

HOUSING DISCRIMINATION

Addressing Illegal Covenants in Historic Land Records

DOCUMENTS IN THE LAND RECORDS provide public notice of property ownership and indicate when real estate is subject to a mortgage, judgment, or other encumbrance. These public records are accessed, reviewed, and used in every real estate transaction, including refinancing of home loans. A property's chain of title includes transfers of ownership and contains other important records impacting the property. Removal of documents or pertinent information from the land records creates breaks in the chain of title, which can result in ownership disputes, a loss of property rights or an inability to buy, sell, or refinance property.

IN THE EARLY PART OF THE 20TH CENTURY, discriminatory covenants barring the sale or lease of property based on race, ethnicity or religion were inserted in some property records as part of deeds, plats and covenants, conditions, and restrictions (CC&Rs). Two decades after the landmark US Supreme Court case *Shelley v Kraemer* established racially restrictive covenants were unenforceable under the 14th Amendment, the federal Fair Housing Act of 1968 made discriminatory covenants illegal and unenforceable.

Based on prohibitions in the Fair Housing Act on republication of discriminatory covenants, and on the advice of the Department of Justice, title insurers do not include discriminatory covenants in title reports. Title commitments and policies include a disclaimer that discriminatory covenants may exist but are not reprinted. The example below is taken from the 2021 ALTA policy forms.

“Discriminatory Covenant”: Any covenant, condition, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class.

The American Land Title Association (ALTA) is strongly opposed to any form of housing discrimination and is committed to proactively working toward solutions that protect the property rights of all homebuyers.

Colleges, universities, and non-profits around the country are engaged in efforts to identify and document discriminatory covenants in land records for historic and educational purposes. These initiatives have resulted in maps and visualizations that enhance understanding of the impact and harm caused by discriminatory covenants. In 2021, legislation was introduced by US Senator Tina Smith (D-MN) would help fund the continuation of these initiatives.

Currently, there is no model law or uniform legislative approach to address previously recorded discriminatory covenants that still exist in public land records. However, state lawmakers have considered one or more of the following legislative approaches to address illegal and unenforceable discriminatory covenants in public land records. These legislative

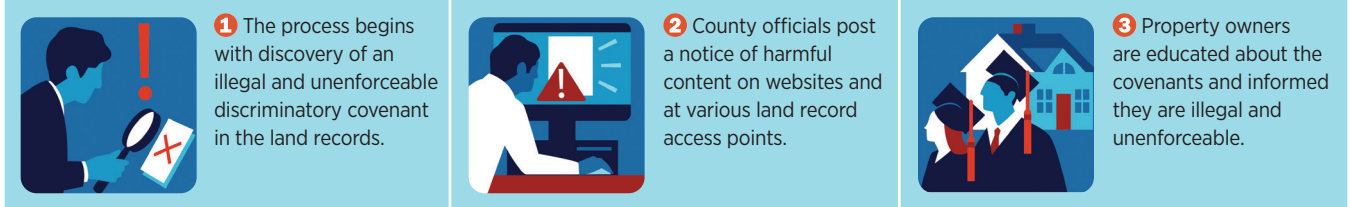
approaches can be combined, and bill text authorizing research, education and awareness initiatives regarding discriminatory covenants can be included.

1. Notification posted by county offices on websites and at record access points indicating the historical land records may contain harmful content in illegal and unenforceable discriminatory covenants. These notices are general and do not identify specific recorded instruments.
2. Repudiation of identified discriminatory language by recording a declaration in the land records of the illegal and unenforceable nature of discriminatory covenant(s) associated with a particular property.
3. Modification, through judicial or public official action, of the land record(s) containing an identified discriminatory covenant, resulting in creation of a superseding document without the discriminatory language.
4. Redaction, through judicial or public official action, of discriminatory covenants in identified documents within the land records, resulting in removal of the discriminatory language from existing land records.

With each of these methods, lawmakers should consider the potential for inadvertent removal of enforceable records or content. Repudiation measures avoid this potential outcome. Modification approaches, with care to remove only the illegal and unenforceable content, minimize this risk. Other approaches, such as expungement of entire records containing illegal covenants threaten the chain of title and create gaps in land records that jeopardize consumer property rights and the ability to buy, sell or refinance property.

NOTIFICATION APPROACH

Notification posted by county offices on websites and at record access points indicating the historical land records may contain harmful content in illegal and unenforceable discriminatory covenants. These notices are general and do not identify specific recorded instruments.



Key Components

- Authorization for county offices to post notice of harmful content on websites and at various land record access points.

PROs

- An expedient process with simple implementation at little to no cost for taxpayers or property owners.
- Maintains clarity in the chain of title regarding previously recorded covenants.

