SENATE COMMITTEE ON INSURANCE
Senator Susan Rubio, Chair
2021 - 2022 Regular

Bill No:	AB 1466	**Hearing Date:**	July 8, 2021
Author:	McCarty		
Version:	July 1, 2021		
Urgency:	No	**Fiscal:**	Yes
Consultant:	Brian Flemmer		

SUBJECT: Real property: discriminatory restrictions

DIGEST: Expands the ease of use for Restrictive Covenant Modification forms; creates a task force funded by a small fee per real estate transaction to search for and remove the restrictive language; and allows the task force to partner with the University of California to accomplish this task.

ANALYSIS:

Existing law:

1) Prohibits, under the California Fair Employment and Housing Act, discrimination in housing based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information, and provides that discrimination in housing through a restrictive covenant includes the existence of a restrictive covenant, regardless of whether accompanied by a statement that the covenant is repealed or void.

2) Provides that a provision in any deed of real property that purports to restrict the right of any person to sell, lease, rent, use, or occupy the property to persons having the characteristics specified above by providing for payment of a penalty, forfeiture, reverter, or otherwise, is void.

3) Provides that any deed or other written instrument that relates to title to real property, or any written covenant, condition, or restriction annexed or made a part of, by reference or otherwise, any deed or instrument, that contains any provision that purports to forbid, restrict, or condition the right of any person or persons to sell, buy, lease, rent, use, or occupy the property on account of any of characteristics specified above, is deemed to be revised to omit that provision.

4) Authorizes a person who holds an ownership interest of record in property that they believe is the subject of an unlawfully restrictive covenant, as specified, to record a Restrictive Covenant Modification (RCM) form, which is required to include a copy of the original document with the illegal language stricken.

5) Requires the county recorder, before recording the modification document, to submit the modification document and the original document to the county counsel who is required to determine whether the original document contains an unlawful restriction based on any of the characteristics specified above.

6) Requires the county counsel to return these documents and inform the county recorder of their determination, and requires the county recorder to refuse to record the modification document if the county counsel finds that the original document does not contain an unlawful restriction.

7) Requires the county recorder to make Restrictive Covenant Modification forms available to the public.

8) Authorizes the recordation of certain documents, including a release, discharge, or subordination of a lien for postponed property taxes, without acknowledgment, certificate of acknowledgment, or further proof.

9) Imposes a fee, except as provided, of $75 to be paid at the time of the recording of every real estate instrument, paper, or notice required or permitted by law to be recorded, per each single transaction per single parcel of real property, not to exceed $225. Existing law exempts from this fee any real estate instrument, paper, or notice recorded in connection with a transfer subject to the imposition of a documentary transfer tax, as provided, or with a transfer of real property that is a residential dwelling to an owner-occupier.

10) Exempts from the fee above any real estate instrument, paper, or notice executed or recorded to remove a restrictive covenant that is in violation of specified provisions of the California Fair Employment and Housing Act.

This bill:

1) Requires a county recorder, title company, escrow company, real estate broker, real estate agent, or association that delivers a copy of a declaration, governing document, or deed to a person who holds an ownership interest of record in property to also provide a Restrictive Covenant Modification form with specified procedural information.

2) Authorizes a title company, escrow company, real estate broker, real estate agent, or other person to record a Restrictive Covenant Modification form.

3) Requires a title company, escrow company, real estate broker, real estate agent, or other person that knows an unlawful, restrictive covenant exists, to notify the person who holds ownership interest of record in property and file a Restrictive Covenant Modification on their behalf.

4) Requires the county counsel, after their review, to return the documents to the county recorder and inform the county recorder of their determination within a reasonable period of time, not to exceed 3 months, as provided.

5) Requires the county recorder to make Restrictive Covenant Modification forms available to the public onsite or online, as provided, and require the forms to permit the submission of a form that will correct unlawfully restrictive covenants for multiple dwellings within a subdivision, as specified.

6) Authorizes the recordation of any modification document, instrument, paper, or notice to remove a restrictive covenant that is in violation of specified provisions of the California Fair Employment and Housing Act without acknowledgment, certificate of acknowledgment, or further proof.

7) Until January 1, 2027, imposes a fee, except as provided, of $2 to be paid at the time of the recording of every real estate instrument, paper, or notice required or permitted by law to be recorded, except as specified. The bill would require that a county recorder quarterly send revenues from this fee, after deduction of any actual and necessary administrative costs incurred by the county recorder, to the Controller for deposit in the Unlawfully Restrictive Covenant Redaction Trust Fund, a continuously appropriated fund, which the bill would create within the State Treasury.

