

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 721 (Bloom)
Version: July 5, 2021
Hearing Date: July 13, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Covenants and restrictions: affordable housing

DIGEST

This bill makes covenants, restrictions, or private limits on the residential density of a property unenforceable against a property owner who is developing a housing project consisting entirely of affordable units, as defined.

EXECUTIVE SUMMARY

During subdivision of property for residential development, it is common for the subdivider to record covenants on each parcel, restricting how the land may be put to use. Afterwards, each property owner within the subdivided community has the power to enforce those covenants against the others. Such covenants frequently prohibit the construction of high-density housing on the land. In this way, these private covenants operate to prevent the development of affordable housing even in places where the local zoning law would otherwise permit it. This dynamic contributes to ongoing housing segregation and California's housing affordability crisis. To address the problem, this bill would render covenants that limit housing density unenforceable against a property owner proposing to use the land to develop housing that consists entirely of affordable rate units. The bill would not affect conservation easements.

The bill is sponsored by the Community Corporation of Santa Monica and Public Counsel. Support comes from affordable housing developers and advocates. Opposition comes from local neighborhood groups who want to be able to rely on these restrictive covenants to control housing density levels in their communities. The bill passed out of the Senate Housing Committee by a vote of 7-2.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that the owner of a property subject to an unlawfully restrictive covenant based on race, color, religion, sex, familial status, marital status, disability, national origin, or ancestry may submit for recordation a document striking out the unlawfully restrictive covenant. (Gov. Code § 12956.2.)

- 2) Defines “affordable rent” as the following:
 - a) for extremely low income households, the product of 30 percent times 30 percent of the area median income adjusted for family size appropriate for the unit;
 - b) for very low income households, the product of 30 percent times 50 percent of the area median income adjusted for family size appropriate for the unit;
 - c) for lower income households whose gross incomes exceed the maximum income for very low income households, the product of 30 percent times 60 percent of the area median income adjusted for family size appropriate for the unit. In addition, for those lower income households with gross incomes that exceed 60 percent of the area median income adjusted for family size, it shall be optional for any state or local funding agency to require that affordable rent be established at a level not to exceed 30 percent of gross income of the household; and
 - d) for moderate-income households, the product of 30 percent times 110 percent of the area median income adjusted for family size appropriate for the unit. In addition, for those moderate-income households whose gross incomes exceed 110 percent of the area median income adjusted for family size, it shall be optional for any state or local funding agency to require that affordable rent be established at a level not to exceed 30 percent of gross income of the household. (Health & Saf. Code § 50053.)

- 3) Permits the legislative body of any county or city to adopt zoning ordinances that do any of the following:
 - a) regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes;
 - b) regulate signs and billboards;
 - c) regulate all of the following: the location, height, bulk, number of stories, and size of buildings and structures; the size and use of lots, yards, courts, and other open spaces; the percentage of a lot which may be occupied by a building or structure; and the intensity of land use;
 - d) establish requirements for off-street parking and loading;
 - e) establish and maintain building setback lines;

- f) create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts; and
 - g) require, as a condition of the development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower income, very low income, or extremely low income households, as specified. (Gov. Code § 65850.)
- 4) Defines “conservation easement” to mean any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition. (Civ. Code § 815.1.)
- 5) Provides that only the following entities or organizations may acquire and hold conservation easements:
- a) a tax-exempt nonprofit organization qualified under Section 501(c)(3) of the Internal Revenue Code and qualified to do business in this state which has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use;
 - b) the state or any city, county, city and county, district, or other state or local governmental entity, if otherwise authorized to acquire and hold title to real property and if the conservation easement is voluntarily conveyed. No local governmental entity may condition the issuance of an entitlement for use on the applicant’s granting of a conservation easement pursuant to this chapter; or
 - c) a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed. (Civ. Code § 815.3.)
- 6) Requires instruments creating, assigning, or otherwise transferring conservation easements to be recorded in the office of the county recorder of the county where the land is situated, in whole or in part, and such instruments shall be subject in all respects to the recording laws. (Civ. Code § 815.5.)
- 7) Requires, as a part of the Housing Element of a General Plan, a jurisdiction to provide an inventory of land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality’s housing need for a designated income level, and an analysis of the relationship of zoning and public facilities and services to these sites. (Gov. Code § 65583(a)(3).)

