SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1466 (McCarty)
Version: April 5, 2021
Hearing Date: June 29, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Real property: discriminatory restrictions

DIGEST

This bill establishes procedures intended to ensure that, as part of each real estate sale, any illegal and offensive exclusionary covenants in the property records are redacted before the buyer is confronted with them.

EXECUTIVE SUMMARY

For decades and perhaps centuries, exclusionary covenants prevented many people of color and also some religious minorities from buying properties on which the covenants had been recorded. Though these covenants have been illegal and unenforceable for over 50 years in California, they remain physically present as ugly stains of our racist and bigoted past inked onto the pages of an unknown but large fraction of the state's property records. Pursuant to prior legislation, procedures exist by which property owners can have these illegal, exclusionary covenants redacted from their property records, but those procedures are largely voluntary and are not always effective. As a result, people buying homes in California still frequently find themselves confronted with the offensive language and hateful messages contained in these covenants; an experience that is especially traumatic for many homebuyers of color. This bill seeks to prevent that harm from recurring by requiring land title companies to find and redact illegal exclusionary covenants in property records before completing home sales.

The bill is author sponsored. Support comes from civil rights advocates and consumer attorneys. Opposition comes from the various players in real estate transactions, who support the identification and redaction of unlawful and offensive covenants but argue that the method proposed by the bill would delay and disrupt home sales, adding burdens and costs without necessarily solving the problem. If the bill passes out of this Committee, it will proceed next to the Senate Insurance Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Generally prohibits discrimination in housing accommodations, as specified, and declares as void and unenforceable any provision in any deed or other written document relating to title to property that purports to condition the right to sell, lease, rent, use, or occupy the property to any person based upon that person having specified characteristics, including race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, source of income, or sexual orientation. (Gov. Code §§ 12955 - 12956.1; *Shelley v Kramer* (1948) 334 U.S. 1; *Hurd v Hodge* (1948) 334 U.S. 24.)

2) Requires county recorders, title insurance companies, escrow companies, real estate brokers, real estate agents, and homeowner associations, when providing a deed or other written documents relating to title to property, to include a cover sheet which states that unlawfully discriminatory covenants, conditions, or restrictions are void and unenforceable and also notifies the recipient how the recipient may go about redacting the void and unenforceable covenant, condition, or restriction from the property records. (Gov. Code § 12956.1(b).)

3) Permits a person with an ownership interest in a property to file a "Restrictive Covenant Modification" (RCM) form in order to remove any void or unenforceable covenant, condition, or restriction, as specified, and permits, but does not require, the County Recorder to waive any fees for filing the RCM. (Gov. Code § 12956.2.)

This bill:

1) Authorizes any person to initiate the RCM process with the relevant county recorder for the property in question.

2) Requires a title insurance company involved in any transfer of real property that provides a copy of a deed or other written instrument, including any covenants, conditions, or restrictions (CC&Rs), to identify whether any of the documents contain an unlawfully discriminatory covenant, as specified.

3) Provides that if a title insurance company identifies an unlawfully discriminatory covenant pursuant to (2), above, the title insurance company must initiate the RCM process.

4) Authorizes a title company to work in conjunction with public interest lawyers, law schools, nonprofit organizations, or activist groups with expertise in identifying unlawfully restrictive language in order to comply with (2) and (3), above.

5) Requires the county recorder to record any modification request submitted pursuant to (3), above, within a period not to exceed 30 days from the date of the request.

6) Requires the county recorder to make available all restrictive covenant modification forms on site in an appropriately designated area, or online on the county recorder's website. Specifies that the forms shall permit multiple submissions on behalf of different homes and for processing homes in batches with respect to a modification document that affects multiple homes or lots.

7) Provides that any modification document, instrument, paper, or notice to remove an unlawful and discriminatory restrictive covenant may be recorded without acknowledgement, certificate of acknowledgement, or further proof.

8) Provides that any modification document, instrument, paper, or notice executed or recorded to remove an unlawfully discriminatory covenant shall not be subject to a recording fee.

