

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 911 (Schiavo)
Version: June 19, 2023
Hearing Date: June 27, 2023
Fiscal: Yes
Urgency: No
ID

SUBJECT

Unlawfully restrictive covenants: affordable housing

DIGEST

This bill strengthens and clarifies the process whereby a purchaser of a property can remove a covenant, condition, or restriction limiting the property's use for affordable housing.

EXECUTIVE SUMMARY

California has a long and troubled history of utilizing restrictive covenants to promote segregation in housing and residential construction. Although racially restrictive covenants have been unlawful and unenforceable since 1948, California law still permits covenants that restrict the size and density of residential property, and these covenants have often been utilized to continue segregated neighborhoods. In 2021, the Legislature passed AB 721 to allow for the removal of these restrictive covenants for affordable housing projects in order to promote the development of affordable housing. However, since AB 721's passage, affordable housing developers have encountered uncertainties in the process of removing the restrictive covenants. This bill addresses these issues and builds on AB 721 by creating an optional notice process whereby a property purchaser can provide notice to interested parties that they intend to remove the covenant, by creating a 35 day timeline for parties to file a lawsuit objecting to the covenant's elimination upon the providing of such notice, and by clarifying that affordable housing developers may request the covenant be removed before they have finalized a purchase of the property in question.

AB 911 is sponsored by the San Francisco Bay Area Planning and Urban Research Association and is supported by California Community Builders, the California Housing Consortium, and Valley Oak Partners, LLC. It has no known opposition. Should the bill pass this Committee, it will then be heard in the Senate Housing Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits enforcement, against the owner of an affordable housing development, of any covenants, conditions, restrictions, or private limits on private or publicly owned land that restrict the number, size, or location of the residences that may be built on the property, or that restrict the number of persons or families who may reside on the property, if an approved restrictive covenant affordable housing modification document has been recorded in the public record, as specified. (Civ. Code § 714.6 (a).)
- 2) Authorizes the owner of an affordable housing development to remove a covenant restricting the number or size of the residences that may be built on a property or the number of persons who may reside on the property by submitting a restrictive covenant modification document to the county recorder. (Civ. Code § 714.6 (b)(1).)
- 3) Outlines the process for obtaining a modified covenant, in which the county counsel reviews for eligibility the covenant modification document submitted by the owner, and approves if eligible. (Civ. Code § 714.6 (b)(2).)
- 4) Exempts the following from the prohibition on restrictive covenants related to affordable housing:
 - a) specified conservation easements; and
 - b) any interest in land comparable to a conservation easement that is held by any political subdivision and recorded in the office of the county recorder of the county where the land is situated. (Civ. Code § 714.6 (g).)
- 5) Specifies that a county will not incur any liability for recording a covenant modification document that is not authorized by section 714.6, and that liability for an unauthorized recording should be the sole responsibility of the owner that caused the unauthorized recordation. (Civ. Code § 714.6(b)(3).)
- 6) Provides that a restrictive covenant invalidated under section 714.6 will be enforceable if the property in question is utilized in a manner that violates the terms relating to affordable housing. (Civ. Code § 714.6(b)(4).)
- 7) Provides a process through which a city or county may provide notice of a violation of the terms of this section relating to affordable housing when an owner who obtained a covenant modification under this section fails to utilize the property for affordable housing. (Civ. Code § 714.6(b)(5).)
- 8) Provides that, in any suit to enforce the rights provided by section 714.6 or to defend against any suit filed against those rights, a prevailing owner will be entitled to recover litigation costs and reasonable attorney's fees. (Civ. Code § 714.6(d).)

- 9) Authorizes the appointment of a county counsel by a county board of supervisors and vests the county counsel with the duties of a public prosecutor. (Gov. Code § 27640 et seq.)
- 10) Authorizes a county counsel to represent and advise the officers and employees of special districts organized within the county and shall have exclusive charge and control of all civil actions and proceedings in which special districts, their officers or employees are concerned or are parties, as specified. (Gov. Code § 27645.)
- 11) Provides that specified notices must be published, as specified, in a newspaper of general circulation for the period prescribed, the number of times, and in the manner provided. (Gov. Code § 6060.)

