

## **The Calderon Act: Some Common Questions and Answers**

*What steps have to be taken before an Association can sue a builder for design or construction defects?*

The Association must provide written notice to the builder, including a preliminary list of defects (§1375(b)(1)(A) through (C))

1. The Association must engage in a period of negotiations not in excess of 90 days, during which time the Association and the Builder shall attempt to settle the dispute or agree to ADR (Alternative Dispute Resolution) (§1375(b)(2))
2. The Association must meet and confer with the Builder if the Builder so requests, within 25 days of the date the Association delivers the initial notice, the Association must make available to the Builder for inspection and testing, at least those areas inspected or tested by the Association. §1375(b)(3)(B)(1.)
3. If the Association conducted inspection and testing prior to its initial notice, the Association must make available to the builder for inspection and testing at least those areas inspected or tested by the Association. (§ 2375(d)(1).)
4. If the builder timely submits a written settlement offer, the board must meet and confer again the builder after inspection and testing are completed. The builder and the board shall meet and confer about the builder's settlement offer, including any offer to submit the dispute to ADR. (§ 1375(e)(3).)
5. If the board rejects the builder's written settlement offer, the Association must satisfy one of two alternatives for providing information to the members about the dispute before filing a lawsuit. (§ 1375(g)(1) and (2).)

*How does the Act deal with running of the statutes of limitations?*

1. The initial notice by the Association shall, upon mailing, toll (stop the running of) all statutory and contractual limitations on actions against all parties who may be responsible for the damages claimed, whether named in the notice or not. (§ 1375(b)(3)(A).)

*How long is the tolling period:*

1. One hundred fifty (150) days or a longer period agreed to in writing by the Association and the builder. (§ 1375(b)(3)(A).)

*Does the tolling apply to claims against subcontractors and design professionals?*

1. Yes. The tolling applies to all parties who may be responsible for the damages claimed, “whether named in the notice or not”, including claims for indemnity. (§ 1375(b)(3)(A).)

*Can the builder cancel the tolling provision?*

1. Yes. At any time, the builder may give written notice to cancel the tolling of the statute of limitations. (§1375(b)(3)(B).)

*What is the effect of the builder canceling the tolling?*

1. Upon delivery of written cancellation notice from the builder, the Association is relieved of any further obligations under subdivisions (b), (d) and (e), inclusive. (§ 1375(b)(3)(B).)

*If the builder cancels, when does the tolling cease?*

1. The tolling of all applicable statutes of limitations shall cease sixty (60) days after the written notice of cancellation by the builder is delivered to the Association. ( 1375(b)(3)B.)

*Where is the meeting to be held?*

1. At a mutually agreeable time and place. (§ 1375(b)(3)(B)(1).)

*Is the meeting subject to Civil Code § 1363(g)?*

1. Yes (§ 1375(b)(3)(B)(1).)

*What does Civil Code § 1363(g) require?*

1. Former § 1363(g), now a part of § 1363.05, the “Common Interest Development Open Meeting Act”, permits any member of the Association to attend board meetings, except<sup>4</sup> when the board adjourns to executive session to consider litigation, matters relating to the formation of contracts with third parties, member discipline, or personnel matters. (§ 1363.05(b).)

*What is the purpose of the first meet and confer?*

1. The meeting shall be for the purpose of discussing all of the following:
  - (A) The nature and extent of the claimed defects;
  - (B) Proposed methods of repair, to the extent there is sufficient information;
  - (C) Proposals for submitting the dispute to ADR;
  - (D) Requests from the builder to inspect the project and conduct testing. (§ 1375(b)(3)(B)(1)(A)-(D).)

*Are discussions at the first meet and confer admissible in a civil action?*

1. No. The discussions at the first meet and confer are privileged communications and are not admissible in evidence in any civil action, unless the Association and builder consent to their admission. (§ 1375(b)(3)(B)(1).)

*At what point must the builder notify insurers?*

1. If the builder requests the first meet and confer with the board, the builder shall deliver the Association's initial notice to "any insurer that has issued a policy to the builder which imposes upon the insurer a duty to defend the insured or indemnify the insured for losses resulting from the defects identified in the Association's initial notice". (§ 1375(b)(3)(B)(2).)

*What obligations does delivery of the notice by the builder impose on the insurer?*

1. The notice by the builder, upon request, imposes upon the insurers any obligation which would be imposed under the terms of the policy if the insured had been served with a summons and complaint for damages. (§ 1375(b)(3)(B)(2).)

