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# COMMENTS

## CONDOMINIUMS IN VIRGINIA — THE CONDOMINIUM ACT OF 1974

The condominium is one of the fastest growing forms of housing in the United States.<sup>1</sup> As a legal concept, the condominium involves "separate ownership of individual units in a multi-unit project,"<sup>2</sup> along with an undivided interest in common areas owned by members of the project.<sup>3</sup> Unit owners, while owning their units separately, are responsible for expenses relative to the management and maintenance of the project.

Until 1974, the Horizontal Property Act regulated the development of condominiums in Virginia.<sup>4</sup> While helpful in providing for the initial wave of condominium building, it was inadequate in many respects.<sup>5</sup> In 1974, the Virginia General Assembly completely revised the State's condominium law to remedy these shortcomings.<sup>6</sup> The following discussion explores the new Virginia Condominium Act by outlining its main provisions and their implications for purchasers and developers.

### I. VIRGINIA CONDOMINIUM ACT: MAIN FEATURES

In general, the Virginia Condominium Act provides a framework for development combined with a regulatory scheme for consumer protection. The Act provides greater flexibility for condominium builders by allowing progressive construction in which developers regulate the size of the project according to its success.<sup>7</sup> The Act permits progressive construction under

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1. See Washington Post, May 26, 1974, at 1, col. 4; *id.*, May 27, 1974, at 1, col. 1; *id.*, May 28, 1974 at 1, col. 1.

2. I. P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 1.01 (1972).

3. A. FERRER & K. STECHER, LAW OF CONDOMINIUM 2 § 3 (1967) [hereinafter cited as FERRER & STECHER].

The interest unit owners possess in the common area is similar to the tenancy in common. However, such an interest is not subject to partition as is the tenancy in common.

4. VA. CODE ANN. §§ 55-79.1-79.38 (1950), as amended VA. CODE ANN. §§ 55-79.39-79.103 (Cum. Supp. 1974). The Act was similar to other such laws throughout the United States. See COMMITTEE TO STUDY AND RECOMMEND REVISION OF THE CONDOMINIUM LAWS, REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY OF VIRGINIA at 3 (1973) [hereinafter cited as VIRGINIA CONDOMINIUM STUDY].

5. Part II *infra* will deal with some of the shortcomings of the old act.

6. VA. CODE ANN. §§ 55-79.39-79.103 (Cum. Supp. 1974).

7. In the traditional approach a builder was tied to the number of buildings that he originally establishes as constituting the project. This led to problems if the project was not as successful as he had anticipated or if he later wanted to increase its size since the developer was committed to the project as originally established. VIRGINIA CONDOMINIUM STUDY at 5.

the following concepts: (1) expandable condominiums in which the developer reserves a seven year option to expand the development, and (2) contractable condominiums which permit a developer to withdraw land from a development in the event the project is not as successful as anticipated.<sup>8</sup>

Consumer protection is provided through a system of full and fair disclosure of information relating to the project.<sup>9</sup> This is accomplished by the requirement that various documents associated with the project be accessible to purchasers before they become legally obligated to buy.<sup>10</sup> Furthermore, the Act gives the Virginia Real Estate Commission quasi-administrative and quasi-regulatory powers to oversee its operation.<sup>11</sup>

The Condominium Act is divided into four articles. Article I is introductory in nature and defines the terms used throughout the Act.<sup>12</sup> It also includes provisions dealing with taxation, zoning, and eminent domain.<sup>13</sup>

Article II deals with the instruments necessary to create a condominium.<sup>14</sup> The declaration, a basic document which must be filed, is analogous to articles of incorporation and includes provisions fundamental to the condominium such as a physical description of the project and an allocation of common interests.<sup>15</sup> In addition to the declaration, the declarant must file plats and plans of the project.<sup>16</sup> Article II also establishes provisions for limited common areas such as garages and elevators for which the responsibility of upkeep is in the hands of the unit owners.<sup>17</sup>

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8. VA. CODE ANN. § 55-79.41(g),(n),-79.54 (Cum. Supp. 1974); *see infra* at 9-8.

9. VIRGINIA CONDOMINIUM STUDY at 11, 12.

10. The basic documents are the declaration, the bylaws, and a public offering statement. VA. CODE ANN. §§ 55-79.54, -79.73, -79.88, -79.89 (Cum. Supp. 1974).

