

SA2005RF0148

December 22, 2005

VIA PERSONAL DELIVERY

The Honorable Bill Lockyer
Attorney General
1300 I Street
Sacramento, CA 95814

RECEIVED
DEC 27 2005

INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE

Attention: Tricia Knight, Initiative Coordinator

Re: Request for Title and Summary- Initiative Statutory Amendment

Dear Mr. Lockyer:

Pursuant to Article II, Section 10(d) of the California Constitution and Section 9002 of the Elections Code, I hereby request that a title and summary be prepared for the attached initiative statutory amendment. Enclosed is a check for \$200.00. My residence address is attached.

All inquires or correspondence relative to this initiative should be directed to Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, 1415 L Street, Suite 1200, Sacramento, CA 95814, (916) 446-6752, Attention: Richard D. Martland.

Thank you for your assistance.

Sincerely,

Robert Rivinius
Proponent

Jo/ Condie
Proponent

Enclosure: Proposed Initiative

SECTION. 1 This measure shall be known as "The Opportunity to Repair Act of 2006."

SEC. 2 Findings and Declarations

The People of the State of California declare:

(a) Unnecessary litigation to correct residential construction defects and commercial building accessibility violations has cost homeowners and small businesses significant money. In many cases, the only winners are the trial lawyers who make off with millions of dollars in fees and settlements.

(b) The problem is that trial lawyers do not encourage resolution of these disputes by first offering the contractor in the case of residential construction defects or small business owners in the case of accessibility violations, an opportunity to repair the problem without litigation. Often times in accessibility violation situations, the lawyers don't even have a client who has been harmed, yet they force businesses into settlements where the lawyers get most of the money.

(c) The result is that the trial lawyers prosper at the expense of homeowners and small businesses by filing frivolous and unnecessary lawsuits over minor problems that could be corrected without resorting to litigation.

(d) The system has to be changed so that homeowners and small businesses have a procedure to resolve construction defects and accessibility issues before costly and time-consuming litigation is filed.

SEC. 3. Purpose and Intent

It is the intent of the people of the State of California to:

(a) Establish a fair procedure to help homeowners and businesses resolve residential construction defects and commercial building accessibility violations in a timely and efficient manner to avoid unnecessary litigation and costs.

(b) Reduce frivolous lawsuits so that people with legitimate lawsuits can get a speedy trial and resolution of their claims.

(c) Preserve the ultimate right of the homeowner or those who allege lack of accessibility to commercial buildings to file a lawsuit and have their day in court.

SEC. 4. Title 9 (commencing with Section 945.7) is added to Part 2 of Division 2 of the Civil Code, to read:

**TITLE 8. PRELITIGATION PROCEDURE: REAL PROPERTY DEFICIENCIES
OPPORTUNITY TO REPAIR**

945.7 Definitions

For purposes of this title:

(a) "Accessibility Standard" means any statute, provision, standard or regulation applicable to any real property under state or federal law requiring:

(1) The removal of architectural barriers, or communication barriers that are structural in nature; or

(2) Compliance with applicable accessibility standards in construction or alteration.

(b) "Action" means either:

(1) For a Residential Construction Defect as defined in subsection (f)(1) below, any civil lawsuit, judicial action, judicial reference, arbitration proceeding, or alternative dispute resolution proceeding; or

(2) For a Violation as defined in subsection (f)(2) below, any civil lawsuit, judicial action, judicial reference, arbitration proceeding, or alternative dispute resolution proceeding brought under Sections 51, 52, 54, 54.1, 54.3 or 55 of the Civil Code.

(c) "Builder" has the meaning set forth in section 911.

(d) "Claimant", has the meaning set forth in section 895(f) for claims regarding Residential Construction Defects, or an alleged aggrieved party, for claims regarding a Violation as defined in subsection (f)(2) below.

(e) "Owner" means the person or entity responsible for meeting the Accessibility Standards.

(f) "Real Property Deficiencies" means either a:

(1) "Residential Construction Defect" is a deficiency in the residential construction, design, specifications, surveying, planning, supervision, testing, soil conditions, observation of construction, or the design or manufacture of a component part installed in the original construction of a dwelling unit, common area or original construction of appurtenant structures or improvements made to the dwelling or property upon which the dwelling is located.

(2) "Violation" is an alleged violation of an Accessibility Standard.

