ASSEMBLY THIRD READING
AB 1466 (McCarty, et al.)
As Amended April 5, 2021
Majority vote

SUMMARY

Requires a title insurance company involved in any transfer of real property and that provides a deed or other documents to identify whether any of the documents contain unlawfully restrictive covenants and, if found, record a specified modification document with the county recorder. Makes changes to the existing process of recording a restrictive covenant modification, as provided.

Major Provisions

1) Authorizes any person to record a restrictive covenant modification document, as specified, with a county recorder, whereas existing law only authorizes a person who holds an ownership interest in a property that is the subject of an unlawful restrictive covenant to record a modification.

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 restrictive covenant, as specified. If the title insurance company identifies unlawfully restrictive language, then the title insurance company shall record a modification document, as provided.

3) 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 implement 2) above.

4) Requires the county recorder to record any modification submitted pursuant to 2) above within a period not to exceed 30 days from the date the request for recordation is made.

5) 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.

6) 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.

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

COMMENTS

Racially Restrictive Covenants. 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. One legal mechanism used to maintain residential segregation, especially from the 1920s to 1948, was the "racially restrictive covenant," an agreement prohibiting the homeowner from selling or renting the property to members of a specific race, ethnic, or religious background. 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.*)

However, despite their unlawfulness and unenforceability, these offensive exclusionary restrictions – especially those based upon race – can still appear in existing CC&Rs that are transferred from property sellers to buyers, unless the restrictions have been previously stricken, modified, or recorded over. This bill is not the first to address this issue. For example, SB 1148 (Burton), Chapter 589, Statutes of 1999, allowed a homeowner to submit a suspect provision to the Fair Employment and Housing Commission (FEHC) for review and, if FEHC determined that the provision was 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. 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 recorded over the impermissible covenant and 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.

Shortcomings of Existing Law. Existing law, in short, notifies a buyer that the documents may contain racially restrictive and offensive provisions and informs buyers of their right to file an RCM with the county recorder. Once an RCM has been filed, existing law requires the county recorder to submit the request to county counsel for review, in order to ensure that the covenant is indeed invalid before the recorder can record the modification removing the offensive provision. While the invalidity of some restrictions may be obvious, it is necessary to have some form of review in order to ensure that an owner does not attempt to unilaterally remove a valid covenant or restriction. However, existing law still does not prevent buyers from seeing offensive language in deeds and CC&Rs. Recent news reports describe unsuspecting buyers encountering offensive language in these documents at some point in the buying process, including when they are signing final documents as part of the escrow process. For buyers of color, this language is a particularly offensive and painful reminder of a history of racial hostility

and exclusion. Indeed, some reports suggest that buyers have walked away from these deals rather than sign or receive documents with offensive language, even if that language is no longer enforceable. This bill seeks to hasten the removal of the offensive covenants by requiring the title company to search records in order to identify objectionable covenants and, if one is found, to record an RCM with the county recorder.

This bill is not the first legislative effort seeking to protect buyers from encountering offensive language in the covenants. This measure is very similar to bills heard in 2008 and 2009. AB 2204 (De La Torre) of 2008, as heard in policy committee in 2008, would have required the title company to remove any offensive language from the deed, CC&Rs, and any other document before transferring the document to the buyer. However, that bill was amended to instead place the duty of removing the language and recording the modification on county recorders. Because of the cost of assigning this duty to the county recorders, AB 2204 eventually died in the Senate Appropriations Committee. In 2009, AB 985 (De La Torre) of 2009 returned to the original version of the 2008 bill and placed the obligation back on the title companies. That bill passed out of the Legislature, but was vetoed by then-Governor Schwarzenegger. In the intervening years, however, our continuing failures to achieve racial justice have become painfully obvious, and new social movements such as Black Lives Matter have pushed issues of racial equity into the forefront of our national consciousness, all suggesting that the bill may fare better this time around.

