Elizabeth Palen <epalen@dls.virginia.gov>

Fwd: State Senator Whipple- Governor's Foreclosure Task Force Assistance

1 message

Senator Whipple <district31@senate.virginia.gov> **Tue, Apr 26, 2011 at 3:42 PM**
To: Elizabeth Palen <epalen@dls.virginia.gov>

Hi Elizabeth,

Senator Whipple asked me to forward this to you. She responded to the gentleman that the VHC is meeting tomorrow and maybe this can be brought to their attention.

Thanks,
Arlene
--
Arlene Spinelli
Legislative Assistant
District 31
Senate of Virginia

——— Forwarded message ———
From: **Vincent Fleece** <vince817@yahoo.com>
Date: Tue, Apr 26, 2011 at 12:17 AM
Subject: State Senator Whipple- Governor's Foreclosure Task Force Assistance
To: district31@sov.state.va.us

State Senator Whipple,
I have written the Governor's Foreclosure Task Force however I believe it would lend some weight if you too could show your support. As president of the Palazzo Condominium Association, I write you today to ask your assistance with the Governor's Foreclosure Task Force. As a community association we work to improve our community and the current foreclosure environment has turned predatory towards community associations and home owners. We have a unit that has been abandoned for 4 years and from our last collections effort found that the ower had left the state of Virginia and was now some where in Florida with no identifiable income or residence. Our dilema as you can read below is that Bank of America is paying the county taxes to keep the county from foreclosure knowing that the association's only avenue for foreclosure is to purchase a mortage note that is grossly over inflated. Community associations should have a seat at this table and need to be included in any legislation proposals. This maneuver by the bank is either by design between the financial industry and legislators or by accident. It needs to rectified. You have to restore balance to the equation. I am asking the task force to recommend legislation to either set a $10,000 limit on lost condo fees as an unreasonable restraint on alienation. OR another avenue for redress "mortgage termination' where there is not a current avenue. Communities should not have to shoulder the largest burden to correct issues in the financial industry which we did not mismanage or create. How does the bank pay the property taxes when it is not collecting a mortgage payment and is able to deny ownership and avoid its community obligation. I thought the definition of property ownership was paying taxes? If that is the case then

they need to also pay community dues as well.....How is it that these financial institutions are sheltered by current laws and legislation at the expense of coummunities you and they serve?? I know you did not create this mess but as a quiet tax payer it starts to stir up a storm protest and change when I find financial institutions shifting financial burdens on individual tax payers for risky lending decisions that tax payers did not have a voice. They took the risk why do I pay the price??

Review of the November 20, 2010 Washington Post Article, *Condo groups facing unpaid dues push for foreclosures* authored by Benny L. Kass (the "Article") and provide the Association Board of Directors ("Board") with comments related to the article. Specifically, you ask whether the law of the Commonwealth of Virginia supports the course of action described in the article and whether the course of action could be used to force the foreclosure of Unit 712 in the Condominium.

The November 20, 2010 Washington Post Article, Condo groups facing unpaid dues push for foreclosures authored by Benny L. Kass. We also reviewed relevant provisions of the Virginia Condominium Act ("Act") and pleadings for two Florida cases, *7149 Bay Drive Condominium Ass'n v. Citibank, N.A., et al.* (Case No. 10-9406 CA 30, Fla. 11th Cir. Ct.) and *HSBC Bank, USA, N.A. v. Keys Gate Community Association, Inc.* (Case No. 07-18411 CA 09, Fla. 11th Cir. Ct.), which are discussed in the article.

Summary of Washington Post Article

The Article outlines the efforts taken by a Florida law firm to collect unpaid assessments in Florida on behalf of their condominium association clients. After discussion of the recent economic troubles condominium unit owners associations are facing throughout the country, the Article describes a legal tactic for dealing with unpaid (and largely uncollectible) assessments which has become known as "reverse foreclosure" or "mortgage termination."