(g) "Responding Party" means Builder or Owner who receives the notice described in 945.9.

945.8 Opportunity to Repair

Notwithstanding any other provision of law, prior to filing any Action on or after November 8, 2006, for claims not subject to Title 7 (commencing with Section 895) that seek injunctive relief or the recovery of damages, including without limitation actual, consequential or statutory damages, arising out of Real Property Deficiencies, a Claimant shall follow the prelitigation procedure provided in this title.

945.9 Notice: Contents

(a) Claimant shall send written notice of a claim to Builder for Residential Construction Defects, or to Owner for a Violation of an Accessibility Standard. The notice, and all written communications between Claimant and Responding Party shall be sent via certified mail or personal service, in accordance with applicable state or federal laws. The notice shall include Claimant's name, address, and the address of the property subject to the claim and shall state the specific facts that constitute the Real Property Deficiencies and shall describe the claim in reasonable detail sufficient to determine the nature and location of the claimed Real Property Deficiencies and consequential property damage, if any, resulting from each defect. The notice shall include any evidence that depicts the nature and cause of the Real Property Deficiencies, including expert reports, photographs, and videotapes, if they exist and are discoverable pursuant to California law. If, after a proper request by Responding Party, Claimant fails to provide such evidence then Claimant shall not be permitted to introduce any such evidence in any subsequent Action. In addition, exclusively for violations of an Accessibility Standard, the notice must include the date on which the alleged violation occurred and the federal, state, and local statute, provision or regulation of which the property is believed to be in violation.

(b) Subdivision (a) must be satisfied for each Real Property Deficiency before it may be included in any Action.

945.10 Acknowledgment: Timing, election not to follow

(a) Responding Party shall acknowledge, in writing, receipt of the notice of the claim within 30 business days after receipt of the notice. In the acknowledgment, Responding Party shall indicate whether or not Responding Party elects to follow the prelitigation procedure provided in this title.

(b) If Responding Party elects not to follow the prelitigation procedures provided in this title, or rejects the claim, this title is of no further force or effect, and nothing herein applies to, or in any way affects, Responding Party's or Claimant's rights, remedies, obligations, or defenses, contractual or legal.

(c) Failure of the Responding Party to acknowledge the notice within 30 business days of receipt of the notice or to indicate in the Responding Party's acknowledgment whether or not the Responding Party elects to follow the prelitigation procedure provided in this title shall be deemed Responding Party's election not to follow the prelitigation procedure provided in this title.

945.11 Procedures for Residential Construction Defects

(a) Builder's acknowledgment shall either (1) offer to settle the claim by monetary payment, the making of repairs, or a combination of both, without inspection, or (2) propose to inspect the dwelling that is the subject of the claim.

(b) (1) If a proposal for inspection is made pursuant to paragraph (2) subdivision (a), Claimant shall be advised in a reasonable time prior to an inspection of the names of the employers of all Builder's agents invited to attend. Within 22 business days of receiving Builder's inspection proposal, Claimant shall provide Builder and his or her agents access to the property at a mutually convenient date and time to conduct the initial inspection of the property, document any alleged construction defects, and perform any destructive or nondestructive testing required to fully evaluate the nature, extent, and cause of the claimed defects and the nature and extent of any repairs or replacements that may be necessary to remedy the alleged defects. If destructive testing is required, Builder shall give Claimant advance notice of the testing and shall, after completion of the testing, return the property to its pretesting condition within a reasonable time of completion of the testing.

(2) If a builder deems a second inspection or testing reasonably necessary, Builder shall provide notice to Claimant within 10 business days following the completion of the initial inspection and testing. A second inspection or testing shall be completed within 22 business days of completion of the initial inspection or testing. All requirements concerning the initial inspection or testing shall also apply to the second inspection or testing.

(3) If a claim is asserted on behalf of owners of multiple dwellings, or multiple owners of units, then Builder shall be entitled to inspect each of the dwellings or units at a mutually convenient time.

(4) All costs of builder inspection and testing, including any damage caused by Builder inspection, shall be borne by Builder. Nothing that occurs during a builder's or claimant's inspection or testing may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent Action.

(c) (1) Within 11 business days following the completion of the final inspection or testing pursuant to subdivision (b), Builder shall send Claimant one of the following:

(A) A written offer to fully or partially remedy any construction defect at no cost to Claimant. The offer shall include a description of any additional construction necessary to remedy the defect described in the claim and an anticipated timetable for the completion of that construction.

