

VIRGINIA ACTS OF ASSEMBLY -- 2013 SESSION

CHAPTER 327

An Act to amend and reenact §§ 55-369 and 55-370 of the Code of Virginia, relating to the Virginia Real Estate Time-Share Act; developer control in time-share estate programs; liens; foreclosure procedure.

[S 772]

Approved March 13, 2013

Be it enacted by the General Assembly of Virginia:

- 1. That §§ 55-369 and 55-370 of the Code of Virginia are amended and reenacted as follows:
§ 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 developer, except for time-share estate occupancy expenses that shall, if required by the developer in the time-share instrument, be allocated only to and paid by time-share estate owners other than the developer. "Time-share estate occupancy expenses" means all costs and expenses incurred in (i) the formation, organization, operation, and administration, including capital contributions thereto, of the association and both its board of directors and its members and (ii) all owners' use and occupancy of the time-share estate project including without limitation its completed and occupied time-share estate units and common elements available for use. Such costs and expenses include but are not limited to maintenance and housekeeping charges; repairs; refurbishing costs; insurance premiums, including the premium for comprehensive general liability insurance required by subdivision 8 of § 55-368; taxes; properly allocated labor, operational, and overhead costs; general and administrative expenses; managing agent's fee; utility charges and deposits; the cost of periodic repair and replacement of walls and window treatments and furnishings, including furniture and appliances; filing fees and annual registration charges of the State Corporation Commission and the Board; counsel fees and accountant charges; and reserves for any of the foregoing. Nothing shall preclude the developer, during the developer control period and at any time after the lapse of a purchaser's right of cancellation, and without regard to the recordation of the deed, provided the deed has been delivered to the purchaser or the purchaser's agent, from collecting an annual or specially assessed charge from each time-share estate owner for the payment of the time-share estate occupancy expenses by way of a "maintenance fee." However, any such funds received and not spent or any other funds received and allocated to the benefit of the association shall be transferred to the association by the developer at the termination of the developer control period.

B. ~~Fee~~ *Except to the extent that the purchase contract or time-share instrument expressly provides otherwise, fee* simple title to the common elements, shall be transferred to the time-share estate owners' association, free of charge, no later than at such time as the developer ~~either~~ (i) transfers to purchasers legal or equitable ownership of at least ~~ninety~~ 90 percent of the time-share estates ~~or completes~~, *excluding any reacquisitions by the developer;* (ii) *is no longer the beneficiary on deeds of trust secured on at least 20 percent of the time-share estates;* or (iii) *has completed all of the promised common elements and facilities comprising the time-share estate project, whichever occurs later last.* The developer may, but shall not be required to, make such transfer when the period has ended for a phase or portion of the time-share estate project. The transfer herein required of the developer shall not exonerate ~~it~~ *the developer* from the responsibility of completion of the promised and incomplete common elements once the transfer occurs. Upon transfer of the time-share project or portion to the association, the developer control period for such project or portion thereof shall terminate.

§ 55-370. Time-share estate owners' association control liens.

A. The board of directors of the association shall have the authority to adopt regular annual assessments and to levy periodic special assessments against each of the time-share estate unit owners and to collect the same from such owners according to law, if the purpose in so doing is determined by the board of directors to be in the best interest of the *time-share project or time-share program* and the proceeds are used to *either pay time-share common expenses or fund a reserve*. In addition, the board of directors of the association shall have the authority to collect, on behalf of the developer or on its own account, the maintenance fee imposed by the developer pursuant to § 55-369. The authority hereby granted and conferred upon the association shall exist notwithstanding any covenants and restrictions of record applicable to the project stated to the contrary and any such covenants and restrictions are hereby declared void.

B. The developer may provide that it not be obligated to pay all or a portion of any assessment,

dues, or other charges of the association, however denominated, passed, or adopted, pursuant to subsection A, if such developer so provides, in bold type, in the time-share instrument for the time-share estate project. If no such provision exists, the developer shall be responsible to pay the same assessment, dues, or other charges that a time-share estate owner is obligated to pay for each of its unsold time-shares existing at the end of the fiscal year of the association and no more if the board of directors of the association so determines. In no event shall either a time-share expense or the dues, assessment, or charges of the association discriminate against the developer.

