



# HAWAI‘I CIVIL RIGHTS COMMISSION

## KOMIKINA PONO KĪWILA O HAWAI‘I

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Wednesday, March 12, 2025, at 9:00 a.m.  
Conference Room 430 & Videoconference

To:  
COMMITTEE ON HOUSING  
Rep. Luke A. Evslin, Chair  
Rep. Tyson K. Miyake, Vice Chair

From:  
Dr. William J. Puette, Chair  
and Commissioners of the Hawai‘i Civil Rights Commission

### **Re: S.B. No. 31 S.D. 2**

### **SUPPORT**

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai‘i’s laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services. The HCRC carries out the Hawai‘i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

### **The HCRC SUPPORTS S.B. 31 and offers comments.**

Section 515-6 of the Hawai‘i Revised Statutes currently prohibits discriminatory restrictive covenants and conditions based on Hawai‘i’s protected classes: race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection.

The HCRC supports adding a definition of discriminatory restrictive covenant and new section (d) of 515-6 which allows a person who discovers a recorded discriminatory restrictive covenant to take action to invalidate the covenant without liability which may reduce time, cost, and other barriers to removing discriminatory covenants.

Discriminatory restrictive covenants are more than just evidence of a painful past, but a formal, written history of discriminatory practices that have resulting in division and inequity in society today.

Hawai‘i’s fair housing laws provide protection for more protected classes than

Federal law. The HCRC appreciates S.D.1 and S.D. 2 of this bill which specify all the classes protected by Hawai'i state law enumerated in Section 515-2(3) of the Hawai'i Revised Statutes.

The HCRC SUPPORTS S.B. 31, S.D.2.



## **Statement of Jane Sternecky, Legislative Counsel for the Uniform Law Commission, to the Hawaii Committee on Housing Regarding Senate Bill 31/SD 2 Relating to Property.**

Chair Evslin, Vice Chair Miyake, and Members of the Committee:

Thank you for considering Senate Bill 31/SD 2, regarding the removal of unlawful restrictive covenants from property records. This bill is conceptually similar to a uniform act that aims to achieve the same goals: the Uniform Unlawful Restrictions in Land Records Act (the “Act”). However, the bill creates a distinct process for removal of discriminatory restrictive covenants that may not adequately address concerns that were brought up by the real estate and land title industries during the course of the Uniform Law Commission’s two-year drafting process. The purpose of my testimony today is to provide additional background and hopefully encourage the sponsors of SB 31/SD 2 to amend the bill to more closely align with the Act.

First, both the bill and the Act recognize that even though discriminatory restrictive covenants are no longer enforceable and are illegal to record, homeowners who encounter them nonetheless find them to be offensive and upsetting. Accordingly, both the bill and the Act aim to create a mechanism to allow the removal of these unlawful restrictions.

However, the bill creates two distinct processes for removal of a discriminatory restrictive covenant. One of these processes, in section 2(d)(1) of the bill, is more complex than the Act: it allows discriminatory restrictions to be removed by recording a statement in the property records during a real estate transaction, with the consent of all of the parties. The second process, described in section 2(d)(2) of the bill, allows *anyone* who discovers a discriminatory restriction to record a separate notice stating that the covenant is invalid and unenforceable.

By requiring the consent of all parties to a real estate transaction in order to remove a discriminatory restrictive covenant during the purchase or sale process, the bill creates a narrow window for removal and gives a seller or buyer the opportunity to stop a discriminatory restriction from being removed. Additionally, this process would likely prohibit Hawaiians who own property in co-ops, condominiums, or planned communities from being able to remove discriminatory restrictions because of the impracticability of gathering consent from all of the other members of their residential community, who could easily be viewed as parties to the real estate transaction.

On the other hand, allowing anyone who encounters a discriminatory restrictive covenant on anyone’s property to record an amendment to effectively remove it could complicate the chain

of title for the property. Additionally, any such notice would likely not end up being indexed in a way that would be readily accessible to current or future owners of the property.

Instead of creating two different tracks for removal of a discriminatory restriction during a real estate transaction and outside of it, the Act empowers single-family homeowners and those who own property in condominiums, co-ops, and planned communities to record an amendment that effectively removes a discriminatory restriction. This process is broad enough to allow homeowners who encounter discriminatory restrictions the right to remove them without having to gather the consent of several parties, while still placing a reasonable limitation on which parties are able to modify a property's land records.

Furthermore, the Act contains a sample amendment form that can be used by property owners who wish to effectively remove a discriminatory restriction from their land records. This ensures that property owners do not break federal law and reprint the text of a discriminatory restrictive covenant, and creates a straightforward and inexpensive process that can be easily used by non-attorneys.

We sincerely appreciate that Hawaii is taking these steps to address our country's painful history of discrimination in housing, and we hope that reasonable amendments can be made to SB 31 to align with the straightforward, accessible, and thorough process created by the Uniform Unlawful Restrictions in Land Records Act. A copy of the Act is attached for this Committee's reference.

Thank you for your consideration. Please do not hesitate to get in touch with any questions.