11. *Id.* § 55-79.86.

12. *Id.* § 55-79.41.

This section is important not only for its substantive aspects but also because it establishes statutory labels used throughout the Act. "Declarant," for example, is defined as "all persons who execute the declaration." *Id.* § 55-79.41(k). In practice, this stands for the developer or promoter of the project. Also "condominium instruments" refer to the declaration, bylaws, plats and plans, and other exhibits and schedules associated with the project. *Id.* § 55-79.41(e).

13. *Id.* §§ 55-79.44—79.44.

14. Article II also has provisions which prevent the application of the Rule Against Perpetuities and the rule against restraints on alienation to the condominium project. *Id.* § 59-79.52(b), (c).

15. *Id.* §§ 55-79.54—79.56.

It should be noted that the contents of the declaration may vary according to whether the project is an expandable condominium, contractable condominium, leasehold condominium, or contains convertible lands or easements.

The declaration must be filed with the Virginia Real Estate Commission. *Id.* § 55-79.89.

16. *Id.* § 55-79.58.

17. *Id.* §§ 55-79.54(a)(6), -79.57.

Article III deals with the internal operations and management of the project. The bylaws, similar to corporate bylaws, is the instrument governing daily management and must be filed simultaneously with the declaration.<sup>18</sup> There are also provisions requiring annual unit owner's meetings and establishing the procedures for such meetings.<sup>19</sup> Finally, included in this article are provisions: (1) placing the responsibility for maintenance of common elements upon the unit owner's association and for maintenance of individual units upon unit owners,<sup>20</sup> (2) giving unit owners common profits once expenses have been paid,<sup>21</sup> (3) making unit owners liable for common expenses in excess of profits,<sup>22</sup> and (4) creating liens in favor of the unit owner's association for unpaid assessments of the individual owners.<sup>23</sup>

Article IV sets forth basic disclosure and enforcement provisions. Disclosure is through the public offering statement, which gives prospective purchasers information such as the declaration and bylaws, plans for future expansion and management contracts.<sup>24</sup> The statement must be delivered to a purchaser before the declarant can sell the unit.<sup>25</sup> The Virginia Real Estate Commission is responsible for the enforcement of the Act's disclosure requirements,<sup>26</sup> and those found in violation of the Act are subject to penalties including a misdemeanor charge with imprisonment up to six months and/or fines ranging from \$1000 to \$50,000 for each offense.<sup>27</sup>

## II. RESPONSE OF STATUTE TO PRIOR PROBLEMS

The new Virginia Condominium Act provides a more comprehensive framework for condominium development than the old law, and overcomes many of its predecessor's shortcomings.

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18. *Id.* § 55-79.73.

An important provision in this regard is that the bylaws, declaration, and other instruments are interpreted as a whole. *Id.* § 55-79.51; *see id.* § 55-79.52. This provision prevents the impairment of a condominium in the event a draftsman inadvertently places information in the declaration which should go in the bylaws or vice versa. See VIRGINIA CONDOMINIUM STUDY at 10.

19. VA. CODE ANN. § 55-79.76, - 79.77 (Cum. Supp. 1974).

20. *Id.* § 55-79.79.

21. *Id.* § 55-79.82.

22. *Id.* § 55-79.83.

23. *Id.* § 55-79.84.

24. *Id.* §§ 55-79.88-79.90.

25. *Id.* §§ 55-79.88, -79.89.

26. *Id.* §§ 55-79.86, -79.89.

27. *Id.* § 55.79.103.

### A. *Consumer Protection*

Through the new Act's elaborate disclosure provisions, greater protection is afforded prospective purchasers from abuses by developers.<sup>28</sup> An important requirement is that a builder must state his plans for future development.<sup>29</sup> For example, when building an expandable condominium,<sup>30</sup> the developer must reserve an option to expand at the time he files the declaration.<sup>31</sup> Failure to reserve this option when filing, or to exercise it within seven years therefrom, precludes expansion.<sup>32</sup> Additionally, a statement giving the maximum number of units to be erected in the expandable portion and the nature of the units in terms of construction, style, and similarity to present units must be filed as part of the declaration.<sup>33</sup>

