



September 7, 2012

Alfred Pollard, Esq.
General Counsel
Federal Housing Finance Agency (FHFA)
400 Seventh Street SW, Eighth Floor
Washington, D.C. 20024

Via email: eminentdomainOCG@fhfa.gov

Re: No. 2012-N-11, The Use of Eminent Domain to Restructure Performing Loans

Dear Mr. Pollard,

The Association of Mortgage Investors (AMI) submits the following statement to supplement the views expressed in the stakeholder “joint response” to the Agency’s Federal Register notice request for input and comments. We emphasize that nothing in the following comment letter should be construed as contradicting or detracting from those views expressing our strong opposition to the use of eminent domain in this context or as a foreclosure mitigation tool generally.

Background

The AMI was organized as the primary trade association representing investors in mortgage-backed securities, including university endowments and pension funds. The AMI was founded to play a primary role in the analysis, development, and implementation of mortgage

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and housing policy to help keep homeowners in their homes and provide a sound framework that promotes continued home purchasing. Since its formation, the AMI has been developing a set of policy priorities that we believe can contribute to achieving this goal. We are an investor-only group comprised of a significant number of substantial institutional investors in commercial and residential mortgage-backed and other asset-backed securities. Our members manage a collective investment in ABS in excess of \$300 billion.

We fully concur with FHFA's announced concerns about the use of eminent domain, including its dubious constitutionality, the potential to limit consumer credit and the economic harm to communities, the impact on securities and other institutional holdings, and the ultimate losses imposed upon tax-payers due to alterations to the Enterprise's securities holdings. We further wish to emphasize many the consequences of this use of eminent domain. First, it will likely curtail access to the thirty-year fixed mortgage, an integral part of the American Dream. Additionally, it will harm all tax-payers that are holders of the Enterprise and Private Label Securities (PLS) through their public or private pensions, 401Ks and/or mutual funds.

The use of eminent domain to restructure residential loans is a controversial, untried, and potentially an unconstitutional use of government power.¹ The use of such government power is an extremely blunt instrument; the burden on its proprietary and the justification for its use must reside with its advocates. While some would claim that it is a last resort, there are no indications that this is true or that, in the case of performing mortgages, said borrowers should be entitled to relief. Either way, it appears that the negative consequences will always outweigh the purported benefits. Even though AMI is extremely sympathetic to the problems surrounding the

¹ Cornell Law Professor Robert C. Hockett, a key architect, spokesman for the eminent domain proposal and MRP consultant, has conceded that this plan is untried and legally unverified. "In an interview Wednesday, Hockett conceded that the eminent domain seizure of a mortgage loan has apparently not been tested explicitly in court." http://newsandinsight.thomsonreuters.com/Legal/News/2012/07_-_July/Eminent_domain,_MBS_and_the_U_S_Constitution_a_one-sided_fight/

housing sector and borrowers for the past six years, the case has not been satisfactorily made for the use of eminent domain, particularly given all of the programs available to distressed borrowers, some of which are too new to have fully registered their full potential. Further, the research data of housing analysts and the government suggest that after a six year housing crisis, many key criteria, including home prices and relief for borrowers, are showing consistent improvement.

Remedial Efforts are Helping Borrowers; The Housing Data Indicates a Large Population Have Been Modified

Eminent domain is falsely being portrayed as a foreclosure mitigation tool and justified by current housing market conditions. As the FHFA officials well know, the federal and state governments have allocated great resources for remedial efforts to assist distressed borrowers with foreclosure prevention programs, including refinancing and modification programs.² U.S. Department of Housing and Urban Development Secretary Donovan recently testified before the U.S. Senate Committee on Banking, Housing, and Urban Affairs regarding the assistance borrowers have received and the benefits of federal remedial programs in effect since 2009. He essentially made the case why eminent domain is not a necessary tool for communities, as he testified:

Today, because the Obama Administration moved to keep interest rates low and took aggressive steps to stabilize the housing market, more than 14 million homeowners have refinanced their mortgages since April 2009 . . . because we worked with lenders to develop a range of options for families struggling to hold onto their homes, more than 5.8

² We have no doubt that you and your staff are familiar with these programs. For the comment record, these programs include no fewer than 14 federal initiatives, including variations of the Hope for Homeowners (H4H), the FHA Short Refinance Program, Home Affordable Program (HARP), and Home Affordable Modification Program (HAMP).

million loan modifications have been started in the last three years and foreclosure notices are down 50 percent since early 2009.³

Earlier this year, the National Mortgage Settlement was approved. This landmark settlement provides for more than \$25 billion in assistance for homeowners and important servicing reforms aimed at helping borrowers. Certainly, the pace of relief for responsible homeowners has been slower than we have hoped. However, we see progress from these current federal remedial programs, casting doubt on whether communities should even consider the use eminent domain. The improving housing market conditions furthermore do not justify eminent domain's use to restructure mortgages.

Recent industry housing analytic data confirms positive trends in the U.S. housing market. One significant factor is the decline in completed foreclosures, an indicator of improving housing market conditions for the housing market. There were 58,000 completed foreclosures in the U.S. in July 2012 down from 69,000 in July 2011 and 62,000 in June 2012. Since the financial crisis began in September 2008, it is estimated that approximately 3.8 million foreclosures have been completed across the country. Anand Nallathambi, president and CEO of CoreLogic, recently commented, "The decline in completed foreclosures is yet another positive signal that the housing market is continuing on a progressive path of stabilization and recovery."

