

**Be Careful What You Ask For:
Tips for the Real Estate Practitioner in Buying and Selling
Condominium or Community Association Properties**

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I. What is the nature of the association property being conveyed?

- Is it a condominium? If so, it is governed by the Illinois Condominium Property Act, 765 ILCS 605/1 et seq. (“Condo Act”).

- Is it property located within an Illinois common interest community?

Common interest community means real estate other than a condominium or cooperative with respect to which any person by virtue of his or her ownership of a partial interest or a unit therein is obligated to pay for the maintenance, improvement, insurance premiums or real estate taxes of common areas described in a declaration which is administered by an association. “Common interest community” may include, but not be limited to, an attached or detached townhome, villa, or single-family home. A **“common interest community” does not include a master association.** 765 ILCS 160/1-5.

- Generally speaking, if the property is not a condominium and not a cooperative, the Illinois Common Interest Community Association Act (“CICAA”) will apply, unless it is exempt!

- Is it property governed by CICAA?

Exemptions for small common interest communities

(a) A common interest community association organized under the General Not for Profit Corporation Act of 1986 and having either (i) 10 units or less or (ii)

annual budgeted assessments of \$100,000 or less shall be exempt from this Act unless the association affirmatively elects to be covered by this Act by a majority of its directors **or members**. 765 ILCS 160/1-75(a).

- Finally, if it is not governed by the Condo Act and not governed by CICAA, then it is likely governed by subsections (c-h) of 18.5 of the Condo Act. This is important because 765 ILCS 605/18.5(g) is substantially similar to 765 ILCS 605/22.1, both of which govern the right of a prospective purchaser in obtaining an enumerated list of documents from the seller of association property.

II. You represent the purchaser of an Illinois condominium. The contract is executed and you just received the 22.1 documents from the seller's attorney pursuant to your request.

A. What documents did you receive? Was it completely responsive to your request?

Section 22.1 (a) provides for the following:

605/22.1 Resales - Disclosures - Fees

(a) In the event of any resale of a condominium unit by a unit owner other than the developer such owner shall obtain from the Board of Managers and shall make available for inspection to the prospective purchaser, upon demand, the following:

(1) A copy of the Declaration, by-laws, other condominium instruments and any rules and regulations.

(2) A statement of any liens, including a statement of the account of the unit setting forth the amounts of unpaid assessments and other charges due and owing

as authorized and limited by the provisions of Section 9 of this Act or the condominium instruments.

(3) A statement of any capital expenditures anticipated by the unit owner's association within the current or succeeding two fiscal years.

(4) A statement of the status and amount of any reserve for replacement fund and any portion of such fund earmarked for any specified project by the Board of Managers.

(5) A copy of the statement of financial condition of the unit owner's association for the last fiscal year for which such statement is available.

(6) A statement of the status of any pending suits or judgments in which the unit owner's association is a party.

(7) A statement setting forth what insurance coverage is provided for all unit owners by the unit owner's association.

(8) A 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.

(9) The identity and mailing address of the principal officer of the unit owner's association or of the other officer or agent as is specifically designated to receive notices. 765 ILCS 605/22.1.

B. Now what? What do you do with them? How far do you dig into them in order to render advice to your purchaser? Do you simply hand them over to the buyer to digest, or perform a review for the client's benefit?

- The starting point is found in the Illinois Rules of Professional Conduct.

RPC 1.1 Competence states as follows:

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, *thoroughness* and *preparation* reasonably necessary for the representation.

C. If we assume that the attorney is competent to render the advice, what are the best practices here?

- What are the mutual expectations of attorney and client regarding the services that the attorney will provide (e.g. negotiating contract, reviewing title and survey, attending closing, etc.)?
- Is the scope of the representation memorialized in writing?

RPC 1.3 Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.

Comments to RPC 1.3: A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

RPC 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer: (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

- Did the client sign and return the engagement agreement?
- D. You have decided to render advice regarding the quality, nature and content of the documents received from the association.
- Do you understand the liability associated with giving such advice?
- Are you competent to render advice regarding the financial condition of the association for the last fiscal year? The sufficiency of the reserves in place?
- Do you have ALL the necessary documents? Plat of survey?
 - Components of governing documents and other information that ideally should be included:
 - A. Complete declaration with exhibits, recording stamp
 - B. All amendments to the declaration
 - C. Bylaws if not already contained within declaration (recorded or non-recorded?)
 - D. Most recently adopted Rules/Regulations
 - E. All policies/procedures reduced to writing that have been adopted by the board
 - F. Name, telephone and e-mail address of manager in order to verify foregoing
- Sections of interest in the Declaration
 - A. Parking
 - B. Storage

- C. What constitutes a unit or a lot
- D. What are common elements and limited common elements
- E. What maintenance responsibility is shouldered by the owner vs. association
- F. What insurance obligations does the owner have
- G. Is renting permitted?
- H. Specific issues (e.g., are pools/basketball hoops/dogs permitted, etc.)