Focusing on the only two instances in which a "reverse foreclosure" has yielded positive results for condominium unit owners associations in Florida, the Article suggests that association boards of directors in the Washington metropolitan area confer with legal counsel about the use of this tactic to collect unpaid assessments. Below we review the "reverse foreclosure" and "mortgage termination" cases described in the Article and provide recommendations related to the potential success using those tactics.

HSBC Bank USA, N.A. v. Keys Gate Community Association, Inc.

We first reviewed *HSBC Bank, USA, N.A. v. Keys Gate Community Association, Inc.* (Case No.

07-18411 CA 09, Fla. 11th Cir. Ct.), a reverse foreclosure case out of the Eleventh Circuit Court for Miami-Dade County, Florida. In *HSBC*, Keys Gate Community Association requested and was granted Partial Summary Judgment against itself and the Court issued a Certificate of Title to the HSBC Bank.

On June 27, 2006, the Keys Gate Community Association recorded a lien against a Lot within the community. Keys Gate Community Association, through the filing of a judicial foreclosure sale, took title to the Lot on August 10, 2007.

During the pendency of the judicial foreclosure proceeding, Deutsche Bank National Trust Company filed an action for the judicial foreclosure sale of the Lot on June 19, 2007. Keys Gate Community Association was named as a defendant in the foreclosure action because of, among other things, the lien recorded against the Lot (the Association was not the owner of the Lot at the time this suit was filed). In October 2007 Deutsche Bank was granted title to the Lot by the Court.

However, in May 2008 an Order was entered vacating (overturning) the October 2007 Court action because of an incorrect legal description in Deutsche Bank's complaint and *lis pendens*. Although Deutsche Bank filed an amended *Lis Pendens* in July 2008, Deutsche Bank never took additional action to pursue foreclosure of the Lot. In November 2008, HSBC entered the lawsuit in place of Deutsche Bank after an apparent transfer of rights to the mortgage on the Lot.

The principal amount due for the HSBC mortgage was $284,000.00, but the current assessed value of the Lot was only $208,991.00. Additionally, a Florida statute gave a super-priority of twelve months to associations like Keys Gate. In their Motion for Summary Judgment, Keys Gate claimed that HSBC's failure to "diligently pursue its foreclosure action" impaired the alienability of the Lot. Additionally, Keys Gate waived all defenses with respect to the foreclosure action.

Ultimately, the Court held that Keys Gate was the current lawful owner of the property and waived any right of redemption and consented to the issuance of a Certificate of Title (effectively foreclosing the Lot and vesting title to the Lot with HSBC).

7149 Bay Drive Condominium Ass'n v. Citibank, N.A., et al

We also reviewed *7149 Bay Drive Condominium Ass'n v. Citibank, N.A., et al.*, a mortgage termination case discussed in the Article. In *7149 Bay Drive*, a condominium unit owners association filed

suit requesting that a Court declare that a mortgage on a Unit creates an unreasonable restraint on alienation (because the mortgage exceeds the value of the Unit), that the mortgage be deemed to have been abandoned by Citibank, or for a decree vesting title of the Unit to Citibank.

According to the pleadings in *7149 Bay Drive*, the condominium unit owners association took possession of the Unit pursuant to a foreclosure sale (with no bidders) on September 7, 2007. The association stopped paying, and Citibank stopped receiving mortgage payments on the Unit in December 2007. In April 2008, Citibank filed suit to foreclose the mortgage against the Unit. However, in June 2009 Citibank voluntarily dismissed its foreclosure action. Based on the dismissal, the condominium unit owners association claimed that Citibank "waived any right, interest or title" to the Unit. The pleadings filed in *7149 Bay Drive* claim the mortgage held by Citibank was an "absolute restriction on the sale" of the Unit.