Information about the developer including his past projects and the projected operating expenses of the development is important since it alerts a purchaser to the builder's reputation and provides an estimate of maintenance expenses.<sup>34</sup> The public offering statement discloses this and other information such as the declaration and bylaws, a general description of the development, and any encumbrances or liens which may affect the condominium's title.<sup>35</sup> To make sure the prospective purchaser actually sees the public offering statement, the Act requires that the developer deliver it to the purchaser either ten days prior to the date of contract or at the time of contract providing ten days are allowed in which to cancel.<sup>36</sup>

28. VIRGINIA CONDOMINIUM STUDY at 3, 11-13.

29. VA. CODE ANN. § 55-79.54 (Cum. Supp. 1974).

30. See p. 2 *supra* and *infra* at 11.

31. VA. CODE ANN. § 55-79.54(c) (Cum. Supp. 1974).

32. *Id.* § 55-79.54(c)(1)(3).

33. *Id.* 55-79.54(c) (8-12).

These provisions prevent the obvious abuse of a developer selling high-quality units first and then subsequently expanding remaining land into cheaper condominium units thereby lowering the value of the initial purchaser's property.

Similar provisions exist for convertible land. *Id.* § 55-79.54(b)(1-6).

In situations involving the conversion of apartments to condominiums (conversion condominiums), tenants are also protected in that 90 days notice must be given prior to conversion. Also tenants have, for the first 60 days of this period, the exclusive right to purchase the unit as long as the conversion occurs "without substantial alteration in [the unit's] physical layout." *Id.* § 55-79.94(b).

In addition to expandable and convertible condominiums, disclosure provisions exist for contractable condominiums, leasehold condominiums, and proposed easements the developer may require. *Id.* § 55-79.54(d-f).

34. See WASHINGTON CENTER FOR METROPOLITAN STUDIES, CONDOMINIUMS IN THE DISTRICT OF COLUMBIA: A PRELIMINARY RECONNAISSANCE at 18-20 (1974) [hereinafter cited as WASHINGTON CENTER STUDY].

35. VA. CODE ANN. § 55-79.90 (Cum. Supp. 1974).

36. *Id.* § 55-79.88(b); see *id.* § 55-79.41(l).

The extent to which prospective purchasers receive information about anticipated future repairs and maintenance expenses varies according to the type of condominium.<sup>37</sup> For a new condominium just placed on the market, the public offering statement includes the condominium's proposed budget for at least the first year of operation.<sup>38</sup> In the case of conversion condominiums, situations in which an apartment has been converted to a condominium,<sup>39</sup> the public offering statement must provide information about repair and maintenance costs for the past three years.<sup>40</sup> On the resale of condominiums, subsequent purchasers are furnished information about anticipated capital expenditures and the status of reserve funds.<sup>41</sup> Furthermore, a purchaser may request a statement setting forth current unpaid assessments on the unit he is contracting to buy.<sup>42</sup> The unit owner's association is penalized for failing to provide such a statement.<sup>43</sup>

A basic problem in condominium development is management after the condominium is complete and all the units are sold.<sup>44</sup> Under old Virginia

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The purchaser's right to receive the statement prior to the purchase or at the purchase date subject to the 10-day cancellation period must also be included in the public offering statement. *Id.* § 55-79.90(a)(9).

The public offering statement must also be filed with the Virginia Real Estate Commission when the developer initially registers the condominium, and it, along with the registration of a condominium development, are mandatory before condominium units can be sold. *Id.* § 55-79.88.

37. This information is important since unit owners must pay these expenses in the form of yearly assessments.

38. VA. CODE ANN. § 55-79.90(a)(3) (Cum. Supp. 1974).

39. *Id.* § 55-79.41(h).

40. This is also broken down into per unit costs. *Id.* § 55-79.94.

The three year period is important because it counteracts the frequent abuse of unrealistically low maintenance expenses just prior to the conversion which are substantially increased after conversion.

41. *Id.* § 55-79.97(a) (2-3).

42. *Id.* § 55-79.84(h).

43. *Id.*; The association's lien for unpaid assessments is extinguished if it fails to give this statement. *See id.* § 55-79.84(a); *see infra* p. 16.

Further protection of an informational nature is provided by the requirement that the Virginia Real Estate Commission investigate the veracity of the developer's promotional literature, the status of his title, the background of the developer with regard to prior criminal convictions for the sale and development of condominiums, and the public offering statement. *Id.* § 55-79.91(a)-(e).

44. Abuses occur when developers enter into favorable long-term management agreements, often with management companies controlled by the developer.