(B) A written offer to settle the claim by monetary payment.

(C) A written offer including a combination of repairs and monetary payment.

(D) A written statement that Builder will not proceed further to remedy any defect.

(2) Any offer shall be accompanied by a detailed statement identifying the particular defect that is being repaired, explaining the nature, scope, and location of the repair, and setting a reasonable completion date for the repair. The offer shall also include the names and license numbers of the contractors whom Builder intends to have perform the repair. Those contractors shall have insurance, and shall be responsible for, all damages or injuries that they may cause during the repair process.

(d) Claimant may reject Builder's offer made pursuant to paragraph (1) of subdivision (a) or subparagraphs (1)(A), (B) or (C) of subdivision (c) by providing written notice to Builder within 11 business days of the date of the offer. The rejection shall include the specific reasons for Claimant's rejection of Builder's offer. If Claimant believes that Builder's offer either (1) omits reference to any portion of the claim, or (2) was unreasonable in any manner, Claimant shall, in the written notice of rejection, include those items Claimant believes were omitted and set forth in detail all reasons why Claimant believes the offer is unreasonable.

(e) Upon receipt of a claimant's rejection and the reasons for the rejection provided for in subdivision (d), Builder may, within 11 business days of receiving the rejection, make a supplemental offer of repair or monetary payment or both to claimant. Claimant is barred from raising any reason not included in any of its rejections in a subsequent Action asserting that the offer made pursuant to this subdivision or subdivisions (a) or (c) was inadequate. If Claimant rejects the final offer made by Builder and the trier of fact determines that the final offer was reasonable, Claimant may not recover Claimant's postoffer costs.

(f) Claimant may reject the supplemental offer made by Builder pursuant to subdivision (e), by providing written notice to Builder within 11 business days of the date of the offer.

(g) To accept Builder's offer to remedy a construction defect or to settle the claim by monetary payment, or both, pursuant to subdivisions (a), (c), or (e), Claimant shall send Builder a written notice of acceptance within 11 business days of the date of the offer. If no response is sent to Builder within the 11-day period, then the offer shall be deemed accepted.

(h) If Claimant accepts Builder's offer to repair a construction defect described in the notice of claim, Claimant shall provide Builder and his or her agents access to the dwelling at a mutually convenient date and time, to perform and complete the construction by the timetable stated in the settlement offer. Nothing that occurs during the repair process may be used or introduced as evidence to support a spoliation defense by any party in any subsequent litigation.

(i) If Claimant accepts Builder's offer pursuant to subdivision (g), and Builder does not proceed to make the monetary payment or remedy the construction defect within the agreed timetable, Claimant may bring an Action against Builder for the claim described in the notice of claim without further notice except as otherwise provided by applicable contract or law. Builder's offer and Claimant's acceptance thereof shall create a rebuttable presumption that a binding and valid settlement has been reached and shall be enforced by the court or arbitrator.

(j) If Claimant receives a written statement at any time during the procedure set forth in this section that Builder will not proceed further to remedy the defect, including but not limited to acts or omissions described in subdivisions (b) or (c) of section 945.10 or subparagraph (1)(D) of subdivision (c), or Claimant rejects the final offer made by Builder pursuant to subdivision (f), Claimant may bring an Action against Builder for the claim described in the notice of claim without further notice except as otherwise provided by applicable law or contract.

(k) To the extent that provisions of this title are enforced and those provisions are substantially similar to provisions in section 1375, but an Action is subsequently commenced under section 1375, the parties are excused from performing the substantially similar requirements under section 1375.

945.12 Procedures for claims for violations of Accessibility Standards

(a) Owner's acknowledgment shall state that either

(1) improvements will be made to bring the premises into compliance with applicable Accessibility Standards, or

(2) that the property is compliant or the alleged violations identified have been corrected to comply with applicable Accessibility Standards.

(b) If the acknowledgment states that improvements will be made pursuant to subdivision (a)(1), Owner shall remedy alleged violations within a reasonable time, not to exceed 120 business days from the date Owner sends the acknowledgment. Upon good cause showing by Owner, Owner may request and Claimant shall not unreasonably withhold, agreement for additional time necessary to complete improvements under subsection (a)(1) due to impracticability of completion of such improvements within 120 business days.

