

Agent Disclosure of Discriminatory Covenants Based on Actual Knowledge

What is a discriminatory covenant?

Discriminatory covenants are agreements between property owners that prohibit ownership, occupation, and/or use of the property based on such things as race or religion. Prior to 1948 they were sometimes written into property records and were intended to bind all current and subsequent owners. Presently, these covenants may still be found in deeds, CC&Rs, declarations or other governing documents.

Is there a new law that requires agents or brokers to disclose discriminatory covenants?

Yes. Assembly Bill 1466 requires the disclosure of discriminatory covenants. It was signed into law in September of 2021.

When is this disclosure required to be made under this law?

July 1, 2022.

Are these discriminatory covenants enforceable today?

No. Discriminatory covenants based on such things as race have not been enforceable since 1948.

Who is required to make the disclosure under the law?

Real estate brokers, real estate agents, title companies or escrows if they have actual knowledge that a deed or other governing document that is being directly delivered to a buyer (or owner) includes a possible unlawfully discriminatory covenant.

What if an agent or broker is not directly delivering the deed or governing document to a buyer (or owner)? Are they still required to make the disclosure?

The law is ambiguous on this point. The conservative risk management approach is to provide the disclosure whenever the agent or broker has actual knowledge of a possible discriminatory covenant, whether or not they are the ones directly delivering the document.

What must be disclosed?

The agent or broker must disclose that: 1) the deed or governing document includes a possible unlawfully restrictive covenant, and 2) the ability of the buyer (or owner) to have it removed through the restrictive covenant modification process.

How should an agent make this disclosure? Is there a form?

C.A.R. will develop a Sample Letter for this purpose which will be accessible in the Sample Letter Library on zipForm prior to July of 2022.

At what point in the transaction should a listing agent make this disclosure?

The disclosure should be made as soon as practicable after the agent becomes aware of the discriminatory covenant. If the agent knows of the discriminatory covenant at or prior to the time of the seller's completion of a TDS, then the agent should make the disclosure at the same time as the seller's delivery of a completed TDS and the agent's visual inspection disclosure. If the agent becomes aware of the discriminatory covenant at a later time, then the disclosure should be made as soon as possible thereafter.