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AB-721 Covenants and restrictions: affordable housing. (2021-2022)

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Assembly Bill No. 721

CHAPTER 349

An act to add Section 714.6 to the Civil Code, relating to real property.

[Approved by Governor September 28, 2021. Filed with Secretary of State September 28, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

AB 721, Bloom. Covenants and restrictions: affordable housing.

Existing law permits a person who holds an ownership interest of record in property that the person believes is the subject of an unlawfully restrictive covenant based on, among other things, source of income, to record a Restrictive Covenant Modification, which is to include a copy of the original document with the illegal language stricken. Before recording the modification document, existing law requires the county recorder to submit the modification document and the original document to the county counsel who is required to determine whether the original document contains an unlawful restriction.

This bill would make any recorded covenants, conditions, restrictions, or 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, size, or location of the residences that may be built on the property, or that restricts the number of persons or families who may reside on the property, unenforceable against the owner of an affordable housing development, as defined, if an approved restrictive covenant affordable housing modification document has been recorded in the public record, as provided, unless a specified exception applies.

The bill would authorize the owner of an affordable housing development to submit, among other things, a copy of the original restrictive covenant and a restrictive covenant modification document, pursuant to the above-described provisions of existing law, that modifies or removes any existing restrictive covenant language to the extent necessary to allow an affordable housing development to proceed. Before recording the restrictive covenant modification document, the bill would require the county recorder to submit documentation received from the owner and the modification document to the county counsel, and would require the county counsel to make specified determinations, including whether the original restrictive covenant document contains an unlawful restriction in violation of these provisions and whether the property qualifies as an affordable housing development.

The bill would specify that its provisions do not apply to restrictive covenants that relate to purely aesthetic objective design standards, provide for fees or assessments for the maintenance of common areas, or provide for limits on the amount of rent that may be charged to tenants. The bill would also specify that its provisions do not apply to conservation easements that meet certain conditions, a recorded interest in land comparable to a conservation easement held by a political subdivision, or any settlement, conservation agreement, or conservation easement for which certain conditions apply. The bill would also specify that its provisions do not apply to any recorded deed restriction, public access easement, or other similar covenant that was required by a state agency for the purpose of compliance with a state or federal law under certain circumstances.

This bill would declare that ensuring access to affordable and supportive housing and the production of additional affordable and supportive housing is a matter of statewide concern, not a municipal affair, and that this bill shall therefore apply statewide to all cities and counties, including charter cities, and to all conditions, covenants, restrictions, or limits on the use of land, whether recorded previous to the effective date of this bill or recorded at any time thereafter.

By imposing additional duties on counties with regard to recorded covenants, the bill would impose a state-mandated program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) The lack of available and safe affordable and supportive housing equitably distributed throughout California presents a crisis for Californians that threatens the health of California citizens and their communities.

(b) The Legislature has previously taken action to expand access to affordable and supportive housing.

(c) Recorded covenants burdening real estate have historically been used to perpetuate discrimination and racial segregation in housing throughout the state and have hampered the effectiveness of efforts to expand the availability of affordable and supportive housing.

(d) The safety and welfare of the general public is promoted by eliminating, with limited exceptions as specified herein, the ability of recorded covenants, conditions, restrictions, or private limits on the use of land to prevent the construction or maintenance of additional affordable and supportive housing particularly in areas that have historically excluded this type of housing.

(e) Ensuring access to affordable and supportive housing and the production of additional affordable and supportive housing is a matter of statewide concern and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution. It is the intent of the Legislature that this act therefore apply statewide to all cities and counties, including charter cities, and to all conditions, covenants, restrictions, or private limits on the use of land, whether recorded previous to the effective date of this act or recorded at any time thereafter.

SEC. 2. Section 714.6 is added to the Civil Code, to read:

714.6. (a) Recorded 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 of any interest in real property that restrict the number, size, or location of the residences that may be built on the 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, if an approved restrictive covenant affordable housing modification document has been recorded in the public record as provided for in this section, except as explicitly provided in this section.

(b) (1) The owner of an affordable housing development shall be entitled to establish that an existing restrictive covenant is unenforceable under subdivision (a) by submitting a restrictive covenant modification document pursuant to Section 12956.2 of the Government Code that modifies or removes any existing restrictive covenant language that restricts the number, size, or location of the residences that may be built on the property, or that restricts the number of persons or families that may reside on the property, to the extent necessary to allow the affordable housing development to proceed under the existing declaration of restrictive covenants.

(2) (A) The owner shall submit to the county recorder a copy of the original restrictive covenant, a copy of any notice the owner believes is required pursuant to paragraph (3) of subdivision (g), and any documents the owner believes necessary to establish that the property qualifies as an affordable housing development under this section prior to, or simultaneously with, the submission of the request for recordation of the restrictive covenant modification document.

