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HOUSE BILL NO. 581

Offered January 19, 1996

A BILL to amend and reenact §§ 55-79.41, 55-79.53, 55-79.74, 55-79.74:3, 55-79.80, and 55-79.80:1 of the Code of Virginia, relating to the Condominium Act.

Patrons—Wagner (By Request) and Tata

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 55-79.41, 55-79.53, 55-79.74, 55-79.74:3, 55-79.80, and 55-79.80:1 of the Code of Virginia are amended and reenacted as follows:

§ 55-79.41. Definitions.

When used in this chapter:

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

"Common expenses" means all expenditures lawfully made or incurred by or on behalf of the unit owners' association, together with all funds lawfully assessed for the creation and/or maintenance of reserves pursuant to the provisions of the condominium instruments;

~~"future common expenses"~~ "Future common expenses" means common expenses for which assessments are not yet due and payable.

"Condominium" means real property, and any incidents thereto or interests therein, lawfully submitted to this chapter by the recordation of condominium instruments pursuant to the provisions of this chapter. No project shall be deemed a condominium within the meaning of this chapter unless the undivided interests in the common elements are vested in the unit owners.

"Condominium instruments" is a collective term referring to the declaration, bylaws, and plats and plans, recorded pursuant to the provisions of this chapter. Any exhibit, schedule, or certification accompanying a condominium instrument and recorded simultaneously therewith shall be deemed an integral part of that condominium instrument. Any amendment or certification of any condominium instrument shall, from the time of the recordation of such amendment or certification, be deemed an integral part of the affected condominium instrument, so long as such amendment or certification was made in accordance with the provisions of this chapter.

"Condominium unit" means a unit together with the undivided interest in the common elements appertaining to that unit. (Cf. the definition of "unit," infra.)

"Contractable condominium" means a condominium from which one or more portions of the submitted land may be withdrawn in accordance with the provisions of the declaration and of this chapter. If such withdrawal can occur only by the expiration or termination of one or more leases, then the condominium shall not be deemed a contractable condominium within the meaning of this chapter.

"Conversion condominium" means a condominium containing structures which before the recording of the declaration, were wholly or partially occupied by persons other than those who have contracted for the purchase of condominium units and those who occupy with the consent of such purchasers.

"Convertible land" means a building site; that is to say, a portion of the common elements, within which additional units and/or limited common elements may be created in accordance with the provisions of this chapter.

"Convertible space" means a portion of a structure within the condominium, which portion may be converted into one or more units and/or common elements, including but not limited to limited common elements in accordance with the provisions of this chapter. (Cf. the definition of "unit," infra.)

"Declarant" means any person, or group of persons acting in concert, that (i) offers to dispose of his or its interest in a condominium unit not previously disposed of, including an institutional lender which may not have succeeded to or accepted any special declarant rights pursuant to § 55-79.74:3; (ii) reserves or succeeds to any special declarant right; or (iii) applies for registration of the condominium. However, for the purposes of clauses (i) and (iii), the term "declarant" shall not include an institutional lender which acquires title by foreclosure or deed in lieu thereof unless such lender offers to dispose of its interest in a condominium unit not previously disposed of to anyone not in the business of selling real estate for his own account, except as otherwise provided in § 55-79.74:3. The term "declarant" shall not include an individual who acquires title to a condominium unit at a foreclosure sale.

"Dispose" or "disposition" refers to any voluntary transfer of a legal or equitable interest in a condominium unit to a purchaser, but shall not include the transfer or release of security for a debt.

"Executive organ" means an executive and administrative entity, by whatever name denominated, designated in the condominium instruments as the governing body of the unit owners' association.

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60 "Expandable condominium" means a condominium to which additional land may be added in
61 accordance with the provisions of the declaration and of this chapter.

62 "Identifying number" means one or more letters and/or numbers that identify only one unit in the
63 condominium.

