

“SO MANY HOLES TO FILL, SO LITTLE MUD”

The Multi-unit Development Bill 2009

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The Multi-Unit Development Bill 2009 (The MUD Bill) forms the centrepiece of the government’s strategy to deal with multi-unit developments (MUD’s) and their management companies. Within it there are many positives for apartment/unit owners – I for one will certainly welcome it but believe that its legislative proposals are still not sufficiently all encompassing and do not go far enough to protect existing and future unit owners. There are shortcomings and room for additional amendments to tighten the proposed systems to ensure that when the Bill is enacted it establishes a robust statutory framework which supports existing, and encourages more, multi-unit development.

INTRODUCTION

At present the MUD Bill is making its way through the houses of the Oireachtas. The amendments made during the Seanad committee and report stages have improved it greatly since it was initially launched.

In the meantime, within a significant number of multi-unit developments built during the property boom, there exist social and environmental problems arising directly from the absence of an appropriate legal framework. The Bill’s provisions are intended to provide remedial measures for these problems retrospectively and reforms which will facilitate greater consumer protections to multi-unit purchasers in the future.

Reform and regulation of this sector has long been awaited and within this article, from a very practical basis, I will try to address how well the Bill, as it is currently drafted, will function and what benefits and implications it will deliver for current unit owners, directors of management companies, developers and management agents.

MAIN LEGISLATIVE PROVISIONS

Generally the MUD Bill satisfactorily addresses common administrative problems for the management companies (now to be known as Owners Management Companies – OMCs) such as the timing of the transfer of the common areas to the OMC, the governance arrangements, regulations for the calculation and apportionment of the service charge and sinking funds, the enforcement of covenants and house rules, compliance with statutory reporting requirements, remedial measures for strike offs and new means for dispute resolutions.

The important changes and improvements the Bill will provide to OMCs are welcomed but from practical experience

I can see where further considerations are warranted to create a more positive culture and a suitable platform to deliver fair, efficient and effective management to support and sustain apartment / multi-unit purchase as a housing choice in Ireland.

THE SHORTCOMING – means to assure “completion”

“Completion” is at the heart of a range of current problems suffered by owners and tenants and therefore I continue to be concerned that the Bill should do more to alleviate the problems of multi-unit developments as regards proper completion of the construction of the whole development.

Currently there is no process and no conditions to the transfer, and once common areas, structural parts and plant are vested by the developer into the OMC, the OMC (which is funded exclusively by the unit owners service charges) immediately acquires onerous contractual obligations to maintain and repair these common areas including services. Disputes arise and unit owners become aggrieved when they then have to apply their own service funds to complete or correct construction work.

Therefore much needed essential regulations and conditions to the determination and standard of construction and completion still remain outstanding.

GREATER ANALYSIS NEEDED

Greater analysis of the practical problems consumers face in multi-unit developments would have highlighted how “completion issues” represent the core of the vast majority of them. They are often irresolvable issues and the following three factors together prohibit reasonable protections or redress:

- (1) The OMC has limited power or contractual rights with the developer to verify the completion of the development before it acquires ownership and responsibility for its common areas; the OMC is in practice, devoid of any contractual rights – an empty vessel effectively into which the developer can place the common areas without any real contractual requirement in terms of construction standards or verification of completion.
- (2) The agreement for the conveyance of the common areas by the developer to the OMC is usually devoid of any formal or defined process for the event and therefore no conditions which might normally require the verification or certification of the whole development in compliance with planning permissions and building control operate.
- (3) Within the conveyance process, as a form of assurance, the standard Certificate of Compliance is frequently inadequate for the purchaser's protection, as it usually operates to the effect that the individual apartment complies with planning permission and building regulations but contains a 'qualification' insofar as it is applicable for the estate.

Purchasers seldom appreciate that any item referred to as a 'qualification' is actually excluded from the Certificate of Compliance and highlighted as being not compliant. In reality, therefore, the qualification could refer to all of the common areas outside the owner's own apartment door.

This situation leaves ample room for abuse by some developers and problems are compounded with the lack of redress available. The consequences are that developments are abandoned by developers with incomplete works and defects without fear of any real attendant consequences.

ADVANCING TOWARDS A SOLUTION

The Bill will now ensure the transfer of the common area to the OMC occurs before the sale of any unit and this has many advantages for the administration of the OMC, but how this measure may strengthen or set down clear conditions as to construction and completion standards remains unclear.

The Bill requires that the beneficial ownership of the common areas will remain with the developer until the entire development is completed but in practice how will the attaching liabilities for completion and compliance with planning and building regulations be assured and what means of process will be provided to ensure the liability is only extinguished once the common areas are actually completed satisfactorily?

A defined process for the completion of the common areas including conditions before transfer or the extinguishment of the developers' beneficial interest remains outstanding and is still required within the new legislative regime even though the transfer is now to occur before the sale of the first unit.

Such a formality might normally include a requirement to provide an overall certificate of completion and compliance with planning and building regulations for the development as a whole. However, currently because there is no formal process proposed, there are no such conditions.