(B) Before recording the restrictive covenant modification document, pursuant to subdivision (b) of Section 12956.2 of the Government Code, the county recorder shall, within five business days of receipt, submit the documentation provided to the county recorder by the owner pursuant to subparagraph (A) and the modification document to the county counsel for review. The county counsel shall determine whether the original restrictive covenant document restricts the property in a manner prohibited by subdivision (a), whether the owner has submitted documents sufficient to establish that the property qualifies

as an affordable housing development under this section, whether any notice required under this section has been provided, whether any exemption provided in subdivision (g) or (h) applies, and whether the restriction may no longer be enforced against the owner of the affordable housing development and that the owner may record a modification document pursuant to this section.

(C) Pursuant to Section 12956.2 of the Government Code, the county counsel shall return the documents and inform the county recorder of the county counsel's determination within 15 days of submission to the county counsel. If the county counsel is unable to make a determination, the county counsel shall specify the documentation that is needed in order to make the determination. If the county counsel has authorized the county recorder to record the modification document, that authorization shall be noted on the face of the modification or on a cover sheet affixed thereto.

(D) The county recorder shall not record the modification document if the county counsel finds that the original restrictive covenant document does not contain a restriction prohibited by this section or if the county counsel finds that the property does not qualify as an affordable housing development.

(E) A modification document shall be indexed in the same manner as the original restrictive covenant document being modified. It shall contain a recording reference to the original restrictive covenant document, in the form of a book and page or instrument number, and date of the recording. The effective date of the terms and conditions of the modification document shall be the same as the effective date of the original restrictive covenant document, subject to any intervening amendments or modifications, except to the extent modified by the recorded modification document.

(3) If the holder of an ownership interest of record in property causes to be recorded a modification document pursuant to this section that modifies or removes a restrictive covenant that is not authorized by this section, the county shall not incur liability for recording the document. The liability that may result from the unauthorized recordation shall be the sole responsibility of the holder of the ownership interest of record who caused the unauthorized recordation.

(4) A restrictive covenant that was originally invalidated by this section shall become and remain enforceable while the property subject to the restrictive covenant modification is utilized in any manner that violates the terms of the affordability restrictions required by this section.

(5) If the property is utilized in any manner that violates the terms of the affordability restrictions required by this section, the city or county may, after notice and an opportunity to be heard, record a notice of that violation. If the owner 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 release of the notice of violation, and if approved by the city or county, a release of the notice of violation may be recorded.

(6) The county recorder shall charge a standard recording fee to an owner who submits a modification document for recordation pursuant to this section.

(c) (1) Subject to paragraph (2), this section shall only apply to restrictive covenants 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 a property. This section does not apply to any other covenant, including, but not limited to, covenants that:

(A) Relate to purely aesthetic objective design standards, as long as the objective design standards are not applied in a manner that renders the affordable housing development infeasible.

(B) Provide for fees or assessments for the maintenance of common areas.

(C) Provide for limits on the amount of rent that may be charged to tenants.

(2) Paragraph (1) shall not apply to restrictive covenants, fees, and assessments that have not been consistently enforced or assessed prior to the construction of the affordable housing development.

(d) In any suit filed to enforce the rights provided in this section or defend against a suit filed against them, a prevailing owner of an affordable housing development, and any successors or assigns, or a holder of a conservation easement, shall be entitled to recover, as part of any judgment, litigation costs and reasonable attorney's fees, provided that any judgment entered shall be limited to those costs incurred after the modification document was recorded as provided by subdivision (b). This subdivision shall not prevent the court from awarding any prevailing party litigation costs and reasonable attorney's fees otherwise authorized by applicable law, including, but not limited to, subdivision (d) of Section 815.7 of the Civil Code.

(e) Nothing herein shall be interpreted to modify, weaken, or invalidate existing laws protecting affordable and fair housing and prohibiting unlawful discrimination in the provision of housing, including, but not limited to, prohibitions on discrimination in, or resulting from, the enforcement of restrictive covenants.

(f) (1) Provided that the restrictions are otherwise compliant with all applicable laws, this section does not invalidate local building codes or other rules regulating either of the following:

(A) The number of persons who may reside in a dwelling.

(B) The size of a dwelling.

(2) This section shall not be interpreted to authorize any development that is not otherwise consistent with the local general plan, zoning ordinances, and any applicable specific plan that apply to the affordable housing development, including any requirements regarding the number of residential units, the size of residential units, and any other zoning restriction relevant to the affordable housing development.

(3) This section does not prevent an affordable housing development from receiving any bonus or incentive pursuant to any statute listed in Section 65582.1 of the Government Code or any related local ordinance.

