

Date of Hearing: June 19, 2019

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

SB 326 (Hill) – As Amended June 12, 2019

**SENATE VOTE:** 28-8

**SUBJECT:** Common interest developments

**SUMMARY:** Establishes specified mandatory inspections for exterior elevated elements such as balconies, decks, walkways, stairways, and railings in common interest developments (CIDs) and prohibits a homeowner association's (HOA's) governing documents from limiting the ability of an HOA to bring construction defect litigation against the founder, developer, or builder of the HOA. Specifically, **this bill:**

- 1) Includes the following definitions:
  - a) "Associated waterproofing systems" include flashings, membranes, coatings, and sealants that protect the load-bearing components of exterior elevated elements from exposure to water.
  - b) "Exterior elevated elements" means the load-bearing components together with the associated waterproofing system.
  - c) "Load bearing components" means those components beyond the exterior walls of the building to deliver structural loads to the building from decks, balconies, stairways, walkways and their railings, that have a walking surface six feet above the ground level and are designed for human occupancy or use, and are supported in whole or in substantial part by wood or wood-based products.
  - d) "Statistically significant sample" means a sufficient number of units inspected to provide 95 percent confidence that the results from the sample are reflective of the whole with a margin of error of no greater than plus or minus 5 percent.
  - e) "Visual inspection" means inspection through the least obtrusive method necessary to inspect load-bearing components, including visual observation only or visual observation in conjunction with the use of moisture meters, borescopes or infrared technology.
- 2) Requires an HOA, of a condominium project with three or more units, at least once every nine years, to contract with a licensed structural engineer or architect for a visual inspection of a random and significantly significant sample of exterior elements of the HOA.
- 3) Requires an inspection of the exterior elements of the HOA to determine whether or not they are generally in safe condition and performing in accordance with applicable standards.
- 4) Requires the inspector to generate a random list of locations of each type of exterior elevated element that includes all exterior elevated elements that the HOA has maintained or repaired. The inspector shall provide the HOA the list.

- 5) Requires the inspector to conduct a visual inspection based on the random list to determine if any unintended water or water vapor has passed into the associated waterproofing system creating potential damage to the load bearing components.
- 6) Provides that the inspector shall exercise their best professional judgement in determining the necessity for further inspection.
- 7) Provides the inspector shall issue a written report containing the following information:
  - a) An identification of the building components comprising the load bearing components and associated waterproofing system;
  - b) The physical condition of load-bearing components and associated waterproofing systems including whether the condition presents an immediate threat to the health and safety of the residents;
  - c) The expected future performance and remaining useful life of the load bearing components and associated waterproofing system; and
  - d) Recommendation for any necessary repair or replacement of load bearing components and associated waterproofing system.
- 8) Requires the report submitted by the inspector shall be stamped and signed by the inspector and included in the HOAs reserves study.
- 9) Provides that if the inspector determines a risk to safety of the residents as a result of the inspection, the inspector shall provide a copy of the inspection report the HOA immediately upon completion of the report and to the local code enforcement agency within 15 days.
- 10) Requires the HOA to take preventative measures immediately to prevent occupant access to exterior elevated elements until repairs have been inspected and approved by the enforcement agency.
- 11) Allows a local enforcement agency to recover enforcement costs from an HOA.
- 12) Requires the first inspection to be completed on January 1, 2025 and every nine years after in coordination with the reserve study.
- 13) Requires that for buildings for which a building permit application was submitted after January 1, 2020, the first inspection of the exterior elevated elements shall occur six years after the certificate of occupancy is issued.
- 14) Allows an HOA to adopt rules or bylaws that impose requirements beyond what is in this Act.
- 15) Authorizes an HOA to bring an action against a developer or builder of a CID for construction defect after providing notice to the members of the HOA.
- 16) Provides that if the developer or builder sits on the HOA board then the decision to pursue legal proceedings for a construction defect shall be solely in the nonaffiliated board members.

- 17) Provides that the governing documents of the HOA shall not impose any preconditions or limitations on the board's authority to pursue and claim, civil action, arbitration, or pre-litigation process against a developer or builder for construction defect.
- 18) Provides that any provision of the governing document that imposes a limitation or preconditions on the board's authority to pursue litigation for construction defect is valid if it was adopted solely when the developer of the HOA is no longer on the board and was adopted subject to the rules necessary to amend the government documents.
- 19) Applies to all governing documents whether adopted before or after this bill takes effect and retroactively to claims initiated before the effective date of this bill, unless those claims have been resolved through an executed settlement, a final arbitration decision, or a final judicial decision on the merits.
- 20) Requires at a meeting of an HOA to consider filing a civil action against the developer of a CID, when discussing the impacts of the civil action the HOA shall discuss the potential impacts including any financial impacts, with its members.

**EXISTING LAW:**

- 1) Requires, pursuant to SB 721 (Hill, Chapter 445, Statutes of 2018), regular inspection of elevated decks, balconies, stairways, walkways, and their railings, together with the associated waterproofing system, on all buildings with three or more multifamily dwelling units, excluding buildings in CIDs.
- 2) Establishes, through the Davis-Stirling Common Interest Development Act, the rules and regulations governing the operation of a residential CID and the respective rights and duties of an HOA and its members.
- 3) Provides that, unless otherwise provided in the declaration of a CID, the HOA is responsible for repairing, replacing, and maintaining the common area, as defined, while the individual members are responsible for repairing, replacing, and maintaining their separate interest (e.g., their individual unit).
- 4) Requires an HOA board to cause to be conducted, at least once every three years, a reasonably competent and diligent visual inspection of the accessible areas of all the major components the HOA is obligated to repair, replace, restore, or maintain as part of a study of the triannual inspection reserve study requirements of the CID, when the current replacement value of the major components meets a specified threshold.
- 5) Requires an HOA board, at least 30 days prior to filing a civil against a developer or other declarant for damage to a property that the HOA is obligated to maintain or repair, to notify its members in writing of the time and place of a meeting to discuss the problems leading to the filing and options available to address the problems. An HOA board may give this notice within 30 days of filing a civil action if it has reason to believe the applicable statute of limitations will imminently expire.

