

# ARNSTEIN & LEHR LLP

- Providing Required Disclosures to Buyers
- Responding to Mortgagee Questionnaires
- Responding to Requests for Association Records
- Recovering the “Six Months”

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**ARNSTEIN & LEHR LLP**

**Providing Required Disclosures to Buyers**



# Providing Required Disclosures to Buyers

**Purpose of disclosures: consumer protection. To provide buyers with information with which to make an informed purchase decision**

**Different statutory requirements for condo owners and owners of non-condo HOA property**

- **Condo unit – ICPA § 22.1(a)**
- **Non-condo HOA property – CICA §1-35(d) [formerly covered by ICPA §18.5(g)]**

# Who must provide disclosures?

**The Board -- not management -- is  
statutorily obligated to provide  
disclosures.**

**ICPA §22.1(a)**

**CICAA §1-35(d)**

# Who is entitled to request disclosures?

- **Condominium unit**: Unit seller (that is, current condo unit owner) must request disclosure and provide disclosure to buyer - ICPA §22.1(a). If seller doesn't make a request for disclosures on behalf of buyer, no disclosures are required
- **Non-condo HOA property**: buyer or seller may request ??? - CICA §1-35(d). If neither seller nor buyer makes a request for disclosures, no disclosures are required

# To whom is disclosure made?

Condominium unit: to seller (that is, current condo unit owner), and seller must provide disclosures to buyer - ICPA §22.1(a)

- Non-condo HOA property: to buyer or seller ??? - CICA §1-35(d)

# **Disclosure #1 -Governing Documents**

**A copy of the association's governing instruments (e.g., Declaration, by-laws) any rules and regulations.**

**ICPA §22.1(a)(1)**

**CICAA §1-35(d)(1)**

# **Disclosure #2 - Unpaid Assessments**

**Statement of any liens for unpaid assessments on the unit and a statement of unpaid assessments and other charges due and owing**

**ICPA §22.1(a)(2)**

**CICAA §1-35(d)(2)**

# Sample response – unpaid assessments

**“The monthly assessment for unit \_\_\_\_ is \$\_\_\_\_, plus \$\_\_\_\_ for cable television services. As of the date of this disclosure and through the end of the current month, the Association is owed and asserts a lien on the subject unit for any unpaid common expense assessments and related charges. Any amount due will be noted in a paid assessment letter. The Association has no other liens on the unit in question.”**

# Disclosure #3 - Anticipated Capital Expenditures

**“A statement of any capital expenditures anticipated by the association within the current or succeeding two fiscal years.”**

- Most difficult disclosure question.
- Anticipated expenditure ≠ approved expenditure
- Intended to warn buyer of potential for special assessments

**NOTE: Disclosure concerning anticipated special assessments is NOT required.**

ICPA §22.1(a)(3)  
CICAA §1-35(d)(3)

# Sample response – “anticipated capital expenditures”

“Other than as set forth in the current year’s budget, the Association’s Board of Managers has not authorized any capital expenditures in the current fiscal year, and the Board has not authorized any capital expenditures in the next two succeeding fiscal years. However, the Association’s building was first constructed in 19\_\_\_\_, and significant capital expenditures for maintenance, repair, restoration and replacement of deteriorated common element facilities may be required in the coming years. Whether any capital expenditures will be made within the next three years is unknown at this time, as is the amount of any such capital expenditures.”

# Another sample response – “anticipated capital expenditures”

“The Association’s Replacement Reserve Study dated \_\_\_\_\_, 200\_\_ and prepared by \_\_\_\_\_, projects the need for specified capital expenditures in the current fiscal year and in the next two succeeding fiscal years. However, other than as set forth in the current year’s budget, the Association’s Board of Managers has not authorized any capital expenditures in the current fiscal year, and the Board has not authorized any capital expenditures in the next two succeeding fiscal years. The Association’s Board of Managers does, however, anticipate making approximately \$\_\_\_\_\_ of capital expenditures during 2012 and 2013 for façade restoration, concrete repairs and elevator upgrades. In addition, the Association’s building was first constructed in 19\_\_\_\_, and other significant capital expenditures for maintenance, repair, restoration and replacement of deteriorated common element facilities may be required in the coming years, and those capital expenditures may be required sooner than projected in the Association’s Replacement Reserve Study and/or may carry a cost in excess of that estimated in the Association’s Replacement Reserve Study. Whether any capital expenditures will be made within the next three years is unknown at this time, as is the amount of any such capital expenditures.”

