

# CONDOMINIUM ACT

MERCER TRIGIANI

**CODE OF VIRGINIA  
TITLE 55. PROPERTY AND CONVEYANCES.**

**CHAPTER 4.2.  
CONDOMINIUM ACT**

**TABLE OF CONTENTS**

<b>Article 1.</b>	<b>General Provisions.....</b>	<b>12</b>
§ 55-79.39.	How chapter cited.....	12
§ 55-79.40.	Application and construction of chapter.....	12
§ 55-79.41.	Definitions.....	13
§ 55-79.41:1.	Variation by agreement.....	18
§ 55-79.42.	Separate assessments, titles and taxation.....	18
§ 55-79.43.	County and municipal ordinances; nonconforming conversion condominiums; applicability of Uniform Statewide Building Code; other regulations .....	19
§ 55-79.44.	Eminent domain.....	21
<b>Article 2.</b>	<b>Creation, Alteration and Termination of Condominiums.....</b>	<b>23</b>
§ 55-79.45.	How condominium may be created.....	23
§ 55-79.46.	Release of liens.....	23
§ 55-79.47.	Description of condominium units.....	24
§ 55-79.48.	Execution of condominium instruments.....	24
§ 55-79.49.	Recordation of condominium instruments.....	25
§ 55-79.50.	Construction of condominium instruments.....	25
§ 55-79.51.	Complementarity of condominium instruments; controlling construction.....	26
§ 55-79.52.	Validity of condominium instruments; discrimination prohibited.....	26
§ 55-79.53.	Compliance with condominium instruments.....	26
§ 55-79.54.	Contents of declaration.....	27
§ 55-79.55.	Allocation of interests in the common elements.....	34
§ 55-79.56.	Reallocation of interests in common elements.....	35
§ 55-79.57.	Assignments of limited common elements; conversion to common element.....	36
§ 55-79.58.	Contents of plats and plans.....	38
§ 55-79.58:1.	Bond to insure completion of improvements.....	41
§ 55-79.59.	Preliminary recordation of plats and plans.....	41
§ 55-79.60.	Easement for encroachments.....	42

# MERCER TRIGIANI

§ 55-79.61.	Conversion of convertible lands.....	42
§ 55-79.62.	Conversion of convertible spaces.....	43
§ 55-79.63.	Expansion of condominium.....	44
§ 55-79.64.	Contraction of condominium.....	44
§ 55-79.65.	Easement to facilitate conversion and expansion.....	44
§ 55-79.66.	Easement to facilitate sales.....	45
§ 55-79.67.	Declarant's obligation to complete and restore.....	45
§ 55-79.68.	Alterations within units.....	46
§ 55-79.69.	Relocation of boundaries between units.....	46
§ 55-79.70.	Subdivision of units.....	48
§ 55-79.71.	Amendment of condominium instruments.....	49
§ 55-79.71:1.	Use of technology.....	51
§ 55-79.72.	Repealed.....	52
§ 55-79.72:1.	Termination of condominium.....	52
§ 55-79.72:2.	Rights of mortgagees.....	56

## **Article 3. Management of Condominiums.....56**

§ 55-79.73.	Bylaws to be recorded with declaration; contents; unit owners' association; executive organ; amendment of bylaws.....	56
§ 55-79.73:1.	Amendment to condominium instruments; consent of mortgagee.....	57
§ 55-79.74.	Control of condominium by declarant.....	58
§ 55-79.74:01.	Deposit of funds.....	61
§ 55-79.74:1.	Books, minutes and records; inspection.....	61
§ 55-79.74:2.	Management office.....	63
§ 55-79.74:3.	Transfer of special declarant rights.....	63
§ 55-79.74:4.	Declarants not succeeding to special declarant rights.....	66
§ 55-79.75.	Meetings of unit owners' association and executive organ.....	66
§ 55-79.75:1.	Distribution of information by members.....	69
§ 55-79.75:2.	Display of the flag of the United States; necessary supporting structures; affirmative defense.....	69
§ 55-79.76.	Same; quorums.....	70
§ 55-79.77.	Same; voting.....	70
§ 55-79.78.	Officers.....	72
§ 55-79.79.	Upkeep of condominiums; warranty against structural defects; statute of limitations for warranty.....	72
§ 55-79.80.	Control of common elements.....	75
§ 55-79.80:01.	Common Elements; notice of pesticide application.....	76
§ 55-79.80:1.	Tort and contract liability; judgment lien.....	76
§ 55-79.80:2.	Assessment of charges for violations; suspension of services for failure to pay assessments; hearing.....	77

# MERCER TRIGIANI

§ 55-79.80:3.	Power of unit owners' association to limit occupancy of a unit.....	78
§ 55-79.81.	Insurance.....	79
§ 55-79.82.	Repealed.....	80
§ 55-79.83.	Liability for common expenses.....	80
§ 55-79.83:1.	Reserves for capital components.....	82
§ 55-79.84.	Lien for assessments.....	82
§ 55-79.84:1.	Bond to be posted by declarant.....	88
§ 55-79.85.	Restraints on alienation.....	89

## **Article 4. Administration of Chapter; Sale, etc., of Condominium Units.....89**

§ 55-79.86.	Administrative agency.....	89
§ 55-79.87.	Exemptions from certain provisions of article.....	89
§ 55-79.88.	Limitations on dispositions of units.....	90
§ 55-79.89.	Application for registration; fee.....	90
§ 55-79.90.	Public offering statement; condominium securities.....	92
§ 55-79.91.	Inquiry and examination.....	95
§ 55-79.92.	Notice of filing and registration.....	96
§ 55-79.93.	Annual report by declarant; termination of registration....	96
§ 55-79.93:1.	Annual report by unit owners' association.....	97
§ 55-79.93:2.	Termination of Registration.....	97
§ 55-79.94.	Conversion condominiums; special provisions.....	98
§ 55-79.95.	Escrow of deposits.....	102
§ 55-79.96.	Declarant to deliver declaration, etc., to purchaser.....	104
§ 55-79.97.	Resale by purchaser.....	104
§ 55-79.97:1.	Fees for resale certificate.....	108
§ 55-79.97:2.	Properties subject to more than one declaration.....	112
§ 55-79.97:3.	Requests by settlement agents.....	112
§ 55-79.98.	General powers and duties of the Common Interest Community Board.....	113
§ 55-79.99.	Investigations and proceedings.....	114
§ 55-79.100.	Cease and desist orders.....	115
§ 55-79.101.	Revocation of registration.....	115
§ 55-79.102.	Judicial review.....	116
§ 55-79.103.	Penalties.....	116

**CODE OF VIRGINIA  
TITLE 55. PROPERTY AND CONVEYANCES.**

**CHAPTER 4.2.  
CONDOMINIUM ACT**

**Article 1.  
General Provisions.**

**§ 55-79.39. How chapter cited.** This chapter shall be known and may be cited as the “Condominium Act.”

**§ 55-79.40. Application and construction of chapter.**

A. This chapter shall apply to all condominiums and to all horizontal property regimes or condominium projects. For the purposes of this chapter, the terms “horizontal property regime” and “condominium project” shall be deemed to correspond to the term “condominium”; the term “apartment” shall be deemed to correspond to the term “unit”; the term “co-owner” shall be deemed to correspond to the term “unit owner”; the term “council of co-owners” shall be deemed to correspond to the term “unit owners’ association”; the term “developer” shall be deemed to correspond to the term “declarant”; the term “general common elements” shall be deemed to correspond to the term “common elements”; and the terms “master deed” and “master lease” shall be deemed to correspond to the term “declaration” and shall be deemed included in the term “condominium instruments.” This chapter shall be deemed to supersede the Horizontal Property Act, §§ 55-79.1 through 55-79.38, and no condominium shall be established under the latter on or after July 1, 1974. But this chapter shall not be construed to affect the validity of any provision of any condominium instrument recorded prior to July 1, 1974. Nor shall Article 4 (§ 55-79.86 et seq.) of this chapter be deemed to supersede §§ 55-79.16 through 55-79.31 of the Horizontal Property Act as to any condominiums established prior to the effective date hereof.

B. This chapter shall not apply to condominiums located outside the Commonwealth. Sections 55-79.88 through 55-79.94 and §§ 55-79.98 through 55-79.103 shall apply to all contracts for the disposition of condominium units signed in the Commonwealth by any person, unless exempt under § 55-79.87.

# MERCERTRIGIANI

C. Subsection B of § 55-79.79 and § 55-79.94 do not apply to the declarant of a conversion condominium if that declarant is a proprietary lessees' association that, immediately before the creation of the condominium, owned fee simple title to or a fee simple reversionary interest in the real estate described pursuant to subdivision (a) (3) of § 55-79.54.

## **§ 55-79.41. Definitions.** When used in this chapter:

*“Capital components”* means those items, whether or not a part of the common elements, for which the unit owners' association has the obligation for repair, replacement or restoration and for which the executive organ determines funding is necessary.

*“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.

*“Common interest community manager”* means the same as that term is defined in § 54.1-2345.

*“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

## MERCERTRIGIANI

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.*).

*“Contractible 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 contractible 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

## MERCER TRIGIANI

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.

“*Electronic transmission*” means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process. Any term used in this definition that is defined in § 59.1-480 of the Uniform Electronic Transactions Act shall have the meaning set forth in such section.

“*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.

“*Expandable condominium*” means a condominium to which additional land may be added in accordance with the provisions of the declaration and of this chapter.

“*Financial update*” means an update of the financial information referenced in subdivisions C 2 through C 7 of § 55-79.97.

“*Future common expenses*” means common expenses for which assessments are not yet due and payable.

“*Identifying number*” means one or more letters and/or numbers that identify only one unit in the condominium.

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



## MERCER TRIGIANI

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

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

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

*“Meeting”* or *“meetings”* means the formal gathering of the executive organ where the business of the unit owners’ association is discussed or transacted.

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

*“Offer”* means any inducement, solicitation, or attempt to encourage any person or persons to acquire any legal or equitable interest in a condominium unit, except as security for a debt. Nothing shall be considered an “offer” which expressly states that the condominium has not been registered with the Common Interest Community Board and

## MERCERTRIGIANI

that no unit in the condominium can or will be offered for sale until such time as the condominium has been so registered.

*“Officer”* means any member of the executive organ or official of the unit owners’ association.

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

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

*“Purchaser”* means any person or persons, other than a declarant, who acquire by means of a voluntary transfer a legal or equitable interest in a condominium unit, other than (i) a leasehold interest, including renewal options, of less than 20 years or (ii) as security for a debt.

*“Resale certificate update”* means an update of the financial information referenced in subdivisions C 2 through C 9 and C 12 of § 55-79.97. The update shall include a copy of the original resale certificate.

*“Settlement agent”* means the same as that term is defined in § 6.1-2.20.

*“Size”* means the number of cubic feet, or the number of square feet of ground and/or floor space, within each unit as computed by reference to the plat and plans and rounded off to a whole number. Certain spaces within the units including, without limitation, attic, basement, and/or garage space may, but need not, be omitted from such calculation or

# MERCERTRIGIANI

partially discounted by the use of a ratio, so long as the same basis of calculation is employed for all units in the condominium, and so long as that basis is described in the declaration.

*“Special declarant rights”* means any right reserved for the benefit of a declarant, or of a person or group of persons that becomes a declarant, to (i) expand an expandable condominium, (ii) contract a contractible condominium, (iii) convert convertible land or convertible space or both, (iv) appoint or remove any officers of the unit owners’ association or the executive organ pursuant to subsection A of § 55-79.74, (v) exercise any power or responsibility otherwise assigned by any condominium instrument or by this chapter to the unit owners’ association, any officer or the executive organ, or (vi) 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.

**§ 55-79.41:1. Variation by agreement.** Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived. A declarant may not act under power of attorney or use any other device to evade the limitations or prohibitions of this chapter or of the condominium instruments.

**§ 55-79.42. Separate assessments, titles and taxation.** Except as provided in the following sentence, each condominium unit constitutes for all purposes a separate parcel of real estate. If there is any unit owner other than the declarant, each unit, together with its common element interest, but excluding its common element interest in convertible land and in any withdrawable land within which the declarant has the right to create units and/or limited common elements shall be

## MERCERTRIGIANI

separately assessed and taxed. Each convertible land and withdrawable land within which the declarant has the right to create units and/or limited common elements shall be separately assessed and taxed against the declarant.

### **§ 55-79.43. County and municipal ordinances; nonconforming conversion condominiums; applicability of Uniform Statewide Building Code; other regulations.**

A. No zoning or other land use ordinance shall prohibit condominiums as such by reason of the form of ownership inherent therein. Neither shall any condominium be treated differently by any zoning or other land use ordinance which would permit a physically identical project or development under a different form of ownership. Except as provided in subsection E, no local government may require further review or approval to record condominium instruments when a property has previously complied with subdivision, site plan, zoning, or other applicable land use regulations.

B. Subdivision and site plan ordinances in any county, city or town in the Commonwealth shall apply to any condominium in the same manner as such ordinances would apply to a physically identical project or development under a different form of ownership; however, the declarant need not apply for or obtain subdivision approval to record condominium instruments if site plan approval for the land being submitted to the condominium has first been obtained.

C. During development of a condominium containing additional land or withdrawable land, phase lines created by the condominium instruments shall not be considered property lines for purposes of subdivision. If the condominium can no longer be expanded by the addition of additional land, then the owner of the land not part of the condominium shall subdivide such land prior to its conveyance, unless such land is subject to an approved site plan as provided in subsection B of this section, or prior to modification of such approved site plan. In the event of any conveyance of land within phase lines of the condominium, the condominium and any lot created by such conveyance shall be deemed to comply with the local subdivision ordinance, provided such land is subject to an approved site plan.

## MERCERTRIGIANI

D. During the period of declarant control and as long as the declarant has the right to create additional units or to complete the common elements, the declarant has the authority to execute, file, and process any subdivision, site plan, zoning, or other land use applications or disclosures, including conditional zoning proffers and agreements incidental thereto that do not create an affirmative obligation on the unit owners' association without its consent, with respect to the common elements or applications affecting more than one unit, notwithstanding that the declarant is not the owner of the land.

In accordance with subsection B of § 55-79.80, once the declarant no longer has such authority, the executive organ of the unit owners' association, if any, and if not, then a representative duly appointed by the unit owners' association, shall have the authority to execute, file, and process any subdivision, site plan, zoning, or other land use applications or disclosures, including conditional zoning proffers and agreements incidental thereto that do not create an affirmative obligation on the declarant without its consent, with respect to the common elements or applications affecting more than one unit, notwithstanding that the unit owners' association is not the owner of the land. Such applications shall not adversely affect the rights of the declarant to develop additional land. For purposes of obtaining building and occupancy permits, the unit owner (including the declarant if the declarant is the unit owner) shall apply for permits for the unit, and the unit owners' association shall apply for permits for the common elements, except that the declarant shall apply for permits for convertible land.

E. Counties, cities and towns may provide by ordinance that proposed conversion condominiums and the use thereof, which do not conform to the zoning, land use and site plan regulations of the respective county or city in which the property is located, shall secure a special use permit, a special exception, or variance, as the case may be, prior to such property becoming a conversion condominium. A request for such a special use permit, special exception, or variance filed on or after July 1, 1982, shall be granted if the applicant can demonstrate to the reasonable satisfaction of the local authority that the nonconformities are not likely to be adversely affected by the proposed conversion. No action on any such request shall be unreasonably delayed. In the event of an approved conversion to condominium ownership, counties, cities, towns, sanitary districts, or other political subdivisions may impose such charges and fees as are lawfully imposed by such political subdivisions as a result of

## MERCERTRIGIANI

construction of new structures to the extent that such charges and fees, or portions of such charges and fees, imposed upon property subject to such conversions may be reasonably related to greater or additional services provided by the political subdivision as a result of the conversion.

F. Nothing in this section shall be construed to permit application of any provision of the Uniform Statewide Building Code (§ 36-97 et seq.) or any local ordinances regulating design and construction of roads, sewer and water lines, storm water management facilities and other public infrastructure, to a condominium in a manner different from the manner in which such provision is applied to other buildings of similar physical form and nature of occupancy.

### **§ 55-79.44. Eminent domain.**

(a) If any portion of the common elements is taken by eminent domain, the award therefor shall be paid to the unit owners' association. Provided, however, that the portion of the award attributable to the taking of any permanently assigned limited common element shall be allocated by the decree to the unit owner of the unit to which that limited common element was so assigned at the time of the taking. If that limited common element was permanently assigned to more than one unit at the time of the taking, then the portion of the award attributable to the taking thereof shall be allocated in equal shares to the unit owners of the units to which it was so assigned or in such other shares as the condominium instruments may specify for this express purpose. A permanently assigned limited common element is a limited common element which cannot be reassigned or which can be reassigned only with the consent of the unit owner or owners of the unit or units to which it is assigned in accordance with § 55-79.57.

(b) If one or more units is taken by eminent domain, the undivided interest in the common elements appertaining to any such unit shall thenceforth appertain to the remaining units, being allocated to them in proportion to their respective undivided interests in the common elements. The court shall enter a decree reflecting the reallocation of undivided interests produced thereby, and the award shall include, without limitation, just compensation to the unit owner of any unit taken for his undivided interest in the common elements as well as for his unit.

## MERCERTRIGIANI

(c) If portions of any unit are taken by eminent domain, the court shall determine the fair market value of the portions of such unit not taken, and the undivided interest in the common elements appertaining to any such units shall be reduced, in the case of each such unit, in proportion to the diminution in the fair market value of such unit resulting from the taking. The portions of undivided interest in the common elements thereby divested from the unit owners of any such units shall be reallocated among those units and the other units in the condominium in proportion to their respective undivided interests in the common elements, with any units partially taken participating in such reallocation on the basis of their undivided interests as reduced in accordance with the preceding sentence. The court shall enter a decree reflecting the reallocation of undivided interests produced thereby, and the award shall include, without limitation, just compensation to the unit owner of any unit partially taken for that portion of his undivided interest in the common elements divested from him by operation of the first sentence of this subsection and not revested in him by operation of the following sentence, as well as for that portion of his unit taken by eminent domain.

(d) If, however, the taking of a portion of any unit makes it impractical to use the remaining portion of that unit for any lawful purpose permitted by the condominium instruments, then the entire undivided interest in the common elements appertaining to that unit shall thenceforth appertain to the remaining units, being allocated to them in proportion to their respective undivided interests in the common elements, and the remaining portion of that unit shall thenceforth be a common element. The court shall enter a decree reflecting the reallocation of undivided interests produced thereby, and the award shall include, without limitation, just compensation to the unit owner of such unit for his entire undivided interest in the common elements and for his entire unit.

