

A Consumer Guide to Apartment Ownership Under the Multi-Unit Developments (MUD) Act 2011



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The purpose of this consumer guide is to inform owners and prospective purchasers in multi-unit developments of the key aspects of the Multi-Unit Developments (MUD) Act 2011 and of their rights and obligations as members and directors of their Owners' Management Company (OMC).

Background

Apartment and multi-unit living is relatively new to Ireland, with much of the development occurring in the past ten to fifteen years. However, a legal framework and regulatory system to govern this

new type of housing was not simultaneously developed. This deficiency has resulted in a wide variety of problems and challenges for apartment owners which the MUD Act now seeks to address.

When did the MUD Act come into force and to whom is it applicable?

The Act became law on 1st April 2011 and it applies to all multi-unit developments, i.e. developments with not less than five apartments with shared amenities, facilities and services. This includes

private housing estates that have an OMC structure and mixed-use developments which are residential but have also some commercial elements such as shops or offices.

Why was the MUD Act created?

The MUD Act was developed to address the absence of legislation and to accommodate the very unique challenges, rights and responsibilities that come with being an owner of a home in an apartment complex or private housing estate. It puts structured processes in place for important matters such as the transfer of the common areas from the developer to the OMC

and for transparent and equitable apportionment of service charges, service costs and sinking funds. It also sets down new arrangements for the future, whilst providing remedial measures to address existing developments which have problems and it generally aims to facilitate fair and effective management for the long term.

What is the Owners' Management Company (OMC) and what does it do?

The OMC is an integral part of multi-unit living. It is a legal structure; a company established by the developer, to own and be responsible for the maintenance and management of the development once it's completed. All the non-privately owned areas are known as common areas, e.g. the structures, building façades, roofs, hallways, stairwells, car parks together with the various machinery and plant within the buildings including the pedestrian and vehicular gates, lifts, fire safety systems, intercoms etc. are maintained and

managed by the OMC. The common areas vary in every development but the lease should outline them.

The OMC also administers and delivers all the estate services such as waste management, lighting, landscaping, cleaning and fire safety programmes. It also looks after procuring adequate insurance, together with the finance, accounting, corporate and statutory compliance and day to day communications. The OMC usually engages a managing agent to undertake many of these activities on its behalf.

Who is a member of the OMC?

Each unit owner upon closing their sale becomes a member of the OMC and is assigned one vote of equal value to one unit. This is a legal right and the

vote may be used when the OMC is making important decisions relating to the running of the development.

Who is a director of the OMC?

Any member (owner) is entitled to become a Director of their OMC. The Board of Directors is required to have a more active involvement in the decision making and strategic management of the development. The Board of Directors has a responsibility to the members and must now, under the MUD Act hold a members

meeting once per year to discuss the management activities through the publication of an annual report. Twenty one days advance notice of the meeting must be advised and the annual report must be circulated at least ten days prior to the meeting.

What is a Managing Agent?

The Board of Directors will usually engage a Managing Agent to carry out the corporate and statutory administration, issue and collect service charges, oversees estate services, maintenance and repairs

through the appointment of contractors. The Managing Agent should be professional and licensed with the Property Services Regulatory Authority*.

*Property management agents will be required to be licensed by the Property Services Regulatory Authority once the legislation is enacted.

What is covered in the Act?

The Act primarily covers 4 key areas

1. Conditions and obligations relating to the compulsory transfer of the common areas from the developer to the OMC
2. Obligations of the developer upon completion of the development stage
3. New remedial mechanisms for dealing with disputes
4. New Regulations, Rights and Obligations of the Owners' Management Company (OMC) in relation to Directorships and voting rights, reporting and information, the calculation, apportionment and recovery of service charges, the provision of a sinking fund and other related matters

1. Conditions and obligations relating to the compulsory transfer of common areas from the developer to the OMC

The Act requires developers to transfer ownership of the common areas to the Owners' Management Company (OMC) within six months of the enactment of the Act, i.e. by midnight on 30th September 2011 and in future new development before any sales occur. Accordingly the common area ownership in all existing partially and substantially sold developments must now have been transferred. Where a development is unfinished this transfer does not relieve the developer of his obligations to complete.