8) Requires the revenues deposited in the fund to be used for specified purposes, including requiring Department of Housing and Community Development to develop a task force to coordinate the identification and redaction of unlawfully restrictive covenants in the records of the county recorder's offices throughout the state in the most expeditious process possible. The bill would require the task force to consist of specified representatives, including, among others, those from the title industry, real estate professional associations, and activist groups with expertise in searching for and identifying unlawful, restrictive language. The bill would specify that unlawful, restrictive covenants identified by the task force are exempt from certain procedures when recording a modification document.

9) Authorizes the task force to partner with the University of California and coordinate with specific universities to conduct research regarding identified unlawful, restrictive covenants.

10) Authorizes the task force to collaborate with the University of California to create a centralized database for identified unlawful, restrictive covenants and map the location of unlawful, restrictive covenants throughout the state, as specified.

Background

According to the author, "AB 1466 will take proactive steps in removing Jim-Crow Era, racist language from housing documents throughout the state of California. Specifically, this bill will create a systematic approach to identifying and redacting racially restrictive language. Furthermore, this bill will make it easier to redact racially restrictive language for homeowners by waiving fees, streamlining the recording process, and expanding who can file requests. Eliminating these racist covenants is a moral right and an important step in bringing racial justice to Californians."

Covenants, conditions, and restrictions (CCRs) are privately created rules between parties regarding the use and improvement of real property. A covenant is language within a conveyance or other contract evidencing an agreement to do or refrain from doing a particular act. Covenants are either personal, restricting only the party who signs the agreement, or they "run with the land," passing the burden along to subsequent property owners as well. Conditions restricting free use of property are not

favored under the law. Therefore, the language of the parties must clearly indicate the desire to create one.

Property owners and builders since at least the 1890s in California created segregated neighborhoods by including language both in individual home deeds and in pacts among neighbors that prohibited future resales to different communities of color. While these covenants were contracts between private parties, over time, they became an increasingly important tool used by all levels of government to segregate neighborhoods. When the Federal government increased their involvement in housing development under the Federal Housing Administration, its appraisers not only gave high ratings to mortgage applications if there were no African Americans living in or nearby the neighborhood but also lowered their risk estimates for individual properties with restrictive deed language. In this way, the federal government incentivized the use of racially restrictive covenants.

Exclusionary covenants and deed restrictions were used to prevent many people of color, as well as people of Jewish heritage and other religious minorities from buying properties where covenants had been recorded. Though these covenants have been illegal and unenforceable for over 50 years in California, they remain physically present on many deeds. Procedures exist under current law by which property owners can have these illegal, exclusionary covenants redacted from their property records, but those procedures are largely voluntary. As a result, people buying homes in California still frequently find themselves confronted with the offensive language and hateful messages contained in these covenants.

As an example of typical language used in a racial covenant/ deed restriction, here is an excerpt of the deed for former State Assemblymember Hector De La Torre's South Gate home.

> "(k) Until January 1, 1989, no lot in said tract shall at any time be lived upon by a person whose blood is not entirely that of the Caucasian Race, and for the purpose of this paragraph, no Japanese, Chinese, Mexican, Hindu, or any person of the Ethiopian, Indian, or Mongolian Races shall be deemed to be a Caucasian, but if persons not of the Caucasian Race be kept thereon by a Caucasian occupant strictly in the capacity of servants or employees of such occupant, such circumstances shall not constitute a violation of this condition."[1]

The popular use of racial restrictive covenants increased greatly after 1917, when the U.S. Supreme Court deemed city segregation ordinances illegal. In *Buchanan v. Warley* (245 U.S. 60), the court ruled that outright segregation ordinances violated the Fourteenth Amendment. In the aftermath of this ruling, segregationists turned to restrictive neighborhood covenants and a decade later, the Supreme Court affirmed their legality. The 1926 ruling in *Corrigan v. Buckley* (271 U.S. 323) stated that while

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[1] https://www.kcet.org/shows/city-rising/how-prop-14-shaped-californias-racial-covenants

states are barred from creating race-based legislation, private deeds and developer plat maps are not similarly affected by the Fourteenth Amendment.