(e) Votes in the unit owners' association, rights to future common profits, and liabilities for future common expenses not specially assessed, appertaining to any unit or units taken or partially taken by eminent domain, shall thenceforth appertain to the remaining units, being allocated to them in proportion to their relative voting strength in the unit owners' association, with any units partially taken participating in such reallocation as though their voting strength in the unit owners' association had been reduced in proportion to the reduction in their

# MERCERTRIGIANI

undivided interests in the common elements, and the decree of the court shall provide accordingly.

(f) The decree of the court shall require the recordation thereof among the land records of the city or county in which the condominium is located.

## **Article 2.**

### **Creation, Alteration and Termination of Condominiums.**

**§ 55-79.45. How condominium may be created.** No condominium shall come into existence except by the recordation of condominium instruments pursuant to the provisions of this chapter. No condominium instruments shall be recorded unless all units located or to be located on any portion of the submitted land, other than within the boundaries of any convertible lands, are depicted on plats and plans that comply with the provisions of subsections A and B of § 55-79.58. The foreclosure of any mortgage, deed of trust, or other lien shall not be deemed, *ex proprio vigore*, to terminate the condominium.

### **§ 55-79.46. Release of liens.**

A. At the time of the conveyance to the first purchaser of each condominium unit following the recordation of the declaration, every mortgage, deed of trust, any other perfected lien, or any mechanics' or material men's liens, affecting all of the condominium or a greater portion thereof than the condominium unit conveyed, shall be paid and satisfied of record, or the declarant shall forthwith have the said condominium unit released of record from all such liens not so paid and satisfied. The provisions of this subsection shall not apply, however, to any withdrawable land in a contractible condominium, nor shall any provision of this subsection be construed to prohibit the unit owners' association from mortgaging or causing a deed of trust to be placed on any portion of the condominium within which no units are located, so long as any time limit specified pursuant to § 55-79.74 has expired, and so long as the bylaws authorize the same. This subsection shall not apply to any lien on more than one condominium unit in a condominium in which all units are restricted to nonresidential use and in which all unit owners whose condominium units will be subject to such lien expressly agree to assume or take subject thereto.



## MERCERTRIGIANI

B. In the event that any lien, other than a deed of trust or mortgage, becomes effective against two or more condominium units subsequent to the creation of the condominium, any unit owner may remove his condominium unit from that lien by payment of the amount attributable to his condominium unit. Such amount shall be computed by reference to the liability for common expenses appertaining to that condominium unit pursuant to subsection D of § 55-79.83. Subsequent to such payment, discharge or other satisfaction, the unit owner of that condominium unit shall be entitled to have that lien released as to his condominium unit in accordance with the provisions of § 55-66.4, and the unit owners' association shall not assess, or have a valid lien against, that condominium unit for any portion of the common expenses incurred in connection with that lien, notwithstanding anything to the contrary in §§ 55-79.83 and 55-79.84.

**§ 55-79.47. Description of condominium units.** After the creation of the condominium, no description of a condominium unit shall be deemed vague, uncertain, or otherwise insufficient or infirm which sets forth the identifying number of that unit, the name of the condominium, the name of the city or county wherein the condominium is situated, and either the deed book and page number where the first page of the declaration is recorded or else the document number assigned to the declaration by the clerk. Any such description shall be deemed to include the undivided interest in the common elements appertaining to such unit even if such interest is not defined or referred to therein.

**§ 55-79.48. Execution of condominium instruments.** The declaration and bylaws, and any amendments to either made pursuant to § 55-79.71 shall be duly executed by or on behalf of all of the owners and lessees of the submitted land. But the phrase "owners and lessees" in the preceding sentence and in § 55-79.63 does not include, in their capacity as such, any mortgagee, any trustee or beneficiary under a deed of trust, any other lien holder, any person having an equitable interest under any contract for the sale and/or lease of a condominium unit, any lessee whose leasehold interest does not extend to any portion of the common elements, any person whose land is subject to an easement included in the condominium or, in the case of a leasehold condominium subject to any lease or leases executed before July 1, 1962, any lessor of the submitted land who is not a declarant.

**§ 55-79.49. Recordation of condominium instruments.**

All amendments and certifications of condominium instruments shall set forth the name of the city or county in which the condominium is located, and the deed book and page number where the first page of the declaration is recorded. All condominium instruments and all amendments and certifications thereof shall be recorded in every city and county wherein any portion of the condominium is located. The condominium instruments, amendments and certifications shall set forth the name of the condominium and either the deed book and page number where the first page of the declaration is recorded or the document number assigned to the declaration by the clerk. Wherever the phrase “city or county” appears in this chapter, the disjunctive shall be deemed to include the conjunctive and the singular shall be deemed to include the plural.

**§ 55-79.50. Construction of condominium instruments.**

Except to the extent otherwise provided by the condominium instruments:

(a) The terms defined in § 55-79.41 shall be deemed to have the meanings therein specified wherever they appear in the condominium instruments unless the context otherwise requires.

(b) To the extent that walls, floors and/or ceilings are designated as the boundaries of the units or of any specified units, all lath, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces thereof, shall be deemed a part of such units, while all other portions of such walls, floors and/or ceilings shall be deemed a part of the common elements.

(c) If any chutes, flues, ducts, conduits, wires, bearing walls, bearing columns or any other apparatus lies partially within and partially outside of the designated boundaries of a unit, any portions thereof serving only that unit shall be deemed a part of that unit, while any portions thereof serving more than one unit or any portion of the common elements shall be deemed a part of the common elements.

(d) Subject to the provisions of subsection (c) hereof, all space, interior partitions and other fixtures and improvements within the boundaries of a unit shall be deemed a part of that unit.

## MERCERTRIGIANI

(e) Any shutters, awnings, doors, windows, window boxes, doorsteps, porches, balconies, patios and any other apparatus designed to serve a single unit, but located outside the boundaries thereof, shall be deemed a limited common element appertaining to that unit exclusively; provided that if a single unit's electrical master switch is located outside the designated boundaries of the unit, the switch and its cover shall be deemed a part of the common elements.

**§ 55-79.51. Complementarity of condominium instruments; controlling construction.** The condominium instruments shall be construed together and shall be deemed to incorporate one another to the extent that any requirement of this chapter as to the content of one shall be deemed satisfied if the deficiency can be cured by reference to any of the others. In the event of any conflict between the condominium instruments, the declaration shall control; but particular provisions shall control more general provisions, except that a construction conformable with the statute shall in all cases control over any construction inconsistent therewith.

**§ 55-79.52. Validity of condominium instruments; discrimination prohibited.**

A. All provisions of the condominium instruments shall be deemed severable, and any unlawful provision thereof shall be void.

B. No provision of the condominium instruments shall be deemed void by reason of the rule against perpetuities.

C. No restraint on alienation shall discriminate or be used to discriminate on any basis prohibited under the Virginia Fair Housing Law (§ 36-96.1 et seq.).

D. Subject to the provisions of subsection C, the rule of property law known as the rule restricting unreasonable restraints on alienation shall not be applied to defeat any provision of the condominium instruments restraining the alienation of condominium units other than such units as may be restricted to residential use only.

**§ 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. Except as provided in subsection B, the prevailing party shall be entitled to recover reasonable attorney fees, costs expended in the matter, and interest on the judgement as provided in § 8.01-382.

B. In actions against a unit owner for nonpayment of assessments in which the unit owner has failed to pay assessments levied by the unit owners' association (1) on more than one unit or (2) such unit owner has had legal actions taken against them for nonpayment of any prior assessment and the prevailing party is the association on its executive organ or any managing agent on behalf of the association, the prevailing party shall be awarded reasonable attorney fees, costs expended in the matter, and interest on the judgement as provided in subsection A, even if the proceeding is settled prior to judgment. The delinquent unit owner shall be personally responsible for reasonable attorney fees and costs expended in the matter by the unit owners' association whether any judicial proceedings are filed.

C. 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.

**§ 55-79.54. Contents of declaration.**

(a) The declaration for every condominium shall contain the following:

(1) The name of the condominium, which name shall include the word "condominium" or be followed by the words "a condominium."

## MERCERTRIGIANI

(2) The name of the city or county in which the condominium is located.

(3) A legal description by metes and bounds of the land submitted to this chapter.

(4) A description or delineation of the boundaries of the units, including the horizontal (upper and lower) boundaries, if any, as well as the vertical (lateral or perimetric) boundaries.

(5) A description or delineation of any limited common elements, other than those which are limited common elements by virtue of subsection (e) of §55-79.50, showing or designating the unit or units to which each is assigned.

(6) A description or delineation of all common elements not within the boundaries of any convertible lands which may subsequently be assigned as limited common elements, together with a statement that (i) they may be so assigned and a description of the method whereby any such assignments shall be made in accordance with the provisions of § 55-79.57 or (ii) once assigned, the conditions under which they may be unassigned and converted to common elements in accordance with § 55-79.57.

(7) The allocation to each unit of an undivided interest in the common elements in accordance with the provisions of § 55-79.55.

(7a) A statement of the extent of the declarant's obligation to complete improvements labeled "(NOT YET COMPLETED)" or to begin and complete improvements labeled "(NOT YET BEGUN)" on plats recorded pursuant to the requirements of this chapter. Such statement shall be specific as to the type and quality of materials to be used, the size or capacity of the improvements, when material, and the time by which such improvements shall be completed.

(8) Such other matters as the declarant deems appropriate.

(b) If the condominium contains any convertible land the declaration shall also contain the following:

(1) A legal description by metes and bounds of each convertible land within the condominium.

(2) A statement of the maximum number of units that may be created within each such convertible land.

## MERCERTRIGIANI

(3) A statement, with respect to each such convertible land, of the maximum percentage of the aggregate land and floor area of all units that may be created therein that may be occupied by units not restricted exclusively to residential use.

(4) A statement of the extent to which any structure erected on any convertible land will be compatible with structures on other portions of the submitted land in terms of quality of construction, the principal materials to be used, and architectural style.

(5) A description of all other improvements that may be made on each convertible land within the condominium.

(6) A statement that any units created within each convertible land will be substantially identical to the units on other portions of the submitted land, or a statement describing in detail what other types of units may be created therein.

(7) A description of the declarant's reserved right, if any, to create limited common elements within any convertible land, and/or to designate common elements therein which may subsequently be assigned as limited common elements, in terms of the types, sizes, and maximum number of such elements within each such convertible land.

Provided, that plats and plans may be recorded with the declaration and identified therein to supplement information furnished pursuant to items (1), (4), (5), (6) and (7), and that item (3) need not be complied with if none of the units on other portions of the submitted land are restricted exclusively to residential use.

(c) If the condominium is an expandable condominium, the declaration shall also contain the following:

(1) The explicit reservation of an option to expand the condominium.

(2) A statement of any limitations on that option, including, without limitation, a statement as to whether the consent of any unit owners shall be required, and if so, a statement as to the method whereby such consent shall be ascertained; or a statement that there are no such limitations.

## MERCER TRIGIANI

(3) A time limit, not exceeding 10 years from the recording of the declaration, upon which the option to expand the condominium shall expire, together with a statement of the circumstances, if any, which will terminate that option prior to the expiration of the time limit so specified. After the expiration of any period of declarant control reserved pursuant to subsection (a) of § 55-79.74, such time limit may be extended by an amendment to the declaration made pursuant to § 55-79.71.

(4) A legal description by metes and bounds of all land that may be added to the condominium, henceforth referred to as “additional land.”

(5) A statement as to whether, if any of the additional land is added to the condominium, all of it or any particular portion of it must be added, and if not, a statement of any limitations as to what portions may be added or a statement that there are no such limitations.

(6) A statement as to whether portions of the additional land may be added to the condominium at different times, together with any limitations fixing the boundaries of those portions by legal descriptions setting forth the metes and bounds thereof and/or regulating the order in which they may be added to the condominium.

(7) A statement of any limitations as to the locations of any improvements that may be made on any portions of the additional land added to the condominium, or a statement that no assurances are made in that regard.

(8) A statement of the maximum number of units that may be created on the additional land. If portions of the additional land may be added to the condominium and the boundaries of those portions are fixed in accordance with item (6) the declaration shall also state the maximum number of units that may be created on each such portion added to the condominium. If portions of the additional land may be added to the condominium and the boundaries of those portions are not fixed in accordance with item (6) then the declaration shall also state the maximum number of units per acre that may be created on any such portion added to the condominium.

(9) A statement, with respect to the additional land and to any portion or portions thereof that may be added to the condominium,

## MERCERTRIGIANI

of the maximum percentage of the aggregate land and floor area of all units that may be created thereon that may be occupied by units not restricted exclusively to residential use.

(10) A statement of the extent to which any structures erected on any portion of the additional land added to the condominium will be compatible with structures on the submitted land in terms of quality of construction, the principal materials to be used, and architectural style, or a statement that no assurances are made in those regards.

(11) A description of all other improvements that will be made on any portion of the additional land added to the condominium, or a statement of any limitations as to what other improvements may be made thereon, or a statement that no assurances are made in that regard.

(12) A statement that any units created on any portion of the additional land added to the condominium will be substantially identical to the units on the submitted land, or a statement of any limitations as to what types of units may be created thereon, or a statement that no assurances are made in that regard.

(13) A description of the declarant's reserved right, if any, to create limited common elements within any portion of the additional land added to the condominium, and/or to designate common elements therein which may subsequently be assigned as limited common elements, in terms of the types, sizes, and maximum number of such elements within each such portion, or a statement that no assurances are made in those regards.

Provided, that plats and plans may be recorded with the declaration and identified therein to supplement information furnished pursuant to items (4), (5), (6), (7), (10), (11), (12) and (13), and that item (9) need not be complied with if none of the units on the submitted land are restricted exclusively to residential use.

(d) If the condominium is a contractable condominium the declaration shall also contain the following:

(1) The explicit reservation of an option to contract the condominium.

(2) A statement of any limitations on that option, including, without limitation, a statement as to whether the consent of any unit owners shall be required, and if so, a statement as to the method whereby



## MERCERTRIGIANI

such consent shall be ascertained; or a statement that there are no such limitations.

(3) A time limit, not exceeding 10 years from the recording of the declaration, upon which the option to contract the condominium shall expire, together with a statement of the circumstances, if any, which will terminate that option prior to the expiration of the time limit so specified.

(4) A legal description by metes and bounds of all land that may be withdrawn from the condominium, henceforth referred to as “withdrawable land.”

(5) A statement as to whether portions of the withdrawable land may be withdrawn from the condominium at different times, together with any limitations fixing the boundaries of those portions by legal descriptions setting forth the metes and bounds thereof and/or regulating the order in which they may be withdrawn from the condominium.

(6) A legal description by metes and bounds of all of the submitted land to which the option to contract the condominium does not extend.

Provided, that plats may be recorded with the declaration and identified therein to supplement information furnished pursuant to items (4), (5) and (6) and that item (6) shall not be construed in derogation of any right the declarant may have to terminate the condominium in accordance with the provisions of § 55-79.72:1.

(e) If the condominium is a leasehold condominium, then with respect to any ground lease or other leases the expiration or termination of which will or may terminate or contract the condominium, the declaration shall set forth the city or county wherein the same are recorded and the deed book and page number where the first page of each such lease is recorded; and the declaration shall also contain the following:

(1) The date upon which each such lease is due to expire.

(2) A statement as to whether any land and/or improvements will be owned by the unit owners in fee simple, and if so,

## MERCERTRIGIANI

either (a) a description of the same, including without limitation a legal description by metes and bounds of any such land, or (b) a statement of any rights the unit owners shall have to remove such improvements within a reasonable time after the expiration or termination of the lease or leases involved, or a statement that they shall have no such rights.

(3) A statement of the rights the unit owners shall have to redeem the reversion or any of the reversions, or a statement that they shall have no such rights.

Provided, that after the recording of the declaration, no lessor who executed the same, and no successor in interest to such lessor, shall have any right or power to terminate any part of the leasehold interest of any unit owner who makes timely payment of his share of the rent to the person or persons designated in the declaration for the receipt of such rent and who otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. Acquisition or reacquisition of such a leasehold interest by the owner of the reversion or remainder shall not cause a merger of the leasehold and fee simple interests unless all leasehold interests in the condominium are thus acquired or reacquired.

(f) Wherever this section requires a legal description by metes and bounds of land that is submitted to this chapter or that may be added to or withdrawn from the condominium, such requirement shall be deemed satisfied by any legally sufficient description and shall be deemed to require a legally sufficient description of any easements that are submitted to this chapter or that may be added to or withdrawn from the condominium, as the case may be. In the case of each such easement, the declaration shall contain the following:

(1) A description of the permitted use or uses.

(2) If less than all of those entitled to the use of all of the units may utilize such easement, a statement of the relevant restrictions and limitations on utilization.

(3) If any persons other than those entitled to the use of the units may utilize such easement, a statement of the rights of others to utilization of the same.

## MERCER TRIGIANI

(g) Wherever this section requires a legal description by metes and bounds of land that is submitted to this chapter or that may be added to or withdrawn from the condominium, an added requirement shall be a separate legally sufficient description of all lands in which the unit owners shall or may be tenants in common or joint tenants with any other persons, and a separate legally sufficient description of all lands in which the unit owners shall or may be life tenants. No units shall be situated on any such lands, however, and the declaration shall describe the nature of the unit owners' estate therein. No such lands shall be shown on the same plat or plats showing other portions of the condominium, but shall be shown instead on separate plats.

### **§ 55-79.55. Allocation of interests in the common elements.**

(a) The declaration may allocate to each unit depicted on plats and plans that comply with subsections A and B of § 55-79.58 an undivided interest in the common elements proportionate to either the size or par value of each unit.

(b) Otherwise, the declaration shall allocate to each such unit an equal undivided interest in the common elements, subject to the following exception: Each convertible space so depicted shall be allocated an undivided interest in the common elements proportionate to the size of each such space, vis-à-vis the aggregate size of all units so depicted, while the remaining undivided interest in the common elements shall be allocated equally to the other units so depicted.

(c) The undivided interests in the common elements allocated in accordance with subsection (a) or (b) hereof shall add up to 1 if stated as fractions or 100% if stated as percentages.

(d) If, in accordance with subsection (a) or (b) hereof, an equal undivided interest in the common elements is allocated to each unit, the declaration may simply state that fact and need not express the fraction or percentage so allocated.

