

MULTI-UNIT DEVELOPMENTS ACT 2011

EXPLANATORY MEMORANDUM

Introduction

The Multi-Unit Developments Act 2011 seeks to address problems relating to the ownership and management of the common areas of both existing and new multi-unit developments, and to facilitate the fair and effective management of bodies responsible for the management of such areas.

The Multi-Unit Developments Bill 2009 was extensively amended in the course of its passage through the Oireachtas and this revised Explanatory Memorandum outlines the provisions of the Act as passed.

Provisions in the Act

Section 1 is a standard provision containing definitions of terms used in the Act.

"Common areas" are defined as those parts of a development designated as common areas including all relevant structural parts of a building such as walls, foundations, roofs, halls, landings, lifts, liftshafts, staircases and passages. They also include all access roads, footpaths, kerbs, landscaped areas, boundary walls, architectural and water features, as well as ducts, conduits, cisterns, tanks, sewers, pipes, drains, wires and central heating boilers which are used to serve more than one unit in a development.

"Development stage" means the period beginning when the first unit is made available for sale and concludes when all construction and ancillary works have been completed in accordance with any planning permission granted under the Planning Acts and with any requirements under the Building Control Acts. In the case of new developments the contract agreed between the developer and the owners' management company must also be completed.

"Mixed-use multi-unit development" is defined as a multi-unit development in which a commercial unit(s) forms part of the development.

"Multi-unit development" means a development being land on which there stands a building or buildings comprising units where it is intended that the units share amenities, facilities and services and where the development contains not less than 5 units intended for residential use.

"Owners' management company" means a company established under the Companies Acts for the purpose of becoming the owner of the common areas of a multi-unit development and for managing, maintaining and

repairing such areas. For the purposes of imposing certain requirements of the Act on existing owners' management bodies which are not companies, subsection (3) provides that reference to an "owners' management company" shall include reference to an industrial and provident society, a partnership or unincorporated body or a group of persons which own the common areas of a multi-unit development.

"Relevant parts" means the parts of the common areas of a multi-unit development which are necessary for the quiet and peaceful occupation of units.

"Unit" means a unit designed for use and occupation as an apartment, flat or other dwelling. Subsection (2) provides that a unit shall not be considered as intended for residential use unless it has self-contained cooking and bathroom facilities for the exclusive use of the occupants.

"Unit owner" means the person (other than the developer or owners' management company) who holds the highest freehold or leasehold estate or interest in a unit.

Subsection (5) provides for the use of proxy voting in owners' management companies while subsection (6) makes it clear that it is permissible, in a phased or mixed use multi-unit development to have separate owners' management companies for different phases or different classes of units.

Section 2 deals with the scope of the Act. Subsection (1) provides that the provisions specified in Schedule 1 shall apply to smaller developments containing two or more residential units but less than 5 residential units. Subsection (2) provides that provisions set out in Schedule 2 will apply to multi-unit developments consisting solely of houses, whether detached, semi-detached or terraced, but which have an owners' management company structure.

Subsections (3), (4) and (5) relate to mixed-use multi-unit developments. Subsection (3) provides that, subject to subsection (4), the Act shall apply to residential units and commercial units in the development, to the extent that amenities, facilities and services are shared by such commercial units and residential units.

Subsection (4) provides that, in situations where more than one owners' management company exists in a mixed use development (i.e. where one company exists for residential units and one for commercial units), the obligations on such companies will be met where the provisions in the Act with respect to annual reports and meetings, annual service charges and contributions to the sinking are applied in a fair and equitable manner.

Subsection 4(b) provides that owners' management companies in mixed-use developments will be deemed to have complied with the provisions of voting rights provisions where the voting rights of the members are apportioned in a manner which is fair and equitable. Subsection (6) specifies that for the purposes of ensuring that such matters are dealt with fairly and equitably, account must be taken of all relevant matters including the level of use of the common areas by the different classes of units.

Subsection (5) specifies that except where otherwise provided, the Act will apply to all multi-unit developments, i.e. existing and future developments. The exceptions are sections 3 and 14 which will apply to future developments.

Section 3 imposes conditions on the sale of units in new multi-unit developments.

Subsection (1) provides that such a unit shall not be sold unless an owners' management company has been established at the expense of the developer and ownership of relevant parts of the common areas have, subject to subsection (7), been transferred to that company. A certificate from a suitably qualified person regarding compliance with fire safety in the development must be supplied by the developer. Subsections (8) and (9) define the meaning of "suitably qualified person" and allow the Minister to make regulations on the matter.