This bill:

- 1) Provides that recorded covenants, restrictions, or private limits that restrict the number, size, or location of the residences that may be built on a property, or that restrict the number of persons or families who may reside on the property, shall not be enforceable against the owner of an affordable housing development, provided a modification of the covenant, restriction, or private limit is recorded pursuant to (3) below.
- 2) Defines an affordable housing development as one that is subject to a recorded affordability restriction requiring all of the units in the development to be affordable for lower income housing, as defined, for at least 55 years, and that is owned or controlled by an entity or individual that has submitted a permit application to the jurisdiction to develop the project.
- 3) Establishes the following process for an affordable housing developer to have the records for the property modified to remove housing density restrictions:
 - a. authorizes an owner of an affordable housing development to submit a modification document to modify or remove any existing restrictive covenant language, as specified;
 - b. requires a county recorder, prior to recording the modification document, to submit it to the county counsel for review;
 - c. requires the county counsel to determine whether:
 - i. the original restrictive covenant document restricts the property in a manner prohibited by (1) above;
 - ii. the owner has submitted sufficient documents to establish that the property qualifies as an affordable housing development;
 - iii. any notice required pursuant to this bill has been provided;
 - iv. any exemptions apply, as specified; and
 - v. restrictions may no longer be enforced against the owner of the affordable housing development;
 - d. requires the county counsel to inform the county recorder of its determination within 15 days, or, if unable to make a determination, to specify the additional documentation needed;
 - e. provides that if the county counsel has authorized the county recorder to record the document, the authorization shall be noted on the face of the modification or on an attached cover sheet;
 - f. requires a modification document to be indexed in the same manner as the original restrictive covenant document, and to include a recording reference to the original restrictive covenant document, as specified;
 - g. provides that a county shall not incur liability for recording a modification document that is not authorized by this bill;
 - h. provides that if the property is utilized in any manner that violates the terms of affordability restrictions required by this bill, the city or county may record a

- notice of the violation, at which point the modification shall become void and unenforceable; and
- i. authorizes the county recorder to charge a \$100 fee to an owner who submits a modification document.
- 4) Specifies that nothing in this bill shall be interpreted to weaken, modify, or invalidate existing laws that:
 - a) protect affordable housing;
 - b) protect fair housing; or
 - c) prohibit unlawful discrimination in the provision of housing.
 - 5) Exempts specified conservation easements from the types of density restrictions that may be modified by an affordable housing developer.
 - 6) Entitles the owner of an affordable housing development who prevails in a lawsuit to enforce the rights under this bill to recover litigation costs and reasonable attorney's fees, with specified limitations.

COMMENTS

1. Background on the imposition of property covenants

California property law enables the owner of property, upon subdivision of the land, to place covenants, restrictions, or other limitations on how the subdivided land may be used. These restrictions can then be enforced, through legal action if necessary, by any of the other owners of the subdivided property. The primary purpose of such restrictions is to provide assurance to those purchasing the property that the surrounding area will not develop in ways that they do not expect and do not want.¹

2. Relationship of covenants restricting housing density to discriminatory restrictive covenants

The use of restrictive covenants on property can be relatively benign. For example, they can be used to ensure that all of the homes in a neighborhood conform to a certain architectural style. Historically, however, restrictive covenants have also been used for exclusionary purposes. Restrictive covenants prohibiting people of color and religious minorities from owning or occupying property are commonplace in California. Such discriminatory covenants have not been legally enforceable for decades (*Shelley v. Kramer* (1948) 334 U.S. 1), and there is now a process under California law through which property owners can have these discriminatory covenants redacted from their property records. (Gov. Code § 12956.2.)

¹ Ellickson, Robert C., *Stale Real Estate Covenants* (August 21, 2020). Yale Law & Economics Research Paper <https://ssrn.com/abstract=3678927> (as of Jul. 3, 2021) at p. 10.

In more recent years, however, subdivided communities have been able to achieve much the same practical result by recording covenants on property that restrict the density of housing that may be built there. While such covenants do not technically exclude anyone from buying the property on the basis of race, they often have that practical effect because of the significant gaps in wealth between whites and other racial and ethnic groups. Large, single-family homes with sprawling yards are generally more expensive than smaller housing units that can accommodate multiple families at once.

