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AB 1466

QUESTIONS AND ANSWERS

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Discriminatory Racial Covenants and their Removal from Antiquated Real Property Records

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Discriminatory racial covenants were private covenants put into recorded documents attempting to prohibit persons of particular races or ethnic backgrounds from owning or occupying homes in certain areas, resulting in segregation within residential neighborhoods throughout the country.

Many homeowners and homebuyers are not aware that private discriminatory racial covenants were enforced until they were struck down in the 1940s by the United States Supreme Court as being illegal and unconstitutional.

Believe it or not, these offensive covenants were once promoted by the Federal Housing Administration and upheld and enforced by courts across the country until the U.S. Supreme Court decision.

Because these documents are illegal and unenforceable, they very rarely come to a consumer's attention unless someone goes looking for them in old California real property records.

Do I need to remove discriminatory covenants when buying, selling, or refinancing a home?

No. Discriminatory covenants are already illegal and unenforceable, so nothing requires homeowners or homebuyers to remove them from older county records when they are discovered.

However, California law does provide a way for consumers to initiate the removal of these discriminatory covenants through the use of a "Restrictive Covenant Modification" form (RCM), which can be completed and submitted to the county recorder to effectuate the redaction of discriminatory racial covenants.

What has changed with the law regarding these covenants?

Despite the fact that these covenants have long been illegal and unenforceable, they are nonetheless very offensive when found. For this reason, the California State Legislature recently passed AB 1466 (McCarty), which provides for the restrictive covenant modification process to strike them entirely from public-facing documents.

How do I submit an RCM if I am aware of a discriminatory covenant and want to have it removed?

In the rare event a consumer finds a discriminatory racial covenant, the consumer may complete an RCM and submit it to the county recorder of the county in which the home is located, requesting that the discriminatory language be struck from the document on a go-forward basis.

An RCM is a simple form that allows a homeowner or homebuyer to identify the document and location of the discriminatory covenant they believe is illegal. Once filled out, the RCM can be submitted to the county recorder and county counsel for consideration, along with a complete copy of the document containing the discriminatory covenant with the covenant redacted.

If the county counsel determines that the RCM request has indeed located an illegal and discriminatory racial covenant as defined by law, the RCM and document containing the redacted covenant will be recorded in county records.

In the event county counsel determines that an RCM form is targeting a covenant that is not illegal or discriminatory, the RCM and modified document will not be recorded, and the covenant will not be struck.

Once recorded, only the redacted, public-facing document – now devoid of the illegal and discriminatory covenant -- should be made available to future homebuyers and sellers for review. Therefore, only individuals doing historical research should be able to find these discriminatory covenants in the future.

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Updated: December, 2021

QUESTIONS AND ANSWERS RELATING TO THE IMPLEMENTATION OF AB 1466 (MCCARTY) DEALING WITH UNLAWFUL RESTRICTIVE COVENANTS

California Land Title Association

December 15, 2021

Provident Title provides this for informational purposes only. All contents written by California Land Title Association. All information deemed reliable but not guaranteed.

NOTE: The following FAQs are meant for informational purposes only and the statements and opinions provided are not those of CLTA member companies nor legal advice. The CLTA strongly recommends that interested parties contact the offices of local county recorders to determine the procedures in each county associated with the enactment of Chapter 359, Statutes of 2021 (AB 1466 McCarty).

1. Q: Does AB 1466 require any changes to title or escrow company processes or operations?

A: Yes. AB 1466 creates a number of changes to existing law that will require changes to title or escrow company processes or operations. **The changes required by AB 1466 are spread across two implementation dates: January 1, 2022, and July 1, 2022.** These changes are summarized here and explained in further detail in separate questions below.

