# MEMORANDUM

**To:** Rep. Sarah Anthony

**From:** David Pierson

**Re:** Prohibited Restrictive Covenants; Draft 3 Substitute for HB 4416

**Date:** December 7, 2021

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As you know, the Real Property Law Section took a position opposing HB 4416 as introduced. The changes to the bill could better answer our objections, using the new language in the substitute. In other places, the language still raises other issues as to its effect on other laws and on existing governing documents for homeowners associations and condominiums. Based on our conversation, we believe real progress could be made in addressing the other issues, and we would look forward to working with you to do that.

***1. Basis of discrimination.*** The substitute incorporates the Fair Housing Act. Although that incorporation ties to an existing body of law, whether or not a restriction violates the Fair Housing Act can be a matter of interpretation. Certainly there are restrictions that are clear violations on their face. But there are violations of the Fair Housing Act due to a disparate impact on a protected class. Disparate impact requires a determination that the restriction has a disproportionate adverse impact on a protected class when there is no legitimate, nondiscriminatory need for the policy. Volunteer members of a board of directors of a condominium association or homeowners association would be hard put to make such determinations (assuming they even have discretion to decide, as discussed below). Limiting the reach of the legislation to intentional discrimination or disparate treatment rather than disparate

impact would largely resolve the problem. We can suggest language that we believe can address that issue but retain the intent of the bill.

***2. Governance or consent issues.*** The language of the bill does not appear to leave any discretion to a board of directors. If the board of an association of property owners or condominium co-owners "receives a written request by a member . . . the board *shall*, within a reasonable time, prepare amended governing documents or record a discharge form" without any vote of the property owners or co-owners. The section also provides that board action does not require the vote or approval of the property owners. That may allow a single member to decide that a particular restriction is a violation and require an amendment. If disparate impact is included, any member can make that interpretation and decision and could require the board to abide by that decision. All property owners would be bound by that single member's interpretation. The same issues apply to condominiums. As with the Fair Housing Act, further discussions could lead to agreement on how to address the question.

***3. Removal vs. amendment.*** The Fair Housing Act, as well as the Elliott-Larsen Civil Rights Act, among other laws, currently provides the means, through administrative or judicial proceedings, to determine whether restrictions discriminate and address their effect (although those processes may be cumbersome and time consuming).

The substitute creates a new "discharge" form to be recorded setting out the provisions that are prohibited. In addition, a new document may be recorded, edited or redacted to remove the prohibited provisions. Associations may record the discharge form, as may individual property owners. This provides a clear declaration of the association or owner's statement that the prohibited provisions are illegal and the association or the owner disavow them.

However, section 8 still provides for an action in the circuit court, the result of which is

> An order striking the provisions from the records of the register of deeds and eliminating the provisions from the deed or other instrument for the property described in the complaint.

It would seem appropriate to allow the court instead to order the recording of an appropriate discharge form. With "striking" the restriction, the question is what that means as a practical matter. Under court rules in many states, Michigan among them, a party may move to "strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules," MCR 2.115. If the motion is granted, an order is entered that the matter be stricken; it is not actually removed from the court records. If that is what is meant, then there is no real objection to that portion of the bill. On the other hand, if that is the case, the discharge form would be an appropriate and uniform way to do so and avoid any ambiguity. We could not agree that a court could or should actually remove records from the Register of Deeds, and some news articles on the legislation seem to suggest that.

***4. Miscellany.*** Section 5 could be read to effectively amend or abrogate statutes governing associations, the Nonprofit Corporation Act, and the Condominium Act,[1] as well as the recorded declarations, articles of incorporation, and bylaws of associations, to require them to amend recorded declarations by a simple majority vote of the board, not by the prescribed majority or super-majority of members or owners. The bill has the same effect in simply directing that the amendment may be executed by "any board officer," contrary to governing documents, and must be recorded with a specified statement.

[1] The companion bill, HB 4417, would amend the Condominium Act to provide that amending condominium documents to remove a prohibited restriction does not require the consent of co-owners or mortgagees.

Section 7 permits any property owner to record a discharge form (without specifying that the owner owns the property subject to a restriction). Even if it is so limited, the section still allows a single owner to unilaterally amend a restriction, again allowing the current owner to determine the effect of such a restriction, without notice or the consent of the original grantor or the intended beneficiary of the restriction. For example, a conservation easement might be read to have a disparate impact on people with a handicap who cannot gain access to the property. A property owner could record such a statement today, but it should have no effect on the enforceability of the restriction. That question would have to be decided by a court. The question raised by the discharge form is whether it would be any more or less effective with this statutory sanction. Allowing property owners to unilaterally amend the instruments by which they took title to the property violates fundamental principles of real property law.

Section 10 still provides that a person who refuses to remove a prohibited restriction before recording it is liable for any damage sustained by another person because of the refusal, without reference to who might demand it or what standing they might have. We are not sure what situation this provision might cover.

In sum, the substitute is closer to a form that would fit with real property titles and legal remedies. Perhaps some of the confusion arises from the effect of recording a document. So long as it is in recordable form, almost any document can be recorded with the Register of Deeds. Whether it has any effect is a question to be decided by a court, or in the first instance in most real estate transactions today, whether a title company will insure the title. We would look forward to working with you.