



**Irish Auctioneers & Valuers Institute**

## **Submission to Government**

### **Multi-Unit Development Bill 2009**

# **IAVI Observations & Recommendations**

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## **Overview of the Irish Auctioneers & Valuers Institute.**

The IAVI is the representative body for c. 1,800 professionally qualified estate agents, valuers and surveyors with members in all 32 counties of Ireland and promotes the highest professional, ethical and educational standards in this currently unregulated industry.

Our members are involved in every facet of the property market, within development companies, financial institutions, estate agency and local authorities, in every sector including agricultural, residential, commercial, industrial, development, licensed premises & hotels, professional services, planning and taxation, marketing and valuation.

Our current academic entry standard for ordinary membership is a Degree in Property Related Studies with the principal core competency being valuation methodology, application and analysis and we accredit full-time degrees from DIT, GMIT, LIT and UJJ. In addition, we operate and fully administer our own degree entry programme, a Level 8 Honours Degree in Property Studies awarded by DIT under a partnership arrangement. Our Degree programme is fully accredited by the Society of Chartered Surveyors and the Royal Institution of Chartered Surveyors. For Associate Membership (Assoc. IAVI) candidates must secure a Level 6 Higher Certificate in Property Studies and, again, we fully administer this course in partnership with DIT.

Our members have committed to the principle of life-long learning and engage in a CPD programme which includes seminars, training courses, employment-based learning, business briefings and participation on industry bodies and professional task forces. The IAVI is the only body in the property profession in the UK or Ireland to have carried out a 100% audit of members' compliance with its mandatory requirement for CPD with an outstanding 98% compliance result and a withdrawal of membership for the non-compliant 2% in 2008.

The IAVI is a member of The European Group of Valuers' Associations (TEGoVA) and of the International Valuation Standards Council (IVSC). It is also a founding member of the International Consortium of Real Estate Associations (ICREA), a member of the main European property body, CEPI, and the Principal Member in Ireland of FIABCI, the International Real Estate Federation. The IAVI recently accepted an invitation by the Irish Banking Federation to assist the banking industry in a comprehensive review for the improvement of valuation procedures and standards.

Communication is one of our core strategies and our website [www.iavi.ie](http://www.iavi.ie) is a great source of information for practitioners and consumers and the Property Valuer, our quarterly magazine publication providing market and legal updates, commentary and news, is available on line and is highly regarded throughout the business community.

## **Overview of IAVI Members' comments relating to the Multi Unit Development Bill.**

IAVI members involved in Multi Unit Development have broadly welcomed the publication of the Multi Unit Development Bill 2009. The IAVI endorses the IPFMA's comprehensive submission to Government on the Bill, authored by IAVI member and IPFMA Vice Chair Siobhan O'Dwyer, and supports its recommendations as well as those outlined below from the Law Reform Commission's (LRC) Draft Bill.

IAVI member comments, which have been consolidated into substantive points on which a consensus exists and our recommendations for the Multi Unit Development Bill 2009 follow:

### **Section 1 : Interpretation**

#### **(a) Definition of 'Multi Unit Development'**

The term Multi Unit Development is defined in the Department's MUD Bill as *"multi-unit development" means land on which there stands erected a building which, or a part of which, subject to subsection (3), is divided into units of which not less than 5 are designed and intended for residential use.*

#### **IAVI Recommendation**

- The definition of 'Multi Unit Development' should be broadened to take into account the various types of properties that can comprise a Multi Unit Development (i.e. a Multi Unit Development can include a combination of apartments, commercial units (especially ground floor retail units) and duplexes or townhouses) and as such impact on the service charge calculation/ apportionment, voting rights and unit owner responsibilities.

#### **(b) Definition of 'Completion of a Development'**

The Bill does not include a definition for 'Completion of a Development'. In practical terms, it would be useful to have a definition for what constitutes a completed development to avoid any ambiguity among parties to the Multi Unit Development.