Effective January 1, 2022:

- Title or escrow companies will need to modify the "stamps" or coversheets put on the front of any declaration, governing document, or deed. ***(See: Question #2)***
- Title or escrow companies that deliver a copy of a declaration, governing document, or deed directly to a property owner will also need to provide a "Restrictive Covenant Modification" form (RCM), along with "procedural information" for appropriate processing of the form. ***(See: Question #3)***

Effective July 1, 2022:

- If a title or escrow company has "actual knowledge" that certain property records being directly delivered to a homeowner or home buyer include a possible unlawfully restrictive covenant, they must notify the person of the existence of the covenant and their ability to remove it. ***(See: Question #7)***
- If requested before the close of escrow by a homeowner or home buyer, a title or escrow company involved in a pending real estate transaction must assist in the preparation of a RCM. ***(See: Question #5)***

2. Q: What changes will title or escrow companies need to make to the "stamps" or coversheets put on the front of any declaration, governing document, or deed, as described in Question #1?

A: **Effective January 1, 2022**, the "stamps" or coversheets put on the front of any declaration, governing document, or deed must match the new statutory language. The new language adds the term "age" to the protected classes in the current stamp, and adds language regarding the processing of the Restrictive Covenant Modification form. The new stamp would read:

> "If this document contains any restriction based on age, 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 by submitting a "Restrictive Covenant Modification" form, together with a copy of the attached document with the unlawful provision redacted to the county recorder's office. The "Restrictive Covenant Modification" form can be obtained from the county recorder's office and may be available on its internet website. The form may also be available from the party that provided you with this document. 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."

(Gov. Code Section 12956.1(b)(1))

3. Q: How does a title or escrow company provide a "Restrictive Covenant Modification" form (RCM), along with "procedural information," as described in Question #1?

A: **Effective January 1, 2022,** AB 1466 requires that a "title company, escrow company, or association that delivers a copy of a declaration, governing document, or deed directly to a person who holds an ownership interest of record in property shall also provide a Restrictive Covenant Modification form with procedural information for appropriate processing along with the document." The law requires that the county recorder make the RCM form, along with the procedural information for processing, available either onsite at the recorder's office or on its website. To satisfy the obligation to deliver the RCM form and procedural information, title and escrow companies should obtain the RCM forms and procedural information from the county recorder's office or website and provide to the property owner.

(Gov. Code Section 12956.1(b)(3))

4. Q: What is a "Restrictive Covenant Modification" form (RCM), and how is it processed?

A: The "Restrictive Covenant Modification" form (RCM) is a form that can be completed and submitted to the county recorder to effectuate the redaction of unlawful restrictive covenants. AB 1466 prescribes a standardized RCM in Gov. Code Section 12956.2(f).

A complete copy of the original document containing the unlawful restrictive covenant, with the unlawful restrictive covenant redacted, must be attached to a submitted RCM in order to ensure that the newly recorded document will be properly found in a title search.

(Gov. Code Section 12956.2(a)(1))

After receiving a submitted RCM, county recorders are required to forward the completed RCM and accompanying original document to county counsel, who is required to determine whether the language in the original document contains an unlawful restriction based on specified criteria. After making their determination, county counsel is required to return the documents to the county recorder and inform the recorder of their determination.

If, after review, county counsel informs the county recorder that it has determined that an unlawful restriction exists within the document, the county recorder can proceed with recordation of the RCM. However, if county counsel "finds that the original document does not contain an unlawful restriction…or the modification document contains [unauthorized] modifications," the county recorder is required to refuse recordation of the RCM.

(Gov. Code Section 12956.2(b)(1))

If the RCM is recorded, in subsequent real estate transactions the RCM and new document–which omits the offensive language—would be found during a public records search for the original record. Title companies would then either provide a copy, or provide a link, to the new version of the document to customers. The original document containing the offensive unlawful restrictive covenant should no longer be provided to customers in connection with public records searches or title products prepared by title companies.

While the RCM process existed prior to AB1466, the process rarely worked; often the recorded document was difficult to read or failed to adequately redact the unlawful restrictive covenant. For example, in some cases a homeowner/buyer recorded an RCM but simply drew a line through the unlawful restrictive covenant (which often remained legible), before attaching it to the RCM and submitting it for recordation. Thus, the unlawful restrictive covenant was never extinguished from the public record. The process under AB 1466 is intended to resolve those inadequacies.

