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HOUSE BILL NO. 2116

Offered January 14, 2009

Prefiled January 13, 2009

A BILL to amend and reenact §§ 55-79.93:1, 55-504.1, 55-516.1, 55-528, 55-530, and 55-530.1 of the Code of Virginia, to amend the Code of Virginia by adding a section numbered 54.1-2353.1, and to repeal §§ 54.1-2351 and 54.1-2352 of the Code of Virginia, relating to common interest communities.

Patron—Nichols

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 55-79.93:1, 55-504.1, 55-516.1, 55-528, 55-530, and 55-530.1 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 54.1-2353.1 as follows:

§ 54.1-2353.1. Cease and desist orders.

A. The Board may issue an order requiring a common interest community manager licensed in accordance with this chapter 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, if the Board determines after notice and hearing that such common interest community manager has:

1. Engaged, in the performance of his duties as a common interest community manager for an association, in any act or practice in violation of this chapter, Chapter 4.2 (§ 55-79.39 et seq.), 21 (§ 55-360 et seq.), 24 (§ 55-424 et seq.), or 26 (§ 55-508 et seq.) of Title 55, or any of the Board's regulations or orders; or

2. Willfully refused to furnish the Board information or records required or requested pursuant to statute or regulation;

B. If the Board makes a finding of fact in writing that the public interest will be irreparably harmed by delay in issuing an order, it may issue a temporary cease and desist order. Prior to issuing the temporary cease and desist order, the Board shall give notice of the proposal to issue a temporary cease and desist order to the person. Every temporary cease and desist order shall include in its terms a provision that upon request a hearing will be held promptly to determine whether or not it becomes permanent.

§ 55-79.93:1. Annual report by unit owners' association.

A. The unit owners' association shall file an annual report in a form and at such time as prescribed by regulations of the agency. The filing of the annual report required by this section shall commence upon the termination of the declarant control period pursuant to § 55-79.74.

B. The agency may accept copies of forms submitted to other state agencies to satisfy the requirements of this section if such forms contain substantially the same information required by the agency.

C. The annual report shall be accompanied by a fixed fee in an amount established by the agency, together with an annual assessment in an amount equal to the lesser of \$1,000 (or such other amount as the agency may establish by regulation) or 0.02 percent of the unit owners' association's gross assessment income during the preceding calendar year, to be remitted to the State Treasurer and shall be placed to the credit of the Common Interest Community Management Fund established pursuant to § 55-529.

§ 55-504.1. Annual report by associations.

A. The association shall file an annual report in a form and at such time as prescribed by regulations of the agency. The filing of the annual report required by this section shall commence upon the termination of any declarant control period reserved pursuant to § 55-460.

B. The agency may accept copies of forms submitted to other state agencies to satisfy the requirements of this section if such forms contain substantially the same information required by the agency.

C. The annual report shall be accompanied by a fixed fee in an amount established by the agency, together with an annual assessment in an amount equal to the lesser of \$1,000 (or such other amount as the agency may establish by regulation) or 0.02 percent of the association's gross assessment income during the preceding calendar year to be remitted to the State Treasurer and shall be placed to the credit of the Common Interest Community Management Fund established pursuant to § 55-529.

§ 55-516.1. Annual report by association.

A. The association shall file an annual report in a form and at such time as prescribed by regulations

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59 of the Common Interest Community Board.

60 B. The Common Interest Community Board may accept copies of forms submitted to other state
61 agencies to satisfy the requirements of this section if such forms contain substantially the same
62 information required by the Common Interest Community Board.

63 C. The annual report shall be accompanied by a fixed fee in an amount established by the Common
64 Interest Community Board, ~~together with an annual assessment in an amount equal to the lesser of~~
65 ~~\$1,000 (or such other amount as the Board may establish by regulation) or 0.02 percent of the~~
66 ~~association's gross assessment income during the preceding calendar year to be remitted to the State~~
67 ~~Treasurer and shall be placed to the credit of the Common Interest Community Management Fund~~
68 ~~established pursuant to § 55-529.~~

69 § 55-528. Definitions.

70 As used in this chapter, unless the context requires a different meaning:

71 "Association" includes condominium, cooperative, or property owners' associations.

72 "Balance of the fund" means cash, securities that are legal investments for fiduciaries under the
73 provisions of subdivisions (1), (2), and (4) of § 26-40, and repurchase agreements secured by obligations
74 of the United States government or any agency thereof, and shall not mean accounts receivable,
75 judgments, notes, accrued interest, or other obligations to the fund.

76 "Board" means the Common Interest Community Board.

77 "Claimant" means upon proper application to the Director, a receiver for a common interest
78 community manager appointed pursuant to § 54.1-2353 in those cases in which there are not sufficient
79 funds to restore all funds that were or ought to have been held in a fiduciary capacity by the subject
80 common interest community manager or to pay an award of reasonable fees, costs, and expenses to the
81 receiver.

