

Date of Hearing: January 13, 2026

ASSEMBLY COMMITTEE ON JUDICIARY

Ash Kalra, Chair

AB 1406 (Ward) – As Amended January 5, 2026

As Proposed to be Amended

**SUBJECT:** RESIDENTIAL PROPERTY CONTRACTS: LIQUIDATED DAMAGES

**KEY ISSUE:** SHOULD THE STATUTORILY ESTABLISHED CAP ON LIQUIDATED DAMAGES IMPOSED ON BUYERS OF NEWLY CONSTRUCTED CONDOMINIUM WHO BREACH SALES CONTRACTS BE INCREASED FROM THREE PERCENT OF THE PURCHASE PRICE TO TEN?

**SYNOPSIS**

*It is no secret that California continues to be mired in a housing affordability crisis. Nearly every stakeholder and advocate involved in home sales and construction agrees that this crisis is rooted in California's decades-long failure to build sufficient housing units to meet the state's population growth. However, that is about all stakeholders in the housing development and sales space agree upon. While many blame land use policies and local opposition to new construction for the crisis, others cite market conditions as the primary deterrence to new construction. Indeed, the stubbornly high interest rates of recent years has further complicated the housing crisis plaguing this state. Many developers now cite limited access to affordable construction capital as a primary factor deterring new housing starts. The author and proponents of this measure contend this issue is particularly acute for new condominium construction which requires significant capital when compared to single family home developments that can be constructed over an extended period of time.*

*Seeking to address the issues plaguing the condominium construction industry, this bill aims to provide condominium developers with additional financial guarantees in order to improve these developers' odds of obtaining construction financing. As proposed to be amended, this bill would increase the amount of liquidated damages a developer can seek from a prospective buyer of a newly constructed condominium who breaches a home sale contract from three percent of the sales price to ten. This provision essentially permits a developer to pledge to a lender that they will be guaranteed up to ten percent of a potential unit's cost should the buyer back out of the sale. The author and the housing developers that constitute the proponents of this measure hope that the increased monetary recovery in the event a would-be buyer breaches a sales contract provides the necessary financial guarantees to lenders to unlock the construction loans necessary to fund these critical housing projects.*

*This bill is stridently opposed by a coalition of property sales organizations, including the California Association of Realtors and the California Land Title Association. Although this measure does not impact the vast majority of existing law's consumer protections, including strong escrow requirements and the prohibition on liquidated damages provisions being needlessly punitive, the opposition contends this bill significantly undermines consumer protections and puts condominium buyers at significant risk for financial losses.*

*Should this bill advance, it remains a work in progress and the author has committed to working with all stakeholders to find an amicable resolution that promotes condominium development and preserves consumer protections.*

**SUMMARY:** Increases the permissible amount of liquidated damages that may be imposed on a buyer who breaches a contract for the purchase of a newly constructed condominium from three to ten percent of the purchase price. Specifically, **this bill**:

- 1) Provides that, for the initial sale of a newly constructed attached condominium unit, as defined, that involves the sale of an attached residential condominium unit located within a structure of ten or more residential condominium units, the amount actually paid to the seller pursuant to the liquidated damages provision cannot exceed ten percent of the purchase price of the residential unit in the transaction.
- 2) Requires a seller to refund any retained liquidated damages in excess of ten percent of the purchase price unless the buyer can demonstrate the amount is unreasonable as liquidated damages, as specified.