5. Q: Will title or escrow companies be required to assist with the preparation of a RCM?

A: **Effective July 1, 2022,** title or escrow companies are required to assist consumers with the preparation of an RCM if:

- The title or escrow company is directly involved in a pending transaction to which the person requesting assistance is a party.
- The request for preparation assistance is received before the close of escrow.

AB 1466 does not define the terms "assist" or "preparation" in the context of this requirement, and title and escrow companies will need to make their own independent determinations as to how they intend to comply with the law.

AB 1466 also states that a title or escrow company assisting with the preparation of an RCM "shall have no liability associated with the recordation of a Restrictive Covenant Modification that contains modifications not authorized by this section on behalf of the requester."

(Gov. Code Section 12956.2(a)(3))

6. Q: What is the definition of an "unlawful restrictive covenant"?

A: While the term "unlawful restrictive covenant" is not explicitly defined in AB 1466, the term can essentially be defined as a covenant in violation of subdivision (l) of Government Code Section 12955, given that the bill provides the following:

- "A person who holds or is acquiring an ownership interest of record in property that the person believes is the subject of an unlawfully restrictive covenant in violation of subdivision (l) of Section 12955 may record a document titled Restrictive Covenant Modification…" (Gov. Code Section 12956.2(a)(1))
- And, separately, that the "county recorder of each county shall establish a restrictive covenant program to assist in the redaction of unlawfully restrictive covenants in violation of subdivision (l) of Section 12955." (Gov. Code Section 12956.3(a))

Government Code Section 12955(l) provides that it shall be unlawful:

"(l) To discriminate through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, genetic information, national origin, source of income, veteran or military status, or ancestry. Discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable. Discrimination under this subdivision also includes the existence of a restrictive covenant, regardless of whether accompanied by a statement that the restrictive covenant is repealed or void."

(Government Code Section 12955(l))

7. Q: When would a title or escrow company be required to notify a consumer as to the existence of a possible unlawful restrictive covenant, as summarized in Question #1?

A: Effective July 1, 2022, a title or escrow company would be required to notify a "person who holds or is acquiring the ownership interest in [a] property of the existence of [a possible unlawfully restrictive covenant] and their ability to have it removed through the restrictive covenant modification process" if all of the following criteria are met:

- The title or escrow company has ***"actual knowledge"*** that a document includes a possible unlawfully restrictive covenant
- That said unlawful restrictive covenant is contained within a **"declaration, governing document, or deed"**
- That the above-mentioned **"declaration, governing document, or deed"** is ***delivered by the title company directly*** to the consumer

NOTE: AB 1466 also states that there "shall be no presumption that a party providing a document has read the document or has actual knowledge of its content."

(Gov. Code Section 12956.2(a)(2))

8. Q: Will title or escrow companies be required to search for possible unlawfully restrictive covenants under AB 1466?

A: No. AB 1466 requires that the "county recorder of each county shall establish a restrictive covenant program to assist in the redaction of unlawfully restrictive covenants in violation of subdivision (l) of Section 12955."

(Gov. Code Section 12956.3(a))

9. Q: What is the definition of "redact" within AB 1466?

A: AB 1466 defines the term "redact" via the definition of two separate terms, "redaction" and "redacted," as follows:

"Redaction" means the process of rerecording of a document that originally contained unlawful restrictive language, and when presented to the county recorder for rerecording, no longer contains the unlawful language or the unlawful language is masked so that it is not readable or visible.

"Redacted" means the result of the rerecording of a document that originally contained unlawful restrictive language, and when presented to the county recorder for rerecording, no longer contains the unlawful language or the unlawful language is masked so that it is not readable or visible.