The Law Reform Commission's definition of a completed development is as follows:

*The Commission recommends that 'completion' should be defined by law as compliance with planning conditions and the statutory building code, as certified by a Building Surveyor/ architect in accordance with the Building Control Acts 2000 and 2007.*

#### **IAVI Recommendation**

- The Bill should include a definition for 'Completion of a Development' in line with the LRC recommendation and should also include a requirement for the developer to complete the management company's snag list prepared by an independent Building Surveyor/architect as recommended by the National Consumer Agency in its 2006 Report:

*“contract between the developer and the management company to convey the title of the buildings and common areas to the management company should include a contractual obligation on the developer to attend to the management company’s snag list prepared by an independent surveyor/architect. The developer should be required to furnish a completion certificate certified by the architect on completion.”*

- Completion of the development should also be required to be of the same standard as set out in the marketing/ advertising materials and brochures used to sell the development. Buyers often buy units off plans and are at a disadvantage in that the finished product may not match the description given during marketing, although new regulations to be brought in by the new Property Services Regulatory Authority should address this issue, as recommended by the IAVI.

## **Section 2: Conditions relating to the Sale of Multi Unit Developments**

We welcome the provision for the mandatory establishment of an Owners’ Management Company (OMC) and the requirement to transfer ownership of the common areas to the owners’ management company in advance of sales being completed.

However, there are no provisions included in the Bill to require completions within a specified time frame or to a required standard.

In relation to ensuring the completion of a development in a timely manner, the LRC has recommended that 5% of the purchase monies of each unit be paid by the purchaser to the owners’ management company to be held in trust for the developer by same, pending satisfactory completion of the development.

### **IAVI Recommendations**

- We agree with the retention of a portion of the purchase price as it will provide unit owners with a level of protection that the common areas will be completed to a required standard, that these should be snagged and certified by a qualified Building surveyor/architect and that Certificates of Completion and Compliance be issued in advance of the OMC issuing the balance of payments to the developer.
- However, while we agree with a modest retention, we feel that the 5% as suggested may in certain circumstances present a problem for developers who are on extremely tight margins. Indeed, those trying to offload completed developments are in many cases doing so at a loss and therefore there should be some flexibility in this.

The LRC also recommended that the developer should make an application to the Property Registration Authority to register the title vested in the owners’ management company with the Land Registry in accordance with the *Registration of Title Act 1964*.

### **IAVI Recommendations**

- The title vested in the OMC should be registered under the *Registration of Title Act 1964*
- Compulsory registration would have the additional advantage of the necessity of filing a map in the Land Registry to clearly show the boundaries of the development

The LRC also recommends that there should be an onus on the developer or the developer's selling agent to establish at pre-planning stage whether it is intended that the development's common external areas will be taken in charge by the local authority or remain as a private development.

### **IAVI Recommendation**

- While recognising that a commitment to take such areas in charge will not always be forthcoming, we recommend that an obligation to at least seek such an assurance is included in the Bill, with the position being notified to buyers, to ensure transparency and in order to ensure that prospective purchasers are made fully aware of this and any potential obligations that may arise as a result.

### **Section 3: Transfer of common areas in existing developments**

While the IAVI welcomes the provision for the developer to transfer the relevant parts of the common areas to the owners' management company in the case of existing developments within six months (where Section 2 does not apply), we note that again there is no reference to a defined process for the completion of the common areas to the required standards within a specified timeframe.

### **IAVI Recommendation**

- We recommend that a process for the transfer of common areas, including conditions for the quality, timings, mechanism for attending to snagging issues and the requirement for certifications of completion in advance of the extinguishment of the developers' beneficial interest are clearly defined in the Bill.

### **Section 4: Transfer of completed developments to the OMC**

We welcome the obligation of the developer to transfer ownership of common areas of completed developments to Owners' Management Company in theory.

### **Recommendation**

- There should be a legal requirement to furnish the OMC with a prescribed set of documentation essential for Good Estate Management.

- We recommend the IPFMA’s suggested list of minimum documentation outlined below:

- i. Agreed snag list and Practical Completion Certificate.
- ii. Certificate of Completion and Compliance with planning permission and building regulations for the overall development and estate.
- iii. Set of ‘as-built’ drawings, operational and maintenance manuals and health and safety manuals (three copies).
- iv. Warranties and other guarantees, including test records for drainage, water and heating pipe work.
- v. Certifications for fire safety, health and safety, including the project safety file.
- vi. Schedule of plant, equipment and infrastructure defining its expected useful life, recommended maintenance and details of the relevant suppliers and installation sub-contractors.
- vii. Title documents to the estate including original stamped and registered transfer of the common areas.
- viii. Stamped and registered counterpart leases for all the units within the development.
- ix. Documentation relating to the management company, including the statutory documents such as the Register of Members, the Minute Book and the company seal.

