Date of Hearing: April 13, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 1466 (McCarty) – As Amended April 5, 2021

SUBJECT: REAL PROPERTY: DISCRIMINATORY RESTRICTIONS

KEY ISSUES:

1) SHOULD TITLE COMPANIES, FOR REAL PROPERTY SALES TRANSACTIONS, BE REQUIRED TO IDENTIFY DISCRIMINATORY RESTRICTIVE COVENANTS AND, IF SUCH COVENANTS ARE FOUND, TO FILE A RESTRICTIVE COVENANT MODIFICATION FORM WITH THE COUNTY RECORDER?

2) SHOULD THE EXISTING PROCESS FOR FILING A RESTRICTIVE COVENANT MODIFICATION FORM BE MODIFIED IN ORDER TO MAKE THE PROCESS EASIER AND ELIMINATE RECORDING FEES AND NOTARIZATION REQUIREMENTS?

SYNOPSIS

This bill addresses one of the many ugly legacies of our nation's long history of racism. Until at least the late 1940s, racially exclusionary covenants attached to real property were used to keep persons of color out of certain neighborhoods. Not only did such devices perpetuate segregation, they denied persons of color the benefits of home ownership, not the least of which is the ability to accumulate wealth and pass it along to their children. In the 1940s the United States Supreme Court made such covenants unenforceable. Subsequent state legislation prohibited such covenants altogether, and later extended the prohibition to include other forms of discrimination. Yet some of these restrictive covenants still exist in deeds or in covenants, conditions, and restrictions (CC&Rs) attached to the property. Recent news reports describe unsuspecting buyers encountering offensive language in various documents at some point in the escrow process. For buyers of color, this language is a particularly offensive and painful reminder of a history of racial hostility and exclusion. Past legislation attempted to address this issue by, among other things, requiring any person or entity that transfers deeds or covenants to buyers to include a cover sheet declaring that such covenants are void and unenforceable, and informing the buyer of how they might go about removing the offensive and invalid language by recording a "restrictive covenant modification" (RCM) form with the county recorder. While recording an RCM may prevent future buyers from seeing the language, it does not prevent the present buyer from seeing it. This process also unfairly burdens the understandably offended buyer with the task of correcting the problem.

This bill would require a title insurance company that transfers any deeds or other documents to a buyer to identify any unlawful discriminatory covenants and record an RCM with the county recorder, prior to the transfer of any documents to the buyer. The bill is similar to AB 985 of 2009, which was vetoed by then-Governor Arnold Schwarzenegger. Prior legislation has also attempted to give the responsibility for recording RCM's to county recorders, but such legislation has failed in appropriations committees due to cost concerns. This bill is supported by consumer and civil rights groups. It is opposed by associations representing land title and escrow companies, who contend that the bill illogically imposes a duty on title insurers which will unreasonably delay an already lengthy escrow process. For similar reasons, the California

Association of Realtors supports the bill "in concept," but only if the requirement placed on title insurers is removed. Less controversially, the bill also makes changes that are designed to improve the existing RCM filing process by, among other things, eliminating filing fees and notarization requirements, and allowing any person (not just an owner) who suspects the existence of a restrictive covenant to file an RCM form with the county recorder.

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. Specifically, **this bill**:

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.

EXISTING LAW:

1) Generally prohibits discrimination in housing accommodations, as specified, and declares as void and unenforceable any provision in any deed or other written document relating to title to property that purports to condition the right to sell, lease, rent, use, or occupy the property

to any person based upon that person possessing some specified characteristic, including race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, source of income, or sexual orientation. (Government Code Sections 12955 through 12956.1; *Shelley v Kramer* (1948) 334 U.S. 1; *Hurd v Hodge* (1948) 334 U.S. 24.)

2) Provides that a person or entity, as specified, that transfers a deed or other written documents relating to title to property to include a cover sheet providing notice to the buyer that certain prohibited covenants, conditions, or restrictions are void and unenforceable. Provides further that the person or entity transferring the deed or documents must notify the recipient how they may go about removing the void and unenforceable covenant, condition, or restriction. (Government Code Section 12956.1.)