#### **EXISTING LAW:**

- 1) Establishes the Department of Real Estate within the Business, Consumer Services and Housing Agency. (Business and Professions Code Section 10000 *et seq.*)
- 2) Establishes the Subdivided Lands Act to regulate the sale of subdivided lands in California. (Business and Professions Code Section 11000 *et seq.*)
- 3) Defines, pursuant to the Subdivided Lands Act, “subdivided lands” and “subdivision” as improved or unimproved land in California that is divided, or proposed to be divided, into five or more lots or parcels for sale, lease, or financing, with narrow exemptions. (Business and Professions Code Sections 11000 & 11000.1.)
- 4) Defines “escrow” as any transaction in which one person, for the purpose of effecting the sale, transfer, encumbering, or leasing of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter. (Financial Code Section 17003.)
- 5) Provides that it is unlawful for an escrow agent to disburse or cause the disbursal of escrow funds other than in accordance with the Escrow Law. (Financial Code Section 17414(a).)
- 6) Requires, pursuant to the Subdivided Lands Act, that any person intending to offer subdivided lands for sale or lease must file an application for a public report with the Department of Real Estate. (Business and Professions Code Section 11010.)
- 7) Requires, upon receipt of an application pursuant to 6), the Department of Real Estate to issue the public report after examination of the subdivision, unless there are grounds for denial, as specified. (Business and Professions Code Section 11018.1.)

- 8) Prohibits selling, leasing, or offering for sale or lease of any lot or parcel within a subdivision without obtaining a public report from the Department of Real Estate. (Business and Professions Code Section 11018.2.)
- 9) Prohibits a subdivider, owner, or agent from selling or leasing lots or parcels in a subdivision when an encumbrance on the subdivision does not have a release clause, unless any of the following occur:
  - a) The entire deposit advanced by the purchaser or lessee is deposited into an escrow account;
  - b) The title to the subdivision is held in trust under an agreement of trust acceptable to the Commissioner of the Department of Real Estate, until a release from the encumbrance is obtained;
  - c) A bond to the state is furnished to the Commissioner for the benefit and protection of purchasers or lessees of such lots or parcels, which shall provide for the return of the moneys paid or advanced by the purchaser or lessee; or
  - d) There is conformance to such other alternative requirement or method which the Commissioner deems acceptable as provided. (Business and Professions Code Section 11013.2.)
- 10) Defines "condominium" as an estate in real property that is an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit, the boundaries of which are described on a recorded final map, parcel map, or condominium plan in sufficient detail to locate all boundaries thereof, as specified. (Civil Code Section 783.)
- 11) Provides that a provision in a contract to purchase and sell residential property that provides that all or any part of a payment made by the buyer is to constitute liquidated damages to the seller upon the buyer's failure to complete the purchase of the property is valid to the extent that payment in the form of cash or check, including a postdated check, is actually made if the provision satisfies the following requirements:
  - a) The liquidated damages provision is separately signed or initialed by each party to the contract and drafted in specified sized text; and
  - b) The amount actually paid pursuant to the liquidated damages provision does not exceed three percent of the purchase price unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages. (Civil Code Section 1675(b).)
- 12) For the initial sale of newly constructed attached condominium units that involves the sale of an attached residential condominium unit located within a structure of 10 or more residential condominium units, the amount actually paid to the seller pursuant to the liquidated damages provision cannot exceed three percent of the purchase price. (Civil Code Section 1675(f).)
- 13) Provides that a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was

unreasonable under the circumstances existing at the time the contract was made. (Civil Code Section 1671(b).)

**FISCAL EFFECT:** As currently in print this bill is keyed non-fiscal.

**COMMENTS:** There is little question that finding an affordable home is growing increasingly difficult for many Californians. A 2022 report by the state Department of Housing and Community Development noted that the state needs to produce approximately 2.5 million housing units over the next eight years, with roughly one million of those units being set aside for lower income households, in order to meet the anticipated demand for housing over the same time period. (Dept. of Housing and Community Development, *California Statewide Housing Plan: A Home for Every Californian* (Mar. 2022) available at: <https://storymaps.arcgis.com/stories/94729ab1648d43b1811c1698a748c136>.) However, as a result of persistently high interest rates in recent years, many housing developers are now noting that obtaining adequate financing to construct new homes is becoming increasingly difficult. This is especially true for condominium development which, unlike single family homes projects that can be built in phases, must obtain funding for the entire project upfront.

