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HOUSE BILL NO. 2750
AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the House Committee on General Laws
on)

(Patrons Prior to Substitute—Delegates Oates and Coyner [HB 2292])

A *BILL to amend and reenact §§ 54.1-2353, 54.1-2354.5, 55.1-1837, and 55.1-1940.1 of the Code of Virginia, relating to common interest communities; termination of certain management contracts; transfer of association books and records.*

on _____)

Be it enacted by the General Assembly of Virginia:

1. That §§ 54.1-2353, 54.1-2354.5, 55.1-1837, and 55.1-1940.1 of the Code of Virginia are amended and reenacted as follows:

§ 54.1-2353. Protection of the interests of associations; appointment of receiver for common interest community manager.

A. A common interest community manager owes a fiduciary duty to the associations to which it provides management services with respect to the manager's handling the funds or the records of each association. All funds deposited with the common interest community manager shall be handled in a fiduciary capacity and shall be kept in a separate fiduciary trust account or accounts in an FDIC-insured financial institution separate from the assets of the common interest community manager. The funds shall be the property of the association and shall be segregated for each depository in the records of the common interest community manager in a manner that permits the funds to be identified on an association basis. *The common interest community manager shall transfer and release all funds and close bank accounts maintained on behalf of an association within a reasonable time after termination of the contract for management services without additional cost to the association.*

B. All records having administrative or fiscal value to the association that a common interest community manager holds, maintains, compiles, or generates on behalf of a common interest community are the property of the association. A common interest community manager may retain and dispose of association records in accordance with a policy contained in the contract between the common interest community manager and the association. Within a reasonable time after a written request for any such records, the common interest community manager shall provide copies of the requested records to the association at the association's expense. The common interest community manager shall return all association records that it retains and any originals of legal instruments or official documents that are in the possession of the common interest community manager to the association within a reasonable time after termination of the contract for management services without additional cost to the association. Records maintained in electronic format may be returned in such format.

B- C. If the Board has reasonable cause to believe that a common interest community manager is unable to properly discharge its fiduciary responsibilities to an association to which it provides management services, the Board may submit an ex parte petition to the circuit court of the city or county wherein the common interest community manager maintains an office or is doing business for the issuance of an order authorizing the immediate inspection by and production to representatives of the petitioner of any records, documents, and physical or other evidence belonging to the subject common interest community manager. The court may issue such order without notice to the common interest community manager if the petition, supported by affidavit of the petitioner and such other evidence as the court may require, shows reasonable cause to believe that such action is required to prevent immediate loss of property of one or more of the associations to which the subject common interest community manager provides management services. The court may also temporarily enjoin further activity by the common interest community manager and take such further action as shall be necessary to conserve, protect, and disburse the funds involved, including the appointment of a receiver. The papers filed with the court pursuant to this subsection shall be placed under seal.

C- D. If the Board has reasonable cause to believe that a common interest community manager is unable to properly discharge its fiduciary responsibilities to an association to which it provides management services, the Board may file a petition with the circuit court of the county or city wherein the subject common interest community manager maintains an office or is doing business. The petition may seek the following relief: (i) an injunction prohibiting the withdrawal of any bank deposits or the disposition of any other assets belonging to or subject to the control of the subject common interest community manager and (ii) the appointment of a receiver for all or part of the funds or property of the subject common interest community manager. The subject common interest community manager shall be given notice of the time and place of the hearing on the petition and an opportunity to offer evidence. The court, in its discretion, may require a receiver appointed pursuant to this section to post bond, with or without surety. The papers filed with the court under this subsection shall be placed under seal until such time as the court grants an injunction or

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60 appoints a receiver. The court may issue an injunction, appoint a receiver, or provide such other relief as the
61 court may consider proper if, after a hearing, the court finds that such relief is necessary or appropriate to
62 prevent loss of property of one or more of the associations to which the subject common interest community
63 manager provides management services.

64 ~~D~~. *E*. In any proceeding under subsection ~~C~~ *D*, any person or entity known to the Board to be indebted to
65 or having in his possession property, real or personal, belonging to or subject to the control of the subject
66 common interest community manager's business and which property the Board reasonably believes may
67 become part of the receivership assets shall be served with a copy of the petition and notice of the time and
68 place of the hearing.

