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. Understanding the historical factors that have contributed to our Town's unfortunate status of being among the "most segregated, heavily white cities in [Santa Clara County]"[1] would be a prudent starting point. 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]

The practice of using restrictive covenants to prevent the transfer of property in Los Gatos to non-white persons might serve as an entry point and vehicle to shed light on how discriminatory practices historically started and evolved in the Town. These vestiges still exist today as a reminder of the Town's racist past. 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.

What are restrictive covenants?

Restrictive covenants are provisions in title documents that prohibit the transfer of the property covered by that title document to non-white persons. Some restrictive covenants specifically reference particular races or ethnicities. 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 ethnicity [add footnote]. 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. [3] 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.[4] 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 not proceed with the purchase.[5]

In 2022, California law was amended to require county recorders to develop plans to affirmatively identify and redact restrictive covenants.[6] Santa Clara County has created a Restrictive Covenant Modification 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.[7] The DEI Commission is exploring ways that it may 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?

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. In addition, we encourage property owners to share information about the covenants revealed in the title documents and, even if no such covenant is found, to report to the DEI Commission that information. We believe that such effort can help inform the Town about the extent of such discriminatory practices. While we understand that Santa Clara County will address the restrictive covenants through their Restrictive Covenant Modification Program, we also recognize the enormous undertaking of such program and anticipate that it will take longer than currently planned to ameliorate this problem. By

affirmatively undertakings steps to discover the existence of restrictive covenants, Town residents can denounce these practices and demonstrate our community's concern with eliminating these covenants.

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, residents should look more deeply into the circumstances surrounding the recording of such covenant. Apart from identifying the source and nature of the covenant, residents are encouraged to consider the following:

(1) 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?
(2) What might have been the fears or concerns of the people who inserted the covenants in the title documents?
(3) Who were the parties involved in transactions that included such covenants? Were they known community leaders or otherwise active in the community? Did other people voice concerns about using these covenants, both for and against?
(4) 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, then you can demonstrate your support for DEI by investigating whether your property is subject to such restrictive covenants, and if so, taking steps to have that provision redacted from your title report. We admit that this is largely a symbolic effort, but it sends a message of your concern for critical values embraced by this community. Participating in our [Los Gatos Against Restrictive Covenants] program reaffirms our community's rejection of racist behavior, and strengthens Los Gatos' reputation for being a DEI community.

How Can the Los Gatos DEI Commission Help Los Gatos Residents Deal with Restrictive Covenants?

[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] SB 1148 (Burton), Chapter 589, Statutes of 1999

[4] AB 394 (Niello), Chapter 297, Statutes of 2005

[5] Senate Committee Report on AB 1466 https://trackbill.com/s3/bills/CA/2021/AB/1466/analyses/senate-judiciary.pdf

[6] Assembly Bill 1466 (McCarty), Chapter 359, Statutes of 2021

[7] Link to SCC program