This bill:

- 1) Provides that, upon authorization of a covenant modification by the county counsel, the county recorder shall notify the owner or submitting party of that authorization without delay.
- 2) Provides that, upon notice by the county recorder of the authorization of the modification, the owner of the property may mail, by certified mail to anyone who the owner knows has an interest in the property or in the restrictive covenant, a copy of the modification document, together with a copy of the code section implicated by this bill and a written explanation that the modification has been applied for and approved for recordation by the county counsel.
 - a) Requires notice to be deemed given to persons with interest in the property if the notice is actually received by the intended recipient or if the notice is mailed by certified mail both to an address for notice indicated in the restrictive covenant, if any, and to the intended recipient's address as shown in the last equalized assessment roll, if that address reasonably can be ascertained from the assessment roll.
 - b) In lieu of the mail notice, authorizes a property owner to publish notice of the modification of the restrictive covenant in a newspaper of general circulation, as specified.
 - c) Provides that the above described notice provisions are optional and that a failure to provide the notice does not invalidate a restrictive covenant modification document recorded pursuant to existing law.
- 3) Provides that, if the owner of the property subject to a covenant restricting affordable housing is not yet its record title owner, but is instead a beneficial owner with a right pursuant to a purchase and sale or similar agreement to purchase the property, the county recorder cannot record the modification document until the owner closes escrow on the property and becomes its record title owner.

- 4) Provides that any lawsuit challenging the modification filed by a party that is deemed to have been given notice of the approved modification must be filed within 35 days of that notice.
- 5) Defines “owner” for the purposes of Civil Code section 714.6 to include a record title owner of the property, a beneficial owner of the property, or an entity or individual with a right to acquire the property under an option agreement, purchase and sale agreement, or similar agreement.

COMMENTS

1. Author’s statement

According to the author:

For decades, some neighborhoods have included covenants on properties that limit the allowable density or number of units permitted on a property, even when they may conflict with local zoning ordinances. While recent legislation has forged a path for removing these covenants for 100% affordable housing, developers must own the property before seeking to remove the covenant. For some developers, this creates uncertainty in a process that requires sometimes millions in investments to address an administrative hurdle. AB 911 opens up the process of removing restrictive covenants for prospective buyers, providing confidence to investors that they can build on the properties they acquire.

2. The history of restrictive covenants in California

California property law enables the owner of property, upon subdivision of the land, to place covenants, restrictions, or other limitations on how the subdivided land may be used. These restrictions can then be enforced, through legal action if necessary, by any of the other owners of the subdivided property. The primary purpose of such restrictions is to provide assurance to those purchasing the property that the surrounding area will not develop in ways that they do not expect and do not want. Restrictive covenants can be used to ensure that all homes in a neighborhood conform to a certain architectural style.

However, historically, restrictive covenants have been used to exclude and discriminate against minorities. These covenants were used to prohibit the sale of a property to a person of color, thereby ensuring that a particular neighborhood or area of a city remained inhabited by white residents. The Federal government promoted and encouraged racially restrictive covenants, and accompanied with the practice of red-lining, in which entire sections of a city were designated as too risky for underwriting mortgage guarantees, confined minorities to poorer neighborhoods and denied them

the ability to purchase property and accrue wealth.¹ Such covenants were also similarly used to exclude religious minorities.

The United States Supreme Court eventually ruled such covenants were unenforceable as they violated the Equal Protection Clause of the Fourteenth Amendment. (*Shelley v. Kramer* (1948) 334 U.S. 1.). Yet these covenants still exist in many housing deeds, even though they are unenforceable. There is now a process under California law through which a property owner can have a discriminatory covenant removed from their deed. (Gov. Code § 12956.2.)

However, as racially restrictive covenants were banned, developers and neighborhood associations found new ways to subvert the *Shelley* ruling. Many developers and homeowners associations began adopting covenants that restricted the number or size of the residences that may be built on a property, or that restricted the number of persons who may reside on the property. Although race-neutral on their face, these covenants had the practical effect of maintaining white, single-family neighborhoods in California's affluent suburban communities. These covenants are still enforceable, and prior to AB 721 were able to be used to block an affordable housing development that otherwise had been approved by the city.

