

ASSEMBLY BILL

No. 927

Introduced by Assembly Member Charles Calderon

February 26, 2009

An act to amend Section 1375 of the Civil Code, relating to common interest developments.

LEGISLATIVE COUNSEL'S DIGEST

AB 927, as introduced, Charles Calderon. Common interest developments: construction defects.

The Davis-Stirling Common Interest Development Act provides for the creation and regulation of common interest developments. The act requires, until July 1, 2010, with respect to certain common interest developments, that specified requirements be satisfied before an association files a complaint for damages against the builder, developer, or general contractor of the development based upon a claim for defects in the design or construction of the development. Those requirements include filing a notice regarding the commencement of legal proceedings, participating in a dispute resolution process, and preparing a case management statement, as specified.

This bill would delete the expiration date for these provisions and would thereby extend their operation indefinitely.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1375 of the Civil Code is amended to
2 read:

1 1375. (a) Before an association files a complaint for damages
2 against a builder, developer, or general contractor (“respondent”)
3 of a common interest development based upon a claim for defects
4 in the design or construction of the common interest development,
5 all of the requirements of this section shall be satisfied with respect
6 to the builder, developer, or general contractor.

7 (b) The association shall serve upon the respondent a “Notice
8 of Commencement of Legal Proceedings.” The notice shall be
9 served by certified mail to the registered agent of the respondent,
10 or if there is no registered agent, then to any officer of the
11 respondent. If there are no current officers of the respondent,
12 service shall be upon the person or entity otherwise authorized by
13 law to receive service of process. Service upon the general
14 contractor shall be sufficient to initiate the process set forth in this
15 section with regard to any builder or developer, if the builder or
16 developer is not amenable to service of process by the foregoing
17 methods. This notice shall toll all applicable statutes of limitation
18 and repose, whether contractual or statutory, by and against all
19 potentially responsible parties, regardless of whether they were
20 named in the notice, including claims for indemnity applicable to
21 the claim for the period set forth in subdivision (c). The notice
22 shall include all of the following:

- 23 (1) The name and location of the project.
24 (2) An initial list of defects sufficient to apprise the respondent
25 of the general nature of the defects at issue.
26 (3) A description of the results of the defects, if known.
27 (4) A summary of the results of a survey or questionnaire
28 distributed to homeowners to determine the nature and extent of
29 defects, if a survey has been conducted or a questionnaire has been
30 distributed.
31 (5) Either a summary of the results of testing conducted to
32 determine the nature and extent of defects or the actual test results,
33 if that testing has been conducted.

34 (c) Service of the notice shall commence a period, not to exceed
35 180 days, during which the association, the respondent, and all
36 other participating parties shall try to resolve the dispute through
37 the processes set forth in this section. This 180-day period may be
38 extended for one additional period, not to exceed 180 days, only
39 upon the mutual agreement of the association, the respondent, and
40 any parties not deemed peripheral pursuant to paragraph (3) of

1 subdivision (e). Any extensions beyond the first extension shall
2 require the agreement of all participating parties. Unless extended,
3 the dispute resolution process prescribed by this section shall be
4 deemed completed. All extensions shall continue the tolling period
5 described in subdivision (b).

6 (d) Within 25 days of the date the association serves the Notice
7 of Commencement of Legal Proceedings, the respondent may
8 request in writing to meet and confer with the board of directors
9 of the association. Unless the respondent and the association
10 otherwise agree, there shall be not more than one meeting, which
11 shall take place no later than 10 days from the date of the
12 respondent's written request, at a mutually agreeable time and
13 place. The meeting shall be subject to subdivision (b) of Section
14 1363.05. The discussions at the meeting are privileged
15 communications and are not admissible in evidence in any civil
16 action, unless the association and the respondent consent in writing
17 to their admission.

