



# California Swings for the Fences to Strike Racially Restrictive Covenants from the Public Record

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Those programs made and underwrote loans primarily in neighborhoods that were predominantly White or that otherwise intentionally excluded African Americans, limiting not only their housing opportunities but also their future economic success.<sup>6</sup>

Even after other federal and state legislative and judicial decisions held RRCs to be unconstitutional and unenforceable, RRCs continued their drumbeat of exclusion, sending messages to non-White,<sup>7</sup> prospective homeowners that they were not welcome in predominantly White neighborhoods. Even today, homebuyers, often while purchasing a home and sometimes long after their purchase, discover that RRCs were recorded in the chain of title of the documents for their home. RRCs can be a continuing and often painful reminder of past racial exclusion, violence, injury, and injustice.

## I. INTRODUCTION

When Nathaniel Colley and Jerlean Colley tried to purchase their first home in Sacramento in 1955, they were unable to find a real estate agent to assist them with their purchase and were unable to themselves purchase the property they chose. The Colleys were African American.<sup>1</sup> Though racially restrictive covenants (“RRCs”) were already unconstitutional and unenforceable, the effects of segregation and discrimination continued to make impossible, or nearly so, the purchase of homes by African Americans and other non-Whites. White friends of the Colleys, Leland Anderson and Virginia Anderson, purchased an undeveloped lot for them in the South Land Park Terrace neighborhood of Sacramento<sup>2</sup> and transferred the property to the Colleys,<sup>3</sup> who then built the home where they would live for four decades.<sup>4</sup>

The experience of the Colleys was not unique. Many African Americans throughout California and the United States had long been prohibited from buying a home, by circumstances both *de jure* and *de facto*.<sup>5</sup> This was a direct result not only of recorded RRCs, but also other factors, such as private agreements and government programs, including federally funded home financing programs.

Several states, including California, have tried over the years to identify and enact solutions for the redaction and removal of RRCs from the public record. Many RRCs are embedded in documents that include other covenants, conditions, and restrictions (“CC&Rs”). Redacting or removing RRCs requires methods to identify and extract the RRCs with surgical precision from CC&Rs that may otherwise lawfully proscribe other property uses, such as historical prohibitions on the use of the residence as a laundry, a boardinghouse, or a distillery. More modern covenants or prohibitions include parking restrictions, exterior home colors, landscaping requirements, and setbacks. Typically, CC&Rs were intended, among other purposes, to maintain consistency and uniformity for the purpose of increasing the desirability, marketability, and value of the affected property.

While scholars may debate the practical enforceability challenges of provisions in CC&Rs (not including RRCs), restrictions that do not contain racial prohibitions have

generally been found to be enforceable. The challenge in removing RRCs from the public record is complex; while removing RRCs may be a remedy, remaining CC&Rs should be retained. Removing RRCs from the public record also requires balancing practical considerations of workload and costs with public policy questions of who should be responsible for identifying RRCs, and how to effectively accomplish the contemplated RRC removal.

Responsible policymaking requires both public policy decisions and private efforts that are sustainable, equitable, and efficient, and that recognize the harms of exclusionary RRCs, programs, and practices. Over the years, the California Legislature has enacted and modified statutory structures in attempts to modify or eliminate RRCs, with limited effects. In 2021, partly as a result of increased individual and institutional introspection and discussions about race across our country and our state, the California Legislature again took up the task of eliminating RRCs from the public record, attempting to finally answer the questions of whether RRCs can and should be entirely removed from the public record, whether RRCs should remain as a historic reminder, and if efforts to eliminate RRCs can be accomplished in ways that are effective and efficient and will serve to advance equitable solutions for California. This article will discuss California's history of RRCs, its past legislative efforts to remove RRCs from the public record, and the recently enacted process for doing so.

## II. RACIALLY RESTRICTIVE COVENANTS—AN AMERICAN TRADITION

*“The past is a foreign country: they do things differently there.”*<sup>8</sup>

### A. Racially Restrictive Covenants Defined

RRCs are recorded documents or private agreements that “have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property.”<sup>9</sup> A typical RRC states the exclusion explicitly, though some allow an exception for servants and employees of a White owner. The goal of RRCs was to prohibit occupancy and ownership by non-Whites, either by creating enforceable covenants that ran with the land that, if violated, could result in reversionary rights and evictions, or alternatively, by creating contractual rights that, if violated, could result in injunctions and awards of money damages.

### B. Examples of Racially Restrictive Covenants

The first reported RRC is thought to have been in Brookline, Massachusetts in 1843, where subdivision deeds included provisions prohibiting the sale of homes to “any Negro or native of Ireland.”<sup>10</sup> RRCs were often included in purchase and sale contracts and were recorded in the public records, most often by way of deed restrictions in individual grant deeds or by the recording of blanket CC&Rs by a housing developer, affecting entire neighborhoods.