COMMENTS

1. Brief history of exclusionary property covenants

The Assembly Judiciary Committee analysis of this bill provides a succinct but thorough background on the history of how exclusionary covenants were used for decades in California to deny people of color and some religious minorities the opportunity to purchase many properties in California. For easy reference, the bulk of the Assembly Judiciary Committee's background is repeated here:

> Although we often associate forced, Jim Crow-era racial segregation with the Southern parts of the United States, residential racial segregation was, in fact, enforced throughout the United States, including in California, by a combination of government policies and judicially enforced private agreements. In the first two decades of the 20th century, local governments enacted zoning ordinances that restricted the sale of homes in certain neighborhoods to members of particular races. When the U.S. Supreme Court struck down racial zoning ordinances in *Buchanan v. Warley* (1917) 245 U.S. 60, champions of segregation turned to private agreements in order to achieve the same end, such that "racially restrictive covenants" came increasingly into use in the 1920s. During the Great Depression and New Deal, two government entities –the Home Owners' Loan Corporation (HOLC) and the Federal Housing Administration (FHA) – promoted more widespread homeownership (for whites at least) by

guaranteeing loans and mortgages. An FHA underwriting manual explicitly stated that mortgage loans in predominantly Black and mixed-neighbors constituted a higher risk, warning lenders that the federal government would not back loans unless they reinforced segregation. In his bestselling and award-winning book, *The Color of Law: A Forgotten History of How Our Government Segregated America,* Richard Rothstein challenged what he called the "myth" of de facto segregation – or the idea that racial segregation outside of the South was the product of private agreements between private persons and private entities. To the contrary, Rothstein demonstrates, the so-called "de facto" segregation in the North and West was in fact "de jure" segregation, a deliberate and conscious product of government policy and law.

After World War II exposed the cognitive dissonance of fighting a racist regime abroad while tolerating Jim Crow and disenfranchisement at home, both the courts and the federal government began to take modest steps toward dismantling segregation, as was evidenced in the U.S. Supreme Court invalidating the "all white primary" and President Harry Truman integrating the U.S. Armed Forces by Executive Order. In 1948, in the companion cases of *Shelley v Kramer* 334 U.S. 1 and *Hurd v Hodge* 334 U.S. 24, the United States Supreme Court held that state court enforcement of racially restrictive property covenants violated the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution. While private parties could make such agreements without violating the 14th Amendment – which required "state action" – the courts, as state actors, could not enforce such agreements. While the Supreme Court ruling made such covenants unenforceable, subsequent state legislation, in California and elsewhere, made racial discrimination in housing accommodations, including by the use of exclusionary covenants, unlawful. Although originally targeting racial discrimination, these laws have subsequently been amended to include discrimination on other grounds, such as gender, religion, and sexual orientation, among others. (Government Code Section 12955 *et seq.*)

2. Ongoing harm caused by racial covenants

Although racially exclusionary covenants are now unenforceable, their enduring consequences still inflict profound harm.

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.

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.

This bill seeks to put an end to this second enduring impact of discriminatory covenants. Building on existing mechanisms for redacting these covenants out of property records, this bill is intended to ensure that Californians purchasing property are never again scarred by the experience of coming across one of these covenants just as they are about to buy a home.

3. Existing mechanisms for addressing the presence of racial covenants

As a result of prior legislation attempting to deal with this issue, there is already a process under California law through which a property owner may seek to have discriminatory covenants redacted out of their property records. That procedure is generally referred to as restrictive covenant modification, or "RCM," and it is set forth in the Government Code at Section 12956.2.

Under the RCM procedure, anyone with an ownership interest in a property may request to have any unlawfully discriminatory covenants redacted from the property records. The property owner initiates the process by presenting the county recorder for the county in which the property is located with two versions of the document containing the covenant that the owner wants redacted: a copy of the original document and a copy of the original document with the offending covenant stricken out. Upon receipt of these documents, the county recorder transmits them to the county counsel's office for review. If the county counsel's office determines that the covenant in question is not, in fact, unlawful, then the county recorder makes no changes to the property

records. If, by contrast, the county counsel's office confirms that the covenant in question is indeed unlawfully discriminatory, the county recorder records the modified version of the document with the covenant stricken out. That modified document then becomes the applicable set of covenants and restrictions for the property. As a result, any prospective buyers who look up the applicable covenants and restrictions for the property will obtain the modified document with the discriminatory covenant redacted, rather than the original.

4. Shortcomings of the existing mechanisms for addressing racial covenants

While this process does provide a method for property owners to have discriminatory covenants redacted from their property records, it has a number of shortcomings. Most obviously – and of particular relevance to this bill – it provides little to no protection against the possibility that homebuyers will be confronted with the content of these discriminatory covenants. Homebuyers will only be protected against that experience if the current property owner, or one of the previous owners, has voluntarily taken the initiative to go through the RCM process.