The National Housing Act of 1934 also played a part in popularizing these covenants. Passed during the Great Depression to protect affordable housing, the Housing Act introduced the practice of "redlining," or drawing lines on city maps delineating the ideal geographic areas for bank investment and the sale of mortgages. Areas blocked off by redlining were considered risky for mortgage support and lenders were discouraged from financing property in those areas. This legislation was intended to ensure that banks would not over-extend themselves financially by exceeding their loan reserves, but it resulted in intensified racial segregation.

In 1948, the U.S. Supreme Court held in *Shelley v. Kraemer* (334 U.S. 1) that the Fourteenth Amendment prohibits a state from enforcing restrictive covenants that prevent owning or occupying property based on race or color. The court at that time did not bar private parties from abiding by the terms of a racially restrictive covenant.

Twenty years after the Supreme Court ruling in *Shelley v. Kraemer*, The Fair Housing Act of 1968 was passed, prohibiting discrimination of sale, rental, and financing of dwellings and other housing-related transactions, based on race, color, national origin, religion, and sex (and later amended to include handicap (disability) and family status). This law officially made the use of racial restrictive covenants in housing illegal.

The Senate Judiciary Committee analysis of this bill provides a succinct explanation of the harm caused by these covenants:

> First, when housing segregation was legal, governments disproportionately invested in the schools, parks, and other public amenities in white neighborhoods, while leaving communities of color marginalized. Not coincidentally, the property values of homes in white communities grew far more quickly than those in other neighborhoods, meaning that white homeowners built greater equity than their counterparts and were able to pass this wealth on to their children. The built-in economic advantage these white homeowners received, coupled with the ongoing access to better schools and other public amenities, led to entrenched cycles of wealth and opportunity for white folks while the inverse effect drove cycles of poverty in many communities of color. In essence, housing segregation and differences in access to opportunity arose from the laws, but ultimately became baked into financial, social, and geographic disparities that reproduce themselves independently of the law. As a result, a significant amount of the racial inequality that characterizes the United States today can be directly traced to residential racial covenants and the deliberate, government-backed policies that encouraged their proliferation.
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> Second, the actual racial covenants themselves – their offensive words and hateful message – remain etched in property records throughout California. As a result, Californians examining property records are frequently subjected to stumbling upon these covenants, most commonly right as they are on the cusp of purchasing that property to be their home. The

> experience can be jarring for anyone, but it is especially painful and traumatic for many homebuyers of color.

A previous version of this bill would have required a title insurance company involved in any transfer of real property that provides a copy of a deed or other written instrument relating to title to real property, to identify whether any of the documents contain an unlawfully restrictive covenant, as specified. If the title insurance company identifies unlawfully restrictive language, the bill would require the title insurance company to record a modification document.

There was strong opposition to this version of the bill from nearly all involved in real estate transactions including realtors, escrow agents, and land title insurers. They all assert that the procedures the bill proposed would add significant costs and delays to the escrow process, leading in many instances to the disruption of the transaction altogether. Land title companies in particular assert that it is not their ordinary course of business to comb through property records looking for specific terms. Taking on that task would be expensive and time-consuming. They emphasize that successfully closing escrow on real estate transactions frequently requires meeting tight deadlines for funding, among other things.

This version of the bill moves away from a transaction-by-transaction approach and instead creates a coordinated effort to remove these restrictions. This approach has several advantages to a transaction approach including harnessing economies of scale, potential to use technology to search for these restrictions, and shortening the amount of time the process could take, as many properties go decades without changing hands. The new structure of the bill was proposed by the California Land Title Association to address their practical concerns with implementing the previous version of the bill, and is based on a similar law in Washington State. The CLTA suggests the temporary imposition of a small $2 fee on recording property documents would generate about $18 million annually. Under Proposition 26, such a fee would likely be considered a tax. As a result, this bill would require a two-thirds vote to pass out of the Legislature.

Suggested Amendments

There is a provision of the bill, Government Code 12956.2, that requires a title company, escrow company, real estate broker, real estate agent, or other person that *knows* an unlawful, restrictive covenant exists, to notify the owner and file a Restrictive Covenant Modification on their behalf. The use of the term “knows” may be vague, as it could mean actual knowledge, or could include instances where the party knew or should have known. The Committee may wish to consider amendments that would clarify the requirements on these parties under the section.

Related/Prior Legislation

AB 721 (Bloom, 2021) Would make any CC&Rs restricting the production of affordable housing unenforceable. Would authorize the owner of affordable housing developments to submit modification documents to the county recorder for the purpose of removing an unlawful restriction per the provisions of the bill.