(e) Otherwise, the undivided interest allocated to each unit in accordance with subsection (a) or (b) hereof shall be reflected by a table in the declaration, or by an exhibit or schedule accompanying the declaration and recorded simultaneously therewith, containing three columns. The first column shall identify the units, listing them serially or

grouping them together in the case of units to which identical undivided interests are allocated. Corresponding figures in the second and third columns shall set forth the respective areas or par values of those units and the fraction or percentage of undivided interest in the common elements allocated thereto.

(f) Except to the extent otherwise expressly provided by this chapter, the undivided interest in the common elements allocated to any unit shall not be altered, and any purported transfer, encumbrance, or other disposition of that interest without the unit to which it appertains shall be void.

(g) The common elements shall not be subject to any suit for partition until and unless the condominium is terminated.

**§ 55-79.56. Reallocation of interests in common elements.**

(a) If a condominium contains any convertible land or is an expandable condominium, then the declaration shall not allocate undivided interests in the common elements on the basis of par value unless the declaration:

(1) Prohibits the creation of any units not substantially identical to the units depicted on the plats and plans recorded pursuant to subsections A and B of § 55-79.58, or

(2) Prohibits the creation of any units not described pursuant to subdivision (b) (6) of § 55-79.54 (in the case of convertible lands) and subdivision (c) (12) of § 55-79.54 (in the case of additional land), and contains from the outset a statement of the par value that shall be assigned to every such unit that may be created.

(b) Interests in the common elements shall not be allocated to any units to be created within any convertible land or within any additional land until plats and plans depicting the same are recorded pursuant to subsection C of § 55-79.58. But simultaneously with the recording of such plats and plans the declarant shall execute and record an amendment to the declaration reallocating undivided interests in the common elements so that the units depicted on such plats and plans shall be allocated undivided interests in the common elements on the same basis as the

## MERCERTRIGIANI

units depicted on the plats and plans recorded simultaneously with the declaration pursuant to subsections A and B of § 55-79.58.

(c) If all of a convertible space is converted into common elements, including without limitation limited common elements, then the undivided interest in the common elements appertaining to such space shall thenceforth appertain to the remaining units, being allocated among them in proportion to their undivided interests in the common elements. The principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall forthwith prepare, execute, and record an amendment to the declaration reflecting the reallocation of undivided interests produced thereby.

(d) In the case of a leasehold condominium, if the expiration or termination of any lease causes a contraction of the condominium which reduces the number of units, then the undivided interest in the common elements appertaining to any units thereby withdrawn from the condominium shall thenceforth appertain to the remaining units, being allocated among them in proportion to their undivided interests in the common elements. The principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall forthwith prepare, execute, and record an amendment to the declaration reflecting the reallocation of undivided interests produced thereby.

### **§ 55-79.57. Assignments of limited common elements; conversion to common element.**

A. All assignments and reassignments of limited common elements shall be reflected by the condominium instruments. No limited common element shall be assigned or reassigned except in accordance with the provisions of this chapter. No amendment to any condominium instrument shall alter any rights or obligations with respect to any limited common elements without the consent of all unit owners adversely affected thereby as evidenced by their execution of such amendment, except to the extent that the condominium instruments expressly provided otherwise prior to the first assignment of that limited common element.

B. Unless expressly prohibited by the condominium instruments, a limited common element may be reassigned or converted to a common

## MERCERTRIGIANI

element upon written application of the unit owners concerned to the principal officer of the unit owners' association, or to such other officer or officers as the condominium instruments may specify. The officer or officers to whom such application is duly made shall forthwith prepare and execute an amendment to the declaration reassigning all rights and obligations with respect to the limited common element involved. Such amendment shall be executed by the unit owner or unit owners of the unit or units concerned and recorded by an officer of the unit owners' association or his agent following payment by the unit owner or unit owners of the unit or units concerned of all reasonable costs for the preparation, acknowledgment and recordation thereof. The amendment shall become effective when recorded.

C. A common element not previously assigned as a limited common element shall be so assigned only in pursuance of subdivision (a) (6) of § 55-79.54. The amendment to the declaration making such an assignment shall be prepared and executed by the declarant, the principal officer of the unit owners' association, or by such other officer or officers as the condominium instruments may specify. Such amendment shall be recorded by the declarant or his agent, without charge to any unit owner, or by an officer of the unit owners' association or his agent following payment by the unit owner or unit owners of the unit or units concerned of all reasonable costs for the preparation, acknowledgment and recordation thereof. The amendment shall become effective when recorded, and the recordation thereof shall be conclusive evidence that the method prescribed pursuant to subdivision (a) (6) of § 55-79.54 was adhered to. A copy of the amendment shall be delivered to the unit owner or unit owners of the unit or units concerned. If executed by the declarant, such an amendment recorded prior to July 1, 1983, shall not be invalid because it was not prepared by an officer of the unit owners' association.

D. If the declarant does not prepare and record an amendment to the declaration to effect the assignment of common elements as limited common elements in accordance with rights reserved in the condominium instruments, but has reflected an intention to make such assignments in deeds conveying units, then the principal officer of the unit owners' association may prepare, execute and record such an amendment at any time after the declarant ceases to be a unit owner.

## MERCER TRIGIANI

E. The declarant may unilaterally record an amendment to the declaration converting a limited common element appurtenant to a unit owned by the declarant into a common element as long as the declarant continues to own the unit.

### **§ 55-79.58. Contents of plats and plans.**

A. There shall be recorded simultaneously with the declaration one or more plats of survey showing the location and dimensions of the submitted land, the location and dimensions of any convertible lands within the submitted land, the location and dimensions of any existing improvements, the intended location and dimensions of any contemplated improvements which are to be located on any portion of the submitted land other than within the boundaries of any convertible lands, and, to the extent feasible, the location and dimensions of all easements appurtenant to the submitted land or otherwise submitted to this chapter as a part of the common elements. If the submitted land is not contiguous, then the plats shall indicate the distances between the parcels constituting the submitted land. The plats shall label every convertible land as a convertible land, and if there is more than one such land the plats shall label each such land with one or more letters and/or numbers different from those designating any other convertible land and different also from the identifying number of any unit. The plats shall show the location and dimensions of any withdrawable lands, and shall label each such land as a withdrawable land. The plats shall show the location and dimensions of any additional lands and shall label each such land as an additional land. If, with respect to any portion or portions, but less than all, of the submitted land, the unit owners are to own only an estate for years, the plats shall show the location and dimensions of any such portions, and shall label each such portion as a leased land. If there is more than one withdrawable land, or more than one leased land, the plats shall label each such land with one or more letters and/or numbers different from those designating any convertible land or other withdrawable or leased land, and different also from the identifying number of any unit. The plats shall show all easements to which the submitted land or any portion thereof is subject, and shall show the location and dimensions of all such easements to the extent feasible. The plats shall also show all encroachments by or on any portion of the condominium. In the case of any improvements located or to be located on any portion of the submitted land other than within the boundaries of any convertible lands, the plats shall indicate which, if any, have not been begun by the

## MERCER TRIGIANI

use of the phrase “(NOT YET BEGUN),” and which, if any, have been begun but have not been substantially completed by the use of the phrase “(NOT YET COMPLETED).” In the case of any units the vertical boundaries of which lie wholly or partially outside of structures for which plans pursuant to subsection B are simultaneously recorded, the plats shall show the location and dimensions of such vertical boundaries to the extent that they are not shown on such plans, and the units or portions thereof thus depicted shall bear their identifying numbers. Each plat shall be certified in a recorded document as to its accuracy and compliance with the provisions of this subsection by a licensed land surveyor, and the said surveyor shall certify in such document or on the face of the plat that all units or portions thereof depicted thereon pursuant to the preceding sentence of this subsection have been substantially completed. The specification within this subsection of items that shall be shown on the plats shall not be construed to mean that the plats shall not also show all other items customarily shown or hereafter required for land title surveys.

B. There shall also be recorded, simultaneously with the declaration, plans of every structure which contains or constitutes all or part of any unit or units, and which is located on any portion of the submitted land other than within the boundaries of any convertible lands. The plans shall show the location and dimensions of the vertical boundaries of each unit to the extent that such boundaries lie within or coincide with the boundaries of such structures, and the units or portions thereof thus depicted shall bear their identifying numbers. In addition, each convertible space thus depicted shall be labeled a convertible space. The horizontal boundaries of each unit having horizontal boundaries shall be identified on the plans with reference to established datum. Unless the condominium instruments expressly provide otherwise, it shall be presumed that in the case of any unit not wholly contained within or constituting one or more such structures, the horizontal boundaries thus identified extend, in the case of each such unit, at the same elevation with regard to any part of such unit, lying outside of such structures, subject to the following exception: In the case of any such unit which does not lie over any other unit other than basement units, it shall be presumed that the lower horizontal boundary, if any, of that unit lies at the level of the ground with regard to any part of that unit lying outside of such structures. The plans shall be certified on their face or in another recorded document as to their accuracy and compliance with the provisions of this subsection by a licensed architect, licensed engineer or



## MERCER TRIGIANI

licensed land surveyor, and the said architect, engineer or land surveyor shall certify on the plans or in the recorded document that all units or portions thereof depicted thereon have been substantially completed.

C. When converting all or any portion of any convertible land, or adding additional land to an expandable condominium, the declarant shall record, with regard to any structures on the land being converted, or added, either plats of survey conforming to the requirements of subsection A and plans conforming to the requirements of subsection B, or certifications, conforming to the certification requirements of said subsections, of plats and plans previously recorded pursuant to § 55-79.59.

D. Notwithstanding the provisions of subsection A and B, a time-share interest in a unit which has been subjected to a time-share instrument pursuant to § 55-367 may be conveyed prior to substantial completion of that unit if (i) a completion bond has been filed in compliance with subsection B of § 55-79.58:1 and remains in full force and effect until the unit is certified as substantially complete in accordance with subsections A and B and (ii) the settlement agent or title insurance company insuring the time-share estate in the unit certifies to the purchaser in writing, based on information provided by the Common Interest Community Board, that the bond has been filed with the Common Interest Community Board.

E. When converting all or any portion of any convertible space into one or more units and/or limited common elements, the declarant shall record, with regard to the structure or portion thereof constituting that convertible space, plans showing the location and dimensions of the vertical boundaries of each unit and/or limited common elements formed out of such space. Such plans shall be certified as to their accuracy and compliance with the provisions of this subsection by a licensed architect, licensed engineer or licensed land surveyor.

F. For the purposes of subsections A, B, and C, all provisions and requirements relating to units shall be deemed equally applicable to limited common elements. The limited common elements shall be labeled as such, and each limited common element depicted on the plats and plans shall bear the identifying number or numbers of the unit or units to which it is assigned, if it has been assigned, unless the provisions of subsection (e) of § 55-79.50 make such designations unnecessary.

## MERCERTRIGIANI

### **§ 55-79.58:1. Bond to insure completion of improvements.**

A. The declarant shall file with the Common Interest Community Board a bond entered into by the declarant in the sum of 100 percent of the estimated cost of completion, to the extent of the declarant's obligation as stated in the declaration, of all improvements to the common elements of the condominium labeled in the plat or plats as "(NOT YET COMPLETED)" or "(NOT YET BEGUN)" located upon submitted land and which the declarant reasonably believes will not be substantially complete at the time of conveyance of the first condominium unit. Such bond shall be conditioned upon the faithful performance of the declarant's obligation to complete said improvements in strict conformity with the plans and specifications for the same as described in the declaration.

B. The declarant shall file with the Common Interest Community Board a bond entered into by the declarant in the sum of 100 percent of the estimated cost of completion of a unit in which a time-share interest is conveyed before the unit has been certified as substantially complete in accordance with subsections A and B of § 55-79.58. The bond required by this subsection shall be conditioned upon the faithful performance of the declarant's obligation to complete said improvements in strict conformity with the plans and specifications for the same as described in the declaration.

C. All bonds required herein shall be executed by a surety company authorized to transact business in the Commonwealth of Virginia or by such other surety as is satisfactory to the Board.

D. The Board may promulgate reasonable regulations which govern the return of bonds submitted in accordance with this section.

### **§ 55-79.59. Preliminary recordation of plats and plans.**

Plats and plans previously recorded pursuant to § 55-79.54 (a), (b) and (c) may be used in lieu of new plats and plans to satisfy in whole or in part the requirements of § 55-79.56 (b), § 55-79.61 B and/or § 55-79.63 if certifications thereof are recorded by the declarant in accordance with § 55-79.58 A and B; and if such certifications are recorded, the plats and plans which they certify shall be deemed recorded pursuant to § 55-79.58C within the meaning of the three sections aforesaid. All condominium instruments for condominiums created prior to July 1, 1991,

## MERCERTRIGIANI

are hereby validated notwithstanding that the plats were prerecorded as if in compliance with this section and not recorded with amendments converting convertible land or adding additional land if the plats or subsequent amendments contained the required certifications.

**§ 55-79.60. Easement for encroachments.** To the extent that any unit or common element encroaches on any other unit or common element, whether by reason of any deviation from the plats and plans in the construction, repair, renovation, restoration, or replacement of any improvement, or by reason of the settling or shifting of any land or improvement, a valid easement for such encroachment shall exist. The purpose of this section is to protect the unit owners, except in cases of willful and intentional misconduct by them or their agents or employees, and not to relieve the declarant or any contractor, subcontractor, or materialman of any liability which any of them may have by reason of any failure to adhere strictly to the plats and plans.

### **§ 55-79.61. Conversion of convertible lands.**

A. The declarant may convert all or any portion of any convertible land into one or more units and/or limited common elements subject to any restrictions and limitations which the condominium instruments may specify. Any such conversion shall be deemed to have occurred at the time of the recordation of appropriate instruments pursuant to subsection B of this section and subsection C of § 55-79.58.

B. Simultaneously with the recording of plats and plans pursuant to subsection C of § 55-79.58, the declarant shall prepare, execute, and record an amendment to the declaration describing the conversion. Such amendment shall assign an identifying number to each unit formed out of a convertible land and shall reallocate undivided interests in the common elements in accordance with subsection (b) of § 55-79.56. Such amendment shall describe or delineate the limited common elements formed out of the convertible land, showing or designating the unit or units to which each is assigned.

C. All convertible lands shall be deemed a part of the common elements except for such portions thereof as are converted in accordance with the provisions of this section. Until the expiration of the period during which conversion may occur or until actual conversion, whichever occurs first, the declarant alone shall be liable for real estate taxes assessed

## MERCER TRIGIANI

against the convertible land and any improvements thereon and all other expenses in connection with that real estate, and no other unit owner and no other portion of the condominium shall be subject to a claim for payment of those taxes or expenses, and unless the declaration provides otherwise, any income or proceeds from the convertible land and any improvements thereon shall inure to the declarant. No such conversion shall occur after 10 years from the recordation of the declaration, or such shorter period of time as the declaration may specify.

### **§ 55-79.62. Conversion of convertible spaces.**

(a) The declarant may convert all or any portion of any convertible space into one or more units and/or common elements, including, without limitation, limited common elements, subject to any restrictions and limitations which the condominium instruments may specify. Any such conversion shall be deemed to have occurred at the time of the recordation of appropriate instruments pursuant to subsection (b) hereof and subsection B of § 55-79.58.

(b) Simultaneously with the recording of plats and plans pursuant to subsection E of § 55-79.58, the declarant shall prepare, execute, and record an amendment to the declaration describing the conversion. Such amendment shall assign an identifying number to each unit formed out of a convertible space and shall allocate to each unit a portion of the undivided interest in the common elements appertaining to that space. Such amendment shall describe or delineate the limited common elements formed out of the convertible space, showing or designating the unit or units to which each is assigned.

(c) If all or any portion of any convertible space is converted into one or more units in accordance with this section, the declarant shall prepare and execute, and record simultaneously with the amendment to the declaration, an amendment to the bylaws. The amendment to the bylaws shall reallocate votes in the unit owners' association, rights to future common profits, and liabilities for future common expenses not specially assessed, all as in the case of the subdivision of a unit in accordance with subsection D or § 55-79.70.

(d) Any convertible space not converted in accordance with the provisions of this section, or any portion or portions thereof not so

converted, shall be treated for all purposes as a single unit until and unless it is so converted, and the provisions of this chapter shall be deemed applicable to any such space, or portion or portions thereof, as though the same were a unit.

**§ 55-79.63. Expansion of condominium.** No condominium shall be expanded except in accordance with the provisions of the declaration and of this chapter. Any such expansion shall be deemed to have occurred at the time of the recordation of plats and plans pursuant to subsection C of § 55-79.58, together with an amendment to the declaration, duly executed by the declarant, including, without limitation, all of the owners and lessees of the additional land added to the condominium. Such amendment shall contain a legal description by metes and bounds of the land added to the condominium, and shall reallocate undivided interests in the common elements in accordance with the provisions of subsection (b) of § 55-79.56. Such amendment may create convertible or withdrawable lands or both within the land added to the condominium, but this provision shall not be construed in derogation of the time limits imposed by or pursuant to subdivision (d) (3) of § 55-79.54 and subsection C of § 55-79.61.

**§ 55-79.64. Contraction of condominium.** No condominium shall be contracted except in accordance with the provisions of the declaration and of this chapter. Any such contraction shall be deemed to have occurred at the time of the recordation of an amendment to the declaration, executed by the declarant, containing a legal description by metes and bounds of the land withdrawn from the condominium. If portions of the withdrawable land were described pursuant to subdivision (d) (5) of § 55-79.54, then no such portion shall be so withdrawn after the conveyance of any unit on such portion. If no such portions were described, then none of the withdrawable land shall be withdrawn after the first conveyance of any unit thereon.

**§ 55-79.65. Easement to facilitate conversion and expansion.** Subject to any restrictions and limitations the condominium instruments may specify, the declarant shall have a transferable easement over and on the common elements for the purpose of making improvements on the submitted land and any additional land pursuant to the provisions of those instruments and of this chapter, and for the purpose of doing all things reasonably necessary and proper in connection therewith.

**§ 55-79.66. Easement to facilitate sales.** The declarant and his duly authorized agents, representatives, and employees may maintain sales offices and/or model units on the submitted land if and only if the condominium instruments provide for the same and specify the rights of the declarant with regard to the number, size, location, and relocation thereof. Any such sales office or model unit which is not designated a unit by the condominium instruments shall become a common element as soon as the declarant ceases to be a unit owner, and the declarant shall cease to have any rights with regard thereto unless such sales office or model unit is removed forthwith from the submitted land in accordance with a right reserved in the condominium instruments to make such removal.

