

## SELLING AN EXISTING CONDOMINIUM JUST GOT EASIER

By John W. Farrell



*John W. Farrell is a principal in the Northern Virginia firm of McCandlish Lillard. He has over 40 years of experience in matters of real estate development, land use and environmental regulation, including the acquisition, development, leasing and sale of mixed-use communities, condominium and residential projects, commercial and retail properties.*

In the Spring 2019 edition of the *Fee Simple*, I reported on one of the first terminations of a condominium regime in Virginia and the litigation attendant to that termination and prospective sale.

The article concluded with several “lessons learned” that, among other things, recommended amendments to the Condominium Act to make condominium terminations more equitable and less susceptible to manipulation by dissident unit owners.

With the leadership of Delegate Marcus Simon, Chairman of the Housing Subcommittee of the General Laws Committee of the House of Delegates, and input from practitioners in the field, the General Assembly passed, and the Governor signed, Chapter 817 of the 2020 Acts of the Assembly. Introduced as House Bill 1548, the bill made multiple changes to Va. Code §§ 55.1-1937 and 55.1-1941, which changes go into effect on July 1, 2020.

When the requisite majority of the unit owners have voted to terminate and sell the condominium, subparagraph I (5) of § 55.1-1937 now makes explicit that it is the responsibility of the individual unit owner to satisfy and cause the release of any leases, mortgages or liens applicable to that unit. As described in the prior article, the dissenting unit owners at Sunrise Valley were able to extract a disproportionate share of the sale proceeds through the imposition of leases and mortgages on their individual units. After July 1, 2020, unless the termination agreement specifically permits such an arrangement, that tactic will no longer be effective.

New language in § 55.1-1941 also provides that only institutional mortgagees may object to an amendment to the condominium documents and they must do so within a year of recordation of the amendment. This provision prevents a private mortgagee, such as a friend or relative of a dissenting unit owner, from interfering with the sale of a condominium.

Next, Subparagraph I (3) of § 55.1-1937, explicitly allows condominium associations to avoid the substantial costs of individual appraisals of each unit as part of the sales process. However, that paragraph also includes language that protects the interests of the individual unit owners from an unfair division of the sale proceeds. If the proceeds of the sale are to be divided among the unit owners based on the percentage of their common elements interest or some other means that does not rely on appraisals then the association must give each unit owner a notice stating the results of the chosen method for each unit. That subparagraph goes on to provide that 10% of the unit owners can dispute the allocation of proceeds and demand that all the units be appraised. If the appraisal demonstrates that value of the objecting unit owners is 10% more than each would have received under the method chosen by the majority, the proceeds are distributed using the relative values of the appraisals and the costs of the appraisals are born by the association. If the difference is less than 10%, the costs of the appraisals are born by the objecting unit owners.

New language in Paragraphs D, F and G of § 55.1-1937 makes clear that condominium terminations may be accomplished by exchanging interests in a successor limited liability company or other entity and not solely upon the payment of cash.

Paragraph C has been amended to make clear that anyone acquiring a condominium unit subsequent to the approval of a termination agreement is bound by that termination.

New language has been added to Paragraph G to provide that, if the termination does not result in a sale but rather a conversion to a tenancy in common interest, any lien on an individual unit will not encumber the entirety of the property but only the tenancy in common interest of the individual unit owner.

With these changes, sales of condominiums should be able to proceed more smoothly thereby achieving the desires of the substantial majority of owners.

Even with these statutory changes, several of the lessons learned from the Sunrise Valley sale will still apply:

1. The provisions of Va. Code § 55.1-1964(B) must be incorporated into the declaration to permit the association to recover from individual unit owners the association's costs to buy out tenants or pay-off lenders of those individual units.
2. The sales contract should list the association as the seller and should include an acknowledgement by the buyer that removal of liens and tenancies and delivery of possession of individual units is the responsibility of individual unit owners.
3. The membership resolution approving the termination should have an outside expiration date that accounts for the satisfaction of any sale contingencies, e.g. a rezoning.
4. The membership resolution should set out how the proceeds will be allocated among the unit owners.
5. Members who support the sale should sign proxies to the association president approving the sale.
6. Notices of the allocation of proceeds should be sent to each unit owner as soon as possible in order to start the 30 day objection period set out in Subparagraph I (3) of § 55.1-1937.