# Uniform Unlawful Restrictions in Land Records Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES



*WITH COMMENTS*

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

October 18, 2023

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## Uniform Unlawful Restrictions in Land Records Act

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# Uniform Unlawful Restrictions in Land Records Act

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# Uniform Unlawful Restrictions in Land Records Act

## Prefatory Note

Throughout the first half of the 20<sup>th</sup> century, owners and developers of real property commonly inserted racially restrictive covenants into deeds and declarations. This legal mechanism reinforced the prevailing social norms that viewed racial segregation as appropriate and served broadly as a mechanism for private enforcement of segregation in housing. Mid-century the U.S. Supreme Court ruled it unconstitutional for courts to enforce racial covenants. Then, in 1968, in response to the Civil Rights Movement, the U.S. Congress passed the Fair Housing Act further prohibiting the use of covenant, among other devices, that facilitate discrimination in the sale, rental, and financing of housing based on race, religion, national origin and sex. A flurry of state and local fair housing statues followed over the next decade. Litigation and legislative activity involving racial covenants continued thereafter, but at relatively reduced levels during the 20-year period before the end of the millennium and the 20-year period after it.

Then, midway through 2020, in the wake of the widely televised killing of George Floyd, later ruled a murder, by a police officer, a period of national mourning ensued along with some soul-searching over the long-troubled confluence of race and citizenship in our country. In response state legislatures across the country looked far and wide for statutory solutions for systemic and symbolic patterns of racial subordination, including focusing renewed and heightened legislative attention on racial covenants. Regrettably, a number of these purported solutions have been uneven or worse. Many proposed bills were either inadequate or would introduce avoidable problems and inconsistencies in our land and historical records. A uniform law, therefore, may be of great value to assist state legislatures in enacting effective solutions to confront the continuing harm resulting from the existence of unlawful restrictions in public records. In this Prefatory Note, we briefly describe the historical context of the rise and fall of legally valid racial restrictive covenants. We then turn to the current context giving rise to the proposed Act, and finally conclude by discussing a number of salient policy considerations and choices reflected in the Act.

Three key considerations and related choices reflected in the Act warrant mention in these introductory comments. First, while the unenforceability and invalidity of “racial covenants” is well-settled law throughout the country, there are various other discriminatory restrictions based on characteristics or the status of persons that are prohibited in some states but not in others. The Act offers a simple and uniform approach for dealing with this underlying state variability of unlawful restrictions in land records. Second, nothing in this Act requires or permits the physical destruction, alteration, or sequestration of historical documents in land records. To remove an unlawful restriction under this Act is to amend a record chain of title, not to disturb or destroy a historical record. We cannot change our history and it is essential to preserve the records of our past, lest we are encouraged to repeat it. At the same time, homeowners needn’t be conscripted as carriers of history, hurtful and without legal effect, in their chain of title. They should, if they so desire, be able to remove offensive unlawful restrictions from the chain of title of their real estate. Which brings us to the third, and related, key consideration. Namely, this Act adopts a prospective orientation rather than a retrospective one on the legality of racially discriminatory restrictions. It is existing federal and state law, and

not this Act, that makes discriminatory restrictions in land records unlawful. Yet, this Act accomplishes a separate distinct legal effect by allowing property owners to renounce and remove mention of these unlawful restrictions from their chain of title going-forward.

## Historical Context of Racial Restrictive Covenants

Covenants in land records purporting to restrict ownership, lease, occupancy, or other use of real property based on the characteristics or the status of persons have a long and continuing history across the United States. An 1886 deed recorded in Ventura County, California, prohibiting rental to Chinese men provides an early example.<sup>1</sup> A broad class of restrictive covenants based on race, religion, ethnicity and nationality reached great prominence during the first half of the 20<sup>th</sup> century. Homeowners and developers placed these so-called “racial (or racially) restrictive covenants” into deeds and declarations to exclude from real property persons of Asian or Jewish ancestry, as well as Hispanics, Irish, Italians, and Hawaiians among numerous other categories and characterizations of persons, and most commonly to exclude Black Americans. While initially observed sparsely, the spread of racial covenants expanded significantly between the first and second World Wars—picking up after the Supreme Court ruled, in 1917, that racial zoning by municipalities and other governmental bodies violated the Fourteenth Amendment of the U.S. Constitution,<sup>2</sup> and later proliferating with the “dramatic transformation” of the nation’s urban landscape “largely in response to the rapid urbanization of immigrants and migrants of color, whether from the rural South or from abroad.”<sup>3</sup>

During the interwar period and immediately after, state courts were often enlisted to enforce racial covenants. However, in 1948 the Supreme Court ruled (in *Shelley v. Kraemer*) that equitable enforcement of these restrictions violated the Equal Protection Clause of the Fourteenth

