
SENATE COMMITTEE ON HOUSING
Senator Scott Wiener, Chair
2021 - 2022 Regular

Bill No: AB 721 **Hearing Date:** 7/1/2021
Author: Bloom
Version: 6/23/2021 Amended
Urgency: No **Fiscal:** Yes
Consultant: Erin Riches

SUBJECT: Covenants and restrictions: affordable housing

DIGEST: This bill provides that covenants, restrictions, or private limits on the density of a property shall not be enforceable against a property owner who is developing a 100% affordable project, as specified.

ANALYSIS:

Existing law:

- 1) Authorizes the owner of a property subject to an unlawfully restrictive covenant based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, veteran or military status, genetic information, national origin, source of income, or ancestry to submit for recordation a document striking out the unlawfully restrictive covenant (modification document).
- 2) Authorizes the county recorder to record the modification document if all other requirements of recordation are met, or to direct the individual to obtain a determination from the Department of Fair Employment and Housing.
- 3) Requires a county recorder, title insurance company, escrow company, real estate broker, real estate agent, or association that provides a copy of the declaration, governing document, or deed to any individual to place a cover page or stamp on the first page of the previously recorded document or documents stating, in at least 14-point boldface type, the following:

“If this document contains any restriction based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, veteran or military status, genetic information, national origin, source of income as defined in subdivision (p) of Section 12955, or ancestry, that restriction violates state and federal fair

housing laws and is void, and may be removed pursuant to Section 12956.2 of the Government Code. Lawful restrictions under state and federal law on the age of occupants in senior housing or housing for older persons shall not be construed as restrictions based on familial status.”

- 4) Provides that any individual who records a document for the express purpose of adding a racially restrictive covenant is guilty of a misdemeanor. Provides that the county recorder shall incur no liability for recording the document.
- 5) Authorizes a property owner to file a modification document to remove any void or unenforceable covenant, condition, or restriction (CC&R), as specified, and permits the county recorder to waive any filing fees.
- 6) Requires the county recorder, prior to recording the modification document, to submit it to the county counsel. Requires the county counsel to determine whether the original document includes an unlawful restriction based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, veteran or military status, national origin, source of income, or ancestry. Requires the county counsel to inform the county recorder of its determination. Prohibits the county recorder from recording the modification document if the county counsel finds that the original document does not contain an unlawful restriction.
- 7) Provides that a county recorder is not liable for recording a modification document that is not authorized by existing law.
- 8) Requires instruments that create, assign, or otherwise transfer conservation easements to be recorded with the county recorder.

This bill:

- 1) Provides that recorded covenants, restrictions, or private limits that restrict the number, size, or location of the residences that may be built on a property, or that restrict the number of persons or families who may reside on the property, shall not be enforceable against the owner of an affordable housing development, as specified.
- 2) Defines an affordable housing development as one that is subject to a recorded affordability restriction requiring 100% of the units to be affordable to lower

income housing for at least 55 years, and requires that the property is owned or controlled by an entity or individual that has submitted a permit application to the jurisdiction to develop the project.

- 3) Establishes a process by which an affordable housing developer may – but is not required – to file a modification document with the county recorder to replace a non-compliant document, as follows:
 - a) Authorizes an owner of an affordable housing development to submit a modification document to modify or remove any existing restrictive covenant language, as specified.
 - b) Requires a county recorder, prior to recording the modification document, to submit it to the county counsel for review. Requires the county counsel to determine whether: the original restrictive covenant document restricts the property in a manner prohibited by (1) above; the owner has submitted sufficient documents to establish that the property qualifies as an affordable housing development; any notice required pursuant to this bill has been provided; whether any exemptions apply, as specified; and restrictions may no longer be enforced against the owner of the affordable housing development.
 - c) Requires the county counsel to inform the county recorder of its determination within 15 days. Requires the county counsel, if unable to make a determination, to specify the documentation needed to do so. Provides that if the county counsel has authorized the county recorder to record the document, the authorization shall be noted on the face of the modification or on an attached cover sheet.
 - d) Requires a modification document to be indexed in the same manner as the original restrictive covenant document, and to include a recording reference to the original restrictive covenant document, as specified.
 - e) Provides that a county shall not incur liability for recording a modification document that is not authorized by this bill.
 - f) Provides that if the property is utilized in any manner that violates the terms of affordability restrictions required by this bill, the city or county may record a notice of the violation, at which point the modification shall become void and unenforceable.

- g) Authorizes the county recorder to charge a \$100 fee to an owner who submits a modification document.
- 4) Provides that nothing in this bill shall be interpreted to weaken, modify, or invalidate existing laws protecting affordable and fair housing and prohibiting unlawful discrimination in the provision of housing.
 - 5) Provides that this bill shall not apply to conservation easements that are held by tax-exempt non-profit organizations; the state or any city, county, district or other state or local government entity; or a California Native American Indian tribe, as specified. Provides that this bill shall not apply to specified settlements, conservation agreements, or conservation easements.
 - 6) Provides that this bill shall not apply to any recorded deed restriction, public access easement, or other similar covenant that was required by a state agency for purposes of complying with a state or federal law, as specified.