*In Sacramento County*, the restriction for the Colleys’ home and neighborhood provided:

No persons of any race other than the White or Caucasian race shall use or occupy any structure or any lot except that this provision shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant.<sup>11</sup>

Advertisements for developments referred to homes and neighborhoods as “restricted,” “highly restricted,” and as “secure investments,”<sup>12</sup> all of which signaled to potential buyers, real estate salespersons, and lenders that exclusionary RRCs were in place.

*In Fresno*, a RRC recorded in November 1947 provided:

No part of said subdivision, nor any building thereon, shall be sold, conveyed or leased by Deed or otherwise, to any Negro, Chinese, Japanese, Hindu, Armenian, Malayan, Asiatic, or Native of the Turkish Empire, or any person not of the Caucasian race, or any descendent of any one or more of said persons ... provided, however, that such person may be employed as a servant by a resident upon such property.<sup>13</sup>

*In Los Angeles*, a RRC recorded in 1944 stated that:

No part of this said real property, described therein, should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race, and also ... that this restriction should be incorporated in all papers and transfers of lots or parcels of land hereinabove referred to; provided, however, that said restrictions should not prevent the employment by the owners or tenants of said real property of domestic servants or other employees who are not wholly of the white or Caucasian race; provided, further, however, that such employees shall be permitted to occupy said real property only when actively engaged in such

employment. That said Agreement was agreed to be a covenant running with the land. That each provision in said Agreement was for the benefit for all the lots therein described.<sup>14</sup>

These RRCs are illustrative of the numerous RRCs that are prevalent in cities across the country. A 2019 study of deeds in the City of Philadelphia revealed nearly 4,000 RRCs in deeds from 1920 to 1932 alone.<sup>15</sup>

It is important to note that despite the pervasiveness of RRCs in the public record, not all developers and property owners used or relied upon RRCs. Joseph Eichler and Ned Eichler were father and son developers of approximately 11,000 homes in Northern and Southern California and deliberately did not use RRCs in their developments. In 1958, Joseph Eichler resigned from the National Association of Home Builders when the association refused to support a nondiscrimination policy. He was said to have offered to buy back homes if anyone was unhappy with their neighbors, saying “[i]f, as you claim, this will destroy property values, I could lose millions.... You should be ashamed of yourselves for wasting your time and mine with such pettiness.”<sup>16</sup>

### C. Racially Restrictive Covenants in the Context of Other Exclusionary Policies

RRCs were not the only method used to systematically exclude non-Whites from purchasing and occupying residences. Other race-based practices functioned in similarly exclusionary ways. Racial zoning ordinances and financing programs funded, insured, or underwritten by the federal government are examples of such other race-based practices and are briefly discussed here for context. These exclusionary policies, and the processes created by them, were lawful at the time and were for years upheld by the courts.

In some older areas where African Americans might have been able to purchase a home that was not subject to RRCs, or in neighborhoods that were less desirable for Whites because of the age and condition of the homes, cities were more likely to try to acquire neighborhoods using eminent domain proceedings for freeways, shopping malls, and office buildings, in the name of “urban renewal.” Such forced relocation displaced African Americans and other non-Whites from the very neighborhoods that were often the only place they could live or purchase a home.<sup>17</sup> These practices were layered on top of unlawful, extra-judicial activities including harassment, threats, intimidation, and violence by Whites against non-Whites, particularly African

Americans. In California, homes were targets of vandalism, arson, and gunfire.<sup>18</sup>

#### 1. Racial Zoning Ordinances

RRCs were increasingly introduced into California real estate sales agreements and recorded documents in the early twentieth century after exclusionary zoning laws, prohibiting use and occupancy by non-Whites, were struck down in 1917 by the United States Supreme Court in *Buchanan v. Warley*.<sup>19</sup> This case involved a Louisville, Kentucky racial zoning ordinance, which the Court found unconstitutional as an unlawful interference with property rights by the state, in violation of the Fourteenth Amendment of the Constitution.<sup>20</sup> Refusing to recognize *Buchanan*, cities including Atlanta, Georgia; Richmond, Virginia; Birmingham, Alabama; West Palm Beach, Florida; and Austin, Texas continued to adopt and enforce racial zoning ordinances by claiming they involved different facts than those of *Buchanan*.<sup>21</sup>

In jurisdictions, including California, which followed *Buchanan*, RRCs became a way around that law and a method of denying access to homeownership by non-Whites. A 1926 United States Supreme Court decision, *Corrigan v. Buckley*,<sup>22</sup> may even have facilitated the use of RRCs. The Court in *Corrigan* held that the “prohibitions of the Fourteenth Amendment have reference to State action exclusively, and not to any action of private individuals,”<sup>23</sup> and thus that while states could not engage in race-based zoning, private individuals were not prohibited from entering into race-based agreements not to sell to others.<sup>24</sup>