### **Section 5: Obligation remains with the Developer to complete the Development**

The provision that the transfer of the ownership of an interest in the common areas of the development shall not relieve the developer from duty, obligation or responsibility to ensure completion of the development in accordance with the Planning and Development Acts 2000 to 2007 and Building Control Acts 1990 and 2007 does not establish assurance for the standard of completion and compliance and does not offer sufficient protection to the unit owner that the common areas will be completed to a satisfactory standard or in accordance with the specifications granted under Planning Permission.

#### **IAVI Recommendations**

- The provision should include further assurance to unit owners that the developer/development company must complete the development in accordance with the Planning and Development Acts and Building Control Acts and to a required standard.
- The recommendation of retention of a portion of the purchase price would be another safeguard to unit owners in the instance, particularly where the developer experiences financial difficulties.
- The LRC recommendation that each development and OMC be registered with the regulator would also serve to ensure that the development is completed to the required standards.

## **Section 6: Automatic Transfer of membership of Owners' Management Company on sale of unit**

The IAVI welcomes the provision that upon the sale of a unit, membership of the management company will transfer automatically to the new owner and that they will be issued with a membership certificate as soon as practically possible. The Bill also states that the new member will:

- (a) be entitled to exercise the powers, rights and entitlement of a member in the company concerned, and*
- (b) be obliged to perform all the obligations (including the payment of service charges) pertaining to the membership of such company concerned.*

However, in practical terms, a high majority of unit owners do not understand the 'powers, rights and entitlements' as a member of the management company and similarly there is confusion over their obligations, particularly in relation to the payment of service charges and the obligation on the OMC, of which they become part owner, to comply with company law.

### **IAVI Recommendations**

- A provision should be included to ensure that prior to or upon the transfer of membership a legal schedule of members' rights and obligations is issued. This would assist with the current lack of understanding around members' rights and obligations.

The Law Reform Commission recommends that entry of a unit purchaser's name on the register of members of the owners' management company should be a condition of the requisitions on title for purchase in a multi-unit development; and that the purchaser's solicitor must explain to the purchaser that he or she is now a member of the Owners' Management Company. [Paragraph 3.53]

### **IAVI Recommendation**

- We support the LRC recommendation that the entry of a unit purchaser's name of the register of the OMC be a condition of the requisitions on title for a purchase in a multi unit development.

However, one area of concern related to Section 119 of the 1963 Companies Acts that requires all companies to keep a register of members at the registered office. Such a register will list the names of the apartment owners and the address of each owner's unit. Anyone is entitled to view or receive a copy of the register regardless of them being a member in the company or not. From a security point of view it is not acceptable that this information is available and the register of members under the new Bill should not be a public document.

### **IAVI Recommendation**

- The Bill should amend the 1963 Act so that only members are entitled to view this document when it relates to an OMC.

### **Section 7: Consequences of transfer of common areas.**

This section deals with the right of the developer to pass and re-pass into the common areas and to complete the development with minimum inconvenience to residents. Similarly, the management company has a duty not to obstruct the developer in the course of works connected with the completion of the multi unit development.

Section 2 requires the developer to indemnify the OMC in respect of all claims in respect of acts or omissions by the developer in the course of works connected with the completion of the multi unit development and Section 3 requires the developer to keep in force a policy of insurance in respect of the developers' use of occupation of the multi unit development. Section 4 requires the developer to take all reasonable steps necessary to minimise inconvenience to unit owners for the duration of the works.

We welcome the Section 2 provisions and the necessity in Section 3 for the developer to keep in force a policy of indemnity insurance. However, the Bill does not explicitly specify who should incur the expense of this insurance. Furthermore, while Section 3 asserts the developer should take 'all reasonable steps necessary' to minimise inconvenience to residents, the Bill does not expand on that requirement.