COMMENTS:

- 1) *Author's statement.* "Decades of exclusionary housing practices have led to our housing and homelessness crisis. With a shortfall of almost 1.2 million homes, we must take necessary measures to promote the development of affordable and supportive housing. AB 721 will clarify that private landowners cannot engage in exclusionary tactics through private restrictive covenants. Such covenants arguably conflict with the Fair Employment and Housing Act and other state anti-discrimination laws. Furthermore, the density restrictions in these private covenants conflict with local zoning, remain enforceable without state intervention, and undermine California's efforts to promote affordable and supportive housing construction."
- 2) *Racially restrictive covenants.* Multiple studies have shown that life outcomes improve for those living in "high-opportunity areas," i.e., neighborhoods with high quality public schools, proximity to well-paying jobs, and a clean and safe environment. However, low-income people have historically been excluded from high-opportunity areas through exclusionary zoning policies such as redlining. Another legal mechanism used to maintain segregation, particularly from the 1920s to the 1940s, 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. A 1948 US Supreme Court ruling, *Shelley v. Kramer*, made such covenants unenforceable; subsequent legislation in California and elsewhere made racial discrimination in

housing accommodations, including by the use of exclusionary covenants, unlawful.

However, despite their unlawfulness and unenforceability, these exclusionary restrictions – particularly those based on race – still appear in existing covenants, conditions, and restrictions (CC&Rs) that are transferred from property sellers to buyers, unless the restrictions have been previously stricken, modified, or recorded over. As noted in the Assembly Judiciary Committee analysis, “For buyers of color, this language is a particularly offensive and painful reminder of a history of racial hostility and exclusion.” The Legislature is currently considering AB 1466 (McCarty), which would require any racially restrictive language to be removed from housing documents when a property changes hands, as well as making it easier for homeowners who purchased their homes under such restrictive covenants to file a modification document.

- 3) *Restrictive density covenants.* As racially restrictive covenants were banned, developers and neighborhood associations found new ways to subvert the Supreme Court ruling. Many began adopting covenants that restricted the number or size of residences that may be built on a property, or that restricted the number of persons who may reside on a property. Although race-neutral on their face, these covenants had the practical effect of maintaining white, single-family hegemony in California’s burgeoning post-war suburbs. Unlike racially restrictive covenants, restrictive density covenants remain legally valid and can be enforced against a development; thus, there is no process by which a property owner may file a modification document. The author and sponsor note these covenants are becoming increasingly problematic, as they provide residents of single-family neighborhoods with a tool to combat new development – even if the democratically elected city council had previously chosen to upzone the neighborhood in an attempt to boost the jurisdiction’s affordable housing supply.

This bill makes restrictive density covenants unenforceable if the property will be developed into 100% affordable housing. The developer must enter into an agreement with the local government to deed-restrict the affordable housing units for 55 years. This bill also establishes a process by which a developer may record a modification document.

- 4) *Easements.* As introduced, this bill included all conservation easements. A conservation easement ensures that the land’s natural, scenic, historic, agricultural, forested, or open space condition is maintained. These easements are purchased by non-profits as well as by state, federal, and tribal governments. However, the proponents of this measure point out that simply

exempting all conservation easements from this bill would enable NIMBY property owners to create spurious conservation easements on their properties or in their neighborhoods in an attempt to block new development. The author and sponsor have engaged in extensive negotiations to ensure that this bill exempts legitimate conservation activities while also ensuring that conservation easements do not become a NIMBY weapon. Accordingly, this bill now exempts certain categories of conservation easements, including: easements purchased prior to January 1, 2022; easements on land held by a certified land trust; easements funded by a government entity as part of a mitigation requirement for a government project; easements intended to conserve indigenous cultural and natural resources; and easements located entirely outside the boundaries of an urbanized area or urban cluster.

- 5) *Opposition concerns.* Sustainable Tamalmonite, a neighborhood organization located in Marin County, opposes this bill because it would hinder the capability to lower density, restrict the number of units, and limit the number of residents in a neighborhood, all of which help preserve public health and safety, the environment, neighborhood character, and quality of life.
- 6) *Committee amendments.* **To address concerns expressed by the California Land Title Association and the California Association of Realtors, this bill will be amended to make the filing of the modification document mandatory, rather than permissive. Due to timing, the author will accept these amendments as committee amendments.** Committee amendments also include an amendment to change the authorization for the county recorder to charge a \$100 fee for the modification document, to instead authorize the county recorder to charge a standard recording fee.
- 7) *Double referral.* This bill has also been referred to the Senate Judiciary Committee.

RELATED LEGISLATION:

AB 1466 (McCarty, 2021) — requires a title insurance company involved in any transfer of real property 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. Also makes changes to the existing process of recording a restrictive covenant modification, as specified. *This bill will be heard in the Senate Judiciary Committee on June 29th.*

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

**POSITIONS: (Communicated to the committee before noon on Friday,
June 25, 2021.)**

SUPPORT:

Community Corporation of Santa Monica (Co-Sponsor)
Public Counsel (Co-Sponsor)
Abundant Housing LA
American Planning Association, California Chapter
California Apartment Association
California Coalition for Rural Housing
California Housing Consortium
California Housing Partnership
California Reinvestment Coalition
California Rural Legal Assistance Foundation
Clergy and Laity United for Economic Justice
Committee for Racial Justice
Corporation for Supportive Housing
Eden Housing
Enterprise Community Partners, INC.
LA Voice
Lisc Los Angeles
National Association of Social Workers, California Chapter
National Equity Fund
Path
San Diego Housing Federation
Santa Monica Bay Area Human Relations Council
Santa Monica Forward
Santa Monicans for Renters' Rights
Southern California Association of Non-profit Housing (SCANPH)
United Way Bay Area
Western Center on Law & Poverty
Westside Coalition

OPPOSITION:

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