In addition, as the opposition highlights, even when a property owner does take the initiative to go through the current RCM process it is only effective enough to prevent prospective buyers from seeing the content of the covenant if the redaction is thorough. Often, the opponents assert, owners going through the RMC process will strike out the discriminatory text with a simple line that leaves the offensive language quite legible, thereby defeating much of the purpose behind the modification.

The existing process can further be criticized for the fact that, in many instances, it results in a cruel scenario in which the very person who was bothered, offended, or even traumatized by encountering the covenant must then do the work to have the covenant removed. Again, though the person affected could be anybody, the cruelty will often be felt most acutely by homebuyers of color.

5. How this bill proposes to address racial covenants differently

In an attempt to address at least some of these shortcomings, this bill would modify the existing RCM process with the aim of ensuring that discriminatory covenants are redacted from property records before the point at which a homeowner is likely to run across them.

To accomplish this goal, the bill tasks land title companies with the job of reviewing the records for any property that is coming up for sale or transfer. If, during that review, the land title company discovers discriminatory covenants, then the bill requires the land title company to initiate the RCM process with the county recorder. So that the RCM process will delay any potential transfer of the property as little as possible, the

bill requires county counsel to make its determination regarding the legality of the covenant within 30 days.

To further facilitate the RCM process generally, the bill would also remove some associated notarization requirements and lift the fees for recording the modified documents at the end of the RCM process.

6. Concerns about how this bill proposes to address racial covenants

There appears to be universal agreement that making people endure the possibility of encountering discriminatory covenants as part of the home buying process is unacceptable. Nonetheless, there is strong opposition to the bill in print from nearly all involved in real estate transactions: realtors, escrow agents, and land title insurers, among others. They all assert that the procedures that the bill currently proposes would add significant costs and delays to the escrow process, leading in many instances to the disruption of the transaction altogether.

Not surprisingly, given the significant role that the bill assigns to them, land title companies are particularly outspoken in their opposition. They 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.

In response to these concerns, it could be argued that the additional real estate transaction costs and delays are simply the price that must be paid to prevent the harm that can occur each time these discriminatory covenants surface. There are, however, a number of additional reasons why it might make better policy sense to approach the problem differently.

In particular, the approach taken by the bill in print would operate on a transaction-by-transaction basis. If, instead, California elected to undertake a coordinated effort to proactively hunt down and redact these covenants statewide, such a project might unlock several advantages.

First and most obviously, such a statewide endeavor would avoid imposing the additional costs and delays on real estate transactions that concern the opposition. For this reason, the opposition favors a proactive approach. The California Land Title Association, in particular, appears to have devoted significant time and effort to developing an alternative framework for the bill along these lines.

Second, a coordinated effort of this nature could benefit from economies of scale. For example, where multiple properties were developed concurrently and each property was subjected to the same covenants, all of the covenants could be modified at once,

rather than relying on the sale of each individual parcel over time. Similarly, the legal review now performed by each county counsel could potentially be harmonized so that once a determination was made that language in one covenant was unlawful, all identical covenants statewide could be deemed unlawful without the need for further legal review.

Third, a coordinated state project could potentially harness the ingenuity of California's renowned tech sector to help get the job done efficiently. The same kind of technology that allows software to identify individuals in a packed stadium must surely be capable, with the right modifications, of identifying discriminatory covenants among reams and reams of text.

Fourth, a coordinated effort could be used to compile a comprehensive, publicly available database of where these covenants applied. The resulting information could be used for research purposes, enabling close analysis of how patterns of *de jure* housing segregation in the past influence *de facto* housing segregation patterns today. That research could, in turn, inform public policy making. Indeed, the database itself could be used as a component in future public policy endeavors.

Finally, a proactive, coordinated endeavor to identify and strike out discriminatory covenants statewide holds out the hope that these covenants could be redacted from California's property records in a comprehensive fashion within a few years. Realistically, reaching the same goal transaction-by-transaction would take many decades if not centuries.

The combination of these advantages makes a compelling public policy case for shifting the framework of the bill from a transaction-by-transaction approach to a coordinated, proactive approach. The obvious challenge is how to pay for it. As part of its proposal, the California Land Title Association suggests the temporary imposition of a small fee on recording property documents, which it estimates would generate about $18 million annually. Under Proposition 26, such a fee would almost certainly be considered a tax, since the fee would pay for activities intended to benefit more than just the party paying the fee. As a result, this bill would require a two-thirds supermajority to pass out of the Legislature.