3. How covenants restricting density inhibit development of affordable housing

As is well-known and well-documented, California presently confronts an affordable housing crisis. In response, the Legislature has enacted a variety of measures intended to spur the production of the affordable rate housing. However, according to the author and sponsors of this measure, when affordable housing developers identify what would otherwise be ideal properties on which to undertake such projects, the presence of private covenants restricting the density at which they can build make it impossible to proceed.

4. The solution proposed by this bill

In order to combat the negative effects that private covenants restricting residential density have on housing segregation and the production of affordable housing, this bill proposes a narrow, but simple solution. Under the bill, any covenants, conditions, restrictions, or private limits on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale that restricts the number or size of the residences that may be built on the property, or that restricts the number of persons who may reside on the property would be unenforceable as against a property owner developing the land for housing composed exclusively of affordable units. To facilitate that end, the bill requires such an affordable housing developer to redact the density restriction out of the property records, using much the same process that property owners can currently use to redact discriminatory restrictive covenants out of their property records.

5. Arguments about local control

The opposition to this bill asserts that it will undermine local control over property use. It is true that, in the very narrow instance of a property owner who proposes to construct housing consisting of affordable units exclusively, the bill does enable that property owner to proceed over the objection of individual neighbors who might otherwise have had the power to block it. It is important to note, however, just how limited and specific that circumstance is. Nothing in the bill prevents the enforcement of private density restrictions as against any development plan except for one composed strictly of affordable housing.

Moreover, nothing in the bill impacts the ability of local communities to impose public land-use and zoning laws that include limitations on density. In this sense, the bill may be more accurately viewed as reinforcing public local control of land use. It will enable construction of affordable housing where the local community has authorized it through its land-use and zoning laws, even where private individuals may be opposed.

6. How the bill handles conservation easements

Conservation easements are restrictions on the development of property. In other words, these easements require the property owner to “conserve” the land in a certain state. Typically, non-profit organizations or government agencies purchase such easements from the property owners in order to spare it from development. In this way, conservation easements have played a critical role facilitating the preservation of natural, scenic, historic, agricultural, forested, and open space land in California.

It is not the intent of this bill to enable the construction of affordable housing projects on land covered by conservation easements. Accordingly, earlier versions of this bill simply excluded conservation easements from its ambit altogether. A blanket exclusion of all conservation easements would, however, create a significant loophole since property owners could achieve the same sort of restrictions on density that the bill seeks to overcome, simply by styling the density restrictions as a form of conservation easement.

To prevent this sort of an end run around the bill’s intent while still allowing conservation easements to be used for their intended purpose, the bill now contains a nuanced and comprehensive set of exemptions setting forth the types of conservation easements that cannot be overridden even for the purpose of affordable housing construction. In addition to these exceptions, the bill now also includes a detailed process by which any affordable housing developer who intends to override a conservation easement will first have to notify the parties to the easement and any third party beneficiaries, among others, before attempting to move forward.

7. Addressing procedures around rescission of the modification

The bill in print contains a provision addressing what happens in the event that a property owner obtains the modification facilitated by this bill. Specifically, if the property is utilized in any manner that violates the terms of the affordability restrictions, the bill empowers the city or county to record a notice of that violation and, thereafter, the density restriction covenant will spring back to life. If the owner then complies with the applicable affordability restrictions, the owner may apply to the agency of the city or county that recorded the notice of violation for a rescission of the notice of violation, and if the city or county records a notice of rescission of the violation, the modification document shall thereafter become effective again.

The substance of these provisions appears sound, assuming that the city or county would provide the property owner with notice and an opportunity to be heard before recording its notice of violation. The author reports some last minute disagreement among stakeholders to the recording process regarding exactly how these provisions would operate procedurally. Assuming the bill passes out of Committee, this very narrow, procedural wrinkle will need to be ironed out while the bill is under consideration in the Appropriations Committee or on the Senate Floor.

8. Arguments in support of the bill

According to the author:

Decades of exclusionary housing practices have led to our housing and homelessness crisis. With a shortfall of almost 1.3 million homes, we must take necessary measures to promote the development of affordable and supportive housing. AB 721 will clarify that private landowners cannot engage in exclusionary tactics through private restrictive covenants. Such covenants arguably conflict with the Fair Employment and Housing Act and other state anti-discrimination laws. Furthermore, the density restrictions in these private covenants conflict with local zoning, remain enforceable without state intervention, and undermine California's efforts to promote affordable and supportive housing construction.