*Is the builder required to inform the Association when the insurers are notified?*

1. Yes. The builder shall inform the Association when the builder delivers the notice to each insurer. (§ 1375(b)(3)(B)(2).)

*How does the Act deal with inspection and testing?*

1. If the Association conducted inspection and testing prior to the date it sent the initial written notice, the Association shall make available for inspection and testing at least those areas inspected or tested by the Association. (§ 1375(d)(1).)

*When must the Association make those areas available for inspection and testing?*

1. At the "earliest practicable date" after the initial meet and confer. (§ 1375(d)(1).)

*How long does the builder have to complete its inspection and testing?*

1. Fifteen (15) days from the date the Association makes these areas available for inspection and testing, unless the Association and builder agree to a longer period. (§ 1375(d)(1).)

*How will the manner of inspection and testing determined?*

1. By agreement of the Association and builder. (§ 1375(d)(1).)

*What if the builder wishes to conduct inspection and testing beyond that which was conducted by the Association?*

1. The extent of any such inspection and testing shall be set by agreement of the Association and builder. (§ 1375(d)(1).)

*What if the builder does not timely complete its inspection and testing?*

1. The Association then shall be relieved of any further obligations to satisfy the requirements of subdivisions (d) and (e). (§ 1375(d)(1).)

*What pays the builder's inspection and testing costs?*

1. The builder. (§ 1375(d)(2).)

*What other obligations does the builder have with regard to inspection and testing?*

1. There are two other obligations: to restore the property to the condition which existed immediately prior to the testing and to indemnify the Association and the owner of the separate interest involved for any damages resulting from the testing. (§ 1375(d)(2).)

*How does the builder get access for inspection and testing of occupied units?*

1. Interior inspections of occupied separate interests and destructive testing of any interior of a separate interest shall be conducted in accordance with the governing documents of the Association, unless the individual owner agrees otherwise. (§ 1375(d)(3).)

*What if the builder fails to pay the cost of inspection and testing?*

1. The court shall order the builder to pay any deficiencies within thirty (30) days, with interest, and may fashion any additional remedy which the court determines to be in the interest of justice. (§ 1375(h)(4).)

*What if the governing documents of the Association do not provide for inspection and testing of separate interest?*

1. In that event, the inspection or testing shall be conducted in a manner and at a time agreed to by the owner of the separate interest. (§ 1375(d)(3).)

*Are the inspection and testing results inadmissible as evidence in a civil action?*

1. No, because the inspection and testing was conducted pursuant to the Act. (§ 1375(d)(4).)

*When does the builder submit a written settlement offer?*

1. The builder shall submit to the Association a written settlement offer within thirty (30) days of the completion of inspection or testing, or within thirty (30) days of the initial meet and confer (if no inspection and testing is conducted). (§ 1375(e)(1).)

*What must the builder submit to the Association?*

1. The builder shall submit to the Association all of the following:
  - (A) A request to meet with the board to discuss a written settlement offer.

- (B) A written settlement offer, and a concise explanation of the specific reasons for the terms of the offer. The offer may include an offer to submit the dispute to ADR;
- (C) A statement that the builder for the purpose of determining the nature and extent of defects. However, if the Association provided the builder with actual test results in the Association's initial notice, then the builder shall provide the Association with actual test results. (§ 1375(e)(1)(A)-(D).)

*What if the builder does not timely submit the four items discussed above?*

- 1. In that case, the Association shall be relieved of any further obligations to satisfy the requirements of subdivision (e) (the second meet and confer). (§ 1375(e)(2).)

*When does the second meet and confer take place?*

- 1. No less than ten (10) days after the builder submits the four items discussed above, the builder and the board shall meet and confer about the builder's settlement offer, including any offer to submit the dispute ADR. (§ 1375(e)(3).)

*What if the board rejects the builder's settlement offer presented at the second meet and confer?*

- 1. The board must hold a meeting open to each member of the Association. The meeting shall be held no less than fifteen (15) days before the Association commences on action for damages against the builder. (§1375(g)(1)(A).)

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

- a) That a meeting will take place to discuss problems that may lead to the filing of a civil action, and the time and place of the meeting;
- b) The options that are available to address the problems, including the filing of a civil action;
- c) A complete text of any written settlement offer from the builder and a concise explanation of the specific reasons for the terms of the offer submitted and of any offer by the builder to submit the dispute to ADR;

- d) The preliminary list of defects provided by the Association to the builder with the Association's initial notice, together with a list of other documents provided by the Association to the builder and information about where and when members of the Association may inspect those documents. (§ 1375(g)(1)(B)(I)-(iv).)