### **IAVI Recommendation**

- We recommend that the Bill should specifically state that the developer should incur the cost of the indemnity insurance and that a guideline be drafted for undertaking common area completion works outlining the responsibilities of the developer and what should be expected, for the benefit of both the OMC and residents.

### **Section 8 Transfer of ownership of parts of a multi-unit development.**

This section relates to parts of the common areas, which have been allocated to an individual unit owner being transferred to the management company.

This would be an unusual occurrence in practice in Multi Unit Developments.

### **Section 9: Determination of certain beneficial interests on completion of development.**

The section requires that the developer must as soon as practically possible, make a declaration that such beneficial interest stands extinguished.

The Bill does not specify a protocol for the developer to make the declaration to the Owners' Management Company and therefore those involved in the latter may be unaware that the interest has been extinguished.

**IAVI Recommendation**

- We recommend the inclusion of a requirement on the developer (or its solicitor) to formally make a declaration to the management company that the beneficial interest has been extinguished.

**Section 10: Determination of certain beneficial interests in common areas in certain cases.**

Section 10 relates to where a multi unit development has not been completed, 60% of the unit owners can make a request for the developer to make a declaration that such beneficial interest is extinguished, unless 'good and sufficient' cause is shown. Disputes can be made to the Circuit Court under section 18.

However, the management company has no contractual rights to enforce completion of the development.

**IAVI Recommendation**

- There needs to be a statutory schedule for the completion of the development and defined process for the handover of the common areas.

**Section 11: Right of management company to effect essential repairs.**

We welcome the provision in Section 11 to give the management company the right to carry out reasonable and necessary repairs to common parts in order to ensure the safe and effective occupation or peaceful enjoyment of units in the multi unit development.

While the Bill states that:

*(2) Where expenditure is incurred pursuant to subsection (1) the owners' management company may recover such expenditure from any person (including the developer) who had responsibility for incurring such expenditure or carrying out the repairs and maintenance concerned.*

In practical terms it is likely that there may be difficulty in securing compensation for expenditure incurred and this payment should not come from the Management Company bank account.

### **IAVI Recommendations**

- There needs to be a mechanism to ensure that these works are carried out by the developer by request of the management company where necessary to ‘ensure safe and effective occupation’ of the development.
- This is another compelling reason for the recommendation of the retention of a portion of the purchase price to ensure that the developer pays for the works.
- There should be a guideline with examples of works to be carried out and as such ‘reasonable and necessary repairs’ to the common areas should be defined more explicitly.

### **Section 12: Structure of certain owners’ management companies.**

The provision to name each management company with Owners’ Management Company in the title will assist in the explanation and understanding of the management company.

In relating to the voting structure, the Bill states that;

*“One vote shall attach to each unit owner in a multi-unit development to which the owners’ management company relates, and that no other person has such a vote”.*

However, the LRC recommends that *“there should be one vote per unit”* (3.54). This is more practical given that there may be several owners of a unit and that one owner may own more than a single unit and have responsibilities for all of his units. Such an owner should be entitled to a vote per unit owned by him, whereas co-owners of a single unit should not enjoy multiple votes.

### **IAVI Recommendations**

- There should be one vote per unit

### **Section 13: Annual meetings and reports of owners’ management companies.**

We welcome the provisions set out in Section 13 in relation to holding Annual General Meetings and preparing reports of OMC’s, which comply with good practice.

### **IAVI Recommendations**

- The objects and functions of the OMC should be set out in the memorandum and articles of association as per the LRC recommendations.
- On the transfer of membership, by way of an obligation on the vendor as part of the requisition on title, the new member be furnished with service charge budgets and annual reports outlining expenditure and sinking fund contributions for the previous 3 years of the development (where applicable).
- This should be an obligation on the vendor
- Company Law requirements requiring management companies to submit annual returns to the Companies Registration Office be amended given the status of

management companies as non profit making entities. Such entities should enjoy more relaxed rules on submitting annual returns.

The LRC provisionally recommended that it should be possible at the point of registration in the CRO to categorise a company as an owners' management company.

The LRC also recommends that legislation should provide for a prohibition of any conveyance of a unit unless accounts for the OMC have been filed in respect of a period of 24 months before the date of the conveyance, which is not included in the Bill. It is recognised that in practice this will require annual returns being made as in most developments units will be sold in any given year and the relaxation referred to above should relate to the timescale for making returns and the penalties for failing to comply rigidly with such timescales.