3. AB 721's process for eliminating restrictive covenants for affordable housing projects

To combat the negative effects that covenants restricting residential density have on the production of affordable housing and how these restrictions also lead to housing segregation, the Legislature passed AB 721 in 2021. Under the bill, any covenants, conditions, restrictions, or private limits on private or publicly owned land that restricts the number or size of the residences that may be built on the property, or that restricts the number of persons who may reside on the property, would be unenforceable as against a property owner developing the land for housing composed exclusively of affordable units. To facilitate that end, the bill allows an affordable housing developer to request the county recorder remove the covenant from the property deed, using much the same process that property owners can currently use to remove discriminatory restrictive covenants.

AB 721 included a number of provisions relating to the procedure that would take place to remove the restrictive covenant. To have the restrictive covenant removed and deemed unenforceable, an owner of an affordable housing project must submit a covenant modification document to the county recorder in much the same way that covenant modification documents must be submitted to remove racially restrictive covenants. The county recorder then has five business days to submit the documentation and modification document to the county counsel for review. The county counsel is required to determine if the request for modification meets the

¹ Farrell Evans, "How Neighborhoods Used Restrictive Housing Covenants to Block Nonwhite Families," History (Dec. 15, 2022), available at <https://www.history.com/news/racially-restrictive-housing-covenants> [available as of June 19, 2023].

requirements under AB 721 to have the covenant removed within 15 business days of receiving the documents from the county recorder.

Through that process, AB 721 vested authority in the county counsel to determine if the request for modification qualifies under the provisions of the statute. However, that decision, and the legality of the modification document, can theoretically be challenged at any time after the approval of the modification document. While AB 721 did include language relating to the recovery of litigation costs and reasonable attorney's fees in any suit filed to enforce the rights of the statute or in any suit filed against those rights, it did not specify further regarding such types of suits. It did, however, include provisions allowing a county or city to notice a violation of the affordable housing requirements to qualify for the covenant modification.

4. AB 911's changes to the AB 721 process

Because AB 721 did not provide a clear process for contesting a covenant modification, the authors assert that affordable housing developers are left without clarity. That could pose a risk to the developer well into the construction phase of the affordable housing project, since in theory an interested party could sue to challenge the validity of the modification at any time. To address this, AB 911 amends the civil code section codified by AB 721 (Civil Code section 714.6) to clarify a process for challenging a covenant modification document under AB 721. The process provides that the owner may, once notified by the county recorder that the county counsel approved the modification, provide notice of the modification to anyone who the owner knows has an interest in the property or the restrictive covenant. It also specifies that any suit challenging the validity of a restrictive covenant modification document by a person who was provided notice must be filed within 35 days of such notice. In amending the statute in this way, AB 911 places a clear limit for suits challenging an approved modification, though it does not require that notice be given of the modification. Considering the clarity and finality of this provision, affordable housing developers would likely voluntarily provide the notice allowed so that they can be sure that, after 35 days, they will not be subject to any suits challenging the validity of the modification.

AB 721 also only allowed a covenant modification document to be filed with the county recorder when an affordable housing developer owned the property subject to the restrictive covenant. The author asserts that this posed a problem for affordable housing developers because it created uncertainty because the developer would have to buy the property before even knowing if they would be able to receive the covenant modification to then build their affordable housing project. To overcome this uncertainty and the risk it poses to affordable housing developers, AB 911 amends the statute to clarify that an entity or individual with a right to acquire the property through an option agreement, a purchase and sale agreement, or other similar agreement can file a covenant modification document with the county recorder to remove the covenant. This would allow the affordable housing developer to know,

before they finalize purchase of the property, whether the modification will be approved and would therefore remove a hurdle to the development of the property.

SUPPORT

San Francisco Bay Area Planning and Urban Research Association (sponsor)
California Community Builders
California Housing Consortium
Valley Oak Partners, LLC

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 721 (Bloom, Ch. 349, Stats. 2021) made covenants and other recorded documents that restrict the number or size of the residences or the number of persons who may reside on the property unenforceable if the property is developed into 100 percent affordable housing. Created a process for an owner to record a modification document through the county recorder to override the restrictive covenants.

PRIOR VOTES:

Assembly Floor (Ayes 64, Noes 14)
Assembly Appropriations Committee (Ayes 12, Noes 4)
Assembly Judiciary Committee (Ayes 8, Noes 3)
Assembly Housing and Community Development Committee (Ayes 7, Noes 1)