64 "Institutional lender" means one or more commercial or savings banks, savings and loan
65 associations, trust companies, credit unions, industrial loan associations, insurance companies, pension
66 funds, or business trusts including but not limited to real estate investment trusts, any other lender
67 regularly engaged in financing the purchase, construction, or improvement of real estate, or any assignee
68 of loans made by such a lender, or any combination of any of the foregoing entities.

69 "Land" is a three-dimensional concept and includes parcels with upper or lower boundaries, or both
70 upper and lower boundaries, as well as parcels extending ab solo usque ad coelum. Parcels of airspace
71 constitute land within the meaning of this chapter. Any requirement in this chapter of a legally sufficient
72 description shall be deemed to include a requirement that the upper or lower boundaries, if any, of the
73 parcel in question be identified with reference to established datum.

74 "Leasehold condominium" means a condominium in all or any portion of which each unit owner
75 owns an estate for years in his unit, or in the land within which that unit is situated, or both, with all
76 such leasehold interests due to expire naturally at the same time. A condominium including leased land,
77 or an interest therein, within which no units are situated or to be situated shall not be deemed a
78 leasehold condominium within the meaning of this chapter.

79 "Limited common element" means a portion of the common elements reserved for the exclusive use
80 of those entitled to the use of one or more, but less than all, of the units.

81 "Nonbinding reservation agreement" means an agreement between the declarant and a prospective
82 purchaser which is in no way binding on the prospective purchaser and which may be canceled without
83 penalty at the sole discretion of the prospective purchaser by written notice, hand-delivered or sent by
84 United States mail, return receipt requested, to the declarant or to any sales agent of the declarant at any
85 time prior to the formation of a contract for the sale or lease of a condominium unit or an interest
86 therein. Such agreement shall not contain any provision for waiver or any other provision in derogation
87 of the rights of the prospective purchaser as contemplated by this subsection, nor shall any such
88 provision be a part of any ancillary agreement.

89 "Offer" means any inducement, solicitation, or attempt to encourage any person or persons to
90 acquire any legal or equitable interest in a condominium unit, except as security for a debt. Nothing
91 shall be considered an "offer" which expressly states that the condominium has not been registered with
92 the Real Estate Board and that no unit in the condominium can or will be offered for sale until such
93 time as the condominium has been so registered.

94 "Officer" means any member of the executive organ or official of the unit owners' association.

95 "Par value" means a number of dollars or points assigned to each unit by the declaration.
96 Substantially identical units shall be assigned the same par value, but units located at substantially
97 different heights above the ground, or having substantially different views, or having substantially
98 different amenities or other characteristics that might result in differences in market value, may, but need
99 not, be considered substantially identical within the meaning of this subsection. If par value is stated in
100 terms of dollars, that statement shall not be deemed to reflect or control the sales price or fair market
101 value of any unit, and no opinion, appraisal, or fair market transaction at a different figure shall affect
102 the par value of any unit, or any undivided interest in the common elements, voting rights in the unit
103 owners' association or liability for common expenses assigned on the basis thereof.

104 "Person" means a natural person, corporation, partnership, association, trust, or other entity capable
105 of holding title to real property, or any combination thereof.

106 "Purchaser" means any person or persons, other than a declarant, who acquire by means of a
107 voluntary transfer a legal or equitable interest in a condominium unit, other than (i) a leasehold interest,
108 including renewal options, of less than twenty years or (ii) as security for a debt.

109 "Size" means the number of cubic feet, or the number of square feet of ground and/or floor space,
110 within each unit as computed by reference to the plat and plans and rounded off to a whole number.
111 Certain spaces within the units including, without limitation, attic, basement, and/or garage space may,
112 but need not, be omitted from such calculation or partially discounted by the use of a ratio, so long as
113 the same basis of calculation is employed for all units in the condominium, and so long as that basis is
114 described in the declaration.