**§ 55-79.67. Declarant's obligation to complete and restore.**

(a) No covenants, restrictions, limitations, or other representations or commitments in the condominium instruments with regard to anything that is or is not to be done on the additional land, the withdrawable land, or any portion of either, shall be binding as to any portion of either lawfully withdrawn from the condominium or never added thereto except to the extent that the condominium instruments so provide. But in the case of any covenant, restriction, limitation, or other representation or commitment in the condominium instruments or in any other agreement requiring the declarant to add all or any portion of the additional land or to withdraw any portion of the withdrawable land, or imposing any obligations with regard to anything that is or is not to be done thereon or with regard thereto, or imposing any obligations with regard to anything that is or is not to be done on or with regard to the condominium or any portion thereof, this subsection shall not be construed to nullify, limit, or otherwise affect any such obligation.

(a1) The declarant shall complete all improvements labeled "(NOT YET COMPLETED)" on plats recorded pursuant to the requirements of this chapter unless the condominium instruments expressly exempt the declarant from such obligation, and shall, in the case of every improvement labeled "(NOT YET BEGUN)" on such plats, state in the declaration either the extent of the obligation to complete the same or that there is no such obligation.

## MERCERTRIGIANI

(b) To the extent that damage is inflicted on any part of the condominium by any person or persons utilizing the easements reserved by the condominium instruments or created by §§ 55-79.65 and 55-79.66, the declarant together with the person or persons causing the same shall be jointly and severally liable for the prompt repair thereof and for the restoration of the same to a condition compatible with the remainder of the condominium.

### **§ 55-79.68. Alterations within units.**

(a) Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, any unit owner may make any improvements or alterations within his unit that do not impair the structural integrity of any structure or otherwise lessen the support of any portion of the condominium. But no unit owner shall do anything which would change the exterior appearance of his unit or of any other portion of the condominium except to such extent and subject to such conditions as the condominium instruments may specify.

(b) If a unit owner acquires an adjoining unit, or an adjoining part of an adjoining unit, then such unit owner shall have the right to remove all or any part of any intervening partition or to create doorways or other apertures therein, notwithstanding the fact that such partition may in whole or in part be a common element, so long as no portion of any bearing wall or bearing column is weakened or removed and no portion of any common element other than that partition is damaged, destroyed, or endangered. Such creation of doorways or other apertures shall not be deemed an alteration of boundaries within the meaning of §55-79.69.

### **§ 55-79.69. Relocation of boundaries between units.**

A. If the condominium instruments expressly permit the relocation of boundaries between adjoining units, then the boundaries between such units may be relocated in accordance with (i) the provisions of this section and (ii) any restrictions and limitations not otherwise unlawful which the condominium instruments may specify. The boundaries between adjoining units shall not be relocated unless the condominium instruments expressly permit it.

## MERCERTRIGIANI

B. If the unit owners of adjoining units whose mutual boundaries may be relocated desire to relocate such boundaries, then the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall, upon written application of such unit owners, forthwith prepare and execute appropriate instruments pursuant to subsections C, D, and E.

C. An amendment to the declaration shall identify the units involved and shall state that the boundaries between those units are being relocated by agreement of the unit owners thereof, which amendment shall contain conveyancing between those unit owners. If the unit owners of the units involved have specified in their written application a reasonable reallocation as between the units involved of the aggregate undivided interest in the common elements appertaining to those units, the amendment to the declaration shall reflect that reallocation.

D. If the unit owners of the units involved have specified in their written application a reasonable reallocation as between the units involved of the aggregate number of votes in the unit owners' association allocated to those units, an amendment to the bylaws shall reflect that reallocation and a proportionate reallocation of liability for common expenses as between those units.

E. Such plats and plans as may be necessary to show the altered boundaries between the units involved together with their other boundaries shall be prepared, and the units depicted thereon shall bear their identifying numbers. Such plats and plans shall indicate the new dimensions of the units involved, and any change in the horizontal boundaries of either as a result of the relocation of their boundaries shall be identified with reference to established datum. Such plats and plans shall be certified as to their accuracy and compliance with the provisions of this subsection (i) by a licensed land surveyor in the case of any plat and (ii) by a licensed architect, licensed engineer or licensed land surveyor in the case of any plan.

F. When appropriate instruments in accordance with the preceding subsections hereof have been prepared, executed, and acknowledged, they shall be recorded by an officer of the unit owners' association following payment by the unit owners of the units involved of all reasonable costs for the preparation, acknowledgment and recordation thereof. Said instruments shall become effective when executed by the



## MERCERTRIGIANI

unit owners of the units involved and recorded, and the recordation thereof shall be conclusive evidence that the relocation of boundaries thus effectuated did not violate any restrictions or limitations specified by the condominium instruments and that any reallocations made pursuant to subsections C and D were reasonable.

G. Any relocation of boundaries between adjoining units shall be governed by this section and not by § 55-79.70. Section 55-79.70 shall apply only to such subdivisions of units as are intended to result in the creation of two or more new units in place of the subdivided unit.

### **§ 55-79.70. Subdivision of units.**

A. If the condominium instruments expressly permit the subdivision of any units, then such units may be subdivided in accordance with (i) the provisions of this section and (ii) any restrictions and limitations not otherwise unlawful which the condominium instruments may specify. No unit shall be subdivided unless the condominium instruments expressly permit it.

B. If the unit owner of any unit which may be subdivided desires to subdivide such unit, then the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall, upon written application of the subdivider, as such unit owner shall henceforth be referred to in this section, forthwith prepare and execute appropriate instruments pursuant to subsections C, D and E.

C. An amendment to the declaration shall assign new identifying numbers to the new units created by the subdivision of a unit and shall allocate to those units, on a reasonable basis acceptable to the subdivider, all of the undivided interest in the common elements appertaining to the subdivided unit. The new units shall jointly share all rights, and shall be equally liable jointly and severally for all obligations, with regard to any limited common elements assigned to the subdivided unit except to the extent that the subdivider may have specified in his written application that all or any portions of any limited common element assigned to the subdivided unit exclusively should be assigned to one or more, but less than all of the new units, in which case the amendment to the declaration shall reflect the desires of the subdivider as expressed in such written application.

## MERCERTRIGIANI

D. An amendment to the bylaws shall allocate to the new units, on a reasonable basis acceptable to the subdivider, the votes in the unit owners' association allocated to the subdivided unit, and shall reflect a proportionate allocation to the new units of the liability for common expenses formerly appertaining to the subdivided unit.

E. Such plats and plans as may be necessary to show the boundaries separating the new units together with their other boundaries shall be prepared, and the new units depicted thereon shall bear their new identifying numbers. Such plats and plans shall indicate the dimensions of the new units, and the horizontal boundaries thereof, if any, shall be identified thereon with reference to established datum. Such plats and plans shall be certified as to their accuracy and compliance with the provisions of this subsection (i) by a licensed land surveyor in the case of any plat and (ii) by a licensed architect, licensed engineer or licensed land surveyor in the case of any plan.

F. When appropriate instruments in accordance with the preceding subsections hereof have been prepared, executed, and acknowledged, they shall be recorded by an officer of the unit owners' association following payment by the subdivider of all reasonable costs for the preparation, acknowledgment and recordation thereof. Said instruments shall become effective when executed by the subdivider and recorded, and the recordation thereof shall be conclusive evidence that the subdivision thus effectuated did not violate any restrictions or limitations specified by the condominium instruments and that any reallocations made pursuant to subsections C and D were reasonable.

G. Notwithstanding the definition of "unit" found in § 55-79.41 and the provisions of subsection (d) of § 55-79.62, this section shall have no application to convertible spaces, and no such space shall be deemed a unit for the purposes of this section. However, this section shall apply to any units formed by the conversion of all or any portion of any such space, and any such unit shall be deemed a unit for the purposes of this section.

### **§ 55-79.71. Amendment of condominium instruments.**

A. If there is no unit owner other than the declarant, the declarant may unilaterally amend the condominium instruments, and the amendment shall become effective upon the recordation thereof if

## MERCER TRIGIANI

the amendment has been executed by the declarant. But this section shall not be construed to nullify, limit, or otherwise affect the validity of enforceability of any agreement renouncing or to renounce, in whole or in part, the right hereby conferred.

B. If any of the units in the condominium is restricted exclusively to residential use and there is any unit owner other than the declarant, the condominium instruments shall be amended only by agreement of unit owners of units to which two-thirds of the votes in the unit owners' association appertain, or such larger majority as the condominium instruments may specify, except in cases for which this chapter provides different methods of amendment. If none of the units in the condominium is restricted exclusively to residential use, the condominium instruments may specify a majority smaller than the minimum specified in the preceding sentence.

C. An action to challenge the validity of an amendment adopted by the unit owners' association pursuant to this section may not be brought more than one year after the amendment is recorded.

D. Agreement of the required majority of unit owners to any amendment of the condominium instruments shall be evidenced by their execution of the amendment, or ratifications thereof, and the same shall become effective when a copy of the amendment is recorded together with a certification, signed by the principal officer of the unit owners' association or by such other officer or officers as the condominium instruments may specify, that the requisite majority of the unit owners signed the amendment or ratifications thereof.

E. Except to the extent expressly permitted or expressly required by other provisions of this chapter, or agreed to by 100 percent of the unit owners, no amendment to the condominium instruments shall change (i) the boundaries of any unit, (ii) the undivided interest in the common elements, (iii) the liability for common expenses, or (iv) the number of votes in the unit owners' association that appertains to any unit.

F. Notwithstanding any other provision of this section, the declarant may unilaterally execute and record a corrective amendment or supplement to the condominium instruments to correct a mathematical mistake, an inconsistency or a scrivener's error, or clarify an ambiguity

in the condominium instruments with respect to an objectively verifiable fact (including without limitation recalculating the undivided interest in the common elements, the liability for common expenses or the number of votes in the unit owners' association appertaining to a unit), within five years after the recordation of the condominium instrument containing or creating such mistake, inconsistency, error or ambiguity. No such amendment or supplement may materially reduce what the obligations of the declarant would have been if the mistake, inconsistency, error or ambiguity had not occurred. Regardless of the date of recordation of the condominium instruments, the principal officer of the unit owners' association may also unilaterally execute and record such a corrective amendment or supplement upon a vote of two-thirds of the members of the executive organ. All corrective amendments and supplements recorded prior to July 1, 1986, are hereby validated to the extent that such corrective amendments and supplements would have been permitted by this subsection.

**§ 55-79.71:1. Use of technology.**

A. Unless the condominium instruments expressly provide otherwise, (i) any notice required to be sent or received or (ii) any signature, vote, consent, or approval required to be obtained under any condominium instrument or any provision of this chapter may be accomplished using the most advanced technology available at that time if such use is a generally accepted business practice. This section shall govern the use of technology in implementing the provisions of any condominium instrument or any provision of this chapter dealing with notices, signatures, votes, consents, or approvals.

B. Electronic transmission and other equivalent methods. The unit owners' association, unit owners, and other persons entitled to occupy a unit may perform any obligation or exercise any right under any condominium instrument or any provision of this chapter by use of any technological means providing sufficient security, reliability, identification, and verifiability. "Acceptable technological means" shall include without limitation electronic transmission over the Internet or the community or other network, whether by direct connection, intranet, telecopier, or electronic mail.

C. Signature requirements. An electronic signature meeting the requirements of applicable law shall satisfy any requirement for a

# MERCER TRIGIANI

signature under any condominium instrument or any provision of this chapter.

D. Voting rights. Voting, consent to and approval of any matter under any condominium instrument or any provision of this chapter may be accomplished by electronic transmission or other equivalent technological means provided that a record is created as evidence thereof and maintained as long as such record would be required to be maintained in nonelectronic form.

E. Acknowledgment not required. Subject to other provisions of law, no action required or permitted by any condominium instrument or any provision of this chapter need be acknowledged before a notary public if the identity and signature of such person can otherwise be authenticated to the satisfaction of the executive organ.

F. Nontechnology alternatives. If any person does not have the capability or desire to conduct business using electronic transmission or other equivalent technological means, the unit owners' association shall make reasonable accommodation, at its expense, for such person to conduct business with the unit owners' association without use of such electronic or other means.

G. This section shall not apply to any notice related to an enforcement action by the unit owners' association, an assessment lien, or foreclosure proceedings in enforcement of an assessment lien.

## **§ 55-79.72. Repealed.**

### **§ 55-79.72:1. Termination of condominium.**

A. If there is no unit owner other than the declarant, the declarant may unilaterally terminate the condominium. An instrument terminating a condominium shall become effective upon recordation thereof if the termination instrument has been signed by the declarant. But this section shall not be construed to nullify, limit, or otherwise affect the validity or enforceability of any agreement renouncing or to renounce, in whole or in part, the right hereby conferred.

B. Except in the case of a taking of all the units by eminent domain, if any of the units in the condominium is restricted exclusively to residential use and there is any unit owner other than the declarant, the

## MERCERTRIGIANI

condominium may be terminated only by the agreement of unit owners of units to which four-fifths of the votes in the unit owners' association appertain, or such larger majority as the condominium instruments may specify. If none of the units in the condominium is restricted exclusively to residential use, the condominium instruments may specify a majority smaller than the minimum specified in the preceding sentence.

C. Agreement of the required majority of unit owners to termination of the condominium shall be evidenced by their execution of a termination agreement, or ratifications thereof, and the same shall become effective when a copy of the termination agreement is recorded together with a certification, signed by the principal officer of the unit owners' association or by such other officer or officers as the condominium instruments may specify, that the requisite majority of the unit owners signed the termination agreement or ratifications thereof. Unless the termination agreement otherwise provides, prior to recordation of the termination agreement, a unit owner's prior agreement to terminate the condominium may be revoked only with the approval of unit owners of units to which a majority of the votes in the unit owners' association appertain. The termination agreement shall specify a date after which the termination agreement shall be void if the termination agreement is not recorded. For the purposes of this section, an instrument terminating a condominium and any ratification thereof shall be deemed a condominium instrument subject to the provisions of § 55-79.49.

D. In the case of a condominium that contains only units having horizontal boundaries described in the condominium instruments, a termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the termination agreement, any property in the condominium is sold following termination, the termination agreement shall set forth the minimum terms of the sale.

E. In the case of a condominium that contains any units not having horizontal boundaries described in the condominium instruments, a termination agreement may provide for sale of the common elements. The termination agreement may not require that the units be sold following termination, unless the condominium instruments as originally recorded provide otherwise or all the unit owners consent to the sale. In the case of a master condominium that contains a unit which is a part of another condominium, a termination agreement for the master condominium shall not terminate the other condominium.

## MERCERTRIGIANI

F. On behalf of the unit owners, the unit owners' association may contract for the disposition of property in the condominium, but the contract shall not be binding on the unit owners until approved pursuant to subsections B and C of this section. If the termination agreement requires that any property in the condominium be sold following termination, title to the property, upon termination, shall vest in the unit owners' association as trustee for the holders of all interest in the units. Thereafter, the unit owners' association shall have powers necessary and appropriate to effect the sale. Until the same has been concluded and the proceeds have been distributed, the unit owners' association shall continue in existence with all the powers the unit owners' association had before termination. Proceeds of the sale shall be distributed to unit owners and lien holders as their interests may appear, in proportion to the respective interests of the unit owners as provided in subsection I of this section. Unless otherwise specified in the termination agreement, for as long as the unit owners' association holds title to the property, each unit owner or his successor in interest shall have an exclusive right to occupancy of the portion of the property that formerly constituted his unit. During the period of occupancy by the unit owner or his successor in interest, each unit owner or his successor in interest shall remain liable for any assessment or other obligation imposed on the unit owner by this chapter or the condominium instruments.

G. If the property that constitutes the condominium is not sold following termination, title to the common elements and, in the case of a condominium containing only units that have horizontal boundaries described in the condominium instruments, title to all the property in the condominium shall vest in the unit owners, upon termination, as tenants in common in proportion to the unit owners' respective interests as provided in subsection I of this section. Any liens on the units shall shift accordingly. While the tenancy in common exists, each unit owner or his successor in interest shall have the exclusive right to occupancy of the portion of the property that formerly constituted the unit owner's unit.

H. Following termination of the condominium, the proceeds of any sale of property, together with the assets of the unit owners' association, shall be held by the unit owners' association as trustee for unit owners or lien holders on the units as their interests may appear. Following termination, any creditor of the unit owners' association who holds a lien on the unit that was recorded before termination may enforce

## MERCERTRIGIANI

the lien in the same manner as any lien holder. Any other creditor of the unit owners' association shall be treated as if he had perfected a lien on the units immediately before termination.

I. Unless the condominium instruments as originally recorded or as amended by 100 percent of the unit owners provide otherwise, the respective interests of unit owners referred to in subsections F, G, and H shall be as follows:

1. Except as provided in subdivision 2, the respective interests of the unit owners shall be the fair market values of their units, limited common elements, and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the unit owners' association. The decision of the independent appraisers shall be distributed to the unit owners and become final unless disapproved within thirty days after distribution by unit owners of units to which one-quarter of the votes in the unit owners' association appertain. The proportion of any unit owner's interest to the interest of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and their common element interests.

2. If any unit or limited common element is destroyed to the extent that an appraisal of the fair market value thereof before destruction cannot be made, the interests of all unit owners are the unit owners' respective common element interests immediately before the termination.

J. Except as provided in subsection K, foreclosure or enforcement of a lien or encumbrance against the entire condominium shall not alone terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium, other than withdrawable land, shall not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable land shall not alone withdraw the land from the condominium, but the person who takes title to the withdrawable land shall have the right to require from the unit owners' association, upon request, an amendment that excludes the land from the condominium.

K. If a lien or encumbrance against a portion of the property that comprises the condominium has priority over the condominium



## MERCERTRIGIANI

instruments and the lien or encumbrance has not been partially released, upon foreclosure, the parties foreclosing the lien or encumbrance may record an instrument that excludes the property subject to the lien or encumbrance from the condominium.

**§ 55-79.72:2. Rights of mortgagees.** No provision of this chapter shall be construed in derogation of any requirement of the condominium instruments that all or a specified number of the beneficiaries of mortgages or deeds of trust encumbering the condominium units approve specified actions contemplated by the unit owners' association.

### **Article 3. Management of Condominiums.**

**§ 55-79.73. Bylaws to be recorded with declaration; contents; unit owners' association; executive organ; amendment of bylaws.**

A. There shall be recorded simultaneously with the declaration a set of bylaws providing for the self-government of the condominium by an association of all the unit owners. The unit owners' association may be incorporated.

