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HOUSE BILL NO. 1077

Offered January 9, 2008

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A BILL to amend and reenact §§ 55-362, 55-369, 55-382, 55-383, and 55-396 of the Code of Virginia, relating to the Virginia Real Estate Time Share Act; obligation for fees; limitation on actions; powers of Real Estate Board.

 Patron—Suit

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 55-362, 55-369, 55-382, 55-383, and 55-396 of the Code of Virginia are amended and reenacted as follows:

§ 55-362. Definitions.

When used in this chapter, or in a time-share instrument, unless the context requires a different meaning:

"Additional land" has the meaning ascribed to it in subsection C of § 55-367;

"Alternative purchase" means anything valued in excess of \$100 which is offered to a potential purchaser by the developer during the developer's sales presentation and which is purchased by such potential purchaser for more than \$100, even though the purchaser did not purchase a time-share. An alternative purchase is not a time-share. A membership camping contract as defined in § 59.1-313 is not an alternative purchase. An alternative purchase shall be registered with the Board unless it is otherwise registered as a travel service under the Virginia Travel Club Act (§ 59-445 et seq.), and shall include, without limitation, vacation packages (howsoever denominated) and exit programs (howsoever denominated);

"Association" means the association organized under the provisions of § 55-368;

"Board" means the Real Estate Board, an agency within the meaning of the Administrative Process Act (§ 2.2-4000 et seq.);

"Board of directors" means an executive and administrative entity, by whatever name denominated, designated in a time-share estate project instrument as the governing body of the time-share estate owners' association;

"Common elements" means the real estate, improvements thereon, and the personalty situate within the time-share project that are subject to the time-share program. "Common elements" shall not include the units and the time-shares;

"Consumer documents" means the aggregate of the following documents: the reverter deed, note, and the deed of trust. A consumer document shall be deemed one of the consumer documents;

"Contract," "sales contract," "purchase contract," "contract of purchase" or "contract to purchase" shall be interchangeable throughout this chapter and shall mean any legally binding instrument executed by the developer and a purchaser whereby the developer is obligated to sell and the purchaser is obligated to purchase either a time-share and its incidental benefits or an alternative purchase registered under this chapter;

"Conversion time-share project" means a real estate improvement, which prior to the disposition of any time-share, was wholly or partially occupied by persons as their permanent residence or on a transient pay-as-you-go basis other than those who have contracted for the purchase of a time-share and those who occupy with the consent of such purchasers;

"Deed" means the instrument by which title to a time-share estate is transferred from one person to another person;

"Deed of trust" means the instrument conveying the time-share estate that is given as security for the payment of the note;

"Default" means either a failure to have made any payment in full and on time or a violation of a performance obligation required by a consumer document for a period of no less than 60 days;

"Developer" means any person or group of persons acting in concert who (i) offers to dispose of a time-share or its or their interest in a time-share unit for which there has not been a previous disposition or (ii) applies for registration of the time-share program;

"Developer control period" has the meaning ascribed to it in § 55-369;

"Development right" means any right reserved by the developer to create additional units which may be dedicated to the time-share program;

"Dispose" or "disposition" means a transfer of a legal or equitable interest in a time-share, other than

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59 a transfer or release of security for a debt;

60 "Exchange agent" or "exchange company" means a person or persons who exchange or offer to
61 exchange time-shares in an exchange program with other time-shares;

62 "Exchange program" means any opportunity or procedure for the assignment or exchange of
63 time-shares among owners in other time-share programs as evidenced by a past or present written
64 agreement executed between an exchange company and the developer or the time-share estate
65 association; however, an "exchange program" shall not be either an incidental benefit or an opportunity
66 or procedure whereby a time-share owner can exchange his time-share for another time-share within
67 either the same time-share or another time-share project owned in part by the developer;

68 "Guest" means a person who is on the project, additional land or development at the request of an
69 owner, developer, association or managing agent, or a person otherwise legally entitled to be thereon. A
70 guest includes, without limitation, family members of owners, time-share exchange participants,
71 merchants, purveyors, vendors and employees thereof, and of the developer and association.

72 "Incidental benefit" means anything valued in excess of \$100 provided by the developer that is
73 acquired by a purchaser upon acquisition of a time-share and includes without limitation exchange
74 rights, travel insurance, bonus weeks, upgrade entitlements, travel coupons, referral awards, and golf and
75 tennis packages. An incidental benefit is not a time-share or an exchange program. An incidental benefit
76 shall not be registered with the Board;

77 "Inherent risks of project activity" mean those dangers or conditions that are an integral part of a
78 project activity, including certain hazards, such as surface and subsurface conditions; natural conditions
79 of land, vegetation, and waters; the behavior of wild or domestic animals; and ordinary dangers of
80 structures or equipment ordinarily used in association or time-share operations. Inherent risks of project
81 activity also include the potential of a participant to act in a negligent manner that may contribute to
82 injury to the participant or others, including failing to follow instructions given by the project
83 professional or failing to exercise reasonable caution while engaging in the project activity.