As sponsor of the bill, Public Counsel writes:

While the explicitly racially restrictive components of these covenants have already been made unenforceable under well-established law, there remain vestigial provisions arbitrarily limiting density by private agreement even when the local zoning would otherwise allow that density. These vestigial provisions often limit a parcel's density to one to three units, and act as clear barriers to the development of affordable and supportive housing – the types of housing necessary not only to combat homelessness, but that are needed to affirmatively combat generations of racial exclusion caused by the systems that allowed for creation of the restrictive covenant in the first place. By making vestigial density restrictions in such covenants unenforceable against developers of affordable and supportive housing, AB 721 will reduce costs for affordable housing developers, open up sites in high opportunity areas, and help local jurisdictions advance affordable and supportive housing in an equitable manner.

In support, the Southern California Association of Non-Profit Housing writes:

While many recognize that constructing more housing is one piece of the solution to this problem, density restrictions in certain covenants can prevent the expansion of affordable housing in our state. [...] By rendering these covenants unenforceable, AB 721 will allow developers of affordable and supportive housing to build in these previously inaccessible sites. This means that affordable housing could become distributed in all areas of the state, including those that are more affluent. Future residents would then gain access to high-performing schools and high-quality transit, rather than be relegated only into impoverished areas.

9. Arguments in opposition to the bill

In opposition to the bill, Los Altos Residents writes:

Sacramento continues to try to pass one-size-fits-all legislation and misleading your constituents by selling these bills as seeking to solve the affordable housing crisis. In fact, these bills do nothing but provide gifts to developers and drive the cost of land further up making home ownership for low-income Californians even more unattainable. Stop it!

In further opposition to the bill, Sustainable TamAlmonte writes:

Assembly Bill 721 is poor policy and an example of legislators seeking to micro-manage local affairs and give control of land use to developers. Whereas such control should rightfully remain with local governments and communities. There are many reasons why lowering the density, restricting the number of units, and limiting the number of residents are beneficial. These reasons include, but are not limited to, preserving public health and safety, the environment, neighborhood character, and quality of life, as well as avoiding significant adverse impacts. AB-721 would hinder this capability.

SUPPORT

Community Corporation of Santa Monica (sponsor)

Public Counsel (sponsor)

Abundant Housing LA

American Planning Association, California Chapter

California Apartment Association

California Coalition for Rural Housing
California Housing Consortium
California Housing Partnership
California Reinvestment Coalition
California Rural Legal Assistance Foundation
Clergy and Laity United for Economic Justice
Committee for Racial Justice
Community Corporation of Santa Monica
Community Health Councils
Corporation for Supportive Housing
Eden Housing
Enterprise Community Partners
Housing California
Inner City Law Center
LA Voice
Local Initiatives Support Corporation Los Angeles
National Association of Social Workers, California Chapter
National Equity Fund
Nonprofit Housing Association of Northern California
People Assisting the Homeless
Public Interest Law Project
San Diego Housing Federation
Santa Monicans for Renters' Rights
Santa Monica Forward
Santa Monica Bay Area Human Relations Council
Southern California Association of Non-Profit Housing
United Way Bay Area
Western Center on Law & Poverty
Westside Coalition

OPPOSITION

Community Catalysts
Los Altos Residents
Mission Street Neighbors
Sustainable TamAlmonte

RELATED LEGISLATION

Pending Legislation: AB 1466 (McCarty, 2021) establishes a task force for the purpose of searching out, redacting, and compiling a publicly searchable database of unlawful discriminatory restrictive housing covenants. AB 1466 is currently pending consideration before the Senate Appropriations Committee.

Prior Legislation: AB 394 (Niello, Ch. 297, Stats. 2005) permitted any owner who believed that there was an unlawful covenant attached to the owner's property to file a "Restrictive Covenant Modification" (RCM) form that effectively operates to remove the offensive covenant from any subsequent documents that would be sent to future buyers.

PRIOR VOTES:

Senate Housing Committee (Ayes 7, Noes 2)

Assembly Floor (Ayes 52, Noes 18)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Judiciary Committee (Ayes 7, Noes 3)

Assembly Housing and Community Development Committee (Ayes 5, Noes 0)
