

**Public Policy Position**  
**HB 4416 & HB 4417**

The Real Property Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,545 members. The Real Property Law Section is not the State Bar of Michigan and the position expressed herein is that of the Real Property Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on these items.

The Real Property Law Section has a public policy decision-making body with 17 members. On May 12, 2021, the Section adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 1 member did not vote.

**Oppose**

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# MEMORANDUM

**To:** Real Property Law Section Counsel  
**From:** Real Property Law Section Legislative Committee  
**Re:** Prohibited Restrictive Covenant legislation  
**Date:** May 11, 2021

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## Attached Reference Documents

Memorandum dated 3-15-2021 by David Pierson

Prohibited Restrictive Covenants Act – HB 4416

<https://www.legislature.mi.gov/documents/2021-2022/billintroduced/House/pdf/2021-HIB-4416.pdf>

RPLS Public Policy Position 2019

Legislative Report dated 7-8-19 by Greg Gamalski

The Legislation Committee recommends that RPLS Council take a position to oppose House Bill 4416.

Please see the March 15, 2021 Memorandum from David Pierson.

HB 4416 proposes to create a prohibited restrictive covenants act. Its proposed terms prohibit the recording of deeds or other instruments relating to real property that contain certain restrictive covenants or conditions and to declare such prohibited restriction void. These prohibited restrictions are defined as those that violate “the fair housing act, title VIII of the civil rights act of 1968, Public Law 90-284.” Classes protected under the Fair Housing Act are race, color, religion, national origin, sex, handicap, and familial status.

HB 4416 authorizes a court action to order an existing prohibited restriction “stricken from the records of the register of deeds.” It is not entirely clear whether the sponsors believe that is to be taken literally or if one simply records an order declaring it so.

HB 4416 would also amend by reference or overrule the Condominium Act, Nonprofit Corporation Act, and existing condominium master deeds and subdivision restrictions, declarations, articles of incorporation and bylaws by allowing amendment of “governing documents” by a simple majority of the board of directors with the written consent of owners of property subject to the document.

# MEMORANDUM

**To:** Real Property Law Section Legislative Committee  
**From:** David Pierson  
**Re:** Prohibited Restrictive Covenant legislation  
**Date:** March 15, 2021

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The new bill introduced this session addresses only

a restriction, covenant, or condition, including a right of entry or possibility of reverter, that violates the fair housing act, title VIII of the civil rights act of 1968, Public Law 90-284.<sup>1</sup>

In contrast to the last version, it is at least tied to property and to a settled set of protected classes. It removes the requirement that registers of deeds determine whether an instrument violates the prohibition and refuse to record those that do but would still authorize a court action to order an existing prohibited restriction “stricken from the records of the register of deeds.” It is not entirely clear whether the sponsors believe that is to be taken literally or if one simply records an order declaring it so.

The bill would also amend by reference or overrule the Condominium Act, Nonprofit Corporation Act, and existing condominium master deeds and subdivision restrictions, declarations, articles of incorporation and bylaws by allowing amendment of “governing documents” by a simple majority of the board of directors with the written consent of owners of property subject to the document. In these and other ways, the bill conflicts with or ignores basic Michigan property law, recording statutes, and legal process. To be fair, in

that respect it is like prior amendments to the Condominium Act that conflict with, but have been taken to overrule, existing master deeds. Michigan courts have upheld amendments to other substantive provisions of the Condominium Act with similar effect.

The companion bill, HB 4417, would amend the Condominium Act to provide that an amendment to remove a prohibited restriction does not require the consent of two-thirds of the co-owners or mortgagees and may be accomplished as described above. The bill does not address its application to conflicting provisions of other governing documents, or state whether it is to be applied only prospectively.

**1. Basis of discrimination.** Although the incorporation of the Fair Housing Act makes the effect much clearer, tying it to an existing body of law, the legislation still ignores the fact that whether or not a restriction violates the Fair Housing Act is a matter of interpretation. The ability of members of a board of directors of a condominium association or homeowners association (even assuming they have discretion to decide, as discussed below) to decide disparate impact seems dubious at best. Limiting the reach of the legislation to intentional discrimination or disparate treatment rather than disparate impact would largely resolve the problem.

**2. Governance or consent issues.** The language of the bill is unclear as to the discretion, if any, a board of directors may exercise. 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 documents” and “shall record” them, without any vote of the property owners or co-owners. The section also provides that a board, “acting through a simple majority of the board, *may* amend” the governing

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<sup>1</sup> Classes protected under the Fair Housing Act are race, color, religion, national origin, sex, handicap, and familial

documents. The question is whether “may” means that the board may do so without the vote of the owners or is intended to say that the board may disagree and decline to amend the documents. If the board has no discretion, any member may take it upon himself or herself to decide that a particular restriction is a violation and require an amendment. If disparate impact is included, the member would make that interpretation and decision as well and could require the board to abide by that decision.