In terms of these arrangements, the developer retains the right to pass and re-pass over conveyed areas to enable the development's completion and must arrange insurance in respect of all risks regarding their use. The developer must indemnify the OMC against claims for any acts or omissions during the course of completing the development.

The OMC must not hinder access to the developer for the purpose of completing the work or entering any adjoining land. The OMC will be obliged to join in the conveyances and transfers of units to future purchasers.

In terms of these arrangements, the OMC is to have separate legal representation which must have all the necessary powers to perform any functions conferred on it by the Act and all rights and amenities necessary for reasonable use and occupancy.

Apartment owners in existing partially and substantially completed multi-unit developments should arrange to obtain professional advice to ensure the interests of the OMC are adequately addressed in accordance with the legislation.

Figure 1 - Extract from the MUD Act

Pursuant to Schedule 3, Section 31(2) – The following list of estate documentation should be handed over by the developer to the OMC;

- Confirmation that the development has been completed in compliance with statutory requirements
- Certification confirming that any financial contributions for planning have been paid
- Safety file
- 'As built' structural drawings
- 'As built' service drawings
- Operational & Maintenance Manuals for plant & equipment
- Warranties & guarantees with the benefit transferred to the OMC
- Maintenance Contracts relating to the development
- Test records for drainage, water pipe work and heating pipe work
- Schedule of plant, equipment and fire protection systems specifying their expected useful life
- Title documentation for common areas and reversion
- Stamped & registered counterpart leases
- Documentation and records relating to the OMC

2. Obligations of the developer upon completion of the development stage

There are conditions set down for completion of the development stage and the extinguishment of the developer's beneficial interest. When the development stage (as defined in the Act) ends, the developer makes a statutory declaration for the benefit of the OMC that the legal and beneficial interests stand merged. This declaration terminates the developer's ongoing involvement and requires the consent (which may not be unreasonably withheld) of any mortgagee or owner.

An important condition is the handover of a prescribed and comprehensive set of documents

and records including, as built drawings, technical specifications, service test records and title deeds. See Figure 1 - Extract from MUD Act – documents to be handed over.

Prior to the Act there were no such obligations on the part of the developer and the OMC invariably lacked a written contract, had no right to compel the transfer, or enforce any conditions in terms of standards and completion, or to receive any estate documentation.

In future new developments a separate and new form of contract will be created and entered into by

the developer and the OMC to outline the responsibilities between them. The contract must include a process for ensuring compliance with statutory requirements, completion of the common areas, the retention of money and dispute resolution.

In the meantime in terms of the provisions for assuring completion and standards of construction it may be prudent of the OMC to have an independent chartered building surveyor undertake an inspection and a professional snag report which might then be used to negotiate with the developer.

3. New remedial mechanisms for dealing with disputes



The Act now provides new remedial mechanisms for dealing with disputes and allows the OMC, as a legal entity, to pursue recourse in the courts. Heretofore, the OMC seldom had the right to represent owners as a collective body, rather individuals had to take legal action in a personal capacity on behalf of the OMC and as such were exposed to all the associated risk and liability.

The Act designates the Circuit Court as having exclusive jurisdiction and will encourage mediation as a means of dispute resolution in the first instance. Mediation is an important feature as it should prove beneficial to the consumer in terms of time and costs. Applications to the court may include seeking an order to enforce any right or obligation by the Act, to alter voting, to direct a rearrangement or apportioning of funds, to determine common area boundaries or physical characteristics or alterations to the structure, to amend covenants contained in the lease, to enable an OMC to deal with a debt or an issue in relation to the future management, and or to direct any owner or owners to cooperate with the decisions made by a majority of unit owners in a development.

Under the Act's dispute resolution methods, where an OMC has been struck off, the limit for making an application for reinstatement has now been extended from one year to six years.