**FISCAL EFFECT:** None.

**COMMENTS:**

*Purpose of this bill:* According to the author, “SB 326 builds upon last year’s SB 721, which I authored to address balcony inspections and repairs for apartment buildings, following the deadly 2015 Berkeley balcony collapse that killed six and injured seven. SB 326 also requires that existing condominium buildings, governed by homeowners associations (HOAs), have inspections at least once every nine years on a small percentage of their balconies, stairwells, and other exterior elevated elements to ensure they are safe. And SB 326 also prevents builders from placing language in an HOA’s covenants, conditions, and restrictions, or CC&Rs, that would limit the ability of the HOA Board of Directors to sue the developer if there are construction defects. This is not a hypothetical situation. A case is currently being litigated in San Francisco, where a routine water leak revealed that a main walkway on the third floor was about to collapse due to wood rot. When the HOA Board attempted to file a civil suit against the developer, they found requirements in their CC&Rs, placed there by the developer that required a full-member vote before they could legally seek damages. It took the Board months to conduct the member vote, and the statute of limitations on construction defect lawsuits nearly ran out.”

*Common interest developments:* There are over 52,000 CIDs in the state that comprise over six million housing units, or approximately one quarter of the state's housing stock. CIDs include condominiums, community apartment projects, housing cooperatives, and planned unit developments. They are characterized by a separate ownership of dwelling space coupled with an undivided interest in a common property, restricted by covenants and conditions that limit the use of common area and the separate ownership interests, and the management of common property and enforcement of restrictions by an association. CIDs are governed by the Davis-Stirling Act (the Act) as well as the governing documents of the association, including bylaws, declaration, and operating rules.

CIDs are required to complete a reserve study every three years which includes a visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore, or maintain as part of a study of the reserve account requirements of the common interest development.

*Background:* SB 721 (Hill) Chapter 445, Statutes of 2018, establishes minimum inspection requirements for the exterior elevated elements, including balconies and decks, of buildings with three or more multifamily dwelling units, as specified. The bill was introduced in response to the 2015 Berkeley balcony collapse. The balcony collapse incident, due to decayed wooden joists, killed six young adults and injured seven others, mostly Irish citizens, visiting California as part of a summer exchange program. The incident occurred at the Library Gardens apartment complex, located near the University of California, Berkeley campus. CIDs were not included in SB 721 because CIDs are already required to complete a review of the major components of the CID every three years. After working with representatives of the CID industry, the author introduced SB 326 which requires a review process that works in conjunction with the reserve study.

*Construction defect litigation:* When CIDs are created the developer writes the governing documents of the HOA subject to the review and approval of the Department of Real Estate. While the HOA developer is still selling off the separate properties within the HOA to

homeowners, it is also common for the developer to serve, or appoint people to serve, on the HOA board of directors. Some bylaws require that the members of the HOA vote to approve construction defect lawsuit against the developer. This bill declares null and void any provision in the governing documents purporting to place limitations or preconditions on the HOA board's ability to initiate a construction defect claim against the developer. It would also prevent board members appointed by or affiliated with the developer from participating in any board decision as to whether or not to pursue a construction defect claim against the developer.

Civil Code Section 6150 already provides some protections against a board suing the developer: it requires an HOA board to hold a meeting of the members 30 days prior to filing a lawsuit, stating its reasoning and laying out the options available to the HOA.

*Arguments in support:* Supporters of this bill write that the bill will prohibit developer of an HOA from including preconditions in the governing documents that prevent an HOA from recovering for construction defects. They also support efforts to maintain the safety of the balconies and external decks, balconies, stairways, walkways of a CID.

*Arguments in opposition:* The author has taken amendments to address concerns raised by the California Building Industry Association (BIA), however BIA has remaining concerns with the bill that keeps them opposed. BIA is concerned that the bill would prevent an HOA from participating in arbitration or alternative dispute resolution prior to initiating a construction defect lawsuit against a builder. The bill makes any provision of the governing documents that imposes any limitation or precondition on filing a construction defect lawsuit void and unenforceable. This provision is designed to void any requirement placed in the governing documents by a builder during the development of the HOA that requires the members of an HOA to vote on prior to suing a developer for construction defect. BIA is concerned that this could be interpreted to apply to arbitration or alternative dispute resolution. Those options are available to the HOA and would continue to be available if this bill were to go into effect. BIA has requested an amendment to specify those options are still available to the HOA.

*Committee amendment:*

The committee may wish to consider the following amendment to further clarify that the bill does not impact any requirement in an HOA's governing documents to participate in arbitration or alternative dispute resolution.

e) Nothing in this section extends any applicable statute of limitation or repose to file or initiate any claim, civil action, arbitration, prelitigation process, or other legal proceeding. ~~This section shall not affect the obligations of an association contained in Title 7 (commencing with Section 895) of Part 2 of Division 2.~~ Subject to the provisions of subdivisions (a) and (b), this section shall not affect any other obligations of an association contained in Title 7 (commencing with Section 895) of Part 2, Division 2, or other provisions in the association's CC&Rs related to arbitration or other alternative dispute resolution procedures.

*Double-referred:* This bill was also referred to the Assembly Committee on Judiciary where it will be heard should it pass out of this committee.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Community Associations Institute  
Consumer Attorneys of California

**Opposition**

California Building Industry Association  
Plante Lebovic, LLP

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