In this situation, the unit owner's association is ineffective since the major agreements have already been signed. The result is that unit owners are burdened with onerous improvements they do not desire or expensive maintenance agreements. Often the developer is involved in condominium affairs as a management company long after all units are sold. WASHINGTON CENTER STUDY at 20-21.

law, the status of management contracts made prior to control by the unit owner's association was uncertain.<sup>45</sup> The new Act moves toward solving this problem by setting a limit to the time a declarant, instead of the owner's association, may manage and control the condominium and by providing that contracts made by the declarant during his control must be ratified by the unit owner's association.<sup>46</sup>

Another potential problem for condominium owners is the practice of many condominium associations of reserving a right of first refusal when a unit owner resells his unit.<sup>47</sup> Section 55-79.85 of the new law is designed to prevent undue delay in the exercise of first refusal rights by making the condominium instructions require the prompt exercise of this right. Otherwise the establishment of first refusal rights is void *ab initio*.<sup>48</sup> When a unit owner sells, failure to comply with the terms of the instrument and promptly produce a statement of the association's intentions with regard to the unit is an additional ground for voiding a right of refusal.<sup>49</sup>

Several other parts of the statute benefit the purchaser of a condominium. Developers must provide a one year warranty covering structural defects in a unit and common areas<sup>50</sup> and must place in escrow any money required as a deposit for the sale.<sup>51</sup> Such funds are immune from the creditors of both the buyer and the seller, thereby preventing developers from diverting them into the project's regular cash flow.<sup>52</sup>

### B. Aid to the Developer

While the statute clearly seeks to assist the condominium buyer, it also

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45. However, case law in Florida indicates that condominium owners could be bound by agreements made before all units of the condominium are sold, regardless of how unfavorable the contracts are to the eventual owners. *Riviera Condominium Apt. Inc v. Weinberger*, 231 So. 2d 850 (Fla. 1970), *cert. denied*, 238 So. 2d 424 (1970); *Wechsler v. Goldman*, 214 So. 2d 741, 744 (Fla. 1968); *Fountainview Ass'n v. Bell*, 203 So. 2d 657 (Fla. 1967), *cert. denied*, 214 So. 2d 609 (1968); *Lake Mabel Development Corp. v. Bird*, 99 Fla. 253, 257, 126 So. 356, 358 (1930).

46. VA. CODE ANN. § 55-79.74 (Cum. Supp. 1974).

47. The justification for this practice is that condominium buy-back arrangements protect the complex from a flood of sales by giving the complex the first opportunity to purchase the property. Abuse occurs, however, when the condominium uses its right of first refusal as a device to block sales. This can be done by unduly prolonging the period for exercising this right, thereby driving away prospective purchasers.

48. VA. CODE ANN. § 55-79.85 (Cum. Supp. 1974).

49. *Id.*

50. *Id.* § 55-79.79(b).

51. *Id.* § 55-79.95.

52. Many condominium buyers have complained that "deposit" money is in reality only a way for a developer to have immediate, interest-free cash to use for his project rather than a true escrow. WASHINGTON CENTER STUDY at 20.

is designed to help the developer by providing greater flexibility in the type of development arrangements legally available.<sup>53</sup> The Act allows developers to expand or reduce the condominium in relation to market conditions in such a way that the rights of unit holders in common areas are not injured.<sup>54</sup> This is an improvement over the old law which held the developer to the project as he first records it, regardless of market changes.

The method used to expand or contract condominiums involves the following statutory concepts: convertible land, contractable condominium, expandable condominium, and convertible space.<sup>55</sup> Convertible land is "a building site within which the developer intends to create units that are not in existence at the time of the recordation of the condominium instruments."<sup>56</sup> Prior to conversion, it is treated as a common element and is held by the unit owners, subject to the right of the developer to convert it to buildings.<sup>57</sup> The developer has five years in which to convert convertible lands to buildings, thereby enlarging the number of units in the project.<sup>58</sup> After conversion, the interest of existing unit owners in the remaining common areas is reallocated.<sup>59</sup>

The convertible land concept gives the developer flexibility for he may add additional units according to sales. The contractable condominium concept, in conjunction therewith provides additional flexibility.<sup>60</sup> By reserving an option in the declaration to contract the condominium, the developer may withdraw convertible land from the project when it is not as successful as he had originally expected.<sup>61</sup>

Convertible land and contractable condominiums assist not only the developer but also the mortgagee and unit owners. If a mortgage lender should acquire the property through foreclosure, he has the option to either continue with development or take out withdrawal land.<sup>62</sup> He would not have had this option in the traditional project and would have been forced to spend his resources to continue the project.