The author and proponents of this measure note that one of the main obstacles to obtaining funding for condominium development is the fact that the developer must demonstrate sufficient and legitimate interest from buyers. One means of demonstrating such interest is to obtain security deposits from would-be buyers to indicate that the eventual sale of the condominium units will be sufficient to repay construction loans. The proponents of this measure note that the existing security deposit limits are no longer sufficient to satisfy many lenders. Thus this bill would increase the amount of a deposit a developer may retain if a buyer backs out of a purchase agreement from three to ten percent of the purchase price. In support of this relatively modest measure, the author states:

As California embraces pro-housing and environmentally responsible policy, the share of multifamily housing in the state continues to grow. However, only a small fraction of this housing is available for purchase. Between 2011 and 2021, an estimated 3 percent of newly built housing in California consisted of multifamily condominiums. AB 1406 would align California with best practices from states such as New York, Colorado, and Nevada, by raising the liquidated damages cap in current statute from 3% to 10%. This change would unlock financing for condo projects and increase the supply of more affordable, for sale housing.

***The Subdivided Lands Act guides the purchase of newly constructed properties in California.*** Broadly speaking, there are two primary types of homes available for purchase in California: single-family homes and multifamily developments. Although new developments of both types of homes are typically governed by a homeowner association, single family homes are standalone units that developers can build in phases to meet financing needs and projected sales. Conversely, multifamily housing developments including condominiums, townhomes, stock cooperatives, limited-equity housing cooperatives, and other similar types of dwellings are frequently joined together in one physical structure. Given the unitary structure, these developments must be built at the same time, regardless of sales demand. These types of dwellings are typically considered a subdivision, which California law defines as improved or unimproved land that is divided or proposed to be divided for sale, lease, or financing into five or more lots or parcels. (Business and Professions Code Section 11000, 11004.5.) Seeking to

protect would-be purchasers of subdivided interests from fraud, deceit, or misrepresentation, the Subdivided Lands Act adopts an extensive series of consumer protections. Most notably, the Act requires a developer seeking to sell subdivided properties to obtain a subdivision public report from the Department of Real Estate prior to offering any property for sale. The Department's public report includes information and disclosures regarding the subdivision and the developer's commitments regarding facilities and improvements for the subdivision. A developer of the subdivision must meet certain requirements and provide documentation of sufficient financial arrangements for the completion of the improvements and facilities that will be included in the subdivision.

Additional protections for buyers can be found in both the Civil Code and the Subdivided Lands Act's requirements that many downpayments or deposits provided by a buyer in advance of a final purchase of a newly constructed property must remain in an escrow account managed by a neutral third party. The role of the escrow account is to ensure that the buyer has a stake in completing the purchase while simultaneously protecting the deposit should the developer be unable to complete a project. Under the existing law, unless the developer follows existing procedures and obtains permission from the Department of Real Estate, the escrow money cannot be utilized to fund construction of the project. Nonetheless, the existence of the escrow money is a critical component of loan applications utilized by developers to borrow the funds necessary to finance the development.

***California maintains one of the lowest permissible liquidated damage levels in the nation when buyers breach property sale agreements.*** Under existing law (Civil Code Section 1675), California law caps the amount of liquidated damages a property seller may recoup from a defaulting buyer at three percent of the purchase price. The author and proponents of this bill note that this is significantly less than many other states, including other large, urbanized states like New York or Washington. For example, the State of New York, of which condominiums make up a comparatively large share of the housing stock, maintains a ten percent cap on liquidated damages for breaching buyers. (NY-RPP Chap. 50, Art. 9-b *et seq.*) Despite the statutory provisions, however, New York state case law prohibits the developer from recovering the full ten percent if the liquidated damages are sought to punish buyers and not reimburse sellers (*Atlantis Management Group II LLC v. Nabe* (2023) N.Y. Slip Op. 02737). Notably, California case law has established a similar prohibition on punitive liquidated damages provisions in real estate contracts. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949.)