### **Training for Officers of Owners' Management Companies**

It is clear that when individuals agree to be a director of an Owners' Management Company, they are often unaware of the scope of their responsibility as company directors under Company Law.

The National Consumer Agency has recommended that officers of owners' management companies should receive training, the cost of which would be covered by the company itself.

#### **IAVI Recommendation**

- Training courses (offline and/or online) be delivered to officers of management companies to ensure they are aware of their rights and obligations as officers and those of other stakeholders in the multi unit development.

### **Section 14: Annual service charges.**

We welcome the formal establishment of a service charge scheme and a description of what should be included as expenditure in a service charge budget along with its calculation, which follows best practice in the area.

We would have concerns about 14-(2) which states that the service charge should be considered by a general meeting of members. In practical terms, the turnout at AGM's are usually quite low and it may not be the best place to consider a service charge budget.

#### **IAVI Recommendation**

- The directors of the Owners' Management Company are usually best placed to determine the service charge budget and such decisions should be left to the Board which is, in turn, elected at a general meeting of members.

We welcome 14-(6) which states that the service charges may not be used to defray expense on matters which are or were the responsibility of the developer and also and 14-

(8) which provides for the recouping of expenses incurred by the OMC for works which should have been carried out by the developer.

However, the Bill does not set out any means for enforcement.

#### **IAVI Recommendation**

- A means for enforcement / recouping of expenditure should be set out.

In practical terms, it is often the case experienced by managing agents that unit owners in recently built developments refuse to pay their service charges while snagging issues relating to the common areas persist that they believe the management company is responsible for.

#### **IAVI Recommendations**

- The Bill should set out the types of costs that the developer is responsible for, particularly in relation to snagging so as to avoid confusion.
- This snag list should be compiled by a professional chartered Building Surveyor or architect and a certificate of completion should be issued.
- This process of agreeing and completing snagging should be incorporated into the definition of ‘completion of a development’ and inserted into the Bill.

14-(11) sets out that *‘the annual service charge shall be calculated on a transparent basis and shall be equitably apportioned between unit owners.’*

We agree with the intention of the section for transparency but the apportionment of the service charge will be determined by the lease agreement in advance of purchase. Our comments on Section 12 above are pertinent.

#### **IAVI Recommendations**

- We recommend that a guideline be drawn up in relation to service charge budgeting, apportionment and that in the initial stages, services charges are projected for the coming years to ensure that unit owners know what their obligations are, what they are paying for and what will be demanded of them in accordance with their lease agreement. (IHBA 2008 Code of Practice).
- There should be a standardised process for the calculation of service charges which should be incorporated into the lease documentation at the initial stages of planning the development.

#### **Recovery of Service Charges**

In the current economic climate the recovery of service charges will account for increasing amounts of time and cost incurred by the management company.

The LRC recommends that the Small Claims Court should have jurisdiction to a limit of €3,000 to deal with cases involving non-payment of service charges and building

investment fund contributions in a multi-unit development, which was not included in the Bill.

#### **IAVI Recommendation**

- Extend Small Claims Court jurisdiction to €3000 to deal with claims for non-payment of service charges.

#### **Section 15: Sinking / Building Investment Fund**

We welcome the requirement in the Bill for the OMC to establish a building investment/sinking fund, which is in accordance with best practice.

However, we believe that the LRC's recommendation to refer to the fund as a building investment fund more accurately represents the function of the fund.

#### **Recommendation**

- Rename the 'sinking fund' the 'building investment fund'

Furthermore, in relation to 15-(6) and the timing of the obligation to establish a sinking fund and to make contributions to the fund shall apply on the later of:

- (a) The passing of a period of 3 years since the first transfer of the ownership of a unit in the multi-unit development concerned, or*
- (b) The passing of a period of 18 months since the coming into operation of this section.*

The LRC recommends that the building investment fund is established as soon as is practical, i.e. on completion of the scheme.

