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Virginia Assembly House Bill 516: A Subject-Matter Summary Analysis

By Ken Chadwick and Bruce Easmunt

House Bill 516 ("HB 516") amends several significant provisions of the Code of Virginia ("Code") pertaining to common interest communities.

HB 516 specifically establishes licensing requirements for managing agents, creates the Common Interest Community Board, the Office of the Common Interest Community Ombudsman, amends certain provisions of both the Virginia Real Estate Time-Share Act and Virginia Real Estate Cooperative Act, and makes significant amendments primarily to the resale requirements of both the Virginia Condominium Act ("Condominium Act") and the Virginia Property Owners' Association Act ("POAA").

Unless otherwise stated, the provisions of HB 516 will go into effect on July 1, 2008. An analysis of the provisions of HB 516 affecting the Condominium Act and the POAA follows:

The provisions of HB 516 will go into effect on July 1, 2008.

Creation of the Common Interest Community Board:

Perhaps the most significant change enacted by HB 516 is the creation of the Common Interest Community Board ("Board") whose eleven members are to be appointed by the governor. The Board will consist of three community managers, an attorney, a certified public accountant, a time-share representative, two real estate developers, one citizen who serves on an association governing body, and two citizens who reside in a common interest community.

The Board was established for several purposes. First, the Board will oversee and enforce the licensing and certification of persons or entities offering management services to common interest communities and their employees. The Board will require such persons or entities to seek accreditation and certification, as well as attend regular training and testing programs as established by the Board. The Board will also establish standards of conduct for community managers and their employees.

The Board will take over the administration of the Common Interest

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Community Management Information Fund from the Virginia Real Estate Board. In order to partially fund this, the Board has the authority under HB 516 to annually assess each community manager for licensing fees the lesser of $1,000.00 or 0.02 percent of its annual gross receipts. This fund will also be partially funded by similar assessment of common interest community associations through their annual registration fees.

In addition, the Board (instead of the Virginia Real Estate Board) will now prepare and disseminate both an association annual report, as well as a one page form to accompany association disclosure packets. The disclosure form will include information for prospective buyers pertaining to the circumstances unique to community associations, i.e. assessments, restrictive covenants and the operation and administration of the association.

In general, the Board has the authority to adopt rules and regulations in order to enforce its objectives. However, the Board may not intervene in the internal activities of an association unless it is necessary to prevent violations of the licensing provisions stated above, or provisions of the Code under which such association is created. This suggests that the Board has the authority to enforce the provisions of both the Condominium Act and the POAA.

In furtherance of its enforcement power, the Board has the authority to assess individuals up to $1,000.00 for any violation of newly added Chapter 23.3, Title 54.1 of the Code. The Board may issue cease and desist orders to an association's governing board if it has determined after a hearing that such governing board has violated any statute or regulation which governs the association. The Board may also seek court orders and injunctions against any community manager it has reasonable cause to believe is unable to properly discharge its fiduciary responsibilities to the association.

Management Agent Licensing:

Among the significant changes, HB 516 creates a requirement for any and all persons or entities engaging in "Managing services" (as such term is newly defined in Section 54.1-2345 of the Code) on or after January 1, 2009 to hold a valid license prior to engaging in such services. Engaging in such services without a valid license will subject the person or entity to the sanctions and penalties set forth in Section 54.1-111 of the Code. However, provided that an entity or person engaging in managing services submits an application to the Board prior to January 1, 2009, the Board shall issue a provisional license to such person or entity which is valid from December 31, 2008 until June 30, 2011.

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There are several requirements for a non-provisional license. In order to obtain a license from the Board, a common interest community manager must obtain and carry a blanket fidelity bond or employee dishonesty insurance policy which not only insures the community manager from loss, but insures all clients of the community manager as well. The fidelity bond or insurance policy must be in an amount equal to the lesser of $2 million, or the highest aggregate amount of both the operating and reserve balances of all associations under the control of the community manager, but in any event no less than $10,000.00.

A community manager must also certify to the Board that it is in good standing and authorized to transact business in Virginia, that it has established a code of conduct for its employees, that all agreements with its clients are in writing, that it has established internal controls to prevent the risk of fraud, and that its records are independently reviewed or audited on an annual basis.

In addition to the license above, HB516 also requires that on or after July 1, 2011 each employee who is providing managing services on the "front lines" for a common interest community manager must be certified by the Board. Thus, a person or entity who performs management services must be licensed and its "front line" manager employees must be certified by the Board. The above licensing and certification requirements do not apply to community association employees or board members whose actions may fall within the definition of management services, nor do they apply to attorneys or certified public accountants.