***This bill would increase the liquidated damage caps for downpayments on new condominiums only.*** Seeking to align California law with the laws of other large states, this bill would increase the liquidated damage cap imposed on buyers breaching property sale contracts for the purchase of *new* condominiums from three percent of the purchase price to ten percent of the purchase price. The bill maintains the existing law's requirement that the money be held in escrow and similarly maintains the law's general prohibition on the use of such funds to finance construction and other related costs. Additionally, as proposed to be amended, this bill does not impact any single family home sales, for new or existing properties, and this bill does not apply to the sale of *existing* condominiums. This bill only raises the liquidated damages cap on new construction condominiums in order to provide developers and their lenders sufficient financial assurances in the event a buyer breaches a sales contract.

***Proposed amendments remedy a drafting error and narrow the measure to only apply to newly constructed condominiums.*** As currently in print this bill would apply the increased damage cap to all property sales. The author notes this was a drafting error and does not reflect the original agreement between this Committee and the author regarding the scope of the bill, nor reflects the intent of the bill's proponents. To fix this drafting error and ensure that *only* new condominium developments are subject to the new liquidated damage provisions the author is proposing to amend the bill to reinsert the existing three percent liquidated damage cap for all other property transactions. Accordingly, subdivisions (c) and (d) of Civil Code Section will be amended to reflect the existing law and will, once again, read as follows:

- (c) If the amount actually paid pursuant to the liquidated damages provision does not exceed ~~3~~ ~~10~~ percent of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that the amount is unreasonable as liquidated damages.
- (d) If the amount actually paid pursuant to the liquidated damages provision exceeds ~~3~~ ~~10~~ percent of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.

***Although the opposition raises valid concerns, the scope of this bill is limited and market forces may negate many of the potential impacts.*** This bill, as currently in print and as proposed to be amended, is vociferously opposed by a coalition of stakeholders in the property sales industry. Writing jointly in opposition, the California Association of Realtors and the California Land Title Association argue the bill, “will expose homebuyers to extraordinary financial risk while serving to dismantle strong consumer safeguards enacted specifically to protect California homebuyers.” They also argue the bill does, “nothing to address the home affordability crisis and in fact likely put the dream of homeownership more at risk as buyers could lose so much money in one transaction they could be forced out of the market for years.”

The opposition is certainly correct in noting that the bill does expose a larger percentage of a downpayment to loss should a buyer breach a sales contract. However, it should be noted that, as proposed to be amended, this bill only make such an adjustment to a relatively small portion of California’s housing market. Indeed, based on current trends, by limiting this bill to *new* condominiums only, the measure impacts a part of the housing market typically found in large urban areas and purchased by affluent professionals. While this does not wholly relieve the risk that such an individual may lose a sizable security deposit, these buyers tend to be relatively sophisticated, capable of weighing the risk, and are more likely to be able to retain any professional services necessary to vindicate their rights. Additionally, the damage provisions are only triggered if the buyer *defaults* or otherwise violates their contractual obligations.

Furthermore, the bill does not require a liquidated damage level of ten percent but simply permits such damages. Indeed, although existing law sets a three percent cap on liquidated damages, many real estate contracts presently do not impose the maximum level of damages. Moreover, should, as the opposition also contends, market forces prevent many Californians from being able to afford a ten percent downpayment, condominium developers will have no choice but to apply lower liquidated damages in actual sales agreements if the developer actually wants to generate a market for the units. Nothing in the bill overrides the terms of a contract and nothing permits a developer to seek higher liquidated damages than originally agreed to in the sales contract. For example, if market conditions drive a developer to impose a five percent damage amount in contract, nothing in this bill authorizes the developer to subsequently seek additional

damages should the seller breach the agreement. A final safeguard, as noted above, can be found in the case law interpreting Civil Code Section 1671 which prevents punitive liquidated damages provisions. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, *supra*.) While the opposition is correct that invoking these provisions of law is likely to require the employment of legal counsel and the potential for litigation, beyond raising the permissible level of non-punitive liquidated damages, nothing in this bill changes the existing statutory or common law protections for potential condominium buyers.