69 ~~E~~. *F*. The court shall describe the powers and duties of the receiver in its appointing order, which may be
70 amended from time to time. The receiver shall, unless otherwise ordered by the court in the appointing order,
71 (i) prepare and file with the Board a list of all associations managed by the subject common interest
72 community manager; (ii) notify in writing all of the associations to which the subject common interest
73 community manager provides management services of the appointment and take whatever action the receiver
74 deems appropriate to protect the interests of the associations until such time as the associations have had an
75 opportunity to obtain a successor common interest community manager; (iii) facilitate the transfer of records
76 and information to such successor common interest community manager; (iv) identify and take control of all
77 bank accounts, including without limitation trust and operating accounts, over which the subject common
78 interest community manager had signatory authority in connection with its management business; (v) prepare
79 and submit an accounting of receipts and disbursements and account balances of all funds under the receiver's
80 control for submission to the court within four months of the appointment and annually thereafter until the
81 receivership is terminated by the court; (vi) attempt to collect any accounts receivable related to the subject
82 common interest community manager's business; (vii) identify and attempt to recover any assets wrongfully
83 diverted from the subject common interest community manager's business, or assets acquired with funds
84 wrongfully diverted from the subject common interest community manager's business; (viii) terminate the
85 subject common interest community manager's business; (ix) reduce to cash all of the assets of the subject
86 common interest community manager; (x) determine the nature and amount of all claims of creditors of the
87 subject common interest community manager, including associations to which the subject common interest
88 community manager provided management services; and (xi) prepare and file with the court a report of such
89 assets and claims proposing a plan for the distribution of funds in the receivership to such creditors in
90 accordance with the provisions of subsection ~~F~~ *G*.

91 ~~F~~. *G*. Upon the court's approval of the receiver's report referenced in subsection ~~E~~ *F*, at a hearing after
92 such notice as the court may require to creditors, the receiver shall distribute the assets of the common
93 interest community manager and funds in the receivership first to clients whose funds were or ought to have
94 been held in a fiduciary capacity by the subject common interest community manager, then to the receiver for
95 fees, costs, and expenses awarded pursuant to subsection ~~G~~ *H*, and thereafter to the creditors of the subject
96 common interest community manager, and then to the subject common interest community manager or its
97 successors in interest.

98 ~~G~~. *H*. A receiver appointed pursuant to this section shall be entitled, upon proper application to the court
99 in which the appointment was made, to recover an award of reasonable fees, costs, and expenses. If there are
100 not sufficient nonfiduciary funds to pay the award, then the shortfall shall be paid by the Common Interest
101 Community Management Recovery Fund as a cost of administering the Fund pursuant to § 54.1-2354.5, to
102 the extent that the said Fund has funds available. The Fund shall have a claim against the subject common
103 interest community manager for the amount paid.

104 ~~H~~. *I*. The court may determine whether any assets under the receiver's control should be returned to the
105 subject common interest community manager.

106 ~~I~~. *J*. If the Board shall find that any common interest community manager is insolvent, that its merger into
107 another common interest community manager is desirable for the protection of the associations to which such
108 common interest community manager provides management services, and that an emergency exists, and, if
109 the board of directors of such insolvent common interest community manager shall approve a plan of merger
110 of such common interest community manager into another common interest community manager, compliance
111 with the requirements of § 13.1-718 shall be dispensed with as to such insolvent common interest community
112 manager and the approval by the Board of such plan of merger shall be the equivalent of approval by the
113 holders of more than two-thirds of the outstanding shares of such insolvent common interest community
114 manager for all purposes of Article 12 (§ 13.1-715.1 et seq.) of Chapter 9 of Title 13.1. If the Board finds that
115 a common interest community manager is insolvent, that the acquisition of its assets by another common
116 interest community manager is in the best interests of the associations to which such common interest
117 community manager provides management services, and that an emergency exists, it may, with the consent of
118 the boards of directors of both common interest community managers as to the terms and conditions of such
119 transfer, including the assumption of all or certain liabilities, enter an order transferring some or all of the
120 assets of such insolvent common interest community manager to such other common interest community

121 manager, and no compliance with the provisions of §§ 13.1-723 and 13.1-724 shall be required, nor shall §§
 122 13.1-730 through 13.1-741 be applicable to such transfer. In the case either of such a merger or of such a sale
 123 of assets, the Board shall provide that prompt notice of its finding of insolvency and of the merger or sale of
 124 assets be sent to the stockholders of record of the insolvent common interest community manager for the
 125 purpose of providing such shareholders an opportunity to challenge the finding that the common interest
 126 community manager is insolvent. The relevant books and records of such insolvent common interest
 127 community manager shall remain intact and be made available to such shareholders for a period of 30 days
 128 after such notice is sent. The Board's finding of insolvency shall become final if a hearing before the Board is
 129 not requested by any such shareholder within such 30-day period. If, after such hearing, the Board finds that
 130 such common interest community manager was solvent, it shall rescind its order entered pursuant to this
 131 subsection and the merger or transfer of assets shall be rescinded. But if, after such hearing, the Board finds
 132 that such common interest community manager was insolvent, its order shall be final.