EXISTING MULTI-UNIT DEVELOPMENTS - COMPULSORY VESTING

For all existing developments, the MUD Bill provides that the developer must arrange the transfer of the common areas to the OMC within 6 months of the Bill's enactment subject to the retention by the developer of the beneficial interest, pending completion of the relevant common areas.

The Bill provides that the transfer of ownership of common areas does not relieve a developer of responsibility or obligation for completing the development in compliance with the Planning and Development Acts 2000 and 2009 and compliance with the Building Control Acts 1990 and 2007.

However, as existing planning legislation already provides similarly in law but not in practice, there is concern as to how compliance will be assured.

Accordingly for the provisions within the new legislation to operate effectively in practice and not just in law, a regulatory system must operate simultaneously to ensure the application of the law.

In estates, which will be taken in charge or part in charge by the local authorities, planning authorities usually require a cash lodgment or performance bond, as security for the completion of the common areas. However, they do not routinely insist on security bonds in their planning conditions for private schemes.

A PRACTICAL SOLUTION – not implemented

A practical solution within The Law Reform Commission's Report, (and subsequently supported in various other submissions, including that of the IAVI), recommended that, for new apartment developments, legislation be enacted whereby in the event that the common areas (such as open spaces, lifts and internal stairs) have not been certified as completed under the Building Control Acts 1990 and 2007, the management company (OMC) would hold 5% of the purchase money for each apartment in trust for the developer until completion is certified.

It is clear that the intention was to provide a powerful stimulus for the developer to complete the development and to generally both accelerate and set standards for completion, which would have resolved many current problems but this recommendation has been excluded in the Bill.

FUTURE/NEW MULTI UNIT DEVELOPEMENTS

With respect to future new developments the MUD Bill provides that the OMC must be established and own the common areas of a development (or such relevant parts) before any apartments may be sold. In doing so the Bill corrects the present common, but invalid, practice whereby the OMC operates from the sale of the first unit rather than following the assurance of the common areas. The new arrangement will now enable the OMC to regulate the common areas and collect the service charges legitimately from the sale of the first unit.

Importantly the new arrangement provides each purchaser with immediate membership and involvement in the OMC, and ad hoc unit owners committees who currently form and operate by necessity without formal authority can now be replaced with directorships of the OMC.

The Bill specifies that the words “Owners Management Company” be abbreviated to “OMC” must be included in the name of any management company and one vote shall attach to each unit, thus outlawing weighted voting and forging greater power and control of the OMC to the unit owners. Such inclusion and control will be welcomed by many unit owners who have been prohibited from taking an active role in the management of their development.

Indeed the new law will restrict a developer from retaining control of the OMC long after they should and consequently issues, such as the owner’s lack of power to compel services and service standards and generally to have a say in the management, ought to be no more.

However, a practical concern that arises since the Bill allows for piecemeal transfers is that this will lead to the developer creating multiple and separate OMC’s within a development. This might comply with the new requirement but it is hardly what is envisaged under the Act and would undoubtedly lead to inefficiencies, boundary issues and higher service charge costs to owners in relation to the ongoing management of these smaller entities.

The Bill intends that the developer will retain the beneficial interest in the estate and common areas until completion occurs but with the continued absence of any means to verify the standard of construction or determine satisfactory completion of the common areas, it still remains unclear how the unit owners will be assured of the standard of completion and indeed compliance with planning permission and building regulations.

Without this, issues currently at the core of the vast majority of unit owner’s problems and disputes in multi-unit developments will still remain unresolved.

BUYER BEWARE UNTIL FURTHER NOTICE

In the meantime, it is important to note that even with the new legislation, the onus shall continue to remain on the prospective purchaser of a dwelling in a multi-unit development to satisfy themselves with regard to the completion of the units and common areas prior to purchase. This situation must be corrected in order to support reasonable consumer protections and to sustain a strong multi-unit market for the future.

ESTATE DOCUMENTATION – A PREREQUISITE TO GOOD ESTATE MANAGEMENT

A great advance towards improved management and appropriate consumer protections is the MUD Bill’s provision for a mandatory schedule of estate documentation required to be delivered by the developer to the OMC upon completion of the development.

The delivery of such documentation is a matter of standard practice in many other countries which have more established legal frameworks for multi-unit development. In fact, often such documentation is required not just following completion but before any occupation is permitted.

The schedule includes for delivery of the overall certification of the estate, and inter alia the safety file, as built drawings, drawings showing the services relating to the development, test records relating to drainage, water and heating pipe work and general documentation relating to the management company, all of which are prerequisites to good estate management and provide invaluable means to enable health and safety regimes, planned preventative maintenance programs and cost effective repair and improvement works.

Such documentation will enable some appropriate assurances as to completion and certification with Planning and Building Regulations. However, a process including a means for the OMC to verify the adequacy of the documentation furnished will be required to ensure the system operates successfully.

THE OMC’S RIGHT TO EFFECT REPAIRS

The Bill also provides that the OMC shall have a right to carry out reasonably necessary repairs or maintenance to areas not within its ownership and may recover the cost from any person (including the developer) responsible.

