

Proposal for Los Gatos DEI Commission Effort to Educate Public on Restrictive Covenants

We have a challenge. We need to find creative ways to educate our community on DEI issues. As pointed out during the process of updating our Town’s Housing Element, Los Gatos is among the “most segregated, heavily white cities in [Santa Clara County].”¹ How did the Town get this way? While the Los Gatos Town Library maintains a “collection of historically valuable documents” regarding the Town’s history, information relating to Los Gatos residents who are members of BIPOC communities and/or other groups suffering discrimination are underrepresented in the Library’s collection.² If an important goal of Los Gatos is to shed this undesirable status, it is important to understand what specific factors got the Town to this point.

The historic practice of using restrictive covenants to prevent the transfer of property in Los Gatos to non-white persons might serve as an entry point to understand how discriminatory practices started and evolved in the Town. These vestiges still exist as a reminder of the Town’s racist past, and provide insight into its current segregated make-up. While the California State Legislature has taken steps to remove these offensive provisions from the public record, an opportunity exists for Los Gatos residents to use that process to determine whether their own properties may contain restrictive covenants. We ask that the community actively participate in reporting whether restrictive covenants exist regarding their property. We will collect the results of this community effort and assist Los Gatos property owners on what they can do to get rid of these distasteful and obnoxious provisions. This can serve as an important step in acknowledging the past harms of racism, and inform the steps we can take to ensure Los Gatos is a welcoming town to all regardless of race or ethnicity.

What are restrictive covenants?

Restrictive covenants are provisions in title documents that govern and impact the use and/or transfer of real property. Not all restrictive covenants are illegal, invalid or unenforceable. For example, two-story buildings may be prohibited in a neighborhood that desires to maintain the character of one-story buildings. However, restrictive covenants that prohibit the transfer of the property to non-white persons or other Constitutionally-protected classes of individuals are not legal, valid or enforceable by law. Some racially restrictive covenants specifically reference particular races or ethnicities. Black people were systematically excluded from living in many communities across the United States, including within California, and particularly Los Gatos. California has a long well-documented history of prominent public and private leaders who advocated against the presence of Asians—mainly those of Chinese and Japanese ethnicity³. But, these covenants can also apply to any Constitutionally-protected classes of individuals who

have been discriminated against based upon gender, religion, age, sexual preference, and disability, among others.

When were these restrictive covenants used? Are they enforceable as a matter of law?

Although the U.S. Supreme Court in its 1926 decision *Corrigan v. Buckley* discusses the use of racially-based restrictive covenants, the practice dates back to at least the late 1800s, if not earlier. A reported California federal district court case in 1892 struck down the enforceability of a restriction on selling property to Chinese Americans, but surprisingly that case was ignored by the courts and seldom cited. In the *Corrigan* decision, the Court actually upheld the mere existence of restrictive covenants in title documents on the grounds that such transactions were between private parties and involved no state action (e.g., no use of governmental agencies or tribunals to enforce such covenants). Twenty-two years later, the Court struck down the enforceability of these types of covenants in *Shelley v. Kraemer*. In *Shelley*, the seller of a parcel of real estate discovered that the purchaser of the property was not white and sought to prevent the purchaser from taking possession of the property. In finding the racial covenant violative of the Equal Protection Clause of the Fourteenth Amendment, the Court found state action present with the contemplated judicial enforcement of those covenants. Subsequent federal and state fair housing laws have also made such restrictive covenants and practices unlawful.

What has California done to deal with these restrictive covenants?

In 1999, California began creating ways for property owners, upon discovering the existence of a restrictive covenant in their title documents, to apply to the Fair Employment and Housing Commission (FEHC) to have the FEHC review the validity of the covenant and, if found invalid, request the county recorder to strike the unlawful covenant.⁴ In 2005, the law was streamlined to allow owners to file directly with the county recorder a Restrictive Covenant Modification (RCM) form to have such covenants redacted from title documents.⁵ However, these changes did not prevent restrictive covenants from appearing in title documents, and unsuspecting buyers might nevertheless be unduly influenced by such covenants and choose not to pursue the purchase or at the very least feel unwelcome in that neighborhood.⁶

What has Santa Clara County done to deal with these restrictive covenants?