Unfortunately, there was no formal opinion issued by the Court or review of the merits of the claim. In response to the lawsuit, Citibank released the mortgage and executed a stipulated settlement order effectively waiving all rights to enforce the mortgage.

Summary and Recommendations

Similar to Florida law, the common law of the Commonwealth of Virginia restricts *unreasonable restraints on alienation*. A *restraint on alienation* is a restriction on a landowner's ability to sell or transfer property. The mortgage securing the Units includes several restraints on alienation - an example of a restraint on alienation is the due-on-sale clause that requires payment of a mortgage upon the transfer of conveyance of all or part of a Unit.

Based on a limited search of Virginia case law, there are no cases in the Virginia evaluating whether a mortgage securing a Unit in the Virginia for more than the Unit is worth would be considered an *unreasonable* restraint on alienation. **Any suit brought by the Association would be a matter of first impression for the Court and we cannot assure the Association of a court order favoring the Association. This should be part of legislation not ground breaking case law for community associations.**

Comparing the facts related to Unit 712 to those presented in the Florida cases discussed above, it is important to note several important considerations. In the Florida cases identified in the Article, the community association took possession of the property pursuant to a judicial foreclosure sale *prior* to instituting action against the lender to foreclose. In both instances, therefore, the community association was the *owner* of the property. Prior to instituting any action similar to those presented in the Article, the

Association must purchase the unit at a properly-held auction and take title to the Units. This is ridiculous to have to pay more than fair market value and then to sue for the difference and lose attorney fees!!! Once the Association takes possession of the Unit, the Association may initiate proceedings to force foreclosure or relinquishment of rights by the bank.

In any proceeding to force foreclosure or relinquishment of rights by the bank, the Association will have the burden to plead and prove that the non-judicial foreclosure of the Units was valid and done pursuant to Virginia law.

In both of the Florida cases cited in the Article, the lenders initiated foreclosure proceedings and for different reasons, failed to pursue foreclosure of the units diligently. With respect to Unit 712, this is also the case.

Based on the distinguishing facts between the Florida cases and without clear case law on point, we cannot recommend the Association pursue legal action as described in the Article. The cost associated with the initiation of foreclosure proceedings may be significant and most likely unrecoverable.

We have found that the financial industry can not regulate itself and consumer protections can only be implemented and enforced by legislation. I do not mind shouldering my responsibility but please tell me where my responsibility ends? I pay condo assessments, county property taxes, state taxes, federal taxes, city sales taxes and now I have to pay the delinquent assessments of my neighbors because the bank is unwilling to foreclose on the property. The current delinquent fees for this unit total $36,000 which now has to be passed around to all the home owners in the assocation many of which can ill afford additional assessment burdens in this economy. Another four years and this balance tops $76,000 burden for the community association. Monies collected in assessments and fees are recycled back into the community through vendor services and contracts to support the community. Balance needs to be restored to the process please present this issue at the Governor's Foreclosure Task Force

Sincerely,

Vincent Fleece
5353 Columbia Pike 110
Arlington, VA 22204

----- Forwarded Message ----
From: Frank OLeary <Foleary@arlingtonva.us>
To: Vince817@yahoo.com
Cc: Hope Halleck <Hhalle@arlingtonva.us>
Sent: Thu, March 24, 2011 1:08:27 PM

Subject: RE: abandoned unit

Mr. Fleece:

The taxes are up to date on the property you identified as 5353 Columbia Pike #712, thus precluding the possibility of a tax sale.

Best wishes,
Frank O'Leary

Frank O'Leary
Treasurer

Arlington County
2100 Clarendon Blvd., #201
Arlington VA, 22201
tel: 703-228-3255
fax: 703-228-7436

Foleary@arlingtonva.us

Want a signature like this?

From: Hope Halleck
Sent: Tuesday, March 08, 2011 3:52 PM
To: Frank OLeary
Subject: abandon unit

Frank

Per the managers office you should be the one to handle this. Let me know. Thanks.

