New York State Bar Association
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# Memorandum in Opposition

## REAL PROPERTY LAW SECTION

RPLS #6 June 3, 2013

A. 1984 By: M. of A. Titus
S. 1844 By: Senator Parker

S. 3192 By: Senator Parker

Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: 180th day after becoming law

**AN ACT** to amend the Real Property Actions and Proceedings Law (RPAPL), in relation to relation to recording of restrictive covenant modification documents

**LAW AND SECTION REFERRED TO:** Real Property Law Section 291-k

**THE REAL PROPERTY LAW SECTION OPPOSES THE ABOVE REFERENCED LEGISLATION**

The Real Property Law Section has reviewed the above-referenced legislation and **OPPOSES** its enactment.

The bills would require title insurance companies, title abstract companies or escrow companies (title companies) to notify in at least eighteen-point bold face type, prospective property purchasers and purchasers of a common interest property of illegal language contained in any document to be recorded, which language discriminates based upon race, color, religion, gender, sexual orientation, familial status, marital status, disability, national origin, source of income, socio-economic status or ancestry, and therefore, would violate state and federal housing law. Prospective documents of conveyance created after the effective date of the above proposed legislation would not be permitted to contain provisions violating this statute. All of the proposed legislation provides for the recording of a restrictive covenant modification document, to be made available by county recorders (the form of which has yet to be established), or in the alternative by forms prepared by the attorney for the property owner, that removes the illegal restrictions from the originally recorded document. It is not clear who would pay the recording fees. Additionally, the legislation would allow property owners who believe their real property is subject to an unlawful restrictive covenant to unilaterally record a restrictive covenant modification document signed under penalty of law, which would include a complete copy of the document containing the restrictive covenant with the illegal language stricken.

The goal of this legislation is laudable in that it proposes to expunge from public land records discriminatory restrictive covenants. While the legislation addresses many different forms of illegal discrimination, the discussion in the memorandum of support focuses on "racial or Caucasian covenants," which purport to prohibit certain persons from acquiring title to, or from using or occupying buildings on, the burdened properties. Such covenants exist to a limited extent in early chains of title to certain real property located in Nassau County, Westchester County and possibly other areas of New York State.

Further, the bill(s) state after the recording of the restrictive covenant modification document that such restrictive covenant modification agreement will be the only restriction left having effect on the property. The provision is ambiguous and may call in to question all covenants and instructions restrictions recorded prior to the restrictive covenant modification agreement. It has been acknowledged that these covenants already have been declared illegal. More specifically, the Federal Civil Rights Act of 1968 and in the same year, the Supreme Court decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 have rendered racial restrictions ineffective and unenforceable. Additionally, the New York State General Obligation Law Section 5-331 prohibits various forms of discrimination including those based upon race, color or creed of an individual. Being illegal under the current state of the law, racial covenants should not affect the marketability of title to those properties for which such covenants have been recorded.

Title companies do not report these restrictions to buyers after conducting their record searches. This practice by title companies results from the Fair Housing Act of 1968, 42 USC §3604(C), which makes it illegal "[t]o make, print or publish..any notice…with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, sex… or national origin…." When such covenants are discovered during a title examination, title companies do not disclose the restrictions in their title reports even if the restrictions provide for a forfeiture of title upon breach of the restrictions. If such illegal restrictions are a part of a more comprehensive set of lawful restrictions which address other issues such as building height, location, or setback from streets, the unlawful restrictions will be deleted and the title companies will report only those portions of the covenants that are valid and enforceable. In addition, many of these ancient restrictions are holographic or even typed are not readable or reproducible in a clear manner. This statute which mandates that a legible copy be supplied to the title insurance applicant, would necessitate the retyping of such a "racial etc." restriction, which, in of itself, may constitute both a criminal or civil penalty.

Additionally, in *Mayers vs. Ridley*, 465 F.2d 630 the United States Court of Appeals for the District of Columbia forbade recorders of deeds from accepting for filing or recording documents containing such discriminatory restrictions. Such restrictions recorded subsequent to April 11, 1968 - - the date of the decision - - would have been illegally recorded and thus would not constitute constructive notice of its content. Pursuant to the subject legislation, the recording of a document containing an illegal restriction followed by the recording of a modification document to remove the

restriction, notwithstanding its good intentions, may in itself be in violation of the *Mayers* decision and may subject the title insurance company to both federal criminal and civil penalties. In addition, permitting the filing of restrictive covenant modification documents, with respect to a recorded or a previously recorded illegal restriction not likely to be reported by title insurers, may in and of itself serve as a reminder of the existence of those offensive and illegal restrictions, which this legislation is attempting to address.

With respect to documents to be recorded, title closers, untrained in the laws pertaining to housing discrimination, would have the primary burden of determining whether specific language in such deeds, mortgages or other documents, contain discriminatory restrictions in violation of Civil Rights and Fair Housing Acts. This information may be especially difficult to discern during a closing and would impose an unfair burden on the closer as well as his or her employer, the title company.

In addition, allowing individual property owners or community interest development to decide whether particular covenants in the chain of title to their property, which are already recorded, violate anti-discrimination provisions of current law (some of which may in fact be valid and enforceable and benefit a number of other property owners) and to alter the public records by the recording of a restrictive covenant modification document, would be inappropriate and a misuse of the recording system. To place this burden on county attorneys would require county attorneys to suffer additional expenses. It also establishes a disturbing element to the recording process namely the unilateral review and approval of a modification document by a government official without examination by benefited persons especially where the covenants are not unlawfully discriminating. This may be a misuse of the recording system. The county attorney was not a party to the restrictive covenant and only a court should pass on documents recorded or to be recorded.

S. 3192 carves out from prohibited restrictive covenants, certain limitations on the use of real property on the basis of religion held by a religious or charitable organization, the latter being a charitable organization used for religious purposes and also for federal or state law provisions creating limitations on the use of real property designated as housing accommodations for low income people in publicly assisted accommodations. The bill states that properties subject to rent control or rent stabilization laws are excluded from the statute. This bill shows that the intentions of the sponsors are to go further than the stated object of the legislation.

Based on the foregoing, the Real Property Law Section **OPPOSES** this legislation.

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