82 "Common interest community" means real estate located within the Commonwealth subject to a
83 declaration which contains lots, at least some of which are residential or occupied for recreational
84 purposes, and common areas to which a person, by virtue of his ownership of a lot, is a member of an
85 association and is obligated to pay assessments provided for in a declaration.

86 "Declaration" means any instrument, however denominated, recorded among the land records of the
87 county or city in which the development or any part thereof is located, that either (i) imposes on the
88 association maintenance or operational responsibilities for the common area as a regular annual
89 assessment or (ii) creates the authority in the association to impose on lots, or on the owners or
90 occupants of such lots, or on any other entity any mandatory payment of money as a regular annual
91 assessment in connection with the provision of maintenance or services or both for the benefit of some
92 or all of the lots, the owners or occupants of the lots, or the common area. "Declaration" includes any
93 amendment or supplement to the instruments described in this definition.

94 "Director" means the Director of the Department of Professional and Occupational Regulation.

95 "Governing board" means the governing board of an association, including the executive organ of a
96 condominium unit owners' association, the executive board of a cooperative proprietary lessees'
97 association, and the board of directors of a property owners' association.

98 "Lot" means (i) any plot or parcel of land designated for separate ownership or occupancy shown on
99 a recorded subdivision plat for a development or the boundaries of which are described in the
100 declaration or in a recorded instrument referred to or expressly contemplated by the declaration, other
101 than a common area, and (ii) a unit in a condominium association or a unit in a real estate cooperative.

102 "*Member*" means an individual who owns real property in a common interest community.

103 § 55-530. Powers of the Board; Common interest community ombudsman; complaints.

104 A. The Board shall administer the provisions of this chapter pursuant to the powers conferred by
105 § 54.1-2349 and this chapter.

106 B. The Director in accordance with § 54.1-303 shall appoint a Common Interest Community
107 Ombudsman (the Ombudsman) and shall establish the Office of the Common Interest Community
108 Ombudsman. The Ombudsman shall be a member in good standing in the Virginia State Bar. All state
109 agencies shall assist and cooperate with the Office of the Common Interest Community Ombudsman in
110 the performance of its duties under this chapter. The expenses for the operations of the Office of the
111 Common Interest Community Ombudsman, including the compensation paid to the Ombudsman, shall
112 be paid first from interest earned on deposits constituting the fund and the balance from the moneys
113 collected annually in the fund.

114 C. The Office of the Common Interest Community Ombudsman shall:

115 1. Assist members in understanding their rights and the processes available to them according to the
116 declaration and bylaws of the association;

117 2. Answer inquiries from members and other citizens by telephone, mail, electronic mail, and in
118 person;

119 3. Provide to members and other citizens information concerning common interest communities upon
120 request;

4. Make available, either separately or through an existing Internet website utilized by the Director, information as set forth in subdivision 3 and such additional information as may be deemed appropriate;

5. Receive the notices of complaint filed;

6. In conjunction with complaint and inquiry data maintained by the Director, maintain data on inquiries received, the types of assistance requested, notices of complaint received, any actions taken, and the disposition of each such matter;

7. Upon request, assist members in using the procedures and processes available to them in the association, including nonbinding explanations of laws or regulations governing common interest communities or interpretations thereof by the Board, and referrals to public and private agencies offering alternative dispute resolution services, with a goal of reducing and resolving conflicts among associations and their members. Such assistance may require the review of the declaration and other records of an association. An association shall provide such information to the Office of the Common Interest Community Ombudsman within a reasonable time upon request;

8. Ensure that members have access to the services provided through the Office of the Common Interest Community Ombudsman and that the members receive timely responses from the representatives of the Office of the Common Interest Community Ombudsman to the inquiries;

9. Upon request to the Director by (i) any of the standing committees of the General Assembly having jurisdiction over common interest communities or (ii) the Housing Commission, provide to the Director for dissemination to the requesting parties assessments of proposed and existing common interest community laws and other studies of common interest community issues;

10. Monitor changes in federal and state laws relating to common interest communities;

11. Provide information to the Director that will permit the Director to report annually on the activities of the Office of the Common Interest Community Ombudsman to the standing committees of the General Assembly having jurisdiction over common interest communities and to the Housing Commission. The Director's report shall be filed by December 1 of each year, and shall include a summary of significant new developments in federal and state laws relating to common interest communities each year; and

12. Carry out activities as the Board determines to be appropriate.

D. The Board may use the remainder of the interest earned on the balance of the fund and of the moneys collected annually and deposited in the fund for financing or promoting the following:

1. Information and research in the field of common interest community management and operation;

2. Expedient and inexpensive procedures for resolving complaints about an association from members of the association or other citizens;

3. Seminars and educational programs designed to address topics of concern to community associations; and

4. Other programs deemed necessary and proper to accomplish the purpose of this chapter.

E. The Board shall establish by regulation a requirement that each association shall establish reasonable procedures for the resolution of written complaints from the members of the association and other citizens, which system shall include the following:

1. A record of each complaint shall be maintained for no less than one year after the association acts upon the complaint.