This arrangement is not unfair to unit owners since they entered their

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53. VIRGINIA CONDOMINIUM STUDY at 5-9.

54. *Id.*

55. VA. CODE ANN. § 55-79.41(g),(i),(j),(n) (Cum. Supp. 1974).

56. VIRGINIA CONDOMINIUM STUDY at 5; *see* VA. CODE ANN. § 55-79.41(i) (Cum. Supp. 1974).

57. VA. CODE ANN. § 55-79.61(c) (Cum. Supp. 1974). *See id.* § 55-79.54(b), -79.55, -79.56, -79.58(c).

A developer may not, however, hold convertible land indefinitely. A conversion must be made within a five-year period. *Id.* § 55-79.61.

58. *Id.* § 55-79.61(c).

59. *Id.* § 55-79.61(b).

60. *Id.* §§ 55-79.41(g), -79.64. *See id.* § 55-79.54(d).

61. *Id.* §§ 55-79.54(d), -79.64.

contracts fully aware that land could be converted or withdrawn. Furthermore their title is free and clear when land not suitable for development is withdrawn<sup>63</sup> and they are no longer burdened with its maintenance and upkeep.

The expandable condominium is the converse of the contractable condominium. Here, the developer reserves the option to expand the condominium in the event the project is successful;<sup>64</sup> however, no obligation exists requiring expansion.

Another area of flexibility affecting condominiums for commercial and business use is the convertible space concept.<sup>65</sup> Convertible space, as distinguished from convertible land, is space in a building which the developer has reserved for himself.<sup>66</sup> Until he sells this space, the builder is like a unit owner since he owns a unit of space in the building with a proportionate share of common area attached to it.<sup>67</sup>

This concept proves to be more expedient than the traditional arrangements whereby the developer had to design the physical layout in advance of his sale and thus could not allocate space according to the needs of his buyer. Under the new law, when using convertible space, the builder can divide the unit at the time of sale if the buyer expresses a desire to do so.<sup>68</sup>

### C. *Solution of Technical Problems in the Old Horizontal Property Act*

The new Virginia Condominium Act removes several technical problems existing under the old Act. One was that, arguably, the old law was not mandatory, therefore allowing certain types of condominiums to be built under Virginia common law.<sup>69</sup> In bypassing the statute, a developer could avoid disclosure provisions, separate tax assessment and bylaw enforceability.<sup>70</sup> The new law ends this possibility by prohibiting sales until a condominium is registered under the Act.<sup>71</sup>

62. VIRGINIA CONDOMINIUM STUDY at 6.

63. *Id.*

64. VA. CODE ANN. §§ 55-79.54(c), -79.56, -79.63 (Cum. Supp. 1974).

65. VIRGINIA CONDOMINIUM STUDY at 7-8.

66. VA. CODE ANN. § 55-79.41(j) (Cum. Supp. 1974); *see* VIRGINIA CONDOMINIUM STUDY at 4-5, 7-8.

67. VA. CODE ANN. §§ 55-79.41(j), -79.55(b), -79.56(c), -79.58(d), -79.62.

68. VIRGINIA CONDOMINIUM STUDY at 7-8.

69. Bergin, *Virginia's Horizontal Property Act: An Introductory Analysis*, 52 VA. L. REV. 961, 978-82 (1966) [hereinafter cited as Bergin]. One situation where a developer could bypass the old law was a multiple unit structure in which the units "together with undivided interests in fee in the land and in common buildings" were to be sold to individual purchasers. *Id.* at 981.

70. *Id.* at 982; *see* VA. CODE ANN. §§ 55-79.11, -79.14, -79.17, -79.21, -79.29, -79.38 (1950), as amended VA. CODE ANN. §§ 55-79.39-79.103 (Cum. Supp. 1974).

