

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 621

(Senator Conway, *et al.*)

Judicial Proceedings

Environment and Transportation

**Real Property - Deletion of Ownership Restrictions Based on Race, Religious
Belief, or National Origin**

This bill authorizes a person to execute and record a restrictive covenant modification to an unlawfully restrictive covenant if the person (1) holds an ownership interest in property that the person believes is subject to a specified unlawfully restrictive covenant or (2) is a nonprofit entity that is required to enforce, within a defined residential neighborhood, covenants that limit architectural alterations, renovations, landscaping elements, or other modifications to residential lots in the neighborhood as well as the unlawfully restrictive covenant. The bill also *requires* the governing body of a homeowners association (HOA) to delete any recorded covenant or restriction that restricts ownership based on race, religious belief, or national origin from the common area deeds or other declarations of property in the development by September 30, 2019.

Fiscal Summary

State Effect: The bill is not anticipated to materially impact State operations or finances, as discussed below.

Local Effect: The bill is not anticipated to materially impact local government operations or finances, as discussed below.

Small Business Effect: Minimal.

Analysis

Bill Summary: “Unlawfully restrictive covenant” means any recorded covenant or restriction that restricts ownership based on race, religious belief, or national origin.

Restrictive Covenant Modification

A restrictive covenant modification must (1) consist of a complete copy of the original instrument containing the unlawfully restrictive covenant with the language of the unlawfully restrictive covenant stricken and (2) be accompanied by a complete restrictive covenant modification intake sheet, on the form that the Administrative Office of the Courts (AOC) provides. The intake sheet must (1) be signed by the record owner of the property or, in the case of a nonprofit entity, be accompanied by a statement that a majority of the governing body of the nonprofit entity has agreed to the restrictive covenant modification; (2) reference the book and page number or other place where the original instrument containing the unlawfully restrictive covenant is recorded; and (3) include any other information that the AOC considers necessary.

Subject to all covenants, conditions, and restrictions that were recorded after the recording of the original instrument, the restrictions contained in the restrictive covenant modification, once recorded, are the only restrictions based on the original instrument that apply to the property. The effective date of the terms and conditions contained in the restrictive covenant modification must be the same as the effective date of the original instrument. Generally, a restrictive covenant modification is not subject to specified prerequisites to recording.

Requirements for the Circuit Court and County Attorney

On receipt of a restrictive covenant modification, the clerk of the circuit court must submit the restrictive covenant modification and a copy of the original instrument to the county attorney. The county attorney must review the restrictive covenant modification and the copy of the original instrument to determine whether the original instrument contains an unlawfully restrictive covenant, and whether the modification correctly strikes only the language of the unlawfully restrictive covenant. After reviewing the modification, the county attorney must return the modification and copy of the original instrument to the clerk of the circuit court, along with the county attorney's determination.

The clerk of the circuit court may not record a restrictive covenant modification unless the county attorney determines that the modification is appropriate. A restrictive covenant modification must be indexed in the same manner as the original instrument.

Limitation on Liability

If a person records a restrictive covenant modification that contains modifications not authorized under the bill, (1) the clerk of the circuit court may not incur any liability for recording the restrictive covenant modification; (2) the county may not be held liable as a result of a determination rendered by the county attorney; and (3) any liability that results

from the unauthorized recordation must be the sole responsibility of the person that executed the restrictive covenant modification.

Deletion of Ownership Restriction by a Homeowners Association

By September 30, 2019, the governing body of an HOA must delete any recorded covenant or restriction that restricts ownership based on race, religious belief, or national origin from the common area deeds or other declarations of property in the development. Notwithstanding the provisions of a governing document, the governing body may delete such a recorded covenant or restriction without the approval of the lot owners. The governing body of the HOA must record an amendment to the common area deeds or other declarations containing specified information with the clerk of the court.

Beginning on October 1, 2019, the governing body of an HOA must delete a recorded covenant or restriction that restricts ownership based on race, religious belief, or national origin from the common area deeds or other declarations of property in the development within 180 days of receiving a written request from a lot owner.

Charges and Fees

An administrator of the court or a clerk of the circuit court may not charge specified surcharges or fees for the recordation of a restrictive covenant modification or for the recordation of an amendment to the common area deeds or other declarations of an HOA filed under the bill. Provisions that prohibit the administrator or the clerk of the circuit courts from collecting a surcharge or fee expire at the end of September 30, 2019.

Current Law/Background:

Deletion of Ownership Restriction by a Homeowners Association

An HOA may delete a recorded covenant or restriction that restricts ownership based on race, religious belief, or national origin from the deeds or other declarations of property in the development with the affirmative vote of at least 85% of the lot owners. If the deeds or other declarations specify a method of amendment or deletion of a recorded covenant or restriction, a recorded covenant or restriction may also be deleted as is specified for in the deeds or declarations.