This new right or means for the OMC to arrange collective remedy and redress when defects arise irrespective of their location will be welcomed.

IMPROVED REPORTING - ANNUAL GENERAL MEETING

The MUD Bill mandates additional reporting requirements from the OMC at the AGM which will serve to provide greater information and transparency to the unit owners and will be welcomed by apartment owners throughout the country. Inter alia such items shall include detail of the income and expenditure, assets and liabilities, service charge, sinking fund, planned expenditure on maintenance and repair, insurance cover and contracts entered into. This information already accords with good practice and goes beyond the limited statutory reporting requirements. Such improved reporting should help promote more the positive role and benefits professional management can play in quality community living and in sustaining value.

ANNUAL SERVICE CHARGES

There are changes to the area of service charges which will facilitate more information and transparency but fail to provide any improved means to defray ever increasing problems with their non payment:

1. A formal scheme must be established, expenditure categories defined and the budget/service charge be approved at an AGM before being levied.

2. A transparent and equitable method of apportionment is required which may avoid current and frequent disputes and problems which arise when the formal documentation falls short in addressing the complexities of phased schemes and/or fails to set out a coherent and comprehensive system of management suited to the diversity and design of the particular development.
3. The developer will now be legally obliged to contribute the service charges in respect of unsold units, an important reform as it discontinues the current utterly unfair arrangement whereby the initial unit owners can be burdened with the cost of the full provision for the entire estate. Unfortunately, however, the arrangement will not be applied retrospectively and unit owners in existing partially sold developments may continue to be exploited.
4. The Mud Bill re-affirms each unit owner's obligation to pay the service charge as levied and mandates that the demand for payment sets out the basis of the calculation of the charge but proposes no alternative means for recovery. This means ever increasing recoveries will be attempted through the courts giving rise to increased cost to the OMC funded continuously and unfairly by the compliant owners. It is disappointing that various proposals submitted including the use of the Small Claims Court, to simplify recovery, speed up the process and save OMC's the considerable costs associated with pursuing arrears have not been adopted.

MANDATORY SINKING FUNDS

The MUD Bill requires that the OMC must establish a sinking fund, now to be referred and known as "building investment fund" for expenditure on refurbishment, improvement or maintenance of a recurring nature.

Unit owners will be legislatively required to make contributions to the sinking fund, which will be at least €200 per annum, or such higher figure as may be agreed by the members of the OMC, and the fund must be established within 3 years of the first sale of a unit in the development or within 18 months of the commencement of the legislation, whichever is later.

The fact that schedule 3 (item 10) of the Bill requires a schedule of plant and equipment setting out the expected useful life of such plant and equipment be provided to the OMC will facilitate easier calculation of the funding requirements. However, the deferring of the creation of the fund for 3 years contradicts good estate management practice that clearly recommends it be commenced immediately following construction.

Furthermore unless the fund is initiated from the time of construction a person buying a unit in year four will effectively be required to service the cost of the dilapidations which occurred in the three years prior to his ownership which is not appropriate.

Indeed in terms of all existing developments a recommendation in the IAVI's submission was to obligate the Directors of OMCs to have any deficit in the Sinking Fund professionally estimated and to levy owners to make good the shortfall in the fund within a reasonable period (say 3-5 years).

Furthermore a recommendation made by the Law Reform Commission that interest earned on the sinking funds monies be statutorily exempt from deposit interest retention tax (DIRT) would have been beneficial. It is unfortunate that neither of these recommendations were included in the Bill.

HOUSE RULES

House rules form an integral part of the peaceful enjoyment of the multi-unit development and generally rely on implied voluntary compliance so difficulties that arise usually relate to enforcement.

The legislation provides that the OMC may make House Rules in addition to the covenants within the leases. However, it unfortunately introduces no additional means or sanctions to enforce or ensure compliance and or to alleviate nuisance. Albeit in the event of breach, it permits the recovery of reasonable costs, but that is assuming costs are calculable as incurred – as the loss may simply amount to inconvenience and disturbance.

DISPUTE RESOLUTIONS, REHABILITATION AND MEDIATION

The MUD Bill sets out numerous very welcomed situations where remedial orders may be sought and obtained by the OMC; to enforce any rights or obligations imposed under the new legislation. The Bill also sets out – persons who may apply, the jurisdiction and that the Court may direct that the parties engage in mediation if it might assist in the settlement of the dispute.

If an OMC is struck off for failure to comply with Company law reporting requirements, the legislation now provides for an extended period of 6 years (as opposed to 1 year) for restoration to the Companies Register.

IN CONCLUSION

Although clearly the intention of the new legislation is to deliver a better program of regulation for the management company and to ensure the transfer of the common areas, which often may be outstanding, it is not clear how the reforms will fully address the fundamental issues of construction standards and completion of the common areas themselves.

Therefore the new arrangement may operate well, in theory, to effect a transfer of the common areas but in practice for it to be beneficial and effective for unit owners an appropriate and defined process to ensure satisfactory completion will be essential as part of the conditions to transfer and before the extinguishment of the developers beneficial interest. ♦