71. VA. CODE ANN. § 55-79.88(a) (Cum. Supp. 1974).

Another shortcoming of the old Act was its failure in eminent domain proceedings to devise a method for distributing the proceeds of an award and reallocating the interest of remaining owners in common areas.<sup>72</sup> The new law covers the various possible effects that condemnation could have upon the condominium.<sup>73</sup> It establishes court supervision of reallocation of the interest of unit owners in common areas and a reevaluation of unit value in the event of partial condemnation of a unit.<sup>74</sup>

The statute also provides various easements which facilitate condominium management and benefit unit owners. Section 55-79.60 gives an easement to a unit or common element which encroaches on another unit or common element because of deviation during construction from the original plan or because of encroachment during subsequent repairs.<sup>75</sup> Easements of this type are customarily required by title insurers as a prerequisite to giving survey coverage or title insurance policies.<sup>76</sup> Sections 55-79.65 and 55-79.66 provide the developer with easements when converting or expanding the condominium and for use in sales promotion activity.<sup>77</sup> Finally, section 55-79.79 provides the management association with access to units for repair work.<sup>78</sup>

Under the old law, it was uncertain as to whether the statute applied only to horizontal building.<sup>79</sup> The new law clearly implies that detached dwellings within a complex are considered condominiums and that a complex can include non-contiguous land.<sup>80</sup>

Another technical problem which is clarified involves the taxation of

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72. Bergin at 986.

73. VA. CODE ANN. § 55-79.44 (Cum. Supp. 1974).

74. When common area is taken, the award is allocated to unit owners in proportion to their undivided interest in common areas. *Id.* (a). If one or more units is taken, the remaining common interest is reallocated according to court decree. Unit owners of condemned units are also compensated for their common interest as well as their unit. *Id.* (b).

When a portion of a unit is taken, the court determines the value of the remaining portion and reallocates the common's interest accordingly. *Id.* (c). If the remaining portion is unuseable, a unit owner gets full compensation for his unit; the unit then becomes a common area; and the remaining interests in commons is reallocated. *Id.* (d). The court decree also provides for a reallocation of voting strength, future participation in profits, and liabilities for expenses. *Id.* (e).

75. *Id.* § 55-79.60.

76. VIRGINIA CONDOMINIUM STUDY at 10.

77. VA. CODE ANN. §§ 55-79.65—79.66 (Cum. Supp. 1974).

78. *Id.* § 55-79.79.

79. Bergin at 979-80; VIRGINIA CONDOMINIUM STUDY at 4.

80. See VA. CODE ANN. § 55-79.58(a) (Cum. Supp. 1974). This provision, by implication, permits non-contiguous land to be included in a single condominium project.

Also, non-horizontal townhouse structures are included within the condominium concept as seen in the statute's definition of "condominium unit" and "unit." *Id.* § 55-79.41(f), (y).

condominium units before any are sold. Under the old law, each was taxed separately.<sup>81</sup> The simpler method of taxation established under the new law allows the entire project to be taxed as a whole until units are conveyed to purchasers.<sup>82</sup>

### III. PROBLEMS TO CONSIDER

Despite the many improvements that the new Virginia Condominium Act makes, it still leaves potential problems for condominium purchasers, owners, and builders. Careful preliminary planning is necessary to avoid these problems.

One perplexing question is the extent to which individual unit owners, absent liability insurance, are required to satisfy judgments in tort actions rendered against either the unit owner's association or individual owners.<sup>83</sup> In the case of a tort committed by the unit owner's association or its agents,<sup>84</sup> the association would appear to be solely liable because it committed the tort as a separate entity apart from the unit owners.<sup>85</sup> Moreover, it is the logical party to sue since its resources would appear to be greater than those of any individual unit owner. The new Act does not, however, confirm this result.

Failure of the new Act to make the unit owner's association the sole source of liability for its torts leaves open the possibility that individual unit owners may be required to satisfy a judgment against the association. This is because unit owners, as individuals, have an undivided interest in common areas thereby making them liable for torts occurring thereon.<sup>86</sup> By virtue of their participation in decisions affecting these common areas, the condominium is analogous to a joint enterprise, and it would be all too easy for a court to look beyond the unit owner's association as an entity and hold individual unit owners liable for acts of the association.<sup>87</sup>

With regard to torts committed by owners in individual units, classical

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81. VA. CODE ANN. § 55-79.14 (1950), as amended VA. CODE ANN. § 55-79.42 (Cum. Supp. 1974).