#### 2. Federal Housing Finance Programs

To encourage homeownership, New Deal-era agencies were established to make or guarantee loans. The Home Owners Loan Corporation (“HOLC”) was established in 1933, and the Federal Housing Administration (“FHA”) was established in 1934. HOLC programs refinanced existing loans, and FHA programs insured lenders making new loans that were all for the first time fully amortized and required low down payments. The HOLC program systematically identified neighborhoods that were primarily White, resulting in color-coded maps that identified areas most and least favorable for the security of the loans. This process was known as redlining, in reference to the delineation in red ink of neighborhoods that were predominantly African American. HOLC maps were later used by FHA and G.I. Bill-related Veterans Administration (“VA”) loan programs, under the guise of protecting the public fisc by

decreasing the risk of insured loans and lending in only predominantly White and newer neighborhoods. FHA and VA loan programs required a review or appraisal to assess the risk of default. The appraisal was often done by local real estate salespersons and involved several factors, including the age and condition of the house, as well as the racial composition of the neighborhood.<sup>25</sup> Because loans in redlined neighborhoods were deemed to be at a significantly higher risk of nonpayment and loss to those agencies, these government programs often encouraged developers to use RRCs.<sup>26</sup> The FHA's *Underwriting Manual* even recommended the use of deed restrictions that included "prohibition of the occupancy of properties except by the race for which they are intended"<sup>27</sup> and gave favorable underwriting treatment to loans in developments that were subject to RRCs. These discriminatory practices facilitated a boom in homeownership by Whites, but resulted in very few favorable loans being made to African Americans, which led to the denial of homeownership to generations of non-Whites.

#### D. Court Decisions and Fair Housing Legislation

RRCs have been the subject of cases in the superior and appellate courts of California, other states, federal courts, and the United States Supreme Court, as well as the topic of federal and state legislation and regulations. RRCs have a complex and varied history of judicial, legislative, and regulatory actions. The following abridged version is intended as a partial, foundational primer for this article.

##### 1. *Title Guarantee & Trust Company v. Garrott*

As early as 1919, California courts considered the enforceability of RRCs. In *Garrott*,<sup>28</sup> the plaintiff was the former owner of 127 lots subject to a RRC which stated that a property owner shall not:

Lease or sell any portion of said premises to any person of African, Chinese, or Japanese descent, and that if at any time the said party of the second part, her heirs, assigns, or successors in interest, or those holding or claiming thereunder, shall violate any of the provisions herein named, whether directly or under some evasive guise, thereupon the title hereby granted shall revert to and be vested in the said party of the first part, its successors and assigns, and its successors and assigns shall be entitled to the immediate possession thereof, which covenants shall be construed to be covenants running with the land,

but shall cease and terminate, at option of the owner for the time being, after January 1, 1925.<sup>29</sup>

The purchaser of one of the lots subject to this restriction was African American, and the plaintiff sought judicial enforcement of its asserted right of reversion, to return the property to the plaintiff as the remedy for the RRC violation. In what appears to have been a case of first impression in California, the Court declined to follow two earlier cases from Louisiana and Missouri, both of which held "that a condition in a deed providing for forfeiture in case the premises should be sold or leased to a negro is not an unlawful restraint upon the power of alienation."<sup>30</sup> The Court considered the limited nature of the RRC affecting a particular class of persons and the temporal nature of the RRC with an expiration date. After a detailed discussion of common law principles of alienation and forfeiture, and considering the rule of perpetuities, the Court commented that the case law on such partial restraints on alienation was "in a state of conflict and hopeless confusion."<sup>31</sup> Ultimately, the Court held that the restriction was a "condition repugnant to the fee-simple estate created by the granting clause of the deed,"<sup>32</sup> and was void. Because the case addressed only ownership, the door remained open for RRCs to prohibit use or occupancy. Proponents of RRCs thereafter "fought harder to maintain the legal supports for segregated and privileged space, rewriting their racial restrictions to focus on occupancy rather than ownership."<sup>33</sup>

##### 2. *Janss Investment Co. v. Walden*

In 1925, the California Supreme Court upheld a RRC preventing use and occupancy by African Americans. In *Janss Investment Co. v. Walden*,<sup>34</sup> Walden, a white man, had purchased property in 1922 from the Janss Investment Company pursuant to a land installment contract, in a subdivision with a RRC providing that "no part of said real property shall ever be leased, rented, sold or conveyed to any person who is not of the white or Caucasian race, nor be used or occupied by any person who is not of the white or the Caucasian race whether grantee hereunder or any other person."<sup>35</sup> Walden then transferred the property to the Wallings, who were African American. The developer filed suit to enforce the RRC.