In 2022, California law was amended to require county recorders to develop plans to affirmatively identify and redact restrictive covenants.⁷ Santa Clara County has created a Restrictive Covenant Modification Program (“RCM Program”), where it has committed to devote staff and resources to the process of identifying restrictive covenants, evaluating their lawfulness and enforceability, and redacting the covenants from the public record.⁸ With a deadline of December 2027, the challenges for the County’s RCM Program are enormous. The County estimates that it needs to process over 24 million pages of recorded documents, the vast majority of which have not yet been digitized. Starting in July 2022, the County has processed to date 462,600 pages or just under 2%. At its new offices in North San Jose, the County makes available computer terminals where the public can access recorded documents

with the assistance of staff. But, unless the party interested in reviewing his or her property deeds already possesses a title report for that property, a search at the County office will most likely not uncover the restricted covenants. Even if a property owner has an address and assessor's parcel number for the property, that will likely not be sufficient to locate all of the documents in the chain of title that have some bearing or impact on the property.

Santa Clara County's RCM Program has to date uncovered 19 instances of racially restrictive covenants governing parcels located within the Town of Los Gatos. All of these racially restrictive covenants were identified by County staff utilizing key word searches. None of the 19 redactions of racially restrictive covenants were initiated by private parties. Information on a county-wide basis is updated from time to time on the County's website.⁹ The Town's DEI Commission will continue to explore ways to assist Santa Clara County in such redaction process as it relates to properties located within the Town of Los Gatos.

If the Santa Clara County Recorder is already underway to redact restrictive covenants from public records, why do I need to take any further action to get them removed?

While we understand that Santa Clara County will address racially and other discriminatory restrictive covenants through its RCM Program, we also recognize the enormous undertaking of such program. According to recent news reports,¹⁰ the County is partnering with Stanford University's Regulation, Evaluation, and Government Lab (RegLab) to utilize AI technology to uncover racially and other discriminatory restricted covenants affecting properties in the County, particularly in light of the County's ambitious goal of identifying all discriminatory restrictive covenants by December 2027. As currently reported on the County's RCM program website, the County has reviewed approximately 2% of the 24 million pages of recorded documents—although the website is updated frequently, this information is just slightly higher than what the County had disclosed on its website back in August when we started communicating with them. At that time, the County's manual search process had identified 19 properties within Los Gatos that contain restrictive covenants. That number of properties is still reported today with respect to Los Gatos.

We were surprised to discover that at least 9 of the 19 properties found by the County did not show up on the RegLab's mapping of the properties that it found.¹¹ We have conveyed this information to the County, and they are looking into how the properties may have been missed. The paper discussing the project by the RegLab researchers also notes that the AI tool may not catch all properties with restrictive covenants.¹²

Inasmuch as our efforts at the DEI Commission are also focused on creating learning opportunities for the Town of Los Gatos and the Los Gatos community, particularly using the County's RCM program to educate property owners and the community about the historical discriminatory practices, there is still a need to get private property owners more involved in this search process. When the County uncovers a racially restrictive covenant and processes a redaction of that covenant, the County is unable to notify the property owner of such action. In addition, given the possibility that the augmented AI search of the County's records may not necessarily uncover a discriminatory covenant, it is still important for property owners to

review a title report of their property to ensure that their property is not subject to such a covenant. Property owners reviewing such reports may also discover recent action taken by the County to redact a discriminatory covenant, which we assume would be of interest to them. We want to encourage Los Gatos property owners to affirmatively take steps to investigate whether their homes or other properties may be subject to these covenants and get them eliminated from their title deeds. By affirmatively undertaking steps to discover the existence of restrictive covenants, Town residents can denounce these practices and demonstrate our community's concern with eliminating these covenants.

We are concerned, however, that such voluntary efforts by property owners will not occur unless that process to identify and redact restrictive covenants is simple, burdenless (with little or minimal cost), timely and efficient for property owners. The RCM Program appears to assume that the property owner has a readily available copy of his or her title documents that will reveal whether a restrictive covenant on that property exists. A party who has recently acquired a property in Los Gatos is more likely to have ready access to the package of closing documents containing the title report. However, if the purchase of a home occurred some years ago, such documents may not be readily available. A title report can be obtained from a title company, but there will be charges for the title search and report. Although the County's public computers can be used to search title documents without charge, online information may not be downloaded or otherwise transmitted electronically, and users will normally be charged for copies of relevant documents.

How can a Los Gatos property owner get a copy of a title report?

