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Discriminatory Restrictive Covenants

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PROPERTY RECORDS INDUSTRY ASSOCIATION

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For

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Executive Summary

Restrictive covenants are commonly used in land records documents. From homeowner associations to individual conveyance documents, covenants, conditions, and restrictions (CC&Rs) contractually regulate activities on properties. In the past few years, attention has been given to historically discriminatory restrictive covenants, which today are illegal and unenforceable. These discriminatory covenants restricted who could own property based on factors such as race, religion, and national origin.

Discriminatory restrictive covenants are contrary to law and are a stain on our national history. Today, land records custodians, real estate stakeholders, and lawmakers are working to provide education about the history of discriminatory restrictive covenants and empower property owners to take action regarding this language in public land records related to their property.

Addressing the existence of these discriminatory covenants can take different forms which will be discussed in this paper. Also, factors including the various forms in which land records have been archived can present significant obstacles to removing illegal, discriminatory language from recorded, historical documents.

PRIA and other trade associations, such as the American Land Title Association (ALTA), have been tracking the various proposals that have been either introduced or adopted by state legislatures, and exploring solutions to mitigate these disquieting reminders of past discriminatory behaviors without causing unintended consequences.

History of Discriminatory Restrictive Covenants

The use of discriminatory covenants in America can be traced to the post-Civil War period. In fact, the Federal Housing Administration (FHA) recommended inclusion of discriminatory covenants on properties it insured from 1934 to 1948.

The landmark Supreme Court decision in [Shelley v. Kraemer](#) in 1948 ruled that discriminatory covenants based on race or religion contradict the 14th Amendment's Equal Protection Clause and are therefore unenforceable. This legal precedent was codified in statute 20 years later by the provisions of the [1968 Fair Housing Act](#).

Despite current laws and federal statutes rendering these discriminatory covenants unenforceable, the offending language can be found in countless historical documents in the public land records.

Land Records Primer

The role of the recorder is to create a permanent, unaltered record of land transactions that is maintained in-perpetuity. Each of the records included in the recorder's office represents a claim to an interest in a parcel of land. The recorder is not charged with determining the validity or enforceability of any of these claims. Rather, the public record provides notice that someone is asserting a claim. The recording act itself does not effectuate or validate a property claim or any associated action such as a covenant. The efficacy of any specific claim is determined by the courts.

It is a fundamental principle of the public land records that the recorder maintains the records without alteration. Even if a claim asserted in a specific document is found to be invalid, the document itself is never removed from the record. Instead, a new document clarifying the status of the claim is entered into the public record to provide notice that the claim is not valid.

The accumulation of these documents creates a chain of title that provides the foundation of real property rights in the United States. Without an unalterable chain of title, buying, selling, and collateralizing real property becomes much more difficult and expensive.

Removing the discriminatory language from existing documents may appear to be a solution, but contradicts the public land records function, and may also cause unintended consequences.

Approaches To Removing Discriminatory Covenants

Notification posted by county offices on websites and at record access points indicating the public land records may contain objectionable content in the form of illegal and unenforceable discriminatory covenants. These notices are general and do not specifically identify discriminatory language within recorded instruments.

Repudiation of identified discriminatory language through the recording of a declaration in the land records of the illegal and unenforceable nature of a discriminatory covenant(s) associated with a particular property.

Modification through judicial or public official action of the land record(s) containing the identified discriminatory covenant resulting in creation of a superseding recorded instrument which amends and restates the legally enforceable covenants but omits the discriminatory language.

Redaction through judicial or public official action of discriminatory covenants in identified documents within the land records resulting in removal of discriminatory language contained within existing land records.

Some proposals have called for the complete expungement of records containing discriminatory covenants. Expungement creates breaks in the chain of title that could significantly increase the cost of purchasing and conveying real estate and may result in a parcel of land with unmarketable title. It is PRIA's position that expungement will do irreparable damage to the official public land records and erode confidence in the United States real estate system and should not be considered a viable alternative.

Advice for Policymakers

When considering the best approach for dealing with discriminatory language in land records, policymakers should consider several factors.

Legal Factors

- In every state there are laws governing the maintenance of the land records. Given that, altering permanent land records should be a formal judicial process rather than allowing an administrative procedure that is overseen by the recording office. The altering of permanent land records creates complex legal issues. Many recorders do not have the necessary background to determine whether specific language qualifies to be removed or redacted. These determinations should be managed by a judicial process.
- Public land records preserve important historical and financial references beyond the transactions they represent. The use of discriminatory restrictive covenants is contrary to the Constitution and is a regrettable period of American history. The documentation and study of these covenants tells a powerful story of the harm they caused and provides important context for the socio-economic inequities in property ownership and the generational wealth gap that persist today.
- The impact of altering language other than illegal discriminatory covenants contained within land records has implications for chain of title, which tracks interests in the property, as well as the marketability of a parcel of land.
- There may be other unintended consequences, such as the possibility of reinstating otherwise lapsed covenants included in the same document which could have previously been eliminated under a state's marketable title act. These are nuances that can negatively impact the value of real property.

Implementation Factors

- The various methods used historically for archiving land records present obstacles for easily removing discriminatory covenants from a recorded document. For example, how do you redact a few words or sentences from a microfilm image? Additionally, documents may have been duplicated and maintained in multiple systems (e.g., private and commercial document repositories, title plants, and tax assessment records). Recorders have substantial experience with efforts to redact personally identifiable information from public records, and yet there are other sources where this information can be found. The same would be true regarding historical, and now illegal, discriminatory restrictive covenants.
- Additional factors to consider include employee resources and costs associated with the approach being recommended. Staff time will be required to locate the record and find and redact the discriminatory language. There will be costs associated with creating the new archive record. While these may seem small for each specific instance, when aggregated over a large record set, they can become a burden when resources are limited. The costs would be significant.

- Discriminatory covenants law is evolving as cases are litigated in the judicial system. This makes any proposed legislation open to challenges. At the time of this paper's publication, one state's highest court has ruled against expunging discriminatory restrictive covenant language from a previously recorded document.

PRIA's Recommendation

No single approach is the answer for every jurisdiction. Options will vary based on state law and local jurisdiction workflows. As stated previously, the possibility for unintended consequences in this process is strong. The nuances of how records are created and maintained vary by state and by recording jurisdiction and will impact implementation. Thoughtful consideration must be given to avoid creating new problems that may detrimentally impact the intended benefits. The ability to look back on our history is vitally important, but so too is acknowledging and confronting our discriminatory past.

Determining the enforceability of any recorded document and deciding whether specific language violates legal precedent or statutory provisions is beyond the mandate of the recorder's office. Such determinations are best made through the judicial processes, with clear direction provided to the recorder.

If the recorder has responsibility for searching or redacting records, this will have financial and staffing impact to the operations of the office and taxpayers. Any mandates regarding the process should be fully funded.

Recorders and other stakeholders in the real estate industry should engage with their state associations and lobbyists to determine the best approach to addressing discriminatory covenants. Recorders and other stakeholders in the real estate industry should serve as subject matter experts (SMEs) as lawmakers look to find ways to address the existence of discriminatory restrictive covenants in land records and highlight the harm they have caused. As SMEs, recorders and stakeholders are best positioned to caution policymakers about the potential harmful effects of altering the public record.

The Uniform Law Commission (ULC) is drafting an [act](#) addressing discriminatory restrictive covenants. PRIA encourages its members and other stakeholders in the real estate industry to consider the expected ULC act as a means to address the issue of discriminatory restrictive covenants in the public land records.