In addition, the developer must enter into a contract with the owners' management company which outlines the responsibility of the developer to the owners' management company and vice versa and which will deal with issues such as compliance with statutory requirements, completion of the common areas, retention money and dispute resolution. Subsection (6) provides that the owners' management company must have separate legal representation in relation to the negotiation of the contract.

Subsection (2) provides that the section applies to developments in which a unit has not yet been sold.

Subsection (3) provides that transfer of the common areas will oblige the developer to transfer the rights and amenities necessary for the reasonable use and peaceful occupation of the units.

Subsection (4) places an obligation on the developer to do all things within his or her power which are reasonably necessary to ensure the unit owner enjoys the rights referred to in subsection (3). Subsection (5) makes it clear that the owners' management company established must have all necessary powers to perform any functions conferred on it by this Act.

With a view to ensuring that the developer is not relieved of responsibility for completion of the common areas as a result of the transfer of their ownership to the owners' management company, subsection (6) provides that the transfer of the common areas is subject to retention of the beneficial interest by the developer. Transfer of the retained beneficial interest upon completion is provided for in section 11 (see below).

Section 4 deals with existing multi-unit developments in which a residential unit has already been sold but the common areas have not been transferred to the owners' management company. In such cases, the developer must transfer ownership of the relevant parts of the common areas to the owners' management company within 6 months. Subsection (2) provides for retention of the beneficial interest pending completion of the relevant common areas.

Section 5 deals with completed or substantially completed multi-unit developments in which the common areas have not been transferred to the owners' management company. It obliges the developer to transfer ownership of the relevant parts of the common areas of such developments to the relevant owners' management company within 6 months of the coming into operation of the section. The transfer to the owners' management company is not subject to the retention of the beneficial interest. Subsection (2) defines "substantially completed" in the context of the section as being where sales of not less than 80% of the residential units have been closed.

Section 6 provides that an owners' management company shall join in a deed of conveyance or transfer relating to a residential unit in the development in order to ensure that a good marketable title will vest in the purchaser of that unit.

Section 7 makes it clear that the transfer of ownership of common areas does not relieve a developer of his or her responsibility for completing the development, including compliance with the requirements or conditions of planning permission under the Planning and Development Acts and standards under the Building Control Acts.

Section 8 provides that whenever ownership of a residential unit in a multi-unit development is sold or assigned, membership of the relevant owners' management company shall transfer to the purchaser without the need to execute a transfer or have it approved by the directors of the company. The owners' management company will be obliged to furnish the purchaser with a share or membership certificate as soon as practicable following notification of the change of ownership. It must also ensure that the register of members is updated and comply with other relevant requirements under the Companies Acts. Subsection (3) places an obligation on a unit owner to provide the owners' management company with details of his or her address and any other contact details. The unit

owner is also required to notify the owners' management company of any changes to those details.

Section 9 outlines the consequences of transfer of common areas in a multi-unit development. Subsection (1) provides that the developer shall retain rights to pass and re-pass over such areas in order to complete them. There must be a valid insurance policy in place in respect of all risks relating to the developer's use or occupation of the multi-unit development (subsection (3)) and the developer must also indemnify the owners' management company against claims made against it in respect of acts or omissions by the developer in the course of completion works (subsection (2)).

There will be a general obligation on the developer to minimise inconvenience to the unit owners and ensure that access is available to them at all reasonable times. Subsection (6) provides that the owners' management company must not obstruct the developer in exercising any rights in relation to the multi-unit development or adjoining land.

Section 10 is intended to deal with cases in which ownership or an interest in or responsibility for the maintenance and management of a part of a multi-unit development which is commonly held by a owners' management company is held instead by an individual unit owner. In such cases, subsection (1) provides that the unit owner and the company may agree to the transfer ownership of that interest and responsibility to the company.

Subsection (2) provides that any such agreement will be subject to approval at a general meeting of members of the company. Subsection (3) provides that where either party considers that consent to the transfer is being unreasonably withheld, they may make an application to the court under the dispute resolution mechanism in section 24 (see below).