4. New regulations for governance, reporting, service charges and sinking funds

The Act now offers stronger arrangements, terms, and greater rights and protections for owners in multi-unit developments. However, it also imposes greater responsibilities on the Board of Directors of the OMC. These added responsibilities are in addition to the pre-existing obligations under Company Law (Companies Acts 1963 – 2009).

The Act imposes additional corporate governance obligations and far greater responsibility on OMC Directors in terms of consultation with the owners, reporting and generally in relation to ensuring adequate funding and maintenance of the development, particularly in relation to fire safety equipment servicing, and planning for the future refurbishments and the adequate provision of a sinking fund.

Directors will now also have far greater responsibility for ensuring value in the selection and delivery of services to the development and cannot enter into contracts for a fixed period greater than 3 years.

Another part of the Act aimed at ensuring fair and consistent practices for the OMC, states that Directors on the Board of Management of the OMC must retire after three years to allow a change in personnel. If a person wishes to continue in their role as a Director and the members agree, the person can be re-elected.

The Directors must report annually to the members and ensure that the OMC prepares an annual report and that it sets out specific information, over and above statutory reporting. See Figure- 2 - Annual Report extract.

Figure 2 - Annual Report Extract: Contents

- A statement of the Income and Expenditure
- A statement of the Assets & Liabilities
- A statement of the funds in the Sinking Fund Account and details of the basis and calculation of the annual contribution
- A statement of the amount of the Annual Service Charge and the details and basis of calculation
- A statement of the following years (current) service charge
- A statement of any Planned Expenditure on refurbishment, improvement or maintenance intended to be carried out
- A statement of the insured value, details of the premium, the insurer and a summary of the principal risks covered
- A statement setting out the fire safety equipment installed and the arrangements in place for the maintenance
- A statement fully disclosing any contracts entered into or in force and any connected party transactions

Service charges

The Act stipulates that every member must pay service charges.

Furthermore under the Act, a developer is deemed to be an owner of a unit, the sale of which has not yet been completed, (i.e. unsold) from when the first sale of a unit is closed. The effect of this is to make

the developer responsible for the service charges due in respect of such unsold units. This relieves owners from having to make up a shortfall in funding resulting from unsold units. The Act further clarifies that the service charge may be recoverable as a simple contract debt before the ordinary courts thus removing obstacles and long delay to recovery.

Figure 3 - Service Charges Extract

Figure 3 –Pursuant to Section 18 - Extract of the obligatory expenditure breakdown required in the estimate of expenditure (the service charge budget) for consideration by the members at an Annual Meeting;

- Insurance
- General maintenance
- Repairs
- Waste management
- Cleaning
- Gardening & landscaping
- Concierge/security services
- Legal services & accounts preparation
- Other expenditure anticipated in connection with maintenance/repair and management

Sinking funds

The Act stipulates that all multi-unit developments must establish a sinking fund for specific purposes including refurbishment, improvement or maintenance of a non-recurring nature. In simple terms this is essentially a savings fund. As with service charges, all owners, and developers in the case of unsold units, are obliged to contribute to the sinking fund.

Its function is to ensure adequate funds are available and an extra levy is not required, when expensive refurbishment works arise in a given year. It does this by predicting the future needs of the building, calculating the total monies likely to be required and charging out a small contribution annually.

This arrangement avoids dilapidations by ensuring the works are funded and can be done on a timely basis.

The Act states that the sum of the sinking fund is to be €200 per annum or such sum agreed at a general meeting of the owners thus allowing for the varying needs of developments of differing sizes and specifications.

The Sinking Fund monies must be held in a separate bank account to the service charge fund to ensure that the sinking fund it is not spent inappropriately. For existing developments which do not currently have a sinking fund, the Act mandates that one must be established by September 2012.

Voting rights

Equal voting rights are now enshrined within the Act. The Act requires that one vote of equal value will be given to each unit. This is a change from situations where ‘golden votes’ or ‘weighted subscriber votes’ allowed particular parties to hold unfair influence over the running of the development. Now under the MUD Act owners in multi-unit developments will have fair and equal voting rights.