C. The association shall have a lien on every time-share estate within its project for unpaid and past due regular or special assessments levied against that estate in accordance with the provisions of this chapter and for all unpaid and past due maintenance fees. The exemption created by § 34-4 shall not be claimed against the debt or lien of the association created by this section.

The association, in order to perfect the lien given by this subsection, shall file, before the expiration of four years from the time such special or regular assessment or maintenance fee became due and payable, in the clerk's office of the county or city in which the project is situated, a memorandum verified by the oath of any officer of the association or its managing agent and containing the following information:

1. The name and location of the project;
2. The name and address of each owner of the time-share on which the lien exists and a description of the unit in which the time-share is situate;
3. The amount of unpaid and past due special or regular assessments or unpaid and past due maintenance fees applicable to the time-share, together with the date when each became due;
4. The amount of any other charges owing occasioned by the failure of the owner to pay the assessments or maintenance fees, including late charges, interest, postage and handling, ~~attorneys'~~ attorney fees, recording costs and release fees;
5. The name, address and telephone number of the association's trustee, if known at the time, who will be called upon by the association to foreclose on the lien upon the owner's failure to pay as provided in this subsection; and
6. The date of issuance of the memorandum.

Notwithstanding any other provision of this chapter, or any other provision of law requiring documents to be recorded in the deed books of the clerk's office of any court, from July 1, 1981, all memoranda of liens arising under this subsection shall be recorded in the deed books in such clerk's office. Any such memorandum shall be indexed in the general index to deeds, and such general index shall identify the lien as a lien for time-share estate regular or special assessments or maintenance fees.

It shall be the duty of the clerk in whose office such memorandum shall be filed as provided herein to record and index the same as provided in this subsection, in the names of the persons identified therein as well as in the name of the time-share estates owners' association. The cost of recording such memorandum shall be taxed against the owner of the time-share on which the lien is placed. The filing with the clerk of one memorandum on which is listed two or more delinquent time-share estate unit owners is permitted in order to perfect the lien hereby allowed and the cost of filing in this event shall be the clerk's fee as prescribed in subdivision A 2 of § 17.1-275.

D. At any time after perfecting the lien pursuant to this section, the association may sell the time-share estate at public sale, subject to prior liens. For purposes of this section, the association shall have the power both to sell and convey the time-share estate, and shall be deemed the time-share estate owner's statutory agent for the purpose of transferring title to the time-share estate. A nonjudicial foreclosure sale shall be conducted by a trustee and in accordance with the following:

1. The association shall give notice to the time-share estate owner, prior to advertisement, as required by subdivision 4. The notice shall specify (i) the debt secured by the perfected lien; (ii) the action required to satisfy the debt secured by the perfected lien; (iii) the date, not less than 60 days from the date the notice is given to the time-share estate owner, by which the debt secured by the lien must be satisfied; and (iv) that failure to satisfy the debt secured by the lien on or before the date specified in the notice may result in the sale of the time-share estate. The notice shall further inform the time-share estate owner of the right to bring a court action in the circuit court of the county or city where the time-share project is located to assert the nonexistence of a debt or any other defenses of the time-share estate owner to the sale.

2. After expiration of the 60-day notice period provided in subdivision 1, the association may appoint a trustee to conduct the sale. The appointment of the trustee shall be filed in the clerk's office of the circuit court in the county or city in which the time-share project is located. It shall be the duty of the clerk in whose office such appointment is filed to record and index the same, as provided in this subsection, in the names of the persons identified therein as well as in the name of the association. The association, at its option, may from time to time remove the trustee and appoint a successor trustee.

3. If the time-share estate owner meets the conditions specified in this subdivision prior to the date of the foreclosure sale, the time-share estate owner shall have the right to have enforcement of the perfected lien discontinued prior to the sale of the time-share estate. Such conditions are that the time-share estate owner: (i) satisfy the debt secured by lien that is the subject of the nonjudicial

foreclosure sale and (ii) pay all expenses and costs incurred in perfecting and enforcing the lien, including but not limited to advertising costs and reasonable attorney fees.