Section 11 provides that where a multi-unit development has been completed, the owner of the beneficial interest in the common areas must, as soon as practicable after completion, make a declaration for the benefit of the owners' management company stating that the beneficial interest stands transferred to the owners' management company and that the beneficial and legal interests stand merged.

Subsection (2) provides that the declaration must be made with the consent of any mortgagee or owner of a charge on the property and that the consent may not be unreasonably withheld. Subsection (3) contains conditions in relation to such consent.

Section 12 provides for the possible merging of the beneficial and legal interests in advance of completion of a development. Subsection (1) provides that where 60% of the owners of residential request the beneficial owner to make a statement that the beneficial interest stands transferred

to the owners' management company and that the beneficial and legal interests stand merged, such owner shall make that declaration unless good and sufficient cause is shown (subsection (4) provides that good and sufficient cause can include a reason that the granting of the declaration would interfere with the completion of the entire development).

Subsection (2) provides that any declaration shall be made with the consent of any mortgagee or owner of a charge on the land and that consent may not be unreasonably withheld. Subsection (3) contains conditions in relation to such consent. Subsection (5) provides that any dispute as to whether good and sufficient cause has been shown as to why a declaration should not be made under subsection (1), may be the subject of an application to court under the dispute resolution mechanism in section 24.

Section 13 makes it clear that an owners' management company shall have a right to carry out repairs or maintenance on a part of a multi-unit development which is not within its control where the repairs are reasonably necessary to ensure the safe and effective occupation or the peaceful enjoyment of occupation of any unit. However, subsection (2) provides that the company shall not carry out such repairs until the person who has responsibility for carrying out the repairs has been requested to do so and has been afforded a reasonable opportunity to carry out the repairs.

Subsection (3) states that subsection (2) shall not, however, apply in emergency cases. Subsection (4) provides that the owners' management company may recover the costs of carrying out such repairs or maintenance from any person (including the developer) who had responsibility for carrying out the repairs or maintenance.

Section 14 makes provision for voting rights in owners' management companies established after the commencement of the Act (subsection (4)).

Subsection (1) specifies that one vote shall attach to each residential unit in a development and that no other person shall have voting rights, while subsection (2) provides that each vote shall be of equal value. Subsection (3) provides that the words "owners' management company" – which may be abbreviated to "OMC" – must be included in the name of any such owners' management company. Subsection (5) provides that the section applies to mixed-use developments subject to the provisions in section 2(4) of the Act.

Section 15 relates to voting rights in owners' management companies in existing developments. Subsection (1) defines the scope of the section in that it applies to existing developments which are not mixed-use developments. Subsection (2) provides that the voting rights of such developments shall, in line with the general rule in section 14, be one vote

per unit and that no other person shall have a vote. In situations where the current voting structure does not meet this criterion, any person wishing to exercise other voting rights (weighted voting, golden share etc.) must apply for and receive authorisation from the Circuit Court to do so (subsection (3)). In making a decision on any such application, the Court, before making an order, must be satisfied that the person concerned has an essential economic interest and the voting right concerned is required to adequately protect that interest or that the court considers it necessary in the interest of fairness or justice to allow the person to exercise that voting right (subsection (4)).

Section 16 deals with the issue of life-long or long-term directors of owners' management companies. In certain circumstances, directors appointed by a developer are entitled to remain as directors for life. The section provides that this shall not be permitted after the coming into operation of the section. A director shall not be permitted to have a term exceeding 3 years in the first instance. Where such a situation exists at present, the director must relinquish the position within 3 years of the coming into operation of the section.

Section 17 imposes specific obligations on an owners' management company. Subsection (1) provides that the owners' management company shall prepare an annual report and shall hold a meeting at least once a year to consider the report. Subsection (2) outlines various matters to be addressed in that report. They include details of income and expenditure, and assets and liabilities; the annual service charges and sinking fund account; planned expenditure on maintenance and repair; insurance cover and contracts entered into by the company.

Advance notice of the meeting must be given to each member 21 days before the meeting (subsection (3)) and a copy of the annual report must be provided at least 10 days beforehand (subsection (4)). Subsection (5) provides that the annual general meeting must take place within reasonable proximity to the multi-unit development unless otherwise agreed in writing by 75% of the members of the company. Subsection (6) makes it clear that the obligations outlined in this section are in addition to any other obligation or duty of the company under any Act, statutory instrument or rule of law.