(g) (1) Subject to paragraph (2), this section does not apply to:

(A) Any conservation easement, as defined in Section 815.1, that is recorded as required by Section 815.5, and held by any of the entities or organizations set forth in Section 815.3.

(B) Any interest in land comparable to a conservation easement that is held by any political subdivision and recorded in the office of the county recorder of the county where the land is situated.

(2) The exclusion from this section of conservation easements held by tax-exempt nonprofit organizations, as provided in subparagraph (A) of paragraph (1), applies only if the conservation easement satisfies one or more of the following:

(A) It was recorded in the office of the county recorder where the property is located before January 1, 2022.

(B) It is, as of the date of recordation of the conservation easement, held by a land trust or other entity that is accredited by the Land Trust Accreditation Commission, or any successor organization, or is a member of the California Council of Land Trusts, or any successor organization, and notice of that ownership is provided in the text of the recorded conservation easement document, or if that notice is not provided in the text of the recorded conservation easement document, the land trust or other entity provides documentation of that accreditation or membership within 30 days of receipt of either of the following:

(i) A written request for that documentation.

(ii) Any written notice of the intended modification of the conservation easement provided pursuant to paragraph (3).

(C) It was funded in whole or in part by a local, state, federal, or tribal government or was required by a local, state, federal, or tribal government as mitigation for, or as a condition of approval of, a project, and notice of that funding or mitigation requirement is provided in the text of the recorded conservation easement document.

(D) It is held by a land trust or other entity whose purpose is to conserve or protect indigenous cultural resources, and that purpose of the land trust or other entity is provided in the text of the recorded conservation easement document.

(E) It, as of the date of recordation of the conservation easement, burdens property that is located entirely outside the boundaries of any urbanized area or urban cluster, as designated by the United States Census Bureau.

(3) (A) At least 60 days before submission of a modification document modifying a conservation easement to a county recorder pursuant to subdivision (b), the owner of an affordable housing development shall provide written notice of the intended modification of any conservation easement to the parties to that conservation easement and any third-party beneficiaries or other entities that are entitled to receive notice of changes to or termination of the conservation easement with the notice being sent to the notice address of those parties as specified in the recorded conservation easement. The notice shall include a return mailing address of the owner of the affordable housing development, the approximate number, size, and location of intended structures to be built on the property for the purposes of affordable housing, and a copy of the intended modification document, and shall specify that it is being provided pursuant to this section.

(B) The county recorder shall not record any restrictive covenant modification document unless the county recorder has received confirmation from the county counsel that any notice required pursuant to subparagraph (A) was provided in accordance with subparagraph (A).

(h) This section shall not apply to any settlement, conservation agreement, or conservation easement, notice of which has been recorded, for which either of the following apply:

(1) It was entered into before January 1, 2022, and limits the density of or precludes development in order to mitigate for the environmental impacts of a proposed project or to resolve a dispute about the level of permitted development on the property.

(2) It was entered into after January 1, 2022, and limits the density of or precludes development where the settlement is approved by a court of competent jurisdiction and the court finds that the density limitation is for the express purpose of protecting the natural resource or open-space value of the property.

(i) The provisions of this section shall not apply to any recorded deed restriction, public access easement, or other similar covenant that was required by a state agency for the purpose of compliance with a state or federal law, provided that the recorded deed restriction, public access easement, or similar covenant contains notice within the recorded document, inclusive of its recorded exhibits, that it was recorded to satisfy a state agency requirement.

(j) For purposes of this section:

(1) "Affordable housing development" means a development located on the property that is the subject of the recorded restrictive covenant and that meets one of the following requirements:

(A) The property is subject to a recorded affordability restriction requiring 100 percent of the units, exclusive of a manager's unit or units, be made available at affordable rent to, and be occupied by, lower income households for 55 years for rental housing, unless a local ordinance or the terms of a federal, state, or local grant, tax credit, or other project financing requires, as a condition of the development of residential units, that the development include a certain percentage of units that are affordable to, and occupied by, low income, lower income, very low income, or extremely low income households for a term that exceeds 55 years for rental housing units.

(B) The property is owned or controlled by an entity or individual that has submitted a permit application to the relevant jurisdiction to develop a project that complies with subparagraph (A).

(2) "Affordable rent" shall have the same meaning as defined in Section 50053 of the Health and Safety Code.

(3) "Lower income households" shall have the same meaning as defined in Section 50079.5 of the Health and Safety Code.

(4) "Modification document" means a restrictive covenant modification document described in paragraph (1) of subdivision (b).

(5) "Restrictive covenant" means any recorded covenant, condition, restriction, or limit on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest that restricts the number, size, or location of the residences that may be built on the property or that restricts the number of persons or families who may reside on the property, as described in subdivision (a).

SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.