Problems exist in relation to many existing developments where no Sinking Fund exists or where inadequate Sinking Funds exist. Thought could be given to the Bill obligating the Directors of all existing Multi Unit Development OMCs to have any deficit in the Sinking Fund professionally estimated and to levy owners to make good the shortfall within a reasonable period (say 3-5 years).

#### **IAVI Recommendations**

- The purchaser should be advised at the outset (in the sales process) if a sinking fund provision is included or not and if not, when it will be charged and how much it is likely to be.
- Contributions should be made to the building investment/sinking fund immediately upon or prior to the transfer of the common areas to the OMC.
- This would provide transparency to unit owners in relation to the long-term purpose of the fund and ensure adequate resources for future long-term reinstatement needs within the Multi Unit Development.
- It would also reduce the strain on the OMC in later years when a significant undertaking of work may be required (replacement of plant etc).

- The building investment fund should be determined by an independent quantity surveyor who can assess the cost of replacing the assets of the management company.
- It would be helpful to have a list of possible building investment/sinking fund expenses for which the sinking fund can be used (See Appendix 1)
- Any withdrawals from the building investment fund should be noted in the accounts by the auditors.
- The Bill should obligate the Directors of all existing Multi Unit Development 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).

### **Non-Taxation of Building Investment Funds**

The LRC has recommended that any interest earned on the building maintenance fund monies should be statutorily exempt from Deposit Interest Retention Tax (DIRT).

#### **IAVI Recommendation**

- Building investment fund monies should be statutorily exempt from any charge to tax for the purposes of the Taxes Consolidation Act 1997

### **Section 16: Owners' management company annual charges.**

Section 16 provides that an OMC may issue a single request for payment of the aggregate of the charges arising under sections 14 and 15.

#### **IAVI Recommendation**

- Both charges should be issued and broken down separately so as to provide transparency to unit owners.

### **Section 17: House Rules**

We welcome the provision for House Rules, which form an integral part of the peaceful enjoyment of the multi unit development and are usually produced and included in the lease agreement and displayed in the common areas of a development in accordance with best practice.

However, on a day to day basis, concerning practical issues such as noise pollution, unit alarms being set off, security breaches, vandalism, negligent activation of fire alarms and breaches of the peace, it is very difficult to enforce these rules and recover “reasonable costs” as set out in the Bill (S17-9). While the house rules are contained within the lease agreement, the ability of the managing agent to enforce these rules is severely limited and many of the common breaches fall into the remit of the community Gardai.

### **IAVI Recommendations**

- A code of practice should be developed to legislate for the repeated non-compliance of residents with house rules and the OMC given powers to deal with them.
- In the case of lettings, there should be a responsibility on the unit owner to ensure that they or their agent include a copy of the house rules in their letting agreement, make prospective tenants aware of same and enforce the rules.
- In cases where breaches of house rules are by tenants of unit owners, a register of rogue tenants should be compiled and published by the PRTB (See the IAVI Submission to the Department of the Environment, Heritage & Local Government in relation to a review of the PRTB under the Residential Tenancies Acts which is available on the IAVI website [www.iavi.ie](http://www.iavi.ie))

### **Section 18: Dispute Resolution and rehabilitation of multi unit developments**

We welcome the introduction of a dispute resolution mechanism to ensure the effective enforcement of a right or the effective discharge of an obligation relating to the multi unit development.

### **Section 19: Persons who may apply under section 18**

We welcome the inclusion of the OMC as a party entitled to apply to the court.

### **Section 20: Jurisdictions and venue of circuit court**

Section 20 provides that the Circuit Court, concurrently with the High Court, have all the jurisdiction of the High Court to hear and determine an application under Section 18.

### **Section 21: Mediation conferences**

The Court may direct the parties to the application to meet to discuss and attempt to settle the matter.

### **Section 22: Report of chairperson or mediation conference**

This relates to the procedure whereby the chairperson of a mediation conference shall prepare a report for the court, the parties involved and make an order directing that party to pay the costs of the application as the courts direct.

### **Section 23: Saver for existing jurisdictions**

Section 23 sets out that nothing in the Act shall be taken to derogate from any power which may, whether before or after the passing of this Act, be vested in any person or court, by statute or otherwise, and the powers conferred by this Act shall be in addition to, and not in substitution for, such other powers.

