LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

MULTI-UNIT DEVELOPMENTS

(LRC 90 – 2008)

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Building Control Act 1990	No. 3 of 1990	Irl
Building Control Act 2007	No. 21 of 2007	Irl
Building Maintenance and Strata Management Act 2004	2004, No. 47	Singapore
Building Units and Group Titles Act 1980	QLD	Aus
Commonhold and Leasehold Reform Act 2002	c. 15	Eng
Companies (Amendment) Act 1986	No. 25 of 1986	Irl
Companies Act 1963	No. 33 of 1963	Irl
Companies Act 1990	No. 33 of 1990	Irl
Company Law Enforcement Act 2001	No. 28 of 2001	Irl
Competition Act 2002	No. 14 of 2002	Irl
Condominium Act	CCSM c. C170	Can
Condominium Act 1989	RSNS c.85	Can
Condominium Act 1998	SO, c.19	Can
Condominium Property Act 1993	SS c. C-26.1	Can
Condominium Property Act 2000	RSA c. C-.22	Can
Consumer Protection Act 2007	No. 19 of 2007	Irl
Finance Act 2008	No. 3 of 2008	Irl
Industrial and Provident Societies Act 1893	56 & 57 Vict.	Irl
Planning and Development (Strategic Infrastructure) Act 2006	2006, No. 27	Irl
Planning and Development Act 2000	No. 30 of 2000	Irl
Registration of Deeds and Title Act 2006	No. 12 of 2006	Irl
Registration of Title Act 1964	No. 16 of 1964	Irl
Residential Tenancies Act 2004	No. 27 of 2004	Irl
Roads Act 1993	No. 14 of 1993	Irl
Safety, Health and Welfare at Work Act 2005	No. 10 of 2005	Irl
Stamp Duties Consolidation Act	No. 31 of 1999	Irl

State Property Act 1954	No. 25 of 1954	Irl
Strata Schemes Management Act 1996	NSW	Aus
Taxes Consolidation Act 1997	No. 39 of 1997	Irl
Trustee Act 1893	56 & 57 Vict, c.52	Irl
Unit Titles Act 2001	ACT	Aus
Value-Added Tax Act 1972	No. 22 of 1972	Irl

AWA Ltd. v. Daniels	(1992) ASCR 759	Aus
Bushell v. Faith	[1969] 1 All ER 1002, [1970] AC 1099	Eng
In re Heidelstone	[2006] IEHC 408	Irl
Re City Equitable Fire Insurance Ltd	[1925] Ch 407	Eng
Secretary of State for the Environment v. Possfund (North West) Ltd	[1997] 2 EGLR 56	Eng

INTRODUCTION

1. This Report completes the Commission's analysis of multi-unit developments, which began under its *Second Programme of Law Reform 2000-2007*.[1] In December 2006 the Commission published a *Consultation Paper on Multi-Unit Developments*,[2] which contained provisional recommendations covering a broad and connected range of areas associated with multi-unit developments. These included: planning law and its enforcement; the role of developers; the appropriate ownership legal structure (notably, an owners' management company[3] and co-ownership); title and conveyancing issues (such as covenants and other house rules); the role and regulation of estate agents and property managing agents, and connected consumer issues; service charges; building investment funds (sometimes referred to as sinking funds); and suitable arrangements to assist developments that are in difficulty (rescue provisions).

A Multi-unit developments, including apartments

2. In certain parts of the world, including North America and many European states, the word "condominium" is often used to describe multi-unit buildings such as blocks of flats or apartments. It is not commonly used in Ireland. In the Consultation Paper and this Report, the Commission has used the term "multi-unit developments" to clarify that, while apartment complexes comprise a large percentage of the developments under examination, a multi-unit development can include a combination of apartments, commercial units (especially ground floor retail outlets) and duplexes or town houses.

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1 Item 22 of the *Second Programme of Law Reform 2000-2007* committed the Commission to examine the law of condominiums.

2 Law Reform Commission, *Consultation Paper on Multi-Unit Developments* (LRC CP 42-2006), available at www.lawreform.ie. This is referred to as "the Consultation Paper" in this Report.

3 In this Report, the Commission uses the term "owners' management company" to refer to the corporate structure used to manage about 4,600 multi-unit developments (which represents the majority of such developments in the State). The term owners' management company allows for a clear method of differentiating its functions from those of the "managing agent," who is often engaged to provide property and estate services in a multi-unit development. Property managing agents will be regulated by the National Property Services Regulatory Authority (NPSRA): see paragraph 24, below.

B This Report and the consultation process

3. In this Report, the Commission sets out its final recommendations on multi-unit developments, taking into account the many changes that have occurred since the publication of the Consultation Paper in 2006 and the considerable number of submissions received by the Commission. Because of the range and complexity of the issues connected with this area, the Commission engaged in an extensive and extended consultation process with numerous bodies and persons, including Government Departments, regulatory bodies, representative groups, the legal profession and individuals with an interest and insight into the problems associated with multi-unit developments. The Commission is extremely grateful to the many bodies and individuals who made submissions and provided further assistance to the Commission in this process, and who are listed on the Acknowledgements page.[4] In this Report, the Commission has set out its assessment of what solutions can be provided in terms of law reform. It is clear from the detailed contents of the Report that the Commission's recommendations involve one part of an overall set of strategies, some of which are already in train or planned, that are aimed at providing a comprehensive approach to the regulation of multi-unit developments.

4. In this Report, the Commission discusses multi-unit developments by reference to three main stages: the planning stage, the development stage, and the completion and post-development stage.

C The recent growth in apartment living

5. As the Consultation Paper noted, apartments have constituted a large proportion of the recent building boom in Ireland. Apartment living is a relatively new feature of Irish life, certainly in terms of the scale it has now reached. Of almost 80,000 housing units completed in 2007, over 18,500 (24.1%) were apartment complexes, with more than 11,000 in the Dublin area alone.[5] It has recently been estimated that about 500,000 people (more than 10% of the total population) live in multi-unit developments in Ireland.[6]

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4 See p. vii above.

5 See paragraph 1.02, below.

6 See *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings* (National Consumer Agency, 2006), p.22, available at www.consumerconnect.ie

D Difficulties in managing and regulating multi-unit developments

6. When the Commission's Consultation Paper was published in December 2006, there was a growing awareness that significant difficulties were being encountered in the management and regulation of multi-unit developments, including apartments. The Consultation Paper noted that some of these difficulties arose from a combination of two factors: poor governance arrangements, in which some developers retained inappropriate control over multi-unit developments, and an understanding deficit among apartment purchasers, who seemed to be unaware of the consequences of buying an apartment in a development by contrast with buying a single house. In many respects, these difficulties reflect the reality that apartment living on a wide scale is a recent phenomenon in Ireland, by contrast with many other States where apartment living, and its regulation, is well-established.

7. As examples of poor governance, some developers have retained effective control over the owners' management company even after all the units have been sold, and have delayed transferring ownership to it of the common areas of an apartment block (such as the grounds and interior stairways). In terms of the "understanding deficit," many apartment purchasers appear to have been unaware that, as well as buying an apartment, they also became a member of an owners' management company and that this company was, in effect, the owner of the apartment block or development. Quite often too, there has been confusion over the role of property managing agents, many of whom are appointed by the developer of the complex. Some property managing agents have merged their proper role as property service advisers and providers with an inappropriate administrative role as company secretary of the owners' management company (including all administration associated with, for example company annual general meetings).

8. Against this unsatisfactory background, difficulties have emerged in the management of some apartment complexes. Often this arises where a property managing agent notifies unit owners of an increased annual service charge (in the Commission's view in some instances the increase is neither explained nor justified). The formal position is that the owners' management company is actually seeking this increase, but some owners have refused to pay it because they may perceive it as an unjustified demand from the property managing agent or the developer. They may not appreciate that a refusal to pay an increased service charge could mean that the grass is not cut, windows are not cleaned and the lifts are not serviced. Such owners may, also, ultimately be acting against their own interests in terms of the long-term value and sustainability of their property. In addition, if all service charges were unpaid it might mean that the accounts for the owners' management company are not filed and the company is struck off the register of companies. In turn,

this makes it difficult to sell the apartment without the considerable expense for an individual owner of having the company restored to the register of companies.

9. The Consultation Paper also noted that problems with service charges were just one of a number of issues that were giving rise to serious concern. Other problems reflected the absence of appropriate regulation at national level. This included the issue of local authorities taking estates in charge. Concern was also expressed about the regulation of property managing agents, particularly as many were engaged by developers on a long-term contract – not in itself inappropriate, but which appeared to decrease the effective control of apartment owners in a multi-unit development. This lack of effective control was, the Commission noted, linked back to the understanding deficit among apartment owners. Ultimately, there was the risk that if owners were not engaged in the need to protect their property in the long term, especially in terms of capital replacement costs for major items such as roofs and lifts, some multi-unit developments would become development blackspots.

E The need for a multi-agency approach

10. Taking into account all these matters, it was also clear to the Commission that the difficulties identified required solutions across the diverse range of agencies with responsibility for multi-unit developments. Because of this, in January 2007 the Commission jointly hosted a conference on Multi-Unit Developments with the Department of Justice, Equality and Law Reform. The conference was attended by over 150 delegates and explored the provisional recommendations in the Consultation Paper. Also discussed at the conference were a number of initiatives by other agencies that had either already begun at that time or were being mooted.

11. In particular, the Office of the Director of Corporate Enforcement (ODCE) outlined its strategy to increase public awareness of the role of owners' management companies.[7] This approach underlined the benefits of active engagement by owners in their own management company – and also the pitfalls of inaction. The National Consumer Agency[8] also announced that it would establish a Consumers Forum on Apartment Complexes to identify solutions to some of the key issues concerning service charges and the

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7 See for example: Office of the Director of Corporate Enforcement *C/2006/2 Draft of the ODCE Guidance on the Governance of Apartment Owners' Management Companies*, published Dec 2006. The ODCE hope to publish their final guidance in the coming months.

8 The NCA was established under the *Consumer Protection Act 2007*.

relationship between the owners' management company and property managing agents.

12. The Minister for Justice, Equality and Law Reform also announced the establishment of an Interdepartmental Working Group on Multi-Unit Developments. This Working Group has brought together all of the key Government Departments and other public agencies with a role in this area. The Commission was happy to have been involved in assisting the work of the Interdepartmental Working Group by attending some of its meetings.

13. Arising from the focus provided by the deliberations of the Interdepartmental Working Group, a number of important initiatives have emerged from public sector and private sector parties with an interest in multi-unit developments. This has been enhanced by extensive public debate, including ongoing interest in the Oireachtas on the matter.[9] The Commission now turns to provide an overview of these initiatives. This is especially important for the Commission because they have resulted in a quite different background for the analysis in this Report when compared with the situation in existence when the Consultation Paper was published in December 2006.

F Developments since the Consultation Paper

(1) National sustainable planning guidelines

14. During 2007 and early 2008, the Department of the Environment, Heritage and Local Government (building on similar initiatives at local government level)[10] published a series of national guidelines and draft guidelines connected directly or indirectly with multi-unit developments. These include:

- *Apartment Design Guidelines,*[11]
- *Quality Housing for Sustainable Communities,*[12]
- *Development Management Guidelines: Guidelines for Planning Authorities,*[13]
- *Taking in Charge of Residential Estates Guidelines,*[14]

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9 For example, the debate on Management Companies, Vol.653 *Dáil Éireann Debates* cols.771-814 (8 May 2008).

10 Notably, a series of publications by Dublin City Council on sustainable apartment living, beginning in late 2006: see Chapter 1, below.

11 January 2007, available at www.environ.ie

12 March 2007, available at www.environ.ie

13 June 2007, available at www.environ.ie

- *Draft Sustainable Residential Development Planning Guidelines*[15] and
- *Urban Design Manual: A Best Practice Guide.*[16]

15. The Commission notes in particular that the Department's *Development Management Guidelines: Guidelines for Planning Authorities* provide an overarching national framework for an integrated approach to housing development and sustainable planning. They set out 12 key criteria or indicators of good urban design, based on existing best practice. These include the context of the development, which in turn includes issues such as density.

16. As to the *Taking in Charge of Residential Estates Guidelines*, the Commission notes that the Minister for the Environment, Heritage and Local Government has indicated that these will be incorporated into the final version of the *Sustainable Residential Development Planning Guidelines*, which will be published as statutory guidelines under section 28 of the *Planning and Development Act 2000*. The Commission welcomes these initiatives, which provide a changed background against which the planning and sustainability elements of multi-unit developments can be assessed.

(2) The role of developers

17. The Commission is also aware that the leading representative body for developers, the Irish Home Builders Association (IHBA), has engaged positively in relation to problems connected with multi-unit developments. In 2008, the IHBA published a *Code of Practice for Multi-Unit Developments*,[17] which sets out key responsibilities for developers in the early stages of a development.

18. In connection with the legal structure for managing multi-unit developments, the Code requires the establishment of an owners' management company, that service charges and building investment funds (sinking funds) must be prepared for its directors by a suitably qualified professional and that the developer must not retain a controlling shareholding in the owners' management company after its transfer to unit owners. The Code also deals with the role of property managing agents, completion and transfer issues, snagging, dispute resolution, standard marketing materials and complaints.

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14 February 2008, available at www.environ.ie

15 February 2008, available at www.environ.ie

16 February 2008, available at www.environ.ie

17 March 2008, available at www.homefacts.ie. The Code came into force for IHBA members on 15 May 2008.

19. In the absence of a statutory regime for multi-unit developments, the Commission welcomes this initiative by the IHBA. It is likely that, assuming the Commission's recommendations in this Report are enacted, some of the specific elements of the IHBA Code of Practice will either be overtaken by statutory requirements or otherwise subsumed into a Code of Practice with statutory backing.

(3) The owner legal structure: owners' management company

20. In the Consultation Paper, the Commission provisionally favoured a corporate structure for larger multi-unit developments[18] and co-ownership for smaller developments. For the larger developments, the Commission expressed a preference for an owners' management company, based on the designated activity company (DAC) which the Commission anticipated was to be proposed by the Company Law Review Group (CLRG) in its fundamental review of the company law code. Since the Consultation Paper was published, the CLRG has published its final Report and draft Scheme of a Companies Consolidation Bill.[19]

21. The CLRG's final Report does, indeed, make provision for a DAC. In the Commission's view, an owners' management company based on the concept of a DAC remains the most suitable vehicle for multi-unit developments of 5 units or more. The Commission sets out in this Report its specific recommendations on how the DAC model can be adapted to multi-unit developments.[20]

22. The Commission also very much welcomes the continuing informational role played by the Office of the Director of Corporate Enforcement (ODCE) in the development of suitable guidelines on the corporate and personal responsibilities of unit owners in multi-unit developments.[21]

(4) Title and conveyancing issues

23. In the Consultation Paper, the Commission referred to the need to ensure enforceability in multi-unit developments of mutual covenants which specify the use to which land can be put by owners. Under current law, the enforcement of such covenants is problematic, where the units are owned on a

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18 In this Report, the Commission defines a larger multi-unit development as one involving 5 units or more: see Chapter 3, below.