### ***3. Removal vs. amendment.***

As to “striking” the restriction, the question is what that means as a practical matter. The apparent aim of the bill is to somehow obviate the need for any formal proceedings, provide for instant relief through self-help, and suggest that the restriction can actually be removed from the records of the register of deeds and thereby disappear from the title. If all that is all that is meant is the recording of a statement that the offending language is stricken, there may be no real objection to that portion of the bill. The news articles on the bills suggest otherwise.

***4. Other provisions.*** Section 5 would effectively amend or abrogate statutes governing associations, the Nonprofit Corporation Act, and the Condominium Act,<sup>2</sup> 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 supra-legal effect in simply directing that the amendment may be executed by “any board

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status.

<sup>2</sup> 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.

officer,” contrary to any governing documents, and must be recorded with a specified statement.

Section 6 permits any property owner who took property subject to a restriction 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.

Section 9 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. I do not know what circumstance this provision might cover.

# HOUSE BILL NO. 4416

March 02, 2021, Introduced by Reps. Anthony, Brixie, Bolden, Puri, Steckloff, Camilleri, Rogers, Hammoud, Sowerby, Brabec, Hood, Weiss, Manoogian, Pohutsky, Breen, Cavanagh, O'Neal, Neeley, Cherry, Stone, Witwer, Rabhi, Hope, Yaroch, Young, Whitsett and Aiyash and referred to the Committee on Local Government and Municipal Finance.

A bill to prohibit the recording of deeds or other instruments relating to real property that contain certain restrictive covenants or conditions; to make such restrictions unenforceable; and to provide remedies with respect to those instruments.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1           Sec. 1. This act shall be known and may be cited as the  
2 "prohibited restrictive covenants act".

3           Sec. 2. As used in this act:

1 (a) "Condominium documents" means that term as defined in  
2 section 3 of the condominium act, 1978 PA 59, MCL 559.103.

3 (b) "Governing documents" means the articles of incorporation,  
4 declaration of covenants, conditions, and restrictions, or bylaws  
5 of a homeowners' or property owners' association.

6 (c) "Person" means an individual or a partnership,  
7 corporation, limited liability company, association, governmental  
8 entity, or other legal entity.

9 (d) "Prohibited restriction" means a restriction, covenant, or  
10 condition, including a right of entry or possibility of reverter,  
11 that violates the fair housing act, title VIII of the civil rights  
12 act of 1968, Public Law 90-284.

13 Sec. 3. (1) A person shall not record in the records of the  
14 register of deeds a deed or other instrument that contains a  
15 prohibited restriction.

16 (2) This act does not impose a duty on a register of deeds or  
17 employee of a register of deeds to inspect a deed or other  
18 instrument to determine whether recording the deed or instrument  
19 would violate subsection (1).

20 Sec. 4. (1) A prohibited restriction is void and has no legal  
21 effect.

22 (2) A court or other person shall not enforce a prohibited  
23 restriction.

24 Sec. 5. (1) A homeowners' or property owners' association,  
25 acting through a simple majority vote of its board, may amend the  
26 association's governing documents for the purpose of removing any  
27 prohibited restriction.

28 (2) If the board of a homeowners' or property owners'  
29 association receives a written request by a member of the



1 association that the board exercise its amending authority under  
2 subsection (1), the board shall, within a reasonable time, prepare  
3 amended governing documents, as provided under subsection (1), this  
4 subsection, and subsections (3) and (4).

5 (3) Board action under subsection (1) or (2) does not require  
6 the vote or approval of the property owners.

7 (4) An amended document under subsection (1) or (2) may be  
8 executed by any board officer.

9 (5) The board of directors of an association of co-owners of a  
10 condominium, acting through a simple majority vote of the board,  
11 may amend the condominium documents for the purpose of removing any  
12 prohibited restriction.

13 (6) If the board of directors of an association of co-owners  
14 of a condominium receives a written request by a co-owner that the  
15 board exercise its amending authority under subsection (5), the  
16 board shall, within a reasonable time, prepare amended condominium  
17 documents, as provided in subsection (5).

18 (7) An amended document under this section must be recorded  
19 with the register of deeds for the county where the property is  
20 located and state the following:

21 "This amended document strikes from an original document  
22 restrictions, covenants, and conditions that are prohibited under  
23 the prohibited restrictive covenants act."