The Court upheld the RRC, referring to its 1919 determination in *Los Angeles Investment Co. v. Gary*<sup>36</sup> that "the condition against the occupation of the property by anyone not of the Caucasian race is valid."<sup>37</sup> The Court in *Janss* stated that it

feels itself bound by the ruling reached in that case. The date of the (*Gary*) decision was December 11, 1919, since which time it has been considered as settled law in this state and accordingly followed by subdividers of property and by purchasers of town lots and the owners of real property in general. It cannot now be disturbed.<sup>38</sup>

In that case, the sole issue before the Court was the sufficiency of the complaint for forfeiture by the developer as against a subsequent purchaser who was non-White. The Court found the complaint stated a cause of action and reversed the sustaining of a demurrer, stating “[o]ur conclusion is that the condition against the occupation of the property by anyone not of the Caucasian race is valid, and that since a breach of this condition is alleged, the complaint states a cause of action.”<sup>39</sup> It was apparently on this language that the *Janss* court relied.

RRCs were not limited to purchase and sale transactions and were increasingly used to exclude African Americans even from renting and leasing properties. The effect of this practice, combined with other exclusionary tools, was reported on extensively in Los Angeles by Charlotta Bass,<sup>40</sup> an African American newswoman, and in California and beyond by later scholars who have examined the racial wealth gap that has ensued as a result of those exclusionary practices.<sup>41</sup> The racial wealth gap suffered by African Americans, in the past and today, can be largely attributed to discriminatory housing practices, including RRCs that have historically excluded them, and other non-Whites, from homeownership. In the last few years, increasing scholarship has been devoted to the long-term effects of those discriminatory housing practices.<sup>42</sup>

### 3. *Shelley v. Kraemer*

When the Colleys went to purchase their home in California, the United States Supreme Court had already eliminated the judicial enforcement of RRCs. The opinion of the *Shelley* Court provided, in part, that:

In granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.... Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.<sup>43</sup>

Thereafter, though courts could no longer enforce reversions or order evictions of non-Whites who purchased or occupied a home in violation of RRCs, private parties could still use the courts to seek other remedies based in contract, such as injunctions and damages.

### 4. *Ming v. Horgan*

In 1958, Oliver Ming, an African American man who had been honorably discharged from the United States Army after his service in World War II, was unable to buy a home in North Highlands in Sacramento County.<sup>44</sup> Ming sued the developer, who had used federal housing funds to build the home, and the real estate brokers, for excluding him as a buyer because of his race. The trial court in *Ming v. Horgan* found that, as a result of FHA and VA loan underwriting guidelines, as well as the actions of the real estate developers and brokers, “Negroes have been and are turned away from original sales of most tract homes in the area despite an increase in the percentage of Negro population in the last few years and an increase in their rate of income as compared with members of the white race.”<sup>45</sup>

By this time, Nathaniel Colley was well known as Sacramento’s first African American attorney in private practice and had become a local, state, and national champion in high-profile cases for fair housing, school desegregation, and equal access to public accommodations on behalf of the National Association for the Advancement of Colored People.<sup>46</sup> As one of the attorneys who represented Ming during trial, in reference to the role of government lending programs in housing discrimination, Colley memorably asserted that “when one dips one’s hand into the Federal Treasury, a little democracy necessarily clings to whatever is withdrawn.”<sup>47</sup> The court agreed, awarding Ming nominal damages and ordering the defendants to end their discriminatory practices.<sup>48</sup>

### 5. *State and National Fair Housing Legislation*

In 1959, the California Legislature passed the Unruh Civil Rights Act,<sup>49</sup> which prohibits discrimination on grounds of “race, color, religion, ancestry, or national origin” by “all business establishments of every kind whatsoever.” In two cases in 1962, the California Supreme Court held that the Unruh Civil Rights Act was valid and applied to real estate transactions<sup>50</sup> and to real estate brokers, notwithstanding a request by an owner retaining a broker’s services for the broker to engage in discriminatory practices.<sup>51</sup> The California Legislature, in the same session, passed the Hawkins Act,<sup>52</sup> which prohibited racial discrimination in

publicly-assisted housing accommodations. In 1961, the California Legislature then enacted its initial prohibitions against discriminatory restrictive covenants affecting real property interests<sup>53</sup> and RRCs in real property deeds.<sup>54</sup>

The Hawkins Act was superseded by the passage in 1963 of the Rumford Fair Housing Act<sup>55</sup> (“Rumford Act”). The Rumford Act provided that “the practice of discrimination because of race, color, religion, natural origin, or ancestry . . . is declared to be against public policy” and prohibited discrimination in the sale or rental of any private dwelling containing more than four units. The State Fair Employment Practice Commission was empowered to prevent violations.<sup>56</sup>

In May 1963, just before the passage of the Rumford Act, the Mulkeys, an African American couple, were unable to rent an apartment in Santa Ana in Orange County, California. They asserted the landlord, Reitman, refused to rent to them because they were African American. The Mulkeys sued Reitman to challenge his refusal. During that time, the controversial initiative campaign of Proposition 14, which was overwhelmingly supported by developers, real estate trade associations, and others, was approved by California voters in 1964, repealing the Rumford Act and amending the California Constitution to provide that

neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.<sup>57</sup>

In 1966, more than 18 months after the passage of Proposition 14, the Mulkeys prevailed when the California Supreme Court held that Proposition 14 was a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. The court commented in its opinion that Proposition 14 was enacted “with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right.”<sup>58</sup> The United States Supreme Court affirmed in 1967.<sup>59</sup>