19 Company Law Review Group, *Report on General Scheme of Companies Consolidation and Reform Bill 2007* (April 2007), available at www.clrg.org

20 See Chapter 3, below.

21 The ODCE aims to publish the final guidance in the coming months.

freehold basis.[22] In 2005, as part of its general proposals on the reform of land and conveyancing law, the Commission recommended that such covenants should be enforceable.[23] The Commission's general proposals are due to be enacted in the *Land and Conveyancing Law Reform Bill 2006*[24] and section 47 of the Bill provides for the enforceability of freehold covenants. In this Report, the Commission makes further recommendations on title and conveyancing issues applicable to multi-unit developments to complement the reforms due to be enacted in the 2006 Bill.

(5) Regulating managing agents and consumer issues

24. The Commission has already referred to a difficulty, identified in the Consultation Paper, posed by the interconnected issue of the role of property managing agents and the understanding deficit of apartment owners in multi-unit developments. Since the Consultation Paper was published, significant moves have occurred in this area. In December 2006, the Minister for Justice, Equality and Law Reform published the *General Scheme of the Property Services Regulatory Authority Bill*[25] which is intended to implement the 2005 *Report of the Auctioneering/Estate Agency Review Group*.[26] The 2005 Report recommended the establishment of a National Property Services Regulatory Authority (NPSRA), which would assume responsibility from the District Court for the licensing and regulation of auctioneers and estate agents.[27] It would also regulate property managing agents for the first time.[28]

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22 This is because it is not currently possible to enforce a positive covenant against a successor in freehold title. For this reason, most apartment units in Ireland are held as long leaseholds.

23 *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).

24 The 2006 Bill was passed by Seanad Éireann in November 2006 and is currently (June 2008) awaiting Committee Stage in Dáil Éireann.

25 Available at www.justice.ie (published on 21 December 2006; the Commission's Consultation Paper was published on 19 December 2006).

26 Available at www.justice.ie

27 Currently regulated under the *Auctioneers and House Agents Acts 1947 to 1973.*

28 Head 2 of the General Scheme of the Bill defines property management services to include the services provided by property managing agents in a multi-unit development.

25. The NPSRA has since been established on an interim non-statutory basis[29] and the Commission understands that the Government's *Property Services Regulatory Authority Bill 2008*, which will provide the statutory basis for the NPSRA, will be published in the near future.[30] The General Scheme of the Bill published in 2006 envisages that the NPSRA may publish standard-setting Codes of Practice for property managing agents[31] and that a managing agent must provide a "letter of engagement," in a form which would be set out in Regulations, to any person for whom the agent provides a service.[32] These provisions would establish a clear statutory basis for the standards expected of property managing agents, including the contract terms on which the managing agent provides professional services to an owners' management company in a multi-unit development.

26. In the meantime, in 2007 the interim NPSRA has published two important documents:

- *Code of Practice for Property Service Providers (Auctioneers and Estate Agents)*[33] and
- *Register of Licensees*[34]

27. The 2007 Code of Practice is currently a voluntary code and does not, in any event, apply to property managing agents. The Commission understands, however, that a similar Code of Practice for managing agents is under consideration by the NPSRA. The publications indicate that the NPSRA will, when placed on a statutory basis, have sufficient standard-setting and regulatory powers to address this aspect of multi-unit developments.

28. In addition to the anticipated establishment of the NPSRA on a statutory basis, the Commission is aware that the National Consumer Agency's Consumers Forum on Apartment Complexes has been engaged in extensive discussions with interested parties to develop best practice guidelines in this area.[35] These guidelines may include a contractual template between the

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29 See www.npsra.ie

30 Government Legislation Programme for Summer 2008 (published on 1 April 2008), available at www.taoiseach.ie

31 Head 18 of the General Scheme of the Bill.

32 Head 63 of the General Scheme of the Bill.

33 November 2007, available at www.npsra.ie

34 November 2007, available at www.npsra.ie

35 These discussions have involved the Irish Home Builders Association (IHBA), which represents many property developers in the State (see paragraph 17,

managing agent and the owners' management company and a general approach to the issue of professional fees and service charges. In the Commission's view, these guidelines would be extremely useful in order to clarify for apartment owners the precise role and function of managing agents and the related, but separate, issue of how to ensure that an appropriate level of service charge is in place to protect the future value of the property investment of all apartment owners in a complex. Ultimately, they might also form the basis for a statutory Code of Practice.

(6) Service charges and related matters

29. As already noted,[36] in the Consultation Paper the Commission acknowledged there were considerable difficulties and misunderstandings associated with service charges and building investment funds (sinking funds). The Commission notes that, since the Consultation Paper was published, interested parties have begun to address how to manage this area in the absence of a specific statutory regime. The Commission has noted in this respect the development of an industry Code of Practice for developers[37] and the work of the National Consumer Agency's Consumers Forum on Apartment Complexes.[38] The Commission welcomes these developments and makes specific recommendations in this Report on how these should be underpinned and further developed in a statutory setting.

(7) Rescue and rehabilitation of multi-unit developments

30. In preparing this Report, the Commission has become aware that some developments have been able to overcome complex problems (a number of which have been rightly well-publicised in the media) after an extended period of dispute and a steep learning curve for unit owners. Some have been able to overcome, for example, the strike-off of an owners' management company using existing legal remedies, though this has been at considerable personal expense for individual apartment owners, including in some instances the cost of litigation.[39] The Commission is aware that the task of rescuing a multi-unit development has, in some instances, empowered some individuals

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above), and the Irish Property and Facility Management Association (IPFMA), which represents many property managing agents in the residential and commercial sectors.

36 See paragraph 8, above.

37 See paragraph 18, above.

38 See paragraph 28, above.

39 See, for example, the discussion of *In re Heidelstone* [2006] IEHC 408; High Court, 24 November 2006, in Chapter 3, below.

while it has taken a great personal toll on others. The Commission is also conscious that, while some unit owners will in the future continue to be able to make suitable arrangements for the rescue of a development, a series of specific solutions tailored to multi-unit developments is also required. This is especially important in the context of developments where the unit owners may be faced with large rehabilitation bills, and the Commission has concluded that it needs to make specific recommendations on the appropriate form of rescue for such developments.

G The Commission's general approach to reform of multi-unit development law

31. The Commission acknowledges that, since the *Consultation Paper on Multi-Unit Developments* was published in December 2006, considerable steps have been taken to address a number of difficulties in connection with multi-unit developments. The Commission has already noted the key developments in this respect. They include the publication of sustainability and planning guidelines aimed directly at multi-unit developments, the development of industry guidance for developers, the final Report of the Company Law Review Group on the reform of the company law code, developments in land law and conveyancing, the imminent regulation of property managing agents by the National Property Services Regulatory Authority and steps to deal with service charges and related consumer issues by the National Consumer Agency in conjunction with representatives of developers and property managing agents. The Commission has taken full account of these recent and ongoing developments in framing its final recommendations in this Report.

32. At a general level, a key issue is whether a specific regulatory body is required to deal with the issues, set out in the succeeding chapters of this Report, that remain to be dealt with concerning multi-unit developments. In addition to taking account of the developments since December 2006, the Commission has also examined the principles in the Government's 2004 White Paper *Regulating Better*.[40] The White Paper indicates that, where existing mechanisms can be used to provide appropriate solutions, an entirely new regulatory regime should not be introduced. The Commission acknowledges that a number of key issues remain to be resolved in the context of multi-unit developments, but has concluded that these can be dealt with through the enforcement of existing (or already planned) legislative mechanisms, supplemented by some additional legislative reforms. The Commission considers that effective and co-ordinated use of existing powers by the various regulatory bodies already involved in the sector means that there exists

[40] Available at www.betterregulation.ie

currently a wealth of expertise available to regulate multi-unit developments. In this light, the Commission therefore recommends that it would not be appropriate or necessary to recommend an entirely new regulator for multi-unit developments.

33. In the chapters of the Report that follow, therefore, the Commission makes a number of discrete recommendations for suitable legislative reform which complement existing laws and planned reforms. In making these recommendations, the Commission is conscious that difficulties continue, and may continue for some time; with the regulation and management of multi-unit developments and that there is no single, or simple, solution to these problems. The answer does not lie simply in recommending that developers hand over all control of a multi-unit development to unit owners when a single unit is sold. Nor would all problems be resolved by telling all purchasers of apartments that they should know what they are getting into when they buy an apartment and should not complain afterwards when problems arise. The imminent statutory regulation of property managing agents will, equally, not provide a complete answer to all of the problems identified in this Report and by other commentators.

34. At the same time, it is clear to the Commission that many of these private sector actors associated with multi-unit developments have actively engaged with the Government Departments and other public bodies to frame solutions to the complex and interlocking issues identified in the Report. Without wishing to resort to cliché in this respect, those most closely associated with the problems have also been involved in some solutions. For example, the Commission recognises the steps taken in connection with setting some standards for developers by their representative bodies and also accepts the benefits associated with the use of appropriately-regulated property managing agents in multi-unit developments in the future. The Commission acknowledges, however, that further reforms affecting the participants in multi-unit developments are required to supplement the steps already taken. To that extent, the Commission makes recommendations for reform which affect each of them to a greater or lesser extent.

35. The Commission's analysis is that reform should involve clear and transparent arrangements for multi-unit developments. This should include clear corporate governance arrangements for larger developments of 5 units or more, under which developers make clear to potential purchasers what is being conveyed in the sale of an apartment. The Commission also accepts that, in a new statutory setting, the legitimate rights and entitlements of both developer and purchaser should be apparent and in no way compromised. The Commission now turns to outline the general shape of the recommendations made in the succeeding chapters of this Report.

H Outline of Report chapters

36. In Chapter 1, the Commission addresses the relevance of sustainability and planning to multi-unit developments. This Chapter takes stock of recent developments in this area, already outlined in general in this Introduction. The Commission's analysis supports the recent development of a national framework for sustainable planning in this area. It also addresses the specific question of taking in charge of estates by local authorities as this applies to multi-unit developments. The Commission recommends that the Guidelines developed by the Department of the Environment, Heritage and Local Government should be converted into Ministerial policy directives under the *Planning and Development Act 2000* in order to enhance their enforceability and to ensure future sustainability of multi-unit developments.

37. In Chapter 2, the Commission discusses the role of developers. The Commission has outlined some of the difficulties that have arisen in recent years linked to the role of developers in owners' management companies in multi-unit developments. These have included the ongoing control by the developer of the owners' management company, engagement of managing agents, arrangements for transfer of title and snagging problems. The Commission makes specific recommendations for statutory reform to address a number of these areas. In particular, the Commission recommends that developers must register an owners' management company before any conveyance of a unit is completed, must vest legal title to the multi-unit development in that company and must register this title with the Land Registry, which forms part of the Property Registration Authority (PRA).

38. In Chapter 3, the Commission addresses how to ensure that the legal structure in place in a multi-unit development operates effectively. The Commission recommends that an owners' management company (OMC), based on the designated activity company (DAC) envisaged by the Company Law Review Group is the appropriate legal structure for larger multi-unit developments, *ie* those of 5 units or more. For smaller developments of 4 units or less, the Commission recommends that a co-ownership arrangement is appropriate. In general, the company law code would apply to an OMC, subject to some specific matters. In this respect, the Commission recommends that there should be a statutorily designated title of "Owners' Management Company (OMC)." The Commission also recommends that the OMC should be incorporated subject to certain mandatory clauses in terms of its main objects, that voting should be on the basis of one vote per unit and that its annual financial returns should be based on income and expenditure, not on a profit and loss account. The Commission also recommends that the annual directors' report should include a list of its assets, its insurance details, and whether the development is fully compliant with fire and safety legislation.

39. The Commission is conscious that these reforms must be seen in the context of the need for unit owners to engage actively in the collective management of a development. In the Commission's view, it is clear that any proposed changes to the current legal regime will only be effective if there is active engagement by unit owners in the management of their multi-unit development.

40. In Chapter 4, the Commission deals with title and related conveyancing issues. In particular, the Commission addresses the key elements of the mutual covenants which must be in place to ensure that multi-unit developments are organised in accordance with principles of good estate management. The Commission also addresses the taxation implications of its proposals.

41. In Chapter 5, the Commission reviews the role of property managing agents, in particular in the context of the role of the National Property Services Regulatory Authority. The Commission acknowledges the benefits associated with the use of appropriately-regulated professional managing agents in multi-unit developments. The Commission also emphasises that there should be no overlap between the role of a property managing agent and the owners' management company which currently arises where, for example, a property managing agent is also secretary of the owners' management company.

42. In Chapter 6, the Commission examines the related issues of service charges and building investment funds (sometimes referred to as sinking funds). The Commission recommends that both must be mandatory for larger multi-unit developments, *ie* those involving 5 units or more. The Commission underlines that this view is of crucial importance to the ongoing sustainability of the multi-unit development stock of housing in the medium to long term.

43. In Chapter 7, the Commission turns to the remedial arrangements that are required to deal with some multi-unit developments which do not meet the statutory regime envisaged by the Commission. At a basic level, matters such as non-payment of service charges by individual unit owners should be dealt with in a simple manner, such as through the Small Claims Court. The Commission is also conscious that, where more fundamental problems arise in a development, such as a serious deficit in a building investment fund (sinking fund), appropriate procedures are in place to rescue and rehabilitate a multi-unit development.

44. Chapter 8 is a summary of the Commission's recommendations in this Report.

45. Appendix 1 contains an outline summary of the key elements in the Commission's proposals for multi-unit developments

46. Appendix 2 contains a *draft Multi-Unit Developments Bill* intended to implement the recommendations in the Report.

CHAPTER 1 SUSTAINABILITY OF MULTI-UNIT DEVELOPMENTS

A Introduction

1.01 In this Chapter, the Commission addresses the sustainability of multi-unit developments against the background of the planning code. In Part B, the Commission reviews its analysis of this area in the Consultation Paper and takes stock of recent developments. The Commission refers in particular to the publication of important national planning and related guidelines by the Department of the Environment, Heritage and Local Government which reinforce the development of a national framework for sustainable planning and design in this area. In Part C, the Commission discusses general planning policy applicable to multi-unit developments, with particular emphasis on: the size and quality of design of new units; the quality of materials used in new developments; and the provision of facilities and amenities to ensure a high quality living environment. Part D addresses the important issue of taking in charge of estates by planning authorities as this applies to multi-unit developments. In Part E, the Commission turns to the mechanisms available for enforcement of planning conditions by planning authorities. In Part F, the Commission brings together its conclusions on this area.