82. VA. CODE ANN. § 55-79.42 (Cum. Supp. 1974.)

83. Bergin at 970-71; Note, *White v. Cox: Tort Actions Against the Condominium Association—Implications for the Individual Owner*, 8 CALIF. W.L. REV. 536, 543-46 (1972) [hereinafter cited as Note, *White v. Cox*]; Note, *Building on the Horizontal Property Act: Condominiums in Iowa*, 50 IOWA L. REV. 291, 321-22 (1973). [hereinafter cited as Note, *Building on the Horizontal Property Act*].

84. This type of tort would usually arise in connection with the use of common areas.

85. *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Ct. App. 1971).

86. See *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (Ct. App. 1971); W. PROSSER, TORTS § 72 (4th ed. 1971) [hereinafter cited as PROSSER].

87. Note, *White v. Cox* at 541-42.

tort doctrine would appear to apply.<sup>88</sup> The likely result is that the individual committing the tort will be solely responsible.<sup>89</sup>

The lack of statutory protection afforded unit owners against liability for the association's torts places responsibility upon the condominium to purchase a master liability insurance policy covering both the unit owner's association and unit owners. The Virginia law permits the original condominium instruments to make such a policy mandatory.<sup>90</sup> However, the statutes do not *require* that condominiums acquire such protection.<sup>91</sup> Therefore, an important consideration for prospective purchasers is the nature and extent of insurance protection provided by the condominium. They should be sure to examine the bylaws given in the public offering statement for this information and be alert for any deficiencies.

Liability for contracts made by the unit owner's association is another area which could create potential liability for unit holders.<sup>92</sup> The unit owner's association, under the Virginia law, is responsible and authorized to provide necessary maintenance associated with the condominium operations and to make improvements.<sup>93</sup> Unit owners are liable for these expenses on a pro-rata basis.<sup>94</sup> In the event unit owners fail to pay these expenses, the association may perfect a lien against the owner's unit.<sup>95</sup> Unit owners may have this lien released by payment of the assessment.<sup>96</sup>

In establishing this procedure, the statute is silent as to possible liens by third party contractors who wish to go beyond the unit owner's association. The inference from the statute's silence is that general contract, agency and corporate law principles would apply to condominiums. Under these principles, liability would not be limited to the unit owner's association, and a unit owner may be personally liable for the association's contracts even though he may have paid all assessments levied against him.<sup>97</sup>

Under the statute, the unit owner's association may be incorporated.<sup>98</sup>

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88. Bergin at 970-71.

89. FERRER & STECHER 299; PROSSER §§ 60-63.

90. VA. CODE ANN. § 55-79.81(a)(2) (Cum. Supp. 1974).

91. Condominiums should, as a matter of routine, acquire liability protection. Liability protection, however, is not always provided. See WASHINGTON CENTER STUDY at 19.

92. Bergin at 971-72.

93. VA. CODE ANN. §§ 55-79.79—79.80 (Cum. Supp. 1974).

94. *Id.* § 55-79.83(c).

95. *Id.* § 55-79.84.

96. *Id.* § 55-79.46(b).

97. Bergin at 972; Note, *Building on the Horizontal Property Act* at 320. The rationale for making unit owners liable is that the association represents the unit owners and acts at their direction. Therefore, unit owners, individually and as a group, should be liable for the acts of the association.

98. VA. CODE ANN. § 55-79.73(a) (Cum. Supp. 1974).

However, even in this situation, contract and tort liability for the individual owners may exist. As one analyst has commented:

Whether it acts as the board of directors of a corporation or not, the board of managers is responsible for its acts and omissions in tort and contract. Under general principles of agency, the unit owners are vicariously liable for any acts performed by the board within the scope of its authority.<sup>99</sup>

A possible solution suggested by several writers is for the bylaws to place a mandatory ceiling on the dollar amount of a contract the association may enter.<sup>100</sup> Any contracts entered in excess of this ceiling would require collective approval by the unit owners.<sup>101</sup> Individual unit owners could further insure that they are not required to pay a large expenditure by having the bylaws require money in excess of the ceiling be collected before the contract is entered.<sup>102</sup>

Another problem associated with the new Act is the effect of termination of the condominium upon mortgagees of the unit owners. Under the old law, a condominium could be terminated only after lien creditors agreed to accept the unit owner's undivided interest as a tenant in common as security.<sup>103</sup> The new law does not have a similar requirement.<sup>104</sup> The result is that without his approval, a mortgagee's form of security may be converted from security in an individual unit of one owner to the same in undivided interest in a tenancy in common.<sup>105</sup>

Despite the Act's emphasis upon consumer protection, problems still exist in this area since, to be protected, a purchaser must act with a great deal of knowledge and expertise in his purchase. The approach the Act takes toward protection is to provide a full and fair disclosure of all the ramifications of a condominium purchase similar to the disclosure established under the Federal Securities Regulation Acts.<sup>106</sup> The result is that the consumer is at his peril to study carefully and understand the information to which he has access.<sup>107</sup>

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99. Kane and Helms, *The Illinois Condominium Property Act*, 1970 U. ILL. L. F. 157, 176 (1970).