Even after these decisions, it was not until other states began to pass fair housing laws, and the passage two years later of the federal *Fair Housing Act of 1968*,<sup>60</sup> that RRCs and racially discriminatory practices in the sale, purchase, and financing of real estate were finally prohibited.<sup>61</sup>

## E. Ongoing Effects of Racially Restrictive Covenants

### 1. *Are Racially Restrictive Covenants Still Harmful?*

Since RRCs are no longer legally effective or enforceable, some may say that the resources to remove or redact RRCs from the public record could be better used to advance other goals, and not all agree that RRCs should be redacted and removed rather than preserved as a reminder of past discriminatory practices. Discussions about the regulation of the movement of people of color and racial territoriality<sup>62</sup> lead to discussions about the continuing impacts of past legal and social structures that perpetuate past systemic oppression.<sup>63</sup> Where some homebuyers have been shocked by the existence of RRCs and have immediately demanded redaction under current law,<sup>64</sup> other potential homebuyers have decided to purchase elsewhere. Other homeowners may learn much later, after their acquisition, that their property still has the recorded RRCs in the chain of title. Whether to take action to remove or redact RRCs from a home in California is currently a matter of personal preference and individual actions; one owner may choose to do so, and another owner in the same neighborhood and subject to the same RRCs may not.

### 2. *Marin County*

The County of Marin, California has recently taken steps to educate its residents, homeowners, and prospective homeowners about Marin County’s own legacy of RRCs. At the height of World War II shipbuilding in Marin City, and during a time when much of the San Francisco Bay Area was racially segregated,<sup>65</sup> the Marinship Corporation established a community that was racially integrated by virtue of the employment and housing of industrial workers who came from throughout the United States to meet the wartime labor shortage. However, the same racially exclusionary practices that caused neighborhoods to become segregated, including the use of RRCs, the effects of FHA and VA lending programs, the increase in exclusive homeowners associations, and other practices, resulted in the segregation of areas that had previously been integrated.<sup>66</sup>

In an effort to acknowledge past history and to connect the narratives of past segregation, Marin County has recently launched its Restrictive Covenant Project.<sup>67</sup> The program facilitates identification by homeowners of RRCs, submission of RRCs to its Community Development Agency for review, and recording of Restrictive Covenant Modifications (“RCMs”). Other components of the

program include mapping the locations of past RRCs as well as an online gallery for the display of shared stories, photos, and videos of the lived experiences of past and present residents, illustrating and discussing the impact of RRCs on their lives.<sup>68</sup>

### III. THE CALIFORNIA LEGISLATURE STEPS UP TO THE PLATE

Beginning in 1999, the California Legislature has attempted to enact solutions to amend CC&Rs to remove RRCs from the public record. Past proposals have considered and determined who should identify the existence of RRCs; methods to accomplish partial removal on a limited basis; who is responsible for specified disclosures and documents; and whether those processes are mandatory or permissive. Those measures have enabled homeowners to learn about the existence of RRCs in the CC&Rs or prior deeds to their homes and have helped them record the applicable documents evidencing their request for the identified RRCs to be removed from the public record. Recently enacted provisions build upon those past efforts and are intended to accelerate the removal of RRCs.

#### A. Early Innings Score Some Successes

##### 1. *A Good Beginning.*

When Senator John Burton introduced Senate Bill (SB) 1148<sup>69</sup> in 1999, he specified as the basis for the measure a homeowner who discovered a provision in their common interest development (“CID”) governing documents, which prohibited residency by anyone other than someone of the “White Caucasian Race” with the exception of servants. When requested by the homeowner to amend the document to remove the RRC, the homeowners association refused, and the homeowner filed a fair housing complaint with the U.S. Department of Housing and Urban Development (“HUD”). In response, the homeowners association eventually amended its declaration to remove the RRCs. Using this example, Senator Burton asserted that, “at a minimum, these discriminatory declarations have an adverse impact on minorities who wish to move into certain neighborhoods” and in some cases, were used for the purpose of explicit and purposeful discrimination. Senator Burton’s measure to require homeowners associations for CIDs to remove RRCs from their governing documents was initially heard in the Senate Judiciary Committee, chaired by a young Adam Schiff. SB 1148 rocketed through policy and fiscal committees, and to the Senate and Assembly Floors, without receiving any “no” votes.