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<sup>1</sup> See *Gandolfo v. Hartman*, 49 Fed. 181 (C. C. S. D. Cal. 1892). Restrictions on personal characteristics beyond race, religion, ethnicity and nationality are also commonly observed in land records. For example, since the 1950s deed restrictions for senior housing could be found in Sun City, Arizona. Such age restrictions in deeds and other recorded documents have only become more common throughout the country. See Karl L. Guntermann and Seongman Moon, “Age Restriction and Property Values” *JRER*, 2002, 24(3), 263-278; Allen, M. T., “Measuring the Effects of ‘Adults Only’ Age Restrictions on Condominium Prices,” *Journal of Real Estate Research*, 1997, 14, 339-46; Do, A. Q. and G. Grudnitski, “The Impact on Housing Values of Restrictions on Rights of Ownership: The Case of an Occupant’s Age,” *Real Estate Economics*, 1997, 25, 683-93; Hughes, W. T. and G. K. Turnbull, “Uncertain Neighborhood Effects and Restrictive Covenants,” *Journal of Urban Economics*, 1996, 39, 160-72. Restrictions based on age are not necessarily unlawful. See The Housing for Older Persons Act of 1995 (HOPA) (Pub. L. 104-76, 109 Stat. 787 (1995), amending Title VIII of the Civil Rights Act of 1968 (Fair Housing Act). Moreover, the unlawfulness of other discriminatory restrictions—such as those based on gender and sex among personal traits, characteristic or characterizations—are not uniformly prohibited or allowed across all jurisdictions.

<sup>2</sup> See *Buchanan v. Warley*, 245 U.S. 60, 81–82 (1917), overruling racial zoning ordinances in cities such as Atlanta, Baltimore, Dallas Louisville, Richmond and Winston-Salem. Later, in *Corrigan v. Buckley*, 271 U.S. 323 (1926), the Supreme Court affirmed that racial covenants reflecting transactions between non-state actors did not violate the Fourteenth Amendment.

<sup>3</sup> Michael Jones-Correa, “The Origins and Diffusion of Racial Restrictive Covenants.” *Political Science Quarterly* 115, no. 4 (2000): 541–68, 551-52. Other important drivers of racial covenants during this time (and later) included their favor among federal housing agencies, lenders, insurers, other real estate professionals and their associations. See Richard R.W. Brooks and Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (2013); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

Amendment, followed by a 1953 ruling (in *Barrows v. Jackson*) that damages awarded at law were also unconstitutional.<sup>4</sup> After these rulings courts could no longer enforce racial covenants, but private actors could still make and record them (and many people did so). It was not until 1968, under the Fair Housing Act, that making new discriminatory restrictive covenants became prohibited among private actors (with some limited exceptions, e.g., religious corporate persons). Old racial covenants, of course, remained in the land records and when reported they continued to have effect. There was not only an emotional effect felt by current or prospective homeowners who took offense on discovering racial covenants in their chain of title, as many homeowners are so offended today, but these racial restrictions appeared to have also had a lingering effect on residential housing patterns more than 20 years after *Shelley*.<sup>5</sup> Their presence in the public record allowed the chain of title to convey information to various actors involved in a real estate transactions that could impact housing segregation even absent the legal enforceability of racial covenants.<sup>6</sup>

### **Current Context Giving Rise to the Act**

Given that racially restrictive covenants no longer have any legal effect, and have been legally ineffective for more than a half century, why should they be legislatively addressed at this time? Moreover, since racial covenants are thought to have little, if any, practical effect on current residential patterns, what's the point of addressing these symbols of the past when ongoing racial segregation remains a real and more pressing matter? Answers to these questions, in this time of reckoning over the country's racial past and current problems, may appear both obvious and overdetermined. Yet, not everyone shares the same sense of the nation's history and racial problems and even fewer, perhaps, agree on whether or how to preserve this history and determine the most effective solutions to the problems.

Consensus or not, many states have introduced legislation dealing with racial covenants, and under the lens of media attention legislators across the country are searching for ready responses to constituents of all races concerned about systemic racism. "[T]he deaths of George Floyd, Breonna Taylor, and numerous other black citizens at the hands of police officers has

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<sup>4</sup> *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) and *Barrows v. Jackson*, 346 U.S. 249, 258 (1953).

<sup>5</sup> In 1969 Jerris Leonard, as Assistant Attorney General, wrote a letter to the nation's leading title companies, asking them to stop reporting these restrictions while expressing the belief that "the effects of these covenants had not been dissipated by the *Shelley* decision."

<sup>6</sup> See Richard R. W. Brooks, "Covenants without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements." *The American Economic Review* 101, no. 3 (2011): 360-65. The direct influence of *unenforceable* racial restrictive on residential segregation is largely historical. There is little evidence of any continuing segregative effect from racial covenants. Occasionally, however, some impact is publicly revealed. For example, in 2005 a white homeowner lost a case for refusing to sell to a black buyer because, he claimed, "a deed restriction prevented him from selling to certain minorities." (Richmond Times Dispatch, December 9, 2005, B-1). Perhaps such things happen more often than are reported, but compared to their former influence on housing segregation such instances of discrimination based on "stale covenants," while no doubt hurtful to individual purchasers, are unlikely drivers of current racial residential segregation, which remains disturbingly high on almost any measure. On stale covenants, Robert C. Ellickson, *Stale Real Estate Covenants*, 63 Wm. & Mary L. Rev. 1831 (2022); On racial segregation measures and current levels see, Douglas S. Massey and Nancy A. Denton. "The Dimensions of Residential Segregation." *Social Forces*, 67(2): 281-315 (1988) and Samuel H Kye and Andrew Halpern-Manners, "If Residential Segregation Persists, What Explains Widespread Increases in Residential Diversity?" *Demography*, 60(2):583-605 (2023).

prompted increasing public concern about systemic racism. These calls have included not only demands for policing reforms, but also new and renewed efforts, in some state legislatures, to provide a statutory mechanism for the ‘removal’ of racially restrictive covenants.”<sup>7</sup> These mechanisms, however, have been uneven, and many proposed bills are inadequate or would likely introduce avoidable problems and inconsistencies in the land and historical records. It would be unfair and inaccurate to refer to the haste with which legislation has been passed in this area as a race to the bottom, but neither can it be called a race to the top.