18 (e) Upon receipt of the notice, the respondent shall, within 60
19 days, comply with the following:

20 (1) The respondent shall provide the association with access to,
21 for inspection and copying ~~of~~, all plans and specifications,
22 subcontracts, and other construction files for the project that are
23 reasonably calculated to lead to the discovery of admissible
24 evidence regarding the defects claimed. The association shall
25 provide the respondent with access to, for inspection and copying
26 ~~of~~, all files reasonably calculated to lead to the discovery of
27 admissible evidence regarding the defects claimed, including all
28 reserve studies, maintenance records and any survey questionnaires,
29 or results of testing to determine the nature and extent of defects.
30 To the extent any of the above documents are withheld based on
31 privilege, a privilege log shall be prepared and submitted to all
32 other parties. All other potentially responsible parties shall have
33 the same rights as the respondent regarding the production of
34 documents upon receipt of written notice of the claim, and shall
35 produce all relevant documents within 60 days of receipt of the
36 notice of the claim.

37 (2) The respondent shall provide written notice by certified mail
38 to all subcontractors, design professionals, their insurers, and the
39 insurers of any additional insured whose ~~identities are~~ *identity is*
40 known to the respondent or readily ascertainable by review of the

1 project files or other similar sources and whose potential
2 responsibility appears on the face of the notice. This notice to
3 subcontractors, design professionals, and insurers shall include a
4 copy of the Notice of Commencement of Legal Proceedings, and
5 shall specify the date and manner by which the parties shall meet
6 and confer to select a dispute resolution facilitator pursuant to
7 paragraph (1) of subdivision (f), advise the recipient of its
8 obligation to participate in the meet and confer or serve a written
9 acknowledgment of receipt regarding this notice, advise the
10 recipient that it will waive any challenge to selection of the dispute
11 resolution facilitator if it elects not to participate in the meet and
12 confer, advise the recipient that it may be bound by any settlement
13 reached pursuant to subdivision (d) of Section 1375.05, advise the
14 recipient that it may be deemed to have waived rights to conduct
15 inspection and testing pursuant to subdivision (c) of Section
16 1375.05, advise the recipient that it may seek the assistance of an
17 attorney, and advise the recipient that it should contact its insurer,
18 if any. Any subcontractor or design professional, or insurer for
19 that subcontractor, design professional, or additional insured, who
20 receives written notice from the respondent regarding the meet
21 and confer shall, prior to the meet and confer, serve on the
22 respondent a written acknowledgment of receipt. That
23 subcontractor or design professional shall, within 10 days of service
24 of the written acknowledgment of receipt, provide to the association
25 and the respondent a Statement of Insurance that includes both of
26 the following:

27 (A) The names, addresses, and contact persons, if known, of all
28 insurance carriers, whether primary or excess and regardless of
29 whether a deductible or self-insured retention applies, whose
30 policies were in effect from the commencement of construction
31 of the subject project to the present and ~~which~~ potentially cover
32 the subject claims.

33 (B) The applicable policy numbers for each policy of insurance
34 provided.

35 (3) Any subcontractor or design professional, or insurer for that
36 subcontractor, design professional, or additional insured, who so
37 chooses, may, at any time, make a written request to the dispute
38 resolution facilitator for designation as a peripheral party. That
39 request shall be served contemporaneously on the association and
40 the respondent. If no objection to that designation is received within

1 15 days, or upon rejection of that objection, the dispute resolution
2 facilitator shall designate that subcontractor or design professional
3 as a peripheral party, and shall thereafter seek to limit the
4 attendance of that subcontractor or design professional only to
5 those dispute resolution sessions deemed peripheral party sessions
6 or to those sessions during which the dispute resolution facilitator
7 believes settlement as to peripheral parties may be finalized.
8 Nothing in this subdivision shall preclude a party who has been
9 designated a peripheral party from being reclassified as a
10 nonperipheral party, nor shall this subdivision preclude a party
11 designated as a nonperipheral party from being reclassified as a
12 peripheral party after notice to all parties and an opportunity to
13 object. For purposes of this subdivision, a peripheral party is a
14 party having total claimed exposure of less than twenty-five
15 thousand dollars (\$25,000).