115 "Special declarant rights" means any right reserved for the benefit of a declarant, or of a person or
116 group of persons that becomes a declarant, to (i) expand an expandable condominium, (ii) contract a
117 contractable condominium, (iii) convert convertible land or convertible space or both, (iv) appoint or
118 remove any officers of the unit owners' association or the executive organ pursuant to subsection (a) A
119 of § 55-79.74, (v) exercise any power or responsibility otherwise assigned by any condominium
120 instrument or by this chapter to the unit owners' association, any officer or the executive organ, or (vi)
121 maintain sales offices, management offices, model units and signs pursuant to § 55-79.66.

"Unit" means a portion of the condominium designed and intended for individual ownership and use. (Cf. the definition of "condominium unit", supra.) For the purposes of this chapter, a convertible space shall be treated as a unit in accordance with subsection (d) of § 55-79.62.

"Unit owner" means one or more persons who own a condominium unit, or, in the case of a leasehold condominium, whose leasehold interest or interests in the condominium extend for the entire balance of the unexpired term or terms. This term shall not include any person or persons holding an interest in a condominium unit solely as security for a debt.

§ 55-79.53. Compliance with condominium instruments.

A. The declarant, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association, or by its executive organ or any managing agent on behalf of such association, or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action. A unit owners' association shall have standing to sue in its own name for any claims or actions related to the common elements as provided in subsection B of § 55-79.80. *The prevailing party shall be entitled to recover reasonable attorneys' fees and costs expended in the matter.*

B. The condominium instruments may provide for arbitration of disputes or other means of alternative dispute resolution. Any such arbitration held in accordance with this subsection shall be consistent with the provisions of this chapter and Chapter 21 (§ 8.01-577 et seq.) of Title 8.01. The place of any such arbitration or alternative dispute resolution shall be in the county or city in which the condominium is located, or as mutually agreed by the parties.

§ 55-79.74. Control of condominium by declarant.

(a) A. The condominium instruments may authorize the declarant, or a managing agent or some other person or persons selected or to be selected by the declarant, to appoint and remove some or all of the officers of the unit owners' association and/or its executive organ, or to exercise powers and responsibilities otherwise assigned by the condominium instruments and by this chapter to the unit owners' association, the officers, or the executive organ. The declarant or the managing agent or such other person or persons selected by the declarant to so appoint and remove officers and/or the executive organ or to exercise such powers and responsibilities otherwise assigned to the unit owners' association, the officers, or the executive organ shall be subject to liability as fiduciaries of the unit owners for their action or omissions during the period of declarant control as specified in the condominium instruments or if not so specified, within such period as defined in this section. But no amendment to the condominium instruments shall increase the scope of such authorization if there is any unit owner other than the declarant, and no such authorization shall be valid after the time limit set by the condominium instruments or after units to which three-fourths of the undivided interests in the common elements appertain have been conveyed, whichever occurs first. For the purposes of the preceding sentence only, the calculation of the fraction of undivided interest shall be based upon the total undivided interests assigned or to be assigned to all units registered with the Real Estate Board pursuant to subsection B of § 55-79.92 hereof and described pursuant to subdivision (4) of subsection (a), subdivision (2) of subsection (b), or subdivision (8) of subsection (c), of § 55-79.54. The time limit initially set by the condominium instruments shall not exceed five years in the case of an expandable condominium, three years in the case of a condominium (other than an expandable condominium) containing any convertible land, or two years in the case of any other condominium. Such time period shall commence upon settlement of the first unit to be sold in any portion of the condominium.

(b) (1) B. If entered into any time prior to the expiration of the period of declarant control contemplated by subsection (a) hereof, no contract or lease entered into with the declarant or any entity controlled by the declarant, management contract, employment contract or lease of recreational or parking areas or facilities, which is directly or indirectly made by or on behalf of the unit owners' association, its executive organ, or the unit owners as a group, shall be entered into for a period in excess of two years. Any such contract or agreement entered into on or after July 1, 1978, may be terminated without penalty by the unit owners' association or its executive organ upon not less than ninety days' written notice to the other party given not later than sixty days after the expiration of the period of declarant control contemplated by subsection (a) hereof. Any such contract or agreement may be renewed for periods not in excess of two years; however, at the end of any two-year period the unit owners' association or its executive organ may terminate any further renewals or extensions thereof. The provisions of this subsection shall not apply to any lease or leases which are referred to in § 55-79.48 or which are subject to subsection (e) of § 55-79.54.