A uniform law would be of great use in guiding legislative efforts in this area and avoiding problems that have already surfaced in a number of statutes that have been recently passed. For example, some states legislated only with respect to race without meaning to exclude the possibility of removal of unlawful restrictions based on other protected personal characteristics or status. As another example, other states have adopted well-intended curative mechanisms in their statutes which will have the unintended effect of republishing unlawful restrictions as part of the removal procedure. This is not only hurtful to many property owners, and unnecessary, but may itself lead to violations of federal and state laws banning such republication. No doubt this effect is unintended, but it could have been avoided by use of the uniform method proposed in this Act, which specifically avoids republication of unlawful restrictions. During the life of this drafting committee, we have become aware of the many approaches that states are taking to legislate the removal of unlawful restrictions in land records. They are all over the place. With each new bill or law enacted, the necessity of a uniform approach becomes evident. In devising an effective uniform approach to removing unlawful restrictions in land records, we looked to a number of policy considerations and choices that are reflected in the Act. We now turn to the most salient of these considerations and choices.

### **Policy Considerations and Choices Reflected in the Act**

The policy choices and considerations reflected in the Act fall under four broad categories, which are elaborated below.

- I. We sought to establish a simple and uniform basis for characterizing the class of unlawful restrictions in land records to which the Act applies. Restrictive covenants (even ones that discriminate, e.g., those favoring persons attaining 55 years of age or more) can offer valuable land use governance and are not necessarily unlawful. Additionally, some restrictive covenants that are in fact invalid or unlawful are so for purposes unrelated to the motivating concerns of this Act. Our aim was to limit application of the Act only to covenants in land records that are unlawful *because* they purport to restrict on the basis of legally protected status or characteristics of persons. Three options presented themselves.

The first option, taken by some state legislatures, looks to only cover racial restrictions. As suggested, we believe this is clearly too narrow. The second option, which a number of other states have adopted, uses a laundry list approach, starting with strictly racial restrictions and going on to other enumerated categories such as gender identity and veteran status, etc. We believe this is likely too expansive for

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<sup>7</sup> Report of the Joint Editorial Board for Uniform Real Property Acts (JEBURPA), June 15, 2021, at p.5.

some states and still has the potential to grow more so with no obvious stopping point of included categories. The third option, reflected in this Act, is to incorporate categories by cross referencing those protected categories which are already included for all states through federal laws and adding to it those additional categories, if any, which are covered by other laws of the state.

The approach selected for this Act allows each individual state to decide whether to add or subtract from its state laws or even to provide for more tailored protected categories with jurisdictions of the state, such as seen in New York and California, which allow for municipal enhancement of protected categories. By deferring to already existing federal and possible state housing protections, the chosen approach promotes state autonomy and avoids some potential opposition to the Act by not inviting debate on the delicate task of determining protected categories. Additionally, we considered (but chose not to specify in the Act) indicia of “protected categories” that may indirectly establish “prohibited restrictions,” such as restrictions on service animals. Again, our approach avoids these issues too, deferring to whatever determinations each state has already made for itself.

- II. We confronted the most controversial question expressed in media coverage and popular conversations regarding these unlawful covenants: What is entailed in removing or striking unlawful restrictive covenants in land records? This question inspired our most extensive exploration of policy considerations and choices reflected in the Act. In the Act, “Remove” means eliminate, by a recorded amendment, any apparent or purportedly continuing effect on title to real property. In other words, under the Act parties can “remove” unlawful restrictions by filing an amendment affecting their chain of title. In adopting this approach, we considered an extensive body of legislative activity. Broadly speaking, legislative responses to racially restrictive covenants and other unlawful restrictions in land records have focused on three distinct strategies that may be pursued in isolation or in combination: (1) adding notices that contravene or disavow unlawful covenants, (2) removing of documents containing unlawful covenants from public view, and (3) physically deleting or redacting unlawful covenants from land records. After careful consideration and extended exchanges, the drafting committee declined to adopt most of the approaches suggested in these three overarching strategies. We briefly review them below, however, to illustrate the breadth of our policy considerations.