In addition to the financial statements the Directors, now as mandated by the Act must also have the annual service charge budget approved by the members at a general meeting. The service

charge budget details provided to the owners must include all details and categories of expenditure. The budget can be amended by at least 60% of the members attending and in order to be disapproved must be voted against by at least 75% of the members attending. If disapproved, the existing charges (prior year) shall remain in place until the adoption of a new service charge.

The MUD Act mandates that the service charges levied must not be used to discharge expenses on matters which were or are the responsibility of the developer, unless such expenditure is approved in writing by 75% of the members.

Fire safety systems

Fire safety is an essential element of any Multi-Unit Development. The MUD Act requires that, in the case of new developments, the developer must provide a certificate from a suitably qualified person (as prescribed) confirming that the relevant parts of the common areas as built comply with the fire safety certificate. This new form of certificate is welcome and ought to ensure that the development complies with the fire safety requirement before any purchaser takes up occupation. Thereafter, the OMC is responsible to ensure Fire Safety Management is in place and compliant.

A Fire Safety Register should include the installation/commissioning certificates (which should have been provided by the developer) and thereafter must be maintained and kept up to date by the OMC. A site log book should record servicing and incident history for the building fire safety systems including the fire alarm, emergency lighting, extinguishers and smoke ventilations systems to

comply with fire safety legislation . Furthermore the fire safety signage in the building should be adequate in terms of indicating locations for fire points and exits etc.

The fire safety systems and maintenance arrangements in place must now be confirmed annually to the members /owners as part of the Directors’ Annual Report for the OMC.



Figure 4 - Typical Fire Safety installations

Typical fire safety installations in a MUD include;

- Fire Detection and Alarm system
- Emergency Lighting & Exit Signage
- Fire extinguishing equipment
- Fire Hose Reel
- Dry/wet risers
- Smoke ventilation
- Fire doors, intumescent seals and closers
- Fire stopping
- Fire safety register and maintenance programme

House rules

Under the Act, the OMC now has the right to alter, amend or add to the House Rules of their development so long as any such changes are consistent, fair, and reasonable and have been circulated to and agreed at a general meeting of

the owners. Landlords are obliged to ensure that their tenants adhere to the house rules. Although the Act does not offer any sanctions for a breach of the house rules, it does allow for the recovery of the cost of remedying a breach of the rules.

Managing Agents / Property Services Providers

Most OMC's employ property managers or 'managing agents' to undertake the services and oversee the running of the development, including the collection of service charges. It is important that where property managing agents are employed that they are professionals and have the competencies to ensure that the common areas of the development are operated effectively and in compliance with all legislation including the MUD Act.

The Property Services Regulation legislation will provide that managing agents must be licensed. This will assist OMC's in ensuring that they are dealing with professional, qualified and compliant agents. Furthermore, managing agents that are members of professional bodies, such as the Society of Chartered Surveyors Ireland, are bound by codes of practice and are regulated in accordance with international standards.

What does it all mean to consumers?

The MUD Act is a reforming piece of legislation which now provides improved protection and dispute resolution for future apartment purchasers. In existing developments it transfers the control and power from the developer to the OMC and to the apartment owners and provides new remedial measures to resolve disputes which may be ongoing.

Apartment ownership and living should now be better and easier as a result of this new legislation. Among the key improvements are fair and equal

voting rights, access to how service charges are calculated and information on where OMC money is being spent. Owners can now influence how their developments are run even in terms of the house rules. Developers can be pursued in the courts to hand over control and transfer the common areas if they have not already done so.

Overall the Multi-Unit Developments Act 2011 is a welcome step forward in consumer protections for apartment owners both current and future.



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Disclaimer

This document is intended to be a general consumer guide outlining some of the broad potential implications of the Multi-Unit Developments Act 2011 for apartment owners in Ireland. It does not constitute a legal interpretation of the Act nor is it intended to constitute professional/legal advice on individual multi-unit developments. Professional advice on individual multi-unit developments or units is recommended.
<http://www.irishstatutebook.ie/pdf/2011/en.act.2011.0002.PDF>

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