3) Permits a person with an ownership interest in a property to file a "Restrictive Covenant Modification" (RCM) form in order to remove any void or unenforceable covenant, condition, or restriction, as specified, and permits, but does not require, the County Recorder to waive any fees for filing the RCM. (Government Code Section 12956.2.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: 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.

Brief History of 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. In the first two decades of the 20th century, local governments enacted zoning ordinances that restricted the sale of homes in certain neighborhoods to members of particular races. When the U.S. Supreme Court struck down racial zoning ordinances in *Buchanan v. Warley* (1917) 245 U.S. 60, champions of segregation turned to private agreements in order to achieve the same end, such that "racially restrictive covenants" came increasingly into use in the 1920s. During the Great Depression and New Deal, two government entities –the Home Owners' Loan Corporation (HOLC) and the Federal Housing Administration (FHA) – promoted more widespread homeownership (for whites at least) by guaranteeing loans and mortgages. An FHA underwriting manual explicitly stated that mortgage loans in predominantly Black and mixed-neighbors constituted a higher risk, warning lenders that the federal government would not back loans unless they reinforced segregation. In his bestselling and award-winning book, *The Color of Law: A Forgotten History of How Our Government Segregated America*, Richard Rothstein challenged what he called the "myth" of de facto segregation – or the idea that racial segregation outside of the South was the product of private agreements between private persons and private entities. To the contrary, Rothstein demonstrates, the so-called "de facto" segregation in the North and West was in fact "de jure" segregation, a deliberate and conscious product of government policy and law.

After World War II exposed the cognitive dissonance of fighting a racist regime abroad while tolerating Jim Crow and disenfranchisement at home, both the courts and the federal government began to take modest steps toward dismantling segregation, as was evidenced in the U.S. Supreme Court invalidating the "all white primary" and President Harry Truman integrating the U.S. Armed Forces by Executive Order. 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.*)

Belated Responses to Racially Restrictive Covenants. 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. The bill now before the Committee is not the first to address this issue. For example, SB 1148 (Chap. 589, Stats. 1999) allowed a homeowner to submit a suspect provision to the Fair Employment and Housing Commission 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 (Chap. 297, Stats. 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. (This was seen as less cumbersome than the FEHC process.) The RCM created by AB 394 effectively "records over" the existing covenant, so as not to remove all traces of this practice from the historical record. Thus, the offensive language would be removed from any subsequent documents generated for transfer to future buyers, but it would not remove important historical evidence showing precisely when, where, and how often this practice occurred. The goal of the previous legislation, like this bill, is not to remove all traces of the covenants from the historical record and pretend that this practice never occurred; rather, the purpose of prior legislation was to empower persons to take affirmative steps to remove the unlawful and offensive language from the deed or any associated CC&Rs.

Shortcomings of Existing Law and Past Legislative Failures. 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 by this Committee in 2008 and 2009. AB 2204 (De La Torre), as heard by this 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) 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. A dozen years later, the Committee finds itself once again considering the same issue. 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. Indeed, apparently no one disagrees about the *need* of removing the offensive language from the documents that a buyer receives. The disagreement involves the *process* for how this can best be done and the *responsibility* for doing it.

Who is best situated to identify discriminatory covenants and record an RCM? Under this bill, primary responsibility for removing the discriminatory and restrictive language before documents are transferred to a buyer, and recording an RCM form that will prevent the language from resurfacing in future documents, would fall to title companies. Title companies generally obtain electronic records from the county recorder and, on the basis of those documents, prepare a "preliminary title report" prior to issuing title insurance. The title insurance policy covers any damages a buyer might suffer if a defect is later discovered in the chain of title for the property. Although many people mistakenly believe that title companies perform a title and document "search" service for the buyer, in fact, they merely provide insurance in the event that harm results from a defect in the title. Clearly, given that a title company is insuring against defects of title, it has some self-interest in searching the chain of title to forestall future claims. However, while the title company often provides a buyer and realtor with access to CC&Rs in the county recorder's office – in modern times via an embedded link in the preliminary title report – the company does not insure against invalid or unenforceable CC&Rs, and therefore has no reason to search for them.