2. Such association shall provide complaint forms or written procedures to be given to persons who wish to register written complaints. The forms or procedures shall include the address and telephone number of the association or its common interest community manager to which complaints shall be directed and the mailing address, telephone number, and electronic mail address of the Office of the Common Interest Community Ombudsman. The forms and written procedures shall include a clear and understandable description of the complainant's right to give notice of adverse decisions pursuant to this section.

F. A complainant may give notice to the Board of any final adverse decision in accordance with regulations promulgated by the Board. The notice shall be filed within 30 days of the final adverse decision, shall be in writing on forms prescribed by the Board, shall include copies of all records pertinent to the decision, and shall be accompanied by a \$25 filing fee. The fee shall be collected by the Director and paid directly into the state treasury and credited to the Common Interest Community Management Information Fund, § 55-530.1. The Board may, for good cause shown, waive or refund the filing fee upon a finding that payment of the filing fee will cause undue financial hardship for the member. The Director shall provide a copy of the written notice to the association that made the final adverse decision.

G. The Director or his designee, may request additional information concerning any notice of complaint from the association that made the final adverse decision. The association shall provide such information to the Director within a reasonable time upon request. If the Director upon review determines that the final adverse decision may be in conflict with laws or regulations governing

182 common interest communities or interpretations thereof by the Board, the Director may, in his sole
183 discretion, provide the complainant and the association with information concerning such laws or
184 regulations governing common interest communities or interpretations thereof by the Board. The
185 determination of whether the final adverse decision may be in conflict with laws or regulations
186 governing common interest communities or interpretations thereof by the Board shall be a matter within
187 the sole discretion of the Director, whose decision is final and not subject to further review. The
188 determination of the Director shall not be binding upon the complainant or the association that made the
189 final adverse decision.

190 H. The Board shall issue a certificate of filing to each association which has properly filed in
191 accordance with this title. The certificate shall include the date of registration and a unique registration
192 number assigned by the Board.

193 I.F. The Board may prescribe regulations which shall be adopted, amended or repealed in accordance
194 with the Administrative Process Act (§ 2.2-4000 et seq.) to accomplish the purpose of this chapter.

195 § 55-530.1. Common Interest Community Management Recovery Fund.

196 A. There is hereby created the Common Interest Community Management Recovery Fund (the Fund)
197 to be used in the discretion of the Board to protect the interests of associations.

198 B. Each common interest community manager, at the time of initial application for licensure, and
199 each association filing its first annual report after the effective date hereof shall be assessed \$25, which
200 shall be specifically assigned to the Fund. Initial payments may be incorporated in any application fee
201 payment or annual filing fee and transferred to the Fund by the Director within 30 days.

202 All assessments, except initial assessments, for the Fund shall be deposited within three business days
203 after their receipt by the Director, in one or more federally insured banks, savings and loan associations,
204 or savings banks located in the Commonwealth. Funds deposited in banks, savings institutions, or
205 savings banks, to the extent in excess of insurance afforded by the Federal Deposit Insurance
206 Corporation or other federal insurance agency, shall be secured under the Security for Public Deposits
207 Act (§ 2.2-4400 et seq.). The deposit of these funds in federally insured banks, savings and loan
208 associations, or savings banks located in the Commonwealth shall not be considered investment of such
209 funds for purposes of this section. Funds maintained by the Director may be invested in securities that
210 are legal investments for fiduciaries under the provisions of § 26-40.01.

211 Interest earned on the deposits constituting the Fund shall be used for administering the Fund. The
212 remainder of this interest, at the discretion of the Board, may be transferred to the Common Interest
213 Community Management Information Fund or accrue to the Fund.

214 C. On and after July 1, 2011, the minimum balance of the Fund shall be \$150,000. Whenever the
215 Director determines that the balance of the Fund is or will be less than such minimum balance, the
216 Director shall immediately inform the Board. At the same time, the Director may recommend that the
217 Board transfer a fixed amount from the Common Interest Community Management Information Fund to
218 the Fund to bring the balance of the Fund to the amount required by this subsection. Such transfer shall
219 be considered by the Board within 30 days of the notification of the Director.