100. Bergin at 973; Note, *Building on the Horizontal Property Act* at 320-21.

101. Note, *Building on the Horizontal Property Act* at 320-21.

102. Bergin at 973.

103. VA. CODE ANN. § 55-79.9 (1950), as amended VA. CODE ANN. § 55-79.72 (Cum Supp. 1974). See Bergin at 977.

104. See VA. CODE ANN. § 55-79.72 (Cum. Supp. 1974).

105. Mortgagees do, however, have priority over liens by the unit owners association and other liens except real estate tax liens before the project is terminated. *Id.* § 55-79.84(a). It is assumed that this priority would continue after termination.

106. VIRGINIA CONDOMINIUM STUDY at 12.

107. Whether the ordinary purchaser is sufficiently equipped to meet this requirement is

The necessity of consumer sophistication in several areas highlights the problems associated with disclosure of information as a means of consumer protection. First, in the case of resale of units, it is not mandatory that a purchaser be furnished a statement of unpaid assessments against the unit. He must request such a statement.<sup>108</sup>

A careful reading of the bylaws and declaration is also necessary. For example, the extent of insurance coverage the condominium offers is contained in the bylaws.<sup>109</sup> Furthermore, in convertible and expandable condominiums, the declaration contains the extent to which future structures will conform to present buildings in style and quality.<sup>110</sup> The purchaser's failure to appreciate the significance of expandable and convertible condominiums with regard to future development could lead to future dissatisfaction when the owner becomes aware that new buildings are substantially different from his own unit.

In other ways, the Act raises questions as to the extent to which it protects purchasers. The Virginia Real Estate Commission's enforcement powers under the law are broad.<sup>111</sup> However, the effectiveness of these powers in benefiting consumers will ultimately depend upon the vigor with which the Real Estate Commission exercises its powers.<sup>112</sup> Finally, the criminal penalties for violation of the statute may not be strong enough to prevent abuses from occurring.<sup>113</sup>

Beyond the scope of the new Virginia law, questions inherent in the purchase and development of condominiums exist. The purchaser of a completely new condominium despite full and adequate disclosure is still participating in a new and unproven venture compared to traditional home ownership. In home ownership, past history is an approximate guide to maintenance expenses, future appreciation, and the legal obligations a

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an open question. The sophisticated consumer may appreciate the material which he is given. However, the ordinary consumer, without neutral, expert advice, may not be aware of the ramifications of the information they receive. The possibility exists that, just as the purchasers of securities often fail to understand the implications of their purchase, condominium purchasers will also fail to understand the nature of their purchase.

108. VA. CODE ANN. § 79.84(h) (Cum. Supp. 1974).

109. *Id.* § 55-79.81.

110. *Id.* § 55-79.54(b)(4), (c)(10).

111. *Id.* §§ 55-79.90, -79.91, -79.98, -79.99, -79.100, -79.101, -79.102.

112. For example, the Act requires that the Commission investigate the background of condominium promoters to ascertain whether they have been convicted of any crimes relating to land sales in the United States. *Id.* § 55-79.91(d). The Commission is not required to investigate beyond the commission of crimes and more detailed investigation could be useful.

Furthermore, the extent the Commission seeks to intervene in suits involving the declarant is a matter of discretion with the Commission. *Id.* § 55-79.98(d).

113. *Id.* § 55-79.103.

purchaser will incur. None of these factors are known for condominiums.

In conclusion, the Virginia Condominium Act is a significant improvement over Virginia's old Horizontal Property Act. It provides consumers with information and gives developers greater flexibility by allowing several possible development arrangements. However, the statute still leaves several questions unanswered such as the tort and contract liability of individual owners and the extent which consumers will take advantage of the protection afforded them.

*E.A.B., III*