(Without Reference to File)

CONCURRENCE IN SENATE AMENDMENTS
AB 1466 (McCarty, et al.)
As Amended September 3, 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, beginning July 1, 2022, 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 the county recorder to record any modification submitted pursuant to 1), above; however, prior to recording the county recorder must submit the proposed modification, as specified, to the county counsel to determine that the covenant is unlawful.

3) Provides that if a county recorder, title company, escrow company, real estate broker, real estate agent, or association knows that a document being delivered to a person who holds or is acquiring an ownership interest in a property contains an unlawfully restrictive covenant.

4) 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, as specified.

5) Requires the county recorder of each county to establish a restrictive covenant program to carry out the redaction of unlawfully restrictive covenant, including requiring each county recorder to prepare an implementation plan by July 1, 2022, as specified, and to submit regular reports on its progress to the Legislature.

6) Authorizes the county's board of supervisors to impose a recording fee of $2 on property recordings in order to fund the program described in 2), above, until December 31, 2027.

Senate Amendments

1) Require the county recorder of each county to establish a restrictive covenant program to carry out the redaction of unlawfully restrictive covenant, including requiring each county recorder to prepare an implementation plan by July 1, 2022, as specified, and to submit regular reports on its progress to the Legislature.

2) Authorize the county's board of supervisors to impose a recording fee of $2 on property recordings in order to fund the program described in 2), above, until December 31, 2027.

3) Eliminate a provision requiring the creating of a Task Force that would have coordinated with other entities in order to develop a program to identify and redact unlawfully restrictive covenants in the records of the county recorder's office, as specified.

4) Remove a requirement that the county recorder post information, as specified, or to notify the current homeowner of the existence of an unlawfully restrictive covenant and that the recording is redacting the covenant.

5) Define "redacted" for purposes of this bill and make other clarifying changes.

6) Specify that the failure of the county recorder to identify or redact covenants shall not result in any liability to the county recorder or the county.

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 United States 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 in three ways. First, this bill seeks to enhance the existing RCM process by allowing any person, not just an owner, to file an RCM with the county recorder's office if they have knowledge of the unlawful restriction. Second, the bill makes it easier for a person with an ownership interest to record an RCM by waiving fees and requiring title companies, realtors, and specified others who know of such restriction to notify an owner or prospective owner of the existence of the restriction and to inform them of their right to use the RCM process to remove the unlawful restriction. Third, and most important, the bill requires all county recorders throughout the state to establish a program to identify and redact unlawfully restrictive covenants and make regular reports on its progress to the Legislature. The bill also authorizes counties to impose a $2 recording fee on all property recordings in order to fund the redaction program.

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."

Arguments in Opposition
The California County Recorders' Association oppose this bill unless it is amended to give individual county recorders the option of developing a redaction program.

FISCAL COMMENTS

According to the Senate Appropriations Committee:

1) *County recorders*: Unknown, potentially-major costs in the aggregate to establish and operate a program to seek and carry out the redaction of unlawfully restrictive covenants. This bill allows recorders to charge a $2 recording fee on documents, except as specified, to offset the costs of performing the duties that would be imposed by this bill. The fee (and its reauthorization after 2027), however, would need to be authorized by the local board of supervisors. County recorders still would be required to perform the duties assigned under this measure even if their respective board of supervisors does not authorize the fee. In those situations, it is likely that the costs to operate the program would be subject to a reimbursement by the state, the amount of which would be determined by the Commission on State Mandates. (General Fund, local funds)

2) *Department of Insurance*: The department reports costs of approximately $4,000 in fiscal year (FY) 2021-2022 and $14,000 in FY 2022-2023 to review rate filings. (Special fund)

3) *University of California*: The university indicates minor and absorbable 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

ASSEMBLY FLOOR: 58-1-20
YES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Bryan, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Cooley, Cunningham, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kiley, Lackey, Lee, Levine, Low, Maienschein, McCarty, Medina, Mullin, Muratsuchi, Nazarian, O'Donnell, Petrie-Norris, Quirk, Quirk-Silva, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Stone, Ting, Villapudua, Voepel, Ward, Akilah Weber, Wicks, Wood, Rendon
NO: Smith
ABS, ABST OR NV: Bigelow, Chen, Choi, Cooper, Megan Dahle, Daly, Davies, Flora, Fong, Frazier, Gallagher, Gray, Mathis, Mayes, Nguyen, Patterson, Ramos, Seyarto, Valladares, Waldron

UPDATED

VERSION: September 3, 2021

CONSULTANT: Thomas Clark / JUD. / (916) 319-2334 FN: 0001461