With the passage of SB 1148, beginning in 2001, California prohibited RRCs in the governing documents of CIDs, including those that denied or restricted access to the development on the basis of sex, color, race, religion, ancestry, national origin, familial status, marital status, or disability. To accomplish the goals of the measure, CIDs were required to amend CC&Rs to eliminate the prohibited restrictions. The remedy of injunctive relief was included for enforcement, and the measure also required that when certain real estate professionals (including title insurance companies, real estate salespersons, and homeowners associations), provided copies of prior restrictions they must include a cover page or stamp containing a notice that, if the document contained an unlawful RRC, any such restriction violated state and federal fair housing laws and was void, and a record owner could request that the county recorder remove the restrictive covenant language pursuant to section 12956.1(c) of the Government Code.<sup>70</sup> The measure also made it a misdemeanor for a person, other than a county recorder, who is exempt given their ministerial role, to record a document for the express purposes of adding a RRC.

Pursuant to SB 1148, any owner of a property subject to RRCs could require the county recorder to remove a “blatant” RRC in a recorded document affecting that property. That raised concerns among county recorders because it required county recorders to first identify, and then alter, an already-recorded document. Attempting clarification to address the county recorders’ concerns, Senator Burton submitted a letter to the Secretary of the Senate at the time of the passage of SB 1148 stating that it was “not the Legislature’s intent that a county recorder be required to alter . . . any records on deposit in his or her office.”<sup>71</sup>

##### 2. *Resolving Unintended Consequences*

In the second year of the 1999-2000 legislative session, Assembly Bill (AB) 1493<sup>72</sup> was enacted to address Senator Burton’s concerns about the role of county recorders in modifying RRCs. This clean-up measure created a new procedure which tasked a record owner with applying in writing to the California Department of Fair Employment and Housing (“DFEH”) for a determination of whether a restrictive covenant was a RRC in violation of the fair housing laws and was therefore void. The measure required DFEH to make that determination within ninety days of the record owner’s application, and if determined to be void, the DFEH would authorize that record owner to

modify the existing RRC to strike out the void RRC and to record the modified document.

### 3. *Further Revisions*

In an effort to streamline the modification of RRCs, AB 1926<sup>73</sup> enacted a procedure by which a homeowner could identify and record a Racially or Otherwise Unlawfully Restrictive Covenant Modification (“RCM”) on a form provided by DFEH and permitted, but did not require, county recorders to record a RCM without a determination from DFEH.<sup>74</sup> This measure also modified the provisions required in the stamp or cover sheet when recorded covenants were given by specified providers.

Further revisions followed in 2005, when AB 394<sup>75</sup> permitted a record owner to record a RCM without having to file an application with DFEH and without having to pay any recording fees. AB 394 required county recorders to provide the form of RCM and to submit the RCM, after completion by the record owner, together with a copy of the original document containing the RRC, to county counsel for a determination of whether the subject document contained an unlawful restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry. County counsel was to then review and return the documents, with its determination, to the county recorder. The county recorder was then required to record the RCM, if the determination was that the document contained an unlawful covenant, or was prohibited from recording if it did not contain an unlawful covenant.

In a departure from prior measures, a provision was added that the RCM “shall be indexed in the same manner as the original document being modified. It shall contain a recording reference to the original document in the form of a book and page or instrument number, and date of the recording.”<sup>76</sup> Prior measures had required only a reference to the property address and description of the property of the person requesting the RCM, rather than all properties affected by the RRC that was blanket in nature. By including this provision, the RCM could have the effect of being indexed for all properties affected by the RRC, in the case of blanket subdivision restrictions, rather than just the property of the record owner recording the RCM.<sup>77</sup>

## B. **Striking Out Twice**

### 1. *2008: AB 2204 (De La Torre)*

In 2008, Assembly Member Hector De La Torre (D–Los Angeles) introduced AB 2204, stating “the present system is underutilized and public awareness on the issue is low. The passiveness of current law allows restrictive covenants to remain in the title documents. Ignoring the problem does not mean that the problem does not exist. Therefore, this legislation will take a major step toward resolving the issue.”<sup>78</sup> As introduced, AB 2204 would have required title insurance companies to strike any unlawful restriction from a deed or document before the property was transferred. The proposal was strongly opposed by trade associations representing title insurers and escrow officers employed by title insurers, who wrote and testified that the measure would harm consumers by causing transaction closing delays, and that title insurers and escrow officers were not lawyers who could reasonably be tasked with reading and interpreting CC&Rs to determine the existence of unlawful restrictions.<sup>79</sup> County recorders opposed the measure on the basis that it would “create an enormous workload” and that it failed to consider the “potential near shut-down of county recorder offices”<sup>80</sup> if enacted. Despite significant amendments, the measure was held in the Senate Appropriations Committee and did not pass.

### 2. *2009: AB 985 (De La Torre)*

With the failure of AB 2204 at the end of the 2007-2008 legislative session, Assembly Member De La Torre introduced AB 985 at the beginning of the 2009-2010 legislative session. As introduced, the measure again would have required that a title insurance company identify and strike any unlawful restrictions before the recording of a deed or other transfer document. Not surprisingly, the measure was again opposed by the same trade associations who in the prior year had advocated against AB 2204. The proposal was amended seven times between June and September 2009; upon its arrival on his desk, Governor Schwarzenegger vetoed the bill.