4. In addition to the advertisement required by subdivision 5, the association shall give written notice of the time, date, and place of any proposed sale in execution of the lien, including the name, address, and telephone number of the trustee, by personal delivery or by mail to (i) the present owner of the time-share estate to be sold at his last known address as such owner and address appear in the records of the association, (ii) any lienholder who holds a note against the time-share estate secured by a deed of trust recorded at least 30 days prior to the proposed sale and whose address is recorded with the deed of trust, and (iii) any assignee of such a note secured by a deed of trust provided the assignment and address of the assignee are likewise recorded at least 30 days prior to the proposed sale. Mailing a copy of the advertisement or the notice containing the same information to the owner by certified or registered mail no less than 14 days prior to such sale and to the lienholders and their assigns, at the addresses noted in the memorandum of lien, by ordinary mail no less than 14 days prior to such sale shall be a sufficient compliance with the requirement of notice.

5. The advertisement of sale by the association shall be in a newspaper having a general circulation in the city or county wherein the time-share estate to be sold and the time-share project, or any portion thereof, lies pursuant to the following provisions:

a. The association shall advertise once a week for four successive weeks; however, if the time-share estate and the time-share project or some portion thereof is located in a city or in a county immediately contiguous to a city, publication of the advertisement five different days, which may be consecutive days, shall be deemed adequate. The sale shall be held on any day following the day of the last advertisement that is no earlier than eight days following the first advertisement nor more than 30 days following the last advertisement.

b. Such advertisement shall be placed in that section of the newspaper where legal notices appear or where the type of time-share estate being sold is generally advertised for sale. The advertisement of sale, in addition to such other matters as the association finds appropriate, shall set forth:

(1) A description of the time-share estate to be sold, which description need not be as extensive as that contained in the deed of trust, but shall identify the time-share project by street address, if any, or, if none, shall give the general location of such time-share project with reference to streets, routes, or known landmarks with further identification of the time-share estate to be sold. Where available, tax map identification may be used but is not required. The advertisement shall also include the date, time, place, and terms of sale and the name of the association. It shall set forth the name, address, and telephone number of the representative, agent, or attorney who is authorized to respond to inquiries concerning the sale; or

(2) In lieu of the requirements of subdivision (1), the advertisement shall set forth the date, time, place, and terms of sale and the name of the association; the street address of the time-share estate to be sold, if any, or if none, the general location of the time-share project; and the name, address, and telephone number of the representative, agent, or attorney who is authorized to respond to inquiries and give additional information concerning the time-share estate to be sold, including providing in hard copy or electronic form a description of the time-share estate to be sold by street address, if any, or, if none, by the general location of the time-share project with reference to streets, routes, or known landmarks, and where available, tax map identification. The advertisement under this subdivision (2) shall also include a website address where the information contained in subdivision (1) is displayed for the time-share estate to be sold.

c. In addition to the advertisement required by subdivisions 5 a and 5 b, the association may give such other further and different advertisement as the association finds appropriate.

6. In the event of postponement of the sale, which postponement shall be at the discretion of the association, advertisement of the postponed sale shall be in the same manner as the original advertisement of sale.

7. Failure to comply with the requirements for advertisement contained in this section shall, upon petition, render a sale of the property voidable by the court. Such petition shall be filed within 60 days of the sale or the right to do so shall lapse.