### **Section 24: Restoration of certain companies to register**

We welcome the provision to enable management companies struck off from the Companies Register to be restored within six years.

### **Section 25: Transfer of benefit of guarantee and warranties**

We welcome the transfer of the guarantees and warranties to the OMC but reiterate a call for a legal requirement on the developer to deliver all documentation relating to the development to the OMC.

### **Section 26: Restrictions on entering into certain contracts**

Section 26 prohibits the OMC from entering into a contract for the provision of a service or the purchase of goods which is expressed to run for a period of 3 years from the date of commencement of the contract or provides a penalty if the contract is terminated after 3 years.

### **IAVI Recommendation**

- For the purposes of transparency we would also recommend that the OMC is required to keep a copy of all service agreements and documentation and that any agent acting on behalf of the OMC is obliged to do same.

### **Section 27: Exercise of power to make regulation**

This provides that before making regulations under sections 14, 15 or 17, the Minister shall consult with the Minister for Enterprise, Trade and Employment and the Minister for the Environment, Heritage and Local Government.

### **Section 28: Short title and commencement**

The Act may be referred to as the Multi Unit Development Act 2009 and the act, other than sections 12 and 26 shall come into operation on such days as appointed by the Minister.

### **Special Note relating to the Enforcement of Planning Conditions**

The LRC report notes that the failure of some developers to comply reasonably promptly with the terms of planning permission granted has led to frustration amongst unit owners in multi-unit developments.

The report also notes that while some developers are clearly at fault for failing to comply with planning conditions, it has been suggested that trends of non-compliance are reinforced by the failure of some planning authorities to ensure compliance with planning conditions and their failure to apply the extensive range of enforcement mechanisms available.

A circular in 2008 from the Department of Environment, Heritage and Local Government advised planning authorities to inspect all developments regularly to ensure compliance with planning conditions and to ensure that the development is being completed to an appropriate standard.

However, the approach to planning enforcement by the authorities appears to vary significantly.

The Law Reform Commission recommends that, insofar as it is practicable, the 2008 draft planning guidelines *Sustainable Residential Development in Urban Areas* should be given the status of a Ministerial policy directive under Section 29 of the *Planning and Development Act 2000*. [Paragraph 1.09]

We note that Section 17 of the *Planning and Development (Amendment) Bill 2009* provides for the amendment of Section 28 of the 2000 Act which goes some way towards this recommendation.

#### **IAVI Recommendation**

- It should be a statutory function of the planning authority to ensure that the multi unit development is monitored throughout the development process and completed within the guidelines of the planning permission granted.

#### **Special Note relating to Covenants:**

The LRC recommends two sets of statutory core and irreducible covenants which all parties to the sale of a unit in a multi unit development should be obliged to make and which cannot be contracted out of (see appendix 2).

The LRC recommends that these core and irreducible obligations should reflect the stage of a multi-unit development:

(1) During development stage, there should be a set of covenants enforceable between the owners' management company and the developers. These will cover key issues such as completion and payment of outstanding purchase monies.

(2) The second set of covenants will be contained in the conveyance of each unit and will be between the owners' management company and the unit owners. These may also include additional house rules which will also be mutually enforceable against the other unit owners.

#### **IAVI Recommendation**

- The Bill should incorporate such covenants relating to all parties to a sale of a unit as set out in stages by the LRC.

## **Conclusion**

IAVI members operating in the sector, broadly welcome the Multi Unit Development Bill 2009 and its provisions. However, as outlined throughout this document, certain recommended legal protections set out by the Law Reform Commission are not included in the MUD Bill and therefore render the overall provisions of the proposed legislation less effective.

Fundamentally, the absence of precise mechanisms obliging the developer to complete the development, to verify the quality of construction, to address snagging and completion issues and to furnish, to the owners and the Management Company, a form of final certificate of completion and compliance, together with all estate documentation for the overall development are significant omissions.

Furthermore, as it stands, the management company has no enforceable contractual right to oblige the developer to satisfactorily complete the development as an integral part of the arrangements, despite the fact that once vested, the Management Company immediately assumes onerous contractual obligations to maintain and repair the common areas, structural parts and utilities, including all services at the owners' expense, funded exclusively through their service charges.

