

01-064

**PROPERTY AND CONVEYANCES: CONDOMINIUM ACT.**

**Nonresident condominium unit owner whose unit leases for period less than 20 years has not disposed of unit and is not disqualified from membership eligibility on unit owners' association board of directors.**

The Honorable L. Karen Darner  
Member, House of Delegates  
July 30, 2001

You ask whether § 55-79.78(A) of the *Code of Virginia* disqualifies nonresident condominium unit owners who lease their units to others from membership on the unit owners' association board of directors in the same manner as it disqualifies unit owners who sell their units.<sup>1</sup>

You advise that the Southampton condominium board of directors has relied on § 55-79.78(A) as the basis for adopting a policy that nonresident unit owners who lease their units are ineligible to serve on the board. You advise further that the condominium bylaws require that board members be unit owners; however, the bylaws are silent as to whether directors must be residents in the condominiums. You relate that, prior to adoption of the new policy, there was no requirement for residency, and over the past twenty years, at least five nonresident unit owners have served on the board.

Chapter 4.2 of Title 55, §§ 55-79.39 through 55-79.103, comprises the Condominium Act. The facility referred to and owned as a "condominium" is one in which owners have individual ownership and use of distinct units along with ownership in undivided common interests in the common elements of the facility.<sup>2</sup> Section 55-79.40(A) provides that the Condominium Act "shall apply to all condominiums." Section 55-79.45 provides that "[n]o condominium shall come into existence except by the recordation of condominium instruments pursuant to the provisions of this chapter." Section 55-79.73(A) provides for the self-government of a condominium by requiring that "[t]here shall be recorded simultaneously with the declaration<sup>[3]</sup> a set of bylaws providing for the self-government of the condominium by an association of all the unit owners."

The Supreme Court of Virginia has noted that "[t]he power exercised by a [condominium unit owners' association] is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private consensus of the unit owners."<sup>4</sup> Unit owners' concerns about the application of the bylaws of an association to a specific factual situation, such as the subject board eligibility rule, are concerns that may be settled pursuant to §§ 55-79.78(A) and 55-79.41.

Section 55-79.78(A) provides:

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 and/or for a term or terms of six months or more 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.

Section 55-79.41 contains definitions of terms used in the Condominium Act:

*'Dispose'* ... 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.

....

*'Officer'* means any member of the executive organ or official of the unit owners' association.

....

*'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 twenty years or (ii) as security for a debt.

In construing statutes, the statutory definition must prevail over a common law definition.<sup>5</sup> The Virginia Supreme Court has stated that "[a] primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning."<sup>6</sup> I am of the opinion that the mere leasing of a unit, for a period of less than twenty years, does not meet the definition of the term "dispose," and therefore, does not disqualify a unit owner who becomes a nonresident from membership eligibility on the association's board of directors. The Condominium Act requires that a policy prohibiting nonresident owners from serving on the association's board of directors must be reflected in the bylaws.

<sup>1</sup>You provide with your request a copy of the Southampton condominium bylaws for review. This Office must decline to render an opinion regarding interpretation of any such condominium documents which, in reality, are private agreements among the several co-owners of the association. This Office traditionally has declined to render opinions in matters of a purely private nature and has limited responses to requests for opinions to matters which concern an interpretation of federal or state law, rule or regulation. 1986-1987 Op. Va. Att'y Gen. 347, 348. I trust you will understand the rationale for this long-standing practice.

<sup>2</sup>See Va. Code Ann. § 55-79.41 (Michie Supp. 2001) (defining "common elements," "condominium," "condominium unit," "convertible space," "limited common element," "unit").

<sup>3</sup>See Va. Code Ann. § 55-79.54 (Michie Supp. 2001) (explaining contents of declaration as containing, e.g., name and location of condominium, metes and bounds description, delineation of common elements and unit boundaries, etc.).

<sup>4</sup>Unit Owners Assoc. v. Gillman, 223 Va. 752, 766, 292 S.E.2d 378, 385 (1982).

<sup>5</sup>See Life & Casualty Co. v. Unemployment Compensation Comm'n, 178 Va. 46, 57, 16 S.E.2d 357, 361 (1941).

<sup>6</sup>Loudoun Co. Dept. Soc. Serv. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993).

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