# Disclosure #4 - Reserves

**Statement of the status and amount of any reserve for replacement fund and any portion of such fund earmarked/specifically designated for specific project(s)**

**ICPA §22.1(a)(4)**

**CICAA §1-35(d)(4)**

# **Disclosure #5 – Latest Annual Financial Statement**

**Copy of statement of financial  
condition for most recent fiscal  
year**

**ICPA §22.1(a)(5)**

**CICAA §1-35(d)(5)**

# Disclosure #6 - Lawsuits and judgments

Statement of the status of any pending suits or judgments in which the association is a party

- ✓ Foreclosure lawsuits
- ✓ Eviction/collection lawsuits
- ✓ Personal injury lawsuits (even if covered by insurance)

ICPA §22.1(a)(6)  
CICAA §1-35(d)(6)

# Sample response - litigation

**“There are no pending judgments against the Association. From time to time, the Association is a defendant in mortgage foreclosure lawsuits against unit owners and/or a plaintiff in assessment collection lawsuits against unit owners. The Association is not a party to any other lawsuits.”**

# **Disclosure #7 - Insurance Coverage**

**Statement setting forth what insurance coverage is provided by the association for all owners**

**ICPA §22.1(a)(7)**

**CICAA §1-35(d)(7)**

# Sample response - insurance

**“A certificate evidencing all insurance maintained by the Association on the common elements and related appurtenances may be obtained by contacting XYZ at 312-123-4567 or [www. \\_\\_\\_\\_\\_ .com](http://www._____.com).”**

## **Disclosure #8 - Compliance of Improvements/Alterations**

**Statement that any improvements or alterations made to the unit, or the limited common elements assigned thereto, by the prior unit owner are in good faith believed to be in compliance with the condominium instruments.**

**ICPA §22.1(a)(8)**

**CICAA – Not applicable**

# Sample response- Compliance of Improvements/Alterations

**“The Association does not inspect individual units and takes no responsibility for improvements or alterations made by individual unit owners within individual units or to limited common elements. The Association has no knowledge of any improvements or alterations made to the subject unit (or to the limited common elements that serve that unit) that are not in compliance with the Association’s Declaration and Rules.”**

# Disclosure #9 - Designated Association Officer

The identity and mailing address of the principal officer of the association or of the other officer or agent as is specifically designated to receive notices.

ICPA §22.1(a)(9)

CICAA – **Not applicable**

# Special supplemental disclosure on first resale after foreclosure concerning amount of “six months”

ICPA §9(g)(5) requires disclosure of the dollar amount of the “six months” that will be owed by the buyer.

Disclosure is required in §22.1(a) disclosures and in paid assessment letter.

**Beware: not mentioned in ICPA §22.1**

## **Sample response - special required disclosure on first resale after foreclosure**

**“This unit’s current owner (Big Bank) is a mortgagee who acquired the unit in a mortgage foreclosure proceeding. Accordingly, pursuant to Section 9(g)(4) of the Illinois Condominium Property Act, the buyer of this unit will also be liable for and have the duty to pay \$\_\_\_\_\_ to the Association, which amount represents \$\_\_\_\_\_ of still-unpaid common expense assessments, fines, and late payment charges owed by the former owner of this unit for the six months immediately preceding the institution of the Association’s collection action against him, plus \$\_\_\_\_\_ of legal fees and court costs in connection with that lawsuit.”**

# Fee for Disclosures?

**A reasonable fee covering the direct out-of-pocket cost of providing such information and copying may be charged by the association to the seller**

**ICPA – last un-numbered paragraph of §22.1**

**CICAA – last un-numbered paragraph of §1-35(d)**

# Why is it important to provide proper disclosures?

- Board faces liability to claims by both buyer and seller for failing to provide disclosures when required to do so
- Board faces liability to both buyer and seller for providing inaccurate or erroneous disclosures, especially concerning anticipated capital expenditures
- Managing agent also exposed to potential liability.
- Don't want new owners to have unpleasant "surprises"