A crucial issue is the need for understanding of all parties to the multi unit development, especially unit owners, as to their and the other parties' obligations, responsibilities and duties. The LRC specifically sets out the duties and responsibilities and core and irreducible covenants of each party which does much to clarify each party's position at each stage of the development process.

Furthermore, a general consumer awareness campaign needs to be undertaken to improve the awareness and understanding of issues relating to multi unit development living. Robert Gogan's excellent book on Apartment Ownership presents a most useful tool to inform consumers and should be updated once this Bill is enacted.

Finally, as all parties to the sale of a unit in a multi-unit development – developer, owners' management company and unit purchasers are to a large degree interdependent, we believe that similarly, a significant degree of interdependence also exists between the various Government stakeholders and as such there should be a joined up approach between the various bodies and current and proposed legislation such as the planning and local authorities, Property Services Regulatory Authority, Private Residential Tenancies Board and the Department of Justice and Environment, Heritage and Local Government to ensure a cooperative approach to facilitate sustainable multi unit development living in Ireland for the future.

## **Appendix 1: Possible Building Investment / Sinking Fund Expenses**

<b>Boundaries</b>	<b>Buildings - Internal</b>	<b>Buildings - External</b>
External Boundary Walls	Lifts (Replacement)	Balconies
Railings (Maintenance/Painting)	Internal Walls - Painting	Cladding
Gates (Maintenance/Repair)	Stair Rails - Maintenance/Painting	Roof Repairs / Flashing
Pavements - Cobblelock/Tarmac	Internal Doors - Painting	Gutter Repairs
Line Marking	Underground Carpark Repairs	External Walls - Painting
Services (Drains etc)	Security Systems (Locks / CCTV etc)	External Doors - Painting
Kerbs	Bicycle Racks	
Steps	Plant Replacement	
External Lighting (Replacement etc)		
Landscaped Areas - Reinstatement		

## **Appendix 2: Law Reform Commissions' Recommendation for a statutory list of irreducible and core covenants which cannot be contracted out of.**

4.78 The Commission recommends that there should be a statutory list of irreducible and core covenants in respect of which parties to the conveyance cannot contract out.

4.79 At development stage core and immutable obligations expected of every developer shall be:

- a responsibility to incorporate an owners' management company;
- a responsibility to vest the legal interest in the head title of the development in the owners' management company;
- a responsibility to register the legal title of the development in the owners' management company' s name at the Land Registry;
- a responsibility to ensure that the directors of the management company fully comply with company law requirements while the developer remains in control of the company;

4.80 At post-development stage core and immutable obligations expected of every developer shall be:

- a responsibility to deal completely with the snagging list to ensure proper completion of the development;
- a responsibility to obtain certification that the development has been properly completed and snagged;
- a responsibility, where a managing agent has been engaged, to pay service charge and building investment fund contributions for the units which have not yet been sold.

4.81 Core and immutable duties expected of the owners' management company shall be:

- an obligation to transfer the legal interest in units to unit purchasers
- a responsibility to hold 5% of the purchase price of the units in trust on behalf of the

developer until the developer provides certification to the effect that the development is properly completed and snagged;

- a responsibility not to pay the 5% balance outstanding on the purchase price of the units of the development to the developer until the development is properly completed and snagged;
- a responsibility to ensure that the building is properly managed and maintained;
- an obligation to abide by all of the rules set out in the Articles and Memorandum of Association; including the establishment, accumulation, maintenance and, where necessary, expenditure of a building investment fund,<sup>72</sup>
- an obligation to enforce the covenants in the unit owners lease agreements.

4.82 Core and immutable obligations expected of the unit purchaser which will form part of the covenants shall be:

- an obligation to abide by all of the house rules;
- an obligation to keep any tenants informed of all house rules;
- an obligation to respect the other development dwellers' right to quiet enjoyment;
- an obligation to discharge all responsibilities expected as member of the management company; including payment of building investment fund contributions and service charges;
- an obligation to obtain the permission of the board of directors of the management company before making any external and/or structural alterations to the unit;
- an obligation to keep the management company updated with accurate contact details;
- an obligation, in the event of being elected as a director of the company, to discharge all relevant directors' duties and act in the best interests of the company.