16 (f) (1) Within 20 days of sending the notice set forth in
17 paragraph (2) of subdivision (e), the association, respondent,
18 subcontractors, design professionals, and their insurers who have
19 been sent a notice as described in paragraph (2) of subdivision (e)
20 shall meet and confer in an effort to select a dispute resolution
21 facilitator to preside over the mandatory dispute resolution process
22 prescribed by this section. Any subcontractor or design professional
23 who has been given timely notice of this meeting but who does
24 not participate; waives any challenge he or she may have as to the
25 selection of the dispute resolution facilitator. The role of the dispute
26 resolution facilitator is to attempt to resolve the conflict in a fair
27 manner. The dispute resolution facilitator shall be sufficiently
28 knowledgeable in the subject matter and be able to devote sufficient
29 time to the case. The dispute resolution facilitator shall not be
30 required to reside in or have an office in the county in which the
31 project is located. The dispute resolution facilitator and the
32 participating parties shall agree to a date, time, and location to
33 hold a case management meeting of all parties and the dispute
34 resolution facilitator; to discuss the claims being asserted and the
35 scheduling of events under this section. The case management
36 meeting with the dispute resolution facilitator shall be held within
37 100 days of service of the Notice of Commencement of Legal
38 Proceedings at a location in the county where the project is located.
39 Written notice of the case management meeting with the dispute
40 resolution facilitator shall be sent by the respondent to the

1 association, subcontractors and design professionals, and their
2 insurers who are known to the respondent to be on notice of the
3 claim, no later than 10 days prior to the case management meeting,
4 and shall specify its date, time, and location. The dispute resolution
5 facilitator in consultation with the respondent shall maintain a
6 contact list of the participating parties.

7 (2) No later than 10 days prior to the case management meeting,
8 the dispute resolution facilitator shall disclose to the parties all
9 matters that could cause a person aware of the facts to reasonably
10 entertain a doubt that the proposed dispute resolution facilitator
11 would be able to resolve the conflict in a fair manner. The
12 facilitator's disclosure shall include the existence of any ground
13 specified in Section 170.1 of the Code of Civil Procedure for
14 disqualification of a judge, any attorney-client relationship the
15 facilitator has or had with any party or lawyer for a party to the
16 dispute resolution process, and any professional or significant
17 personal relationship the facilitator or his or her spouse or minor
18 child living in the household has or had with any party to the
19 dispute resolution process. The disclosure shall also be provided
20 to any subsequently noticed subcontractor or design professional
21 within 10 days of the notice.

22 (3) A dispute resolution facilitator shall be disqualified by the
23 court if he or she fails to comply with this paragraph and any party
24 to the dispute resolution process serves a notice of disqualification
25 prior to the case management meeting. If the dispute resolution
26 facilitator complies with this paragraph, he or she shall be
27 disqualified by the court on the basis of the disclosure if any party
28 to the dispute resolution process serves a notice of disqualification
29 prior to the case management meeting.

30 (4) If the parties cannot mutually agree to a dispute resolution
31 facilitator, then each party shall submit a list of three dispute
32 resolution facilitators. Each party may then strike one nominee
33 from the other parties' list, and petition the court, pursuant to the
34 procedure described in subdivisions (n) and (o), for final selection
35 of the dispute resolution facilitator. The court may issue an order
36 for final selection of the dispute resolution facilitator pursuant to
37 this paragraph.

38 (5) Any subcontractor or design professional who receives notice
39 of the association's claim without having previously received
40 timely notice of the meet and confer to select the dispute resolution

1 facilitator shall be notified by the respondent regarding the name,
2 address, and telephone number of the dispute resolution facilitator.
3 Any such subcontractor or design professional may serve upon
4 the parties and the dispute resolution facilitator a written objection
5 to the dispute resolution facilitator within 15 days of receiving
6 notice of the claim. Within seven days after service of this
7 objection, the subcontractor or design professional may petition
8 the superior court to replace the dispute resolution facilitator. The
9 court may replace the dispute resolution facilitator only upon a
10 showing of good cause, liberally construed. Failure to satisfy the
11 deadlines set forth in this subdivision shall constitute a waiver of
12 the right to challenge the dispute resolution facilitator.