133 ~~J.~~ K. The provisions of this article are declared to be remedial. The purpose of this article is to protect the
 134 interests of associations adversely affected by common interest community managers who have breached
 135 their fiduciary duty. The provisions of this article shall be liberally administered in order to protect those
 136 interests and thereby the public's interest in the quality of management services provided by Virginia
 137 common interest community managers.

138 **§ 54.1-2354.5. Common Interest Community Management Recovery Fund.**

139 A. There is hereby created the Common Interest Community Management Recovery Fund, referred to in
 140 this section as "the Fund," to be used in the discretion of the Board to protect the interests of associations.

141 B. Each common interest community manager, at the time of initial application for licensure, and each
 142 association filing its first annual report after the effective date shall be assessed \$25, which shall be
 143 specifically assigned to the Fund. Initial payments may be incorporated in any application fee payment or
 144 annual filing fee and transferred to the Fund by the Director within 30 days.

145 All assessments, except initial assessments, for the Fund shall be deposited within three business days
 146 after their receipt by the Director, in one or more federally insured banks, savings and loan associations, or
 147 savings banks located in the Commonwealth. Funds deposited in banks, savings institutions, or savings banks
 148 in excess of insurance afforded by the Federal Deposit Insurance Corporation or other federal insurance
 149 agency shall be secured under the Virginia Security for Public Deposits Act (§ 2.2-4400 et seq.). The deposit
 150 of these funds in federally insured banks, savings and loan associations, or savings banks located in the
 151 Commonwealth shall not be considered investment of such funds for purposes of this section. Funds
 152 maintained by the Director may be invested in securities that are legal investments for fiduciaries under the
 153 provisions of § 64.2-1502.

154 Interest earned on the deposits constituting the Fund shall be used for administering the Fund. The
 155 remainder of this interest, at the discretion of the Board, may be transferred to the Common Interest
 156 Community Management Information Fund, established pursuant to § 54.1-2354.2, or accrue to the Fund.

157 C. On and after July 1, 2011, the minimum balance of the Fund shall be \$150,000. Whenever the Director
 158 determines that the principal balance of the Fund is or will be less than such minimum principal balance, the
 159 Director shall immediately inform the Board. At the same time, the Director may recommend that the Board
 160 transfer a fixed amount from the Common Interest Community Management Information Fund to the Fund to
 161 bring the principal balance of the Fund to the amount required by this subsection. Such transfer shall be
 162 considered by the Board within 30 days of the notification of the Director.

163 D. If any such transfer of funds is insufficient to bring the principal balance of the Fund to the minimum
 164 amount required by this section, or if a transfer to the Fund has not occurred, the Board shall assess each
 165 association and each common interest community manager, within 30 days of notification by the Director, a
 166 sum sufficient to bring the principal balance of the Fund to the required minimum amount. The amount of
 167 such assessment shall be allocated among the associations and common interest community managers in
 168 proportion to each payor's most recently paid annual assessment, or if an association or common interest
 169 community manager has not paid an annual assessment previously, in proportion to the average annual
 170 assessment most recently paid by associations or common interest community managers, respectively. The
 171 Board may order an assessment at any time in addition to any required assessment. Assessments made
 172 pursuant to this subsection may be issued by the Board (i) after a determination made by it or (ii) at the time
 173 of license renewal.

174 Notice to common interest community managers and the governing boards of associations of these
 175 assessments shall be by first-class mail, and payment of such assessments shall be made by first-class mail
 176 addressed to the Director within 45 days after the mailing of such notice.

177 E. If any common interest community manager fails to remit the required payment within 45 days of the
 178 mailing, the Director shall notify the common interest community manager by first-class mail at the latest
 179 address of record filed with the Board. If no payment has been received by the Director within 30 days after
 180 mailing the second notice, the license shall be automatically suspended. The license shall be restored only
 181 upon the actual receipt by the Director of the delinquent assessment.