24 (8) An amended document prepared under this section and  
25 recorded or left to be recorded by the register of deeds must  
26 identify and refer to the original document being amended and give  
27 the liber and page or other unique identifying number where the  
28 original document is recorded.

29 Sec. 6. (1) A property owner may record in the records of the

1 register of deeds for the county where the property is located an  
2 amended deed or other instrument to remove any prohibited  
3 restriction.

4 (2) An amended deed or other instrument under this section may  
5 be executed solely by the property owner. The deed or instrument  
6 must be executed and acknowledged in the manner required by law.

7 (3) An amended deed or other instrument under this section  
8 must state the following:

9 "This amended deed or instrument strikes from an original deed  
10 or instrument restrictions, covenants, or conditions that are  
11 prohibited under the prohibited restrictive covenants act."

12 (4) An amended deed or other instrument prepared under this  
13 section and recorded or left to be recorded by the register of  
14 deeds must identify and refer to the original deed or other  
15 instrument being amended and give the liber and page or other  
16 unique identifying number where the original deed or other  
17 instrument is recorded.

18 Sec. 7. (1) If a deed or other instrument contains a provision  
19 that is prohibited under this act, the owner, occupant, or tenant  
20 of the property that is subject to the provision or any member of  
21 the board of a homeowners' or property owners' association or of  
22 the board of directors of an association of co-owners of a  
23 condominium that would have a right to enforce such a provision may  
24 bring an action in the circuit court in the county in which the  
25 property is located to have the provision stricken from the records  
26 of the register of deeds.

27 (2) An action under this section must be brought as an in rem,  
28 declaratory judgment action and the title of the action must be the  
29 description of the property. The owners, occupants, or tenants of

1 the property or any part of the property are necessary parties to  
2 the action.

3 (3) In an action under this section, if the court finds that  
4 any provisions of the deed or instrument are prohibited under this  
5 act, it shall enter an order striking the provisions from the  
6 records of the register of deeds and eliminating the provisions  
7 from the deed or other instrument for the property described in the  
8 complaint.

9 Sec. 8. (1) An amended document, deed, or other instrument  
10 that is prepared and recorded under section 5 or 6 must only amend  
11 the document, deed, or other instrument as to the prohibited  
12 restriction. The document, deed, or other instrument as amended  
13 relates back to the times and dates that the document, deed, or  
14 other instrument being amended was executed and recorded.

15 (2) As provided in 1937 PA 103, MCL 565.201 to 565.203, the  
16 recording requirements of that act apply to a document, deed, or  
17 other instrument prepared and recorded under this act.

18 (3) As provided in section 2567 of the revised judicature act  
19 of 1961, 1961 PA 236, MCL 600.2567, a register of deeds is entitled  
20 to the fees under that section for recording a document, deed, or  
21 other instrument prepared and recorded under this act.

22 Sec. 9. (1) A person that refuses, before recording, to remove  
23 from a deed or other instrument a prohibited restriction is liable  
24 for any damage sustained by another person because of the refusal.

25 (2) This section does not apply to a register of deeds or an  
26 employee of a register of deeds.

27 Sec. 10. (1) Except as otherwise provided in section 5(2),  
28 this act does not create a duty on the part of an owner, occupant,  
29 tenant, association, board, or member or officer of a board to

1 amend a recorded deed or instrument or a governing document as  
2 provided in this act, or to bring an action as authorized under  
3 this act.

4 (2) An owner, occupant, tenant, association, board, or member  
5 or officer of a board is not liable for failing to amend a recorded  
6 deed or instrument or a governing document or to pursue an action  
7 in court as authorized under this act.

8 (3) This act does not limit any right or remedy under the  
9 Elliott-Larsen civil rights act, 1976 PA 453, MCL 37.2101 to  
10 37.2804, or any other law of this state.

**Public Policy Position  
HB 4676 and HB 4677**

The Real Property Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,319 members. The Real Property Law Section is not the State Bar of Michigan and the position expressed herein is that of the Real Property Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Real Property Law Section has a public policy decision-making body with 17 members. On July 12, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 14 members voted in favor of the Section's position on HB 4676 and HB 4677, 0 members voted against this position, 0 members abstained, 3 members did not vote.

