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SENATE BILL NO. 411

Offered January 13, 2010

Prefiled January 13, 2010

A *BILL to amend and reenact §§ 55-79.84 and 55-516 of the Code of Virginia, relating to the Condominium Act and the Property Owners' Association Act; foreclosure on lien for unpaid assessments.*

Patron—Vogel

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:**1. That §§ 55-79.84 and 55-516 of the Code of Virginia are amended and reenacted as follows:**

§ 55-79.84. Lien for assessments.

A. The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments. The said lien, once perfected, shall be prior to all other liens and encumbrances except (i) real estate tax liens on that condominium unit, (ii) liens and encumbrances recorded prior to the recordation of the declaration, and (iii) sums unpaid on any first mortgages or first deeds of trust recorded prior to the perfection of said lien for assessments and securing institutional lenders. The provisions of this subsection shall not affect the priority of mechanics' and materialmen's liens.

B. Notwithstanding any other provision of this section, or any other provision of law requiring documents to be recorded in the miscellaneous lien books or the deed books in the clerk's office of any court, on or after July 1, 1974, all memoranda of liens arising under this section shall, in the discretion of the clerk, be recorded in the miscellaneous lien books or 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 condominium assessments.

C. The unit owners' association, in order to perfect the lien given by this section, shall file before the expiration of 90 days from the time the first such assessment became due and payable in the clerk's office of the circuit court in the county or city in which such condominium is situated, a memorandum, verified by the oath of the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, which contains the following:

1. A description of the condominium unit in accordance with the provisions of § 55-79.47.
2. The name or names of the persons constituting the unit owners of that condominium unit.
3. The amount of unpaid assessments currently due or past due together with the date when each fell due.
4. The date of issuance of the memorandum.

It shall be the duty of the clerk in whose office such memorandum is filed as hereinabove provided to record and index the same as provided in subsection B, in the names of the persons identified therein as well as in the name of the unit owners' association. The cost of recording such memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

D. No suit to enforce any lien perfected under subsection C shall be brought or action to foreclose any lien perfected under subsection I shall be initiated after 36 months from the time when the memorandum of lien was recorded; however, the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section. Nothing herein shall extend the time within which any such lien may be perfected.

E. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and attorneys' fees of the prevailing party. If the association prevails, it may also recover interest at the legal rate for the sums secured by the lien from the time each such sum became due and payable.

F. When payment or satisfaction is made of a debt secured by the lien perfected by subsection C, said lien shall be released in accordance with the provisions of § 55-66.3. Any lien which is not so released shall subject the lien creditor to the penalty set forth in subdivision A (1) of § 55-66.3. For the purposes of that section, the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall be deemed the duly authorized agent of the lien creditor.

G. Nothing in this section shall be construed to prohibit actions at law to recover sums for which subsection A creates a lien, maintainable pursuant to § 55-79.53.

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59 H. Any unit owner or purchaser of a condominium unit, having executed a contract for the
60 disposition of the same, shall be entitled upon request to a recordable statement setting forth the amount
61 of unpaid assessments currently levied against that unit. Such request shall be in writing, directed to the
62 principal officer of the unit owners' association or to such other officer as the condominium instruments
63 may specify. Failure to furnish or make available such a statement within 10 days of the receipt of such
64 request shall extinguish the lien created by subsection A as to the condominium unit involved. Such
65 statement shall be binding on the unit owners' association, the executive organ, and every unit owner.
66 Payment of a fee not exceeding \$10 may be required as a prerequisite to the issuance of such a
67 statement if the condominium instruments so provide.

68 I. At any time after perfecting the lien pursuant to this section, the unit owners' association may sell
69 the unit at public sale; ~~subject to prior liens.~~ *The unit owners' association may either satisfy prior liens*
70 *before or after the sale or sell the unit subject to prior liens. The term "subject to" as used in this*
71 *section means that the liens and encumbrances to which the association's lien is subordinate pursuant to*
72 *subsection A shall survive the sale and be binding upon the purchaser at such sale.*

73 For purposes of this section, the unit owners' association shall have the power both to sell and
74 convey the unit, and shall be deemed the unit owner's statutory agent for the purpose of transferring title
75 to the unit. A nonjudicial foreclosure sale shall be conducted in compliance with the following:

76 1. The unit owners' association shall give notice to the unit owner prior to advertisement required by
77 subdivision 4. The notice shall specify (i) the debt secured by the perfected lien; (ii) the action required
78 to satisfy the debt secured by the perfected lien; (iii) the date, not less than 60 days from the date the
79 notice is given to the unit owner, by which the debt secured by the lien must be satisfied; and (iv) that
80 failure to satisfy the debt secured by the lien on or before the date specified in the notice may result in
81 the sale of the unit. The notice shall further inform the unit owner of the right to bring a court action in
82 the circuit court of the county or city where the condominium is located to assert the nonexistence of a
83 debt or any other defense of the unit owner to the sale.