13 (6) The costs of the dispute resolution facilitator shall be
14 apportioned in the following manner: one-third to be paid by the
15 association; one-third to be paid by the respondent; and one-third
16 to be paid by the subcontractors and design professionals, as
17 allocated among them by the dispute resolution facilitator. The
18 costs of the dispute resolution facilitator shall be recoverable by
19 the prevailing party in any subsequent litigation pursuant to Section
20 1032 of the Code of Civil Procedure, provided however that any
21 nonsettling party may, prior to the filing of the complaint, petition
22 the facilitator to reallocate the costs of the dispute resolution
23 facilitator as they apply to any nonsettling party. The determination
24 of the dispute resolution facilitator with respect to the allocation
25 of these costs shall be binding in any subsequent litigation. The
26 dispute resolution facilitator shall take into account all relevant
27 factors and equities between all parties in the dispute resolution
28 process when reallocating costs.

29 (7) In the event the dispute resolution facilitator is replaced at
30 any time, the case management statement created pursuant to
31 subdivision (h) shall remain in full force and effect.

32 (8) The dispute resolution facilitator shall be empowered to
33 enforce all provisions of this section.

34 (g) (1) No later than the case management meeting, the parties
35 shall begin to generate a data compilation showing the following
36 information regarding the alleged defects at issue:

37 (A) The scope of the work performed by each potentially
38 responsible subcontractor.

39 (B) The tract or phase number in which each subcontractor
40 provided goods or services, or both.

1 (C) The units, either by address, unit number, or lot number, at
2 which each subcontractor provided goods or services, or both.

3 (2) This data compilation shall be updated as needed to reflect
4 additional information. Each party attending the case management
5 meeting, and any subsequent meeting pursuant to this section, shall
6 provide all information available to that party relevant to this data
7 compilation.

8 (h) At the case management meeting, the parties shall, with the
9 assistance of the dispute resolution facilitator, reach agreement on
10 a case management statement, which shall set forth all of the
11 elements set forth in paragraphs (1) to (8), inclusive, except that
12 the parties may dispense with one or more of these elements if
13 they agree that it is appropriate to do so. The case management
14 statement shall provide that the following elements shall take place
15 in the following order:

16 (1) Establishment of a document depository, located in the
17 county where the project is located, for deposit of documents,
18 defect lists, demands, and other information provided for under
19 this section. All documents exchanged by the parties and all
20 documents created pursuant to this subdivision shall be deposited
21 in the document depository, which shall be available to all parties
22 throughout the prefiling dispute resolution process and in any
23 subsequent litigation. When any document is deposited in the
24 document depository, the party depositing the document shall
25 provide written notice identifying the document to all other parties.
26 The costs of maintaining the document depository shall be
27 apportioned among the parties in the same manner as the costs of
28 the dispute resolution facilitator.

29 (2) Provision of a more detailed list of defects by the association
30 to the respondent after the association completes a visual inspection
31 of the project. This list of defects shall provide sufficient detail
32 for the respondent to ensure that all potentially responsible
33 subcontractors and design professionals are provided with notice
34 of the dispute resolution process. If not already completed prior
35 to the case management meeting, the Notice of Commencement
36 of Legal Proceedings shall be served by the respondent on all
37 additional subcontractors and design professionals whose potential
38 responsibility appears on the face of the more detailed list of
39 defects within seven days of receipt of the more detailed list. The
40 respondent shall serve a copy of the case management statement,

1 including the name, address, and telephone number of the dispute
2 resolution facilitator, to all the potentially responsible
3 subcontractors and design professionals at the same time.

4 (3) Nonintrusive visual inspection of the project by the
5 respondent, subcontractors, and design professionals.

6 (4) Invasive testing conducted by the association, ~~if~~ *as* the
7 association deems appropriate. All parties may observe and
8 photograph any testing conducted by the association pursuant to
9 this paragraph, but may not take samples or direct testing unless,
10 by mutual agreement, costs of testing are shared by the parties.

11 (5) Provision by the association of a comprehensive demand
12 ~~which~~ *that* provides sufficient detail for the parties to engage in
13 meaningful dispute resolution as contemplated under this section.

14 (6) Invasive testing conducted by the respondent, subcontractors,
15 and design professionals, ~~if~~ *as* they deem appropriate.

16 (7) Allowance for modification of the demand by the association
17 if new issues arise during the testing conducted by the respondent,
18 subcontractor, or design professionals.