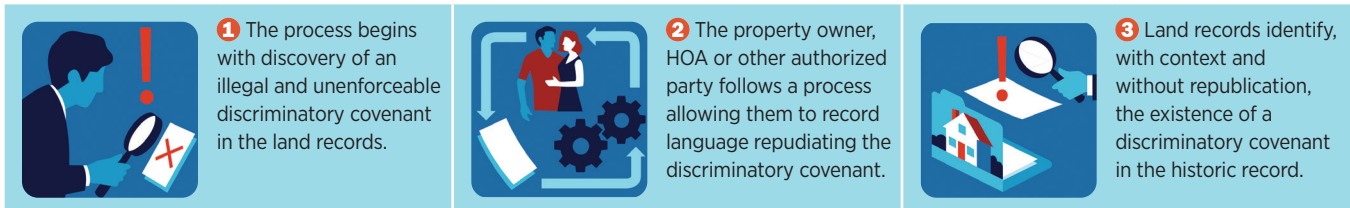
- By educating the ordinary reader that these covenants are void and unenforceable, this approach allows for identification of a discriminatory covenant without republication, which may violate state and federal fair housing laws.
- Addresses all discriminatory covenants existing in the land records.

CONs

- This approach, unless combined with other approaches, does not address discriminatory language in specifically identified documents.

REPUDIATION APPROACH

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



Key Components

- Authorization of a uniform process and standardized forms allowing property owners and homeowners' associations (HOAs) to record language repudiating discriminatory covenants previously included in records pertaining to their property.
- Use of permissive language in the statute, so homeowners and HOAs are not required to act on repudiating discriminatory covenants that are often difficult to find or identify in historical records.
- Avoid any requirement causing reproduction or republication of the discriminatory covenant, which would violate the Fair Housing Act of 1968.

- Reference state and federal fair housing laws as a basis for action.

PROs

- Empowerment to take action to repudiate discriminatory covenants that violate equality.
- An expedient process with simple implementation at little to no cost for taxpayers or property owners.
- Clarity in the chain of title regarding previously recorded covenants.
- By educating the ordinary reader that these covenants are void and unenforceable, this approach allows for identification of a discriminatory covenant without republication that may violate state and federal fair housing laws.

- Identifies, with context and without republication, the existence of a discriminatory covenant in the historic record for organizations tracking the prevalence and impact of these covenants.

CONs

- This method does not provide for validation by a legal authority of whether a specific provision is in fact illegal under fair housing laws.

Example
Indiana

MODIFICATION APPROACH

Modification, through judicial or public official action, of the land record(s) containing an identified discriminatory covenant, resulting in creation of a superseding document without the discriminatory language.



1 The process begins with discovery of an illegal and unenforceable discriminatory covenant in the land records.



2 The property owner, HOA or other authorized party submits a request form for the creation of a superseding document without the discriminatory covenant.



3 Form goes to either a judge or public official authorized to create a superseding document.



4 County recorder posts "Notice of Pendency of Action."



5 Judge or authorized official creates a new document with the discriminatory language removed.



6 New document is sent to the county recorder, who files and indexes the new document.



7 The new document without the discriminatory covenant is referenced going forward and does not impact other updates in the chain of title.



Key Components

- Identify parties authorized to undertake the modification process, given the superseding document must exactly match the original record, except for the removed discriminatory covenant, in order to be used and referenced in future transactions:
 - Alternative 1: Create a judicial process for generation of a modified superseding document with the discriminatory covenant removed.
 - Alternative 2: Identify public officials authorized to create a superseding document with the discriminatory covenant removed (i.e., county attorney or state attorney general).
- Produce uniform state-wide standards for modification of documents:
 - Create a document modification request form
 - Require recording of a standard form that includes a list of amendments to documents in chain of title, reference the original document, the new document, and any court proceedings, along with pertinent information regarding the generation of the superseding document (i.e., dates, document preparer).
 - Set a standard for indexing updates and use of/reference to the modified document for future transactions.
- The original document should never be completely removed from the public record during the modification process.
- Lis pendens should be used to provide notice of court or modification activity.
- Documents recorded during the record modification process are not affected.
- The modified document is in effect only after it is recorded in the public land records.
- Allocate funds for implementation so there are reduced or no costs for processing and recording.
- Address liability for inadvertent removal of enforceable covenants or improper indexing of the modified document, likewise inadvertent failure to remove a specified document or inadvertent removal of an enforceable document.
- Conform to existing state laws relating to property (i.e., marketable title, constructive notice or document recording priority status).
- Authorizes HOAs and other groups to use this process with permission from or notice to the property owner(s).

PROs

- Modification can be done on records regardless of the medium they exist in at county offices (paper, digital, microfilm, etc.).
- The document modification process by an authorized party allows for certainty around the continued transfer of property and reliability of title.
- The standards provide a defined and narrowly tailored process that gives ample notice to those relying on information contained in the land records.
- Identifies, with context, the existence of a discriminatory covenant in the historic record for organizations tracking the prevalence and impact of these covenants.