84 "Lien holder" means either a person who holds an interest in an encumbrance that is not released of
85 record as to a purchaser or such person's successor in interest who acquires title to the time-share project
86 at foreclosure or by deed in lieu of foreclosure, or other instrument however denominated;

87 "Managing agent" means a person who undertakes the duties, responsibilities, and obligations of the
88 management of a time-share project;

89 "Managing entity" means the managing agent or, if there is no managing agent, the time-share
90 owners' association in a time-share estate project and the developer in a time-share use project;

91 "Material change" means a change in any information or document disclosed in or attached to the
92 public offering statement which renders inaccurate, incomplete or misleading any information or
93 document in such a way as to affect substantially a purchaser's rights or obligations, but shall not
94 include a change (i) in the real estate tax assessment or rate, utility charges or deposits, maintenance
95 fees, association dues, assessments, special assessments or any recurring time-share expense item
96 provided the change is made known (a) immediately to the prospective purchaser by a written addendum
97 in the public offering statement and (b) to the Board by filing with the developer's annual report copies
98 of the updated changes occurring over the immediately preceding 12 months; (ii) which is an aspect or
99 result of the orderly development of the time-share project in accordance with the time-share instrument;
100 (iii) resulting from new, updated, or amended information contained in the annual report prepared and
101 distributed pursuant to § 55-370.1; (iv) correcting spelling, grammar, omissions or other similar errors
102 not affecting the substance of the public offering statement; or (v) occurring in the issuance of an
103 exchange company's updated annual report or disclosure document, provided upon its receipt by the
104 developer, it shall be distributed in lieu of all others in order to satisfy § 55-374;

105 "Note" means the instrument that evidences the debt occasioned by the deferred purchase of a
106 time-share;

107 "Offering" or "offer" means any act to sell, solicit, induce, or advertise, which originates in this
108 Commonwealth, whether by radio, television, telephone, newspaper, magazine, or mail, whereby a
109 person is given an opportunity to acquire a time-share;

110 "Participant" means any person, other than a project professional, who engages in a project activity.

111 "Person" means one or more natural persons, corporations, partnerships, associations, trustees of a
112 trust, limited liability companies, other entities, or any combination thereof capable of holding title to
113 real property;

114 "Possibility of reverter" means a provision contained in a reverter deed whereby the time-share estate
115 automatically reverts or transfers back to the developer upon satisfaction of the requirements imposed by
116 § 55-376.1;

117 "Product" means each time-share and its incidental benefits and all alternative purchases that are
118 registered with the Board pursuant to this chapter;

119 "Project" means the same as the term "time-share project";

120 "Project activity" means any activity carried out or conducted on a common element, within a

time-share unit or elsewhere in the project, additional land or development, that allows owners, their guests, and members of the general public to view, observe, participate or enjoy activities, including swimming pools, spas, sporting venues, and cultural, historical or harvest-your-own activities, other amenities and events, or natural activities and attractions for recreational, entertainment, educational or social purposes. An activity is a project activity whether or not the participant paid to participate in the activity.

"Project instrument" means any recorded documents, by whatever name denominated, which create the time-share project and program and which may contain restrictions or covenants regulating the use, occupancy, or disposition of time-shares in a project;

"Project professional" means any person who is engaged in the business of providing one or more project activities, whether or not for compensation. For the purposes of this definition, the developer, association, and managing entity shall each be deemed a project professional.

"Public offering statement" means the statement required by § 55-374;

"Purchaser" means any person other than a developer or lender who owns or acquires a product, or who otherwise enters into a contract for the purchase of a product;

"Reverter deed" means the deed from developer to a grantee that contains a possibility of reverter;

"Sales person" means a person who sells or offers to sell time-share interests in a time-share program;

"Situs" means the place outside the Commonwealth where a developer's time-share project is located;

"Situs Time-Share Act" means the Act, howsoever denominated, that regulates the offering, disposition, and sale of time-shares applicable to the property outside the Commonwealth where the time-share project is located;

"Time-share" or *"timeshare"* means either a time-share estate or a time-share use plus its incidental benefits;

"Time-share estate" means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, coupled with a freehold estate or an estate for years in a time-share project or a specified portion thereof;

"Time-share estate occupancy expense" has the meaning ascribed to it in § 55-369;

"Time-share estate subject to reverter" means a time-share estate (i) entitling the holder thereof to occupy units not more than four weeks in any one year period; and (ii) for which the down payment is not more than 20 percent of the total purchase price of the time-share estate;