Hope L. Halleck
Clerk to the Arlington County Board
2100 Clarendon Blvd., Suite 300
Arlington, Virginia 22201
703-228-3130
www.arlingtonva.us

***Our Vision**: Arlington will be a diverse and inclusive world-class urban community with secure, attractive residential and commercial neighborhoods where people unite to form a caring, learning, participating, sustainable community in which each person is important.*

Please consider the environment before printing this email

From: Vince817@yahoo.com
Sent: Sunday, February 27, 2011 12:18 PM
To: CountyBoard
Subject: WEBSITE COMMENT: Abandoned homes and property taxes --
ATTN:
countyboard

The following comment has been submitted from the Arlington County Website:

Name : Vincent Fleece

Submitter's E-Mail Address : Vince817@yahoo.com

Subject : WEBSITE COMMENT: Abandoned homes and property taxes -- ATTN: countyboard

Comments : Mr. Zimmerman,

I was glad to see you at the polling area introducing yourself to constituents. It made the difference in many of our votes that you took the time to actually meet the community.

I am president of the Palazzo Condominium Association and we have a unit that has been abandoned for four years now. When I called the county manager's office and spoke to some one they indicated the county is averaging 8 years in taking action against foreclosing for non-payment of property taxes. If my association has to wait another 4 years at the current assessment level we are looking at another $36,000 loss on top of the current $36,000 loss experienced by the association for a total of $72,000 of uncollectable debt for the association.

This unit located at 5353 Columbia Pike #712, Arlington, VA 22204 has been abandoned by its owner for the past 4 years and the last review of our collections investigation uncovered the owner had moved to Florida and currently did not have a bank account or means of income. The bank has started and halted foreclosure 5 separate times. Foreclosure would require us to assume/pay the current mortgage amount which may be over $200,000 but because of the current market it makes foreclosure for resale impossible.

Arlington county has the strongest position to force the sale and turn over of this property. I would like to know more about the process used by the county to collect delinquent property taxes and force the turn over of abandoned properties?

Thank you.

Vincent A. Fleece

11103958D

HOUSE BILL NO. 2530

Offered January 21, 2011

A BILL to amend and reenact §§ 55-79.84, 55-79.97, and 55-516 of the Code of Virginia, relating to the Condominium Act and the Property Owners' Association Act; lien for assessments; priority.

Patron—Scott, J.M.

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 55-79.84, 55-79.97, 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 aeeordance with the provisions of this chapter and all lawful provisions of the condominium instruments. ~~The~~ *Except as specifically provided in subsection B,* said lien, once perfeeted, 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 deelaration, 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. *Such portion of the unpaid assessments due and owing the association for a period not to exceed three years that is attributable to providing the maintenance and upkeep of the common elements and such other areas of association responsibility expressly provided for in the declaration, including capital expenditures, shall be prior to all other liens and encumbrances with the exception of any real estate tax liens on the condominium unit.*

C. 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 diseretion 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~~*D.* The unit owners' association, in order to perfect the lien given by this section, shall file beforc 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' assoeiation, 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~~ *C,* in the names of the persons identified therein as well as in the name of the unit owners' association. The eost of recording such memorandum shall be taxed against the person found liable in any judgment or deeree enforcing such lien.

~~D~~*E.* No suit to enforce any lien perfected under subsection ~~C~~ *D* shall be brought or action to foreclose any lien perfected under subsection ~~I~~ *J* 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 seetion. Nothing herein shall extend the time within which any such lien may be perfected.

~~E~~*F.* The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and ~~attorneys'~~ *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~~*G.* When payment or satisfaction is made of a debt secured by the lien perfected by subsection ~~C~~ *D,* 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~~*H.* 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.

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

~~I~~*J.* At any time after perfecting the lien pursuant to this section, the unit owners' association may sell the unit at public sale, subject to prior liens.