# Best Practices concerning statutory disclosures for buyers

- Disclosures are the Board's disclosures, not Management's disclosures. Management can't read Board's mind, so involvement of Board needed.
- Periodic review and approval by Board.
- Monthly review and update by Management.
- Provide disclosures only when requested.
- Answer only what is required by applicable statute; nothing more and nothing less. Volunteering information creates liability risk.
- All disclosures should be dated; circumstances can change quickly.
- Use your own form. Beware of disclosure forms prepared by lawyers and brokers. Never use a form provided by the buyer's lawyer or broker.

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**Responding to Mortgagee  
Questionnaires**



# Responding to Mortgagee Questionnaires

- **Not the same as disclosures to buyers**
- **Statutory authority – NONE**
- **Boards respond because buyers cannot obtain mortgages (and owners cannot re-finance) if associations do not respond to mortgagee questionnaires**
- **Lenders seek information to meet underwriting requirements**

# Mortgagee Questions -

Focus is generally on reserves, reserve study, delinquencies, professional management, environmental problems, number of units, pending litigation, turnover status, etc.

However, some lenders also inquire about time-shares, hotel services, rental pools, property manager's shoe size, etc.

# Best Practices for Responding to Mortgage Questionnaires

- ✓ Create standardized mortgagee disclosure form that includes responses to questions posed by most lenders
- ✓ Consider charging owner when owner's lender will not accept association's standardized response.
- ✓ Seek help from legal counsel for responses to legal/technical questions

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**Responding to Requests for  
Association Records**





# **Purpose of Record Examination Rights**

**To enable owners to gain access to association documents and information**

**Unfortunately, also weapon of choice for gadflies, especially in City of Chicago**

# Responding to requests for association records

## Different statutory provisions and requirements

- Condominiums – ICPA §19 and City of Chicago Condominium Ordinance for associations located in Chicago
- Non-condo HOA – CICA §1-30(j) [previously covered by ICPA §18.5(d)]

# Basics

- **All requests must be made in writing**
- **Right to examine and copy existing documents**
- **No statutory duty to create new documents or to provide non-documentary information**
- **Nine categories of condo association records – ICPA §19(a)(1) through (9)**
- **Other records not covered by ICPA §19**

# Category #1- Governing documents

**Declaration, Bylaws and plats of survey**

**ICPA - §19(a)(1)**

**CICAA - §1-30(i)(1)(i)**

# Category #2 – Rules and Regulations

## Copy of Rules and Regulations

ICPA - §19(a)(2)

CICAA - §1-30(i)(1)(i)

# Category #3 – Corporate documents

## Articles of Incorporation

ICPA - §19(a)(3)

CICAA - §1-30(i)(1)(i) – also annual reports

# Category #4 – Meeting minutes

**Last seven years of minutes of board and unit owner meetings**

**ICPA - §19(a)(4)**

**CICAA - §1-30(i)(1)(iii) – minutes of owners meetings not available under CICAA, but available under NFPCA §107.75**

# Category #5 – Current Insurance Policies

**ICPA - §19(a)(5)**

**CICAA - §1-30(i) – No examination of insurance policies**

# Category #6 – Current contracts and leases

“Proper purpose” required for condo owners under ICPA §19(e)

Proper purpose not required for non-condo HOA owners under CICAA §1-30(i)(1)(ii)

ICPA - §19(a)(6)

CICAA - §1-30(i)(1)(ii)

# Category #7 – Owner List

**“A current listing of the names, addresses, and weighted vote of all members entitled to vote”**

**Proper purpose required - ICPA §19(e)**

**No phone numbers**

**Email addresses?**

**ICPA - §19(a)(7)**

**CICAA – No right to examine owner list**

# Category #8 – Ballots and proxies

- Only ballots and proxies within past year
- Proper purpose required - ICPA §19(e)
- Ballots not subject to examination when secret ballot rule adopted by condo association– ICPA §19(e). CICA does not expressly authorize secret ballot voting

ICPA - §19(a)(8)

CICA - §1-30(i)(1)(iv) – proper purpose required

# Category #9 – Books and records of account

“The books and records of account for the association’s current and 10 immediately preceding fiscal years, including but not limited to itemized and detailed records of all receipts and expenditures.”