B Overview of developments since the Consultation Paper

1.02 In the Consultation Paper, the Commission noted that large-scale apartment living is a relatively recent arrival to Ireland. The proportion of apartment completions compared to overall housing completions in recent years has escalated to the point where it is estimated that about 500,000 people (or over 10% of the population) now live in apartments.[1] Tables 1 and 2 below show that the proportion of completed apartment units as a proportion of completed housing units in Ireland continues to increase.[2]

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1 *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings* (National Consumer Agency, 2006), p.22, available at www.consumerconnect.ie

2 These statistics are based on housing unit completion numbers supplied by the Electricity Supply Board. For statistics on the proportion of apartment units to

Table 1
National Completions

Year	Apartment completions	Apartment completions as a % of total completions	Total completions
2006	19,946	21.4%	93,019
2007	18,691	24.1%	77,629

Table 2
Dublin Completions[3]

Year	Apartment completions	Apartment completions as a % of total completions	Total completions
2006	11,497	59%	19,470
2007	11,035	62.3%	17,725

general housing completions for 1992-2005, see the Consultation Paper, paragraph 1.04.

3 Dublin figures are calculated by totalling apartment completions for each of the four local authorities in the Dublin area, namely Dublin City Council, Fingal County Council, Dun Laoghaire-Rathdown County Council and South Dublin County Council.

1.03 This Chapter aims to consider matters impacting on the sustainability of multi-unit developments; primarily in the context of planning, development and design. In it, the Commission will consider further enforcement mechanisms available in this jurisdiction and makes consequent recommendations on better enforcement of planning conditions by planning authorities, and greater consistency nationwide in the planning processes. It addresses the question of taking in charge, and takes stock of recent developments in this area. First however, the general policy in Ireland relating to multi-unit developments will be addressed.

1.04 Given the above figures, the sustainability of multi-unit developments has important implications for the overall housing supply in the State. In the Consultation Paper, the Commission made a number of provisional recommendations aimed at bringing clarity to planning and development procedures for multi-unit developments. The Commission first discussed general policy for housing in Ireland and recommended the development of a clear and focused strategy for multi-unit developments with the aim of informing government policy on the sector.[4] The Commission then turned to the responsibilities of local authorities to take developments in charge. The Commission provisionally recommended that the scope of s.180 of the *Planning and Development Act 2000*, which deals with the taking in charge of estates, should be clarified and that guidelines should be issued based on that clarification. It also provisionally recommended that a national policy should be devised to guide local authorities on taking in charge.[5] The Commission also considered the enforcement of planning conditions. The Commission observed that where the development bond scheme is properly implemented and enforced, it is reasonably successful as an enforcement mechanism.[6] The Commission also acknowledged that a number of key challenges remained for local authorities in the context of enforcement.

1.05 Since the publication of the Consultation Paper, considerable progress has been made in the context of the planning code as it applies to multi-unit developments. During 2007 and 2008; the Department of the Environment, Heritage and Local Government (building on similar initiatives at local government level)[7] has published a suite of planning guidelines focused on planning and a sustainable built environment. These have included a

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4 (LRC CP 42-2006) paragraph 2.09.

5 *Ibid*, paragraph 2.23.

6 *Ibid*, paragraph 2.29.

7 See paragraphs 1.12 and 1.13 below.

direction from the Department on taking in charge,[8] and draft Guidelines on Sustainable Residential Development in Urban Areas.[9] These publications reflect a strong commitment to the long-term sustainability of communities generally and multi-unit developments in particular. As noted by the Department, "it is the purpose of the planning system to promote proper planning and sustainable development rather than merely to control undesirable forms of development."[10] The Commission welcomes all these recent initiatives and endorses the commitment to a cohesive strategy in the context of sustainability, particularly as applied to multi-unit developments. The Commission now turns to examine this changed background against which the sustainability of multi-unit developments can be assessed in this Report.

C General Policy for Multi-Unit Developments

1.06 In the Consultation Paper, the Commission referred to recent studies which had expressed concern about the long-term viability of some multi-unit developments,[11] in particular because the design and layout of some, including the amount of on-site amenities offered, was not conducive to family living, or indeed, to a high standard of living generally.[12] The Commission agreed with the conclusions reached in these studies that reforms were required to ensure multi-unit developments' sustainability as a form of housing.[13] Much of this requires reform in terms of policy-based guidance focused on the multi-development housing sector but the Commission also noted in the Consultation Paper that some substantive law reform was also required. As a general

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8 Department of Environment, Heritage and Local Government, *Guidance in Relation to a Framework Policy for the Taking in Charge of Residential Developments by Planning Authorities*, February 2008.

9 February 2008. *Urban Design Manual: A best practice guide* was published at the same time by the Department as a companion document.

10 Department of Environment, Heritage and Local Government *Guidelines for Planning Authorities*, June 2007, paragraph 1.2.

11 See Hanlon, Private Housing Unit, Dublin City Council *Successful Apartment Living – A Role for Local Authorities in Private Residential Management Companies*, July 2006. See also *Draft Guidelines - Achieving Liveable Sustainable New Homes for Dublin City*, Dublin City Council, May 2007.

12 For example, on-site play areas, storage and laundry facilities. See also *ibid*, p. 7.

13 Hanlon, Private Housing Unit, Dublin City Council, *Successful Apartment Living – A Role for Local Authorities in Private Residential Management Companies*, July 2006, p.6: Obsolescence.

comment, the Commission noted that the multi-unit development sector had suffered from the absence of comprehensive and focused legislative provisions.[14] Given the relatively recent and rapid increase in apartment living, it was not surprising that existing laws, which had not been tailored to the governance of multi-unit developments, had been found wanting when they were applied in this sector. As with other areas of law examined in the Consultation Paper, planning and development law came into this category.

1.07 As with the other aspects of multi-unit developments discussed in this Report, the Commission emphasises that significant progress has been made in the planning and development context since the publication of the Consultation Paper in December 2006. In general terms, the Department of the Environment, Heritage and Local Government has sought to place into meaningful perspective key matters which planning authorities should take into account when granting planning permission. These changes have direct application to multi-unit developments. The Department's draft guidelines *Sustainable Residential Development in Urban Areas* and accompanying *Urban Design Manual: A Best Practice Guide*[15] have identified guiding principles to which planning authorities should adhere. They provide important guidance for planning authorities on the elements which should be prioritised in granting planning permission for multi-unit developments. For example, the draft guidelines refer to a development's connection to the wider neighbourhood, and the inclusivity and variety of society a given development will engender as a key priority to take into account when considering a planning application. They also place a strong emphasis on factors such as a development's impact on the local community and the potential mutual benefits accruing to communities and developments as offshoots of well-planned and designed developments. The Department's companion document *Urban Design Manual* sets out 12 urban design criteria which ought to be considered when a planning authority is deciding whether to grant planning permission for a new development. These criteria aim to promote a better standard of living environment for people living within developments and to the wider community as a whole as a result of the development's construction.

1.08 The 2008 draft Planning Guidelines and Urban Design Manual are likely to have a positive impact on planning decisions surrounding multi-unit developments but the Commission notes that they have guideline status only. This may lead some planning authorities to view them as desirable, but not compulsory. The Commission considers that they could be reinforced by placing them on a firmer statutory footing, which would be more likely to lead to their

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14 (LRC CP 42-2006) paragraph 1.35.

15 Department of Environment, Heritage and Local Government, February 2008.

general implementation. The Commission notes that, under section 29 of the *Planning and Development Act 2000*, the Minister may issue policy directives to planning authorities regarding any of their functions under the 2000 Act and that planning authorities must comply with any such directives in the performance of their functions. The Commission considers that it would be desirable for the national planning guidelines to be given this status but appreciates that this may require considerable assessment of policy matters within the Department. The Commission considers that, to the extent it is practicable; this should be given urgent consideration. Accordingly the 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*.

1.09 The 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.*

1.10 In the course of this study, some aspects of the physical nature of apartments have come to light which the Commission believes require further assessment. Three key areas which the Commission believes have potential for review are: the size and quality of design of new units; the quality of materials used in new developments; and the provision of facilities and amenities by local authorities to ensure the development of the community and a high quality of living environment for all residents. The Commission fully acknowledges that these are largely matters of policy and it raises these issues in the knowledge that they are being addressed in a proactive manner at national and local government level.

(1) Size and quality of design of new units

1.11 Increasingly, and particularly in urban areas, apartments are now viewed as long-term residences by many unit owners. In the Consultation Paper the Commission noted, however, that the majority of new apartments are one or two-bedroomed and are commonly viewed as a short-term option as a starting point on the property ladder or as an investment. Consequently, the populations of many multi-unit developments tend to be relatively transient, and it was noted that this has negative implications for longer term development and sustainability of communities, particularly in the context of potential 'ghettoisation' of localities.[16]

1.12 Since the publication of the Consultation Paper, many developments have contributed to ameliorating this problem. For example Dublin City Council

[16] (LRC CP 42-2006) para 2.04.

has published guidelines for new housing specifying that the amount of one-bedroom apartments in developments must be 20% or lower out of the total apartment build. This is in contrast with the previous specification that up to 45% of units in a given development could have just one bedroom. Developers must also increase apartment sizes by up to 25% from the previous minimum required size.[17]

1.13 At national level, the Department of Environment, Heritage and Local Government is currently (June 2008) updating and expanding the 1999 Residential Density planning guidelines.[18] A key aim is to take account of rapidly changing demographics and to focus on the delivery of sustainable communities. Draft guidelines on design standards for apartments have also been published by the Department. These developments highlight that the size and design standard of apartments and the commensurate encouragement of longer-term residence of families and individuals in these developments are of increasing importance in the context of housing policy.[19] More welcome contributions to good planning practice are the Department's recently published *Development Management Guidelines*,[20] *Draft Planning Guidelines on Sustainable Residential Development* and its accompanying *Urban Design Manual*.[21]

1.14 These developments mirror measures introduced internationally in recent years. The Australian cities of Melbourne,[22] Canberra[23] and Sydney[24]

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17 See *Irish Times*, 4 May 2007, p.3: 'Dublin Council Guidelines insist on bigger apartments'; *Irish Times*, 3 September 2007, p.8: 'New rules on size of apartments'. The general pro-activity of some local authorities is a further positive sign. Dublin City Council, for example, has conducted a forum aimed at advising apartment owners of their legal rights and organised a conference in April 2008, *Maximising the City's Potential: Creating Sustainable Communities in Dublin*.

18 Department of Environment, Heritage and Local Government: *Guidelines for Planning Authorities on Residential Density*, 1999.

19 Department of Environment, Heritage and Local Government Consultation Draft Guidelines for Planning Authorities: *Sustainable Urban Housing: Design Standards for Apartments*, January 2007.

20 Department of Environment, Heritage and Local Government *Development Management Guidelines: Guidelines for Planning Authorities*, June 2007.

21 Department of Environment, Heritage and Local Government, February 2008.

22 *Guidelines for Higher Density Residential Development,* State of Victoria Department of Sustainability and Environment, 2004.

have all lately revised their minimum design and building standards for apartment developments, with a view to ensuring the long-term sustainability of higher density residential housing within cities; most particularly within their city centres. The design principles outlined in these standards cover amenity levels; resource, energy and water efficiency principles, scale, density, built form, security arrangements, aesthetics and social dimensions.[25]

1.15 The Commission makes no comment on the detailed contents of the documents recently developed in Ireland, but notes that many of them are in the form of guidelines which, by their nature, are discretionary. Guidelines require planning authorities to 'have regard' to them when dealing with planning matters. As a result of the implicit flexibility of this; some planning authorities apply them but others may not. This leads to inconsistency in the planning process nationally. In this respect, the Department of Environment, Heritage and Local Government has commented:

> "Consistency in the interpretation of development plan policies is essential if public confidence in the planning system is to be maintained."[26]

1.16 The Commission accepts that flexibility needs to be retained in order for planning authorities to best meet the needs of a given locality. This should, however, be balanced with the need for consistency on a national level. Accordingly, given their potential importance to the sustainability of multi-unit developments, the Commission recommends that, insofar as it is practicable, the guidelines concerning the size and quality of design of new multi-unit developments should be given directive status by the Department of Environment, Heritage and Local Government under the *Planning and Development Act 2000*.

1.17 The Commission recommends that, insofar as it is practicable, the guidelines concerning the size and quality of design of new multi-unit developments should be given directive status by the Department of

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23 *Apartment Guidelines for Mixed-Use and High Density Residential Developments,* Australian Capital Territory Planning and Land Authority 2005.

24 *State Environmental Policy No. 65: Residential Flat Design Code*, New South Wales Department of Planning, 2002.

25 *Ibid*.

26 Department of Environment, Heritage and Local Government *Development Management Guidelines: Guidelines for Planning Authorities*, June 2007, paragraph 1.5.2.

Environment, Heritage and Local Government under the Planning and Development Act 2000.

(2) Materials and standard of completion

1.18 The quality of materials and standard of completion adopted by some developers has also been identified as a further source of concern for the long-term viability of these units as appropriate forms of housing. Problems in some multi-unit developments include poor insulation, lack of storage facilities and play areas, poor ventilation and unsatisfactory security arrangements.[27] These matters have come to the attention of planning authorities, if only because many local authorities own social housing units in multi-unit developments.

1.19 In this respect, the Commission welcomes the voluntary code of practice agreed between the National Consumer Agency (NCA) and the Irish Home Builders' Association (IHBA).[28] This code of practice covers: completion of developments, taking in charge, snagging, and dispute resolution mechanisms for disagreements arising between builders and unit owners. While this protocol provides an excellent foundation for better completion practices,[29] the Commission notes that it is a voluntary code and only applicable to members of the IHBA. The Commission considers that a statutory basis for the code of practice would prove more compelling as a means of promoting better completion practices.[30]

(3) Provision of amenities and facilities

1.20 In the context of the provision of amenities and facilities, it has been noted that close consideration should be given to the design of the common areas and provision of facilities such as refuse, car parks and storage services in order to maximise the habitability for residents while retaining the long-term

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27 Evelyn Hanlon, Private Housing Unit, Dublin City Council, *Successful Apartment Living – A Role for Local Authorities in Private Residential Management Companies*, July 2006, pp 6-7.

28 Irish Home Builders Association *Code of Practice for Management Companies in Respect of Multi-Unit Developments*, (February 2008). The Code came into effect for IHBA members on 15 May 2008.