B. The bylaws shall provide whether or not the unit owners' association shall elect an executive organ. If there is to be such an organ, the bylaws shall specify the powers and responsibilities of the same and the number and terms of its members. Except to the extent the condominium instruments provide otherwise, any vacancy occurring in the executive organ shall be filled by a vote of a majority of the remaining members of the executive organ at a meeting of the executive organ, even though the members of the executive organ present at such meeting may constitute less than a quorum because a quorum is impossible to obtain. Each person so elected shall serve until the next annual meeting of the unit owners' association at which time a successor shall be elected by a vote of the unit owners. The bylaws may delegate to such organ, inter alia, any of the powers and responsibilities assigned by this chapter to the unit owners' association. The bylaws shall also specify which, if any, of its powers and responsibilities the unit owners' association or its executive organ may delegate to a managing agent.

## MERCERTRIGIANI

C. The bylaws may provide for arbitration of disputes or other means of alternative dispute resolution in accordance with subsection B of § 55-79.53.

D. In any case where an amendment to the declaration is required by subsection (b), (c) or (d) of § 55-79.56, the person or persons required to execute the same shall also prepare and execute, and record simultaneously with such amendment, an amendment to the bylaws. The amendment to the bylaws shall allocate votes in the unit owners' association to new units on the same basis as was used for the allocation of such votes to the units depicted on plats and plans recorded pursuant to subsections A and B of § 55-79.58, or shall abolish the votes appertaining to former units, as the case may be. The amendment to the bylaws shall also reallocate rights to future common profits, and liabilities for future common expenses not specially assessed, in proportion to relative voting strengths as reflected by the said amendment.

### **§ 55-79.73:1. Amendment to condominium instruments; consent of mortgagee.**

A. In the event that any provision in the condominium instruments requires the written consent of a mortgagee in order to amend the condominium instruments, the unit owners' association shall be deemed to have received the written consent of a mortgagee if the unit owners' association sends the text of the proposed amendment by certified mail, return receipt requested, to the mortgagee at the address supplied by such mortgagee in a written request to the unit owners' association to receive notice of proposed amendments to the condominium instruments and receives no written objection to the adoption of the amendment from the mortgagee within 60 days of the date that the notice of amendment is sent by the unit owners' association, unless the condominium instruments expressly provide otherwise. If the mortgagee has not supplied an address to the unit owners' association, the unit owners' association shall be deemed to have received the written consent of a mortgagee if the unit owners' association sends the text of the proposed amendment by certified mail, return receipt requested, to the mortgagee at the address filed in the land records or with the local tax assessor's office, and receives no written objection to the adoption of the amendment from the mortgagee within 60 days of the date that the notice of amendment is sent by the unit owners' association, unless the condominium instruments expressly provide otherwise.

## MERCER TRIGIANI

B. Subsection A shall not apply to amendments which alter the priority of the lien of the mortgagee or which materially impair or affect the unit as collateral or the right of the mortgagee to foreclose on a unit as collateral.

C. Where the condominium instruments are silent on the need for mortgagee consent, no mortgagee consent shall be required if the amendment to the condominium instruments does not specifically affect mortgagee rights.

### **§ 55-79.74. Control of condominium by declarant.**

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 Common Interest Community 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.

Notwithstanding the foregoing, at the request of the declarant, such time limits may be extended for a period not to exceed 15 years from the settlement of the first unit to be sold in any portion of the

## MERCERTRIGIANI

condominium or after units to which three-fourths of the undivided interests in the common elements appertain have been conveyed, whichever occurs first, provided that (i) a special meeting is held prior to the expiration of the initial period of declarant control; (ii) at such special meeting, the extension of such time limits is approved by a two-thirds affirmative vote of the unit owners other than the declarant; and (iii) at such special meeting, there is an election of a warranty review committee consisting of no fewer than three persons unaffiliated with declarant.

Prior to any such vote, the declarant shall furnish to the unit owners in the notice of such special meeting in accordance with §55-79.75 a written statement in a form provided by the Common Interest Community Board that discloses that an affirmative vote extends the right of the declarant, or a managing agent or some other person selected by the declarant, to (a) appoint and remove some or all of the officers of the unit owners' association or its executive organ and (b) exercise powers and responsibilities otherwise assigned by the condominium instruments and by this chapter. In addition, such statement shall contain both a notice of the effect of the extension of declarant in accordance with §55-79.79 and a statement that a unit owner is advised to exercise whatever due diligence the unit owner deems necessary to protect his interest.

B. 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.

C. If entered into any time prior to the expiration of the period of declarant control, 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

## MERCERTRIGIANI

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.

D. If entered into at any time prior to the expiration of the period of declarant control, any contract, lease or agreement, other than those subject to the provisions of subsection B, may be entered into by or on behalf of the unit owners' association, its executive organ, or the unit owners as a group, if such contract, lease or agreement is bona fide and is commercially reasonable to the unit owners' association at the time entered into under the circumstances.

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

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

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

H. Within 45 days from the expiration of the period of declarant control, the declarant shall deliver to the president of the unit owners' association or his designated agent (i) all unit owners' association books

## MERCERTRIGIANI

and records held by or controlled by the declarant including, without limitation, the following items: minute books and all rules, regulations and amendments thereto which may have been promulgated; (ii) a statement of receipts and expenditures from the date of the recording of the condominium instruments to the end of the regular accounting period immediately succeeding the first election of the board of directors by the unit owners not to exceed 60 days from the date of the election, such statement being prepared in an accurate and complete manner, utilizing the accrual method of accounting; (iii) a copy of the latest available approved plans and specifications for all improvements in the project or as-built plans if available; (iv) all association insurance policies which are currently in force; (v) written unexpired warranties of the contractors, subcontractors, suppliers, and manufacturers, if any; (vi) any contracts in which the association is a contracting party, if any; and (vii) a list of manufacturers of paints, roofing materials and other similar materials if specified for use on the condominium property.

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

I. This section shall be strictly construed to protect the rights of the unit owners.

**§ 55-79.74:01. Deposit of funds.** All funds deposited with a managing agent shall be handled in a fiduciary capacity and shall be kept in a fiduciary trust account in a federally insured financial institution separate from other assets of the managing agent. The funds shall be the property of the unit owners' association and shall be segregated for each account in the records of the managing agent in a manner that permits the funds to be identified on an individual unit owners' association basis.

### **§ 55-79.74:1. Books, minutes and records; inspection.**

A. The declarant, the managing agent, the unit owners' association, or the person specified in the bylaws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on behalf of the association. Subject to the provisions of subsections B, C and D, upon request, any unit owner shall

## MERCERTRIGIANI

be provided a copy of such records and minutes. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including, but not limited to, the unit owners' association membership list, addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association, and not for pecuniary gain or commercial solicitation. This right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five days written notice reasonably identifying the purpose for the request and the specific books and records of the unit owners' association requested.

C. Books and records kept by or on behalf of a unit owners' association may be withheld from examination or copying by unit owners and contract purchasers to the extent that they are drafts not yet incorporated into the unit owners' association's books and records or if such books and records concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;

2. Contracts, leases, and other commercial transactions to purchase or provide goods or services currently in or under negotiation;

3. Pending or probable litigation. Probable litigation means those instances where there has been a specific threat of litigation from a party or the legal counsel of a party;

4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the condominium instruments or rules and regulations promulgated by the executive organ;

5. Communications with legal counsel which relates to subdivisions 1 through 4 or which is protected by the attorney-client privilege or the attorney work product doctrine;

6. Disclosure of information in violation of law;

## MERCERTRIGIANI

7. Meeting minutes or other confidential records of an executive session of the executive organ held pursuant to subsection C of § 55-79.75;

8. Documentation, correspondence or management or executive organ reports compiled for or on behalf of the unit owners' association or the executive organ by its agents or committees for consideration by the executive organ in executive session; or

9. Individual unit owner or member files, other than those of the requesting unit owner, including any individual unit owner's files kept by or on behalf of the unit owners' association.

D. Prior to providing copies of any books and records, the unit owners' association may impose and collect a charge, reflecting the reasonable costs of materials and labor, not to exceed the actual costs thereof. Charges may be imposed only in accordance with a cost schedule adopted by the executive organ in accordance with this subsection. The cost schedule shall (i) specify the charges for materials and labor, (ii) apply equally to all unit owners in good standing, and (iii) be provided to such requesting unit owner at the time request is made.

**§ 55-79.74:2. Management office.** Unless the condominium instruments expressly provide otherwise, the unit owners' association shall not be prohibited from maintaining a management office on common elements or in one or more units in the condominium.

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

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

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

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



## MERCERTRIGIANI

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

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

4. A transferor shall have no liability for any breach of a contractual or warranty obligation or for any other act or omission, arising from the exercise of a special declarant right by a successor declarant 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 contractible 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 of § 55-79.74 shall

## MERCERTRIGIANI

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 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 of § 55-79.74.

## MERCERTRIGIANI

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

**§ 55-79.74:4. Declarants not succeeding to special declarant rights.** A declarant who does not succeed to any special declarant rights shall be liable only to the extent of his actions for claims and obligations arising under this chapter or the condominium instruments.

**§ 55-79.75. Meetings of unit owners’ associations and executive organ.**

A. Meetings of the unit owners’ association shall be held in accordance with the provisions of the condominium instruments at least once each year after the formation of said association. The bylaws shall specify an officer or his agent who shall, at least 21 days in advance of any annual or regularly scheduled meeting, and at least seven days in advance of any other meeting, send to each unit owner notice of the time, place, and purposes of such meeting.

Notice shall be sent by United States mail to all unit owners of record at the address of their respective units unless the unit owner has provided to such officer or his agent an address other than the address of the unit; or notice may be hand delivered by the officer or his agent, provided the officer or his agent certifies in writing that notice was delivered to the person of the unit owner.

## MERCERTRIGIANI

In lieu of delivering notice as specified in the preceding paragraph of this subsection, such officer or his agent may, to the extent the condominium instruments or rules adopted thereto expressly so provide, send notice by electronic transmission consented to by the unit owner to whom the notice is given, provided the officer or his agent certifies in writing that notice was sent.

B. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive organ meetings. All meetings of the unit owners' association or the executive organ, including any subcommittee or other committee thereof, shall be open to all unit owners of record. The executive organ shall not use work sessions or other informal gatherings of the executive organ to circumvent the open meeting requirements of this section. The unit owners' association may, to the extent the condominium instruments or rules adopted thereto expressly so provide, send notice by electronic transmission consented to by the officer to whom the notice is given. Minutes of the meetings of the executive organ shall be recorded and shall be available as provided in § 55-79.74:1.

Notice of the time, date and place of each meeting of the executive organ or any subcommittee or other committee thereof, and of each meeting of a subcommittee or other committee of the unit owners' association, shall be published where it is reasonably calculated to be available to a majority of the unit owners.

A unit owner may make a request to be notified on a continual basis of any such meetings which request shall be made at least once a year in writing and include the unit owners' name, address, zip code, and any e-mail address as appropriate. Notice of the time, date, and place shall be sent to any unit owner requesting notice (i) by first-class mail or e-mail in the case of meetings of the executive organ or (ii) by e-mail in the case of meetings of any subcommittee or other committee of the executive organ, or of a subcommittee or other committee of the unit owners' association.

Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided members of the (i) executive organ or any subcommittee or other committee thereof or (ii) subcommittee or other committee of the unit owners' association conducting the meeting.

## MERCER TRIGIANI

Unless otherwise exempt as relating to an executive session pursuant to subsection C, at least one copy of all agenda packets and materials furnished to members of the executive organ or subcommittee or other committee thereof for a meeting shall be made available for inspection by the membership of the unit owners' association at the same time such documents are furnished to the members of the executive organ.

Any unit owner may record any portion of a meeting required to be open. The executive organ or subcommittee or other committee thereof conducting the meeting may adopt rules (i) governing the placement and use of equipment necessary for recording a meeting to prevent interference with the proceedings and (ii) requiring the unit owner recording the meeting to provide notice that the meeting is being recorded.

If a meeting of the executive organ is conducted by telephone conference or video conference or similar electronic means, at least two board members shall be physically present at the meeting place included in the notice. The audio equipment shall be sufficient for any member in attendance to hear what is said by any board member participating in the meeting who is not physically present.

Voting by secret or written ballot in an open meeting shall be a violation of this chapter except for the election of officers.

C. The executive organ or any subcommittee or other committee thereof may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, probable or pending litigation and matters involving violations of the condominium instruments or rules and regulations promulgated pursuant thereto for which a unit owner, his family members, tenants, guests or other invitees are responsible; or discuss and consider the personal liability of unit owners to the unit owners' association, upon the affirmative vote in an open meeting to assemble in executive session. The motion shall state specifically the purpose for the executive session. Reference to the motion and the stated purpose for the executive session shall be included in the minutes. The executive organ shall restrict the consideration of matters during such portions of meetings to only those purposes specifically exempted and stated in the motion. No contract, motion or other action adopted, passed or agreed to in executive session shall become effective unless the executive organ or subcommittee or other committee thereof,

## MERCERTRIGIANI

following the executive session, reconvenes in open meeting and takes a vote on such contract, motion or other action which shall have its substance reasonably identified in the open meeting. The requirements of this section shall not require the disclosure of information in violation of law.

D. Subject to reasonable rules adopted by the executive organ, the executive organ shall provide a designated period of time during a meeting to allow unit owners an opportunity to comment on any matter relating to the unit owners' association. During a meeting at which the agenda is limited to specific topics or at a special meeting, the executive organ may limit the comments of unit owners to the topics listed on the meeting agenda.

### **§ 55-79.75:1. Distribution of information by members.**

A. The executive organ shall establish a reasonable, effective, and free method, appropriate to the size and nature of the condominium, for unit owners to communicate among themselves and with the executive organ regarding any matter concerning the unit owners' association.

B. Except as otherwise provided in the condominium instruments, the executive organ shall not require prior approval of the dissemination or content of any material regarding any matter concerning the unit owners' association.

### **§ 55-79.75:2. Display of the flag of the United States; necessary supporting structures; affirmative defense.**

A. In accordance with the federal Freedom to Display the American Flag Act of 2005, no unit owners' association shall prohibit or otherwise adopt or enforce any policy restricting a unit owner from displaying upon property to which the unit owner has a separate ownership interest or a right to exclusive possession or use the flag of the United States whenever such display is in compliance with Chapter 1 of Title 4 of the United States Code, or any rule or custom pertaining to the proper display of the flag. A unit owners' association may, however, establish reasonable restrictions as to the size, place, duration, and manner of placement or display of the flag on such property provided such restrictions are necessary to protect a substantial interest of the owners' association.

## MERCERTRIGIANI

B. The unit owners' association may restrict the display of such flags in the common elements.

C. In any action brought by the unit owners' association under § 55-79.80:2 for a violation of a flag restriction, the unit owners' association shall bear the burden of proof that the restrictions as to the size, place, duration and manner of placement or display of such flag are necessary to protect a substantial interest of the unit owners' association.

D. In any action brought by the unit owners' association under § 55-79.80:2, the unit owner shall be entitled to assert as an affirmative defense that the required disclosure of any limitation pertaining to the flag of the United States or any flagpole or similar structure necessary to display the flag of the United States was not contained in the public offering statement or resale certificate, as appropriate, required pursuant to § 55-79.90 or 55-79.97.

### **§ 55-79.76. Same; quorums.**

(a) Unless the condominium instruments otherwise provide, a quorum shall be deemed to be present throughout any meeting of the unit owners' association until adjourned if persons entitled to cast more than 33 1/3 percent of the votes are present at the beginning of such meeting. The bylaws may provide for a larger percentage, or for a smaller percentage not less than 10 percent.

(b) Unless the condominium instruments specify a larger majority, a quorum shall be deemed to be present throughout any meeting of the executive organ if persons entitled to cast one-half of the votes in that body are present at the beginning of such meeting.

### **§ 55-79.77. Same; voting.**

A. The bylaws may allocate to each unit depicted on plats and plans that comply with subsections A and B § 55-79.58 a number of votes in the unit owners' association proportionate to the undivided interest in the common elements appertaining to each such unit.

B. Otherwise, the bylaws shall allocate to each such unit an equal number of votes in the unit owners' association, subject to the following exception: Each convertible space so depicted shall be allocated a number of votes in the unit owners' association proportionate to the size of each such space, vis-à-vis the aggregate size of all units so depicted, while the

## MERCERTRIGIANI

remaining votes in the unit owners' association shall be allocated equally to the other units so depicted.

C. Since a unit owner may be more than one person, if only one of such persons is present at a meeting of the unit owners' association, that person shall be entitled to cast the votes appertaining to that unit. But if more than one of such persons is present, the vote appertaining to that unit shall be cast only in accordance with their unanimous agreement unless the condominium instruments expressly provide otherwise, and such consent shall be conclusively presumed if any one of them purports to cast the votes appertaining to that unit without protest being made forthwith by any of the others to the person presiding over the meeting. Since a person need not be a natural person, the word "person" shall be deemed for the purposes of this subsection to include, without limitation, any natural person having authority to execute deeds on behalf of any person, excluding natural persons, which is, either alone or in conjunction with another person or persons, a unit owner.

D. The votes appertaining to any unit may be cast pursuant to a proxy or proxies duly executed by or on behalf of the unit owner, or, in cases where the unit owner is more than one person, by or on behalf of all such persons. No such proxy shall be revocable except by actual notice to the person presiding over the meeting, by the unit owner or by any of such persons, that it be revoked. Except to the extent otherwise provided in the condominium instruments, any proxy shall be void if it is not dated, or if it purports to be revocable without notice as aforesaid. The proxy of any person shall be void if not signed by a person having authority, at the time of the execution thereof, to execute deeds on behalf of that person. Any proxy shall terminate after the first meeting held on or after the date of that proxy or any recess or adjournment of that meeting. The proxy shall include a brief explanation of the effect of leaving the proxy uninstructed. To the extent the condominium instruments or rules adopted thereto expressly so provide, a vote or proxy may be submitted by electronic transmission, provided that any such electronic transmission shall either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the unit owner or the unit owner's proxy.

E. If 50 percent or more of the votes in the unit owners' association appertain to 25 percent or less of the units, then in any case where a majority vote is required by the condominium instruments or by this chapter, the requirement for such a majority shall be deemed to include, in addition to the specified majority of the votes, assent by the unit owners of a like majority of the units.



## MERCERTRIGIANI

F. All votes appertaining to units owned by the unit owners' association shall be deemed present for quorum purposes at all duly called meetings of the unit owners' association and shall be deemed cast in the same proportions as the votes cast by unit owners other than the unit owners' association.