Section 18 provides that the owners' management company must establish a scheme for annual service charges to fund expenditure on the maintenance, insurance and repair of common areas within its control and for the provision of common services (security, legal, accounting etc.) to unit owners.

Subsection (2) provides that any such charge shall be approved by a general meeting of the members of the company, while subsection (3) outlines the categories of expenditure which must be itemised the scheme

of charges. Subsection (4) provides that in any case in which over 75% of the members do not approve the proposed charge, the existing charge shall remain in place until adoption of a new charge. Subsection (5) provides that where no service charge applied in the previous period, the directors may determine a scheme to operate for a period of 4 months. Subsection (8) provides that an owners' management company may set the initial annual service charge for a development without the holding of a meeting.

Subsection (6) provides that the service charge shall not be used to defray expense on matters which are the responsibility of a developer or builder unless agreed in writing by 75% of the members of the company.

Subsection (9) provides that where expenditure is incurred under subsection (6), the owners' management company may recover it from any person (including the developer).

Subsection (7) provides that any approval of such expenditure is conditional on 65% of the units being sold and can only come into effect 3 years after the transfer of ownership of the common areas to the owners' management company. Subsection (9) places an obligation on a unit owner, including the developer, to pay the annual service charge in the case of unsold units (subsection (10)). Subsection (11) sets out the date from which the developer is responsible for the service charge for unsold units.

Subsection (13) provides that the annual service charge must be calculated on a transparent and fair basis. Subsection (14) sets out conditions in relation to the setting of the charge, while subsection (16) will permit any excess to be diverted to the sinking fund. Subsection (15) requires owners' management company to maintain proper records of expenditure for auditing purposes. Subsection (17) provides that the Minister for Justice and Law Reform may make regulations regarding the class or classes of expenditure which may be the subject of service charges

Section 19 provides that an owners' management company must establish a sinking fund for the purpose of spending on refurbishment, improvement or maintenance of a non-recurring nature of the multi-unit development and that unit owners will be obliged to make contributions to it (subsection (3), including developers in the case of unsold units (subsection (4)). Subsection (5) provides that the amount of service charge shall be €200 per annum or such other amount as may be agreed by the members.

Subsection (6) provides that the sinking fund must be established within 3 years of the transfer of ownership of a unit in the development or, where a development is already in existence on the coming into operation of the section, within 18 months of that date. Subsection (7) provides that contributions to the sinking fund shall be held in a separate identified account. Any disputes in relation to the sinking fund may be the subject of an application to court under the dispute resolution mechanism in section

24. Subsection (9) provides that the Minister for Justice and Law Reform may make regulations regarding the class or classes of expenditure which may be the subject of service charges, the procedures to be followed in the setting of the contribution and the levying and payment of the contribution.

Section 20 provides that the provisions contained in section 19 regarding sinking funds (other than the obligation to establish the fund) shall apply to traditional type housing estates which have an owners' management company structure and which already have a sinking fund.

Section 21 provides that the owners' management company may issue an aggregate request for payment under sections 18 and 19. Such a request must outline the basis for the calculation of each charge.

Section 22 provides that service charges or sinking fund contributions may be recovered by the owners' management company as a simple contract debt.

Section 23 provides that an owners' management company may make House Rules for the effective operation and maintenance of the multi-unit development. The Rules must be consistent with any covenants or conditions contained in the documents of title (subsection (2)) and have the objective of advancing the quiet enjoyment of the unit owners and achieving a fair balancing of the rights of such owners (subsection (3)).

House Rules must be agreed by a meeting of members of the owners' management company (subsection (4)) and notice of such meeting must be given to members at least 21 before the meeting together with a copy of the draft rules (subsections (5) and (6)). When House Rules are made, a copy shall be given to unit owners by the owners' management company (subsection (7)).

Subsection (8) provides that the owners' management company can make the initial house rules for the development prior to the sale of the first residential unit. Subsection (9) provides that House Rules may be amended in the same manner as they are made. Where a unit is let, it shall be a term of the letting that it is subject to the observance of the Rules by the tenants (subsection (10)). The Rules may make provision for the recovery by the owners' management company from any person of the reasonable cost of remedying a breach of the rules (subsection (11)). Subsection (12) provides that the Minister may make regulations concerning the making of rules and the matters to which they may relate.

