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HOUSE BILL NO. 1435

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws
on February 12, 2004)

(Patron Prior to Substitute—Delegate Suit)

A *BILL to amend and reenact §§ 55-429, 55-460, 55-462, 55-467, 55-478, 55-479, 55-484, and 55-486 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 55-473.1, relating to the Virginia Real Estate Cooperative Act.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 55-429, 55-460, 55-462, 55-467, 55-478, 55-479, 55-484, and 55-486 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 55-473.1 as follows:

§ 55-429. Applicability of local ordinances, regulations and building codes; county and municipal authority.

A. No zoning or other land use ordinance shall prohibit cooperatives as such by reason of the form of ownership inherent therein. Neither shall any cooperative be treated differently by any zoning or other land use ordinance which would permit a physically identical project or development under a different form of ownership.

B. Subdivision and site plan ordinances in any county, city or town in the Commonwealth shall apply to any cooperative in the same manner as such ordinances would apply to a physically identical project or development under a different form of ownership. Nevertheless, ~~counties~~, *the declarant need not apply for or obtain subdivision approval to record cooperative instruments against a portion of the land that may be submitted to the cooperative if the site plan approval for the land being submitted to the cooperative has first been obtained.*

C. During development of a cooperative containing additional land or withdrawable land, phase lines created by the cooperative instruments shall not be considered property lines for purposes of subdivision. If the cooperative may no longer be expanded by the addition of additional land, then the owner of the land not part of the cooperative shall subdivide such land prior to its conveyance, unless such land is subject to an approved site plan as provided in subsection B, or prior to modification of such approved site plan. In the event of any conveyance of land within phase lines of the cooperative, the cooperative and any lot created by such conveyance shall be deemed to comply with the local subdivision ordinance, provided such land is subject to an approved site plan.

D. Counties, cities and towns may provide by ordinance that proposed cooperatives comprised of conversion buildings and the use thereof, which do not conform to the zoning, land use and site plan regulations of the respective county or city in which the property is located, shall secure a special use permit, a special exception or variance, as the case may be, prior to such property becoming a cooperative. A request for such a special use permit, special exception or variance filed on or after July 1, 1982, shall be granted if the applicant can demonstrate to the reasonable satisfaction of the local authority that the nonconformities are not likely to be adversely affected by the proposed conversion. No action on any such request shall be unreasonably delayed. In the event of an approved conversion, counties, cities, towns, sanitary districts or other political subdivisions may impose such charges and fees as are lawfully imposed by such political subdivisions as a result of construction of new structures to the extent that such charges and fees, or portions of such charges and fees, imposed upon property subject to such conversions may be reasonably related to greater or additional services provided by the political subdivision as a result of the conversion.

E. Nothing in this section shall be construed to permit application of any provision of the Uniform Statewide Building Code (§ 36-97 et seq.) *or any local ordinances regulating the design and construction of roads, sewer and water lines, stormwater management facilities, or other public infrastructure*, which is not expressly applicable to cooperatives by reason of the form of ownership inherent therein to a cooperative in a manner different from the manner in which such provision is applied to other buildings of similar physical form and nature of occupancy.

§ 55-460. Executive board members and officers.

A. Except as provided in the declaration, the bylaws, subsection B or other provisions of this chapter, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board are required to exercise (i) if appointed by the declarant, the care required of fiduciaries of the proprietary lessees and (ii) if elected by the proprietary lessees, ordinary and reasonable care.

B. The executive board may not act on behalf of the association to amend the declaration, to terminate the cooperative, to elect members of the executive board, *except as provided in the declaration*

60 pursuant to subsection F, or to determine the qualifications, powers and duties or terms of office of
61 executive board members. The executive board may fill vacancies in its membership for the unexpired
62 portion of any term.

63 C. Within thirty days after adoption of any proposed budget for the cooperative, the executive board
64 shall provide a summary of the budget to all the proprietary lessees and shall set a date for a meeting of
65 the proprietary lessees to consider ratification of the budget. Such meeting shall be held not less than
66 fourteen nor more than thirty days after mailing of the summary. The meeting place, date, and time shall
67 be provided with the budget summary. Unless at that meeting a majority of all the proprietary lessees or
68 any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a
69 quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the
70 proprietary lessees shall be continued until such time as the proprietary lessees ratify a subsequent
71 budget proposed by the executive board.

