T".

Thomas M. Skiba, CAE  
Chief Executive Officer  
TMS/asf