182 F. If any association fails to remit the required payment within 45 days of the mailing, the Director shall

183 notify the association by first-class mail at the latest address of record filed with the Board. If no payment has
184 been received by the Director within 30 days after mailing the second notice, it shall be deemed a knowing
185 and willful violation of this section by the governing board of the association.

186 G. At the close of each fiscal year, whenever the balance of the Fund exceeds \$5 million, the amount in
187 excess of \$5 million shall be transferred to the Virginia Housing Trust Fund established pursuant to Chapter 9
188 (§ 36-141 et seq.) of Title 36. Except for payments of costs as set forth in this article and transfers pursuant to
189 this subsection, there shall be no transfers out of the Fund, including transfers to the general fund, regardless
190 of the balance of the Fund.

191 H. A claimant may seek recovery from the Fund subject to the following conditions:

192 1. A claimant may file a verified claim in writing to the Director for a recovery from the Fund.

193 2. Upon proper application to the Director, in those cases in which there are not sufficient funds to pay an
194 award of reasonable fees, costs, and expenses to the receiver or to restore all funds that were or ought to have
195 been held in a fiduciary capacity by the subject common interest community manager, the Director shall
196 report to the Board the amount of any shortfall to the extent that there are not sufficient funds (i) to pay any
197 award of fees, costs, and expenses pursuant to subsection ~~G~~ H of § 54.1-2353 by the court appointing the
198 receiver; or (ii) to restore all funds that were or ought to have been held in a fiduciary capacity by the subject
199 common interest community manager, as certified by the court appointing the receiver.

200 3. If the Board finds there has been compliance with the required conditions, the Board shall issue a
201 directive ordering payment of the amount of such shortfall to the claimant from the Fund, provided that in no
202 event shall such payment exceed the balance in the Fund. When the Fund balance is not sufficient to pay the
203 aggregate amount of such shortfall, the Board shall direct that payment be applied first in satisfaction of any
204 award of reasonable fees, costs, and expenses to the receiver and second to restore the funds that were or
205 ought to have been held in a fiduciary capacity by the subject common interest community manager. If the
206 Board has reason to believe that there may be additional claims against the Fund, the Board may withhold
207 any payment from the Fund for a period of not more than one year. After such one-year period, if the
208 aggregate of claims received exceeds the Fund balance, the Fund balance shall be prorated by the Board
209 among the claimants and paid in the above payment order from the Fund in proportion to the amounts of
210 claims remaining unpaid.

211 4. The Director shall, subject to the limitations set forth in this subsection, pay to the claimant from the
212 Fund such amount as shall be directed by the Board upon the execution and delivery to the Director by such
213 claimant of an assignment to the Board of the claimant's rights on its behalf and on behalf of the associations
214 receiving distributions from the Fund against the common interest community manager to the extent that such
215 rights were satisfied from the Fund.

216 5. The claimant shall be notified in writing of the findings of the Board. The Board's findings shall be
217 considered a case decision as defined in § 2.2-4001, and judicial review of these findings shall be in
218 accordance with § 2.2-4025 of the Administrative Process Act (§ 2.2-4000 et seq.).

219 6. Notwithstanding any other provision of law, the Board shall have the right to appeal a decision of any
220 court that is contrary to any distribution recommended or authorized by it.

221 7. Upon payment by the Director to a claimant from the Fund as provided in this subsection, the Board
222 shall immediately revoke the license of the common interest community manager whose actions resulted in
223 payment from the Fund. The common interest community manager whose license was so revoked shall not be
224 eligible to apply for a license as a common interest community manager until he has repaid in full the amount
225 paid from the Fund on his account, plus interest at the judgment rate of interest from the date of payment
226 from the Fund.

227 8. Nothing contained in this subsection shall limit the authority of the Board to take disciplinary action
228 against any common interest community manager for any violation of statute or regulation, nor shall the
229 repayment in full by a common interest community manager of the amount paid from the Fund on such
230 common interest community manager's account nullify or modify the effect of any disciplinary proceeding
231 against such common interest community manager for any such violation.

232 **§ 55.1-1837. Termination and duration of certain management contracts.**

233 A management contract that contains an automatic renewal provision may be terminated by the
234 association or the common interest community manager at any time without cause *and without penalty* upon
235 not less than 60 days' written notice.

236 **§ 55.1-1940.1. Termination and duration of certain management contracts.**

237 A management contract that contains an automatic renewal provision may be terminated by the unit
238 owners' association or the common interest community manager at any time without cause *and without*
239 *penalty* upon not less than 60 days' written notice.