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AB-911 Unlawfully restrictive covenants: affordable housing. (2023-2024)

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Assembly Bill No. 911

CHAPTER 750

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

[Approved by Governor October 11, 2023. Filed with Secretary of State October 11, 2023.]

LEGISLATIVE COUNSEL'S DIGEST

AB 911, Schiavo. Unlawfully restrictive covenants: affordable housing.

Existing law permits a person who holds or is acquiring an ownership interest of record in property that the person believes is the subject of an unlawfully restrictive covenant based on, among other things, the number of persons or families who may reside on the property, to record a restrictive covenant modification. Existing law entitles the owner of an affordable housing development to establish that an existing restrictive covenant is unenforceable by submitting a restrictive covenant modification document that modifies or removes any existing restrictive covenant language. Before recording the modification document, existing law requires the owner to submit to the county recorder a copy of the original restrictive covenant and any documents the owner believes necessary to establish that the property qualifies as an affordable housing development for purposes of these provisions. As part of this process, existing law requires the county counsel to determine, among other things, if the property qualifies as an affordable housing development and if a modification document may be recorded. If the county counsel has authorized the county recorder to record the modification document, that authorization is required to be noted on the face of the modification or on a cover sheet affixed to it.

This bill would require the county recorder to notify the owner or submitting party of the county counsel's determination without delay, so that notice may be given by the owner regarding the authorization to record the modification document. The bill would permit the owner, upon receipt of that notification, to mail copies of the modification documents and related materials by certified mail to anyone who the owner knows has an interest in the property or the restrictive covenant. The bill would also establish a process by which notice by the owner to the intended recipient would be deemed given. The bill would provide that notice by the owner is optional and failure to provide it does not invalidate a recorded restrictive covenant modification document.

Existing law prohibits the county recorder from recording the modification document if the county counsel finds that the original restrictive covenant document does not contain a prohibited restriction, or if the county counsel finds that the property does not qualify as an affordable housing development.

This bill would additionally prohibit the owner from recording the modification document if the owner of the property is not yet its record title owner but is instead a beneficial owner, as specified, until the owner closes escrow on the property and becomes its record title owner. For purposes of these provisions, the bill would define "owner" to mean any record title owner of the property, beneficial owner of the property, or individual controlling the property for purposes of developing an affordable housing project, as specified.

Existing law requires the county recorder to charge a standard recording fee to an owner who submits a modification document for recordation pursuant to these provisions.

This bill would, instead, authorize the county recorder to charge the above-described standard recording fee.

This bill would additionally require a suit that challenges the validity of a restrictive covenant modification document that is filed by a party that has been given notice as described above to be filed within 35 days of that notice. The bill would make conforming changes to these provisions.

By placing additional duties on county officials, the bill would impose a state-mandated local 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 no reimbursement is required by this act for a specified reason.

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

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

SECTION 1. Section 714.6 of the Civil Code is amended 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, and the county recorder shall notify the owner or submitting party of the county counsel's determination without delay so that the notice described in subparagraph (D) may be given.

(D) Upon being notified that the county counsel has authorized the county recorder to record the modification document, the owner may mail, by certified mail to anyone who the owner knows has an interest in the property or in the restrictive covenant, a copy of the modification document, together with a copy of this section and a written explanation that the modification has been applied for and approved for recordation by the county counsel pursuant to this section. That notice

shall be deemed given if the notice is actually received by the intended recipient or if the notice is mailed by certified mail both to an address for notice indicated in the restrictive covenant, if any, and to the intended recipient's address as shown in the last equalized assessment roll, if that address reasonably can be ascertained from the assessment roll. The owner may also publish notice pursuant to Section 6061 of the Government Code identifying that a modification document pursuant to this section has been submitted to the county recorder and approved for recordation by the county counsel, and that the modification document is available for public inspection in the office of the county recorder. The notice shall also identify the property by assessor's parcel number and mailing address. If no mailing address has been assigned for the property, then the property shall be identified instead by its nearest intersection. If the owner elects to publish notice in this manner, then notice shall be deemed given to anyone whose interest does not appear of record or for whom an address for notice does not appear of record and cannot reasonably be ascertained from the assessment roll. Notice as described in this subparagraph is optional, and failure to provide it shall not, in any manner, invalidate a restrictive covenant modification document recorded pursuant to this section.

(E) 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. If the owner of the property is not yet its record title owner, but is instead a beneficial owner with a right pursuant to a purchase and sale or similar agreement to purchase the property, then the owner shall not record the modification document until the owner closes escrow on the property and becomes its record title owner.

(F) 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 may 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) (1) Any suit filed by a party that is deemed to have been given notice as described in subparagraph (D) of paragraph (2) of subdivision (b), which challenges the validity of a restrictive covenant modification document pursuant to this section, shall be filed within 35 days of that notice.

(2) 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).

(3) 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) This section shall not 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) (i) 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).

(ii) For purposes of this subparagraph:

(I) "Controlled" includes, without limitation, the right to acquire the property under an option agreement, purchase and sale agreement, or similar agreement.

(II) "Permit application" includes, without limitation, a building permit application, an application pursuant to Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 of the Government Code, including a preliminary application pursuant to Section 65941.1 of the Government Code, an application for a zoning or general plan amendment, an application for a specific plan or amendment to a specific plan, a notice of intent or an application for development pursuant to Section 65913.4 of the Government Code, or an application for development pursuant to Section 65912.110 of the Government Code.

(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) "Owner" means any record title owner of the property, any beneficial owner of the property, or an entity or individual controlling the property for purposes of subparagraph (B) of paragraph (1).

(6) "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. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.