



**Executive Council of Homeowners**

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May 23, 2019

The Honorable Mark Stone (Chair)  
California State Assembly  
Assembly Judiciary Committee  
State Capitol, Room 3146  
Sacramento, CA 95814

Re: Senate Bill 326 (Hill) – SUPPORT

Dear Chairman Stone:

The Executive Council of Homeowners (“ECHO”) is a statewide nonprofit corporation dedicated to assisting California homeowners’ associations. ECHO is the oldest association in California advocating for common interest development boards and homeowners. Our mission is to educate, advocate and connect members. ECHO’s principal activity is education through curated and published articles in our magazine and e-newsletter and an extensive repository online. We further offer conferences, regional meetings and a trade show. ECHO is an owners’ organization. Founded in San Jose in 1972 with a nucleus of five owner associations, ECHO membership has grown to over 1300 association members representing over 100,000 homes.

ECHO supports SB 326 which precludes developers from inserting provisions in community association CC&Rs which unfairly impose onerous preconditions, including membership approval, before the Board of Directors may initiate a claim for construction defects. These unfair preconditions should be left to the community homeowners to decide. SB 326 invalidates such developer drafted CC&R provisions and it allows homeowners to amend their own CC&Rs based on the desires and needs of the community.

The significant harm of developer inserted provisions in CC&Rs was highlighted by the recent *Branches Neighborhood* case 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. (See, *Branches Neighborhood v. CalAtlantic Group, Inc.* (2018) 26 Cal.App.5<sup>th</sup> 743).

The arbitrator in *Branches* dismissed the HOA’s claim even though **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 to their claim.

The Board of Directors for HOAs are elected by the homeowners to make critical decisions about the operation and management of their respective communities including whether to pursue claims against the developer for construction defects. There are numerous reasons why the decision and authority to pursue construction defect claims should be vested in the elected Board of Directors including, but not limited to, the following:

- Homeowners elect a Board of Directors to make these decisions for their community.
- The Board of Directors has a fiduciary obligation to the members to act in the best interest of the community; whereas individual homeowners do not owe a duty to one another and may vote in their own self-interest (i.e., an owner that is selling their unit may vote against pursuing a claim so as not to impact their personal desire to sell).
- It may be impossible to achieve a quorum due to voter apathy or insurmountable thresholds (i.e., supermajority or 80% approval) imposed by developer written governance documents. The later conditions make it nearly impossible for a valid vote.
- There is added time and expense to having a member vote (i.e., mailers, secret ballots, inspectors of elections, townhall meetings, etc.) and there may be circumstances where the Board learns of a claim shortly before the expiration of the statute of limitations or repose and thus not enough time to properly educate the membership and obtain a vote before the claim is time barred.
- Existing law found in the “Davis Stirling Act” already requires the Board to give the members notice of a potential defect claim and to hold an informational meeting to discuss the matter prior to filing the claim and also allows the Board to provide notice ‘after filing’ in order to protect against the running of the statute of limitations. (See, Civil Code Section 6150)
- The Board of Directors have more information about the merits of any potential claim than homeowners as they meet more regularly and have access to information from attorneys and construction consultants provided in ‘executive session’ which is not open to the members for the reason that the information regarding potential litigation is subject to attorney client privilege/work product and requires confidentiality to preserve those protections.

The bill also would provide for a sensible and cost-effective approach to evaluating the safety of decks and balconies in HOA developments to ensure that lack of attention and/or deferred maintenance on such components does not present a life safety risk or result in large Special Assessments to the homeowners.

Because SB 326 protects homeowners from potentially dangerous conditions of elevated components of their communities in a sensible and economical manner and prevents developers from inserting onerous pre-conditions in the CC&Rs designed to provide a procedural/technical defense to otherwise legitimate claims for construction defects, ECHO respectfully requests your AYE vote on SB 326.

Please contact me at (408) 297-3246 x 4 or [dzepponi@echo-ca.org](mailto:dzepponi@echo-ca.org) if you have any questions about our position.

Sincerely,



David Zepponi  
Executive Director

cc: Senator Jerry Hill