Proper purpose required - ICPA §19(e)

Non-condo HOA: “Detailed and accurate records in chronological order of the receipts and expenditures affecting the common areas, specifying and itemizing the maintenance and repair expenses of the common areas and any other expenses entered into by the board” – Proper purpose required, but no limit on number of years.  
CICAA - §1-30(i)(1)(ii)

# “Proper Purpose”

No statutory definition of “proper purpose”

Under Illinois law, a proper purpose is shown when the requesting owner seeks to protect the interests of the association, is acting in good faith, and is not proceeding for vexatious or speculative reasons. Request based on “good-faith fear of mismanagement of financial matters” satisfies proper purpose requirement. However, curiosity alone is not a “proper” purpose.

Some purposes are not proper (e.g., seeking owner list to solicit business, seeking review of contract to compete with vendor, seeking documents to support threatened lawsuit, etc.)

# Exceptions to Right to Examine and Copy Records

- Documents relating to association employees
- Documents relating to actions pending in a court or administrative tribunal against or on behalf of the association or its board
- Documents relating to actions threatened against, or likely to be asserted on behalf of, the association or its board in a court or administrative tribunal
- Documents relating to common expenses or other charges owed by a member other than the requesting member
- Documents provided to an association in connection with the lease or sale of a unit by a member other than the requesting member

ICPA §19(g)

CICAA - **No exceptions or exclusions!**

# Time for Response

**Categories 1 through 5: Within 30 calendar days of receipt of request - ICPA §19(b)**

**Categories 6 through 9: Within 30 business days of receipt of request - ICPA §19(e)**

**Non-condo HOA: within 30 calendar days – CICA  
§1-30(i)(2)**

# Where records are to be made available

- **Condominium association: records to be maintained (and made available for examination) at condominium association's principal office – ICPA §19(a)**
- **Non-condo HOA: location for maintenance and examination of records not specified – CICA §1-30(i)(1)**

# Charges to requesting owner for examination and copying of association records

“The actual cost to the association of retrieving and making requested records available for inspection and examination under this Section shall be charged by the association to the requesting member. If a member requests copies of records requested under this Section, the actual costs to the association of reproducing the records shall also be charged by the association to the requesting member” – ICPA §19(f)

Charge to requesting owner is mandatory

“Actual cost” – is there really a cost to the association?

Photocopying costs – reasonable

Non-condo HOA: similar provision - CICAA §1-30(i)(3)

# Risks and consequences of failure to provide records requested under ICPA §19

**Categories 1 through 5: No excuses. Failure to provide requested records within 30 calendar days is deemed a denial. If owner sues to compel examination of records and wins suit, owner recovers attorneys' fees and costs from the association**

**Categories 6 through 9: Failure to provide requested records within 30 business days is deemed a denial. If owner sues to compel examination of records and wins, owner recovers attorneys' fees and costs from the association only if judge finds that board "acted in bad faith"**

**Non-condo HOA – CICAA is silent on recovery of litigation expenses**

# **The Joker in the Deck – The Chicago Ordinance**

**Section 13-72-080 of the City of Chicago Municipal Code:**

**"No person shall fail to allow unit owners to inspect the financial books and records of the condominium association within three business days of the time written request for examination of the records is received."**

**Ordinance applies only to condominium associations located in the City of Chicago.**

# Consequences of violating Chicago Condominium Ordinance

- **City of Chicago Department of Consumer Services can initiate a quasi-criminal proceeding by issuing a violation notice (i.e., a “ticket”) to the offender, after which a hearing will be held before a City of Chicago Administrative Law Officer. If it is determined that a violation has occurred, Section 13-72-110 of the Ordinance calls for imposition of a fine of not less than \$100.00 nor more than \$300.00 for a first offense (and not less than \$300.00 nor more than \$500.00 for the second and each subsequent offense in any 180-day period).**
- **Section 13-72-1000 of the Ordinance also authorizes an aggrieved unit owner (or the City) to file a civil lawsuit to compel compliance with the Ordinance. If the lawsuit is successful, Section 13-72-100 provides that the association must pay all “reasonable attorney fees” incurred by the plaintiff in connection with the lawsuit.**

