



## Changes in Multi-Unit Development Requirements

by Julie Fitzgerald, Senior Associate

The Multi-Unit Developments Act was signed into law on 24 January 2011. It provides a statutory framework for new and existing multi-unit developments and for the management companies responsible for the ownership and management of the common areas of such developments.

Two sections of the Act are in force since 24 January - Section 14, regarding the structure of an Owner Management Company (OMC), and Section 32, which restricts such companies from entering into certain types of contract. The remainder of the Act came into operation on 1 April 2011.

The following summarises some of the more significant provisions introduced by the Act:

### *New Multi-Unit Developments*

- Ownership of the common areas must be transferred *prior* to the sale of the first unit (rather than after the sale of the last unit, as was previously the position). The common areas must be transferred to an OMC and the OMC must be established at the expense of the developer. The beneficial interest in the common areas and the reversion relating to the residential units shall rest with the Developer/its mortgagees or chargees until the Development Stage has ended.
- Prior to the transfer of the common areas, the Developer and OMC must enter into a written contract setting out the rights and obligations of the parties concerned. The contract should expressly provide that the beneficial interest is *not* to pass to the OMC, as otherwise the entire beneficial interest passes to the purchaser on the making of an enforceable contract for the sale of land.
- Certificates of compliance with fire safety legislation must also be furnished to the OMC prior to transfer of common areas. This is particularly relevant in light of a recent High Court case concerning an apartment development in Clondalkin. In that case, the local authority brought proceedings over the alleged failure to make the complex fire-safe and an Order was granted prohibiting occupation of the buildings unless outstanding works were completed to ensure that a proper fire safety regime was in place.
- The OMC must be advised by a different firm of solicitors to the Developer, at the Developer's expense, before entering into a contract for the transfer of common areas.

### *Existing Multi-Unit Developments*

- The common areas of existing developments must be transferred within 6 months of the commencement of Section 4 of the Act. The beneficial interest shall be reserved to the person transferring ownership.
- Where at least 80% of residential units have been transferred to owners, the beneficial interest in the common areas may not be reserved. Developers are advised to review their property portfolios in a timely fashion in light of this provision, to ascertain which developments will be affected.
- Where the development stage has ended the owner of every beneficial interest in the common areas and the reversion in the residential units must make a declaration transferring any beneficial interest to the OMC. Such merging of the beneficial and legal interests is subject to the consent of the mortgagee/chargee (which consent shall not be unreasonably withheld). The mortgagee/chargee can retain its mortgage/charge over any unsold units retained by the developer. Developers and their banks should obtain relevant tax and legal advice on the implications of taking leases of units in a development and on the most appropriate legal structure to employ. While there is a mechanism agreed by the Law Society with the Revenue Commissioners, from a stamp duty point of view, for the

transfer of the common areas and retention of units by a developer (which mechanism we understand applies in both mixed commercial and residential developments as well as in wholly residential developments), there may be other tax implications for developers and security implications for their banks to consider.

### *Other changes introduced*

- The Act deals with the structure of OMCs and their corporate governance. For example, in a new residential development the voting rights of owners in the OMC should be of equal value. In the case of a mixed use development, voting rights must be apportioned in a manner which is fair and equitable.
- In existing OMCs for residential developments, any non-owner who has voting rights can only exercise them with court authorisation which may only be granted to protect an essential economic interest in the development (other than as owner of a residential unit) or in the interests of fairness and justice.
- A person may not be appointed as a director of an OMC for a term greater than 3 years. For directors of existing OMCs the clock starts running from the commencement of Section 16, unless the term of the directorship is due to expire before this 3 year period.
- Of importance to both apartment owners and developers are the provisions addressing how service charges are set and approved, including the service charge applicable where more than 75% of the OMC voters (in a development where at least 65% of the units have been sold and where at least 3 years have elapsed since the common areas were transferred) disapprove new service charge proposals: Section 18 (11) confirms that the developer shall be regarded to be the owner of a unit in a multi unit development, the first sale of which unit has not been completed, as and from the day on which the first sale of a residential unit is closed. This subsection make sense in circumstances where the obligation to provide the services presumably rests with the OMC after the transfer of the common areas has been effected. A sinking fund must be established before the expiry of 18 months from the commencement of Section 19, or before the expiration of 3 years since the first unit was sold, whichever is the later.
- Section 30 makes a practical, cost saving exception (without prejudice) to the current law on restoration of certain companies to the register. The Registrar of Companies can restore an OMC to the register if, within 6 years of publication of strike off of the OMC, a member or officer of the OMC (which must own the common areas or part thereof in the multi unit development for which the company was formed) applies for restoration in the prescribed form and delivers all outstanding annual returns for the OMC to the Registrar. S.I. No. 97 of 2011 prescribes the form which allows the administrative restoration of an OMC.

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