CONs

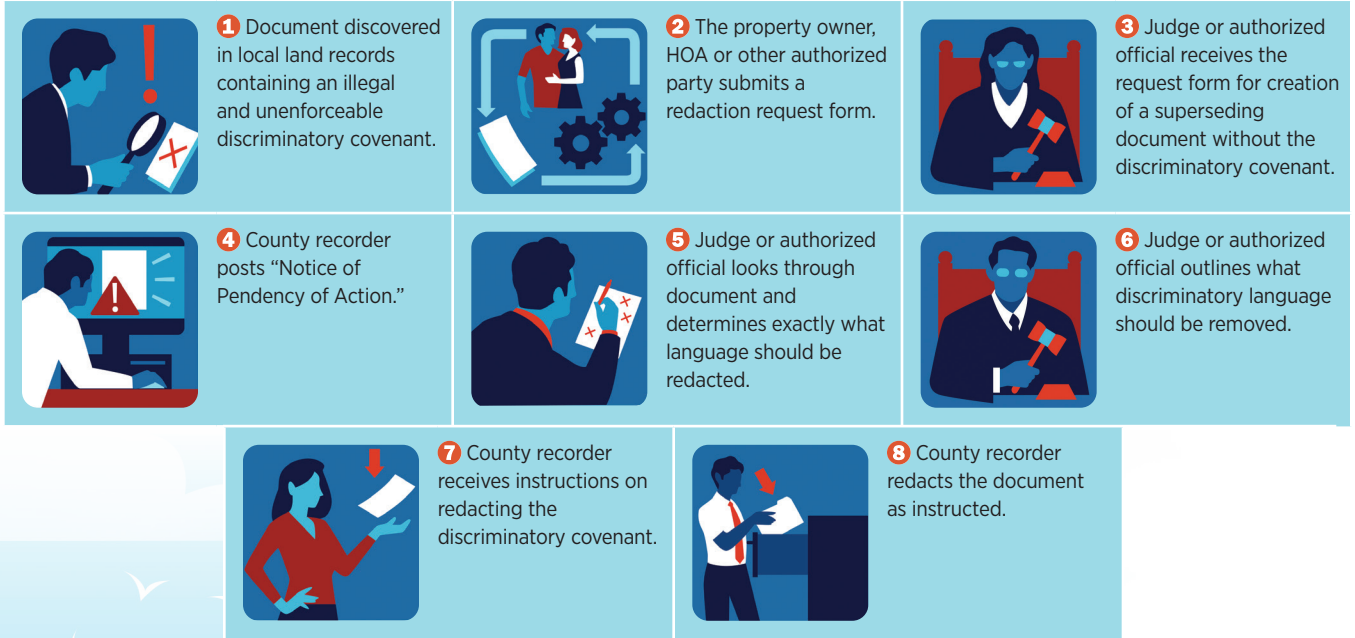
- Implementation costs for modifying and recording the superseding document.
- Multiple-step process, which may vary by state, to get the modified document recorded in the land records and inserted into the chain of title.
- Liability issues of inadvertent removal of enforceable covenants in the modified document or errors in the indexing updates.

Example

Texas

REDACTION APPROACH

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



Key Components

- Identify parties authorized to redact discriminatory covenants from the land records:
 - Alternative 1: Create a judicial process for redaction of discriminatory covenants.
 - Alternative 2: Identify the public officials authorized to redact discriminatory covenants (i.e., county attorney or state attorney general).
- Produce uniform statewide standards for redaction of documents:
 - Create a document redaction request form.
 - Establish a standard and process for determining what language should be redacted.
 - The original document should never be completely removed from the public record during the redaction process.
 - Lis pendens should be used to provide notice of redaction activity.
 - Outline procedures for managing redaction of covenants in various mediums (paper, digital, microfilm, etc.)
 - Documents recorded during the redaction process are not affected.
 - The redacted document is in effect only after it is recorded in the public land records.
- Address liability for inadvertent removal of enforceable covenants.
- Allocate funds for implementation so there are reduced or no costs for processing and recording.
- Conform to existing state laws relating to property (i.e., marketable title, constructive notice or document recording priority status).
- Identify ways to maintain the historic record by sending a copy of the unredacted document to state archives or separately maintain the unredacted document at the county level.

PROs

- Full elimination of the discriminatory covenant from the public land records.
- No effect to the recording of the original document, which still can be used and referenced once the discriminatory covenant is redacted.
- The document redaction process by an authorized party allows for certainty around the continued transfer of property and reliability of title.
- The standards provide a defined and narrowly tailored process that give ample notice to those relying on information contained in the land records.

CONs

- Implementation costs for redacting the document.
- Determining how to redact records in various mediums (paper, digital, microfilm, etc.) and addressing the inability to redact a document due to the archiving of certain records.
- Inability or inconsistency by land records officials in identifying all locations of recorded documents and determining which documents can or cannot be redacted.
- Higher risk of harm caused by inadvertent redaction of enforceable covenants.
- Liability issues of inadvertent removal of enforceable covenants.
- The need to maintain multiple databases in order to preserve the historical record for the purpose of tracking the prevalence and impact of these covenants.