# Chicago Condo Ordinance

The Chicago Ordinance is limited to financial records, but it is far more burdensome on condo associations than ICPA Section 19:

- Does not authorize any records to be withheld, even when the requested records relate to active litigation with the requesting unit owner, assessments owed by another owner, personnel records, etc.
- Allows just 3 business days for production of requested records
- Does not require a showing of proper purpose by the requesting unit owner
- Requires production of more than just the last 10 years of financial records
- Does not authorize recovery of document retrieval costs
- Recovery of litigation costs not conditioned on finding of bad faith by board

## ***Palm vs. 2800 Lake Shore Drive Condominium Assn***

**A condominium unit owner demanded association financial records pursuant to Chicago Ordinance. Association refused, claiming that the condo record requests in Illinois are governed by ICPA, rather than Ordinance. Unit owner filed suit in January of 2000. The City of Chicago intervened in the lawsuit, alleging that the Ordinance superseded the ICPA as a valid exercise of the City's home-rule powers. In 2008, the trial judge ruled in favor of the unit owner. In 2010, the Illinois Appellate Court affirmed the trial judge's decision, holding that that the records examination provisions of the Ordinance supersede those of the ICPA.**

**In late 2010, the Illinois Supreme Court agreed to decide the matter, but it has not yet issued a decision.**

# Best Practices – records examination

- ✓ In Chicago, immediate action required
- ✓ Insist on written request
- ✓ Insist that requested records be identified with specificity
- ✓ Where required, insist on written statement of proper purpose
- ✓ Consult with association attorney
- ✓ Always refer request to board for action; board -- not Management -- makes decision
- ✓ If a request is to be denied for want of a proper purpose or because records are exempt from examination, always send a written response within time allowed
- ✓ Be sensitive to establishing precedent for future requests

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## Recovering the “Six Months”



# Existing law

ICPA §9(g) provides that when a unit is sold at foreclosure auction, the association can recoup up to six months of unpaid pre-foreclosure assessments plus certain litigation costs if ALL three of the following conditions are satisfied:

- Institution of an action to enforce collection of assessments. The association's lawyer must file court papers asserting the Association's claim against the defaulting unit owner at time when at least 6 months of assessments are owed. (Action may be a counterclaim in the foreclosure case, a forcible/collection lawsuit, or even a breach of contract lawsuit)
- Disclosure in Section 22.1 Disclosures. If a Section 22.1 disclosure is requested, the Association must disclose liability of new unit owner for the "six months" in the Section 22.1 disclosures
- Disclosure in Paid Assessment Letter. If the paid assessment letter does not ask for the "six months", the buyer is not obligated to pay the "six months"

# When is the “six months” paid ?

- When the bank buys the unit at the auction, the “six months” is not payable until the unit is re-sold. This may be many months. (Bank must, however, pay current assessments from date of auction sale.)
- When a private party buys the unit at the auction, the “six months” is due and payable immediately. This is often an unpleasant surprise to foreclosure auction buyers.

# Things may be changing...

- **Legislation being developed to make recovery of six full months of assessments automatic, without need of a collection lawsuit. However, no costs of collection would be recoverable.**

# **Non-condo HOAs – confusion**

**Public Act 097-0535 amended ICPA §18.5 to allow “master associations” to recover the “six months”**

**However, given enactment of CICA, it is not clear that non-condo HOAs are still “master associations” that are subject to ICPA §18.5.**

**Corrective legislation to include “six months” in CICA?**

# Best Practices- Recovery of the “six months”

- Be careful with paid assessment letters and Section 22.1 disclosures for first resale after unit has gone through foreclosure
- Timing of collection action is difficult
- When foreclosure lawsuit is filed, advise your association’s lawyer so that required court filings can be made.
- If bank buys unit at foreclosure auction, establish new ledger in the name of the new owner with zero balance, but be sure to retain and flag old account ledger information to calculate the “six months”.