29 See further, Chapter 2: Developers.

30 This is subject to the Commission's own recommendations on completion. See paragraphs 2.29-2.36 below.

value and viability of the complex.[31] In a wider setting, it is equally important to have regard to the impact of a development on a locality's existing and planned infrastructure and its potential influence on the community's sustainability and sense of place. In this respect, the Commission anticipates that the best practice guidelines published in the *Urban Design Manual*[32] will prove invaluable.

D Taking in Charge

1.21 In the past, the problems associated with taking in charge of estates have been seen more often in gated housing estates than in the context of apartment-based developments. Similar problems may, nevertheless, arise with both types of development and, given the rapid increase in apartment developments, may arise more often in the future with multi-unit developments. The consequences of having an estate or development taken in charge are clear. The property owners within the development cease to hold responsibility for the amenities in the exterior parts of the development, notably landscaping, road maintenance and public lighting[33] and, as a result, they become the responsibility of the relevant local authority. Some developments opt to remain private, particularly in high density urban areas, because control over the land around the development includes control over car-parking spaces for the unit owners collectively.[34] Another reason developments opt to remain private is to allow the owners' management company, rather than the local authority, to retain control over the use to which the common exterior areas will be put and the standard to which they will be maintained.

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31 Evelyn Hanlon, Private Housing Unit, Dublin City Council, *Successful Apartment Living – A Role for Local Authorities in Private Residential Management Companies*, July 2006, pp. 6-7.

32 Department of Environment, Heritage and Local Government, *Urban Design Manual: A Best Practice Guide*, February 2008.

33 The Department of Environment, Heritage and Local Government recently published an extensive guidance for local authorities which detailed the amenities which become the responsibility of the authority once an estate is taken in charge; see *Annex to Circular Letter PD 1/08: Framework for a Comprehensive Taking in Charge Policy* February 2008.

34 In some local authority areas, formerly gated developments have opted to be taken in charge on an undertaking from the local authority that a residents parking disc scheme will come into operation.

1.22 In the Consultation Paper, the Commission welcomed the departmental guidelines on s.180 of the *Planning and Development Act 2000*[35] and made a number of points concerning outstanding problems in taking in charge of estates.[36] The Commission observed that, despite the publication of the guidelines, confusion remained as to the exact scope of s.180; especially its applicability to apartment blocks and other residential developments.[37] The Commission is pleased to note that, since the Consultation Paper was published, the Department of Environment, Heritage and Local Government has published a comprehensive guide for local authorities on the taking in charge of multi-unit developments.[38] This is likely to lead to a clearer understanding of the scope of application of s.180 of the 2000 Act.

1.23 A number of questions have arisen about the practical operation of s.180 of the 2000 Act. The Commission is aware that these include: the wording of s.180 as it relates to those who are entitled to make a request to the local authority for taking in charge; that some developers do not apply for estates to be taken in charge; and resourcing issues. These clearly create difficulties for both local authorities and owners and occupiers of estates. The Commission now turns to review these problems in the light of intervening progress since the Consultation Paper was published.

1.24 In connection with perceived ambiguities in the wording of s.180 of the *Planning and Development Act 2000*, the Commission noted in the Consultation Paper that the wording of the section, when read with the definition of "houses" in section 2(1) of the 2000 Act, makes it clear that the section applies equally to multi-unit structures such as apartment blocks and housing estates.[39] While this seems reasonably clear, it appears that in practice in the case of mixed developments comprising both apartment blocks and houses, it is common for some local authorities to take in charge only the common exterior areas surrounding the houses but not the apartment blocks. This seems reasonable to an extent. For example, many of the exterior common areas in

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35 Department of Environment, Heritage and Local Government; Circular PD 1/06; *Taking in Charge of Housing Estates/Management Companies*, 25 January 2006.

36 *Op cit*, paragraphs 2.10-2.23.

37 For example, as discussed at paragraph 2.11, the use of the word 'houses' in the *Planning and Development Act 2000* appeared to preclude the provision's use in the context of apartments, which clearly was not the intendment of the Act.

38 Department of Environment, Heritage and Local Government *Circular Letter PD 1/08: Taking in Charge of Residential Developments/Management Arrangements*, February 2008.

39 *Op cit*, para 2.11.

some apartment developments, such as roof gardens, are inaccessible to the public at large and thus do not meet the criteria required under the *Roads Act 1993*. However, it also appears that it is common practice for some local authorities to avoid taking in charge completely the land around apartments even where it is capable of being used under the *Roads Acts*. This leaves responsibility instead with the owners' management company. Hence, it seems that some local authorities erroneously believe that apartment developments do not come within the scope of section 180.

1.25 The Department's 2008 *Circular Letter on Taking in Charge*[40] clarifies that local authorities have a responsibility where requested, and where the applicable standards have been reached, to take in charge all residential developments. This removes the perceived ambiguity under s.180 highlighted in the Consultation Paper as to whether the section is applicable only to traditional housing developments or whether multi-unit developments also come under its remit. The Commission welcomes this clarification.

1.26 The willingness of many local authorities to clarify matters surrounding taking in charge is very evident given the detail and speed with which many authorities published their protocols following the circulation of the previous 2006 Departmental circular.[41] The Department, in the 2008 Circular, urged local authorities to develop or update, as appropriate, their policy on taking in charge by the end of June 2008.

1.27 Another important factor to be considered in the context of taking in charge is that purchasers of units in a development should be made aware prior to any purchase being made as to whether it is intended that the development should be privately managed or taken in charge by the local authority. Privately managed developments such as gated housing estates are a small but increasingly popular phenomenon in Ireland.[42]

1.28 A second difficulty with section 180 of the *Planning and Development Act 2000* arises from the provision dealing with the right of the majority of the owners or occupiers of a development to apply to have the estate taken in

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40 Department of Environment, Heritage and Local Government *Circular Letter PD 1/08: Taking in Charge of Residential Developments/Management Arrangements*, February 2008.

41 The Commission is concerned to note, however, that the suggestion in the 2006 Circular that all local authorities should develop such a protocol was not universally followed.

42 The rationale which lies against having an estate taken in charge is outlined at paragraph 1.21 above.

charge.[43] The wording of that provision refers to taking in charge "where requested by the majority of qualified electors who own or occupy the houses in question," the majority being ascertained by plebiscite. Under s.180, the local authority must take the estate in charge where it meets the criteria outlined. The section goes on to define the qualified electors as "every person who, in relation to the area of the dwelling houses in question, is registered as a local government elector in the register of local government electors for the time being in force."[44]

1.29 In the Commission's view, there are two difficulties with this aspect of s.180. First, the Commission considers that the owners of units should determine whether their estate is taken in charge by the local authority or whether it should be privately managed by an owners' management company, whereas section 180 suggests that all 'occupiers' within a development should have this decision-making power. The Commission notes that unit owners primarily pay the service charges where an owners' management company exists and opting to remain privately managed could have a sizeable impact on the amount of service charges payable. The only exception to this rule should be where the developers make it clear from the outset, that is, before any purchase of a unit, whether it is intended the development will be privately managed or, alternatively, taken in charge. The wording of section 180 appears, however, to preclude owner-investors who are not resident in the estate or development from voting in the plebiscite: the constituency comprises of "every person [who], in relation to the area of the dwelling houses in question, is registered as a local government elector in the register of local government electors for the time being in force." This wording seems to suggest that only people who live in the development in question are eligible to vote in the plebiscite. Indeed, as it requires voters to be registered to vote for the local government elections, it appears to exclude any unit owners who are not registered or who live outside the particular local authority area.

1.30 The second problem is that the capital value of the units owned may be affected where an estate is taken in charge. For example, where an estate's common exterior areas are heavily landscaped; the local authority's taking in charge budget may not match the resources required for their upkeep. Similarly, if the same landscaped areas are under the control of the owners' management company, which then neglects the areas, this may adversely impact on the value of units within an estate. Thus, the impact of a development being taken in charge can have serious implications for a property's value and this in turn

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43 s.180 (2)(a), *Planning and Development Act 2000*.

44 s.180(6), *Planning and Development Act 2000*.

will directly impact on the owner of a unit but to a much lesser extent on a tenant in the development.

1.31 The Commission considers that the interests of tenant-occupiers of dwellings within an estate are often very different to those of unit owners. Occupiers who are not owners do not, as a rule, directly pay the service charge where a service charge is levied. They do not have a capital investment in the value of the estate. Indeed, some occupants of units on a given estate may intend to reside in an estate for a very short time only. As a result, the Commission questions the suitability of occupiers of property in a development, who are not unit owners, being eligible voters in the event of a plebiscite. The Commission accepts that under company law provisions it is open to unit owners to give a proxy vote to an occupant if they wish to do so.[45] Ultimately, this should be left to the discretion of the unit owner. Consideration should be given however to the right of local authority house occupants who, it is envisaged, are likely to reside for a long term on a given estate to vote on the taking in charge issue.

1.32 The Commission is also aware of problems arising in practice as a result of requiring "a majority of qualified electors who own or occupy." To be involved in a plebicite. The effect is that where a minority of 'qualified electors' vote, or even where a majority vote but the majority of votes cast does not comprise a majority of the electorate as a whole, the estate cannot be taken in charge. The most practical course of action in such circumstances is to have another ballot at a later date. However, this again does not necessarily guarantee that a majority of electors will vote or that a majority of eligible electors will vote for one course of action over another. The Commission's research indicates that this has occurred in practice and results in obvious dilemmas for the local authorities and for the residents who wish to have a decision on taking in charge.

1.33 While section 180 of the *Planning and Development Act 2000* was an innovation in the 2000 Act,[46] it is arguable that the problems surrounding the interpretation of the section largely arise because it was drafted with more traditional forms of housing in mind. For the reasons outlined, the Commission

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45 The Commission takes the view that the principles involved in deciding on who should vote on whether the estate is taken in charge are broadly the same for deciding who should have a vote at the management company meetings- see paragraph 3.54-3.62 below.

46 The Environmental and Planning Law Unit of A&L Goodbody Solicitors *Irish Planning Law and Practice Supplement: Consolidated and Annotated Planning and Development Act 2000*, (Tottel Publishing, Dublin, 2008), p.224.

has concluded that the scope of s.180(6) of the 2000 Act should be reconsidered in light of the problems identified here.

1.34 The Commission recommends that the wording of s.180(6) of the Planning and Development Act 2000, which allows occupiers as well as unit owners to vote on the question of taking in charge of a multi-unit development, be reconsidered in light of the practical difficulties which the current wording presents.

1.35 The Commission now turns to how taking in charge could be addressed at an early stage of the planning process. The Commission greatly welcomes the discussion in the Departmental 2008 Circular that planning authorities should closely consider the implications of s.180 when processing planning applications. The Circular Letter states that:

> "The issue of taking in charge must be addressed at the pre-planning stage with the approved design facilitating the taking in charge of core facilities."[47]

1.36 The Commission's research suggests that there are three factors which frequently result in developments not being taken in charge. The first is the omission by developers, where it is envisaged from the outset that the development will be taken in charge, to actually apply to have the estate taken in charge. This frequently occurs even where the development is completed to a standard appropriate to being taken in charge. This omission can lead to a great deal of frustration on the part of unit owners who expect the local authority to take the development in charge and cannot understand why the local authority does not do so. This is easily avoided if developers are reminded of the taking in charge options by the local authority where the development is close to completion, or by the developers themselves remaining mindful that in order for an estate to be taken in charge an application must be made to the local authority. Given that the Department in the 2008 Circular Letter urges planning authorities to take account of potential taking in charge matters at the pre-planning stage of a development, planning authorities should, in their revised protocols, establish from the outset whether it is intended that a development will be taken in charge. Requiring developers to address this at pre-planning stage removes the potential that they will omit to apply to have the development taken in charge when it is nearly complete. Moreover, the Circular Letter envisages that planning authorities will regularly inspect developments throughout construction to ensure that planning conditions are being complied with.[48] One effect of this, the Commission believes, is that local authorities will

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47 *Op cit*, p.2.

48 See *Annex to Circular Letter PD 1/08: Framework for a Comprehensive Taking in Charge Policy* February 2008, paragraph 3.6.

actively monitor the timeframe under which it will be appropriate for them to take the development in charge.

1.37 The second practical problem is a lack of resources required for the prompt and satisfactory taking in charge of estates. It has been reported that in some areas local authorities have neither the qualified staff nor the funding to ensure that a development can be taken in charge within a given timeframe. Certification that the development has been adequately completed alone proves very costly and time consuming. The Department of Environment, Heritage and Local Government is very clear in the 2008 Circular Letter with regard to the level of monitoring required of planning authorities in ascertaining that completion is done to the standard required for taking in charge:

> "Regular inspections are particularly important in the case of residential developments to ensure that if issues of non-compliance arise, the planning authority is in a position to take appropriate enforcement action so that the obligation to rectify shortcomings does not fall to be funded by the planning authority."[49]

1.38 The Commission believes that this is a policy matter which local authorities in conjunction with the Department of Environment, Heritage and Local Government should assess as part of an overall review of the processes surrounding multi-unit developments.

1.39 A final matter concerns the failure of developers to finish the development to the standard required to be taken in charge by the local authority. As mentioned above, surveying the development to assess its suitability for taking in charge is time consuming and expensive for local authorities. This problem is exacerbated by poor completion of some developments, which in turn requires enforcement of the original planning conditions and further surveying. All of this leads to a longer delay and greater expense in getting the development taken in charge, which leads to inconvenience for the local authority, and frustration and potential difficulty in selling on a unit for unit owners. Against this background, the Commission believes that there is scope for review of the enforcement measures available to planning authorities in order to engender a wider culture of compliance and quality amongst the few developers who propagate taking in charge problems.[50] The Commission believes that the Department's recommendations that

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[49] Department of Environment, Heritage and Local Government, Circular Letter PD 1/08 *Taking in charge of Residential Developments/ Management Arrangements* and *Annex to Circular Letter PD 1/08: Framework for a Comprehensive Taking in Charge Policy* February 2008, paragraph 3.6: Inspection of Construction.

[50] The question of snagging is discussed more comprehensively in the next chapter.

developments should be subject to periodical inspection throughout construction, if properly put into practice, will help eliminate this problem.[51]

E Enforcement of Planning Conditions

1.40 It is clear that the failure of some developers to comply reasonably promptly and satisfactorily with the terms of planning permission granted has led to widespread frustration amongst unit owners in multi-unit developments. For example, a common breach of the permission by developers which adversely affects unit owners is failure to complete the development within a reasonable timeframe. This may constitute a breach of planning permission because s.40 of the *Planning and Development Act 2000* provides that the duration of planning permission is usually 5 years. The use or even the threat of the enforcement mechanisms discussed below by planning authorities is an obvious means of avoiding such breaches.