Negative Equity in Itself is not a Justification for Eminent Domain

Another false justification for the use of eminent domain in this context is foreclosure mitigation. Many analysts will agree that negative equity is a predictor of future default. The

³ Statement of the Hon. Shaun Donovan, *Hearing before the Senate Committee on Banking Housing and Urban Affairs Expanding Refinancing Opportunities to Improve the Housing Market* (May 8, 2012).

actual analyst data, however, shows that on a national basis, the rate of future defaults has substantially improved and continues to diminish with each month. For example, a recent RBS report addressed the conditions in San Bernardino County. The analyst report states:

In November 2007, half of all underwater borrowers defaulted within the following 12 months. By June 2011, even with 75% of homeowners still deeply underwater, that same rate significantly declined to 13%, and continues to improve each month. Simply put, more underwater borrowers continue to make their regular mortgage payment and remain in their homes and communities. Helping this situation is the 35% cumulative modification rate, low interest rates, and the average 6 years of successful mortgage history. Servicers appear to have the freedom to modify these PLS loans.⁴

Accordingly, the improving housing conditions in San Bernardino County and across the country illustrate that there is no justification for eminent domain in this context.

Negative equity is often cited as a singular justification for the seizure of mortgages using eminent domain. Although in many circumstances, negative home equity is the result of actions by the borrower to monetize the value of their home to finance some other purchase *i.e.*, a subsequent cash-out refinancing.

Example. The following table illustrates the case in San Bernardino County, CA. Of the performing negative equity borrowers, 54% are cash-out refinanced and 17% are homes that were purchased with no downpayment.⁵

⁴ Scott Gimpel *et al.*, "Seizing Mortgages by Eminent Domain: Let's Look at the Data," Royal Bank of Scotland (RBS) (July 26, 2012) at 2.

⁵ Data on file with AMI's offices.

**Table I: PLS mortgages that have >110% LTV, Owner-occupied
and At Least 6 Months “Clean Pay.”**

	Inv_bal	Loan Cnt	LoanSize	GWAC	WALA	FICO	IO	IO Term	Remainin g IO	Owner Occ	Full Doc
US	69,441,340,122	314,222	220,995	4.9	73	682	40	102	28	100	50
CA	87,330,135,825	214,319	407,477	4.3	72	709	54	100	37	100	33
Fontana/Ontario	1,072,261,645	3,164	338,894	3.7	71	683	43	94	26	100	34

	Purchase	Cashout	Multilien	HPA CS	LTV Orig	LTV MTM	CLTV Orig	CLTV MTM	APL	RPL
US	44	43	43	-43	81	146	86	159	62	38
CA	43	42	52	-44	78	141	83	155	62	38
Fontana/Ontario	34	54	43	-50	78	154	82	167	39	61

Take aways: Current-to-default rates are coming down. This trend is consistent with California in general. Modified and current above state level – 44.6% for Ontario and Fontana 35.4% for county. Life time perfect pay almost a third for the county but still 22.5% for Ontario and Fontana.

The use of eminent domain in this context is unjust and would exacerbate problems in already distressed communities. Its use would signal that homeowners could deplete or reconstitute equity in their homes in anticipation of a government remedy, at the detriment of their neighbors who played by the rules and tax-payers at-large in many cases.

The Use of Eminent Domain Harms Home Prices and Communities

Proponents of the use of eminent domain claim that refinancing underwater mortgages will spur homebuilding and create good “blue-collar” construction jobs. In contrast, we wish to explain that eminent domain will have the opposite effect on communities.

The issue hinges on simple economics, namely the effects for the supply and demand for housing. If a community adds more inventory via new home construction, then it is likely that existing home properties will decrease in value. The market will not support the investment of private capital for housing construction or the creation of construction jobs in an environment of

decreasing home prices. Eminent domain undermines the economic incentives for housing, jobs, and economic development on many fronts. Meanwhile, the often cited legal justification for using eminent domain to seize mortgages from one private investor for the benefit of another private investor is the U.S. Supreme Court decision, *Kelo v. City of New London*, 545 U.S. 469 (2005). The *Kelo* case is distinguishable, *inter alia*, because the court predicated the seizure of private physical property for the benefit of another private party on the requirement that the property be used for economic development. The use of eminent domain of mortgages undermines the economic development in communities; this further argues against its usage.

Ultimately, the seizure by eminent domain and refinancing of PLS mortgages, including those which are underwater and/or performing, will only have a small impact on communities (e.g., San Bernardino County, California and the City of Chicago, Illinois) and the situation nationally, while being far outweighed by the negative consequences of increasing the cost of lending and availability credit across the country. The enclosed analyst reports provide detailed data justifying this conclusion, based on a multi-faceted analysis such as interest rates, modifications, and payment history.⁶

Conclusion

AMI is comprised of large fixed income institutional investors who support the reemergence of a healthy and functioning housing market. We do not dismiss the depth and extent of the recent housing crisis or its impact on communities and individual borrowers. We are advocates for and committed to long term, effective solutions to the housing crisis. On

⁶ Gimpel et al., "Seizing Mortgages by Eminent Domain: Let's Look at the Data," Royal Bank of Scotland (RBS) (July 26, 2012) at page 2.

behalf of our membership, let me express again our thanks for giving us this opportunity to comment on the use of eminent domain to restructure mortgages and express our strong opposition. Should you or any member of your Staff have any questions with regard to our views, please contact me at 202-327-8100.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Katopis". The signature is fluid and cursive, with a large initial "C" and "K".

Chris Katopis
Executive Director
Association of Mortgage Investors

Enc.