*Who is responsible for paying the cost of sending the settlement offer and holding the members' meeting?*

1. The builder shall pay all expenses attributable to sending the settlement offer and any offer for ADR to all members. The builder also shall pay the expense of holding the meeting, not to exceed \$3.00 per member. (§ 1375(1)(C).)

*What if the builder does not pay expenses attributable to sending the settlement offer and holding the members' meeting?*

1. The court shall order the builder to pay any deficiencies within thirty (30) days, with interest, and may fashion any additional remedy, in the interest of justice. (§ 1375(h)(4).)

*Are discussions at the meeting and the contents of the notice to the members admissible in evidence?*

1. No. The discussions at the meeting and the contents of the notice are privileged communications and are not admissible in evidence in any civil action, unless the association consents to their admission. (§ 1375(g)(1)(D).)

*How does this program relate to the requirements of Civil Code § 1368.4?*

1. Section 1368.4 requires, in pertinent part, that at least thirty (30) days prior to filing suit (unless the statute of limitations will expire) the association shall send notice to the homeowners which specifies: (1) that a meeting will take place to discuss problems that may lead to a lawsuit; (2) the options available to the Association; and (3) the time and place of the meeting. Compliance with the program contained in subdivision (g) of the Act excuses the Association from satisfying the requirements of § 1368.4.

*Is there an alternative compliance program for the Association?*

1. Yes. If the Association is relieved of its obligations to satisfy the requirements of subdivisions (a) to (e), inclusive, before all those requirements have been satisfied, the Association may commence an action for damages against the builder thirty (30) days after sending a written notice to each member specifying all of the following:
  - A) The preliminary list of defects, list of other documents provided by the Association to the builder, and information about member access to those documents;
  - B) The options, including civil actions, that are available to address the problems;
  - C) A statement that if five percent (5%) of the members request a special meeting to discuss the matter within fifteen (15) days of the date the notice is mailed or delivered to the members, such a meeting shall be held. If the governing documents of the Association provide for a different special meeting procedure, then the Association's statement shall inform the members of that procedure.

Compliance with this alternative also excuses the Association from satisfying the requirements of § 1368.4. (§ 1375(g)(2)(A)-(D).)

*What if the Association fails to comply with the requirements of the Act?*

1. If the Association files an action for damages against the builder without complying with the Act, the builder may file a verified application asserting a "procedural deficiency". (§ 1375(h)(1).)

*When must the builder's verified application be filed?*

1. No later than ninety (90) days after the builder's answer to the plaintiff's complaint has been served, unless the court finds that extraordinary conditions exist. (§ 1375(h)(1).)

*What does the court do with the builder's application?*

1. The court is required to schedule a hearing within twenty-one (21) days of the application to determine whether the Association or builder has "substantially complied" with the Act. The issue may be determined upon affidavits or upon oral testimony, in the court's discretion. (§ 1375(h)(2).)

*What happens if the court finds that the Association did not substantially comply?*

1. The court is required to stay the action for up to ninety (90) days to allow the Association to establish substantial compliance. A hearing will be set within ninety (90) days to determine the Association's compliance. For good cause shown, the court may at any time extend the period of the stay at the request of the Association. (§ 2375(h)(3)(A).)

*What are the consequences if the Association has not timely established substantial compliance?*

1. In that event, the court must determine if, in the interest of justice, the action should be dismissed without prejudice or if another remedy should be fashioned. (§ 1375(h)(3)(B).)

*Can the court dismiss the Association's action with prejudice for failing to substantially comply with the Act?*

1. No. (§ 1375(h)(3)(B).)

*Is compliance by the builder relevant to the court's determination of the appropriate remedy?*

1. Yes. "[T]he court shall consider the extent to which the builder has complied" with the Act. (§ 1375(h)(3)(B).)

*Can the various time periods under the Act be extended or modified?*

1. Yes. At any time after the Association's initial notice is delivered to the builder, the Association and the builder may agree in writing to modify or excuse any of the time periods or other obligations imposed by the Act. (§ 1375(f)(1).)

*After the initial notice is delivered by the Association, how are future notices and requests to be delivered?*

1. All required notices, requests, statements or other communications shall be delivered by one of the following:
  - A) By first-class registered or certified mail, return receipt request; or
  - B) In any manner in which it is permissible to serve a summons pursuant to Code of Civil Procedure Sections 415.10 or 415.20 (§ 415.10 sets forth the requirements for personal service. § 415.20 provides for "substituted service" under certain circumstances, permitted the document to be served by leaving a copy then mailing an additional copy.)