"Time-share expense" means (i) expenditures, fees, charges, or liabilities incurred with respect to the operation, maintenance, administration or insuring of the time-shares, units, and common elements comprising the entire time-share project, whether or not incurred for the repair, renovation, upgrade, refurbishing or capital improvements; and (ii) any allocations of reserves;

"Time-share instrument" means any document, however denominated, which creates the time-share project and program, and which may contain restrictions or covenants regulating the use, occupancy, or disposition of time-shares in a project;

"Time-share owner" or "owner" means a person who is an owner or co-owner of a time-share other than as security for an obligation;

"Time-share program" or "program" means any arrangement of time-shares in one or more time-share projects whereby the use, occupancy, or possession of real property has been made subject to either a time-share estate or time-share use in which such use, occupancy, or possession circulates among owners of the time-shares according to a fixed or floating time schedule on a periodic basis occurring over any period of time in excess of five years;

"Time-share project" means all of the real property subject to a time-share program created by the execution of a time-share instrument;

"Time-share use" means a right to occupy a time-share unit or any of several time-share units during five or more separated time periods over a period of at least five years, including renewal options, not coupled with a freehold estate or an estate for years in a time-share project or a specified portion thereof. "Time-share use" shall not mean a right to use which is subject to a first-come, first-served, space-available basis as might exist in a country club, motel, hotel, health spa, campground, or membership or resort facility;

"Time-share unit" or "unit" means the real property or real property improvement in a project which is divided into time-shares and designated for separate occupancy and use.

§ 55-369. Developer control in time-share estate program.

A. The time-share instrument for a time-share estate program shall provide for a period of time, to be called the "developer control period," during which the developer or a managing agent selected by the developer shall manage and control the time-share estate project and the common elements and units, or portions thereof, comprising it. All costs associated with the control, management, and operation of the time-share estate project during the developer control period shall belong to the

182 developer, except for time-share estate occupancy expenses that shall, if required by the developer in the
183 time-share instrument, be allocated only to and paid by time-share estate owners other than the
184 developer. "Time-share estate occupancy expenses" means all costs and expenses incurred in (i) the
185 formation, organization, operation and administration, including capital contributions thereto, of the
186 association and both its board of directors and its members and (ii) all owners' use and occupancy of the
187 time-share estate project including without limitation its completed and occupied time-share estate units
188 and common elements available for use. Such costs and expenses include but are not limited to
189 maintenance and housekeeping charges; repairs; refurbishing costs; insurance premiums, including the
190 premium for comprehensive general liability insurance required by subdivision 8 of § 55-368; taxes;
191 properly allocated labor, operational, and overhead costs; general and administrative expenses; managing
192 agent's fee; utility charges and deposits; the cost of periodic repair and replacement of walls and window
193 treatments and furnishings, including furniture and appliances; filing fees and annual registration charges
194 of the State Corporation Commission and the Board; counsel fees and accountant charges; and reserves
195 for any of the foregoing. Nothing shall preclude the developer, during the developer control period *and*
196 *at any time after the lapse of a purchaser's right of cancellation, and without regard to the recordation*
197 *of the deed*, from collecting an annual or specially assessed charge from each time-share estate owner
198 for the payment of the time-share estate occupancy expenses by way of a "maintenance fee"; ~~however.~~
199 *However*, any such funds received and not spent or any other funds received and allocated to the benefit
200 of the association, shall be transferred to the association by the developer at the termination of the
201 developer control period.

202 B. Fee simple title to the common elements, shall be transferred to the time-share estate owners'
203 association, free of charge, no later than at such time as the developer either transfers to purchasers legal
204 or equitable ownership of at least ninety percent of the time-share estates or completes all of the
205 common elements and facilities comprising the time-share estate project, whichever occurs later. The
206 developer may, but shall not be required to, make such transfer when the period has ended for a phase
207 or portion of the time-share estate project. The transfer herein required of the developer shall not
208 exonerate it from the responsibility of completion of the promised and incomplete common elements
209 once the transfer occurs. Upon transfer of the time-share project or portion to the association, the
210 developer control period for such project or portion thereof shall terminate.

211 § 55-382. Effect of violations on rights of action; attorney's fees; prior determination of Real Estate
212 Board required for certain violations.

213 A. If a developer or any other person subject to this chapter violates any provision hereof or any
214 provision of the time-share instrument, any person or class of persons adversely affected by the violation
215 has a claim for appropriate relief. The court may also award reasonable attorney's fees to the prevailing
216 party.

217 B. *Prior to the commencement of any action alleging a failure to comply with the provisions of*
218 *§ 55-375 or 55-386, however, an aggrieved owner shall first seek a determination from the Board as to*
219 *whether compliance with § 55-375 or 55-386 has occurred. The Board shall make such determination*
220 *within 120 days of the request therefore.*

221 § 55-383. Statute of limitations; actions; limitation on rescission rights.