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

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

2. After expiration of the 60-day notice period provided in subdivision 1, the unit owners' 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 condominium 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 subsection ~~C~~ *D*, in the names of the persons identified therein as well as in the name of the unit owners' association. The unit owners' association, at its option, may from time to time remove the trustee and appoint a successor trustee.

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

4. In addition to the advertisement required by subdivision 5, the unit owners' 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 unit owners' 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 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 unit owners' 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 unit owners' 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 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 property being sold is generally advertised for sale. The advertisement of sale, in addition to such other matters as the unit owners' 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 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 ~~1~~ 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'~~ *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. 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 *this* subsection ~~1~~ 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.

§ 55-79.97. Resale by purchaser.

A. In the event of any resale of a condominium unit by a unit owner other than the declarant, and subject to the provisions of subsection F and § 55-79.87 A, the unit owner shall disclose in the contract that (i) the unit is located within a development which is subject to the Condominium Act, (ii) the Act requires the seller to obtain from the unit owners' association a resale certificate and provide it to the purchaser, (iii) the purchaser may cancel the contract within three days after receiving the resale certificate, (iv) if the purchaser has received the resale certificate, the purchaser has a right to request a

resale certificate update or financial update in accordance with § 55-79.97:1, as appropriate, and (v) the right to receive the resale certificate and the right to cancel the contract are waived conclusively if not exercised before settlement.

B. If the contract does not contain the disclosure required by subsection A, the purchaser's sole remedy is to cancel the contract prior to settlement.

C. The information contained in the resale certificate shall be current as of a date specified on the resale certificate. A resale certificate update or a financial update may be requested as provided in § 55-79.97:1, as appropriate. The purchaser may cancel the contract (i) within three days after the date of the contract, if the purchaser receives the resale certificate on or before the date that the purchaser signs the contract; (ii) within three days after receiving the resale certificate if the resale certificate is hand delivered or delivered by electronic means and a receipt obtained; or (iii) within six days after the postmark date if the resale certificate is sent to the purchaser by United States mail. Notice of cancellation shall be provided to the unit owner or his agent by one of the following methods:

a. Hand delivery;

b. United States mail, postage prepaid, provided the sender retains sufficient proof of mailing, which may be either a United States postal certificate of mailing or a certificate of service prepared by the sender confirming such mailing;

c. Electronic means provided the sender retains sufficient proof of the electronic delivery, which may be an electronic receipt of delivery, a confirmation that the notice was sent by facsimile, or a certificate of service prepared by the sender confirming the electronic delivery; or

d. Overnight delivery using a commercial service or the United States Postal Service.

In the event of a dispute, the sender shall have the burden to demonstrate delivery of the notice of cancellation. Such cancellation shall be without penalty, and the unit owner shall cause any deposit to be returned promptly to the purchaser.

A resale certificate shall include the following:

1. An appropriate statement pursuant to subsection ~~H~~ *I* of § 55-79.84 which need not be notarized and, if applicable, an appropriate statement pursuant to § 55-79.85;

2. A statement of any expenditure of funds approved by the unit owners' association or the executive organ which shall require an assessment in addition to the regular assessment during the current or the immediately succeeding fiscal year;

3. A statement, including the amount, of all assessments and any other fees or charges currently imposed by the unit owners' association, together with any known post-closing fee charged by the common interest community manager, if any, and associated with the purchase, disposition and maintenance of the condominium unit and the use of the common elements, and the status of the account;

4. A statement whether there is any other entity or facility to which the unit owner may be liable for fees or other charges;

5. The current reserve study report or a summary thereof, a statement of the status and amount of any reserve or replacement fund and any portion of the fund designated for any specified project by the executive organ;

6. A copy of the unit owners' association's current budget or a summary thereof prepared by the unit owners' association and a copy of the statement of its financial position (balance sheet) for the last fiscal year for which a statement is available, including a statement of the balance due of any outstanding loans of the unit owners' association;