**Oppose**

**Explanation:**

Partial excerpt from Legislative Report to the Real Property Law Section Council dated July 8, 2019:

3(b) HB 4676 and HB 4677. The bills essentially attempt to bar certain noisome restrictions related to race, religion and sexual orientation, etc. which is a laudable goal. However, the Title and Conveyancing committee reviewed the legislation with particular focus on HB 4676. The analysis/discussion included: (a) the provisions of Paragraph 3(1) are not only vague, but they require subjective analysis, (b) the bill requires the Register of Deeds to subjectively review documents submitted for recording, and that is not their role, nor would we want 83 different interpretations of what is an impermissible restriction, (c) Section 6 appears to permit the grantee in a deed of conveyance to amend the instrument to remove any restriction, and that cannot be done in practice, (d) Paragraph 8 is equally vague as to how that would be enforced. In sum, if the purpose of the bill is to expand and provide coverage beyond Elliott-Larsen Civil Rights Act, then why not limit the bill essentially to Paragraph 4(1) and Paragraph 7? If the Legislature wants to extend protected classes to include other categories, then do so via Elliott-Larsen and any thus restrictions affecting those added protected classes would be void and unenforceable.

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## MEMORANDUM

**TO:** Real Property Law Section Counsel

**FROM:** Gregory J. Gamalski

**DATE:** July 8, 2019

**SUBJECT:** Legislative Report

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1. **Legislative Committee Activities 2018-2019.** The Legislative Committee has just essentially completed the first one year cycle with a multimember committee consisting of Vice-Chair Lorri King, Treasurer Gregory Gamalski, Stephen Estey, Lynn Sagar, David Pierson and Erik Reed. Lorri King will rotate off the Committee and the 2019-2020 Vice Chair will take the lead this year. This was the first year in which the Committee held regular meetings and collectively attempted to monitor legislation. The process was suggested by Cathy LaMont in 2018. We deem it a success. The overall view of the Committee collectively is that the endeavor was useful and the processes in place help keep the Section more fully apprised of pending legislation. We think the goal of continuity on legislative issues will be met consistent with Cathy Lamont's vision. Each member was responsible for review of bills introduced weekly on a rotating basis. Brief summaries of legislation of interest, if any, were circulated among committee members weekly. Telephonic conference calls were organized by Lorri King each month lasting about 30-45 minutes during which the Committee reviewed legislation of interest (or not) to the Section. Presumably a new member will be added, the 2019 – 2020 Treasurer consistent with the chairperson LaMont's vision.
2. **Legislative liaison.** The Section had organized a planned sortie to Lansing to meet with legislators and the governor's legal counsel, however our hard-working legislature decided to take an extended summer break. Therefore the planned June 27 date will be rescheduled to late August or early fall. We received a personal message from the governor's counsel expressing his disappointment that we had to adjourn the meeting but expressing a willingness to confer with us at a later date.
3. **Pending legislation; positions.** Several bills may require Council action and possible positions be taken. For discussion:
  - a. **HB 4123 and 4699.** These bills essentially authorize a lien against all real estate throughout the state owned by an owner of even a single blighted property subject to blight citations. A summary by David Pierson is attached. The Council should consider taking a position. Essentially this is an attempt to give the super lien priority position to blight enforcement when other remedies currently exist and

are available. The Legislative Committee recommends a position be taken against these proposals.

- b. **HB 4676 and HB 4677.** The bills essentially attempt to bar certain noisome restrictions related to race, religion and sexual orientation, etc. which is a laudable goal. However the Title and Conveyancing committee (special thanks to Lynn Sagar and John Bartley) reviewed the legislation with particular focus on HB 4676. Their analysis was: (a) the provisions of Paragraph 3(1) are not only vague, but they require subjective analysis, (b) the bill requires the Register of Deeds to subjectively review documents submitted for recording, and that is not the their role, nor would we want 83 different interpretations of what is an impermissible restriction, (c) Section 6 appears to permit the grantee in a deed of conveyance to amend the instrument to remove any restriction, and that cannot be done in practice, (d) Paragraph 8 is equally vague as to how that would be enforced. In sum if the purpose of the bill is to expand and provide coverage beyond Elliott-Larsen Civil Rights Act, then why not limit the bill essentially to Paragraph 4(1) and Paragraph 7? If the Legislature wants to extend protected classes to include other categories, then do so via the Elliott-Larsen and any thus restrictions affecting those added protected classes would be void and unenforceable. The Legislative Committee recommends the Section take a position against these proposals.
- c. **HB 4750.** A position is probably not required but we should follow this proposal which deals with a disclosure regarding lead pipes by water suppliers to consumers and, on the real estate side, by landlords to tenants via rental agreements. We are not recommending a position be taken but we should continue to follow this legislation.
- d. **Bills attached.** The discussed bills, related bills HB 4123 and 4699 and HB 4676 and HB 4677 are attached.