72 D. Subject to subsection E, the declaration may provide for a period of declarant control of the
73 association, during which period a declarant, or persons designated by him, may appoint and remove the
74 officers and members of the executive board. Regardless of the period provided in the declaration, a
75 period of declarant control terminates no later than the earlier of: (i) sixty days after conveyance of
76 seventy-five percent of the cooperative interests which may be created to proprietary lessees other than a
77 declarant; (ii) two years after all declarants have ceased to offer cooperative interests for sale in the
78 ordinary course of business; or (iii) two years after any development right to add new units was last
79 exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members
80 of the executive board before termination of that period, but in that event he may require, for the
81 duration of the period of declarant control, that specified actions of the association or executive board,
82 as described in a recorded instrument executed by the declarant, be approved by the declarant before
83 they become effective.

84 E. Not later than sixty days after conveyance of twenty-five percent of the cooperative interests
85 which may be created to proprietary lessees other than a declarant, at least one member and not less
86 than twenty-five percent of the members of the executive board must be elected by proprietary lessees
87 other than the declarant. Not later than sixty days after conveyance of fifty percent of the cooperative
88 interests which may be created to proprietary lessees other than a declarant, not less than 33 1/3 percent
89 of the members of the executive board must be elected by proprietary lessees other than the declarant.

90 F. ~~Not Unless the declaration provides for the selection of one or more independent members of the~~
91 ~~executive board, no later than the termination of any period of declarant control, the proprietary lessees~~
92 ~~shall elect an executive board of at least three members, at least a majority of whom must be proprietary~~
93 ~~lessees. To the extent the declaration so provides, the members of the executive board appointed by the~~
94 ~~declarant may continue to serve out their terms and the declarant may continue to appoint a minority of~~
95 ~~the members of the executive board until all of the development rights reserved by the declarant have~~
96 ~~been exercised or have expired. In addition, the declaration may provide for the selection of one or~~
97 ~~more independent members of the executive board, who are neither proprietary lessees nor affiliated~~
98 ~~directly or indirectly in any way with the declarant, by a vote of two-thirds of the members of the~~
99 ~~executive board. The executive board shall elect the officers. The executive board members and officers~~
100 ~~shall take office upon election.~~

101 G. Notwithstanding any provision of the declaration or bylaws to the contrary, the proprietary
102 lessees, by a two-thirds vote of all persons entitled to vote at any meeting of the proprietary lessees at
103 which a quorum is present, may remove any member of the executive board with or without cause,
104 other than a member appointed by the declarant.

105 § 55-462. Termination of contracts and leases of declarant.

106 If entered into before the executive board elected by the proprietary lessees pursuant to subsection F
107 of § 55-460 takes office, (i) any management contract, employment contract or lease of recreational or
108 parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an
109 affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unconscionable to the
110 proprietary lessees at the time entered into under the circumstances then prevailing, may be terminated
111 without penalty by the association at any time after the executive board elected by the proprietary
112 lessees pursuant to subsection F of § 55-460 takes office upon not less than ninety days' notice to the
113 other party. *Notwithstanding the foregoing, a management contract that is not unconscionable between*
114 *an association directly or indirectly providing assisted living or nursing services to proprietary lessees*
115 *and a declarant or an affiliate of a declarant may not be terminated while a member of the executive*
116 *board appointed by the declarant continues to serve unless such termination is approved by a vote of a*
117 *majority of the members of the executive board and a majority vote of the proprietary lessees, other*
118 *than the declarant.*

119 This section does not apply to any proprietary lease or any lease the termination of which would
120 terminate the cooperative or reduce its size, unless the real estate subject to that lease was included in
121 the cooperative for the purpose of avoiding the right of the association to terminate a lease under this

section. Nor shall this section apply to any contract, incidental to the disposition of a cooperative interest, to provide to a proprietary lessee for the duration of such proprietary lessee's life, or for any term in excess of one year, nursing services, medical services, other health-related services, board and lodging and care as necessary, or any combination of such services. The rule of property law known as the rule restricting unreasonable restraints on alienation shall not be applied to defeat any provision of the declaration, bylaws or proprietary leases requiring that the proprietary lessees be parties to such contracts.

§ 55-467. Voting; proxies.