(c) If an acknowledgment is sent pursuant to subsection (a)(2), Owner shall provide evidence of compliance with Accessibility Standards. Owner shall have an additional 30 business days to provide such evidence in addition to the time allotted to respond under section 945.10.

(d) Only upon good cause showing by Claimant, a Claimant may dispute improvements made pursuant to subsections (a)(1) and (b) within 15 business days after the 120th day Owner has to complete the improvements pursuant to subsection (b) or within 15 business days after a different agreed upon completion date in the event Owner and Claimant agreed to additional time to complete improvements pursuant to subsection (b). Upon good cause showing by Claimant, a Claimant may dispute evidence provided by Owner pursuant to subsection (c) within 15 business days after receiving such evidence. If Claimant fails to dispute improvements or evidence within the time periods specified in this subsection, then the improvements or evidence will be deemed approved under this section.

(1). If the Claimant disputes the improvements or evidence upon good cause, the Claimant and Owner shall endeavor in good faith to select a mutually acceptable neutral professional who has a specialization in Accessibility Standards, such as an individual certified as an Access Specialist pursuant to the Certified Access Specialist Program under Chapter 7 (commencing with Section 4450) of Division 5 of the Government Code, and such professional shall either approve the improvements or evidence submitted by Owner or set forth improvements Owner must make to remedy violations identified in subsection a(1). Owner may have a reasonable time to complete any additional improvements necessary to remedy violations identified in subsection 945.9.

(2). If a Claimant and Owner cannot agree on a mutually acceptable neutral professional pursuant to subsection (d)(1), then each party shall choose one professional who has a specialization in Accessibility Standards, such as an individual certified as an Access Specialist pursuant to the Certified Access Specialist Program under Chapter 7 (commencing with Section 4450) of Division 5 of the Government Code, and the two selected professionals shall have the responsibility to select one neutral professional who has a specialization in Accessibility Standards, such as an individual certified as an Access Specialist pursuant to the Certified Access Specialist Program under Chapter 7 (commencing with Section 4450) of Division 5 of the Government Code and this professional shall either approve the improvements or evidence submitted by Owner or set forth improvements Owner must make to remedy violations identified in 945.9. Owner may have a reasonable time to complete any additional improvements necessary to remedy violations identified in subsection (a)(1).

(3). If a Claimant fails to participate in the selection procedures described in subsections (d)(1) and (d)(2), it shall be deemed as a refusal to comply with the prelitigation procedure in this Title and the Claimant will not be permitted to

pursue a claim under Sections 51, 52, 54, 54.1, 54.3 or 55 of the Civil Code. If an Owner fails to participate in the selection procedures described in subsections (d)(1) and (d)(2), it shall be deemed as a refusal to comply with the prelitigation procedure in this Title and Owner will be unable to raise as a defense to an Action, that Claimant did not exhaust, or comply with the prelitigation procedure in this Title.

(e) Either Claimant or Owner may dispute the findings of the neutral professional in (d)(1) or (d)(2) only upon good cause showing and within 15 business days after the neutral professional has completed his or her findings. In the event of litigation arising due to a dispute over the findings of the neutral professional under subsections (d)(1) or (d)(2), the prevailing party shall be entitled to their attorney's fees. If either Claimant or Owner fails to dispute the findings within the time period specified in this subsection, then the improvements or evidence will be deemed approved under this section.

(f) When Owner has completed the improvements identified in subdivision (a)(1) and such improvements have not been disputed or have been approved pursuant to subsection (d) and not disputed pursuant to subdivision (e), or when Owner has provided evidence of compliance pursuant to subsection (c) and such evidence has not been disputed or have been approved pursuant to subsection (d) and not disputed pursuant to subdivision (e), Claimant may not receive any damages, attorney's fees, or injunctive relief, for any claim brought pursuant to Civil Code sections 51, 52, 54, 54.1, 54.3, or 55, arising out of the same or similar facts that served as a basis for the claim.

945.13 Modification of Procedures

After Responding Party receives Claimant's notice of claim, Claimant and Responding Party may, by written mutual agreement, alter the prelitigation procedure described in this title.