### **§ 55-79.78. Officers.**

A. If the condominium instruments provide that any officer or officers must be unit owners, then any such officer who disposes of all of his units in fee shall be deemed to have disqualified himself from continuing in office unless the condominium instruments otherwise provide, or unless he acquires or contracts to acquire another unit in the condominium under terms giving him a right of occupancy thereto effective on or before the termination of his right of occupancy under such disposition or dispositions.

B. If the condominium instruments provide that any officer or officers must be unit owners, then notwithstanding the provisions of subsection (a) of § 55-79.50, the term "unit owner" in such context shall, unless the condominium instruments otherwise provide, be deemed to include, without limitation, any director, officer, partner in, or trustee of any person which is, either alone or in conjunction with another person or persons, a unit owner. Any officer who would not be eligible to serve as such were he not a director, officer, partner in, or trustee of such a person, shall be deemed to have disqualified himself from continuing in office if he ceases to have any such affiliation with that person, or if that person would itself have been deemed to have disqualified itself from continuing in such office under subsection A were it a natural person holding such office.

### **§ 55-79.79. Upkeep of condominiums; warranty against structural defects; statute of limitations for warranty.**

A. Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (i) to the unit owners' association in the case of the common elements, and (ii) to the individual unit owner in the case of any unit or any part thereof, except to the extent that the need for repairs, renovation, restoration or replacement arises from a condition originating in or through the common elements or any

## MERCERTRIGIANI

apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities. Each unit owner shall afford to the other unit owners and to the unit owners' association and to any agents or employees of either such access through his unit as may be reasonably necessary to enable them to exercise and discharge their respective powers and responsibilities. But to the extent that damage is inflicted on the common elements or any unit through which access is taken, the unit owner causing the same, or the unit owners' association if it caused the same, shall be liable for the prompt repair thereof.

B. Notwithstanding anything in this section to the contrary, the declarant shall warrant or guarantee, against structural defects, each of the units for two years from the date each is conveyed, and all of the common elements for two years. In the case of each unit the declarant shall also warrant that the unit is fit for habitation and constructed in a workmanlike manner so as to pass without objection in the trade. The two years referred to in this subsection shall begin as to each of the common elements whenever the same has been completed or, if later, (i) as to any common element within any additional land or portion thereof, at the time the first unit therein is conveyed, (ii) as to any common element within any convertible land or portion thereof, at the time the first unit therein is conveyed, and (iii) as to any common element within any other portion of the condominium, at the time the first unit therein is conveyed. For the purposes of this subsection, no unit shall be deemed conveyed unless conveyed to a bona fide purchaser. Any conveyance of a condominium unit transfers to the purchaser all of the declarant's warranties against structural defects imposed by this subsection. For the purposes of this subsection, structural defects shall be those defects in components constituting any unit or common element which reduce the stability or safety of the structure below accepted standards or restrict the normal intended use of all or part of the structure and which require repair, renovation, restoration, or replacement. Nothing in this subsection shall be construed to make the declarant responsible for any items of maintenance relating to the units or common elements.

C. An action for breach of any warranty prescribed by this section shall be commenced within five years after the date such warranty period began or (ii) one year after the formation of any warranty review committee pursuant to subsection B of §55-79.74, whichever last occurs. However, no such action shall be maintained against the declarant unless a written statement by the claimant or his agent, attorney or representative, of the nature of the alleged defect has been sent to the declarant, by

## MERCERTRIGIANI

registered or certified mail, at his last known address, as reflected in the records of the Common Interest Community Board, more than six months prior to the commencement of the action giving the declarant an opportunity to cure the alleged defect within a reasonable time, not to exceed five months. Sending the notice required by this subsection shall toll the statute of limitations for commencing a breach of warranty action for a period not to exceed six months.

D. If the initial period of declarant control has been extended in accordance with subsection B of §55-79.74, the warranty review committee (the committee) shall have (i) subject to the provisions of subdivision 3, the irrevocable power as attorney-in-fact on behalf of the unit owners' association to assert or settle in the name of the unit owners' association any claims involving the declarant's warranty against structural defects with respect to all of the common elements and (ii) the authority to levy an additional assessment against all of the units in proportion to their respective undivided interests in the common elements pursuant to §55-79.83 if the committee determines that the assessments levied by the unit owners' association are insufficient to enable the committee reasonably to perform its functions pursuant to this subsection. The committee or the declarant shall notify the governing body of the county, city or town in which the condominium is located of the formation of the committee, within 30 days of its formation. Within 30 days after such notice, the local governing body or an agency designated by the local governing body shall advise the chair of the committee of any outstanding violations of applicable building codes, local ordinances, or other deficiencies of record. Members of the committee shall be insured, indemnified, and subject to liability to the same extent as officers or directors under the condominium instruments or applicable law. The unit owners' association shall provide sufficient funds reasonably necessary for the committee to perform the functions set out in this subsection and to:

1. Engage an independent architect, engineer, legal counsel, and such other experts as the committee may reasonably determine;

2. Investigate whether there exists any breach of the warranty as to any of the common elements. The committee shall document its findings and the evidence that supports such findings. Such findings and evidence shall be confidential and shall not be disclosed to the declarant without the consent of the committee; and

3. Assert or settle in the name of the unit owners' association any claims involving the declarant's warranty on the common

## MERCERTRIGIANI

elements, provided (i) the committee sends the declarant at least six months prior to the expiration of the statute of limitations a written statement pursuant to subsection C of the alleged nature of any defect in the common elements giving the declarant an opportunity to cure the alleged defect, (ii) the declarant fails to cure the alleged defect within a reasonable time, and (iii) the declarant control period or the statute of limitations has not expired.

E. Within 45 days after the formation of the committee, the declarant shall deliver to the chair of the committee (i) a copy of the latest available approved plans and specifications for all improvements in the project or as-build plans if available; (ii) all association insurance policies that are currently in force; (iii) any written unexpired warranties of the contractors, subcontractors, suppliers, and manufacturers applicable to the condominium; and (iv) a list of manufacturers of paints, roofing materials, and other similar materials if specified for use on the condominium property.

### **§ 55-79.80. Control of common elements.**

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

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

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

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

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

## MERCERTRIGIANI

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

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

**§ 55-79.80:01. Common elements; notice of pesticide application.** Unit owners' associations shall post notice of all pesticide applications in or upon the common elements. Such notice shall consist of conspicuous signs placed in or upon the common elements where the pesticide will be applied at least forty-eight hours prior to the application.

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

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

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

## MERCERTRIGIANI

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

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

### **§ 55-79.80:2. Assessment of charges for violations; suspension of services for failure to pay assessments; hearing.**

A. The unit owners' association shall have the power, to the extent the condominium instruments or rules duly adopted pursuant thereto expressly so provide, to (i) suspend a unit owner's right to use facilities or services, including utility services, provided directly through the unit owners' association for nonpayment of assessments which are more than 60 days past due, to the extent that access to the unit through the common elements is not precluded and provided that such suspension shall not endanger the health, safety, or property of any unit owner, tenant, or occupant and (ii) assess charges against any unit owner for any violation of the condominium instruments or of the rules or regulations promulgated pursuant thereto for which such unit owner or his family members, tenants, guests or other invitees are responsible.

B. Before any such suspension or charges may be imposed, the unit owner shall be given an opportunity to be heard and to be represented by counsel before the executive organ or such other tribunal as the condominium instruments or rules duly adopted pursuant thereto specify.

## MERCETRIGIANI

Notice of such hearing, including the charges or other sanctions that may be imposed, shall, at least 14 days in advance thereof, be hand delivered or mailed by registered or certified United States mail, return receipt requested, to such unit owner at the address or addresses required for notices of meetings pursuant to § 55-79.75. Within seven days of the hearing, the hearing result shall be hand delivered or mailed by registered or certified mail, return receipt requested, to such unit owner at the address required for notices of meetings pursuant to § 55-79.75.

The amount of any charges so assessed shall not exceed \$50 for a single offense, or \$10 per diem for any offense of a continuing nature, and shall be treated as an assessment against such unit owner's condominium unit for the purpose of § 55-79.84. However, the total charges for any offense of a continuing nature shall not be assessed for a period exceeding 90 days.

After the date a lawsuit is filed in the general district or circuit court by (i) the unit owners' association, by and through its counsel to collect the charges, obtain injunctive relief and correct the violation or (ii) the unit owner challenging any such charges, no additional charges shall accrue. If the court rules in favor of the unit owners' association, it shall be entitled to collect such charges from the date the action was filed as well as all other charges assessed pursuant to this section against the unit owner prior to the action. In addition, if the court finds that the violation remains uncorrected, the court may order the unit owner to abate or remedy the violation.

In any suit filed in general district court pursuant to this section, the court may enter default judgment against the unit owner on the unit owners' association's sworn affidavit.

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

**§ 55-79.80:3. Power of unit owners' association to limit occupancy of a unit.** The unit owners' association shall have the power, to the extent the condominium instruments expressly so provide, to limit the number of persons who may occupy a unit as a dwelling. Such limitation shall be reasonable and shall comply with the provisions of § 55-79.52.

# MERCERTRIGIANI

## **§ 55-79.81. Insurance.**

A. The condominium instruments may require the unit owners' association, or the executive organ or managing agent on behalf of such association, to obtain:

1. A master casualty policy affording fire and extended coverage in an amount consonant with the full replacement value of the structures within the condominium, or of such structures that in whole or in part comprise portions of the common elements.

2. A master liability policy, in an amount specified by the condominium instruments, covering the unit owners' association, the executive organ, if any, the managing agent, if any, all persons acting or who may come to act as agents or employees of any of the foregoing with respect to the condominium, and all unit owners and other persons entitled to occupy any unit or other portion of the condominium.

3. Such other policies as may be required by the condominium instruments, including, without limitation, workers' compensation insurance, liability insurance on motor vehicles owned by the unit owners' association, and specialized policies covering lands or improvements in which the unit owners' association has or shares ownership or other rights.

B. Any unit owners' association collecting assessments for common expenses shall obtain and maintain a blanket fidelity bond or employee dishonesty insurance policy insuring the unit owners' association against losses resulting from theft or dishonesty committed by the officers, directors, or persons employed by the unit owners' association, or committed by any common interest community manager or employees of the common interest community manager. Such bond or insurance policy shall provide coverage in an amount equal to the lesser of \$1 million or the amount of reserve balances of the unit owners' association plus one-fourth of the aggregate annual assessment of such unit owners' association. The minimum coverage amount shall be \$10,000. The executive organ or common interest community manager may obtain such bond or insurance on behalf of the unit owners' association.

C. When any policy of insurance has been obtained by or on behalf of the unit owners' association, written notice of the obtainment thereof and of any subsequent changes therein or termination thereof shall be promptly furnished to each unit owner by the officer required



## MERCETRIGIANI

to send notices of meetings of the unit owners' association. Such notices shall be sent in accordance with the provisions of subsection A of § 55-79.75.

### **§ 55-79.82. Repealed.**

### **§ 55-79.83. Liability for common expenses.**

A. Except to the extent that the condominium instruments provide otherwise, any common expenses associated with the maintenance, repair, renovation, restoration, or replacement of any limited common element shall be specially assessed against the condominium unit to which that limited common element was assigned at the time such expenses were made or incurred. If the limited common element involved was assigned at that time to more than one condominium unit, however, such expenses shall be specially assessed against each such condominium unit equally so that the total of such special assessments equals the total of such expenses, except to the extent that the condominium instruments provide otherwise.

B. To the extent that the condominium instruments expressly so provide, any other common expenses benefiting less than all of the condominium units, or caused by the conduct of less than all those entitled to occupy the same or by their licensees or invitees, shall be specially assessed against the condominium unit or units involved, in accordance with such reasonable provisions as the condominium instruments may make for such cases. The executive organ may impose reasonable user fees.

C. To the extent that the condominium instruments expressly so provide, (i) any common expenses paid or incurred in making available the same off-site amenities or paid subscription television service to some or all of the unit owners shall be assessed equally against the condominium units involved and (ii) any common expenses paid or incurred in providing metered utility services to some or all of the units shall be assessed against each condominium unit involved based on its actual consumption of such services.

D. The amount of all common expenses not specially assessed pursuant to subsection A, B, or C hereof shall be assessed against the condominium units in proportion to the number of votes in the unit owners' association appertaining to each such unit, or, if such votes

## MERCERTRIGIANI

were allocated as provided in subsection B of § 55-79.77, those common expense assessments shall be either in proportion to those votes or in proportion to the units' respective undivided interests in the common elements, whichever basis the condominium instruments specify. Such assessments shall be made by the unit owners' association annually, or more often if the condominium instruments so provide. No change in the number of votes in the unit owners' association appertaining to any condominium unit shall enlarge, diminish, or otherwise affect any liabilities arising from assessments made prior to such change.

E. Except to the extent otherwise provided in the condominium instruments, if the executive organ determines that the assessments levied by the unit owners' association are insufficient to cover the common expenses of the unit owners' association, the executive organ shall have the authority to levy an additional assessment against all of the units in proportion to their respective undivided interests in the common elements. The executive organ shall give written notice of any additional assessment to the unit owners stating the amount, reasons therefore, and the due date for payment of such assessment. If the additional assessment is to be paid in a lump sum, payment shall be due and payable no earlier than 90 days after delivery or mailing of the notice.

All unit owners shall be obligated to pay the additional assessment unless the unit owners by a majority of votes cast, in person or by proxy, at a meeting of the unit owners' association convened in accordance with the provisions of the condominium instruments within 60 days of the delivery or mailing of the notice required by this subsection, rescind or reduce the additional assessment. No director or officer of the unit owners' association shall be liable for failure to perform his fiduciary duty if an additional assessment for the funds necessary for the director or officer to perform his fiduciary duty is rescinded by the unit owners association in accordance with this subsection. The unit owners' association shall indemnify such director or officer against any damage resulting from any claimed breach of fiduciary duty arising therefrom.

F. It remains the policy of this section that neither a unit owned by the declarant nor any other unit may be exempted from assessments made pursuant to this section by reason of the identity of the unit owner thereof.

G. All condominium instruments for condominiums created prior to January 1, 1981, are hereby validated notwithstanding noncompliance

## MERCERTRIGIANI

with the first sentence of subsection D hereof, if they provide instead that the amount of all common expenses not specially assessed pursuant to subsection A, B or C hereof shall be assessed against the condominium units in proportion to their respective undivided interests in the common elements.

### **§ 55-79.83:1. Reserves for capital components.**

A. Except to the extent otherwise provided in the condominium instruments and unless the condominium instruments impose more stringent requirements, the executive organ shall:

1. Conduct at least once every five years a study to determine the necessity and amount of reserves required to repair, replace and restore the capital components;
2. Review the results of that study at least annually to determine if reserves are sufficient; and
3. Make any adjustments the executive organ deems necessary to maintain reserves, as appropriate.

B. To the extent that the reserve study conducted in accordance with this section indicates a need to budget for reserves, the unit owners' association budget shall include, without limitations:

1. The current estimated replacement cost, estimated remaining life and estimated useful life of the capital components;
2. As of the beginning of the fiscal year for which the budget is prepared, the current amount of accumulated cash reserves set aside, to repair, replace or restore the capital components and the amount of the expected contribution to the reserve fund for that fiscal year; and
3. A general statement describing the procedures used for the estimation and accumulation of cash reserves pursuant to this section and the extent to which the unit owners' association is funding its reserve obligations consistent with the study currently in effect.

### **§ 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

## MERCERTRIGIANI

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.

## MERCERTRIGIANI

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 subsection 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.

H. 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. At any time after perfecting the lien pursuant to this section, the unit owners' association may sell the unit at public sale, subject to

## MERCERTRIGIANI

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, 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) satisfy the debt secured by lien that is the subject of the nonjudicial foreclosure sale and (b) 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 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

## MERCERTRIGIANI

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.

## MERCERTRIGIANI

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



## MERCERTRIGIANI

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 a § 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 a § 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 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.

### **§ 55-79.84:1. Bond to be posted by declarant.**

A. The declarant of a condominium containing units which are required by this chapter to be registered with the Common Interest Community Board shall post a bond in favor of the unit owners' association with good and sufficient surety, in a sum equal to \$1,000 per unit, except that such sum shall not be less than \$10,000, nor more than \$100,000. Such bond shall be filed with the Common Interest Community Board and shall be maintained for so long as the declarant owns more than ten percent of the units in the condominium, or, if the declarant owns less than ten percent of the units in the condominium until the declarant is current in the payment of assessments. However, the Board shall return a bond where the declarant owns one unit in a condominium containing less than 10 units, provided such declarant is current in the payment of assessments.

## MERCER TRIGIANI

B. No bond shall be accepted for filing unless it is with a surety company authorized to do business in the Commonwealth, or by such other surety as is satisfactory to the Board and such bond shall be conditioned upon the payment of all assessments levied against condominium units owned by the declarant. The Board may accept a letter of credit in lieu of the bond contemplated by this section.

The Board may promulgate reasonable regulations which govern the return of bonds submitted in accordance with this section.

**§ 55-79.85. Restraints on alienation.** If the condominium instruments create any rights of first refusal or other restraints on free alienability of the condominium units, such rights and restraints shall be void unless the condominium instruments make provision for promptly furnishing to any unit owner or purchaser requesting the same a recordable statement certifying to any waiver of, or failure or refusal to exercise, such rights and restraints, in all cases where such waiver, failure, or refusal does in fact occur. Failure or refusal to furnish promptly such a statement in such circumstances in accordance with the provisions of the condominium instruments shall make all such rights and restraints inapplicable to any disposition of a condominium unit in contemplation of which such statement was requested. Any such statement shall be binding on the association of unit owners, the executive organ, and every unit owner. Payment of a fee not exceeding twenty-five dollars may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

### **Article 4.**

#### **Administration of Chapter; Sale, etc., of Condominium Units.**

**§ 55-79.86. Administrative agency.** This chapter shall be administered by the Common Interest Community Board which hereinafter is called the agency.

#### **§ 55-79.87. Exemptions from certain provisions of article.**

A. Unless the method of offer or disposition is adopted for the purpose of evasion of this chapter, the provisions of §§ 55-79.88 through 55-79.93, subsections A and C of § 55-79.94, and § 55-79.97 do not apply to:

1. Dispositions pursuant to court order;

## MERCERTRIGIANI

2. Dispositions by any government or government agency;
3. Offers by the declarant on nonbinding reservation agreements;
4. Dispositions in a residential condominium in which there are three or fewer units, so long as the condominium instruments do not reserve to the declarant the right to create additional condominium units; or
5. A disposition of a unit by a sale at an auction, where the resale certificate was made available as part of an auction package for prospective purchasers prior to the auction sale.