A. If only one of the multiple proprietary lessees of a unit is present at a meeting of the association, he is entitled to cast all the votes allocated to the cooperative interest of which that unit is a part. If more than one of the multiple proprietary lessees are present, the votes allocated to that cooperative interest may be cast only in accordance with the agreement of a majority in interest of the multiple proprietary lessees, unless the declaration expressly provides otherwise. There is majority agreement if any one of the multiple proprietary lessees casts the votes allocated to that cooperative interest without protest being made promptly to the person presiding over the meeting by any of the other proprietary lessees of the cooperative interest.

B. Votes allocated to a cooperative interest may be cast pursuant to a proxy duly executed by a proprietary lessee. If there is more than one proprietary lessee of a unit, each proprietary lessee of the unit may vote or register protest to the casting of votes by the other proprietary lessees of the unit through a duly executed proxy. A proprietary lessee may not revoke a proxy given pursuant to this section except by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.

C. If the declaration requires that votes on specified matters affecting the cooperative be cast by lessees other than proprietary lessees of leased units: (i) the provisions of subsections A and B apply to lessees as if they were proprietary lessees; (ii) proprietary lessees who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were proprietary lessees. Proprietary lessees must also be given notice, in the manner provided in § 55-465, of all meetings at which lessees may be entitled to vote.

D. ~~No~~ All votes allocated to a cooperative interest owned by the association ~~may be cast shall be deemed present for quorum purposes at all duly called meetings of the association and shall be deemed cast in the same proportions as the votes cast by proprietary lessees, other than the association.~~

§ 55-473.1. Limitation of assumption of debt and encumbrances.

Unless approved by persons entitled to cast at least 80 percent of the votes in the association, including a simple majority of the votes allocated to cooperative interests not owned by a declarant or any larger percentage the declaration specifies: (i) the association shall not assume or take subject to any debt, inclusive of any principal and interest accrued thereon, incurred in the original acquisition, development or construction of or the conversion of the cooperative in excess of the amounts disclosed in the public offering statement pursuant to § 55-478 or § 55-479, nor shall the cooperative or any proprietary lessee's interest be encumbered by a security interest for any greater amount incurred for such purposes and (ii) the declarant may not amend the public offering statement to change the amounts disclosed after conveyance of the first unit to a proprietary lessee. Notwithstanding the foregoing, the amounts disclosed may not be subject to adjustment such that the association or the proprietary lessees are subjected to the construction or market risks of the declarant.

§ 55-478. Public offering statement; general provisions.

A. Except as provided in subsection B, a public offering statement must contain or fully and accurately disclose:

1. The name and principal address of the declarant and of the cooperative;
2. A general description of the cooperative, including to the extent possible, the types, number, declarant's schedule of commencement and completion of construction of buildings, and amenities that the declarant anticipates including in the cooperative;
3. The number of units in the cooperative;
4. Copies and a brief narrative description of the significant features of the declaration and any other recorded covenants, conditions, restrictions and reservations affecting the cooperative; the bylaws and any rules or regulations of the association; copies of any contracts and leases to be signed by purchasers at closing; and a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under § 55-462;

5. Any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for one year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement

183 of the budget's assumptions concerning occupancy and inflation factors. The budget must include,
184 without limitation:

185 a. A description of any provisions made in the budget for reserves for repairs and replacement, or if
186 no provision is made for such reserves, a statement to that effect;

187 b. A statement of any other reserves;

188 c. The projected common expense assessment by category of expenditures for the association; ~~and~~
189 d. The projected monthly common expense assessment for each type of unit; *and*
190 *e. The projected debt, inclusive of principal and any accrued interest, loan fees and other similar*
191 *charges, assumed or to be assumed by the association and an estimate of the payments necessary to*
192 *service such debt.*

193 6. Any services not reflected in the budget that the declarant provides, or expenses that he pays and
194 that he expects may become at any subsequent time a common expense of the association, and the
195 projected common expense assessment attributable to each of those services or expenses for the
196 association and for each type of unit;

197 7. Any initial or special fee due from the purchaser at closing, together with a description of the
198 purpose and method of calculating the fee;

199 8. A description of any liens, defects or encumbrances on or affecting the title to the cooperative;

200 9. A description of any financing offered or arranged by the declarant;

201 10. The terms and significant limitations of any warranties provided by the declarant, including
202 statutory warranties and limitations on the enforcement thereof or on damages;

203 11. A statement that:

204 a. Within ten days after receipt of a public offering statement a purchaser, before conveyance, may
205 cancel any contract for purchase of a cooperative interest from a declarant;

206 b. If a declarant fails to provide a public offering statement to a purchaser before conveying a
207 cooperative interest, that purchaser may recover from the declarant ten percent of the sales price of the
208 cooperative interest, plus ten percent of the share, proportionate to his common expense liability, of the
209 indebtedness of the association secured by mortgages or deeds of trust encumbering the cooperative; and

210 12. A statement of any unsatisfied judgments or pending suits against the association, and the status
211 of any pending suits material to the cooperative of which a declarant has actual knowledge;

212 13. A statement that any deposit made in connection with the purchase of a cooperative interest will
213 be held in an escrow account until closing and will be returned to the purchaser if the purchaser cancels
214 the contract pursuant to § 55-483 together with the name and address of the escrow agent;

215 14. Any restrictions on: (i) use and occupancy of the units; (ii) alienation of the cooperative interests;
216 or (iii) the amount for which a cooperative interest may be sold or on the amount that may be received
217 by a proprietary lessee upon sale, condemnation or casualty loss to the unit or the cooperative or
218 termination of the cooperative;

219 15. A description of the insurance coverage provided for the benefit of proprietary lessees;

220 16. Any current or expected fees or charges to be paid by proprietary lessees for the use of the
221 common elements and other facilities related to the cooperative;

222 17. The extent to which financial arrangements have been provided for completion of all
223 improvements labeled "MUST BE BUILT" pursuant to § 55-494;

224 18. A brief narrative description of any zoning and other land use requirements affecting the
225 cooperative;

226 19. *A specified or maximum amount, if any, of acquisition, development or construction debt,*
227 *inclusive of principal and any accrued interest, loan fees and other similar charges, assumed or to be*
228 *assumed by the association and whether there will be a security interest encumbering the cooperative to*
229 *secure repayment;*

230 20. All unusual and material circumstances, features and characteristics of the cooperative and the
231 units;

232 ~~20.~~ 21. Whether the proprietary lessees will be entitled, for federal, state and local income tax
233 purposes, to a pass-through of deductions for payments made by the association for real estate taxes and
234 interest paid the holder of a security interest encumbering the cooperative;

235 ~~21.~~ 22. A statement as to the effect on every proprietary lessee if the association fails to pay real
236 estate taxes or payments due the holder of a security interest encumbering the cooperative.

237 B. If a cooperative composed of not more than three units is not subject to any development rights,
238 and no power is reserved to a declarant to make the cooperative part of a larger cooperative, group of
239 cooperatives or other real estate, a public offering statement may, but need not include, the information
240 otherwise required by paragraphs 9, 10, 15, 16, 17, 18 and 19 of subsection A and the narrative
241 descriptions of documents required by paragraph A 4.

242 C. A declarant promptly shall amend the public offering statement to report any material change in
243 the information required by this section.

244 D. The declarant shall provide a copy of the public offering statement and all amendments thereto to

the association, and the association shall maintain them in its records.

§ 55-479. Public offering statement; cooperatives subject to development rights.

If the declaration provides that a cooperative is subject to any development rights, the public offering statement must disclose, in addition to the information required by § 55-478:

1. The maximum number of units and the maximum number of units per acre that may be created;

2. A statement of how many or what percentage of the units which may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;

3. If any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas and the maximum percentage of the floor areas of all units that may be created therein, that are not restricted exclusively to residential use;

4. A brief narrative description of any development rights reserved by a declarant and of any conditions relating to or limitations upon the exercise of development rights;

5. A statement of the maximum extent to which each cooperative interest's allocated interests may be changed by the exercise of any development right described in paragraph 4;

6. A statement of the extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the cooperative will be compatible with existing buildings and improvements in the cooperative in terms of architectural style, quality of construction and size, or a statement that no assurances are made in those regards;

7. General descriptions of all other improvements that may be made, and limited common elements that may be created within any part of the cooperative pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

8. A statement of any limitations as to the locations of any building or other improvement that may be made within any part of the cooperative pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

9. A statement that any limited common elements created pursuant to any development right reserved by the declarant will be of the same general types and sizes as the limited common elements within other parts of the cooperative, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

10. A statement that the proportion of limited common elements to units created pursuant to any development right reserved by the declarant will be approximately equal to the proportion existing within other parts of the cooperative, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