1.41 Deviation from the plans under which the permission was granted can lead to enforcement of development bonds and the operation of s.35 of the *Planning and Development Act 2000*[52] unless a variation of plans is expressly obtained from the local authority. Similarly, failure to develop to a standard that would enable the development to be taken in charge and in that is not in compliance with the terms and conditions of the planning permission can lead to the local authority's refusal to take the estate in charge.[53] This can mean, of course, huge inconvenience for the unit owners and residents in the development. This also raises the question as to whether the level of 'actual compliance' (as opposed to 'substantial compliance') required of developers should be expanded for certain aspects of development completion.

1.42 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 through the failure to apply the extensive range of

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51 Department of Environment, Heritage and Local Government, *Annex to Circular Letter PD 1/08: Framework for a Comprehensive Taking in Charge Policy* February 2008, paragraph 3.6. The guidelines also stipulate that planning authorities when gearing development bonds should gear them to a level which will enable the authorities, where the developer has not completed a development or a phase of a development within a specified time, to deal with these problems at no expense to themselves.

52 As amended by s.9 of the *Planning and Development (Strategic Infrastructure) Act 2006.* See paragraph 1.50 below.

53 S.180, *Planning and Development Act 2000*.

enforcement mechanisms available. As the Departmental Circulars already discussed underline, amongst the main objectives of planning enforcement is ensuring that the terms and conditions of planning permissions are observed.[54]

1.43 The Commission's research in preparing this Report suggests that the approaches of planning authorities in enforcing planning conditions vary greatly. Some take a pro-active attitude in ensuring compliance, which includes visiting throughout the construction and completion of the development to ensure that the actual work is in line with planning conditions. In the short term, this avoids the need for planning authorities to compel developers to rectify breaches or, in the long term, to rectify breaches themselves. Other planning authorities appear to operate a more hands-off approach. It is likely that this may result in poorer standards of housing quality within a given planning authority's jurisdiction. As already noted, the Department of Environment, Heritage and Local Government's 2008 Circular Letter advises all planning authorities to inspect all developments regularly to ensure compliance with planning conditions and that the development is being completed to an appropriate standard.[55]

1.44 The extent to which planning authorities employ enforcement mechanisms varies. Some planning authorities rarely, if ever, call in development bonds where a development has not been satisfactorily completed.[56] Other local authorities do not hesitate to call in the development bond, albeit as a last resort following exhaustion of other enforcement mechanisms.

1.45 The Commission accepts that compliance measures, such as calling in development bonds, are in some circumstances equally as effective as formal enforcement through legislative notices to developers.[57] They can also be implemented relatively quickly compared to legislative measures. The Consultation Paper noted the success of protocols such as the Taking in

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54 See also Simons, *Planning and Development Law* (Thomson Round Hall, 2004), paragraph 7.05.

55 Department of Environment, Heritage and Local Government, *Annex to Circular Letter PD 1/08: Framework for a Comprehensive Taking in Charge Policy* February 2008, paragraph 3.6.

56 See paragraphs 1.46-1.48 below. Although see *ibid*, which requires planning authorities to ensure that the level of development bonds will cover the expenses of the local authority where the developer fails to complete a development or a phase of a development within the specified period.

57 Of course, a formal enforcement notice can be most useful as an interim measure to ensure compliance.

Charge Protocol agreed between Kilkenny County Council and the Construction Industry Federation.[58] The Commission also welcomes the development of voluntary industry protocols, notably the Irish Home Builders Association's *Policy for the Taking in Charge of Housing Developments*. If such protocols operate successfully, they may obviate the need for formal enforcement in many instances, which of course is to be preferred. Formal enforcement mechanisms available to planning authorities will, no doubt, continue to play a vital role in the longevity and sustainability of such housing. It is now proposed to provide a brief overview of the various enforcement mechanisms available to planning authorities.

(1) Development Bonds

1.46 In its discussion of the enforcement of planning conditions in the Consultation Paper, the Commission focused on the use of development bonds. Development bonds indemnify the planning authority up to a certain sum of money if the developer fails to fulfil the obligations under a planning permission. In the Consultation Paper, the Commission concluded that, where properly administrated and implemented, development bonds are a useful means of enforcement for planning authorities. On the whole, bonds have improved accountability of developers. Many local authorities feel that the mere threat of calling in a development bond will result in rectification of any planning breaches. Planning authorities note that, through the use development bonds, developers have a real incentive to complete a development promptly and in accordance with the planning permission granted in order to recoup the value of the bond. Thus, development bonds are generally viewed by planning authorities as a compelling enforcement mechanism of last resort. However, it was also observed that, for a variety of reasons, development bonds often prove inefficacious.[59]

1.47 These reasons include the gearing of development bonds to a level inappropriate to deter against failure to complete developments satisfactorily and within a reasonable timeframe,[60] poor administration of bonds leading to their lapse, and a general absence of rigorous enforcement in some cases. Planning authorities are sometimes called upon to spend their own resources on final completion of developments where the cost of the bond has not been

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58 Dated 8 June 2005.

59 (LRC CP 42-2006) at paragraphs 2.24-2.34.

60 Although the recent Department of Environment Departmental Circulars PD1/06 and PD 1/08 outlined the importance to local authorities of the need to insist on developers providing an acceptable level of security to cover completion of developments.

geared sufficiently to cover outstanding problems. As a result, the Commission welcomes the guidance in the 2008 Circular issued by the Department of Environment, Heritage and Local Government, which states:

> "It is a matter for the planning authority to determine both the level of security and the type of security that will be required for each residential development. The amount of the security, and the terms on which it is required to be given, must enable the planning authority, without cost to itself, to complete the necessary services to a satisfactory standard in the event of default by the developer."[61]

1.48 Even where development bonds are properly geared, administrated and enforced, the Commission considers it desirable for there to be a range of enforcement mechanisms open to planning authorities. It seems that development bonds are widely used only as an enforcement mechanism of last resort. The Commission agrees that this is an appropriate strategy and that planning authorities should retain flexibility depending on the nature and severity of non-compliance with the planning permission. Where there is widespread and serious non-compliance within a given planning permission, this is likely to be highlighted through the periodic inspections throughout the construction and completion of a development which the Department's 2008 Circular has recommended.[62] The Commission agrees that this strategy, along with a wider culture of enforcement and consequent compliance is imperative for the future sustainability of developments in general, including multi-unit developments. The Commission now turns to discuss a range of other available enforcement mechanisms.

(2) Refusal of planning permission for past failure to comply

1.49 Section 35 of the *Planning and Development Act 2000* allows planning authorities to refuse planning permission for past failures to comply with planning conditions by the developer, or by a company related to or controlled by the developer.[63] It states:

> "Where...the planning authority is satisfied that a person or company to whom this section applies is not in compliance with the previous permission, or with a condition to which the previous permission is

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61 Department of Environment, Heritage and Local Government, *Annex to Circular Letter PD 1/08: Framework for a Comprehensive Taking in Charge Policy* February 2008, paragraph 3.5.

62 See the discussion at paragraph 3.6 of the Circular.

63 Section 35(7)(c) and (d) of the 2000 Act apply the concepts of "related" and " control" from ss.26(3) and 140(5) of the *Companies Act 1990*).

subject, the authority may form the opinion... that planning permission should not be granted to the applicant concerned in respect of that development."[64]

1.50 The Commission understands that, at the time of writing (June 2008), section 35 of the 2000 Act has never been used. This may have been because, prior to the enactment of the *Planning and Development (Strategic Infrastructure) Act 2006*, planning authorities required the approval of the High Court before refusal under section 35 could be used.

1.51 The changes made by the 2006 Act allow for a more efficient use of section 35 of the 2000 Act and the Commission welcomes the reference to this sanction in the Department's 2008 Circular.[65] The effect of the changes is that a developer must apply to the High Court to overturn the decision to refuse planning permission under section 35.[66] This is likely to lead to actual use of section 35 and, at the least, will have persuasive effect when it is known that planning authorities are less constrained by the restriction imposed by section 35 as originally enacted. Section 35 is not restricted to the functional area of a given planning authority but extends to previous non-compliance in any planning authority area in the State.[67] The Commission underlines the need to ensure information sharing and co-operation across planning authorities. If this is done, rogue developers who have breached planning permission and have become subject to section 35 in one planning area should not, in the future, be able to avoid the effect of this by moving to develop instead in another planning authority's functional area (the Commission is aware from extensive media discussion that some developers have been able to do this). In this respect, the Commission agrees with the view in the Departmental 2008 Circular that section 35, as amended, is a potentially useful deterrent which could lead to higher rates of compliance with planning conditions.

(3) Warning and Enforcement Notices

1.52 Warning notices and enforcement notices are forms of administrative sanctions widely used by planning authorities. They act as a relatively mild but effective means of enforcement. Warning notices are issued "to warn the

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64 S. 35(1), *Planning and Development Act 2000.*

65 See Annex to Circular Letter PD 1/08, *Framework for a Comprehensive Taking in Charge Policy*, paragraph 3.8.

66 S.35(6) of the *Planning and Development Act 2000* as amended by s.9 of the *Planning and Development (Strategic Infrastructure) Act 2006*.

67 The language of s.35 does not limit refusal for failure to comply with past permission to failure to comply with past permission from a given local authority.

recipient that, when the planning authority considers that unauthorised development has been, is being or may be carried out; an enforcement notice may be issued."[68] It will explain that if a breach of planning permission or conditions attached is established, the recipient will be liable for reasonable costs incurred by the planning authority in any enforcement proceedings or court action which may be taken against them. Planning authorities are obliged to send such letters to developers within 6 weeks of a representation (which is not frivolous or vexatious and which has foundation) being made to them that unauthorised development is taking place.[69]

1.53 Enforcement notices are issued by planning authorities where they suspect a breach of planning control. They are issued as a prelude to the taking of enforcement action. Enforcement notices outline that if the

> "...steps specified in the notice are not taken within the period specified in the notice... the planning authority may enter on the land and take such steps itself. This power extends to taking steps including the demolition of any structure and the restoration of land."[70]

The efficacy of enforcement notices is, of course, contingent on the willingness of a given planning authority to make the necessary investigations and consequent willingness to proceed with enforcement if breaches are found. It is clear that this varies from one planning authority to another. In 2006, the various planning authorities issued 8,016 warning letters under section 152 of the 2000 Act, compared with 6,419 in 2005; an increase of almost 25%. In 2006, planning authorities issued 3,411 enforcement notices, compared with 2,622 in 2005; an increase of 30%.[71]

(4) Criminal Prosecution

1.54 A developer who does not comply with planning conditions or an enforcement notice is liable to prosecution.[72] On summary conviction in the

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68 Scannell, *Environmental and Land Use Law,* (2nd ed, Thomson Round Hall, 2006), paragraph 2-446.

69 Scannell, *Environmental and Land Use Law,* (2nd ed, Thomson Round Hall, 2006), paragraph 2-446

70 Simons, paragraph 7.43.

71 Department of the Environment, Heritage and Local Government, *Annual Planning Statistics 2006* (2007), available at www.environ.ie

72 Sections 151 and 154 respectively; *Planning and Development Act 2000*. For a fuller discussion on this, see Simons, paragraphs 7.52-7.66.

District Court, the maximum penalties are a fine of €1,904.61 (£1,500) and/or 6 months imprisonment. On conviction on indictment in the Circuit Criminal Court, the maximum penalties are a fine of €12.697 million (£10 million) and/or 2 years' imprisonment.[73] Although it should be noted that it is rare for local authorities to resort to bringing prosecutions for non-compliance,[74] this means of enforcement comprises a formidable deterrent against any potential breach of the terms and conditions of planning permission or unauthorised development.[75] In recent years, there have been, on average, about 200 convictions per annum under the 2000 Act. In 2006, there were 213 convictions.[76]

F Conclusion

1.55 Until recently, there was relatively little attention given to multi-unit developments in Ireland in terms of overall planning strategy. This can be largely attributed to the reality that large scale apartment construction is a recent phenomenon. Between 2006 and 2008, there has been a significant change, with the publication of a series of documents from individual local authorities and the Department of the Environment, Heritage and Local Government. The range of issues discussed in these documents is wide and diverse: from design, to quality of construction and from taking in charge to adequate enforcement.

1.56 The Commission notes the considerable progress that this involves by contrast with the position when it published its Consultation Paper in 2006. The Departmental national guidance for residential developments and on taking in charge can be used to develop a strategy tailored for multi-unit developments. These can and should be supplemented by suitable protocols at individual planning authority level. In the Consultation Paper, the Commission provisionally recommended that a detailed study should be commissioned with a view to developing a clear and focused strategy for the multi-unit development sector as a whole with the aim of informing government policy on the sector. The Commission has concluded that, in light of the developments since 2006,[77]

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73 Sections 156, 157, *Planning and Development Act 2000*.

74 Not least because the developer is given ample warning of the consequences should he or she fail to rectify the breach via warning and enforcement notices.

75 Sections 152, 153; *Planning and Development Act 2000*.

76 Department of the Environment, Heritage and Local Government, *Annual Planning Statistics 2006* (2007), available at www.environ.ie

77 Notably with the publication by the Department of the Environment, Heritage and Local Government of its *Draft Planning Guidelines on Sustainable Residential*

the context for such a study is markedly different now, but that it is appropriate to reiterate the recommendation in this Report. Given the work already done at local authority and Departmental level recently, the Commission recommends that this study would form part of the work leading to the final guidelines being developed within the Department as the lead State agency with responsibility for sustainable planning.

1.57 As already discussed, planning authorities have a number of different enforcement mechanisms of varying severity at their disposal, allowing them flexibility in ensuring that planning conditions are met. It is unclear to what extent these mechanisms are used consistently throughout the State. In this respect, the Commission has also concluded that a general review of the efficacy of the enforcement mechanisms open to planning authorities would be an appropriate adjunct to the general study.

1.58 The Commission recommends that a study be conducted by the Department of the Environment, Heritage and Local Government with a view to developing a focused and sustainable planning strategy for the multi-unit development sector in the wider context of the preparation of national planning guidance for planning authorities. The Commission also recommends that the study should include a review of the effectiveness of enforcement mechanisms under the planning legislation as applied to multi-unit developments.

Development in Urban Areas and the companion document *Urban Design Manual: A Best Practice Guide* (both February 2008).

CHAPTER 2 THE ROLE OF DEVELOPERS

A Introduction

2.01 In the discussion of the planning stage in Chapter 1, the Commission concluded that clear and consistent application of the existing planning code would greatly assist in avoiding potential problems in multi-unit developments. In this Chapter, the Commission uses the same general approach in its analysis of the role of the developer in a multi-unit development, namely, that appropriate arrangements to delineate the role of the developer would avoid many of the difficulties encountered in recent years. The Commission also makes proposals for reform which are intended to bring clarity to the appropriate roles of developer and purchaser in the multi-unit development setting.