945.14 Insurance

Reasonable costs incurred by a responding party or its agents pursuant to this title may not be construed as unrecoverable from their insurers as voluntary payments, but are recoverable to the extent those costs are reasonable and otherwise covered by the insurance policy. This Act shall not otherwise restrict, modify or alter the terms and conditions of any insurance policy.

945.15 Alternative Dispute Resolution

Nothing in this title is intended to affect existing statutory or decisional law pertaining to the applicability, viability, or enforceability of alternative dispute resolution methods, alternative remedies, contractual arbitration, judicial reference, or similar procedures requiring a binding resolution of a claim or any other disputes between claimants and builders. Nothing in this title is intended to affect the applicability, viability, or enforceability, if any, of contractual arbitration, judicial reference, or any other form of

alternative dispute resolution method after the prelitigation procedure set forth in this title has been completed. The filing of an Action does not preclude the use of binding or nonbinding arbitration, judicial reference, or any other form of alternative dispute resolution.

945.16 Extension of Statute of limitations or Repose

(a) If the applicable statute of limitations would otherwise run during this process, either of the following shall apply:

(1) If Responding Party elects to follow the prelitigation procedure provided by this title, then the time period for filing a complaint or other legal remedies for a violation of any provision of this title, or for a claim of inadequate repair, is extended from the time a complete notice of the claim is sent pursuant to Section 945.9 by Claimant to 100 days after the prelitigation procedure pursuant to this title is completed.

(2) If Responding Party either:

- (A) fails to acknowledge the claim within the time specified, or
- (B) elects not to go through the prelitigation procedure provided by this title,

The time period for filing a complaint or other legal remedies for a Real Property Deficiency is extended from the time a complete notice of the claim is sent pursuant to Section 945.9 by Claimant to 30 days after the time for acknowledging the notice of claim has expired pursuant to (2)(A), or the date of receipt of a notice from Responding Party electing not to follow the procedure pursuant to (2)(B).

(b) This section does not toll any applicable statute of limitations if the prelitigation procedure is completed prior to the expiration of the applicable statute of limitations, nor does it toll or extend any statute of limitations or repose that has expired prior to commencement of the prelitigation procedure provided in this title.

945.17 Enforcement

If Claimant fails to act in accordance with the requirements of this title within the timeframes required, the Responding Party may bring a motion relevant to compliance with this title or enforcement of this title, including but not limited to a motion to stay any subsequent Action or other proceeding, which motion shall be granted and the action stayed until the requirements of this title have been satisfied. The trier of fact, in its discretion, may award to the prevailing party on the motion, his or her attorney's fees and costs in bringing or opposing the motion. Claimant is barred from filing any Action covered by this title until Claimant complies with the prelitigation procedures set forth in this title. In the event Claimant fails to comply with the notice requirements of subdivision (a) of section 945.9 for each claimed Real Property Deficiency, any statute of limitations applicable to each claim shall not be tolled or extended under this title.

945.18 Subsequent Claims

Subsequently discovered claims covered by this title shall be administered separately under this title, unless otherwise agreed to by the parties.

945.19 Admissibility

Evidence of Claimant's and Responding Party's conduct during this process may be introduced during a subsequent Action, if any. Any repair efforts undertaken by the Responding Party may not be considered settlement communications or offers of settlement, but are admissible in evidence but not for purposes of an admission of liability.

945.20 Certificate of Merit

Nothing in this title may be interpreted to eliminate or abrogate the requirement to comply with Section 411.35 of the Code of Civil Procedure or to affect the liability of design professionals, including architects and architectural firms.

945.21 Preservation of Existing Causes of Actions, Standing, Standards of Liability

Nothing in this title establishes any new causes of action, other than to enforce the provisions of this title. Nothing in this title provides standing for any person or entity not already permitted by existing law. Nothing in this title modifies any standard of liability applicable by law or contract to a builder, general contractor, subcontractor, material supplier, individual product manufacturer or design professional.

945.22 Exclusion of Personal Injury Claims; Mixed Claims

If a claim combines personal injuries with a claim subject to this title, the claim brought subject to this title shall be administered according to this title.

945.23 Severability

If any provision of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

945.24 Disclosure

If Claimant retains a legal representative regarding a claim subject to this title, the Claimant's legal representative shall provide to Claimant a copy of this title at the time of retention.

SEC. 4. AMENDMENT

This initiative may be amended to further its purposes by statute, passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, and signed by the Governor.