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

91 3. If the unit owner meets the conditions specified in this subdivision prior to the date of the
92 foreclosure sale, the unit owner shall have the right to have enforcement of the perfected lien
93 discontinued prior to the sale of the unit. Those conditions are that the unit owner: (a) satisfy the debt
94 secured by lien that is the subject of the nonjudicial foreclosure sale and (b) pays all expenses and costs
95 incurred in perfecting and enforcing the lien, including but not limited to advertising costs and
96 reasonable attorneys' fees.

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

109 5. The advertisement of sale by the unit owners' association shall be in a newspaper having a general
110 circulation in the city or county wherein the property to be sold, or any portion thereof, lies pursuant to
111 the following provisions:

112 a. The unit owners' association shall advertise once a week for four successive weeks; however, if
113 the property or some portion thereof is located in a city or in a county immediately contiguous to a city,
114 publication of the advertisement five different days, which may be consecutive days, shall be deemed
115 adequate. The sale shall be held on any day following the day of the last advertisement that is no earlier
116 than eight days following the first advertisement nor more than 30 days following the last advertisement.

117 b. Such advertisement shall be placed in that section of the newspaper where legal notices appear or
118 where the type of property being sold is generally advertised for sale. The advertisement of sale, in
119 addition to such other matters as the unit owners' association finds appropriate, shall set forth a
120 description of the property to be sold, which description need not be as extensive as that contained in

the deed of trust, but shall identify the property by street address, if any, or, if none, shall give the general location of the property with reference to streets, routes, or known landmarks. 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 unit owners' association. It shall set forth the name, address and telephone number of the representative, agent, or attorney who may be able to respond to inquiries concerning the sale.

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

6. In the event of postponement of sale, which postponement shall be at the discretion of the unit owners' association, advertisement of such 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.

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

a. Written one-price bids may be made and shall be received by the trustee from the unit owners' 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 condominium instruments, the unit owners' association may bid to purchase the unit at a foreclosure sale. The unit owners' association may own, lease, encumber, exchange, sell or convey the unit. Whenever the written bid of the unit owners' 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 I 10 of this section and § 26-15. The written bid submitted pursuant to this subsection may be prepared by the unit owners' association, its agent or attorney.

b. The unit owners' association may require of any bidder at any sale a cash deposit of as much as 10 percent of the sale price before his bid is received, which shall be refunded to him if the property is not sold to him. 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 unit owners' association in connection with that sale.

c. The unit owners' 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 attorneys' fees; second, to the satisfaction of all taxes, levies, and assessments, with costs and interest; third, to the satisfaction of the lien for the unit 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 unit 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 unit with special warranty of title, *subject to all prior liens not satisfied by the unit owners' association*. The trustee shall not be required to take possession of the property prior to the sale thereof or to deliver possession of the unit 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 § 55-79.74:1 upon the written request of the prior unit owner, current unit owner or any holder of a recorded lien against the unit at the time of the sale. The unit owners' association shall maintain a copy of the accounting for at least 12 months following the foreclosure sale.

11. If the sale of a unit is made pursuant to subsection I and the accounting is made by the trustee, the title of the purchaser at such sale shall not be disturbed unless within 12 months from the confirmation of the accounting by the commissioner of accounts, 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.

§ 55-516. Lien for assessments.

A. Once perfected, the association shall have a lien on every lot for unpaid assessments levied against that lot in accordance with the provisions of this chapter and all lawful provisions of the declaration. The lien, once perfected, shall be prior to all other subsequent liens and encumbrances except (i) real estate tax liens on that lot, (ii) liens and encumbrances recorded prior to the recordation of the declaration, and (iii) sums unpaid on and owing under any mortgage or deed of trust recorded prior to the perfection of said lien. The provisions of this subsection shall not affect the priority of mechanics' and materialmen's liens. Notice of a memorandum of lien to a holder of a credit line deed of

trust under § 55-58.2 shall be given in the same fashion as if the association's lien were a judgment.

B. The association, in order to perfect the lien given by this section, shall file before the expiration of 12 months from the time the first such assessment became due and payable in the clerk's office of the circuit court in the county or city in which such development is situated, a memorandum, verified by the oath of the principal officer of the association, or such other officer or officers as the declaration may specify, which contains the following:

1. The name of the development;
2. A description of the lot;
3. The name or names of the persons constituting the owners of that lot;
4. The amount of unpaid assessments currently due or past due relative to such lot together with the date when each fell due;
5. The date of issuance of the memorandum;
6. The name of the association and the name and current address of the person to contact to arrange for payment or release of the lien; and
7. A statement that the association is obtaining a lien in accordance with the provisions of the Virginia Property Owners' Association Act as set forth in Chapter 26 (§ 55-508 et seq.) of Title 55.

It shall be the duty of the clerk in whose office such memorandum is filed as hereinafter provided to record and index the same as provided in subsection D, in the names of the persons identified therein as well as in the name of the association. The cost of recording and releasing the memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

C. Prior to filing a memorandum of lien, a written notice shall be sent to the property owner by certified mail, at the property owner's last known address, informing the property owner that a memorandum of lien will be filed in the circuit court clerk's office of the applicable city or county. The notice shall be sent at least 10 days before the actual filing date of the memorandum of lien.