Section 24 establishes a court jurisdiction for the resolution of disputes in relation to multi-unit development. Subsection (1) provides that a person (as defined in section 25), may apply to for an order to enforce any rights conferred or obligation imposed under the Act. For the sake of clarity,

paragraph (b) provides that an application to court may be made in relation to any matter to which reference to making an application under this section is made in this Act.

Subsection (2) provides that an application under the section shall state the circumstance giving rise to it and details of the order or orders requested. The applicant must also state whether mediation has been attempted. Subsection (3) provides that the court, in the case of applications under subsection (1)(a), if satisfied that a right has been infringed or an obligation has not been discharged, may make such order or orders as it deems appropriate. Subsection (4) provides that where subsection (1)(b) applies the court may make such order as it considers just and equitable.

Subsection (5) outlines the various types of order that may be made by the court, while subsection (6) provides that the court must be satisfied that all parties likely to be affected by the making of an order have received sufficient notice of the application. Subsection (7) allows the court to make such ancillary orders as it considers necessary to give effect to any order or orders made by it under subsection (3).

Subsection (8) provides that where arising from an order under this section a deed is required to be executed, each owner in the development shall be furnished with a certified copy of the deed. Subsection (9) provides that the court may make an order regarding the voting rights of an owners' management company where it considers those rights are not established on a fair and equitable basis.

Section 25 defines the persons who may apply for a court order under section 24. They include the owners' management company; a unit owner; any trustee under a will, settlement or other disposition of land by such owner; the developer; or such other person as the court sees fit.

Section 26 provides that the Circuit Court will have exclusive jurisdiction to hear and determine an application under section 24.

Section 27 provides that the court may, upon its own motion or at the request of any party to an application under section 21, at any stage during the course of the proceedings, direct the parties concerned to discuss and attempt to settle the matter in a 'mediation conference'. Subsection (2) provides that where such a conference is directed by the court, all parties must comply with the direction. Subsection (3) deals with the holding of the mediation conference, while subsection (4) deals with the appointment of a chairperson. Subject to section 28, all notes of the chairperson shall be confidential (subsection (5)). Subsection (6) deals with costs associated with the holding of the conference.

Section 28 provides that the chairperson of a mediation conference must submit a report to the court on the outcome of the conference. A copy of the report must also be given to the parties to the application. Where the court is satisfied that a party to the application did not comply with a direction to engage in the mediation process it may make an order as to costs.

Section 29 is a saver provision which provides that nothing in the Act shall derogate from any power vested in any person or court, by statute or otherwise and the powers conferred in the Act shall be in addition to and not in substitution for any such powers.

Section 30 addresses the problems which arise when an owners' management company is struck off the Companies Register for non-compliance with reporting requirements. It provides for an extended period during which such a company may be restored to the Register. At present, a company that has been struck off has a period of one year within which to provide the Registrar with the relevant information and accounts. Thereafter application for restoration must be made in the High Court. Section 30 provides that the period of one year is extended to 6 years in the case of owners' management companies. When restored to the Register, it shall be deemed to have continued in existence as if it had never been struck off. Each application for restoration must be accompanied by a certificate from a solicitor or accountant to the effect that the company is operating as an owners' management company.

Section 31 provides that the benefit of any guarantees or warranties relating to any materials used in the construction repair or improvement of a multi-unit development shall stand transferred to the owners' management company on the transfer of the land. Subsection (2) provides that on completion of a multi-unit development, a developer shall furnish to each owners' management company concerned the documentation specified in Schedule 3.

Section 32 places restrictions on owners' management companies entering into long term contracts with providers of goods and services. Such companies will not be permitted to enter into contracts for a period in excess of 3 years. In addition, any contract entered into by the company cannot include a clause imposing a penalty on the company if the contract is terminated after a 3 year period.

Section 33 specifies that the regulation-making powers conferred on the Minister for Justice, Equality and Law Reform shall be exercised in consultation with the Minister for Enterprise, Trade and Innovation and the Minister for the Environment, Heritage and Local Government.

Section 34 is a standard provision relating to the short title and commencement of the Act.

Schedule 1 to the Act specifies the provisions of the Act which apply to multi-unit developments comprising more than 2 units but less than 5 units to which reference is made in section 1(3).

Schedule 2 relates to developments which consist solely of traditional housing units but which have an owners' management company attached. The majority of the provisions of the Act will apply to such developments.

Schedule 3 specifies the documentation to be provided by the developer to the owners' management company on completion of the development.

Department of Justice and Law Reform

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