***This bill remains a work in progress.*** The original version of this measure was substantially broader than the version of the bill presently before the Committee. Indeed, that version of the bill contained provisions that significantly undermined existing consumer protections, most notably the elimination of the escrow provisions that prevented a developer from accessing a buyer's downpayment to pay for construction costs. The author and this Committee agreed to significantly narrow the bill to only include the increased liquidated damages provisions and to restore all other existing consumer protections. Unfortunately, as discussed above, these significant amendments did not ameliorate the opposition's concerns. Nonetheless, the author is committing to ongoing engagement with all stakeholders to achieve their mutual goal of spurring much needed housing development while protecting everyday Californians. The Committee will continue to monitor these discussions, and as always, reserves the right to recall the bill for additional consideration should existing consumer protections not be maintained. Nonetheless, as proposed to be amended, the bill appears to strike an appropriate balance between spurring new housing construction and protecting the hard-earned savings of prospective California homeowners.

***ARGUMENTS IN SUPPORT:*** This bill is supported by a coalition of developers and affordable housing advocates under the umbrella of the California Home Building Alliance. A coalition letter from organizations that include the California Building Industry Association, the California Coalition for Affordable Housing, the San Francisco Bay Area Planning & Urban Research Association, and the Abundant Housing LA argue in support of the bill:

Condominiums have proven to be an effective path to affordable, entry-level homeownership for first-time buyers. California lags when compared to other states, like Hawaii and Washington, who produce condominiums at roughly ten times the annual rate in California. We have seen that this limited production significantly restricts pathways to homeownership especially in dense urban areas where land is scarce, and costs of single-family homes put them financially out of reach for most Californians. Additionally, despite significant growth in multifamily housing, very little of this new housing is available for ownership.

One major barrier we have identified is that in California, there is a de facto three percent earnest money deposit cap, requiring any funds over three percent to be fully refunded to the buyer if they decide to terminate the deal. AB 1406 would incentivize condominium development by increasing the existing liquidated damages cap from 3% of the sale price to 10%, aligning California with other states such as New York, Colorado, and Nevada that have a higher cap. This change would reduce lender risk, unlock financing for condo projects, and increase the supply of more affordable, entry level for-sale housing.

***ARGUMENTS IN OPPOSITION:*** As noted a coalition of property sales professionals including the California Association of Realtors oppose this measure. In opposition the coalition jointly argues:

California's liquidated-damages framework for owner-occupant buyers exists to protect homebuyers from disproportionate financial loss. In *Guthman v. Moss*, 150 Cal. App. 3d 502 (1984), the Second District Court of Appeal held that "...the purpose of enacting section 1675 et seq. was to protect buyers who fail to complete the purchase of real property and not sellers." The proposed language in AB 1406 (Ward) would turn that that purpose on its head by forcing buyers to forfeit unreasonable sums that bear little relationship to any actual harm.

At today's statewide median home price of approximately \$887,000, a 10-percent liquidated-damages provision would allow a seller to retain nearly \$89,000 from a defaulting buyer, an amount that in most transactions bears no reasonable relationship to foreseeable damages. Liquidated damages are intended to substitute for proof of actual damages by setting a reasonable, good-faith estimate of what a seller is likely to lose if a buyer defaults, not to create a windfall untethered to real economic harm, but this proposal does just that.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

Abundant Housing LA  
Bay Area Council  
California Building Industry Association  
California Community Builders  
California Council for Affordable Housing  
California YIMBY  
Circulate San Diego  
Downtown Sacramento Partnership  
Housing Action Coalition  
Housing Trust Silicon Valley  
Lighthouse Public Affairs, LLC  
Mayor Matt Mahan, City of San Jose  
San Francisco Bay Area Planning & Urban Research Association  
The Two Hundred

### **Opposition**

California Association of Realtors  
California Escrow Association  
California Land Title Association

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