8. In the event of a sale, the association shall have the following powers and duties:

a. The association may sell two or more time-share estates at the sale. Written one-price bids may be made and shall be received by the trustee from the association or any person for entry by announcement at the sale. Any person other than the trustee may bid at the foreclosure sale, including a person who has submitted a written one-price bid. Upon request to the trustee, any other bidder in attendance at a foreclosure sale shall be permitted to inspect written bids. Unless otherwise provided in the time-share instrument, the association may bid to purchase the time-share estate at a foreclosure sale. The association may own, lease, encumber, exchange, sell, or convey the time-share estate. Whenever the written bid of the association is the highest bid submitted at the sale, such written bid shall be filed by the trustee with his account of sale required under subdivision 10 and § 26-15. The written bid submitted pursuant to this subsection may be prepared by the association, its agent or attorney.

b. The association may require of any bidder at any sale a cash deposit of as much as 33.33 percent

of the sale price before his bid is received, which shall be refunded to him if the time-share estate is not sold to him through action of the trustee. The deposit of the successful bidder shall be applied to his credit at settlement, or if such bidder fails to complete his purchase promptly, the deposit shall be applied to pay the costs and expenses of the sale, and the balance, if any, shall be retained by the association in connection with that sale.

c. The association shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same in the following order: first, to the reasonable expenses of sale, including reasonable attorney fees; second, to the satisfaction of all taxes, levies, and assessments, with costs and interest; third, to the satisfaction of the lien for the time-share estate owners' assessments; fourth, to the satisfaction in the order of priority of any remaining inferior claims of record; and fifth, to pay the residue of the proceeds to the time-share estate owner or his assigns, provided, however, that the association as to such residue shall not be bound by any inheritance, devise, conveyance, assignment or lien of or upon the unit owner's equity, without actual notice thereof prior to distribution.

9. The trustee shall deliver to the purchaser a trustee's deed conveying the time-share estate with special warranty of title. The trustee shall not be required to take possession of the time-share estate prior to the sale thereof or to deliver possession of the time-share estate to the purchaser at the sale.

10. ~~The trustee shall file an accounting of the sale with the commissioner of accounts pursuant to § 26-15 and every account of a sale shall be recorded pursuant to § 26-16. In addition the accounting shall be made available for inspection and copying pursuant to § 55-370.01 upon the written request of the prior time-share estate owner, current time-share estate owner, or any holder of a recorded lien against the time-share estate at the time of the sale. The association shall maintain a copy of the accounting for at least 12 months following the foreclosure sale.~~

~~11. If the sale of a time-share estate is made pursuant to this subsection and the accounting is made by the trustee, the title of the purchaser at such sale shall not be disturbed unless within six months from the date of foreclosure, the sale is set aside by the court or an appeal is allowed by the Supreme Court of Virginia, and a decree is therein entered requiring such sale to be set aside.~~

When payment or satisfaction is made of a debt secured by the lien perfected by this subsection, such lien shall be released in accordance with the provisions of § 55-66.3. For the purposes of § 55-66.3, any officer of the time-share estate owners' association or its managing agent shall be deemed the duly authorized agent of the lien creditor.

~~E. The commissioner of accounts to whom an account of sale is returned in connection with the foreclosure of either a lien under subsection C or a purchase money deed of trust taken back by the developer in the sale of a time-share in order to satisfy § 26-15 shall be entitled to a fee on each such sale. The commissioner of accounts to whom an account of sale is returned in connection with the foreclosure of either a lien under subsection C or a purchase money deed of trust taken back by the developer in the sale of a time-share in order to satisfy § 64.2-1309 shall be entitled to a fee, not to exceed \$70, on each foreclosure of a lien under subsection C and not to exceed \$125 on each foreclosure of a purchase money deed of trust taken back by the developer.~~

F. Any time-share owner within the project having executed a contract for the disposition of the time-share, shall be entitled, upon request, to a recordable statement setting forth the amount of unpaid regular or special assessments or maintenance fees currently levied against that time-share. Such request shall be in writing, directed to the president of the time-share estate owners' association, and delivered to the principal office of the association. Failure of the association to furnish or make available such statement within 20 days from the actual receipt of such written request shall extinguish the lien created by subsection C as to the time-share involved. Payment of a fee reflecting the reasonable cost of materials and labor, not to exceed the actual cost thereof, may be required as a prerequisite to the issuance of such a statement.

2. That the provisions of the first enactment of this act amending § 55-369 of the Code of Virginia relating to the effective date of the transfer of the common elements of a time-share project to the time-share estate owners' association and termination of the developer control period shall apply to all registered time-share projects without regard to the effective date of the registration.