• Sections of interest relating to Rules

- A. Renting permitted? If so, there are likely to be restrictions imposed on the owner/tenant.
 - B. Dogs
 - C. Outdoor activity (e.g., sporting, grilling, congregating, etc.)
 - D. Satellite dishes
 - E. Insurance
- E. Is your client purchasing from a bank in the wake of a foreclosure sale?
- A. Your client may be responsible to pay some of the arrearage which accrued on the account of the foreclosed owner before the bank took title! Section 605/9(g)(4) and (5) govern this situation.
 - (4) The purchaser of a condominium unit at a judicial foreclosure sale, other than a mortgagee, who takes possession of a condominium unit pursuant to a court order or a purchaser who acquires title from a

mortgagee shall have a duty to pay the proportionate share, if any, of the common expenses for the unit which would have become due in the absence of any assessment acceleration during the 6 months immediately preceding institution of an action to enforce the collection of assessments, and which remain unpaid by the owner during whose possession the assessments accrued. If the outstanding assessments are paid at any time during any action to enforce the collection of assessments, the purchaser shall have no obligation to pay any assessments which accrued before he or she acquired title.

(5) The notice of sale of a condominium unit under subsection (c) of Section 15-1507 of the Code of Civil Procedure shall state that the purchaser of the unit other than a mortgagee shall pay the assessments and the legal fees required by subdivisions (g)(1) and (g)(4) of Section 9 of this Act. The statement of assessment account issued by the association to a unit owner under subsection (i) of Section 18 of this Act, and the disclosure statement issued to a prospective purchaser under Section 22.1 of this Act, shall state the amount of the assessments and the legal fees, if any, required by subdivisions (g)(1) and (g)(4) of Section 9 of this Act. 765 ILCS 605/9(g).

- Read together, 9(g)(4) and (5) impose an obligation upon the purchaser to pay 6 months of common expenses, court costs and attorney's fees.

- Was an “action” instituted against the prior owner?
- There is no published opinion regarding what the “institution of an action” is. For example, DuPage County judges have generally understood that to mean the commencement of a lawsuit for unpaid common expenses.
- Crafty lenders have been known to use the “Dick Bales” defense [9(g)(3)] in an attempt to skirt the imposition of payment found in 9(g)(4) and (5) require. If this has been done for the property in question, this could benefit your client.
- Finally, “common expenses” are **not** merely unpaid assessments! It is anything that is lawfully charged back to the account pursuant to the terms of the Declaration (e.g., fines, late fees, charge-backs, etc.).

III. You represent the purchaser of property within an Illinois common interest community association.

A. What documents did you receive? Was it completely responsive to your request?

Section 1-35 provides for the following:

Section 1-35. Unit owner powers, duties, and obligations

(d) In the event of any resale of a unit in a common interest community association by a member or unit owner other than the developer, the board shall make available for inspection to the prospective purchaser, upon demand, the following:

- (1) A copy of the declaration, other instruments, and any rules and regulations.
- (2) A statement of any liens, including a statement of the account of the unit setting forth the amounts of unpaid assessments and other charges due and owing.
- (3) A statement of any capital expenditures anticipated by the association within the current or succeeding 2 fiscal years.
- (4) A statement of the status and amount of any reserve or replacement fund and any other fund specifically designated for association projects.
- (5) A copy of the statement of financial condition of the association for the last fiscal year for which such a statement is available.
- (6) A statement of the status of any pending suits or judgments in which the association is a party.
- (7) A statement setting forth what insurance coverage is provided for all members or unit owners by the association for common properties. 765 ILCS 160/1-35(d).

B-D. The same analysis as above applies to non-condominiums.

E. Is your client purchasing a unit from a bank after a foreclosure sale?

Similar to 765 ILCS 605/9(g)(4) & (5) is Section 18.5 of the Condo Act, which says:

18.5(g-1). The purchaser of a unit of a common interest community at a judicial foreclosure sale, other than a mortgagee, who takes possession of a unit of a common interest community pursuant to a court order or a purchaser who acquires title from a mortgagee shall have the duty to pay the proportionate share, if any, of the common expenses for the unit that would have become due in the absence of any assessment acceleration during the 6 months immediately preceding institution of an action to enforce the collection of assessments and the court costs incurred by the association in an action to enforce the collection that remain unpaid by the owner during whose possession the assessments accrued. If the outstanding assessments and the court costs incurred by the association in an action to enforce the collection are paid at any time during any action to enforce the collection of assessments, the purchaser shall have no obligation to pay any assessments that accrued before he or she acquired title. The notice of sale of a unit of a common interest community under subsection (c) of Section 15-1507 of the Code of Civil Procedure shall state that the purchaser of the unit other than a mortgagee shall pay the assessments and court costs required by this subsection (g-1). 765 ILCS 605/18.5(g)(1).