19 (8) Facilitated dispute resolution of the claim, with all parties,
20 including peripheral parties, as appropriate, and insurers, if any,
21 present and having settlement authority. The dispute resolution
22 facilitators shall endeavor to set specific times for the attendance
23 of specific parties at dispute resolution sessions. If the dispute
24 resolution facilitator does not set specific times for the attendance
25 of parties at dispute resolution sessions, the dispute resolution
26 facilitator shall permit those parties to participate in dispute
27 resolution sessions by telephone.

28 (i) In addition to the foregoing elements of the case management
29 statement described in subdivision (h), upon mutual agreement of
30 the parties, the dispute resolution facilitator may include any or
31 all of the following elements in a case management statement: the
32 exchange of consultant or expert photographs; expert presentations;
33 expert meetings; or any other mechanism deemed appropriate by
34 the parties in the interest of resolving the dispute.

35 (j) The dispute resolution facilitator, with the guidance of the
36 parties, shall at the time the case management statement is
37 established, set deadlines for the occurrence of each event set forth
38 in the case management statement, taking into account such factors
39 as the size and complexity of the case, and the requirement of this

1 section that this dispute resolution process not exceed 180 days
2 absent agreement of the parties to an extension of time.

3 (k) (1) (A) At a time to be determined by the dispute resolution
4 facilitator, the respondent may submit to the association all of the
5 following:

6 (i) A request to meet with the board to discuss a written
7 settlement offer.

8 (ii) A written settlement offer, and a concise explanation of the
9 reasons for the terms of the offer.

10 (iii) A statement that the respondent has access to sufficient
11 funds to satisfy the conditions of the settlement offer.

12 (iv) A summary of the results of testing conducted for the
13 purposes of determining the nature and extent of defects, if this
14 testing has been conducted, unless the association provided the
15 respondent with actual test results.

16 (B) If the respondent does not timely submit the items required
17 by this subdivision, the association shall be relieved of any further
18 obligation to satisfy the requirements of this subdivision only.

19 (C) No less than 10 days after the respondent submits the items
20 required by this paragraph, the respondent and the board of
21 directors of the association shall meet and confer about the
22 respondent's settlement offer.

23 (D) If the association's board of directors rejects a settlement
24 offer presented at the meeting held pursuant to this subdivision,
25 the board shall hold a meeting open to each member of the
26 association. The meeting shall be held no less than 15 days before
27 the association commences an action for damages against the
28 respondent.

29 (E) No less than 15 days before this meeting is held, a written
30 notice shall be sent to each member of the association specifying
31 all of the following:

32 (i) That a meeting will take place to discuss problems that may
33 lead to the filing of a civil action, and the time and place of this
34 meeting.

35 (ii) The options that are available to address the problems,
36 including the filing of a civil action and a statement of the various
37 alternatives that are reasonably foreseeable by the association to
38 pay for those options and whether these payments are expected to
39 be made from the use of reserve account funds or the imposition

1 of regular or special assessments, or emergency assessment
2 increases.

3 (iii) The complete text of any written settlement offer, and a
4 concise explanation of the specific reasons for the terms of the
5 offer submitted to the board at the meeting held pursuant to
6 subdivision (d) that was received from the respondent.

7 (F) The respondent shall pay all expenses attributable to sending
8 the settlement offer to all members of the association. The
9 respondent shall also pay the expense of holding the meeting, not
10 to exceed three dollars (\$3) per association member.

11 (G) The discussions at the meeting and the contents of the notice
12 and the items required to be specified in the notice pursuant to
13 paragraph (E) are privileged communications and are not
14 admissible in evidence in any civil action, unless the association
15 consents to their admission.

16 (H) No more than one request to meet and discuss a written
17 settlement offer may be made by the respondent pursuant to this
18 subdivision.

19 (I) Except for the purpose of in camera review as provided in
20 subdivision (c) of Section 1375.05, all defect lists and demands,
21 communications, negotiations, and settlement offers made in the
22 course of the prelitigation dispute resolution process provided by
23 this section shall be inadmissible pursuant to Sections 1119 to
24 1124, inclusive, of the Evidence Code and all applicable decisional
25 law. This inadmissibility shall not be extended to any other
26 documents or communications which would not otherwise be
27 deemed inadmissible.

