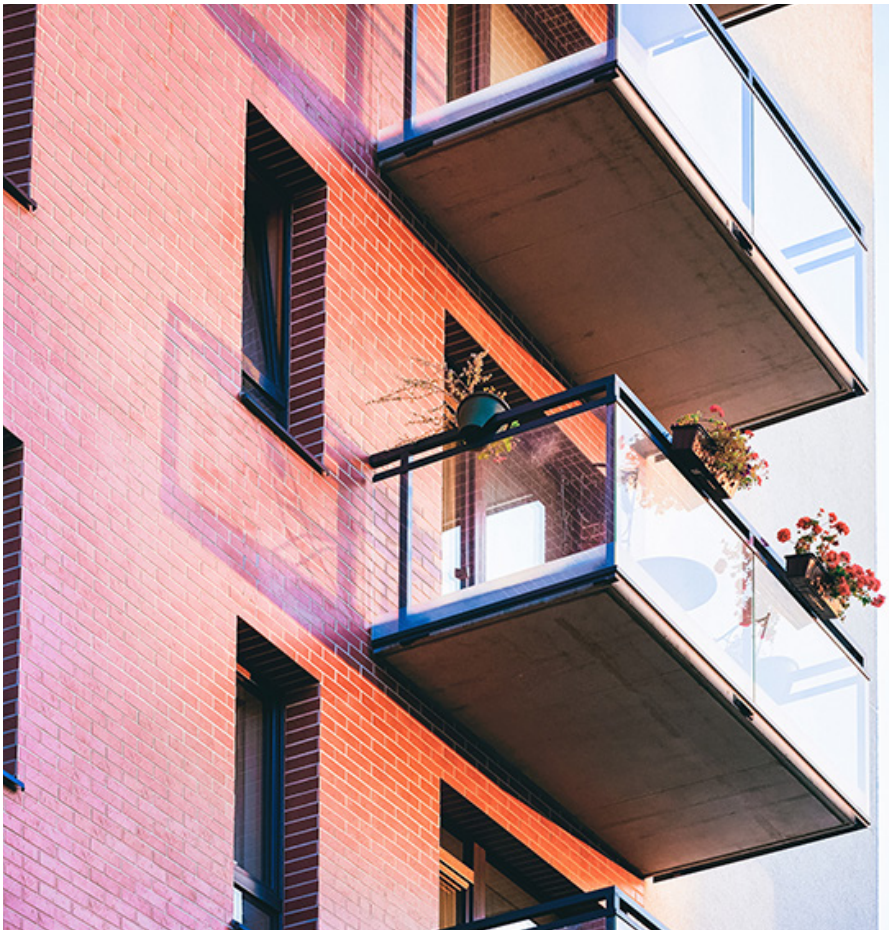

Echo Supported "Balcony Safety Bill" Signed into Law

By J. Spencer Edgett, Esq.

Developer drafted 'poison pill' anti-construction defect litigation provisions in community association governing documents are invalid and unenforceable in California. As a result, new requirement for HOAs to hire inspection of exterior elevated structures.

In recent years, there has been an increasing trend by developers, in an effort to avoid responsibility for construction defects, to insert provisions in the original community association governing documents, i.e., CC&Rs, which makes it exceedingly difficult to pursue such claims against them. The provisions impose onerous preconditions on the Board of Director's ability to pursue claims including, among other things, requiring a membership vote before pursuing a claim, retaining an attorney or construction consultant to investigate a potential claim or incurring any expenses relating to such claims.

The significant harm of these 'poison pill' developer drafted provisions was highlighted in the recent California decision *Branches Neighborhood v. CalAtlantic Group* in which a condominium project claiming $5 million in construction defects had their case summarily dismissed for failing to comply with provisions in the developer drafted CC&Rs requiring a member vote 'before' filing a claim in arbitration.

The arbitrator in *Branches* dismissed the Association's claim despite the fact that 'after' filing the claim, the homeowners overwhelmingly voted to pursue the claim (92 out of 93 voting in favor of pursuing the claim.) The arbitrator ruled that the subsequent vote and ratification of the Board's actions by the membership did not apply retroactively and thus the failure to obtain the vote 'prior' to filing was fatal.

The decision in Branches further emboldened developers to challenge defect claims for failing to comply with such member voting requirements. Developers' attorneys began aggressively seeking to invalidate and/or undermine the voting procedures and argue that any technical flaw in the voting process was a valid basis to avoid a claim for construction defects.

Developers and their attorneys have argued that they insert these provisions to 'protect' the homeowners from Board members that may pursue claims which will be expensive for the members to litigate. However, as evidenced by the result in *Branches*, the

intention is purely self-serving and designed to protect developers against claims for faulty construction and thereby unfairly saddle homeowners with an expense which the Association was never set up to absorb and cannot fund.

In order to protect homeowners from having their rights to pursue legitimate claims for construction defects dismissed on a technicality, Senator Jerry Hill (San Mateo) included a provision in Senate Bill (SB) 326 – commonly known as the 'balcony bill' – which invalidates such 'poison pill' provisions in Association governing documents. These 'poison pill' provisions often include onerous preconditions to pursuing or even investigating a construction defect claim including obtaining a membership vote before initiating an SB800 claim or even incurring any expenses to investigate a potential claim. SB 326 was signed into law by Governor Newsom August 30, 2019 and will go into effect on January 1, 2020.

This aspect of SB 326 furthers its primary purpose, i.e., to protect homeowners from dangerous conditions that could result in injury or death. Specifically, SB 326 is a response to the 2005 Berkeley balcony collapse that killed six people and severely injured seven more. The law seeks to safeguard against such a tragedy by mandating the following for common interest developments:

- Associations (with 3 or more units) are required to retain a licensed structural engineer or architect to perform a 'reasonably competent and diligent' inspection of exterior elevated elements, defined as load bearing components more than 6 ft above the ground with a walking surface (i.e., decks, balconies, walkways, stairways and their railings) supported in whole or substantially by wood or wood-based products, and their associated waterproofing systems on a recurring basis (once every 9 years).

- The first inspection must be completed by January 1, 2025 (except for buildings with permit applications submitted on or after January 1, 2020 in which case the first inspection must be completed within six years following the issuance of the certificate of occupancy.)

- The inspection must consist of a random and statistically significant sample defined as '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.'

- The inspector must submit a report to the board providing specified information about the physical condition and useful life of the elements inspected and any recommendations for repair or replacement.

- If the inspector determines that an exterior elevated element poses and immediate threat to safety of the occupants, the report must be provided to the local enforcement agency and the association is required to take immediate preventative measures.

- Local enforcement agencies have the ability to recover enforcement costs associated with these requirements.

As a result of SB 326, for newer projects (less than 10 years old), in the event that a dangerous condition of the elevated elements and associated waterproofing system is the result of a construction defect, the Association will be able to pursue the developer for compensation to implement repairs without the risk that their claim could be defeated on a technicality for not obtaining a membership vote before taking steps to investigate or initiate the claim.

J. Spencer Edgett is a partner with Chapman & Intrieri, LLP and has represented community associations for more than 15 years both as general counsel and in pursuing claims against developers and contractors for construction defects. Mr. Edgett worked closely with Senator Jerry Hill's office on SB 326, specifically pertaining to the aspect invalidating 'poison pill' anti-construction defect litigation provisions in governing documents. Mr. Edgett also testified in support of SB326 before the Senate Housing Committee.