(Gov. Code Section 12956.1(a)(2)-(3))

10. Q: Are escrow closings contingent upon the RCM process being completed?

A: No. AB 1466 does not require that a submitted RCM be submitted or recorded prior to the close of escrow, though title and escrow companies will need to monitor for whether parties to a specific real estate transaction make the submission or recordation of an RCM a contingency.

However, a consumer seeking title or escrow company assistance with the preparation of an RCM must request such assistance before the close of escrow in order for the title or escrow company to be obligated to assist.

(Gov. Code Section 12956.2(a)(3))

11. Q: Is assisting consumers with the preparation of RCMs considered the unauthorized practice of law?

A: Title and escrow companies will need to consider existing laws related to the unauthorized practice of law as they make their own independent determinations on compliance with the obligations related to assisting consumers with the preparation of RCMs.

12. Q: Is there a new recording fee in AB 1466, and if so, what is the amount of the fee and when is it charged?

A: Beginning January 1, 2022, AB 1466 allows, if authorized by a county board of supervisors, for the charging of a new $2.00 recording fee that will be charged on the "first page of every real estate instrument, paper, or notice required or permitted by law to be recorded per each single transaction per parcel of real property, except those expressly exempted from payment of recording fees, as authorized by each county's board of supervisors and in accordance with applicable constitutional requirements."

(Gov. Code Section 27388.2(a))
If the new $2.00 recording fee is authorized by a county board of supervisors, AB 1466 provides that certain documents are exempt, similar to the $75 recording fee charged under the Building Homes and Jobs Act / SB 2. Specifically, the bill states that the fee shall not be imposed on any of the following documents:

- Any real estate instrument, paper, or notice recorded in connection with a transfer subject to the imposition of a documentary transfer tax, as defined in Section 11911 of the Revenue and Taxation Code.
- Any real estate instrument, paper, or notice recorded in connection with a transfer of real property that is a residential dwelling to an owneroccupier.
- Any real estate instrument, paper, or notice executed or recorded by the federal government in accordance with the Uniform Federal Lien Registration Act (Title 7 (commencing with Section 2100) of Part 4 of the Code of Civil Procedure).
- Any real estate instrument, paper, or notice executed or recorded by the state or any county, municipality, or other political subdivision of the state.

While the bill was drafted to mimic the exemption language in SB 2 as closely as possible, title and escrow companies will need to consult with individual county recorders to determine their interpretation as to which documents will be subject to the fee. This fee will be charged in the same instances as when a SB 2/Affordable Housing Fee is charged. The SB 2 process already put in place by title companies should hopefully operate as a guide regarding when the new $2.00 recording fee should be charged.

13. Q: Who gets the new $2.00 per document fee revenue, how can it be used, and how long will it be imposed?

A: County recorders receive the proceeds generated by the $2 recording fee.

Specifically, the bill provides that the "funds generated by this fee shall be used only by the county recorder collecting the fee for the purpose of implementing a restrictive covenants program pursuant to Section 12956.2."

(Gov. Code Section 27388.2(a))

The bill requires that a "county recorder shall not charge [the $2.00 recording fee] after December 31, 2027," unless "the county recorder has received reauthorization by the county's board of supervisors." Furthermore, the bill states that a "county recorder shall not seek reauthorization of the fee by the [board of supervisors] before June 1, 2027, or after December 31, 2027," and that "any reauthorization period shall not exceed five years."

(Gov. Code Section 27388.2(c))

14. Q: Will the county recorders be charging a standard, per page document recording fee to record the RCMs and/or the attached redacted document?

A: While the County Recorders Association of California (CRAC) has given assurances that county recorders will be waiving recording fees for recordation of the RCMs, there is no express provision that states this fee will be waived.

CLTA hopes that the process of submitting RCMs with attached documents to redact unlawful restrictive covenants will be free to the consumers given the political and cultural sensitivity associated with unlawful restrictive covenants and given that these documents often contain racially discriminatory language.