(2) C. If entered into at any time prior to the expiration of the period of declarant control contemplated by subsection (a) hereof, any contract, lease or agreement, other than those subject to the provisions of subsection (b) (1) hereof, may be entered into by or on behalf of the unit owners'

183 association, its executive organ, or the unit owners as a group, if such contract, lease or agreement is
184 bona fide and is commercially reasonable to the unit owners' association at the time entered into under
185 the circumstances.

186 (3) D. This section does not apply to any contract, incidental to the disposition of a condominium
187 unit, to provide to a unit owner for the duration of such unit owner's life, or for any term in excess of
188 one year, nursing services, medical services, other health-related services, board and lodging and care as
189 necessary, or any combination of such services. The rule of property law known as the rule restricting
190 unreasonable restraints on alienation shall not be applied to defeat any provision of the condominium
191 instruments requiring that the unit owners be parties to such contracts.

192 (e) E. If the unit owners' association is not in existence or does not have officers at the time of the
193 creation of the condominium, the declarant shall, until there is such an association with such officers,
194 have the power and the responsibility to act in all instances where this chapter requires action by the
195 unit owners' association, its executive organ, or any officer or officers.

196 (e1) F. Thirty days prior to the expiration of the period of declarant control, the declarant shall notify
197 the governing body of the city, county or town in which the condominium is located of the forthcoming
198 termination of declarant control. Prior to the expiration of the thirty-day period, the local governing
199 body or an agency designated by the local governing body shall advise the principal elected officer of
200 the condominium unit owners' association of any outstanding violations of applicable building codes,
201 local ordinances or other deficiencies of record.

202 G. *Within 45 days from the expiration of the period of declarant control contemplated by subsection*
203 *A, the declarant shall deliver to the president of the unit owners' association or his designated agent (i)*
204 *all association books and records held by or controlled by the declarant including, without limitation,*
205 *the following items: minute books and all rules, regulations and amendments thereto which may have*
206 *been promulgated; (ii) a statement of receipts and expenditures from the date of the recording of a deed*
207 *to a unit owner other than the declarant to the end of the regular accounting period immediately*
208 *succeeding the first election of the board of directors by the unit owners not to exceed sixty days from*
209 *the date of the election; and said statement shall be prepared in accordance with the requirements set*
210 *forth in § 55-79.74:1; (iii) a copy of all plans and specifications prepared prior to, during, or after*
211 *construction of the improvements on the condominium property, including as-built plans and*
212 *landscaping plans, if any, provided, however, the declarant shall not be held liable by reason of the fact*
213 *that the as-built improvements do not conform to the original plans and specifications unless such*
214 *nonconformity results in a violation of any state statute, building code, or local ordinance, or deviates*
215 *from a generally accepted construction practice in the Commonwealth; (iv) all association insurance*
216 *policies which are currently in force; (v) written unexpired warranties of the contractors,*
217 *subcontractors, suppliers, and manufacturers, if any; (vi) any contracts in which the association is a*
218 *contracting party, if any; and (vii) a list of manufacturers of paints, roofing materials and other similar*
219 *materials used on the condominium property.*

220 *In the event that the unit owner's association is managed by a management company in which the*
221 *declarant, or its principals, have no pecuniary interest or management role, then such management*
222 *company shall have the responsibility to provide the documents and information as required by clauses*
223 *(i), (ii), (iv), and (vi) of this subsection.*

224 (d) H. This section shall be strictly construed to protect the rights of the unit owners.

225 § 55-79.74:3. Transfer of special declarant rights.

226 A. No special declarant right may be transferred except by a document evidencing the transfer
227 recorded in every city and county wherein any portion of the condominium is located. The instrument
228 shall not be effective unless executed by the transferee.