According to the Author
AB 1466 will take proactive steps in removing the egregious language [of racially restrictive covenants] from housing documents once and for all. Specifically, this bill will require when property changes hands, if racially restrictive language has been identified, that language will be removed. Furthermore, this bill will make it easier to remove racially restrictive language for homeowners across the state by removing fees associated with the removal process, streamlining the process, and expanding who can file removal requests.

Arguments in Support
The Consumer Attorneys of California (CAOC) support the bill because it "will make it easier to remove racially restrictive language for homeowners across the state by removing fees, streamlining the recoding process, and expanding who can file removal requests." CAOC notes: "Racist language appears in thousands upon thousands of agreements throughout California. For example, a homeowner's agreement dated from 1948 has such a portion in the contract. Tucked between a bullet point stating no 'noxious or offensive trade' be carried out on the property and another stating no illegal trailers or shacks can be on the property is the following: 'No person other than that of the Caucasian race shall use or occupy any building on any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race or nationality employed by an owner or tenant.' A separate but similar agreement stated, 'That no African, Mongolian, Japanese or person of African, Mongolian or Japanese descent shall be allowed to purchase, own, or lease the property.' CAOC and other supporters believe that AB 1466 will create a clear process to redact this racist language from housing documents when property changes hands.

Arguments in Opposition
The California Land Title Association (CLTA) opposes this bill unless it is amended. CLTA contends the "current version of AB 1466 will not only fail to achieve the desired goal of finding and redacting illegal restrictive covenants, but that it will do so through a very expensive and

time-consuming point-of-sale process that will have very negative impacts on millions of consumers buying homes in California."

CLTA stresses that its member companies only insure against the defects in the chain of title; they do not insure against the CC&Rs that would contain the language of racially restrictive covenants. Thus they have no reason to look through those documents, and they would certainly have no reason to search for covenants that have not been enforceable since 1948. CLTA points out that because no one knows which homes have restrictive covenants, "AB 1466 would necessitate that *every home sale* would require title companies to read old county recorder records they do not normally read to see if perhaps an illegal restrictive covenant exists," even though such documents rarely surface in the documents typically transferred to a home buyer. Moreover, CLTA contends that, where no covenant is found, "the very same search would need to be replicated again [on that same property] since there would be nothing recorded to indicate that such a search – that revealed nothing -- already took place. Only in situations where a restrictive modification was recorded would there perhaps be evidence that such a search took place. However, even in those situations a title company would likely undertake the AB 1466 mandate just to ensure an illegal restrictive covenant has not been missed by the other company. This costly redundancy would be borne by every homebuyer under AB 1466 to no purpose since no illegal restrictive covenant exists." In sum, CLTA believes that AB 1466 creates a cumbersome point-of-sale method that would increase costs, make the escrow process longer than it already is, and, not least of all, would not do much to systematically remove the restrictive covenants from the records.

FISCAL COMMENTS

According to the Assembly Appropriations Committee, costs (General Fund (GF)), possibly in the millions of dollars, in increased staff workload and resources for county recorder offices to record any modification to unlawfully restrictive covenants within 30 days and post modification forms on-line. Additional possibly significant loss of revenue to counties given this bill prohibits requiring any recording fee. County recorders may assess a fee of up to $225 unless otherwise exempted from assessing any recording fee. GF costs will depend on whether the Commission on State Mandates determines this bill imposes local reimbursable costs.

VOTES

ASM JUDICIARY: 9-0-2
YES: Stone, Chau, Chiu, Davies, Lorena Gonzalez, Holden, Kalra, Maienschein, Reyes
ABS, ABST OR NV: Gallagher, Kiley

ASM APPROPRIATIONS: 13-0-3
YES: Lorena Gonzalez, Calderon, Carrillo, Chau, Davies, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Holden, Luz Rivas
ABS, ABST OR NV: Bigelow, Megan Dahle, Fong

UPDATED

VERSION: April 5, 2021

CONSULTANT: Thomas Clark / JUD. / (916) 319-2334 FN: 0000625