As the California Land Title Association (CLTA) points out in its letter of opposition, this bill would require title companies to do something that they presently do not do, and which they apparently have no ready or reasonable means of doing. The CLTA correctly notes that this bill would require them to identify any unlawful restrictive covenants attached to the subject property, which in turn would require them to search for any and all CC&Rs that may have been recorded against the property. Moreover, they would need to perform this search for every property transaction given that they cannot know in advance which properties have unlawful restrictions. It is not entirely clear how this search would be conducted, as the electronic documents obtained from the county recorder do not constitute a single database, but rather consist of individual photographed or PDF documents, some of which may be images of hand-written records. Because records are not in a single searchable database, CLTA has informed the Committee that there is no existing software that would allow them to search through all of the documents at one time.

Will this bill lengthen the already long escrow and home-buying process? In addition to CLTA, the California Escrow Association and the California Association of Realtors report that they support efforts to remove unlawful restrictive covenants by recording an RCM that would effectively "record over" the objectionable document. All three organizations claim, however, that "the point of sale," transaction-by-transaction method proposed by this bill will only add to the cost and time of the escrow process, which many buyers already believe takes too long. The title company will need to conduct a search for every transaction, even though the vast majority of searches will not produce any unlawful covenants. Furthermore, when a restrictive covenant is found, the title company could not simply remove the offensive language; rather, the title company would need to file an RCM form, along with the suspect language, with the county recorder. When an RCM form is filed with the county recorder, the county recorder would then submit the request to the county counsel. Under this bill, the county counsel would then have 30 days to review the request and notify the county recorder that the covenant is indeed unlawful and that the recorder may proceed with the modification.

One would hope, especially when it comes to racially restrictive covenants, that the county counsel review would be fairly simple. Nonetheless, it is unclear how much this process will delay the close of escrow. The escrow process starts when there is a fully executed purchase agreement (buyer and seller have both signed) and ends when the property is recorded with the county in the new owner's name. Adding new responsibilities for the title company would presumably add more time to the title company's role in the escrow process.

Are there alternative means of identifying unlawful restrictions and recording modifications? The author's office, various stakeholders, and the Committee staff have spent considerable time considering other options than the one provided in this bill. Some have suggested that responsibility for identifying restrictive covenants and recording RCMs should lie with the seller. The seller, after all, as owner, has the authority to record an RCM and could ensure that the property is not subject to any unlawful covenant before offering the property for sale, or at least before any documents are transferred to the buyer. However, imposing this duty on the seller creates all of the same problems as imposing the duty upon the title company, insofar as it would be a "point-of-sale," transaction-by-transaction process that would add time and expense. More problematic, most sellers will not be skilled at searching records in the county recorder's office or identifying unlawful covenants. As a practical matter, then, the seller would most likely rely on the title company or the realtor to advise them of this duty and, most likely, the seller would arrange to pay the title company to conduct the search on the seller's behalf. In theory, realtors

could also perform this service for the seller, but, like the title company, would have little reason to search through CC&Rs – unless the property is in a homeowner's association – and would not necessarily have legal training that would be necessary to determine if covenants were unlawful. Moreover, if the seller identified an unlawful covenant and filed an RCM, the RCM and the suspect language would still need to be reviewed by county counsel before it could be recorded and clean documents could be transferred to the buyer.

Should the bill pursue a more global, rather than point-of-sale, approach? Another option discussed by the author's office, committee staff, and stakeholders would create a more global approach, one that would most likely require the county recorder, possibly in conjunction with other private and public groups, to develop a systematic redaction program. Such a program would locate and record over unlawful restrictions. A global approach would eliminate the costs and delays associated with any point of sale method, whether responsibility lay with the seller, title insurer, escrow officer, or county recorder. However, a systematic redaction approach would cost money and take time to launch and implement. As mentioned, one problem – which affects not only the recorders, but also the title companies – has to do with the form of the electronic records maintained by county recorders. Most if not all county recorders scan recorded documents to create an electronic record, and it is this electronic record that is available to the title company or anyone else wishing to research the records. However, because these documents are all separate and not integrated into a single electronic database, there is no available software to conduct a search of the records in their entirety. In order to search for restrictive covenants, county recorders would presumably need to compile all records into a single database and develop software that could search that database, looking for keywords associated with the typical language of restrictive covenants. The County Recorders Association has informed the Committee that while a redaction program could be developed, it would take considerable time and expense to develop programs in all 58 county recorder offices.