229 B. Upon transfer of any special declarant right, the liability of a transferor declarant shall be as
230 follows:

231 1. The transferor shall not be relieved of any obligation or liability arising before the transfer and
232 shall remain liable for warranty obligations imposed upon him by subsection (b) of § 55-79.79. Lack of
233 privity shall not deprive any unit owner of standing to bring an action to enforce any obligation of the
234 transferor.

235 2. If the successor to any special declarant right is an affiliate of a declarant, the transferor shall also
236 be jointly and severally liable with the successor for any obligation or liability of the successor which
237 relates to the condominium.

238 3. If a transferor retains any special declarant rights, but transfers other special declarant rights to a
239 successor who is not an affiliate of the declarant, the transferor shall also be liable for all obligations
240 and liabilities relating to the retained special declarant rights and imposed on a declarant by this chapter
241 or by the condominium instruments.

242 4. A transferor shall have no liability for any breach of a contractual or warranty obligation or for
243 any other act or omission, arising from the exercise of a special declarant right by a successor declarant
244 who is not an affiliate of the transferor.

C. Except as otherwise provided by the mortgage or deed of trust, in case of foreclosure of a mortgage, sale by a trustee under a deed of trust, tax sale, judicial sale or sale under receivership proceedings or the Bankruptcy Code as codified in Title 11 of the United States Code, of any unit owned by a declarant or land subject to development rights:

1. A person acquiring title to all the land being foreclosed or sold shall, but only upon his request, succeed to all special declarant rights related to that land reserved by that declarant, or only to any rights reserved in the declaration pursuant to § 55-79.66 and held by that declarant to maintain sales offices, management offices, model units and/or signs.

2. The judgment or instrument conveying title shall provide for transfer of only the special declarant rights requested.

For the purposes of this subsection, "development rights" means any right or combination of rights to expand an expandable condominium, contract a contractable condominium, convert convertible land or convert convertible space.

D. Upon foreclosure, sale by a trustee under a deed of trust, tax sale, judicial sale or sale under receivership proceedings or the Bankruptcy Code as codified in Title 11 of the United States Code of all units and other land in the condominium owned by a declarant (i) that declarant ceases to have any special declarant rights, and (ii) any period of declarant control reserved under subsection (a) A of § 55-79.74 shall terminate, unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.

E. The liabilities and obligations of any person or persons who succeed to any special declarant right shall be as follows:

1. A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor by this chapter or by the condominium instruments.

2. A successor to any special declarant right, other than a successor described in subdivisions 3 and 4 of this subsection, who is not an affiliate of a declarant shall be subject to all obligations and liabilities imposed by this chapter or the condominium instruments on a declarant, which relate to his exercise or nonexercise of special declarant rights, or on his transferor, except for (i) misrepresentations by any prior declarant, (ii) warranty obligations as provided in subsection (b) of § 55-79.79 on improvements made by any previous declarant or made before the condominium was created, (iii) breach of any fiduciary obligation by any previous declarant or his appointees to the executive organ, or (iv) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

3. Unless he is an affiliate of a declarant, a successor to only a right reserved in the declaration to maintain sales offices, management offices, model units and/or signs shall not exercise any other special declarant right and shall not be subject to any liability or obligation as a declarant, except the liabilities and obligations arising under Article 4 (§ 55-79.86 et seq.) of this chapter as to disposition by that successor.

4. A successor to all special declarant rights held by his transferor who is not an affiliate of that transferor and who succeeded to those rights pursuant to a deed in lieu of foreclosure or a judgment or instrument conveying title to units under subsection C hereof may declare his intention in a recorded instrument to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right reserved by his transferor pursuant to subsection (a) A of § 55-79.74. Any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, he shall not be subject to any liability or obligation as a declarant other than liability for his acts and omissions relating to the exercise of rights reserved under subsection (a) A of § 55-79.74.

F. Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under this chapter or the condominium instruments.