AB 985 (De La Torre, 2009) would have required land title companies to find and redact discriminatory covenants in connection with real estate transactions. The bill also proposed a $2 recording fee to offset the costs. In his message vetoing the bill, then-Governor Schwarzenegger wrote "[w]hile the goal of this measure is a worthy one, the practical legal effect is negligible. The restrictive covenants this bill would redact from certain recorded documents are already illegal and void under existing law. […] Secondly, it is unknown if the $2 recording fee attached to this bill to fund the redacting of restrictive covenants has any nexus to the actual cost of doing so."

AB 2204 (De La Torre, 2008) would have required county recorders to find and redact discriminatory covenants from property records. AB 2204 died in the Senate Appropriations Committee.

AB 394 (Niello, Chapter 297, Statutes of 2005) permitted any owner who believed that there was an unlawful covenant attached to his or her property to file a "Restrictive Covenant Modification"(RCM) form that effectively operated to remove the offensive covenant from any subsequent documents that would be sent to future buyers. AB 394 also modified the required cover sheet to notify buyers of their right to file an RCM with the county recorder.

SB 1148 (Burton, Chapter 589, Statutes of 1999) allowed a homeowner to submit a suspect covenant to the Fair Employment and Housing Commission for review and, if found invalid, the owner could ask the county recorder to strike the objectionable provision. SB 1148 also required a title insurer or escrow agency, or any other person or entity sending documents to a buyer, to attach a cover page with a stamp notifying the buyer that the document might contain unlawful restrictions and that those provisions are not enforceable.

ARGUMENTS IN SUPPORT:

The National Housing Law Projects writes,

> "Making it easier to remove bigoted restrictive covenants will not end the segregation and racial inequality they helped to create. But legislation that makes it easier to remove bigoted restrictive covenants once and for all serves to reinforce California's values and its goal of eradicating racial inequality and bigotry in all its forms. This can only help to steer the conversation that Californians are having right now around racial justice in the right direction. Accordingly, NHLP strongly supports passage of AB 1466."

Habitat for Humanity California argues,

> "While covenants were contracts between private parties, they became an increasingly important tool used by all levels of government to segregate neighborhoods. In 1948, under the two Supreme Court cases Shelley v. Kraemer and Hurd v. Hodge, racially restrictive covenants were found unconstitutional. However, to this day, unenforceable language in these covenants remains in housing documents due to the difficulty to modify a property's chain of title. Numerous cases have been reported of buyers stumbling upon racist language in deeds and other housing documents that are sent prior to the transfer of property. While the exact number of

> properties which contain racially restrictive covenants remains unknown, evidence abounds of their use in neighborhoods up and down the state."

ARGUMENTS IN OPPOSITION:

The California Land Title Association, California Realtors Association, and California Escrow Association write together in an "Oppose Unless Amended" letter on the April 5 version of the bill that:

> "The goal of AB 1466, which the signatories to the letter wholeheartedly support, is to further Fair Housing laws in California by making the process of removing restrictive covenants less burdensome on consumers and homeowners. However, as written, AB 1466 would place the burden of finding offensive restrictive covenants – buried in archaic documents maintained and indexed by county recorders – on the backs of Californians buying or refinancing their homes. Closing the vast homeownership gap that exists between communities of color and their white counterparts is critical in reducing inequities in our society and this bill adds more hurdles in the form of logistic and financial burdens to those seeking to buy homes."

The opposition argues the previous version of the bill would have added weeks to the escrow process, could derail home purchases/ refinances, and burden California homebuyers with hundreds of dollars in new costs. They estimate a cost of $500 per transaction, on the 600,000 real estate purchases and refinance transaction would amount to $300 million in annual costs to Californians. The current structure of the bill is inspired by the opposition's suggested amendments and if opposition is removed prior to the hearing, staff will endeavor to inform the Committee via an addendum.

SUPPORT:

ACLU California Action
All Home
Black Leadership Council
Black Women Organized for Political Action PAC
City of Mountain View
Consumer Attorneys of California
Habitat for Humanity California
Initiate Justice
Japanese American Citizens League
League of Women Voters of California
Method Commercial
National Association of Social Workers, California Chapter
National Housing Law Project

OPPOSITION:

California Association of Realtors
California Escrow Association
California Land Title Association

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