Could the legislature create a funded working group to identify and record over restrictive covenants in bulk? One creative approach suggested by the CLTA would be to impose a mandatory $2 fee on each property transaction and use the funds to create a restrictive covenant redaction fund, to be administered by the Department of Housing and Community Development. The department would work with a task force, consisting of representatives from the title industry, real estate professional associations, county recorders, public interest lawyers, law schools, nonprofit organizations, and activist groups with expertise in identifying unlawful, restrictive language. The working group would be charged with developing techniques for more rapid identification and redaction of restrictive language in the records of county recorders' offices. This could allow a neighborhood association, for example, to record over all covenants affecting an entire development. Many of these covenants applied to all properties within a single development, and if the working group could identify such developments, the covenants could be removed in bulk. While this approach would eliminate the delays associated with any point-of-sale approach, it would also take time to implement and some may object to imposing an additional fee on all property transactions. On the other hand, the $2 fee would provide funding for the program and it would sensibly spread the costs of redaction to all property transactions, which may be reasonable given the collective nature of past discriminatory practices and the need to remediate the damage they continue to cause.

Should government bear the expense for a problem it helped to create? Both in the discussions on this bill, as well as those surrounding the 2008 and 2009 bills, one suggested alternative, is to assign responsibility for identifying unlawful covenants and recording to the county recorders

through a systematic redaction program. As noted above, the last time a bill was amended to give responsibility to the county recorders it died in the Senate Appropriations Committee. Alternatively, as suggested by CLTA, the state could fund a program, whether by a fee or appropriation, that would charge the Department of Housing and Community Development with assembling a task force to develop ways to remove the language of restrictive covenants in bulk, so that multiple restrictions could be removed at once without adding additional costs and delays for sellers and buyers at the point of sale. Such a global and systematic approach would come at an expense, but if the Legislature were serious about resolving this problem, then perhaps the Legislature should be willing to expend government funds to address it. After all, this is a problem that the legislative and administrative branches of government helped to create, and which the judicial branch enforced and legitimated. As astutely noted by All Home, in its letter of support for this bill, removing this language will not address the much deeper, long-term, and generational effects of racial segregation, but words do matter. The Legislature may wish to heed this point and not shy away from the expense of removing offensive language from property records in a more comprehensive and effective manner.

If this bill moves forward, the author may wish to consider some of the above questions and options. Based upon Committee staff's discussions with the author's office and the stakeholders, it is apparent that there is a broad consensus that it is unacceptable to keep the offensive language of unlawful restrictive covenants in property records and that buyers should not have to encounter such language, whether during the escrow process or in final documents that end up in the buyer's possession. Recent news reports make it clear that such language is offensive and demoralizing, especially to buyers of color. Leaving the responsibility for correcting this problem with the offended buyer seems patently unfair.

The bill in print places responsibility for addressing this problem with the title companies. However, it is not entirely clear that the title companies should be responsible or that they are currently able to carry out this duty. Shifting responsibility to sellers, realtors, or escrow officers, to be carried out on a transaction-by-transaction basis, does not appear to provide a better solution. Shifting the responsibility to county recorders, or implementing a systematic redaction program avoids the transaction-by-transaction problems, but would require time and money to complete. None of the options may be perfect, but the author and the stakeholders may wish to consider these options, or some combination thereof. It should be stressed that, in addition to the requirement it imposes upon title insurers, this bill also includes many other reforms that will improve the existing RCM process: allowing anyone, not just an owner, who suspects an unlawful restriction exists to request a modification; removing fee and notarization requirements; and requiring that all buyers be provided with an RCM form, rather than just notifying them of their right to obtain and file such the form.