- The only major difference is that in a non-condo, attorney's fees which are not part of common expenses would not be recoverable to the association, and thus not payable by your client.

IV. You represent the seller of an Illinois condominium or common interest community association property. The contract is executed and you just received a request for documents from the buyer's attorney.

A. Worth noting- statutory provisions

1. Section 22.1 (b) and 1-35(d) both permit the association 30 days to respond to a request for documents. Much less time is afforded in the contract for sale.
2. Both statutory provisions permit a reasonable fee to be charged to cover the direct out-of-pocket cost of providing the information and copying. Since largely this service is performed by a management company, the cost is sometimes surprising to a seller or seller's attorney.

B. Your client is in foreclosure and needs to engage in a short sale before the foreclosure sale occurs.

1. So, you're thinking that you can push down on what the association will have to accept in unpaid assessments.

- In the case of a condo, boards of managers may not forbear from the collection of assessments. In order to comply with a business judgment rule standard, it will likely not accept any less than it could get pursuant to 765 ILCS 9(g)(4) & (5).

2. Your client needs access to the unit to show it to interested buyers but the association has possession. How does the seller show it? It can't! The

association's possessory interest trumps that of the owner, even if the owner is trying to show and sell.

3. We see real estate agents and attorneys advising these sellers to stop paying assessments. Given the length of the average foreclosure proceeding, associations are taking swifter action to pursue their unpaid assessments. Thus, they're looking to take possession and rent these units to reduce the arrearage. An owner who stops paying assessments risks being evicted, especially if the end of the foreclosure proceeding is not in the near future.

V. Specific concerns associated with purchasing within a community association

A. Benefits and challenges of rental restrictions

1. Is there a rental restriction?
2. Where is it found? Declaration or Rules
3. Was it adopted properly?
4. Cap on renting or a percentage of total units? Total Ban? Grandfathered units?
5. Condo? Be aware of Section 18(n) of the Condo Act which imposes an obligation on the owner and tenant to produce a copy of the lease:

Section 18(n). (i) The provisions of this Act, the declaration, bylaws, other condominium instruments, and rules and regulations that relate to the use of the individual unit or the common elements shall be applicable

to any person leasing a unit and shall be deemed to be incorporated in any lease executed or renewed on or after the effective date of this amendatory Act of 1984. (ii) With regard to any lease entered into subsequent to the effective date of this amendatory Act of 1989, the unit owner leasing the unit shall deliver a copy of the signed lease to the board or if the lease is oral, a memorandum of the lease, not later than the date of occupancy or 10 days after the lease is signed, whichever occurs first. In addition to any other remedies, by filing an action jointly against the tenant and the unit owner, an association may seek to enjoin a tenant from occupying a unit or seek to evict a tenant under the provisions of Article IX of the Code of Civil Procedure for failure of the lessor-owner to comply with the leasing requirements prescribed by this Section or by the declaration, bylaws, and rules and regulations. The board of managers may proceed directly against a tenant, at law or in equity, or under the provisions of Article IX of the Code of Civil Procedure, for any other breach by tenant of any covenants, rules, regulations or bylaws. 765 ILCS 605/18(n).

6. Non-condo governed by CICAA? The analog to the condo provision is found in Section 1-35(a):

Section 1-35. Unit owner powers, duties, and obligations

(a) The provisions of this Act, the declaration, bylaws, other community instruments, and rules and regulations that relate to the use of

an individual unit or the common areas shall be applicable to any person leasing a unit and shall be deemed to be incorporated in any lease executed or renewed on or after the effective date of this Act. With regard to any lease entered into subsequent to the effective date of this Act, the unit owner leasing the unit shall deliver a copy of the signed lease to the association or if the lease is oral, a memorandum of the lease, not later than the date of occupancy or 10 days after the lease is signed, whichever occurs first. 765 ILCS 160/1-35(a).

B. Manager comments

1. Make sure buyer gets a complete set of governing documents
2. Don't believe any broker's claim that this is a "maintenance-free community"
3. Ask for financials and seek advice if you do not understand them. The balance sheet, coupled with a reserve study, is very revealing.
4. Clearly understand the rental policy
5. Interview before move-in