The most commonly suggested strategy is the “notice approach,” which may be broad, targeted or tailored. One oft-proposed broad notice strategy involves placement of a stamp or coversheet disavowing or amending unlawful covenants on *all* copies of deeds issued to the public, irrespective of whether the deed contains an offensive restriction. One advantage of this broad approach is that it requires no search costs for identifying specific unlawful covenants. Nor does this approach require republication of any specific offensive language. Additionally, this approach would be broadly educative and informative to the public, but not without some costs. Such a broad sweep would entail greater publication costs than a more targeted or tailored approach. Taking a more targeted approach, a stamp or coversheet could be

placed not on all publicly issued deeds but only those actually containing relevant unlawful covenants. Search costs would be greater under this targeted approach, but aggregate publication costs would be lower. A still more tailored approach, would involve placement of a stamp or coversheet on only deeds containing relevant unlawful covenants *and* only on request of an owner of the property with a deed or other recorded document containing the unlawful covenant.<sup>8</sup> (This tailored approach is closest to the approach adopted in the Act.) Search costs would be lessened under this more tailored approach (as compared to the targeted approach) and aggregate publication costs would be lowest. Whether these costs are to be borne more broadly by the public (state or municipality) or by the private parties directly was a recurrent theme in deliberations. Perhaps the most cost-effective approach would dissociate the notice from the publication of deeds themselves. For example, public notice may be given through local papers, on social media or posted in the clerk’s office or other appropriate government sites (physical or electronic).

Turning to the removal from public view approach, publicly issued deeds would redact, strike-out or otherwise obscure or remove from public view any offensive covenant language. As with the notice approach, the removal from public view approach may be broad, targeted, or tailored. At the broadest scope, *all* publicly issued deeds would remove the offensive covenants, while at the targeted or more narrowly tailored end of things, redacted deeds would be publicly issued only for those who would rather not observe (or have others observe) the offensive restriction in their deeds. The removal from public view approaches do not presuppose elimination or destruction of original deeds containing racially restrictive covenants. Original records would not be altered. Rather, only newly issued copies of deeds containing unlawful covenants would be subject to having the offensive restrictions scrubbed. In counties that have digitized and maintain electronic records of deeds, the costs associated with removing racial and other offending restrictions from deeds is

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<sup>8</sup> Some versions of the notice approaches have been described under the heading “discharge and release.” For instance, Minnesota’s 2019 enactment allows the owner of property affected by such a covenant to “discharge and release [it] . . . permanently from the title” by filing with the county recorder a document entitled “Discharge of Restrictive Covenant Affecting Protected Classes.” This coversheet states that “any restrictive covenant affecting a protected class, including covenants which were placed on the real property with the intent of restricting the use, occupancy, ownership, or financing because of a person’s race, color, creed, national origin, or religious beliefs, is discharged and released from the land.” Nevada adopted a similar approach in 2019; Virginia adopted a similar approach in 2020. See, e.g., Nev. Rev. Stat. § 111.237 (2019) (allowing owner of land with racial covenant in chain of record title to record statutory form declaring covenant is “removed” from the original recorded instrument); Va. Code § 55.1-300.1. (allowing the owner of property with a racially restrictive covenant in the chain of title to record a “Certificate of Release of Certain Prohibited Covenants”). Under California’s statute, if a document contains a racial covenant, then “A county recorder, title insurance company, escrow company, real estate broker, real estate agent, or association that provides a copy [of the document] to any person shall place a cover page or stamp on the first page of the previously recorded document or documents stating, in at least 14-point boldface type, the following: “If this document contains any restriction based on race [and other protected classes], that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to Section 12956.2 of the Government Code.”

less prohibitive than in those counties where land records are still paper bound.<sup>9</sup> At present, the vast majority of counties fall in the latter category, but it is perhaps fair to assume that as technologies improve and costs fall for both scanning and searching documents, including through AI advancement, counties throughout the country will be able to more cost-effectively search deeds for offensive restrictions and produce copies without the offensive language.

Finally, the most aggressive legislative response called for would entail the physical destruction or deletion or redaction of unlawful covenants in land records. This response, as with the prior two responses, may be broad, targeted, or tailored. Whatever the scope, however, the direct costs involved in this approach would likely be substantial—certainly for paperbound records and records kept on microfilm, but also even for electronic records. Moreover, beyond the substantial direct costs of physical deletion of these covenants, the loss of the historical record entailed by such deletion would represent an even greater cost in the eyes of many interested parties.<sup>10</sup> Of course, to some others this loss is not best viewed as a cost, but rather a benefit. Striking a balance between these considerations one may look to “redact-and-sequester” approaches adopted in some states.<sup>11</sup>

III. We sought to devise a simple and straightforward mechanism that common interest communities can use to remove unlawful restrictions in their recorded documents. Removing unlawful restrictions in this context requires some nuance and creativity, raising some important policy considerations. First, the affected community of users is very large and steadily growing in absolute numbers. It is now reasonably estimated that more than a third of all new homes in the US are condominium units or dwellings governed by a mandatory homeowners’ association in which legal changes in the governing documents cannot be made independently by

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<sup>9</sup> San Diego County in California and Hennepin County in Minneapolis, for instance, have both digitized their land records and as a consequence been better able than most counties to respond to demands for deeds without racial covenants.