ARGUMENTS IN SUPPORT: Initiate Justice (IJ) writes that "racially restrictive covenants -- private agreements barring non-whites from occupying or owning property -- were a key element of the segregationist policies in the early twentieth-century United States. Homeowners and builders as early the 1890s in California created segregated neighborhoods by including language both in individual home deeds and impact's that prohibited future resales to different communities of color." IJ believes that "AB 1466 will take proactive steps in removing egregious language from housing documents once and for all. Eliminating these racist covenants is a moral right and an important step in bringing racial justice to Californians."

The Consumer Attorneys of California (CAOC) support the bill for the reasons stated by IJ. CAOC adds that, "this bill 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:

> [R]acist 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 concludes that we "must act legislatively and in the courts to remove such racist language in all housing documents."

All Home, an organization that combats racial disparities on a variety of fronts, supports this bill for many of the reasons articulated above. All Home concludes as follows:

> AB 1466 would create a clear process to redact this racist language from housing documents when property changes hands. The removal of racist language from covenants is not the silver bullet to eradicating racism within our communities, and removing this language does not take away the compounding and multi-generational effects of segregation. However, words matter in life and by making it clear that in California we will not abide racist language in housing documents, we can take an important step to acknowledge and address the impacts of systemic racism and outright prejudice that still affect communities of color today.

ARGUMENT IN SUPPORT IN CONCEPT IF AMENDED: The California Association Realtors (CAR), supports the concept of this bill, but has serious reservation about the bill's current method of assigning responsibility to land titles companies. CAR fears that the bill in print "will put too much of a cost burden on consumers." The title companies will need to review documents, which they do not do now, and "those additional costs will be passed onto buyers." Furthermore, CAR has "serious concerns about a review process being able to be completed in a timely manner to ensure that individual transactions are not disrupted. Transactional delay can significantly impact the cost of home ownership."

ARGUMENTS IN OPPOSITION UNLESS AMENDED: 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.

CLTA would support this bill if it were amended to strengthen the existing RCM process, for example by making the filing process easier, eliminating any fees associated with filing an RCM, and authorizing any person who believes there are restrictive covenants to file an RCM with the county recorder. The CLTA proposal also includes imposing to $2 fee on every property recording to establish an "Unlawfully Restrictive Covenant Redaction Fund" to fund a more systematic method of recording RCMs. The CLTA proposal would also authorize the Department of Housing and Community Development to establish a "working group consisting of representatives from the title industry, real estate professional associations, county recorders, public interest lawyers, law schools, nonprofit organizations, and activist groups with expertise in identifying unlawful, restrictive language in order to develop techniques for more rapid identification and redaction of this restrictive language in the records of the county recorders' offices."

The California Escrow Association (CEA) agrees that the language of restrictive covenants remains a problem, and agrees that past efforts to address the problem have not succeeded. But CEA also believes that "the present version of AB 1466 is not the solution." In particular, CEA opposes this bill unless it is amended to remove the requirement imposed upon the title companies. CEA explains:

> Our concern about AB 1466 relates to amendments proposed in Government Code Section 12956.2, appearing in the April 5, 2021 version of the bill on page 5, lines 25-40. These amendments require title insurers to identify whether any title documents contain unlawfully restrictive covenants. We are not speaking hyperbolically to note that this would literally require an examination of all title documents to property dating back to the earliest days of California, to ensure that no unlawful covenants or deed restrictions remain in the chain of title. Further, such an obligation requires a legal assessment of restrictions, which is not the province of title companies, as not all restrictions are clearly unlawful.
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> The requirement proposed on title insurers would likely greatly delay real estate transactions in order to perform searches for unlawful covenants. Modern real estate transactions have moved away from the standard 90-day escrow of past decades.

Purchasers expect to close transactions quickly, and mostly electronically, and this will simply not be possible if AB 1466 is enacted in its present form.

REGISTERED SUPPORT / OPPOSITION:

Support

All Home
Consumer Attorneys of California
Initiate Justice

Support in Concept If Amended

California Association of Realtors

Opposition Unless Amended

California Escrow Association
California Land Title Association

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