## IV. **SWINGING FOR THE FENCES IN 2021— AB 1466**

### 1. *At Bat—AB 1466, as Introduced*

As introduced on February 19, 2021, AB 1466 (McCarty)<sup>81</sup> would have required title companies, in a pending real estate transaction, to identify whether certain real estate

documents provided to a consumer during that transaction contained RRCs. If the title company identified a RRC, the title company would be required to submit a RCM to facilitate redaction of the RRC. The initial proposal would have required title companies to both identify documents that might contain RRCs and to review those documents to determine if they actually contained RRCs, processes far beyond the usual and customary scope for title searching and examination. The review process alone, contemplated to take place during the real estate transaction, would likely have added weeks of delay and significant costs to nearly every real estate transaction. Trade associations representing title companies and escrow companies opposed the measure, commenting 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.”<sup>82</sup>

### 2. *Hits and Misses—Amendments to AB 1466*

Ongoing discussions between the office of the bill’s author Assembly Member Kevin McCarty and stakeholders, including the California Escrow Association, California Land Title Association, County Recorders Association of California, and the California Association of Realtors,<sup>83</sup> resulted in significant amendments to the proposal. As substantially amended July 12, 2021,<sup>83</sup> AB 1466 would have created a task force under the California Department of Housing and Community Development (“HCD”), in partnership with the University of California, to prepare and submit RCMs to remove RRCs. Additionally, this amendment proposed an additional recording fee of \$2 to specified documents for a period of five years, to be remitted by county recorders to a new Unlawfully Restrictive Covenant Redaction Trust Fund (“Trust Fund”), after deduction by county recorders of expenses incurred by them.<sup>84</sup> The Trust Fund would have provided funding for the formation and administration of the task force, which would be comprised of public interest lawyers, law schools, county recorders, real estate industry representatives, software engineers, nonprofit organizations, and activist groups who have experience with RRCs. The task force would work with HCD, the University of California, and specific universities to conduct research about RRCs, to create a centralized database and map of RRCs in California, and to expedite the redaction of RRCs.<sup>85</sup> The amendments would have required county counsel review and response within “a reasonable period of time, not more than three months, unless extraordinary circumstances apply”<sup>86</sup> from the date the RCM recording request was made, and would have required a postcard notification to be sent by the

county recorder to the requester to inform them of the outcome. Those amendments would also have allowed a person acquiring an interest, but not yet a record owner, to submit a RCM request.<sup>87</sup>

### 3. *Full Count—Further Amendments to AB 1466*

AB 1466 was further amended in late August 2021,<sup>88</sup> as part of its passage out of the Senate Committee on Appropriations, and again in the last week of the 2021 legislative session during which the California Legislature could act. Those amendments, in print on September 3, 2021,<sup>89</sup> reverted many of the prior amendments, and among other things, eliminated the task force, the database and mapping concepts, and the Trust Fund. The amendments also added a definition for the term “redaction”; added county recorders to those obligated to notify record owners and prospective purchasers of the existence of RRCs if the county recorder has actual knowledge that a document it is delivering directly to that party contains a RRC; required each county recorder to establish a restrictive covenant program to remove RRCs; and specified details for the additional \$2 fee county recorders may charge to offset their costs in performing the specified duties.<sup>90</sup>

### 4. *Sliding into Home—Enactment of AB 1466*

AB 1466 was signed by Governor Newsom on September 28, 2021.<sup>91</sup> The measure includes a delayed implementation date of July 1, 2022, to allow for the development of procedures which require: (a) a county recorder, title company, escrow company, real estate broker, or real estate agent with actual knowledge of a “possibly unlawfully restrictive covenant” to notify a record title holder or a person acquiring an ownership interest of the existence of the covenant, and the ability to have it removed through the RCM process; (b) the title company or escrow company involved in a transaction, if requested, to assist in the preparation of a RCM; and (c) each county recorder to prepare a publicly available implementation plan that describes the methods by which that county recorder will identify and redact RRCs, track and maintain RRCs that have been identified, retain and index those records, and include implementation timelines.<sup>92</sup>

## V. HITTING FOR THE CYCLE—CALIFORNIA, CONGRESS, AND THE REST OF US

In California and much of the United States, and more than seventy years after *Shelley*, the impact of RRCs in residential property records can still be felt. Some

state legislatures have previously enacted statutes for the redaction of RRCs, some states have attempted changes but have not yet succeeded, and others are either considering or have recently enacted processes for the redaction of RRCs. California could, in coming years, act to further refine AB 1466. On a nationwide scale, there are nascent efforts in Congress, and RRCs in deeds have been recently taken up by the national Uniform Law Commission. Individuals, organizations, and community groups are engaged in discussions about RRCs, and other matters related to fair and equitable housing reforms.