Changes to the Condominium Act:

Under the provisions of HB 516, condominiums are no longer registered with the Virginia Real Estate Board; condominiums will now be registered and administered by the Common Interest Community Board.

HB 516 increases the mandatory minimum coverage of an association's fidelity bond to the greater of $10,000.00 or the association's reserve balances plus one-fourth of its annual assessment, not to exceed $1 million.

The annual report fee (which is now remitted to the Common Interest Community Board) is also increased by an annual assessment paid by the Association equal to the lesser of $1,000.00 or 0.02 percent of the association's gross assessment income in the preceding year. This increase will serve to partially fund the Board as well as the Common Interest Community Management Information Fund.

A person or entity who performs management services must be licensed and its "front line" manager employees must be certified by the Board.

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A resale certificate will now require a copy of any approved minutes of an association's governing board for the six months immediately prior to the request.

Condominium Resale Certificates:

HB 516 makes several amendments to the requirements of a resale certificate. Such certificate will now require a statement of all assessments currently imposed on the unit by the association, as well as any known post-closing fee charged by the community manager, if any. HB 516 has increased the level of detail of an association's finances to be disclosed in a resale certificate and now requires a balance sheet as opposed to simply a statement of its financial condition. In addition, a resale certificate will now require a copy of any approved minutes of an association's governing board for the six months immediately prior to the request.

HB 516 also makes sweeping changes to the fee structure of resale certificates. The preparer of such certificate may charge a reasonable fee for the inspection of the Unit, up to $100.00. They may also charge up to $150.00 for the actual cost of preparation and delivery of up to two copies of a paper resale certificate, or up to $125.00 for up to two copies of an electronic version. The rush fee has been increased from $25.00 to $50.00. The preparer may charge up to $25.00 for each copy of a paper certificate, but may not charge for additional electronic copies. An association may also charge a fee up to $50.00 to reflect the purchaser as the new owner of the Unit in the association's records. Unlike the amendments to the POAA, there is no provision among the amendments of the Condominium Act setting forth a distinction between associations managed by a common interest community manager and those which are self-managed.

The association may no longer require payment at the time the resale certificate is requested, and must deliver the certificate prior to being paid. The applicable fees will now be collected initially at settlement. If, however, settlement does not occur within 90 days of delivery of the resale certificate, or if settlement does occur and the fees associated with the resale of the Unit are not remitted to the association, the association may assess such charges against the Unit being resold.

Within twelve months of the resale certificate delivery, the seller may request a resale certificate update. In addition, a settlement agent may also request a "financial update" if a full update is not desired. The financial update must contain, upon the settlement agent's request, written escrow instructions for the funds to be paid from the settlement proceeds to the association. The preparer of the resale certificate may charge up to $50.00 for either the resale update or financial update. If another unit inspection is requested the preparer may still charge a fee up to $100.00 in addition to the $50.00 just mentioned. Managers who manage prop-

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erties subject to more than one Declaration may charge separate resale fees, however, they may only charge for an inspection if the association has architectural control over the unit.

Once a resale certificate has been delivered, the association is bound to the statements contained therein. Failure to deliver a resale certificate will make the preparer of the certificate liable for an amount not to exceed $1,000.00 and, as before, the association will have waived any claim for delinquent assessments or violations of the Declaration.

Changes to the Property Owners Association Act:

HB 516 specifically states that "except as expressly authorized in [the POAA], in the Declaration, or otherwise provided by law, no association may make an assessment or impose a charge against a lot or a lot owner unless the charge is a fee for services provided or related to use of the common area." The effect of this amendment is extremely significant, as it statutorily limits the sources upon which an association may rely relative to its assessment authority.

Similar to the amendments to the Condominium Act, HB 516 increases the mandatory minimum coverage of an association's fidelity bond to the greater of $10,000.00 or the association's reserve balances plus one-fourth of its annual assessment, not to exceed $1 million. In addition, the annual report fee (which is now also remitted to the Common Interest Community Board) is increased by an annual assessment equal to the lesser of $1,000.00 or 0.02 percent of the association's gross assessment income in the preceding year. Again, this assessment is used to partially fund the operations of the Board as well as the Common Interest Community Management Information Fund.