7. A statement of the nature and status of any pending suits or unpaid judgments to which the unit owners' association is a party which either could or would have a material impact on the unit owners' association or the unit owners or which relates to the unit being purchased;

8. A statement setting forth what insurance coverage is provided for all unit owners by the unit owners' association, including the fidelity bond maintained by the unit owners' association, and what additional insurance coverage would normally be secured by each individual unit owner;

9. A statement that any improvements or alterations made to the unit, or the limited common elements assigned thereto, are or are not in violation of the condominium instruments;

10. A copy of the current bylaws, rules and regulations and architectural guidelines adopted by the unit owners' association and the amendments thereto;

11. A statement of whether the condominium or any portion thereof is located within a development subject to the Property Owners' Association Act (§ 55-508 et seq.) of Chapter 26 ~~of this title~~;

12. A copy of the notice given to the unit owner by the unit owners' association of any current or pending rule or architectural violation;

13. A copy of any approved minutes of the executive organ and unit owners' association meetings for the six calendar months preceding the request for the resale certificate;

14. Certification that the unit owners' association has filed with the Common Interest Community Board the annual report required by § 55-79.93:1; which certification shall indicate the filing number

assigned by the Common Interest Community Board and the expiration date of such filing;

15. A statement of any limitation on the number of persons who may occupy a unit as a dwelling; and

16. A statement setting forth any restrictions, limitation or prohibition on the right of a unit owner to display the flag of the United States, including, but not limited to reasonable restrictions as to the size, time, place, and manner of placement or display of such flag.

Failure to receive a resale eertificate shall not exeuse any failure to comply with the provisions of the eondominium instruments, articles of incorporation, or rules or regulations.

The resale certificate shall be delivered in accordance with the written request and instructions of the seller or his authorized agent, including whether the resale certificate shall be delivered eleetronically or in hard copy, and shall speeify the complete contact information for the parties to whom the resale certificate shall be delivered. The resale eertificate shall be delivered within 14 days of receipt of such request. The resale eertificate shall not, in and of itself, be deemed a security within the meaning of § 13.1-501.

D. The seller or his authorized agent may request that the resale certificate be provided in hard copy or in electronic form. A unit owners' association or common interest community manager may provide the resale certificate electronically; however, the seller or his authorized agent shall have the right to request that the resale certificate be provided in hard copy. The seller or his authorized agent shall continue to have the right to request a hard copy of the resale certificate in person at the principal place of business of the unit owners' association. If the seller or his authorized agent requests that the resale certificate be provided in electronic format, neither the unit owners' association nor its common interest community manager may require the seller or his authorized agent to pay any fees to use the provider's electronic network or system. If the seller or his authorized agent asks that the resale certificate be provided in electronic format, the seller or his authorized agent may designate no more than two additional recipients to receive the resale certificate in electronic format at no additional charge.

E. Subject to the provisions of § 55-79.87, but notwithstanding any other provisions of this chapter, the provisions and requirements of this section shall apply to any such resale of a condominium unit created under the provisions of the Horizontal Property Act (§ 55-79.1 et seq.).

F. The resale certifieate required by this section need not be provided in the case of:

1. A disposition of a unit by gift;

2. A disposition of a unit pursuant to court order if the court so directs; or

3. A disposition of a unit by foreclosure or deed in lieu of foreclosure.

G. In any transaction in which a resale certificate is required and a trustee acts as the seller in the sale or resale of a unit, the trustee shall obtain the resale certificate from the unit owners' association and provide the resale certificate to the purchaser.

§ 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~~ *Except as specifically provided in subsection B, 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. *Such portion of the unpaid assessments due and owing the association for a period not to exceed three years that is attributable to providing the maintenance and upkeep of the common areas and such other areas of association responsibility expressly provided for in the declaration, including capital expenditures, shall be prior to all other liens and encumbrances with the exception of any real estate tax liens on the lot.*

C. 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;

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6. The name of the assoeiation 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 sueh memorandum is filed as hereinafter provided to record and index the same as provided in subsection ~~D~~ *E*, in the names of the persons identified therein as well as in the name of the association. The eost of recording and releasing the memorandum shall be taxed against the person found liable in any judgment or deeree enforeing sueh lien.

