

VIRGINIA ACTS OF ASSEMBLY -- 2005 SESSION

CHAPTER 436

An Act to amend and reenact §§ 55-426, 55-478, and 55-484 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 55-471.1, relating to the Virginia Real Estate Cooperative Act; reserves for capital components.

[H 2820]

Approved March 21, 2005

Be it enacted by the General Assembly of Virginia:

1. That §§ 55-426, 55-478, and 55-484 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 55-471.1 as follows:

§ 55-426. Definitions.

When used in this chapter or in the declaration and bylaws, unless specifically provided otherwise or the context requires a different meaning, the following terms shall have the meanings respectively set forth:

"Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director or employer of the declarant; (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than ~~twenty~~ 20 percent of the voting interest in the declarant; (iii) controls in any manner the election of a majority of the directors of the declarant; or (iv) has contributed more than ~~twenty~~ 20 percent of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director or employer of the person; (ii) directly or indirectly or acting in concert with one or more persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than ~~twenty~~ 20 percent of the voting interest in the person; (iii) controls in any manner the election of a majority of the directors of the person; or (iv) has contributed more than ~~twenty~~ 20 percent of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

"Allocated interests" means the common expense liability and the ownership interest and votes in the association allocated to each cooperative interest.

"Association" or "proprietary lessees' association" means the proprietary lessees' association organized under § 55-458.

"Capital components" means those items, whether or not a part of the common elements, for which the association has the obligation for repair, replacement, or restoration and for which the executive board determines funding is necessary.

"Common elements" means all portions of a cooperative other than the units.

"Common expenses" means expenditures made by or financial liabilities of the association, together with any allocations to reserves.

"Common expense liability" means liability for common expenses allocated to each cooperative interest pursuant to § 55-444.

"Conversion building" means a building that at any time before creation of the cooperative was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

"Cooperative" means real estate owned by an association, each of the members of which is entitled, by virtue of his ownership interest in the association, to exclusive possession of a unit.

"Cooperative interest" means an ownership interest in the association coupled with a possessory interest in a unit under a proprietary lease. For purposes of this act, a declarant is treated as the owner of any cooperative interests or potential cooperative interests to which allocated interests have been allocated pursuant to § 55-444 until that cooperative interest has been created and conveyed to another person.

"Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of his or its cooperative interest not previously disposed of; (ii) reserves or succeeds to any special declarant right; or (iii) applies for registration of a cooperative under Article 5 (§ 55-496 et seq.) of this chapter.

"Declaration" means any instruments, however denominated, that create a cooperative and any amendments to those instruments.

"Development rights" means any right or combination of rights reserved by a declarant in the declaration to (i) add real estate to a cooperative; (ii) create units, common elements, or limited common elements within a cooperative; (iii) subdivide units or convert units into common elements; or (iv) withdraw real estate from a cooperative.

"Dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a cooperative interest, but does not include the transfer or release of a security interest.

"Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

"Identifying number" means a symbol or address that identifies only one unit in a cooperative.

"Leasehold cooperative" means a cooperative in which all or a portion of the real estate is subject to a lease, the expiration or termination of which will terminate the cooperative or reduce its size.

"Limited common element" means a portion of the common elements allocated by the declaration or by operation of § 55-439 paragraph 2 or 4 for the exclusive use of one or more but fewer than all of the units.

"Master association" means an organization described in § 55-456, whether or not it is also an association described in § 55-458.

"Offering" means any advertisement, inducement, solicitation or attempt to encourage any person to acquire any interest in a cooperative interest, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a cooperative not located in ~~this~~ the Commonwealth, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the cooperative is located.

"Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity. In the case of a land trust, however, "person" means the beneficiary of the trust rather than the trust or the trustee.

"Proprietary lease" means an agreement with the association pursuant to which a proprietary lessee has a possessory interest in a unit.

"Proprietary lessee" means a person who owns a cooperative interest, other than as security for an obligation, and the declarant with respect to cooperative interests or potential cooperative interests to which allocated interests have been allocated pursuant to § 55-444 until that cooperative interest has been created and conveyed to another person.

"Purchaser" means any person, other than a declarant or a person in the business of selling cooperative interests for his own account, who by means of a voluntary transfer acquires or contracts to acquire a cooperative interest other than as security for an obligation.

"Real estate" means any leasehold or other estate or interest in, over or under land, including structures, fixtures, and other improvements and interests which by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

"Residential purposes" means use for dwelling or recreational purposes, or both.

"Security interest" means an interest in real or personal property, created by contract or conveyance, which secures payment or performance of an obligation. "Security interest" includes a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.

"Special declarant rights" means rights reserved for the benefit of a declarant to: (i) complete improvements described in the public offering statement pursuant to subdivision A 2 of § 55-478; (ii) exercise any development right pursuant to § 55-446; (iii) maintain sales offices, management offices, signs advertising the cooperative, and models; (iv) use easements through the common elements for the purpose of making improvements within the cooperative or within real estate which may be added to the cooperative; (v) make the cooperative part of a larger cooperative or group of cooperatives; (vi) make the cooperative subject to a master association as specified in § 55-456; or (vii) appoint or remove any officer of the association, any master association or any executive board member during any period of declarant control.

"Time share" 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, whether or not coupled with an estate or interest in a cooperative or a specified portion thereof.

"Unit" means a physical portion of the cooperative designated for separate occupancy under a proprietary lease.

§ 55-471.1. *Reserves for capital components.*

A. *Except to the extent otherwise provided in the declaration and unless the declaration imposes more stringent requirements, the executive board shall:*

1. *Conduct at least once every five years a study to determine the necessity and amount of reserves required to repair, replace, and restore the capital components;*

2. *Review the results of that study at least annually to determine if reserves are sufficient; and*

3. *Make any adjustments the executive board deems necessary to maintain reserves, as appropriate.*

B. *To the extent that the reserve study conducted in accordance with this section indicates a need to*

budget for reserves, the association budget shall include, without limitations:

1. The current estimated replacement cost, estimated remaining life, and estimated useful life of the capital components;

2. As of the beginning of the fiscal year for which the budget is prepared, the current amount of accumulated cash reserves set aside to repair, replace, or restore the capital components and the amount of the expected contribution to the reserve fund for that fiscal year; and

3. A general statement describing the procedures used for the estimation and accumulation of cash reserves pursuant to this section and the extent to which the association is funding its reserve obligations consistent with the study currently in effect.

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

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

b. A statement of any other reserves;

c. The projected common expense assessment by category of expenditures for the association;

d. The projected monthly common expense assessment for each type of unit; and

e. The projected debt, inclusive of principal and any accrued interest, loan fees and other similar charges, assumed or to be assumed by the association and an estimate of the payments necessary to service such debt.

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

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

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

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

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

11. A statement that:

a. Within 10 days after receipt of a public offering statement a purchaser, before conveyance, may cancel any contract for purchase of a cooperative interest from a declarant;

b. If a declarant fails to provide a public offering statement to a purchaser before conveying a cooperative interest, that purchaser may recover from the declarant 10 percent of the sales price of the cooperative interest, plus 10 percent of the share, proportionate to his common expense liability, of the indebtedness of the association secured by mortgages or deeds of trust encumbering the cooperative; and

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

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

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

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

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

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

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

19. 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 and whether there will be a security interest encumbering the cooperative to secure repayment;

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

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

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

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

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

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.

§ 55-484. 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. *The current reserve study report or a summary thereof and a statement of the status and amount of any reserves for capital expenditures reserve or replacement fund* 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 10 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.