<sup>10</sup> Offensive and formally renounced proclamations in public documents are commonly preserved rather than destroyed. For example, the Twenty-first Amendment of the U.S. Constitution, repeals the Eighteenth Amendment without removing or redacting Constitution: “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.” U. S. Const., 21<sup>st</sup> Amend., Section 1. Consider also the Fugitive Slave Clause in Article IV, Section 2 (Movement Of Persons Throughout the Union) of the Constitution. [perhaps cite/mention other laws that remain on books, such as those concerning blasphemy or sodomy, though constitutional unenforceable and socially rejected].

<sup>11</sup> For instance, under a 2018 Delaware statute, a property owner with a racial covenant is allowed to request that “the recorder for the county in which the instrument is recorded redact and strike the provision from the instrument.” Once the county attorney concludes that the covenant is unlawful, the recorder maintains the original document with the racial covenant intact, but redacts the covenant from the publicly available copy of the document. [The county attorney may also pre-clear “a list of phrases” that represent unlawful restrictive covenants and allow county recorders to grant requests to remove these phrases without further review.] The recorder retains the unredacted original document in the official records, but it may be made available by the recorder only by subpoena or court order. In this way, the statute balances the owner’s desire to physically destroy the racial covenant with the recorder’s statutory obligation to maintain historical property records. Maryland’s statute follows a similar approach. Md. Real Prop. Code § 3-112 (2019).

each homeowner but must be made in the context of all other owners. For purposes of the Act, one decision made early on by the drafting committee was to use the word “governing instruments” to describe the wide variety of documents typically filed in land records to outline how such communities are governed including any amendments that might be needed.

Second, many Governing Instruments contain legal descriptions and deed references which predate the formation of the entity being governed and which contain unlawful restrictions that may offend many homeowners and which they may like to remove from their public chain of title. Unfortunately, unlike the owners of singularly owned homes (addressed in Section 3 of the Act), an owner subject to a Governing Instrument cannot simply amend their own title but must proceed only as authorized by the Governing Instruments or other law governing amendment of such documents.

Third, to amend Governing Instruments one must follow difficult and confusing requirements, such as obtaining the majority vote (sometimes super majority) of all owners voting in a special meeting, providing notice to all, convincing the majority to vote favorably, and obtain the needed quorum of all owners. The process at best is time consuming and expensive.

The basic choice to meet these challenges was to create a special expedited and simplified process for amending governing instruments solely to remove unlawful restrictions by amendment. By providing for their removal only by majority vote of the governing board of any such community, and eliminating an owners vote entirely, the process was made far simpler for a homeowner to overcome the difficulties described above. Several states have legislated such a procedure in the last three years without any apparent difficulty and similar processes have been endorsed by the largest organization representing the interests of such common interest communities.

IV. We gave much consideration to facilitating the ease with which an individual property owner can take advantage of the Act’s provisions without needing to engage legal counsel or others for the drafting of forms or the like. (In many states, drafting such a form for another person could be considered the practice of law, requiring legal counsel to be engaged rather than a realtor, title company, or other similar professional who may be able to assist.) Based on this rationale the ULC promulgated a form of deed in the Uniform Real Property Transfer on Death Act (URPTODA), which is designed to enable consumers to have an inexpensive and simpler alternative to more costly and complicated forms of estate planning. Based on the same rationale this Act includes an optional section providing such a form.

Several additional considerations recommended inclusion of a form in the Act. First, many real estate industry stakeholders, including title companies and recorders, strongly advocated for the inclusion of a form. Second, providing a form in the Act should limit variation across states which choose to incorporate some such device with their enactments. Third, because recorded instruments often require a specific



layout and language on the face of the document, use of the included form will avoid certain common mistakes preventing effective recordation. Fourth, use of the form will also avoid the risk of inadvertent republication of discriminatory and unlawful covenant in the land records, which may constitute a violation of federal law (Section 804 of the Fair Housing Act as to “publish”) and state law prohibiting the republication of illegal discriminatory covenants. Indeed, some existing state statutes require or encourage (no doubt unintendedly so) the republication of discriminatory language in the forms they have promulgated (*e.g.*, Va. Code § 55.1-300.1). If individual homeowners are left to their own devices, many will likewise repeat the illegal language in the forms and other documents they prepare, execute, and submit for recording.

## **Uniform Unlawful Restrictions in Land Records Act**

### **Section 1. Title**

This [act] may be cited as the Uniform Unlawful Restrictions in Land Records Act.

### **Section 2. Definitions**

In this [act]:

(1) “Amendment” means a document that removes an unlawful restriction.

(2) “Document” means a record recorded or eligible to be recorded in land records.

(3) “Governing instrument” means a document recorded in land records that:

(A) establishes a governing body responsible for management of common areas or facilities used by more than one owner of a property interest affected by the document; and

(B) requires contribution, enforceable by a lien on a separate property interest, of a share of taxes, insurance premiums, maintenance, or improvement of, or services or other expenses for the common benefit of, the real property described in the document.

(4) “Index” means a system that enables a search for a document in land records.

(5) “Land records” means documents and indexes maintained by a recorder.

(6) “Owner” means a person that has a fee interest in real property.

(7) “Person” means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(8) “Record”, used as a noun, means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable

form.

(9) “Recorder” means an officer authorized under other law of this state to accept a document for recordation in land records.

(10) “Remove” means eliminate any apparent or purportedly continuing effect on title to real property.