~~C~~*D*. 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 offiee of the applieable city or county. The notice shall be sent at least 10 days before the actual filing date of the memorandum of lien.

~~D~~*E*. Notwithstanding any other provision of this seetion, or any other provision of law requiring documents to be reeorded in the miscellaneous lien books or the deed books in the elerk'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 offiee. 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~~*F*. No suit to enforce any lien perfeeted under subseetion ~~B~~ *C* shall be brought or action to foreclose any lien perfected under subseetion ~~I~~ *J* shall be initiated after 36 months from the time when the memorandum of lien was recorded; however, the filing of a petition to enforee any such lien in any suit wherein the petition may be properly filed shall be regarded as the institution of a suit under this seetion. Nothing herein shall extend the time within whieh any sueh lien may be perfected.

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

~~G~~*H*. When payment or satisfaction is made of a debt seeured by the lien perfected by subseetion ~~B hereof~~ *C*, 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 offieer or officers as the declaration may specify, shall be deemed the duly authorized agent of the lien creditor.

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

~~I~~*J*. At any time after perfeeting the lien pursuant to this section, the property owners' association may sell the lot at public sale, subject to prior liens.

For purposes of this seetion, 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 seeured by the perfected lien; (ii) the action required to satisfy the debt seeured by the perfeeted lien; (iii) the date, not less than 60 days from the date the notiee 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 eireuit court of the eounty or city where the lot is located to assert the nonexistenee 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 conduet the sale. The appointment of the trustee shall be filed in the clerk's offiee of the circuit court in the county or eity in which such development is situated. It shall be the duty of the clerk in whose office sueh appointment is filed to record and index the same as provided in subseetion ~~D~~ *E*, 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 perfeeted lien discontinued prior to the sale of the lot. Those eonditions 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, ineluding but not limited to advertising costs and reasonable ~~attorneys'~~ *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 exeeution 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 baving 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 announeement at the sale. Any person other than the trustee may bid at the foreclosure sale, ineluding a person who has submitted a written one-price bid. Upon request to the trustee, any other bidder in attendanee at a foreclosure sale shall be permitted to inspect written bids. Unless otherwise provided in the declaration, the assoeiation may bid to purchase the lot at a foreclosure sale. The association may own, lease, encumber, exehange, 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 ~~1~~ 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 the sale, and the balanee, if any, shall be retained by the association in eonnection with that sale.

c. The property owners' assoeiation shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proeeeds, and apply the same in the following order: first, to the reasonable expenses of sale, ineluding ~~attorneys'~~ *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 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 owner or his assigns; provided, however, that the association as to such residue shall not be bound by any inheritanee, devise, conveyance, assignment or lien of or upon the owner's equity, without actual notice thereof prior to distribution.

9. The trustee shall deliver to the purchaser a trustee's deed conveying the lot with special warranty of title. The trustee shall not be required to take possession of the property prior to the sale thereof or to deliver possession of the lot 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 § 55-510 upon the written request of the

428 prior lot owner, current lot owner or any holder of a recorded lien against the lot at the time of the sale.
429 The association shall maintain a copy of the accounting for at least 12 months following the foreclosure
430 sale.
431 11. If the sale of a lot is made pursuant to *this* subsection ~~1~~ and the accounting is made by the
432 trustee, the title of the purchaser at such sale shall not be disturbed unless within 12 months from the
433 confirmation of the accounting by the commissioner of accounts, the sale is set aside by the court or an
434 appeal is allowed by the Supreme Court of Virginia, and a decree is therein entered requiring such sale
435 to be set aside.