2.02 In Part B, the Commission outlines some of the difficulties arising from the inappropriate role which developers have sometimes retained in multi-unit developments in recent years. The Commission also explains why, particularly in the context of the role of the developer, it is useful to analyse a multi-unit development in terms of its three different stages, the planning stage, the development stage and the completion and post-development stage. In Part C, the Commission discusses its proposals concerning developers in the planning stage. In Part D, the Commission discusses its central proposals for reform that relate to the developer during the development stage. In particular, the Commission recommends that developers must register an owners' management company before any conveyance of a unit is completed, must vest legal title to the multi-unit development in that company and must register this title with the Land Registry, which forms part of the Property Registration Authority (PRA). The Commission also makes other recommendations for reform building on the Irish Home Builders Association's *Code of Practice for Management Companies in respect of Multi-Unit Developments,*[1] developed in conjunction with the National Consumer Agency. In Part E, the Commission discusses its proposals for the completion and post-development stage, which

[1] March 2008, available at www.homefacts.ie. The Code came into force for IHBA members on 15 May 2008.

provides a connection to the detailed governance arrangements set out in later Chapters of this Report.

B Overview of the current difficulties concerning developers

2.03 In the Consultation Paper, the Commission identified a number of problems flowing from a lack of clarity concerning the role of developers in a multi-unit development. For example, where the developer has incorporated an owners' management company but has not transferred legal title to the development to the company, a series of complications may arise which become extremely evident when unit owners attempt to sell on their units. Similarly, where a developer incorporates an owners' management company but does not comply with company law reporting requirements while in control of the company during the development stage, the company can ultimately be struck off the register of companies and the head title of the development is vested in the Minister for Finance.[2] Where the development is not properly completed, the unit owners can face a long delay in having the development taken in charge, or the owners' management company might refuse to accept the transfer of the common areas of the development.

2.04 In preparing this Report, the Commission is conscious that these problems continue to arise. Some of these problems can be, and have been in some instances, resolved through the gradual reduction in the understanding deficit that characterised apartment purchasing until the engagement of those directly involved in this area, including the relevant State agencies and consumers (unit owners and purchasers). The Commission has concluded, nonetheless, that some specific reforms are also required in this area to bring greater clarity to the appropriate role of a developer and the remainder of this Chapter sets out the Commission's recommendations in this regard.

2.05 In making these recommendations, it is useful to reiterate that there are three main stages in the life of a multi-unit development. These are the planning stage, the development stage and the completion and post-development stage. The planning stage has been discussed in Chapter 1 from the perspective of the role of national and local government. In this Chapter, the Commission examines the planning stage from the perspective of the role of the developer. The development stage, when the multi-unit development is being constructed, is a crucial stage in terms of the proper delineation of the role of the developer. The completion stage is when the developer begins to sell units, completes and snags the development, and begins to transfer, or should be transferring, effective control to the owners' management company. The Commission's proposals in this Chapter are intended to achieve clarity as to the

2 *State Property Act 1954*, s.28.

appropriate responsibilities and entitlements of the developer and the unit purchasers, especially during the development and completion stages of a multi-unit development. The purpose is to avoid in the future many of the problems currently linked to the development and completion stages of a multi-unit development. Before turning to the development and completion stages, the Commission addresses the planning stage from the developer's perspective.

C Planning Stage

2.06 In this Part, the Commission addresses some key issues which arise for developers at the planning stage: taking in charge, off-plan sales and the phasing of developments.

2.07 With regard to taking in charge of multi-unit developments, the Commission considers that it is vital for developers to make clear to the planning authority at the planning stage whether it is intended that the estate remains privately managed or whether it should be taken in charge by the local authority. Ensuring clarity on this matter at planning stage is beneficial to all parties. It allows local authorities to resource themselves adequately according to whether developments will need to be taken in charge. It allows developers to plan whether to market a development as one where the exterior areas will be publicly accessible or not which, in turn, will be important information for potential unit purchasers when the units are put up for sale. This also has implications for the level of service charges which will be charged.

2.08 This issue is, admittedly, more relevant to gated housing estates than apartment developments. This is because, as a general rule, the extent to which it is possible for apartment developments to be taken in charge is relatively limited. With regard to gated developments, however, where the majority of unit owners for whatever reason express a preference for the unit not to be taken in charge it seems reasonable that these wishes are respected.[3] The question then arises as to the appropriate juncture the decision is made to remain a private development.[4] If the developer believes that the development should remain private and markets it as such, the situation should be relatively straightforward. The option still remains under s.180 of the *Planning and Development Act 2000*, discussed in Chapter 1, to have the estate taken in charge at a later date. However, where no express declaration has been made

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[3] Such developments are rare but a few exist in each local authority area the Commission researched.

[4] That is, a development whose exterior common areas are not taken in charge by the local authority under the *Roads Acts*.

before the time of sale that it is intended that the development remain private; this can cause problems. For estates with large landscaped grounds, for example, the annual service charge may prove to be considerable and where a purchaser finds themselves paying unforeseen service charges, there is clearly a problem. Accordingly, the Commission recommends that there is an onus on the developer when applying for planning permission to establish whether it is intended that the development will be taken in charge. The Commission also recommends that there should be an obligation on the developer or the developer's selling agent to establish to potential purchasers when the units are placed on the market whether the intention is that the development's common external areas will remain private. This is in line with the Department of Environment, Heritage and Local Government's recent recommendation that it should be established by the local authority at pre-planning stage whether it is envisaged that the development will be taken in charge.[5]

2.09 The Commission 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.

2.10 Linked to the type of information which should be made available to the unit purchaser on the potential sale of a unit, the Commission wishes to reiterate the recommendation in the 2005 *Report of the Auctioneering/Estate Agency Review Group* that some regulation of sales off plan should be introduced.[6] The developer must supply all of the necessary information relevant to off plan sales to the selling agent who will be obliged to make any potential purchaser of a unit aware of the particulars of this information. As a result, the Commission echoes the Group's recommendation that where new units are being sold off plan, scalable drawings and/or measurements must be given and justifiable estimates of service charges provided. The basis of measurement must be provided.[7]

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5 Department of Environment, Heritage and Local Government, Circular Letter PD 1/08, *Taking in Charge of Residential Developments/ Management Arrangements*, p.2 and *Annex to Circular Letter PD 1/08 Framework for a Comprehensive Taking in Charge Policy* February 2008, paragraph 3.4: Early identification of the areas to be taken in charge.

6 *Report of the Auctioneering/Estate Agency Review Group* (2005), recommendation No. 26, available at www.justice.ie. The Report's recommendations are due to be implemented in the Government's *Property Services Regulatory Authority Bill 2008*, which will be published in the near future: see Introduction, paragraph 24, above.

7 *Ibid*.

2.11 The Commission supports the recommendation in the 2005 Report of the Auctioneering/Estate Agency Review Group that where new units are being sold off plan, scalable drawings and/or measurements must be given and justifiable estimates of service charges provided. The Commission also recommends that the basis of measurement must be provided.

2.12 A final general planning policy point worthy of consideration by developers, planning authorities and the Department of Environment, Heritage and Local Government centres around further development by developers on the same site as existing multi-unit developments.[8] Typically, this is the case with so-called 'phased developments.'[9] The Commission is concerned about the relative lack of available information in some cases for potential purchasers of units in earlier phases of the development as to the nature of the development which will take place in later phases.[10] The Commission considers that, as part of the planning application for a site, developers should include a statement of intention as to their longer-term plans for a particular area of land. The Commission acknowledges the need for developers to retain flexibility as to their future plans in the interests of commerciality and ability to adapt to the requirements of the market where a development is being constructed on a phased basis. Accordingly, the Commission accepts that any such statement of intention can be relatively general in nature.

2.13 The inclusion of clauses in conveyancing agreements which purport to prohibit unit owners from making planning objections against future planning applications lodged by given developers has been brought to the Commission's attention. The inclusion of such clauses can lead the unit owner to believe that they are barred from making any objections to future planning permission sought by the developer. In the interests of clarity and as a matter of good practice, the Commission considers that such covenants should not be included in a conveyancing agreement for a unit in a multi-unit development. The Commission's proposed requirement, discussed below,[11] that a map must be registered in the Land Registry clearly delineating the boundaries of the development being vested in the owners' management company is important in

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8 That is, development of areas within a multi-unit development which were originally earmarked as exterior landscaped areas or carparks, for example.

9 See paragraphs 4.61-4.64 below.

10 For example, while unit owners may be aware that there will be further development on a given site, they may not be aware of the height and the scale to which any further constructions will be built; or the population density envisaged for the remaining space.

11 See paragraph 4.63, below.

this regard. It will have the effect that developers, where they have transferred all legal and beneficial interest in a development to the owners' management company and the unit owners respectively, and have completed the development, will not be able to claim as theirs any remaining land on the site.[12] The map registered in the Land Registry will serve as a clear reference point for this.

D Development Stage: the developer and the owners' management company

2.14 The Commission now turns to a central element of its proposed reforms: clarifying the appropriate role of the developer when conveyances in a multi-unit development begin,[13] that is, when units are being purchased and before unit owners start to move in to apartments. Current conveyancing practice provides that the transfer to the owners' management company will take place when the development has been completed but the decision as to when a development has been completed appears to be left entirely to the developer. In the case of some developers, this can extend the 'development stage' of the development for many years. This presents a range of serious problems for unit owners.[14]

2.15 Because of the lack of certainty in the current position, the Commission has concluded that significant reform of the conveyancing process used for the sale of new units in multi-unit developments is required to clarify the process and avoid the problems which currently exist. This involves the incorporation of an owners' management company and the vesting of the legal title of the development in the company by the developer before any conveyance of units occur. The developer will also be required to register the legal title to the development under the name of the owners' management company.[15] Under the Commission's proposals, the developer will retain the beneficial title in each unit until they are sold individually to unit purchasers. The Commission also makes specific recommendations on the general objects and specific functions of the owners' management company[16] The Commission's recommendations concerning the owners' management company are based on

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12 See paragraph 2.22 below.

13 For further discussion of the specific title and conveyancing issues, see Chapter 4.

14 See paragraph 2.01 above.

15 The system envisaged by the Commission is discussed in Chapter 4.

16 See Chapter 3, Legal Structures for Managing Multi-Unit Developments, below.

the proposal for a Designated Activity Company (DAC) in the 2007 report of the Company Law Review Group,[17] adapted to reflect the specific multi-unit development setting.[18]

(1) Obligation to Incorporate

2.16 In the Consultation Paper the Commission provisionally recommended that transfer of the legal title[19] should be made as soon as the conveyance of the last unit intended to be sold is completed.[20] In preparing this Report, the Commission considered this matter again and has concluded that transfer of the legal title to the owners' management company must occur at the earliest possible opportunity. The National Consumer Agency has outlined the current conveyancing practice as regards transfer of legal title to an owners' management company:

> "The standard conveyancing documentation provides that the developer will transfer the titles to the management company after completion of the development rather than when the last unit is sold. [It] will provide that the sale of the last unit triggers, after a maximum of 60 days, the resignation of [the developer's nominated directors]. This event marks the moment upon which the developer... relinquishes responsibility to the apartment owner and, indeed, to the management company."[21]

2.17 Under current conveyancing arrangements, therefore, it is common practice to provide that the head title to the multi-unit development will be

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17 Company Law Review Group, *Report on General Scheme of Companies Consolidation and Reform Bill 2007*, March 2007.

18 The adoption of the standardised owners' management company model recommended by the Commission as a management company will ensure *inter alia* that there will be no weighted votes in favour of the developer. See further: Chapter 3, below.

19 This can take the form of the freehold of the structure and common areas of the development or, in some cases, comprises a long lease in situations where the developer has purchased from the land owner; whereby when purchasing a unit; the unit purchaser in fact purchases a sub-lease rather than a leasehold or freehold of the unit.

20 LRC (CP 42-2006) paragraph 3.34.

21 *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings,* Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006, pp.30-31, available at www.consumerconnect.ie

transferred on completion of the conveyance of the final unit in the development. The Commission is satisfied that, under the existing arrangements, a significant number of developers convey the legal interest of the development to the owners' management company in a timely manner during the development stage, before completion of the development itself.[22] It is clear, however, that this does not always happen and that some developers who are reluctant to surrender control over the interest in the head title of a development simply do not sell the final unit in the development.

2.18 A common reason for this is that developers wish to retain control over exterior areas on the site of the development in order to retain the possibility that they might be developed at some time in the future. This raises problems for unit owners when they collectively attempt to make decisions that will impact on the common areas, and also affects individual unit owners when they try to sell their units. Either situation invariably results in frustration and confusion for the unit owners concerned. This confusion is exacerbated because, currently, there is no statutory regulation or even best practice guidelines for developers to follow in ensuring that they hand over the freehold interest to the unit owners by a particular date. The Commission notes that the Irish Home Builders Association, in conjunction with the National Consumer Agency, has developed a *Code of Practice for Management Companies in respect of Multi-Unit Developments*,[23] which states that developers should complete transfer in a timely manner. The Commission strongly welcomes this industry initiative, which is a non-statutory code, and has concluded that it is appropriate that it should be placed on a secure statutory footing to reinforce industry best practice.

2.19 The delay in timely transfer creates other problems such as the absence of clear identification of boundaries to common areas, amenity lands and easements relating to the specific part of the development. These are vital pieces of information for any potential purchaser. The Commission therefore considers that the incorporation of the owners' management company and the transfer of title to it must occur at the initial stage of development. This will counter any potential situation in which the failure to incorporate an owners' management company is used as a justification for delay in the transfer of the legal title.

2.20 Current conveyancing practice combines the transfer of legal title to the owners' management company with the completion of the development. The Commission is of the view that these should be treated as separate events

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22 This is discussed further at paragraphs 2.18-2.19 below.

23 March 2008, available at www.homefacts.ie. The Code came into force for IHBA members on 15 May 2008.

which would lead to clarification as to the role of the owners' management company during the development stage, at completion stage and post-completion stage. It would also have the beneficial effect that this sequence of events would clarify for developers the role of the owners' management company throughout these stages and the obligations of the developer to develop and complete the development, which is a separate obligation to the obligation to transfer good marketable title to the owners' management company. Additional benefits are that the unit owners in the owners' management company would be involved in ensuring that snagging problems are adequately dealt with and that appropriate certification of completion is obtained for the development.

2.21 The Commission recommends that the developer must incorporate an owners' management company before the conveyance of any unit in a multi-unit development is completed.