(11) “Unlawful restriction” means a prohibition, restriction, covenant, or condition in a document that purports to interfere with or restrict the transfer, use, or occupancy of real property:

(A) on the basis of race, color, religion, national origin, sex, familial status, disability, or other personal characteristics; and

(B) in violation of other law of this state or federal law.

#### **Comment**

The term “recorder” has a number of comparable expressions across jurisdictions, such as “recorder of deeds” or “register of deeds.” Moreover, the term “recorder” expresses a functional definition, intended to include any office or official authorized to accept a document for recordation in land records, such as the secretary of state in some states.

This definition does not expand, restrict or otherwise alter substantive law characterizing what is an unlawful restriction. Some jurisdictions establish a more expansive set of unlawful restrictions based on personal characteristics, while others adhere more closely to the federally defined baseline established by the Fair Housing Act of 1968 and its Amendments and related federal statutes, such as the Americans with Disabilities Act and its Amendments.

### **Section 3. Amendment by Owner**

Except with respect to property to which Section 4 applies, an owner of real property subject to an unlawful restriction may submit to the recorder for recordation in the land records an amendment to remove the unlawful restriction, but only as to the owner’s property.

#### **Comment**

The expression “*an* owner” of real property in this Section is meant to imply “*any* owner” in the

context of multiple owners. For property jointly held by multiple owners (such as tenants in common, or tenancy by the entirety, among other forms of joint ownership) two alternative criteria to remove an unlawful restriction may be plausibly put forward: (1) removal may be unilaterally undertaken by *any* owner, and (2) removal may require the agreement or consent of *all* owners. (A plausible third alternative—i.e., removal by a majority of owners—does not exist as a distinct option in the frequently observed two-owner context and was thus dismissed for that reason among others.) After weighing the competing considerations for allowing *any* owner, or requiring *all* owners, to remove an unlawful restriction, the drafting committee unanimously agreed to adopt the former allowing *any* owner to exercise rights under Section 3. Allowing *any* owner to remove an unlawful restriction avoids holdouts and other coordination challenges. Removal by *any* owner, as opposed to all owners, is more consistent with the weight of considerations and the aim of this act, which is to facilitate removal unlawful discriminatory restrictions in land records.

#### **Section 4. Amendment by Association of Owners**

(a) The governing body of an association of owners identified in a governing instrument may, without a vote of the members of the association, amend the governing instrument to remove an unlawful restriction.

(b) A member of an association of owners may request, in a record that sufficiently identifies an unlawful restriction in the governing instrument, that the governing body exercise its authority under subsection (a). Not later than 90 days after the governing body receives the request, the governing body shall determine reasonably and in good faith whether the governing instrument includes the unlawful restriction. If the governing body determines the governing instrument includes the unlawful restriction, the governing body not later than 90 days after the determination shall amend the governing instrument to remove the unlawful restriction.

(c) Notwithstanding any provision of the governing instrument or other law of this state, the governing body may execute an amendment under this section.

(d) An amendment under this section is effective notwithstanding any provision of the governing instrument or other law of this state that requires a vote of the members of the association of owners to amend the governing instrument.

## Comment

Many declarations and covenants as well as state statutes (concerning both common interest communities and general non-stock corporate laws) contain provisions that require a vote of a majority, and sometimes a super majority, of association members to approve any amendments to their governing instruments. Rather than amend all such provisions (which is a possible alternative choice) this subsection specifically overrules all such limitations and allows for a faster, easier and less expensive means of removing unlawful restrictions from such instruments by vote of the governing board notwithstanding any contrary other provisions.

### **Section 5. Requirements and Limitations of Amendment**

(a) An amendment under this [act] must identify the owner, the real property affected, and the document containing the unlawful restriction. The amendment must include a conspicuous statement in substantially the following form:

“This amendment removes from this deed or other document affecting title to real property an unlawful restriction as defined under the Uniform Unlawful Restrictions in Land Records Act. This amendment does not affect the validity or enforceability of a restriction that is not an unlawful restriction.”

(b) The amendment must be executed and acknowledged in the manner required for recordation of a document in the land records. The amendment must be recorded in the land records of each [county] in which the document containing the unlawful restriction is recorded.

(c) The amendment does not affect the validity or enforceability of any restriction that is not an unlawful restriction.

(d) The amendment or a future conveyance of the affected real property is not a republication of a restriction that otherwise would expire by passage of time under other law of this state.

**Legislative Note:** In subsection (b), insert the name of the state’s jurisdiction where documents are recorded in the land records.

## Comment

This Act requires that a restriction, once removed, would have to be reinstated with an amendment. That is, removing a restriction under this Act, means that if at some later point the restriction is no longer unlawful, it nevertheless has been removed and does not spring back into life.

The bracketed term (i.e., “[county]”) in Subsection (b) stands for the name of the state’s jurisdiction where documents are recorded in the land records should be. If the governing instrument of an association is recorded in multiple jurisdictions, the amendment must be recorded in the land records of each jurisdiction.