220 D. If any such transfer of funds is insufficient to bring the balance of the Fund to the minimum
221 amount required by this section, or if a transfer to the fund has not occurred, the Board shall assess each
222 association and each common interest community manager within 30 days of notification by the
223 Director, a sum sufficient to bring the balance of the Fund to the required minimum amount. The
224 amount of such assessment shall be allocated among the associations and common interest community
225 managers in proportion to the each payor's most recently paid annual assessment, or if an association or
226 common interest community manager has not paid an annual assessment previously, in proportion to the
227 average annual assessment most recently paid by associations or common interest community managers
228 respectively. The Board may order an assessment at any time in addition to any required assessment.
229 Assessments made pursuant to this subsection may be issued by the Board (i) after a determination
230 made by it or (ii) at the time of license renewal.

231 Notice to common interest community managers and the governing boards of associations of these
232 assessments shall be by first-class mail, and payment of such assessments shall be made by first-class
233 mail addressed to the Director within 45 days after the mailing of such notice.

234 E. If any common interest community manager fails to remit the required payment within 45 days of
235 the mailing, the Director shall notify the common interest community manager by first-class mail at the
236 latest address of record filed with the Board. If no payment has been received by the Director within 30
237 days after mailing the second notice, the license shall be automatically suspended. The license shall be
238 restored only upon the actual receipt by the Director of the delinquent assessment.

239 F. If any association fails to remit the required payment within 45 days of the mailing, the Director
240 shall notify the association by first-class mail at the latest address of record filed with the Board. If no
241 payment has been received by the Director within 30 days after mailing the second notice, it shall be
242 deemed a knowing and willful violation of this section by the governing board of the association.

243 G. At the close of each fiscal year, whenever the balance of the fund exceeds \$5 million, the amount

in excess of \$5 million shall be transferred to the Virginia Housing Partnership Revolving Fund, § 36-137. Except for payments of costs as set forth in this chapter and transfers pursuant to this subsection, there shall be no transfers out of the fund, including transfers to the general fund, regardless of the balance of the fund.

H.G. A claimant may seek recovery from the fund subject to the following conditions:

1. A claimant may file a verified claim in writing to the Director for a recovery from the Fund.

2. Upon proper application to the Director, in those cases in which there are not sufficient funds to pay an award of reasonable fees, costs, and expenses to the receiver or to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager, the Director shall report to the Board the amount of any shortfall to the extent that there are not sufficient funds (i) to pay any award of fees, costs, and expenses pursuant to subsection G of § 54.1-2353 by the court appointing the receiver; or (ii) to restore all funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager, as certified by the court appointing the receiver.

3. If the Board finds there has been compliance with the required conditions, the Board shall issue a directive ordering payment of the amount of such shortfall to the claimant from the fund; provided that in no event shall such payment exceed the balance in the fund. When the fund balance is not sufficient to pay the aggregate amount of such shortfall, the Board shall direct payment shall be applied first in satisfaction of any award of reasonable fees, costs, and expenses to the receiver and second to restore the funds that were or ought to have been held in a fiduciary capacity by the subject common interest community manager. If the Board has reason to believe that there may be additional claims against the fund, the Board may withhold any payment(s) from the fund for a period of not more than one year. After such one-year period, if the aggregate of claims received exceeds the fund balance, the fund balance shall be prorated by the Board among the claimants and paid in the above payment order from the fund in proportion to the amounts of claims remaining unpaid.

4. The Director shall, subject to the limitations set forth in this subsection, pay to the claimant from the fund such amount as shall be directed by the Board upon the execution and delivery to the Director by such claimant of an assignment to the Board of the claimant's rights on its behalf and on behalf of the associations receiving distributions from the fund against the common interest community manager to the extent that such rights were satisfied from the fund.

5. The claimant shall be notified in writing of the findings of the Board. The Board's findings shall be considered a case decision as defined in § 2.2-4001, and judicial review of these findings shall be in accordance with § 2.2-4025 of the Administrative Process Act (§ 2.2-4000 et seq.).

6. Notwithstanding any other provision of law, the Board shall have the right to appeal a decision of any court that is contrary to any distribution recommended or authorized by it.

7. Upon payment by the Director to a claimant from the fund as provided in this subsection, the Board shall immediately revoke the license of the common interest community manager whose actions resulted in payment from the fund. The common interest community manager whose license was so revoked shall not be eligible to apply for a license as a common interest community manager until he has repaid in full the amount paid from the fund on his account, plus interest at the judgment rate of interest from the date of payment from the fund.

8. Nothing contained in this subsection shall limit the authority of the Board to take disciplinary action against any common interest community manager for any violation of statute or regulation, nor shall the repayment in full by a common interest community manager of the amount paid from the fund on such common interest community manager's account nullify or modify the effect of any disciplinary proceeding against such common interest community manager for any such violation.

2. That §§ 54.1-2351 and 54.1-2352 of the Code of Virginia are repealed.