(2) Obligation to transfer title

2.22 The purpose of requiring developers to incorporate an owners' management company at the earliest opportunity is so that the company will be in existence when the conveyance to unit purchasers begins. The Commission recommends that, following incorporation, the legal title to the development will vest in the owners' management company and will become compulsorily registrable with the Land Registry, with the developer retaining the commercially vital beneficial interest in each unit.[24] The Land Registry will be required to register the legal title of a multi-unit development and must refuse to register new multi-unit developments unless the owners' management company has been incorporated in accordance with the specific requirements set out in Chapter 3, below. The Land Registry can only register a development if provided with a map that clearly delineates the boundaries of the property to be transferred to the owners' management company. Thus, the incorporation of an owners' management company will be a prerequisite for the developer to register the development with the Land Registry. This in turn will be a necessary step for developers before the conveyance of any unit can be completed.[25] At this early stage the owners' management company remains fully under the control of the developer.

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[24] The Commission notes here, for the sake of completeness, that if the developer has a charge on the multi-unit development this will be dealt with on completion in accordance with the general principles concerning charges. See also paragraphs 4.19-4.33 below.

[25] See Chapter 4 below.

2.23 The effect of these recommendations is that unit purchasers will be guaranteed that there is a corporate management structure in place as soon as the conveyance of a unit is completed. The traditional obligations of the developer concerning satisfactory construction, completion and snagging of the development will remain with the developer until the development is certified as completed. Requiring incorporation of the owners' management company at such an early stage means that even where units are sold off-plan[26] there is clarity around the respective entitlements and responsibilities of the developer and the unit purchaser.

2.24 The Commission recommends that, following incorporation, the legal title to the development will vest in the owners' management company and will become compulsorily registrable with the Land Registry, with the developer retaining the beneficial interest in each unit.

(3) Other obligations of the developer

2.25 The Commission has already welcomed the publication of the Irish Home Builders Association's *Code of Practice for Management Companies in respect of Multi-Unit Developments,*[27] developed in conjunction with the National Consumer Agency. This non-statutory Code of Practice states that the developer is responsible for incorporation of an owners' management company. The Commission has already recommended that this be placed on a statutory basis with specific timelines attached.

2.26 The IHBA Code also requires the developer to ensure that the owners' management company keep appropriate records of service provision contracts, such as those of a property managing agent. This clearly facilitates transparency of information for the unit owners. The IHBA Code also requires the developer to ensure that, on the incorporation of the owners' management company (or as soon as is possible after this), the unit owners are provided with a number of documents. Of these, the Commission places particular importance on: warranties and other guarantees, including test records for drainage, water and heating pipework; fire safety certificates under the *Building Control Act 1990*; and certificates of compliance with planning requirements and with the *Building Regulations*. The IHBA Code is, by its nature, applicable only to members of the Irish Home Builders' Association. The Commission considers that these requirements, which have a significant impact on the multi-unit

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[26] This has been known to happen even before construction of the development has begun.

[27] March 2008, available at www.homefacts.ie. The Code came into force for IHBA members on 15 May 2008.

development and reflect good practice within the industry,[28] should be placed on a statutory footing, and so recommends.[29]

2.27 The Commission concurs with the general thrust of the obligations on developers in the IHBA Code of Practice. Subject to the Commission's own recommendations on early incorporation of an owners' management company and transfer of legal title, the Commission considers that the IHBA Code represents a suitable statement of the relevant duties of developers.

2.28 The Commission recommends that the developer must ensure that the owners' management company keeps appropriate records of service provision contracts, such as those of a property managing agent. The Commission also recommends that, on the incorporation of the owners' management company (or as soon as is practicable after this), the company retains for the benefit of the unit owners the following: warranties and other guarantees, including test records for drainage, water and heating pipework; fire safety certificates under the Building Control Act 1990; and certificates of compliance with planning requirements and with the Building Regulations.

E Completion and Post-Development Stage

2.29 In this Part the Commission considers the developer's responsibilities with regard to completion and snagging of the development.

(1) Definition of completion

2.30 In this respect, the Commission must consider what is meant by 'completion'. In the Consultation Paper, the Commission recommended that there should be a statutory definition of the term 'completion' of the development.[30] The IHBA Code of Practice has noted that:

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28 The IHBA Code also refers to the following: title documents and counterpart leases, agreed snag list and practical completion certification; as built drawings; and a register of all capital assets. The Commission considers that these other documents should be provided as conforming to the best practice guidance provided in the IHBA Code but that it would be preferable to include as statutory requirements only those which have a significant impact on the development.

29 The Commission acknowledges that, as a result, some elements of the IHBA would be overtaken by the implementation of the Commission's recommendations. Other elements are likely to be overtaken by statutory codes developed by the National Property Services Regulatory Authority (NPSRA) when the *Property Services Regulatory Authority Bill 2008* is enacted.

30 LRC (CP 42-2006), paragraph 3.36.

> "A development shall be deemed to be complete on certification by a qualified member of an appropriate professional body that planning permission has been complied with and the building complies with Building Regulations."[31]

The IHBA Code also usefully lists the factors which must be met in order to establish proper snagging and completion.[32] The resolution by the developer of any snagging list is a condition of satisfactory completion.

2.31 Achieving clarity over the concept of completion is relevant not only to how the Commission envisages the developer's relationship with the owners' management company[33] but also to the taking in charge of a development under section 180 of the *Planning and Development Act 2000*.[34] The Commission observed in the Consultation Paper that the developer:

> "has a legal responsibility under planning law to complete the development in accordance with the planning permission granted by the planning authority, including any conditions attached to the permission."[35]

2.32 As noted in Chapter 1, in the event of failure to complete a development, there are a range of enforcement mechanisms available to planning authorities to ensure that planning conditions are fulfilled.[36] Owners' management companies also have the option of making a complaint to the

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31 *Op cit*, p.11. The value of this definition of 'completion' has been bolstered by the enactment of the *Building Control Act 2007* (which came into force on 1 May 2008). The 2008 Act provides for a new regulatory regime for the profession of architect.

32 *Op cit*, pp.11-12.

33 The Commission recommends in Chapter 4 that completion will be a condition of the developer receiving 5% of the purchase price of the units, which will be held in trust by the owners' management company until completion and snagging of a development.

34 See Chapter 1 above. The Commission notes that taking in charge is not always an important issue for apartment blocks, because the common external areas often remain under the private ownership of the owners' management company.

35 LRC (CP 42-2006), paragraph 3.10.

36 See Chapter 1, Planning. The Commission notes that planning authorities have, in general, 7 years from the date of expiration of the planning permission to take enforcement action: see Simons, *Planning and Development Law* (Thomson Round Hall, Dublin 2004), paragraphs 7.16- 7.31.

planning authority where they are not satisfied that the construction and development meets the conditions specified in the planning permission.[37] Compliance with planning permission is determined by examining whether the terms, conditions and specifications laid out in the planning permission have been met. Individual unit owners may also initiate a civil claim where a development is not properly completed under the terms of the building contract connected with the conveyance of a unit.[38] Alternatively, dissatisfied unit owners might use the agreement which the Commission envisages will be agreed between the developer and the owners' management company[39] as the basis for liability where the developer fails to complete the development adequately. The National Consumer Agency has pointed out,[40] however, that the definition of 'satisfactory completion' is open to considerable interpretation.

2.33 The development of a statutory definition of 'completion' would complement the Commission's recommendations for the early transfer of the head title to the owners' management company and would deal with any ambiguity surrounding the concept. The IHBA has noted that the absence of a uniform definition of completion makes it difficult for unit owners and developers to reach agreement as to the trigger point for transfer of control.[41]

2.34 Taking into account the general definition in the IHBA Code, the Commission considers that this could be further enhanced by reference to the arrangements for certification of completion under the statutory building code. The Commission notes in this respect that the arrangements for certification by an architect or other suitably qualified person under the *Building Control Act 1990* have been greatly strengthened by the *Building Control Act 2007.*[42] The 2007 Act provides for a new statutory professional regime for architects and other related professionals and also for strengthened enforcement powers for building control authorities (the larger local authorities, who are also the planning authorities) to ensure compliance with the building code. In this light,

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37 For example, see *ibid*, paragraph 7.38.

38 See: *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings,* Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006, p. 27.

39 See Chapter 4 below.

40 *Ibid*, p. vii.

41 Irish Home Builders' Association *Code of Practice for Management Companies in respect of Multi-Unit Developments,* March 2008, p. 11.

42 The 2007 Act came into force on 1 May 2008.

the Commission has concluded, and accordingly recommends, that 'completion' should be defined by law as compliance with planning conditions and the statutory building code, as certified by a professional person in accordance with the *Building Control Acts 2000 and 2007.*[43]

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

2.36 Finally, it is useful to note that where a developer has registered a charge over the development; this shall be dealt with in the same manner as it is dealt with under current practice; notwithstanding the fact that the developer will have transferred the legal interest considerably earlier than the beneficial interest in the development has been transferred.

(2) Snagging lists and service charges

2.37 In the Consultation Paper, the Commission provisionally recommended that service charges should never be used to pay for 'snagging problems' or any other expenses incurred by the developer in completing the development.

2.38 One result of the understanding deficit is that on occasion unit owners are under the impression that it is they who pay for resolution of snagging problems through the use of service charges paid through the owners' management company. Another misconception is that developers have no responsibility for the snag list. Neither of these misconceptions is accurate and it is clear dealing with the snag list is the responsibility of the developer alone. Accordingly, the Commission repeats its recommendation from the Consultation Paper on this aspect of snagging.

2.39 The Commission recommends that service charges must never be used to pay for 'snagging problems' or any other expenses incurred by the developer in completing the development.

2.40 The Commission notes that the National Consumer Agency recommended in 2006 that the

> "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 architect/surveyor. The developer should be

[43] *Building Control Act 2007*, Parts III, IV and V.

required to furnish a completion certificate certified by the architect on completion."[44]

This recommendation is consistent with the Commission's recommendation concerning snagging, albeit arrived at through a different route having regard to the Commission's earlier recommendation in this Report that the title to the development should be transferred to the owners' management company before the conveyance of any unit. The Commission's recommendation concerning the retention of a portion of purchase monies by the owners' management company[45] should also act as an incentive to the developer to deal with the snagging list and furnish certification of completion to the owners' management company at the earliest opportunity.

(3) Developers' Relationship with Managing Agents

2.41 The Commission now turns to the developer's relationship with property managing agents. In the Consultation Paper, the Commission noted that some developers agree long-term contracts with property managing agents to provide professional services to the owners' management company.[46] Typically, this takes place before any units have been sold. The Commission considers it unsatisfactory that developers should enter into long-term contractual agreements on behalf of the owners' management company which will impact on it for many years into the future. In the Consultation Paper, the Commission provisionally recommended that developers should be prohibited from committing owners' management companies to long-term contracts with managing agents. Having considered this matter in the preparation of this Report, the Commission has concluded that the essential elements of this recommendation remain valid but that it is preferable to allow the matter to be determined by reference to the general principles of contract law. In particular, having regard to the Commission's recommendations concerning the incorporation of an owners' management company, the conferral of equal voting rights on unit owners on the sale of a unit, the recommendations concerning completion and the impending regulation of property managing agents, the adverse consequences flowing under the existing arrangements are less likely to continue in the future. Indeed, the Commission noted in the Consultation Paper that the owners' management company should not be precluded from

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44 *Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings,* Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006, Recommendation 12, p. vii.

45 See paragraphs 4.41-4.45 below.

46 *Op cit* paragraphs 5.20-5.21.

agreeing a longer-term contract with the original property managing agent once the development is completed.

(4) Service charges and the developer

2.42 The Commission also notes in this context the requirements in the IHBA 2008 Code of Practice that the developer, in conjunction with the managing agent, should prepare a budget and, where possible, forecast estimates for future service charge and building investment fund contributions and should inform unit owners about these.[47] A related issue to which the Commission's attention has been drawn is who is accountable for the service charge for unsold units in a development. The answer to this question is, in the Commission's view clear. Since the details of the apportionment of the service charge are contained in each unit owner's conveyancing agreement, each unit owner is clearly liable for that amount only. The developer is, therefore, accountable for the proportion of the overall service charge which would otherwise be applied to the unsold units in a completed development.

2.43 A final point of note is that developers will be obliged to meet certain core obligations prescribed by covenants in every agreement for the conveyance of a unit. These are discussed by the Commission in Chapter 4.[48] Before that, the Commission turns to explore in detail the governance arrangements for multi-unit developments, notably those concerning the owners' management company.

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47 Irish Home Builders' Association *Code of Practice for Management Companies in respect of Multi-Unit Developments,* March 2008, pp. 6-10.

48 Chapter 4: Title and Conveyancing

CHAPTER 3 THE OWNERS' MANAGEMENT COMPANY AND MULTI-UNIT DEVELOPMENTS

A Introduction

3.01 In the Consultation Paper, the Commission emphasised that a central issue for unit owners in multi-unit developments is that the legal structure in place for managing the development should operate in a transparent manner to protect what is a crucial property investment.[1] The legal structure for most large multi-unit developments in Ireland is an owners' management company (OMC), of which each unit owner is a member. The Commission is aware that, in a number of cases, the owners' management company structure has failed to operate in a transparent manner and that this has, in turn, led to a refusal by some unit owners to pay management service charges. It is important to note that this result could threaten the future viability of a multi-unit development, and the Commission discusses this issue separately in this Report.[2]

3.02 In this Chapter, the Commission addresses how to ensure that the legal structure in place in a multi-unit development operates effectively. The Commission is conscious that this requires a number of approaches. The Commission accepts that some changes are required to current legislative provisions, notably in the company law code, and these are discussed below. Equally, the Commission reiterates that there is a pressing and ongoing need for unit owners to engage actively in the collective management of a development. In the Commission's view, it is clear that any proposed changes to the current legal regime will only be effective if there is active engagement by unit owners in the management of a multi-unit development.

3.03 As noted in the Introduction to this Report,[3] the Commission is aware that, since the Consultation Paper was published, significant steps have been taken to address the understanding deficit about the management of multi-unit

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1 (LRC CP 42-2006), Chapter 4, Parts B and C.

2 The Forum was announced by the NCA Chief Executive at the Commission's January 2007 seminar on the Consultation Paper: see also paragraph 3.03 below.