G. For the purposes of this section, "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 general partner, officer, director or employer of the declarant, (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 percent of the voting interests 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 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 other persons or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing more than twenty percent of the

306 voting interest in the person, (iii) controls in any manner the election of a majority of the directors of
307 the person, or (iv) has contributed more than twenty percent of the capital of the person. Control does
308 not exist if the powers described in this paragraph are held solely as security for an obligation and are
309 not exercised.

310 § 55-79.80. Control of common elements.

311 A. Except to the extent prohibited by the condominium instruments, and subject to any restrictions
312 and limitations specified therein, the unit owners' association shall have the power to:

313 1. Employ, dismiss, and replace agents and employees to exercise and discharge the powers and
314 responsibilities of the said association arising under § 55-79.79.

315 2. Make or cause to be made additional improvements on and as a part of the common elements.

316 3. Grant or withhold approval of any action by one or more unit owners or other persons entitled to
317 the occupancy of any unit which would change the exterior appearance of any unit or of any other
318 portion of the condominium, or elect or provide for the appointment of an architectural control
319 committee, the members of which must have the same qualifications as officers, to grant or withhold
320 such approval.

321 4. Acquire, hold, convey, and encumber title to real property, including but not limited to
322 condominium units, whether or not the association is incorporated.

323 B. Except to the extent prohibited by the condominium instruments, and subject to any restrictions
324 and limitations specified therein, the executive organ of the unit owners' association, if any, and if not,
325 then the unit owners' association itself, shall have the irrevocable power as attorney-in-fact on behalf of
326 all the unit owners and their successors in title with respect to the common elements, including without
327 limitation the right, in the name of the unit owners' association, (i) to grant easements through the
328 common elements and accept easements benefiting the condominium or any portion thereof, (ii) to
329 assert, through litigation or otherwise, defend against, compromise, adjust, and settle any claims or
330 actions related to common elements, other than claims against or actions involving the declarant during
331 any period of declarant control reserved pursuant to subsection (a) A of § 55-79.74, and (iii) to apply for
332 any governmental approvals under state and local law.

333 C. This section shall not be construed to prohibit the grant, by the condominium instruments, of
334 other powers and responsibilities to the unit owners' association or its executive organ.

335 § 55-79.80:1. Tort and contract liability; judgment lien.

336 A. An action for tort alleging a wrong done (i) by any agent or employee of the declarant or of the
337 unit owners' association, or (ii) in connection with the condition of any portion of the condominium
338 which the declarant or the association has the responsibility to maintain, shall be brought against the
339 declarant or the association, as the case may be. No unit owner shall be precluded from bringing such
340 an action by virtue of his ownership of an undivided interest in the common elements or by reason of
341 his membership in the association or his status as an officer.

342 B. Unit owners other than the declarant shall not be liable for torts caused by agents or employees of
343 the declarant within any convertible land or using any easement reserved in the declaration or created by
344 § 55-79.65 or § 55-79.66.

345 C. An action arising from a contract made by or on behalf of the unit owners' association, its
346 executive organ, or the unit owners as a group, shall be brought against the association, or against the
347 declarant if the cause of action arose during the exercise by the declarant of control reserved pursuant to
348 subsection (a) A of § 55-79.74. No unit owner shall be precluded from bringing such an action by
349 reason of his membership in the association or his status as an officer.

350 D. A judgment for money against the unit owners' association shall be a lien against any property
351 owned by the association, and against each of the condominium units in proportion to the liability of
352 each unit owner for common expenses as established pursuant to subsection D of § 55-79.83, but not
353 against any other property of any unit owner. A unit owner who pays a percentage of the total amount
354 due under such judgment equal to such unit owner's liability for common expenses fixed pursuant to
355 subsection D of § 55-79.83 shall be entitled to a release of any such judgment lien and the association
356 shall not be entitled to assess the unit for payment of the remaining amount due. Such judgment shall be
357 otherwise subject to the provisions of § 8.01-458.