Association Disclosure Packets:

HB 516 requires that contracts involving the sale of property subject to the terms of the POAA disclose such fact. As before, the seller is still obligated to provide the purchaser with an association disclosure packet. However, once the purchaser receives the disclosure packet, the purchaser has three days in which he may terminate the contract, or six days to terminate from the date the packet was mailed via U.S. mail.

Much like the amendments to the Virginia Condominium Act, and in addition to the current requirements, HB 516 requires that the disclosure packet contain a disclosure of any post-closing fees. In addition, a copy of any approved minutes of an association's governing board for the six months preceding the request must also be included. It appears that some language was not removed from Paragraph A 6 of

Similar to the amendments to the Condominium Act, HB 516 increases the mandatory minimum coverage of an association's fidelity bond.

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HB 516 differentiates the fees which may be charged by associations subject to the POAA which are managed by common interest community manager from those which are not.

Section 55-509.5, as it was in the Condominium Act, so that a property owners association may still provide either a statement of income and expenses or a statement of its financial position (balance sheet). Once completed, depending on the written instruction of the seller, the association may now be responsible for providing the purchaser with the disclosure packet directly, unlike the current provision of the POAA which places this burden on the seller. Again, once a disclosure packet has been delivered, the association is bound to the statements contained therein. Failure to provide a disclosure packet exposes an association managed by a common interest community manager to liability for any actual damages up to $1000.00 and such association will have waived any claims for delinquent assessments or current violations of the Declaration existing at the time of the request.

The allowable fees for the preparation and delivery of up to two disclosure packets have been amended in a similar fashion as the changes to the Condominium Act, as described above, **but only** for community associations managed by a common interest community manager. HB 516 differentiates the fees which may be charged by associations subject to the POAA which are managed by common interest community manager from those which are not. Again, the amendments to the Condominium Act do not make this distinction. The allowable fees chargeable for the preparation of disclosure packets by associations not managed by a community manager are significantly less (actual costs up to $100.00) than those which are professionally managed and require that only one packet be delivered to a designated party. In addition, failure to deliver the packet once requested only opens a "non-managed" association up to a total of $500.00 for any actual damages sustained by the seller. Another distinction exists as to when the fees are paid. If the common interest community association is managed by a common interest community manager then the fees are to be collected at the settlement table or, alternatively, if ninety (90) days have elapsed from the homeowner's request the charge can be treated as an assessment similar to the Condominium Act revisions. However, if the Association is not managed by a common interest community manager there is no requirement that fees for the preparation of a disclosure packet be paid at the time of settlement. Accordingly, it is our opinion that such fees for a "non-managed" association continue to be payable prior to delivery of the disclosure packet to the seller, unlike those of a condominium association or a professionally managed common interest community association subject to the POAA.

Disclosure packet updates, inspection updates, and settlement agent financial updates may be requested in the same manner as described above in

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the amendments to the Condominium Act.

Common Interest Community Ombudsman:

HB 516 establishes the Office of the Common Interest Community Ombudsman under the purview of the Director of the Virginia Department of Professional Occupational Regulation ("Director"). The Ombudsman will assist community association members in understanding their rights and obligations under their respective association governing documents and answer any questions or attempt to resolve any complaints they may have regarding their specific association. When providing association members with non-binding interpretations of law and regulations, the Ombudsman may require an association to provide the Ombudsman with a copy of the association's Declaration and other records for review. The Ombudsman may establish rules and regulations in furtherance of these goals.

HB 516 is unclear as to how the authority of the Ombudsman relates to the authority of the Board. The Board has the ability to assess individuals up to $1,000.00 while the Ombudsman does not. Arguably, the Ombudsman does not seem to have the same scope of enforcement as the Board.

Formal Complaints Against an Association:

Under HB 516, the Board will require each association to establish reasonable procedures for the resolution of written complaints by the association's members. HB 516 does not describe the types of complaints which may be submitted, and as such, this provision is open to broad interpretation. Resolution procedures must be available in writing to any member who wishes to make a written complaint and must contain the contact information of the Ombudsman, including phone number and email.

An association must maintain a record of any written complaint for at least one year from the date the association acts on the complaint. Upon adverse decision by the association's governing board, a complainant whose complaint was heard by the association's governing board may, within thirty (30) days of such decision, file a notice with the Board for a filing fee of $25.00. If the Director, in his sole discretion, finds that the association's decision was in conflict with governing laws or regulation, the Director may issue a non-binding determination to the association and complainant. HB 516 is unclear as to the purpose of such determination, as the determination is expressly non-binding.

The Ombudsman may require an association to provide the Ombudsman with a copy of the association's Declaration and other records for review.