7. Charting the path forward

As detailed in the preceding comment, there are compelling policy reasons for redirecting this bill's approach from a transaction-by-transaction model to one involving a proactive, coordinated endeavor. Depending on the details, such a shift would likely have the effect of eliminating opposition to the bill as well. The author, too, is favorably inclined toward moving in the direction of a task force charged with achieving his aim of ensuring Californians no longer have to endure coming across discriminatory covenants when acquiring property in the state.

The exact contours of this concept remain to be detailed, however. Given that the bill is double-referred and must be heard in the Senate Insurance Committee next, it is not possible to work out these details before this Committee votes on the bill. Instead, the author offers the following outline of the direction he expects to take the bill, with specific amendments to be taken in the Senate Insurance Committee.

- Under the overall direction and oversight of a state entity to be determined, establish a task force with three related missions:
  - proactively track down discriminatory restrictive covenants;
  - process the redaction of discriminatory restrictive covenants from property records;
  - compile a publicly available database, with mapping features, showing where discriminatory restrictive covenants have been recorded in California.

- The task force would include, among other possible experts and stakeholders:
  - title industry representatives
  - real estate professionals
  - county recorders
  - county counsels
  - civil rights/racial justice groups
  - technology experts
  - public research institution(s)

- Funding source:
  - $2 recording fee on all transactions (CLTA estimates this will generate approximately $18 million a year)

- Sunset upon completion of project (approximately five years).

It should be noted that the formation of this task force and elements of the bill in print are not necessarily mutually exclusive. Even working efficiently and maximizing the use of technology, the task force is likely to take several years to track down every discriminatory covenant in the state. In the meantime, it may perhaps make sense to have some transaction-by-transaction system in place. Then, as the task force "clears" a county of its discriminatory covenants, any requirements associated with individual real estate transactions in that county could be lifted.

While it may raise some concern that the precise details of the bill remain to be worked out at this stage in the legislative process, there are reasons for optimism that these details can be worked out relatively quickly. First, the opposition generally, and the California Land Title Association in particular, have shown great dedication to the issue and have already compiled a relatively detailed proposal that shares many features of the approach set forth here. Second, there are projects underway in other states that this bill may be able to drawn upon, including an especially promising model in

Washington State. Finally, the lack of detail in this approach is partially intentional. In the spirit of a task force, the revised bill would set the end goal, convene the necessary parties, give the appropriate authorization, and provide the necessary resources, but otherwise refrain from stating exactly how the job should be done. In this way, the task force would have the latitude it needs to design and implement the best method for achieving the desired outcome.

8. Arguments in support of the bill

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.

In support, the League of Women Voters writes:

> Words matter. While racist, discriminatory Covenants, Conditions & Restrictions (CC&Rs) have been unenforceable since 1948, a clear process to redact racist language from housing documents when property changes hands without cost to the buyer is finally available in AB 1466. This streamlined process makes it clear that in California we will not abide by racist language in housing documents, taking an important step to acknowledge and address the impact of systemic racism and outright prejudice to which Black, Latino and other communities of color have been subjected.

In further support, Method Commercial writes:

> [A]ction is needed to address the great offense to owners, buyers, investors, tenants, lenders, and all in the real estate ecosystem that not removing racially restrictive covenants creates. These covenants, already illegal, are left on title due to the cumbersome removal process, and as such they continue to inflict their goal of pain and exclusion. As a commercial brokerage firm in Los Angeles, we personally experience the horrible language of these covenants and are left in the position to explain to prospective buyers that while they don't apply anymore, they are still part of

> the title record. It is beyond time to be more proactive in their removal.

9. Arguments in opposition to the bill

In opposition to the bill, the California Association of Realtors, the California Land Title Association, and the California Escrow Association jointly write:

> The goal of AB 1466, which [we] 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.

SUPPORT

All Home
Black Leadership Council
Black Women Organized for Political Action
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

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

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, Ch. 297, Stats. 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, Ch. 589, Stats. 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.

PRIOR VOTES:

Assembly Floor (Ayes 58, Noes 1)
Assembly Appropriations Committee (Ayes 13, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 0)

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