CLTA has not been given a guarantee that this fee will be universally waived but hope that the 58 county recorders will use the AB 1466 monies provided under AB 1466 to pay for their costs of administration and waive the existing recording fees for the RCMs.

15. Q: Will the $75 recording fee assessed under SB 2 also be charged on RCMs?

A: No. The legislation specifically prohibits these affordable housing fees being charged.

(Gov. Code Section 27388.1(a)(2)(E))

16. Q: Will title companies have to make the legal determination of what is or is not an unlawful restrictive covenant?

A: No. This is the responsibility of the local County Counsel in the county in which the real property is located. Title companies will not have to search for these documents or make the legal determination that the alleged unlawful restrictive covenant is in fact unlawful and worthy of redaction under AB 1466.

17. Q: How is the RCM process anticipated to work under AB 1466 for county recorders looking for or discovering unlawful restrictive covenants unrelated to real estate transactions?

A: The county recorder will fill out the new RCM form and attach the new document that is identical to the original document with the unlawful restrictive covenant language properly redacted. The RCM form and new document will be recorded and indexed in the same manner as the original document.

The expectation - and hope - is that, on a go-forward basis, the newly redacted document that is now devoid of the original offensive unlawful restrictive covenant language, will, for all intents and purposes, be considered the original document.

18. Q: What happens if county counsel determines that a restrictive covenant submitted for redaction in a RCM is not unlawful?

A: "The county recorder shall refuse to record the modification document if the county counsel or their designee finds that the original document does not contain an unlawful restriction as specified in this subdivision or the modification document contains modifications not authorized by this section."

(Gov. Code Section 12956.2(b)(1))

19. Q: In a hypothetical situation when a set of CC&Rs contains the illegal restrictive covenant, would the entire set of CC&Rs (potentially over 100+ pages), be reproduced and recorded with the RCM?

A: Yes. The bill states that the "modification document shall include a complete copy of the original document containing the unlawfully restrictive language with the unlawfully restrictive covenant language redacted."

(Gov. Code Section 12956.2(a)(1))

20. Q: Will counties adopt uniform procedures so that the procedural information that county recorders are required to provide and attach to the form under section 12956.2(g) is the same or very similar for each county?

A: CLTA has posed this question to CRAC, but a determination has not yet been made on this issue.

21. Q: Will CRAC publish a properly formatted version of the RCM form in its CRAC Recording Guidebook?

A: In response to questions from CLTA, CRAC has indicated that they believe there will be a standardized version of the RCM in the Recording Guidebook; however, we have yet to receive confirmation that such a process has in fact occurred. CLTA will continue to work with CRAC on this issue. A uniform and standardized RCM form is essential to streamlining this process as much as possible.

22. Q: Will all county recorders uniformly adopt the new AB 1466 $2.00 fee? If they do, will they all adopt the fees at the same time?

A: While we have received word from CRAC that the vast majority – if not all – counties are likely to adopt the $2.00 recording fee, whether the counties follow through – and whether the adoption of the fee is authorized by their respective County Board of Supervisors – is unknown at this time.

Some counties may waive charging any fees to effectuate the AB 1466 redaction objectives, but it is also possible all counties will charge this fee after seeking approval from their County Board of Supervisors.

As for timing, while it is possible that all counties may charge the new $2.00 fee and impose it on January 1, 2022, it is more likely that some counties will charge it right way and others may not charge it at all.

We will continue to monitor this situation and update CLTA members appropriately.

23. Q: Is the $2 fee considered part of the recording fee, so it can be disclosed and passed on to the borrower on the LE/CD?

A: Representatives from CRAC have indicated that they are considering the $2 fee to be part of the recording fee, further supporting that it will likely need to be reported in the TRID documents pursuant to Dodd/Frank and CFPB documents. As always, CLTA members should consult legal counsel with any questions on this or other issues pertaining to AB 1466.

Nothing in the bill speaks to this issue and the CFPB regulations and Dodd/Frank will probably be controlling.