After the lot owners in the development agree to the deletion of a recorded covenant or restriction that restricts ownership based on race, religious belief, or national origin, the governing body of the HOA must record an amendment to the deeds or other declarations with the clerk of the court in the jurisdiction where the development is located.

Discriminatory Housing Practice

Housing discrimination because of race, sex, color, religion, national origin, marital status, familial status, sexual orientation, gender identity, or disability is prohibited.

A person claiming to have been injured by a discriminatory housing practice may file a complaint with the Maryland Commission on Civil Rights (MCCR) or file a civil action in circuit court. If an administrative law judge (ALJ) finds that the respondent has engaged in a discriminatory housing practice, the ALJ may order appropriate relief, including actual damages and injunctive or other relief, and may assess a civil penalty against the respondent. For a first offense, an individual may be assessed a penalty of up to \$10,000. Fines may be higher for an individual who has committed prior acts of discrimination within specified periods of time.

Racially Restrictive Covenants

Racially restrictive covenants in a deed or other instrument used to convey real property are unenforceable by State courts. While such covenants are not illegal *per se*, their enforcement by State court injunctions constitutes state action in violation of the Fourteenth Amendment to the U.S. Constitution.

Even though the covenants' race restrictions are unenforceable, many people still find them offensive. In 2017, the Rodgers Forge Community Association, near Baltimore, Maryland, appropriated \$2,000 to investigate how to remove the covenants and to include a section on its website explaining that the neighborhood today finds the language abhorrent and is trying to remove it.

California Restrictive Covenant Modification

In 2000, the California Fair Employment and Housing Act established procedures for removing illegal restrictive covenants. Effective January 1, 2006, any person holding an ownership interest of record in a property that he or she believes is the subject of an illegal restrictive covenant may record a restrictive covenant modification with the county recorder. The modification document must include a complete copy of the original document containing the unlawfully restrictive language with the unlawfully restrictive language stricken. Following approval by the county counsel, the county recorder will record the modification document.

Additionally, the board of directors of a common interest development or association is required, without approval of the owners, to delete any unlawful restrictive covenant and restate the declaration or governing document without the restrictive covenant but with no other change. A board of directors of a common interest development or association is not

required to obtain approval from the county recorder prior to removal of restrictive covenant language.

State Fiscal Effect: Any impact on the operations or finances of MCCR or the Office of Administrative Hearings (OAH) depends on the number of claims of discriminatory housing practices filed. Because the bill *requires* an HOA to remove specified recorded covenants or restrictions, authorizes the governing body of an HOA to make required changes without the vote of lot owners, and waives all filing and recording fees and surcharges for one year following implementation, an HOA should be able to make the required changes in the time authorized, thus reducing the number of potential claims of discriminatory housing practices. Should the number of claims increase significantly, minimal additional general fund expenditures may be necessary to support MCCR and OAH activities related to claims of discriminatory housing practices.

Local Fiscal Effect: Any impact on the operations or finances of the circuit courts or offices of the county attorney will depend on the number of restrictive covenant modifications submitted by individuals and the number of other changes made by HOAs. The total number of individuals and HOAs who will submit modifications or revised covenants or restrictions is unknown. However, for restrictive covenant modifications, the county attorney is only required to review the submission and determine whether the original instrument contains an unlawfully restrictive covenant, and whether the restrictive covenant modification correctly strikes only the language of the unlawfully restrictive covenant. Because the county attorney is only required to determine whether any restriction is based on race, religious belief, or national origin, not whether any restriction is “discriminatory,” any analysis of proposed modifications should be brief.

The bill prohibits the assessment of recording fees for restrictive covenant modifications for one year following the bill’s effective date. While the impact of the resulting revenue loss depends on the number of modifications submitted to the clerks of the court, it is anticipated that any revenue loss for the clerks will be minimal. Additionally, while the bill may increase the workload of the clerks of the court, primarily for a period of one year following the bill’s effective date, once procedures are in place, any increased activity can likely be handled with existing resources. Likewise, local government expenditures may increase minimally to develop and implement procedures for reviewing and recording modifications under the bill, but any such increases are likely to be temporary.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland Commission on Civil Rights; Baltimore City; Kent, Montgomery, Washington, and Worcester counties; Maryland Association of Counties; Office of the Attorney General (Consumer Protection Division); Secretary of State; Judiciary (Administrative Office of the Courts); Office of Administrative Hearings; State Department of Assessments and Taxation; *The Baltimore Sun*; California Department of Fair Employment Housing; U.S. Supreme Court; Department of Legislative Services

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