### A. California Could Act Further

California could consider further changes to those enacted in 2021, making clarifying changes, if needed. And if during implementation it is anticipated that additional statutory guidance or revisions are needed, the Legislature could address any unintended consequences and could change the delayed implementation date, among other things. Some specifics that the stakeholders and the California Legislature may wish to consider include whether the new, statutory definition of the term “redaction” requires further refinement; to resolve procedural questions, if any, about what it means for a title company or escrow company to “assist” with the RCM process; and whether the term “possible unlawfully restrictive covenant” is an adequate standard that is reasonably and uniformly understood.

Other matters for consideration include whether AB 1466 is sufficient to interpret the statute; if the ability of any person or entity to request a RCM without being an owner of record is a reasonable expansion of the RCM procedure or should be qualified or limited to exclude any “other person”; if the language of the measure regarding actual knowledge of a document containing a RRC, as a trigger for a mandatory duty by a specified party, should include a definition of actual knowledge for the purposes of the statute; whether county recorders alone have sufficient resources to identify and redact RRCs on the large scale contemplated by the previously proposed but rejected task force model; and if the fifty-eight different county recorders in California are able to develop and maintain redaction procedures that are consistent, predictable, effective, efficient, and easily implemented and understood by county recorders and other stakeholders, including members of the public.

Evaluation of whether further changes are needed will also be informed by the experiences of members of the public, by information from stakeholder implementation

working groups, by a “best practices meeting to share concepts on implementation of this section no later than December 31, 2022, with all California county recorder offices” to be then-convened by the County Recorders Association of California, and annually thereafter until December 31, 2027, and by the results of later status reports to the California Legislature, required pursuant to the new measure, from the County Recorders Association of California. Those reports, describing the progress of each county’s restrictive covenant program, are due by January 1, 2023, and January 1, 2025.

### B. Congress Could Act

The *Mapping Discrimination Act*, SB S. 2549,<sup>93</sup> was introduced in Congress on July 29, 2021, with the goals of providing grants and resources to educational institutions

to support: (1) efforts by educational institutions to conduct primary analysis and digitization of historic housing discrimination patterns between 1850 and 1988; (2) efforts by local governments to digitize property deeds and other historic records relating to housing discrimination; and (3) the creation of a national, publicly available database of local records of housing discrimination patterns between 1850 and 1988.<sup>94</sup>

The passage of a federal measure such as the *Mapping Discrimination Act* could result in the availability of additional funds, technology, and other resources that could facilitate review and redaction processes in California.

### C. Uniform Laws Commission

The Uniform Laws Commission (“ULC”) has recently established a new drafting committee, the Restrictive Covenants in Deeds Committee,<sup>95</sup> tasked with preparing a new, uniform act or model state legislation to facilitate the release or expungement of RRCs in deeds. The role of the ULC is to facilitate collaborative, non-partisan study and discussion about issues where a uniform legislative structure could provide research, drafting, and practical guidance to states considering a broad variety of issues. The involvement of the ULC in RRCs is likely to provide additional information, drafting assistance, and resources for states that are considering enacting future legislation or revising or refining existing statutes.

## D. The Rest of Us

In acknowledging the history of RRCs, it is relevant and important to seek input from those who have been harmed about additional ways that efforts to mitigate and resolve past harms would be meaningful. Outside the legislative arena, individuals and organizations are also engaged in this work. In Sacramento, members of one neighborhood talked about RRCs at a recent, outdoor social gathering and resolved to work together on modifications to RRCs in their subdivision. In Southern California, social media efforts have resulted in a loose affiliation of real estate salespersons engaging with one another in discussions, presentations, and changes in practices via Facebook<sup>96</sup> and LinkedIn. Community land trusts, shared-equity ownership, philanthropic efforts, and other structural changes are also being considered as additional opportunities to advance racial, social, and economic equity in the homeownership space.

## VI. CONCLUSION

Racially restrictive covenants in real property records remain a painful reminder of the historic exclusions of non-Whites from homeownership, from society, and from the opportunity to thrive. Throughout California and the nation, conversations are taking place about what other methods can be used to address RRCs and their effects, and how those implicate the need for changes yet to come. Proposals enacted this year, as well as some previously enacted,<sup>97</sup> are intended (among other objectives) to address past injustices to people of color and to study the impacts of the structural and societal problems that have resulted from practices and programs that gave rights and privileges to Whites, rights that were withheld from non-Whites and signified a zero-sum game where success for Whites was dependent upon the suppression of opportunities for non-Whites.<sup>98</sup> California appears to have taken some early steps in the right direction to acknowledge past and present systemic discrimination, segregation, and exclusion, and to engage in actions to bring about necessary changes. California should continue rounding the bases with its efforts for equitable, just, meaningful, and sustainable results.

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## Endnotes

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