D. Notwithstanding any other provision of this section, or any other provision of law requiring documents to be recorded in the miscellaneous lien books or the deed books in the clerk's office of any court, on or after July 1, 1989, all memoranda of liens arising under this section shall be recorded in the deed books in the clerk's office. Any memorandum shall be indexed in the general index to deeds, and the general index shall identify the lien as a lien for lot assessments.

E. No suit to enforce any lien perfected under subsection B shall be brought or action to foreclose any lien perfected under subsection I shall be initiated after 36 months from the time when the memorandum of lien was recorded; however, the filing of a petition to enforce any such lien in any suit wherein the petition may be properly filed shall be regarded as the institution of a suit under this section. Nothing herein shall extend the time within which any such lien may be perfected.

F. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and reasonable attorneys' fees of the prevailing party. If the association prevails, it may also recover interest at the legal rate for the sums secured by the lien from the time each such sum became due and payable.

G. When payment or satisfaction is made of a debt secured by the lien perfected by subsection B hereof, the lien shall be released in accordance with the provisions of § 55-66.3. Any lien which is not so released shall subject the lien creditor to the penalty set forth in subdivision A 1 of § 55-66.3. For the purposes of § 55-66.3, the principal officer of the association, or any other officer or officers as the declaration may specify, shall be deemed the duly authorized agent of the lien creditor.

H. Nothing in this section shall be construed to prohibit actions at law to recover sums for which subsection A hereof creates a lien, maintainable pursuant to § 55-515.

I. At any time after perfecting the lien pursuant to this section, the property owners' association may sell the lot at public sale; ~~subject to prior liens.~~ *The unit owners' association may either satisfy prior liens before or after the sale or sell the unit subject to prior liens. The term "subject to" as used in this section means that the liens and encumbrances to which the association's lien is subordinate pursuant to subsection A shall survive the sale and be binding upon the purchaser at such sale.*

For purposes of this section, the association shall have the power both to sell and convey the lot and shall be deemed the lot owner's statutory agent for the purpose of transferring title to the lot. A nonjudicial foreclosure sale shall be conducted in compliance with the following:

1. The association shall give notice to the lot owner prior to advertisement 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 lot 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 lot. The notice shall further inform the lot owner of the right to bring a court action in the circuit court of the county or city where the lot is located to assert the nonexistence of a debt or any other defense of the lot owner to the sale.

2. After expiration of the 60-day notice period specified 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 such development is situated. It shall be the duty of the clerk in whose office such appointment is filed to record and index the same as provided in subsection D, 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 lot owner meets the conditions specified in this subdivision prior to the date of the foreclosure sale, the lot owner shall have the right to have enforcement of the perfected lien discontinued prior to the sale of the lot. Those conditions are that the lot owner: (i) satisfy the debt secured by lien that is the subject of the nonjudicial foreclosure sale and (ii) pays all expenses and costs incurred in perfecting and enforcing the lien, including but not limited to advertising costs and reasonable attorneys' 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, and including the name, address and telephone number of the trustee, by personal delivery or by mail to (i) the present owner of the property 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 property 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 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 property to be sold, 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 property 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 which 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 property 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 a description of the property to be sold, which description need not be as extensive as that contained in the deed of trust, but shall identify the property by street address, if any, or, if none, shall give the general location of the property with reference to streets, routes, or known landmarks. 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 may be able to respond to inquiries concerning the sale.

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

6. In the event of postponement of sale, which postponement shall be at the discretion of the association, advertisement of such 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.

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

a. 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 declaration, the association may bid to purchase the lot at a foreclosure sale. The association may own, lease, encumber, exchange, sell or convey the lot. 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 I 10 of this section 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 10 percent of the sale price before his bid is received, which shall be refunded to him if the property is not sold to him. 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

305 the sale, and the balance, if any, shall be retained by the association in connection with that sale.

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

314 9. The trustee shall deliver to the purchaser a trustee's deed conveying the lot with special warranty
315 of title, *subject to all prior liens not satisfied by the unit owners' association*. The trustee shall not be
316 required to take possession of the property prior to the sale thereof or to deliver possession of the lot to
317 the purchaser at the sale.

318 10. The trustee shall file an accounting of the sale with the commissioner of accounts pursuant to
319 § 26-15 and every account of a sale shall be recorded pursuant to § 26-16. In addition, the accounting
320 shall be made available for inspection and copying pursuant to § 55-510 upon the written request of the
321 prior lot owner, current lot owner or any holder of a recorded lien against the lot at the time of the sale.
322 The association shall maintain a copy of the accounting for at least 12 months following the foreclosure
323 sale.

324 11. If the sale of a lot is made pursuant to subsection I and the accounting is made by the trustee,
325 the title of the purchaser at such sale shall not be disturbed unless within 12 months from the
326 confirmation of the accounting by the commissioner of accounts, the sale is set aside by the court or an
327 appeal is allowed by the Supreme Court of Virginia, and a decree is therein entered requiring such sale
328 to be set aside.