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CONDO AND HOA LAW

LEGAL TIPS

22.1 Disclosures: Avoid Liability by *Including* "Anticipated" Expenditures

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Condos are bought and sold every day in Illinois. One of the critical roles for the association to play in the transaction is compliance with Section 22.1 of the Illinois Condominium Property Act ("ILCPA"), which requires the board to answer nine (9) key questions about the association upon demand by a current unit owner (typically the seller). The "upon demand" component of that last sentence is critical: the unit owner must *demand* the disclosures before the association's duty to provide them is triggered.

In our experience, one particular disclosure manages to get boards and managers in a twist nearly every time and is by far the one that most frequently results in litigation against the association for providing inaccurate or incomplete information - Section 22.1(a)(3) of the ILCPA, which requires "a statement of any capital expenditures anticipated by the unit owner's association within the current or succeeding two fiscal years."

What is "anticipated"?

What counts as "anticipated" is challenging to identify and creates confusion. **Many boards and managers assume that they need only provide capital improvement projects that have been "approved" by the board. This assumption is entirely incorrect and is a recipe of litigation against an association.**

As an example, what if the board has merely mentioned or discussed, during a meeting, that the roof is leaking and needs repair and, quite possibly, full replacement? Does that mean the board "anticipates" a new roof? Or what if it's a well-known fact in the building that the elevators are in lousy shape and breakdown often. Must the board include an elevator modernization project in the capital expenditure disclosure?

The short answer is if the board reasonably believes that a large-scale capital project on the roof or elevator improvement will take place within the current or following two (2) fiscal years, then yes, those projects are "anticipated" and should be disclosed in the 22.1 disclosure, along with an estimate of the cost of the work. This is true even if the projects have not been formally "approved."

"Anticipated" is NOT the same as "Approved."

We are hitting this point hard because it's such a common misperception – the belief that since the board has not yet formally approved a project there is no requirement to disclose it in the 22.1 form is false and exposes the association to liability.

The language of ILCPA is clear - the legislature wanted associations to disclose what they anticipate will occur, not merely what they have formally approved. If the board *believes* it will replace the leaky roof in the next few

years, **disclose it**. If the elevators are on their last legs and the board finds a significant repair is likely in the next few years, **disclose it**. If, however, the board plans to perform simple patching jobs to the roof (which may not be categorized as a "capital expenditure" or "capital improvement") until after the current and two succeeding fiscal years have elapsed, the repair may not have to be disclosed at all.

At this point, we'll reiterate that each situation is unique and boards should discuss these "grey areas" with their attorneys. After all, it is the association that will be sued as a result of disclosing inaccurate information, so for any specific questions, please speak with your attorney for clarification.

Must we include *how* the association will finance the improvements?

Section 22.1 of the ILCPA does not mandate that the association disclose how it plans to pay for the capital improvements it publishes. Naturally, buyers will want to know such information, and thus may ask whether a special assessment is "anticipated" as well. However, "anticipated" special assessments are not required to be disclosed under Section 22.1. **Whether the board decides to include that information regardless is a board decision, but in general, we caution our clients *against* volunteering unnecessary information that is not required by statute.** Doing so exposes the association up to more liability (which is why, incidentally, boards should be exceedingly wary of completing disclosure forms prepared by the lenders, buyers or buyers' attorney, as they invariably include questions that the association is not required to answer under the ILCPA).

Conclusion

Bear in mind, we are not advocating that the 22.1 disclosure become the board's running "wish list" of items it would *like* to see done. Such a list would enrage current unit owners looking to sell, as it would result in their unit sales prices tanking and pool of potential buyers thinning dramatically. That said, the board has a fiduciary duty to the association, and that means ensuring that it makes the proper disclosures to limit liability from lawsuits filed by new buyers who feel they were misinformed before their purchase. As such, the 22.1 disclosure must strike the proper balance between disclosing what work the association reasonably anticipates doing without making it a document that needlessly frightens off potential buyers.