11. A statement that all restrictions in the declaration affecting use and occupancy of units and alienation of cooperative interests will apply to any units and cooperative interests created pursuant to any development right reserved by the declarant, a statement of any differentiations that may be made as to those units and cooperative interests, or a statement that no assurances are made in that regard; ~~and~~

12. *A specified or maximum amount, if any, of acquisition, development or construction debt, inclusive of principal and any accrued interest, loan fees and other similar charges, assumed or to be assumed by the association for each phase of the development and whether there will be a security interest encumbering the cooperative to secure repayment. If no such amount can be specified, a statement that no amount may be assumed unless approved by persons entitled to cast at least 80 percent of the votes in the association, including a simple majority of the votes allocated to cooperative interests not owned by a declarant, or any larger percentage the declaration specifies; and*

13. A statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant.

§ 55-484. Resales of cooperative interests.

A. Except in the case of a sale where delivery of a public offering statement is required, or unless exempt under subsection B of § 55-476, a proprietary lessee shall furnish to a purchaser before execution of any contract for sale of a cooperative interest, or otherwise before conveyance, a copy of the declaration, the bylaws, the rules or regulations of the association and a certificate containing:

1. A statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the cooperative interest;

2. A statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling proprietary lessee;

3. A statement of any other fees payable by proprietary lessees;

4. A statement of any capital expenditures anticipated by the association for the current and next two succeeding fiscal years;

5. A statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the association for any specified projects;

6. The most recent regularly prepared balance sheet and income and expense statement, if any, of the

association, *including the amount of any debt owed by the association or to be assumed by the association, inclusive of principal and any accrued interest, loan fees and other similar charges;*

7. The current operating budget of the association;

8. A statement of any unsatisfied judgments against the association and the status of any pending suits in which the association is a defendant;

9. A statement describing any insurance coverage provided for the benefit of proprietary lessees;

10. A statement as to whether the executive board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned thereto violate any provision of the declaration;

11. A statement as to whether the executive board has knowledge of any violations of the health or building codes with respect to the unit, the limited common elements assigned thereto or any other portion of the cooperative;

12. A statement of the remaining term of any leasehold estate affecting the cooperative and the provisions governing any extension or renewal thereof;

13. Except where no public offering statement was prepared, a statement that the public offering statement and any amendments thereto are records of the association available for inspection by the purchaser;

14. An accountant's statement, if any was prepared, as to the deductibility for federal income taxes purposes by the proprietary lessee of real estate taxes and interest paid by the association;

15. A statement of any restrictions in the declaration affecting the amount that may be received by a proprietary lessee upon sale, condemnation or loss to the unit or the cooperative on termination of the cooperative; and

16. Certification, if applicable, that the proprietary lessees' association has filed with the Real Estate Board the annual report required by § 55-504.1; which certification shall indicate the filing number assigned by the Real Estate Board and the expiration date of such filing.

B. The association, within ten days after a request by a proprietary lessee, shall furnish a certificate containing the information necessary to enable the proprietary lessee to comply with this section. A proprietary lessee providing a certificate pursuant to subsection A is not liable to the purchaser for any erroneous information provided by the association and included in the certificate.

C. A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A proprietary lessee is not liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner, but the purchase contract is voidable by the purchaser until the certificate has been provided and for five days thereafter or until conveyance, whichever first occurs.

§ 55-486. Release of liens.

A. In the case of a sale of a cooperative interest where delivery of a public offering statement is required pursuant to subsection C of § 55-477, a seller shall, before conveying a cooperative interest, record or furnish to the purchaser releases of all liens affecting the unit which is a part of that cooperative interest and any limited common element assigned thereto, *except liens solely against the unit and any limited common element assigned thereto*, which the purchaser ~~does not~~ expressly ~~agree~~ agrees to take subject to or assume. Releases of liens shall be made pursuant to §§ 55-66.3 through ~~55-66.7~~ 55-66.6. This subsection does not apply to any real estate which a declarant has the right to withdraw.

B. Before conveying real estate to the association the declarant shall have that real estate released from: (i) all liens the foreclosure of which would deprive proprietary lessees of any right of access to or easement of support of their units, and (ii) all other liens on that real estate unless the public offering statement describes certain real estate which may be conveyed subject to liens in specified amounts.