**[Section 6. Optional Form for Amendment by Owner**

The following form may be used by an owner to make an amendment under Section 3:

**Amendment by Owner to Remove an Unlawful Restriction**

This Amendment is recorded under [cite to the state’s Uniform Unlawful Restrictions in Land Records Act] (the Act), by an Owner of an interest in real property subject to an unlawful restriction as defined under the Act.

(1) Name of Owner: \_\_\_\_\_

(2) Owner’s property that is subject to the unlawful restriction is described as follows:

Address: \_\_\_\_\_

Legal Description: \_\_\_\_\_

(3) This Amendment amends the following document:

Title of document being amended: \_\_\_\_\_

Recording date of document being amended: \_\_\_\_\_

Recording information (book/page or instrument number): \_\_\_\_\_

This Amendment removes from the document described in paragraph (3) all unlawful restrictions as defined under the Act. Removal of an unlawful restriction through this Amendment does not affect the validity and enforceability of any other restriction that is not an unlawful restriction as defined under the Act, at the time of filing this Amendment. This Amendment is not effective if

the property is subject to a governing instrument as defined under the Act.

\_\_\_\_\_  
Owner's Signature

\_\_\_\_\_  
Date

Notary Acknowledgment

Witnesses (if required)]

*Legislative Note: A state may include the optional form in the act. The state should conform the notary and witness requirements in the optional form to state law.*

### **Comment**

There are many advantages of making available to individual homeowners a form to remove to an unlawful restriction. These include the ease, consistency, and cost effectiveness of using a standard form. Additionally, and most pressing, the form will effectuate the aim of recording removal of the unlawful restriction. That is, to be eligible to be recorded, real property documents must often adopt a certain layout and contain necessary information (such as current owner name, legal description) in order for clerks or county recorders to be able to properly index the document. Homeowners without legal counsel may have great difficulty drafting a document that satisfies these requirements among other conditions imposed by state recording acts.

### **Section 7. Duty and Liability of Recorder**

(a) The recorder shall record an amendment submitted under this [act], add the amendment to the index, and cross reference the amendment to the document containing the unlawful restriction.

(b) The recorder and the recorder's jurisdiction are not liable for recording an amendment under this [act].

### **Section 8. Uniformity of Application and Construction**

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

### **Section 9. Relation to Electronic Signatures in Global and National Commerce Act**

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or

supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

**Legislative Note:** *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “, as amended”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

### Comment

This is a standard section in Uniform Law Commission acts that provides an express defense for this act against preemption by the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq. (“E-Sign”). E-Sign, enacted into federal law in 2000, governs the legal validity of electronic records and signatures in private and governmental transactions in the United States. In most circumstances, it applies to permit electronic signatures to satisfy the statute of frauds even in states that otherwise retain paper or manual signature requirements. 15 U.S.C. § 7001. E-sign expressly permits states to “modify, limit, or supersede” its requirements if (a) the state law is consistent with E-sign and (b) the state law makes “specific reference” to E-sign. 15 U.S.C. § 7002(a). This act has provisions that permit electronic records and signatures to be used. Consequently, this provision is the “specific reference” required to ensure that these provisions are covered by the non-preemption provision of E-sign. The probability of conflict preemption for this act is very unlikely in any event since the act has been drafted to be consistent with E-Sign and the Uniform Electronic Transactions Act. But this standard section satisfies the express technical requirements of E-sign to qualify for non-preemption, so it provides even greater assurance that the act is not preempted by federal law. This provision also makes clear that this act does not attempt to modify, limit, or supersede provisions of E-sign that permit states to continue to require non-electronic records and signatures in certain situations. These situations include certain consumer contracts, notices to cancel important services (such as utilities and health insurance), and notices of product recalls. 15 U.S.C. §§ 7001(c), 7003(b). Since this act does not apply to those situations, these disclaimers are not essential, but they are included anyway to protect against confusion and because this is a standard ULC provision.

### [Section 10. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

**Legislative Note:** *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.*



**Section 11. Effective Date**

This [act] takes effect . . .

**SB-31-SD-2**

Submitted on: 3/11/2025 1:36:01 AM

Testimony for HSG on 3/12/2025 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Ellen Awai	Individual	Support	Written Testimony Only

Comments:

I support SB31.SD2. There is too much discrimination practices being done by those who do not understand the law, when documents are provided only in a language that many do not understand or needs to be read to. Discrimination is mostly done by people who know technology and comprehend English and have higher education levels who think that everyone should understand their way of doing things. Discrimination practices such as applying online, and being unable to talk to someone via phone or in person should be changed. People need to learn to communicate effectively in person, but many elderly hae difficulty hearing and seeing what is printed and could misunderstand the text or computer. Individuals are traumatized by others who believe labels and that they are better because they have a job that pays them to serve a community that have little, if any computer skills, or don't have technical skills to understand what is needed. Technology skills have only come around in the last 30 years, and many have not even learned to operate their cell phones let alone apply for things on a computer. This is why there is a huge gap even in generations between parents, children, and grandchildren causing a lot angry and depressed individuals! Better communication efforts are needed to educate and support our local community! Youth need to learn patience to deal especially with the kupuna and show more respect because they know very little of what that kupuna may have accomplished in their lifetime! Not everything is about time and money, but building lasting relationships!