B. In cases of dispositions in a condominium where all units are restricted to nonresidential use, the provisions of §§ 55-79.88 through 55-79.95 shall not apply, unless the method of offer or disposition is adopted for the purpose of evasion of this chapter.

**§ 55-79.88. Limitations on dispositions of units.** Unless exempt by § 55-79.87:

1. No declarant may offer or dispose of any interest in a condominium unit located in this Commonwealth, nor offer or dispose in this Commonwealth of any interest in a condominium unit located without this Commonwealth prior to the time the condominium including such unit is registered in accordance with this chapter.

2. No declarant may dispose of any interest in a condominium unit unless he delivers to the purchaser a current public offering statement by the time of such disposition and such disposition is expressly and without qualification or condition subject to cancellation by the purchaser within ten calendar days from the contract date of the disposition, or delivery of the current public offering statement, whichever is later. If the purchaser elects to cancel, he may do so by notice thereof hand-delivered or sent by United States mail, return receipt requested, to the declarant. Such cancellation shall be without penalty, and any deposit made by the purchaser shall be promptly refunded in its entirety.

### **§ 55-79.89. Application for registration; fee.**

A. The application for registration of the condominium shall be filed as prescribed by the agency's regulations and shall contain the following documents and information:

1. An irrevocable appointment of the agency to receive service of any lawful process in any noncriminal proceeding arising

## MERCER TRIGIANI

under this chapter against the applicant or his personal representative if nonresidents of the commonwealth;

2. The states or jurisdictions in which an application for registration or similar document has been filed, and any adverse order, judgment, or decree entered in connection with the condominium by the regulatory authorities in each jurisdiction or by any court;

3. The applicant's name, address, and the form, date, and jurisdiction or organization; and the address of each of its offices in this Commonwealth;

4. The name, address, and principal occupation for the past five years of every officer of the applicant or person occupying a similar status or performing similar functions; the extent and nature of his interest in the applicant or the condominium as of a specified date within thirty days of the filing of the application;

5. A statement, in a form acceptable to the agency, of the condition of the title to the condominium project including encumbrances as of a specified date within thirty days of the date of application by a title opinion of a licensed attorney, not a salaried employee, officer or director of the applicant or owner, or by other evidence of title acceptable to the agency;

6. Copies of the instruments which will be delivered to a purchaser to evidence his interest in the unit and of the contracts and other agreements which a purchaser will be required to agree to or sign;

7. Copies of any management agreements, employment contracts or other contracts or agreements affecting the use, maintenance or access of all or a part of the condominium;

8. A statement of the zoning and other governmental regulations affecting the use of the condominium, including the site plans and building permits and their status, and also of any existing tax and existing or proposed special taxes or assessments which affect the condominium;

9. A narrative description of the promotional plan for the disposition of the units in the condominium;

10. Plats and plans of the condominium that comply with the provisions of § 55-79.58 other than the certification requirements thereof, and which show all units and buildings containing units to be built

## MERCER TRIGIANI

anywhere within the submitted land other than within the boundaries of any convertible lands, except that the agency may establish by regulation or order requirements in lieu of the provisions of § 55-79.58 for plats and plans of a condominium located outside this Commonwealth;

11. The proposed public offering statement;

12. Any bonds required to be posted pursuant to the provisions of this chapter; and

13. Any other information, including any current financial statement, which the agency by its regulations requires for the protection of purchasers.

B. If the declarant registers additional units to be offered for disposition in the same condominium he may consolidate the subsequent registration with any earlier registration offering units in the condominium for disposition under the same promotional plan.

C. The declarant shall immediately report any material changes in the information contained in an application for registration.

D. Each application shall be accompanied by a fee in an amount established by the agency pursuant to § 54.1-113. All fees shall be remitted by the agency to the State Treasurer, and shall be placed to the credit of the Common Interest Community Management Information Fund established pursuant to § 55-529.

### **§ 55-79.90. Public offering statement; condominium securities.**

A. A public offering statement shall disclose fully and accurately the characteristics of the condominium and the units therein offered and shall make known to prospective purchasers all unusual and material circumstances or features affecting the condominium. The proposed public offering statement submitted to the agency shall be in a form prescribed by its rules and regulations and shall include the following:

1. The name and principal address of the declarant and the condominium;

2. A general narrative description of the condominium stating the total number of units in the offering; the total number of units planned

## MERCERTRIGIANI

to be sold and rented; the total number of units that may be included in the condominium by reason of future expansion or merger of the project by the declarant;

3. Copies of the declaration and bylaws, with a brief narrative statement describing each and including information on declarant control, a projected budget for at least the first year of the condominium's operation (including projected common expense assessments for each unit), and provisions for reserves for capital expenditures and restraints on alienation;

4. Copies of any management contract, lease of recreational areas, or similar contract or agreement affecting the use, maintenance or access of all or any part of the condominium with a brief narrative statement of the effect of each such agreement upon a purchaser, and a statement of the relationship, if any, between the declarant and the managing agent or firm;

5. A general description of the status of construction, zoning, site plan approval, issuance of building permits, or compliance with any other state or local statute or regulation affecting the condominium;

6. The significant terms of any encumbrances, easements, liens and matters of title affecting the condominium;

7. The significant terms of any financing offered by the declarant to the purchaser of units in the condominium;

8. Provisions of any warranties provided by the declarant on the units and the common elements, other than the warranty prescribed by subsection B of § 55-79.79;

9. A statement that the purchaser may cancel the disposition within ten days of delivery of the current public offering statement, or within ten days of the contract date of the disposition, whichever is later;

10. A statement of the declarant's obligation to complete improvements of the condominium which are planned but not yet begun, or begun but not yet completed. Said statement shall include a description of the quality of the materials to be used, the size or capacity of the improvements when material, and the time by which the improvements

## MERCERTRIGIANI

shall be completed. Any limitations on the declarant's obligation to begin or complete any such improvements shall be expressly stated;

11. If the units in the condominium are being subjected to a time-share instrument pursuant to § 55-367, the information required to be disclosed by § 55-374;

12. A statement listing the facilities or amenities which are defined as common elements or limited common elements in the condominium instruments, which are available to a purchaser for use. Such statement shall also include whether there are any fees or other charges for the use of such facilities or amenities which are not included as part of any assessment, and the amount of such fees or charges, if any, a purchaser may be required to pay;

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

14. 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, place, and manner of placement or display of such flag; and

15. Additional information required by the agency to assure full and fair disclosure to prospective purchasers.

B. The public offering statement shall not be used for any promotional purposes before registration of the condominium project and afterwards only if it is used in its entirety. No person may advertise or represent that the agency approves or recommends the condominium or disposition thereof. No portion of the public offering statement may be underscored, italicized, or printed in larger or heavier or different color type than the remainder of the statement unless the agency requires it.

C. The agency may require the declarant to alter or amend the proposed public offering statement in order to assure full and fair disclosure to prospective purchasers, and no change in the substance of the promotional plan or plan of disposition or development of the condominium may be made after registration without notifying the

agency and without making appropriate amendment of the public offering statement. A public offering statement is not current unless all amendments are incorporated.

D. If an interest in a condominium is currently registered with the Securities and Exchange Commission of the United States, a declarant satisfies all requirements relating to the preparation of a public offering statement in this chapter if he delivers to the purchaser and files with the agency a copy of the public offering statement filed with the Securities and Exchange Commission. An interest in a condominium is not a security under the provisions of the Securities Act (§ 13.1-501 et seq.).

**§ 55-79.91. Inquiry and examination.** Upon receipt of an application for registration, the agency shall conduct an examination of the material submitted to determine that:

1. The declarant can convey or cause to be conveyed the units offered for disposition if the purchaser complies with the terms of the offer;

2. There is reasonable assurance that all proposed improvements will be completed as represented;

3. The advertising material and the general promotional plan are not false or misleading and comply with the standards prescribed by the agency in its regulations and afford full and fair disclosure;

4. The declarant has not, or if a corporation, its officers, and principals have not, been convicted of a crime involving condominium unit dispositions or any aspect of the land sales business in this Commonwealth, United States, or any other state or foreign country within the past ten years and has not been subject to any injunction or administrative order restraining a false or misleading promotional plan involving land dispositions; and

5. The public offering statement requirements of this chapter have been satisfied.



**§ 55-79.92. Notice of filing and registration.**

A. Upon receipt of the application for registration, the agency shall, within five business days, issue a notice of filing to the applicant. In the case of receipt of an application for a condominium that is a conversion condominium, the agency shall, within five business days, also issue a notice of filing to the chief administrative officer of the county or city in which the proposed condominium is located, which notice shall include the name and address of the applicant and the name and address or location of the proposed condominium. Within sixty days from the date of the notice of filing, the agency shall enter an order registering the condominium or rejecting the registration. If no order of rejection is entered within sixty days from the date of notice of filing, the condominium shall be deemed registered unless the applicant has consented in writing to a delay.

B. If the agency affirmatively determines, upon inquiry and examination, that the requirements of §§ 55-79.89 and 55-79.91 have been met, it shall enter an order registering the condominium and shall designate the form of the public offering statement.

C. If the agency determines upon inquiry and examination that any of the requirements of §§ 55-79.89 and 55-79.91 have not been met, the agency shall notify the applicant that the application for registration must be corrected in the particulars specified within twenty days. If the requirements are not met within the time allowed the agency shall enter an order rejecting the registration which shall include the findings of fact upon which the order is based. The order rejecting the registration shall not become effective for twenty days after issuance of the order. During this twenty-day period the applicant may petition for reconsideration and shall be entitled to a hearing or correct the particulars specified in the agency's notice. Such order of rejection shall not take effect, in any event, until such time as the hearing, once requested, is given to the applicant.

**§ 55-79.93. Annual report by declarant; termination of registration.** The declarant shall file a report in the form prescribed by the regulations of the agency within 30 days of each anniversary date of the order registering the condominium. The report shall reflect any material changes in information contained in the original application for registration.

## MERCERTRIGIANI

### **§ 55-79.93:1. Annual report by unit owners' association.**

A. The unit owners' association shall file an annual report in a form and at such time as prescribed by regulations of the agency. The filing of the annual report required by this section shall commence upon the termination of the declarant control period pursuant to § 55-79.74. The annual report shall be accompanied by a fixed fee in an amount established by the agency.

B. The agency may accept copies of forms submitted to other state agencies to satisfy the requirements of this section if such forms contain substantially the same information required by the agency.

C. The unit owners association shall also remit to the agency an annual payment as follows:

1. The lesser of:

a. \$1,000 or such other amount as established by agency regulation; or

b. Five hundredths of one percent (0.05%) of the unit owners' association's gross assessment income during the preceding year.

2. For the purposes of clause b of subsection C, no minimum payment shall be less than \$10.00.

D. The annual payment shall be remitted to the State Treasurer and shall be placed to the credit of the Common Interest Community Management Fund established pursuant to § 55-529.

### **§ 55-79.93:2. Termination of Registration.**

A. In the event that all of the units in the condominium have been disposed of, and all periods for conversion or expansion have expired, the agency shall issue an order terminating the registration of the condominium.

B. Notwithstanding any other provision of this chapter, the agency may administratively terminate the registration of the condominium if:

## MERCERTRIGIANI

1. The declarant has not filed an annual report in accordance with § 55-79.93 for three or more consecutive years; or

2. The declarant's registration with the State Corporation Commission, if applicable, has not been active for five or more consecutive years.

### **§ 55-79.94. Conversion condominiums; special provisions.**

A. Any declarant of a conversion condominium shall include in his public offering statement in addition to the requirements of § 55-79.90 the following:

1. A specific statement of the amount of any initial or special condominium fee due from the purchaser on or before settlement of the purchase contract and the basis of such fee;

2. Information on the actual expenditures made on all repairs, maintenance, operation or upkeep of the subject building or buildings within the last three years, set forth tabularly with the proposed budget of the condominium, and cumulatively broken down on a per unit basis in proportion to the relative voting strengths allocated to the units by the bylaws. If such building or buildings have not been occupied for a period of three years, then the information shall be set forth for the maximum period such building or buildings have been occupied;

3. A description of any provisions made in the budget for reserves for capital expenditures and an explanation of the basis for such reserves, or, if no provision is made for such reserves, a statement to that effect;

4. A statement of the declarant as to the present condition of all structural components and major utility installations in the condominium, which statement shall include the approximate dates of construction, installation, and major repairs, and the expected useful life of each such item, together with the estimated cost (in current dollars) of replacing each of the same;

5. If any building included or that may be included in the condominium was substantially completed prior to July 1, 1978, a statement that each such building has been inspected for asbestos in accordance with standards in effect at the time of inspection; or that an asbestos inspection will be conducted; and whether asbestos requiring response actions has been found, and if found, that response actions have been or will be completed in accordance with applicable standards prior to the conveyance of any unit in such building. Any asbestos management

## MERCERTRIGIANI

program or response action undertaken by the building owner shall comply with the standards promulgated pursuant to § 2.2-1164.

B. In the case of a conversion condominium, the declarant shall give at the time specified in subsection C of this section, formal notice to each of the tenants of the building or buildings which the declarant has submitted or intends to submit to the provisions of this chapter. This notice shall advise each tenant of (i) the offering price of the unit he occupies, (ii) the projected common expense assessments against that unit for at least the first year of the condominium's operation, (iii) any relocation services or assistance, public or private, of which the declarant is aware, (iv) any measures taken or to be taken by the declarant to reduce the incidence of tenant dislocation, and (v) the details of the relocation plan, if any is provided by the declarant, to assist tenants in relocating. During the first sixty days after such notice is mailed or hand delivered, each of the said tenants shall have the exclusive right to purchase the unit he occupies, but only if such unit is to be retained in the conversion condominium without substantial alteration in its physical layout. If the conversion condominium is subject to local ordinances that have been adopted pursuant to subsections F and G, any tenant who is disabled or elderly may assign the exclusive right to purchase his unit to a government agency, housing authority, or certified nonprofit housing corporation, which shall then offer the tenant a lease at an affordable rent, following the provisions of subsection F. The acquisition of such units by the governmental agency, housing authority, or certified nonprofit housing corporation shall not (i) exceed the greater of one unit or five percent of the total number of units in the condominium or (ii) impede the condominium conversion process. In determining which, if any, units shall be acquired pursuant to this subsection, preference shall be given to elderly or disabled tenants.

The notice required above shall be hand delivered or sent by first-class mail, return receipt requested, and shall inform the tenants of the conversion to condominium. Such notice may also constitute the notice to terminate the tenancy as provided for in § 55-222, except that, despite the provisions of § 55-222, a tenancy from month to month may only be terminated upon 120 days' notice when such termination is in regard to the creation of a conversion condominium. If, however, a tenant so notified remains in possession of the unit he occupies after the expiration of the 120-day period with the permission of the declarant, in order to then terminate the tenancy, such declarant shall give the tenant a further notice as provided in § 55-222. Until the expiration of the 120-day period, the declarant shall have no right of access to the unit except as provided by subsection A of § 55-248.18 and except that, upon 45 days' written

## MERCER TRIGIANI

notice to the tenant, the declarant may enter the unit in order to make additional repairs, decorations, alterations or improvements, provided (i) the making of the same does not constitute an actual or constructive eviction of the tenant; and (ii) such entry is made either with the consent of the tenant or only at times when the tenant is absent from the unit. The declarant shall also provide general notice to the tenants of the condominium or proposed condominium at the time of application to the agency in addition to the formal notice required by this subsection.

C. The declarant of a conversion condominium shall, in addition to the requirements of § 55-79.89, include with the application for registration a copy of the formal notice set forth in subsection B and a certified statement that such notice, fully complying with the provisions of subsection B, shall be, at the time of the registration of such condominium, mailed or delivered to each of the tenants in the building or buildings for which registration is sought. The price and projected common expense assessments for each unit need not be filed with the agency until such notice is mailed to the tenants.

D. Notwithstanding the provisions of § 55-79.40 of this chapter, in the case of any conversion condominium created under the provisions of the Horizontal Property Act (§ 55-79.1 et seq.) for which a final report has not been issued by the agency pursuant to § 55-79.21 prior to June 1, 1975, the provisions of subsections A and B of this section shall apply and the declarant shall be required to furnish evidence of full compliance with subsections A and B prior to the issuance by the agency of a final report for such conversion condominium.

E. Any county, city or town may require by ordinance that the declarant of a conversion condominium file with that governing body all information which is required by the agency pursuant to § 55-79.89 and a copy of the formal notice required by subsection B. Such information shall be filed with that governing body when the application for registration is filed with the agency, and such copy of the formal notice shall be filed with that governing body. There shall be no fees for such filings.

F. The governing body of any county, city or town may enact an ordinance requiring that elderly or disabled tenants occupying as their residence, at the time of issuance of the general notice required by subsection B, apartments or units in a conversion condominium be offered leases or extensions of leases on the apartments or units they

## MERCER TRIGIANI

then occupied, or on other apartments or units of at least equal size and overall quality. The terms and conditions thereof shall be as agreed upon by the lessor and the lessee, provided that the rent for such apartment or unit shall not be in excess of reasonable rent for comparable apartments or units in the same market area as such conversion condominium and such lease shall include or incorporate by reference the bylaws and/or rules and regulations, if any, of the association. No such ordinance may require that such leases or extensions be offered on more than twenty percent of the apartments or units in such conversion condominium, nor may any such ordinance require that such leases or extensions extend beyond three years from the date of such notice. Such leases or extensions shall not be required, however, in the case of any apartments or units which will, in the course of the conversion, be substantially altered in the physical layout, restricted exclusively to nonresidential use, or be converted in such a manner as to require relocation of the tenant in premises outside of the project being converted.

For the purposes of this section:

*"Affordable rent"* means a monthly rent that does not exceed the greater of 30 percent of the annual gross income of the tenant household or 30 percent of the imputed income limit applicable to such unit size, as published by the Virginia Housing Development Authority for compliance with the Low Income Housing Tax Credit program.

*"Certified nonprofit housing corporation"* means a nonprofit organization exempt from taxation under § 501 (c) (3) of the Internal Revenue Code that has been certified by a locality as actively engaged in producing and preserving affordable housing as determined by criteria established by the locality.

*"Disabled"* means a person suffering from a severe, chronic physical or mental impairment which results in substantial functional limitations.

*"Elderly"* means a person not less than 62 years of age.