222 A. *Except as otherwise provided in § 55-389, a judicial proceeding where the sufficiency of the*
223 *time-share instrument, the accuracy of the public offering statement, or validity of any contract of*
224 *purchase is in issue and a rescission of the contract or damages is sought must, shall be commenced*
225 *within two years after the date of the contract of purchase, notwithstanding that the purchaser's terms of*
226 *payments may extend beyond this period of limitation; however, with respect to the enforcement of*
227 *provisions in the contract of purchase which require the continued furnishing of services and the*
228 *reciprocal payments to be made by the purchaser, the period of bringing a judicial proceeding will*
229 *continue for a period of two years for each breach.*

230 *Rescission of the contract shall not be granted by the court unless the inaccuracy of the public*
231 *offering statement or the insufficiency of the time-share instrument directly and adversely affected the*
232 *purchaser's right to participate in the time-share program or to own his time-share. Further, if damages*
233 *are awarded, the amount of the damages shall be limited to actual damages sustained notwithstanding*
234 *any other law to the contrary.*

235 B. If a developer has substantially complied in good faith with the provisions of this chapter, a
236 nonmaterial error or omission shall not be actionable. A nonmaterial error or omission shall not be
237 sufficient to permit a purchaser to cancel a contract after the cancellation period provided by § 55-376
238 has expired.

239 § 55-396. General powers and duties of Board.

240 A. The Board may adopt, amend, and repeal rules and regulations and issue orders consistent with
241 and in furtherance of the objectives of this chapter. The Board may prescribe forms and procedures for
242 submitting information to the Board.

243 B. The Board may accept grants in aid from any governmental source and may contract with

agencies charged with similar functions in this or other jurisdictions, in furtherance of the objectives of this chapter.

C. The Board may cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices, and may develop information that may be useful in the discharge of the Board's duties.

D. 1. If the Board determines after legal notice and opportunity for hearing that a developer or agent of developer has:

a. Made any representation in any document or information filed with the Board which is false or misleading;

b. Engaged or is engaging in any unlawful act or practice;

c. Disseminated or caused to be disseminated orally, or in writing, any false or misleading promotional materials in connection with a time-share program;

d. Concealed, diverted, or disposed of any funds or assets of any person in a manner impairing rights of purchasers of time-shares in the time-share program;

e. Failed to perform any stipulation or agreement made to induce the Board to issue an order relating to that time-share program;

f. Otherwise violated any provision of this chapter or any of the Board's rules and regulations or orders; or

g. Disposed of any time-share in a project without first complying with the requirements of this chapter, it may issue an order requiring the developer to cease and desist from the unlawful practice and to take such affirmative action as in the judgment of the Board will carry out the purposes of this chapter.

2. If the Board makes a finding of fact at a hearing that the public interest will be irreparably harmed by delay in issuing an order, as prescribed in subdivision 1 of this subsection, it may issue a temporary cease and desist order. With the issuance of a temporary cease and desist order, the Board, by registered mail or other personal written service, shall give notice of the issuance to the developer. Every temporary cease and desist order shall include in its terms:

a. A provision clearly stating the reasons for issuing such cease and desist order, the date of the hearing on its issuance, and the nature and extent of the facts and findings on which the order was based;

b. A provision that a hearing by the Board may be held, after due notice but not more than fifteen days from the date such temporary cease and desist order is effective, to determine whether or not a cease and desist order as called for in the immediately preceding subsection shall be issued;

c. A provision that such temporary cease and desist order may remain in full force for a period of not more than fifteen days from the date of its issuance or the date on which the Board has determined that an order as prescribed in subdivision 1 of this subsection is to be issued, whichever shall occur first;

d. A provision that a failure to comply with such temporary cease and desist order will be a violation of this chapter. The Board shall not issue more than one temporary cease and desist order with reference to such finding of fact as prescribed in this subsection.

E. The Board may also issue a cease and desist order if the developer has not registered the time-share program as required by this chapter.

F. The Board, after notice and hearing, may issue an order revoking the registration of the developer's time-share program upon determination that such developer or agent thereof has failed to comply with a cease and desist order issued by the Board affecting the developer's time-share program.

G. If it appears that any person has engaged, is engaging, or is about to engage in any act or practice in violation of this chapter or any of the Board's rules or orders applicable thereto, the Board, without prior administrative proceedings, may bring suit in the circuit court of the city or county in which any portion of the time-share project is located to enjoin that act or practice or for other appropriate relief. The Board is not required to post a bond or prove that no adequate remedy at law exists.

H. Upon request of a time-share owner, the Board shall, in accordance with subsection B of § 55-382, issue its determination whether compliance with § 55-375 or 55-386 has occurred.