With Town staff's assistance, we have located a third party organization who is willing to collaborate with the Town on the Commission's restricted covenant project. The New Museum of Los Gatos has agreed to post contact information to title companies, who are doing business in Los Gatos and willing to help facilitate access to title documents for Los Gatos property owners without charge or at a reduced cost. We will be reaching out to such title companies as part of our listening efforts to find out how the Town can assist local businesses and other organizations with their DEI efforts. We are aware of the Town's policy to not include business contacts directly on its website or to name specific businesses that may be able to help property owners (notwithstanding such businesses may well be interested in so participating directly).

How can Town residents help construct the history surrounding racially restrictive covenants?

To the extent that property owners undertake efforts to determine whether their properties are subject to restrictive covenants, we encourage them to share information about the covenants revealed in the title documents and, even if no such covenant is found, to report that information to the DEI Commission. We believe that such efforts can help inform the Town about the extent of such discriminatory practices. We will also share with the New Museum and the Los Gatos Public Library information uncovered in this process so that it can be incorporated into programs, historical records and archives, and other informational sources of value to the community.

The information gleaned from such action by Town residents may serve as part of an educational project for the Town, helping us understand how restrictive covenants have contributed to the highly segregated community in Los Gatos. When restrictive covenants are discovered, we encourage residents to look more deeply into the circumstances surrounding the recording of such covenant. Apart from identifying the source and nature of the covenant, residents could consider the following:

- (1) To the extent that restrictive covenants are discovered, do they extend to neighboring properties or to particular tracts or subdivisions? The discovery of a restrictive covenant on one parcel may help focus the search on adjoining or nearby parcels.
- (2) What was going on in Los Gatos at the time such covenants were inserted or used? Do historical records reveal events, circumstances or thinking that may have given rise or influenced the use of these covenants? What was going on in areas beyond Los Gatos that may have explained these covenants?
- (3) What might have been the fears or concerns of the people who inserted the covenants in the title documents?
- (4) Who were the parties involved in transactions that included such covenants? Were they known community leaders or otherwise active in the community? Were they real estate developers or urban planners? Did people voice concerns about using these covenants, both for and against?
- (5) Were other efforts undertaken to achieve the same result as the restrictive covenants?

What is the ultimate purpose and value of this project?

If you embrace and celebrate concepts of DEI and believe they are essential for creating a better community for Los Gatos, you can demonstrate your support of DEI principles by investigating whether your property is subject to such restrictive covenants, and if so, by taking steps to have that provision redacted from your title report. It sends a message that you, and our community as a whole, denounce the racist policies of the past, and strengthens Los Gatos' reputation for being a community that embraces diversity, equity, and inclusion.

¹ https://www.losgatosca.gov/DocumentCenter/View/38848/3_Adopted-2023-2031-Housing-Element-Clean-Copy, p. A-3 of Appendix A, p. 61 of 331,

² <https://www.losgatosca.gov/2616/Represent-Los-Gatos>

³ James D. Phelan, "The Japanese Evil in California," 210 *The North American Review* 323-328 (September 1919). See also https://encyclopedia.densho.org/James_D._Phelan/.

⁴ SB 1148 (Burton), Chapter 589, Statutes of 1999

⁵ AB 394 (Niello), Chapter 297, Statutes of 2005

⁶ Senate Committee Report on AB 1466 <https://trackbill.com/s3/bills/CA/2021/AB/1466/analyses/senate-judiciary.pdf>

⁷ Assembly Bill 1466 (McCarty), Chapter 359, Statutes of 2021

⁸ <https://clerkrecorder.sccgov.org/unlawfully-discriminatory-restrictive-covenant-modification-program-assembly-bill-1466>

⁹ <https://clerkrecorder.sccgov.org/unlawfully-discriminatory-restrictive-covenant-modification-program-assembly-bill-1466>

¹⁰ <https://www.kqed.org/news/12009822/stanford-ai-model-helps-locate-racist-deeds-in-santa-clara-county>; <https://www.kron4.com/news/bay-area/stanford-researchers-map-white-only-properties-in-santa-clara-co-using-ai/>; <https://law.stanford.edu/press/stanford-reglab-princeton-and-the-county-of-santa-clara-collaborate-to-use-ai-to-identify-and-map-racial-covenants-from-over-5-million-deed-records/>

¹¹ https://reglab.github.io/racialcovenants/static/maps/dotmap_lot_level.html

¹² <https://dho.stanford.edu/wp-content/uploads/Covenants.pdf>