28 (m) Any subcontractor or design professional may, at any time,
29 petition the dispute resolution facilitator to release that party from
30 the dispute resolution process upon a showing that the
31 subcontractor or design professional is not potentially responsible
32 for the defect claims at issue. The petition shall be served
33 contemporaneously on all other parties, who shall have 15 days
34 from the date of service to object. If a subcontractor or design
35 professional is released, and it later appears to the dispute
36 resolution facilitator that it may be a responsible party in light of
37 the current defect list or demand, the respondent shall renote the
38 party as provided by paragraph (2) of subdivision (e), provide a
39 copy of the current defect list or demand, and direct the party to
40 attend a dispute resolution session at a stated time and location. A

1 party who subsequently appears after having been released by the
2 dispute resolution facilitator shall not be prejudiced by its absence
3 from the dispute resolution process as the result of having been
4 previously released by the dispute resolution facilitator.

5 (n) Any party may, at any time, petition the superior court in
6 the county where the project is located, upon a showing of good
7 cause, and the court may issue an order, for any of the following,
8 or for appointment of a referee to resolve a dispute regarding any
9 of the following:

10 (1) To take a deposition of any party to the process, or subpoena
11 a third party for deposition or production of documents, ~~which~~
12 *that* is necessary to further prelitigation resolution of the dispute.

13 (2) To resolve any disputes concerning inspection, testing,
14 production of documents, or exchange of information provided
15 for under this section.

16 (3) To resolve any disagreements relative to the timing or
17 contents of the case management statement.

18 (4) To authorize internal extensions of timeframes set forth in
19 the case management statement.

20 (5) To seek a determination that a settlement is a good faith
21 settlement pursuant to Section 877.6 of the Code of Civil Procedure
22 and all related authorities. The page limitations and meet and confer
23 requirements specified in this section shall not apply to these
24 motions, which may be made on shortened notice. Instead, these
25 motions shall be subject to other applicable state law, rules of
26 court, and local rules. A determination made by the court pursuant
27 to this motion shall have the same force and effect as the
28 determination of a postfiling application or motion for good faith
29 settlement.

30 (6) To ensure compliance, on shortened notice, with the
31 obligation to provide a Statement of Insurance pursuant to
32 paragraph (2) of subdivision (e).

33 (7) For any other relief appropriate to the enforcement of the
34 provisions of this section, including the ordering of parties, and
35 insurers, if any, to the dispute resolution process with settlement
36 authority.

37 (o) (1) A petition filed pursuant to subdivision (n) shall be filed
38 in the superior court in the county in which the project is located.
39 The court shall hear and decide the petition within 10 days after
40 filing. The petitioning party shall serve the petition on all parties,

1 including the date, time, and location of the hearing no later than
2 five business days prior to the hearing. Any responsive papers
3 shall be filed and served no later than three business days prior to
4 the hearing. Any petition or response filed under this section shall
5 be no more than three pages in length.

6 (2) All parties shall meet with the dispute resolution facilitator,
7 if one has been appointed and confer in person or by the telephone
8 prior to the filing of that petition to attempt to resolve the matter
9 without requiring court intervention.

10 (p) As used in this section:

11 (1) "Association" shall have the same meaning as defined in
12 subdivision (a) of Section 1351.

13 (2) "Builder" means the declarant, as defined in subdivision (g)
14 of Section 1351.

15 (3) "Common interest development" shall have the same
16 meaning as in subdivision (c) of Section 1351, except that it shall
17 not include developments or projects with less than 20 units.

18 (q) The alternative dispute resolution process and procedures
19 described in this section shall have no application or legal effect
20 other than as described in this section.

21 (r) This section shall become operative on July 1, 2002, however
22 it shall not apply to any pending suit or claim for which notice has
23 previously been given.

24 ~~(s) This section shall become inoperative on July 1, 2010, and~~
25 ~~as of January 1, 2011, is repealed, unless a later enacted statute,~~
26 ~~that is enacted before January 1, 2011, deletes or extends the dates~~
27 ~~on which it becomes inoperative and is repealed.~~