G. The governing body of any county utilizing the urban county executive form of optional government (§§ 15.2-800 through 15.2-858) or the county manager plan of optional government (§§ 15.2-702 through 15.2-749), or of any city or town adjoining any such county, may require by

## MERCERTRIGIANI

ordinance that the declarant of any residential condominium converted from multi-family rental use shall reimburse any tenant displaced by the conversion for amounts actually expended to relocate as a result of such dislocation. The reimbursement shall not be required to exceed the amount which the tenant would have been entitled to receive under §§ 25.1-407 and 25.1-415 if the real estate comprising the condominium had been condemned by the Department of Transportation.

### **§ 55-79.95. Escrow of deposits.**

A. Any deposit made in regard to any disposition of a unit, including a nonbinding reservation agreement, shall be held in escrow until delivered at settlement. Such escrow funds shall be deposited in a separate account designated for this purpose which is federally insured and located in Virginia; except where such deposits are being held by a real estate broker or attorney licensed under the laws of this Commonwealth such funds may be placed in that broker's or attorney's regular escrow account and need not be placed in a separate designated account. Such escrow funds shall not be subject to attachment by the creditors of either the purchaser or the declarant.

B. In lieu of escrowing deposits as provided in subsection A, the declarant of a condominium consisting of more than 50 units may:

1. Obtain and maintain a corporate surety bond issued by a surety authorized to do business in the Commonwealth, in the form and amount set forth below, or

2. Obtain and maintain an irrevocable letter of credit issued by a financial institution whose accounts are insured by the FDIC, in the form and amount set forth below.

The surety bond or letter of credit shall be maintained until (i) the granting of a deed to the unit, (ii) the purchaser's default under a purchase contract for the unit entitling the declarant to retain the deposit, or (iii) the refund of the deposit to the purchaser, whichever occurs first.

C. The surety bond shall be payable to the Commonwealth for the use and benefit of every person protected under the provisions of this chapter. The declarant shall file the bond with the Common Interest Community Board. The surety bond may be either in the form of an

## MERCER TRIGIANI

individual bond for each deposit accepted by the declarant or, if the total amount of the deposits accepted by the declarant under this chapter exceeds \$10,000, it may be in the form of a blanket bond. If the bond is a blanket bond, the amount shall be as follows. If the amount of such deposits is:

1. \$75,000 or less, the blanket bond shall be \$75,000;
2. More than \$75,000 but less than \$200,000, the blanket bond shall be \$200,000;
3. \$200,000 or more but less than \$500,000, the blanket bond shall be \$500,000;
4. \$500,000 or more but less than \$1,000,000, the blanket bond shall be \$1,000,000; and
5. \$1,000,000 or more, the blanket bond shall be 100 percent of the amount of such deposits.

D. The letter of credit shall be payable to the Commonwealth for use and benefit of every person protected under this chapter. The declarant shall file the letter of credit with the Common Interest Community Board. The letter of credit may be either in the form of an individual letter of credit for each deposit accepted by the declarant or, if the total amount of the deposits accepted by the declarant under this chapter exceeds \$10,000, it may be in the form of a blanket letter of credit. If the letter of credit is a blanket letter of credit, the amount shall be as follows. If the amount of such deposits is:

1. \$75,000 or less, the blanket letter of credit shall be \$75,000;
2. More than \$75,000 but less than \$200,000, the blanket letter of credit shall be \$200,000;
3. \$200,000 or more but less than \$500,000, the blanket letter of credit shall be \$500,000;
4. \$500,000 or more but less than \$1,000,000, the blanket letter of credit shall be \$1,000,000; and



## MERCERTRIGIANI

5. \$1,000,000 or more, the blanket letter of credit shall be 100 percent of the amount of such deposits.

For the purposes of determining the amount of any blanket letter of credit that a declarant maintains in any calendar year, the total amount of deposits considered held by the declarant shall be determined as of May 31 in each calendar year and the amount of the letter of credit shall be in accordance with the amount of deposits held as of May 31.

**§ 55-79.96. Declarant to deliver declaration, etc., to purchaser.** The declarant shall within ten days of recordation of the condominium instruments as provided for in §§ 55-79.45 and 55-79.49 hereof, forward to each purchaser at his last known address by first-class mail, return receipt requested, an exact copy of the recorded declaration and bylaws.

### **§ 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 or being notified that the resale certificate will not be available, (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.

For the purposes of clause (iii), the resale certificate shall be deemed not to be available if (a) a current annual report has not been filed by the unit owners' association with either the State Corporation Commission pursuant to § 13.1-936 or the Common Interest Community Board pursuant to §55-79.93:1, (b) the seller has made a written request to the unit owners' association that the resale certificate be provided and no such resale certificate has been received within 14 days in accordance with subsection C, or (c) written notice has been provided by the unit owners' association that a resale certificate is not available.

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.

## MERCERTRIGIANI

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 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;

## MERCERTRIGIANI

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;

## MERCERTRIGIANI

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.

17. A statement setting forth any restriction, limitation or prohibition on the right of the unit owner to install or use solar energy collection devices on the unit owner's property

18. A statement indicating any known project approvals in effect issued by secondary mortgage market agencies.

Failure to receive a resale certificate shall not excuse any failure to comply with the provisions of the condominium 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 electronically or in hard copy, and shall specify the complete contact information for the parties to whom the resale certificate shall be delivered. The resale certificate shall be delivered within 14 days of receipt of such request. The resale certificate 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

## MERCERTRIGIANI

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 certificate 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;
3. A disposition of a unit by foreclosure or deed in lieu of foreclosure; or
4. A disposition of a unit by a sale at auction, when the resale certificate was made available as part of the auction package for prospective purchasers prior to the auction.

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.

### **§ 55-79.97:1. Fees for resale certificate.**

A. The unit owners' association may charge fees as authorized by this section for the inspection of the property, the preparation and issuance of the resale certificate required by § 55-79.97, and for such other services as are set out in this action.

B. A reasonable fee may be charged by the preparer of the resale certificate as follows for:

## MERCERTRIGIANI

1. The inspection of the unit, as authorized in the declaration and as required to prepare the resale certificate, a fee not to exceed \$100;

2. The preparation and delivery of the resale certificate in (i) paper format, a fee not to exceed \$150 for no more than two hard copies, or (ii) electronic format, a fee not to exceed \$125, for no more than two electronic copies. Only one fee shall be charged for the preparation and delivery of the resale certificate;

3. At the option of the seller or his authorized agent, with the consent of the unit owners' association or the common interest community manager, expediting the inspection, preparation, and delivery of the resale certificate, an additional expedite fee not to exceed \$50;

4. At the option of the seller or his authorized agent, an additional hard copy of the resale certificate, a fee not to exceed \$25 per hard copy;

5. At the option of the seller or his authorized agent, a fee not to exceed an amount equal to the actual cost paid to a third-party commercial delivery service for hand delivery or overnight delivery of the resale certificate; and

6. A post-closing fee to the purchaser of the unit, collected at settlement, for the purpose of establishing the purchaser as the owner of the unit in the records of the unit owners' association, a fee not to exceed \$50.

Neither the unit owners' association nor its common interest community manager shall require cash, check, certified funds, or credit card payments at the time the request for the resale certificate is made. The resale certificate shall state that all fees and costs for the resale certificate shall be the personal obligation of the unit owner and shall be an assessment against the unit and collectible as any other assessment in accordance with the provisions of the condominium instruments and § 55-79.83, if not paid at settlement or within 45 days of the delivery of the resale certificate, whichever occurs first.

For purposes of this section, an expedite fee shall only be charged if the inspection and preparation of delivery of the resale certificate are completed within five business days of the request for a resale certificate.

## MERCERTRIGIANI

C. No fees other than those specified in this section and as limited by this section, shall be charged by the unit owners' association or its common interest community manager for compliance with the duties and responsibilities of the unit owners' association under this section. The unit owners' association or its common interest community manager shall publish and make available in paper or electronic format, or both, a schedule of the applicable fees so that the seller or his authorized agent will know such fees at the time of requesting the resale certificate.

D. Any fees charged pursuant to this section shall be collected at the time settlement occurs on the sale of the unit and shall be due and payable out of the settlement proceeds in accordance with this section. The seller shall be responsible for all costs associated with the preparation and delivery of the resale certificate, except for the costs of any resale certificate update or financial update, which costs shall be the responsibility of the requestor, payable at settlement. Neither the unit owners' association nor its common interest community manager shall require cash, check, certified funds, or credit card payments at the time the request is made for the resale certificate.

E. If settlement does not occur within 45 days of the delivery of the resale certificate, or funds are not collected at settlement and disbursed to the unit owners' association or the common interest community manager, all fees, including those costs that would have otherwise been the responsibility of the purchaser or settlement agent, shall be (i) assessed within one year after delivery of the resale certificate against the unit owner, (ii) the personal obligation of the unit owner, and (iii) an assessment against the unit and collectible as any other assessment in accordance with the provisions of the condominium instruments and § 55-79.83. The seller may pay the unit owners' association by cash, check, certified funds, or credit card, if credit card payment is an option offered by the unit owners' association. The unit owners' association shall pay the common interest community manager the amount due from the unit owner within 30 days after invoice.

F. The maximum allowable fees charged in accordance with this section shall adjust every five years, as of January 1 of that year, in an amount equal to the annual increases for that five-year period in the United States Average Consumer Price Index for all items, all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the U.S. Department of Labor.

## MERCERTRIGIANI

G. If a resale certificate has been issued within the preceding 12-month period, a person specified in the written instructions of the seller or his authorized agent, including the seller or his authorized agent or the purchaser or his authorized agent, may request a resale certificate update. The requestor shall specify whether the resale certificate update shall be delivered electronically or in hard copy and shall specify the complete contact information of the parties to whom the update shall be delivered. The resale certificate update shall be delivered within 10 days of the written request.

H. The settlement agent may request a financial update. The requestor shall specify whether the financial update shall be delivered electronically or in hard copy and shall specify the complete contact information of the parties to whom the update shall be delivered. The financial update shall be delivered within three business days of the written request.

I. A reasonable fee for the resale certificate update or financial update may be charged by the preparer, not to exceed \$50. At the option of the purchaser or his authorized agent, the requestor may request that the unit owners' association or the common interest community manager perform an additional inspection of the unit, as authorized in the declaration, for a fee not to exceed \$100. Any fees charged for the specified update shall be collected at the time settlement occurs on the sale of the property. Neither the unit owners' association nor its common interest community manager, if any, shall require cash, check, certified funds, or credit card payments at the time the request is made for the resale certificate update. The requestor may request that the specified update be provided in hard copy or in electronic form.

J. No unit owners' association or common interest community manager may require the requestor to request the specified update electronically. The seller or his authorized agent shall continue to have the right to request a hard copy of the specified update in person at the principal place of business of the unit owners' association. If the requestor asks that the specified update be provided in electronic format, neither the unit owners' association nor its common interest community manager may require the requestor to pay any fees to use the provider's electronic network or system. A copy of the specified update shall be provided to the seller or his authorized agent.



## MERCETRIGIANI

K. When a resale certificate has been delivered as required by § 55-79.97, the unit owners' association shall, as to the purchaser, be bound by the statements set forth therein as to the status of the assessment account and the status of the unit with respect to any violation of the condominium instruments as of the date of the statement unless the purchaser had actual knowledge that the contents of the resale certificate were in error.

L. If the unit owners' association or its common interest community manager has been requested in writing to furnish the resale certificate required by § 55-79.97, failure to provide the resale certificate substantially in the form provided in this section shall be deemed a waiver of any claim for delinquent assessments or of any violation of the declaration, bylaws, rules and regulations, or architectural guidelines existing as of the date of the request with respect to the subject unit. The preparer of the resale certificate shall be liable to the seller in an amount equal to the actual damages sustained by the seller in an amount not to exceed \$1,000. The purchaser shall nevertheless be obligated to abide by the condominium instruments, rules and regulations, and architectural guidelines of the unit owners' association as to all matters arising after the date of the settlement of the sale.

**§ 55-79.97:2. Properties subject to more than one declaration.** If the unit is subject to more than one declaration, the unit owners' association or its common interest community manager may charge the fee authorized by § 55-79.97:1 for each of the applicable associations, provided however, that no association may charge an inspection fee unless the association has architectural control over the unit.

**§ 55-79.97:3. Requests by settlement agents.**

A. The settlement agent may request a financial update from the preparer of the resale certificate. The preparer of the resale certificate shall, upon request from the settlement agent, provide the settlement agent with written escrow instructions directing the amount of any funds to be paid from the settlement proceeds to the association or the common interest community manager. There shall be no fees charged for a response by the association or its common interest community manager to a request from the settlement agent for written escrow instructions; however a fee may be charged for a financial update pursuant to this chapter.

## MERCER TRIGIANI

B. The settlement agent, when transmitting funds to the unit owners' association or the common interest community manager, shall, unless otherwise directed in writing, provide the preparer of the resale certificate with (i) the complete record name of the seller, (ii) the address of the subject unit, (iii) the complete name of the purchaser, (iv) the date of settlement, and (v) a brief explanation of the application of any funds transmitted or by providing a copy of a settlement statement, unless otherwise prohibited.

### **§ 55-79.98. General powers and duties of the Common Interest Community Board.**

A. The agency shall prescribe reasonable rules and regulations which shall be adopted, amended or repealed in compliance with law applicable to the administrative procedure of agencies of government. The rules and regulations shall include but not be limited to provisions for advertising standards to assure full and fair disclosure; provisions for operating procedures; and other rules and regulations as are necessary and proper to accomplish the purpose of this chapter.

B. The agency by rule or by an order, after reasonable notice and hearing, may require the filing of advertising material relating to condominiums prior to its distribution.

C. If it appears that a person has engaged or is about to engage in an act or practice constituting a violation of a provision of this chapter, or a rule or order hereunder, the agency, with or without prior administrative proceedings may bring an action in the circuit court of the city or county in which any portion of the condominium is located to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder. Upon proper showing, injunctive relief of temporary restraining orders shall be granted. The agency is not required to post a bond in any court proceedings or prove that any other adequate remedy at law exists.

D. With respect to any lawful process served upon the agency pursuant to the appointment made in accordance with subdivision A 1 of §55-79.89, the agency shall forthwith cause the same to be sent by registered or certified mail to any of the principals, officers, directors, partners, or trustees of the declarant listed in the application for registration at the last address listed in such application or any annual report.

## MERCER TRIGIANI

E. The agency may intervene in any suit involving the declarant. In any suit by or against a declarant involving a condominium, the declarant shall promptly furnish the agency notice of the suit and copies of all pleadings.

F. The agency may:

1. Accept registrations filed in other states or with the federal government;

2. Contract with similar agencies in this Commonwealth or other jurisdictions to perform investigative functions;

3. Accept grants in aid from any governmental source.

G. The agency shall cooperate with similar agencies in other jurisdictions to establish uniform filing procedures and forms, uniform public offering statements, advertising standards, rules and common administrative practices.

### **§ 55-79.99. Investigations and proceedings.**

A. Whenever the agency receives a written complaint which appears to state a valid claim, the agency shall make necessary public or private investigations in accordance with law within or outside of this Commonwealth to determine whether any declarant, its agents, employees or other representatives have violated or are about to violate this chapter or any rule or order hereunder, or to aid in the enforcement of this chapter or in the prescribing of rules, regulations and forms hereunder. The agency may also in like manner and with like authority investigate written complaints against persons other than the declarant, its agents, employees or other representatives.

B. For the purpose of any investigation or proceeding under this chapter, the agency or any officer designated by rule may administer oaths or affirmations, and upon its own motion or upon request of any party shall subpoena witnesses, compel their attendance, take evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts or any other matter reasonably calculated to lead to the discovery of material evidence.

## MERCER TRIGIANI

C. Upon failure to obey a subpoena or to answer questions propounded by the investigating officer and upon reasonable notice to all persons affected thereby, the agency may apply to the Circuit Court of the City of Richmond for an order compelling compliance.

### **§ 55-79.100. Cease and desist orders.**

(a) If the agency determines after notice and hearing that a person has:

(1) Violated any provision of this chapter;

(2) Directly or through an agent or employee knowingly engaged in any false, deceptive, or misleading advertising, promotional, or sales method to offer or dispose of a unit;

(3) Made any substantial change in the plan of disposition and development of the condominium subsequent to the order or registration without notifying the agency;

(4) Disposed of any units which have not been registered with the agency; or

(5) Violated any lawful order or rule of the agency; it may issue an order requiring the person to cease and desist from the unlawful practice and to take such affirmative action as in the judgment of the agency will carry out the purposes of this chapter.

(b) If the agency makes a finding of fact in writing that the public interest will be irreparably harmed by delay in issuing an order, it may issue a temporary cease and desist order. Prior to issuing the temporary cease and desist order, the agency shall give notice of the proposal to issue a temporary cease and desist order to the person. Every temporary cease and desist order shall include in its terms a provision that upon request a hearing will be held promptly to determine whether or not it becomes permanent.

### **§ 55-79.101. Revocation of registration.**

(a) A registration may be revoked after notice and hearing upon a written finding of fact that the declarant has:

## MERCERTRIGIANI

(1) Failed to comply with the terms of a cease and desist order;

(2) Been convicted in any court subsequent to the filing of the application for registration for a crime involving fraud, deception, false pretenses, misrepresentation, false advertising, or dishonest dealing in real estate transactions;

(3) Disposed of, concealed, or diverted any funds or assets of any person so as to defeat the rights of unit purchasers;

(4) Failed faithfully to perform any stipulation or agreement made with the agency as an inducement to grant any registration, to reinstate any registration, or to approve any promotional plan or public offering statement; or

(5) Made intentional misrepresentations or concealed material facts in an application for registration.

Findings of fact, if set forth in statutory language, shall be accompanied by concise and explicit statement of the underlying facts supporting the findings.

(b) If the agency finds after notice and hearing that the developer has been guilty of a violation for which revocation could be ordered, it may issue a cease and desist order instead.

**§ 55-79.102. Judicial review.** Proceedings for judicial review shall be in accordance with the provisions of the Administrative Process Act (§2.2-4000 et seq.).

**§ 55-79.103. Penalties.** Any person who willfully violates any provision of §§ 55-79.87, 55-79.88, 55-79.89, 55-79.90, 55-79.93, 55-79.94, 55-79.95, or any rule adopted under or order issued pursuant to § 55-79.98, or any person who willfully in an application for registration makes any untrue statement of a material fact or omits to state a material fact shall be guilty of a misdemeanor and may be fined not less than \$1,000 or double the amount of gain from the transaction, whichever is the larger but not more than \$50,000; or he may be imprisoned for not more than 6 months; or both, for each offense.