3 Introduction, paragraphs 20-22 above.

developments and to tackle poor practice. Notably, the Office of the Director of Corporate Enforcement (ODCE) has published draft guidelines on the governance of owners' management companies[4] and the National Consumer Agency (NCA) has established a Consumer Forum for multi-unit developments.[5] The Commission warmly welcomes these initiatives, which have been complemented by significant initiatives on apartment living by, for example, Dublin City Council[6] and the Department of the Environment, Heritage and Local Government[7]

3.04 In the remainder of this Chapter, the Commission discusses what is required to complement these recent developments, in particular as to the legal structure for managing a multi-unit development. In Part B, the Commission outlines why an owners' management company (OMC) operating under the company law code is the appropriate structure for larger multi-unit developments – those involving at 5 units or more – and why co-ownership arrangements are appropriate for smaller multi-unit developments – those involving less than 5 units. The Commission also recommends that, regardless of the legal structure, a core set of minimum legal obligations should apply in multi-unit developments: this is particularly important for existing multi-unit developments. In Part C, the Commission sets out how its specific reforms in the context of the company law code would complement the major reform proposals of the Company Law Review Group (CLRG) contained in the draft *Companies Consolidation Bill*.[8] In Part D, the Commission discusses which elements of the recommendations concerning company law should constitute minimum legal obligations applicable to all multi-unit developments, whether incorporated or unincorporated.

B Overview of legal structures for managing multi-unit developments

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4 Office of the Director of Corporate Enforcement, *Draft ODCE Guidance; The Governance of Apartment Owners' Management Companies*, December 2006.

5 See Introduction, paragraph 28 above.

6 In particular, their *Apartment Owners Forum on Successful Apartment Living*, 30 October 2007 and the publication of their *Successful Apartment Living* series.

7 See Introduction, paragraphs 14-16, above.

8 Company Law Review Group, *Report on General Scheme of Companies Consolidation and Reform Bill* (April 2007).

3.05 As noted in the Consultation Paper,[9] it is not currently possible to provide precise figures on the different types of legal structures currently in place for managing multi-unit developments. Despite this, it is possible to identify three main legal structures currently in use. Two of these involve an incorporated arrangement, the most common being owners' management companies – in the form of companies limited by guarantee – the other being friendly and co-operative societies; while unincorporated arrangements include co-ownership agreements and resident/owner associations. In this Part, the Commission considers these existing arrangements and makes general recommendations concerning the most suitable legal structure for future multi-unit developments. In Part C, the Commission sets out its detailed recommendations for owners' management companies. In Part D, the Commission discusses to what extent its detailed recommendations should apply to all multi-unit developments, including existing multi-unit developments.

(1) Owners' management companies for larger developments

3.06 It is clear that owners' management companies (OMCs), in the form of companies limited by guarantee, are the most common legal structure used in recent years for larger multi-unit developments. The National Consumer Agency (NCA) has estimated that there are about 4,600 such owners' management companies.[10] The Consultation Paper highlighted a number of areas where the actual operation in practice of owners' management companies was inimical to multi-unit developments. Notably, some developers continue to be the only directors of the company even where all units had been sold, and a separate managing agent may have effective control over the level of service charges and arrangements for the holding of annual general meetings of the management company.[11] Allied to this was an understanding deficit in which unit owners were unaware of their rights and responsibilities as company members and, potentially, as company directors.[12] In other words, in some multi-unit developments the unit owners may consider that they have little or no stake in the corporate structure, even though they are, in law, the controllers of the owners' management company.

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9 See (LRC CP 42-2006), paragraph 4.63.

10 See *Management Fees and Service Charges levied on Owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Consultants Ltd in Association with Kevin O'Higgins Solicitors, October 2006, p.ii.

11 See (LRC CP 42-2006); paras 4.15-4.17.

12 See for example: Office of the Director of Corporate Enforcement, *Draft ODCE Guidance: The Governance of Apartment Owners' Management Companies*, December 2006.

3.07 Poor corporate governance arrangements in some multi-unit developments have also led to owners' management companies being struck off the Register of Companies. This, in turn, results in the further costs associated with either incorporating a new company or having the original company restored to the companies register in order to restore the unit owners' original ownership interests. This might lead one to conclude that, as the company law code was designed primarily with trading companies in mind, it is not suitable as a legal vehicle for managing multi-unit developments.[13]

3.08 The Commission firmly believes, however, that the benefits of using the company law code far outweigh any perceived disadvantages. The concept of limited liability, for example, is of clear advantage to owners' management company members. The existence of a regulatory regime which protects members of the company and requires annual meetings, the presentation and transparency of accounts, and rules on corporate governance and compliance generally - and directors' duties specifically - all operate for the benefit of the unit owner. The Commission is of the view that once a more widely understood culture of collective management and ownership becomes commonplace in Ireland, as it has in other European States and around the globe, the more the benefits of the company law code will be appreciated.

3.09 In any event, the Commission notes that there are good reasons why at least 4,600 existing multi-unit developments have used the current company law code as a legal vehicle to manage multi-unit developments. In this respect, an owners' management company shares many characteristics, in terms of its objects, with a trading company. It owns and manages assets. It engages in contracts with managing agents, insurers and other service providers. It works for the benefit of a group of people who have invested financially and it is ultimately responsible to them. In some circumstances, owners' management companies may opt to sell part of the common areas. Indeed, it may be said that the raison d'etre of owners' management companies is to maintain or increase the value of the original investment placed in the development by unit owners.

3.10 While the existing company law code may not have envisaged a special-purpose corporate entity such as an owners' management company, the Commission notes that the Company Law Review Group (CLRG) has proposed the inclusion of a Designated Activity Company (DAC) in its draft

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13 (LRC CP 42-2006), paras 4.14-4.16 and 8.13; and Dublin City Council *Guide to Successful Apartment Living*, June 2006; Chapter 2: Management of Apartment Developments pp. 14-21.

Companies Consolidation and Reform Bill.[14] Since the Government has accepted the essential elements of the CLRG's draft Bill,[15] the Commission has, in preparing this Report, concluded that the DAC concept should be applied to multi-unit developments. The Commission was especially conscious in this respect that it should not propose another form of corporate structure, as this might be inimical to the overall purpose of the CLRG to achieve a simplification of the company law code. For this reason, the Commission has made limited recommendations below as to how the CLRG proposal for a DAC should be applied to owners' management companies.[16] The Commission considers that its relatively modest recommendations concerning DACs would reinforce the relevance of the company law code to multi-unit developments. Accordingly, the Commission recommends that an Owners' Management Company (OMC), based on the Designated Activity Company (DAC) envisaged in the CLRG's draft *Companies Consolidation and Reform Bill*, is the preferred legal structure for larger multi-unit developments; that is, those of 5 units or more.[17]

3.11 The Commission recommends that an Owners' Management Company (OMC), based on the Designated Activity Company (DAC) envisaged in the Company Law Review Group's draft Companies Consolidation and Reform Bill, is the preferred legal structure for larger multi-unit developments; that is, those of 5 units or more.

(2) Co-operative societies

3.12 The Commission is aware that a number of multi-unit developments have used the mechanism of a co-operative society and that they appear to operate successfully as ownership and management vehicles.[18] Co-operative

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14 Company Law Review Group, *Report on General Scheme of Companies Consolidation and Reform Bill* (2007), available at www.clrg.org

15 In May 2008, the Minister for Enterprise, Trade and Employment reappointed the members of the CLRG for a 2 year period in order to facilitate the drafting of a *Companies Consolidation and Reform Bill* by 2009: see www.entemp.ie/press/2008/20080506a.htm

16 See Part C, below.

17 For detailed discussion of the Commission's conclusion that 5 unit multi-unit developments should be designated as "larger" developments, see Chapter 4, below.

18 The Commission received a submission from the National Association of Building Co-operatives Ltd (NABCO) supporting the view that there are currently numerous co-operative societies successfully engaged in the management of multi-unit developments in the State. Its website is www.nabco.ie

societies are governed by the *Industrial and Provident Societies Act 1893*, as amended, and regulated by the Registrar of Friendly Societies. In 2006, it appears that about 50 housing co-operative societies were registered,[19] which can be compared with the estimate of about 4,600 owners' management companies.[20] Co-operative societies have the benefit of incorporation and a long-established regulatory framework but, in the Commission's view, this framework may not be as suitable for multi-unit developments as the company law framework, particularly when account is taken of the Commission's recommendations concerning the DACs envisaged in the draft *Companies Consolidation and Reform Bill*.[21] In addition, the Commission notes that a significant number of voluntary housing entities have chosen to incorporate as companies limited by guarantee, using the company law code.[22]

3.13 There may be specific reasons why, for some, the co-operative society would be the preferred corporate vehicle in support of a multi-unit development, for example where there is an existing long-established co-operative society in place. Nonetheless, the Commission's recommendation concerning the use of a DAC will apply in such situations. The Commission believes that the DAC proposal provides the clearest corporate structure for multi-unit developments, particularly when seen in conjunction with the Commission's recommendations on the mandatory establishment by a developer of a DAC owners' management company and the compulsory registration of the company's title to the multi-unit development with the Property Registration Authority (PRA).[23] In the case of existing multi-unit developments structured as co-operative societies, the Commission recommends that there should be a simple, cost-effective, means of conversion to the preferred DAC corporate structure.[24]

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19 *Report of the Registrar of Friendly Societies 2006*, p.9, available at www.entemp.ie

20 See paragraph 3.06, above.

21 See Part C, below.

22 This may be connected with the view that, for the purposes of Revenue-related charitable recognition, the company limited by guarantee is perceived as a preferred option.

23 See Chapter 2, above and Chapter 4, below.

24 This is in line with the Commission's recommendation, concerning the conversion of existing charities, in its *Report on Charitable Trusts and Legal Structures for Charities* (LRC 80-2006), paragraph 2.95.

3.14 The Commission recommends that, for any existing multi-unit developments which are based on the structure of a co-operative society, there should be a simple, cost-effective means of conversion to the Commission's preferred corporate structure, the Owners' Management Company (OMC), based on the Designated Activity Company (DAC) envisaged in the Company Law Review Group's draft Companies Consolidation and Reform Bill.

(3) Resident/owner associations and co-ownership agreements

3.15 The third category of arrangements for multi-unit developments does not involve an incorporated structure, such as the company limited by guarantee or the co-operative society discussed above. The Commission is aware that a number of older multi-unit developments remain in place on the basis of relatively informal resident/owner associations, which do not involve any formal legal structure but which were formed and organised at a time when the original owners were, in most instances, also the residents of the units in question. In addition, in the case of small developments, involving less than 5 units, [25] the Commission is aware that the development may be managed by means of a co-ownership arrangement between the unit owners.

3.16 In the case of older, larger, multi-unit developments, the Commission has concluded that the use of an informal resident/owner association may have been suitable at the early stages of a development but that it is not an appropriate legal vehicle in the long term. This is particularly important when dealing with major capital maintenance issues as they arise at a mature stage of a development. From the Commission's research it would appear that some of these multi-unit developments are likely to require the application of the "rescue arrangements" discussed in this Report.[26] This may be particularly the case in connection with older developments where the resident owners are retired or otherwise on fixed incomes.

3.17 In the Consultation Paper, the Commission considered that owners' management companies are not necessarily appropriate for very small developments where management of the common areas would be better provided for by a co-ownership agreement of the common parts.[27] The Commission continues to be of the view that, in the case of smaller developments of less than 5 units, a co-ownership arrangement between the unit owners remains a suitable structure for the management of the

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25 For detailed discussion of the Commission's conclusion that multi-unit developments of less than 5 units should be designated as "smaller" developments, see Chapter 4, below.

26 See Chapter 7, below.

27 See further (LRC CP 42-2006) Chapter 10, Part D.

development. For this reason, the Commission has concluded that a co-ownership arrangement remains appropriate for such small multi-unit developments. In this context, unlike in the case of co-operative societies, the Commission does not make any recommendation for the easy conversion of co-ownership arrangements to a corporate structure in the case of smaller developments of less than 5 units.

3.18 The Commission recommends that, in the case of smaller multi-unit developments, of less than 5 units, the appropriate legal structure is a co-ownership arrangement.

(4) Application of minimum legal obligations to all multi-unit developments

3.19 The Commission is conscious that its recommendation that an Owners' Management Company (OMC), based on the Designated Activity Company (DAC) envisaged by the Company Law Review Group, should be established for larger multi-unit developments of 5 units or more; will provide a clear corporate structure for future multi-developments only. The Commission is also conscious that it has recommended that, for smaller developments of less than 5 units, a non-corporate structure – co-ownership – is appropriate. The Commission acknowledges that, even for the larger multi-unit developments, it is likely that, for the foreseeable future, some will continue to operate under the existing structure of a company limited by guarantee while new developments will be structured around the proposed DAC (assuming that recommendation is implemented by the Oireachtas). For this reason, the Commission recognises that this Report must address the position of existing multi-unit developments. This is discussed in Part D, below. Before turning to that issue, the Commission discusses in Part C its detailed recommendations for owners' management companies.

C Using an Owners' Management Company (OMC) for larger multi-unit developments

(1) Overview

3.20 The Commission now turns to discuss the detailed arrangements for owners' management companies against the background of its recommendations in Part B.

3.21 In this Part, the Commission's focus is on the DAC-type Owners' Management Company (OMC). The Commission makes a number of recommendations concerning how the DAC model envisaged in the Company Law Review Group's (CLRG's) draft *Companies Consolidation and Reform Bill* may be adapted – in relatively modest ways – to the setting of a large multi-unit development. In Part D, the Commission discusses which of these

recommendations constitute minimum legal obligations which will be applied to all multi-unit developments, whether incorporated or unincorporated, including existing multi-unit developments.

3.22 Section (2) of this Part contains a general review of why the existing company law code has been used for multi-unit developments, and the existing (understandable) shortcomings in using that code in this setting. Section (3) discusses in more depth how the CLRG's proposed new company law code, in particular its proposal for a designated activity company (DAC), can be adapted to multi-unit developments. The remaining sections deal with the detailed aspects of this. Section (4) deals with incorporation of the owners' management company, while sections (5) and (6) deal with the connected, but separate issues of a definition of, and name for, an owners' management company. Section (7) makes recommendations on the objects clause and memorandum and articles of association; and section (8) discusses membership and voting rights. Section (9) deals with financial reporting, accounts and auditing issue. Sections (10) and (11) examine two aspects of sanctions for not complying with company law, strike-off and director liability. Lastly, section (12) looks at training for officers of owners' management companies.

(2) Using the current company law code for multi-unit developments

3.23 In preparing the Consultation Paper and this Report, the Commission has examined whether the current company law regime facilitates the effective management of multi-unit developments and whether it might be more desirable to use a tailored form of company for them. While incorporation as a company provides a useful legal vehicle for the management of developments,[28] it is also clear that the existing company law code was not developed with the specific needs of unit owners in a multi-unit development in mind. It is not surprising, therefore, that the existing regime poses some difficulties and challenges. [29]

3.24 The Consultation Paper noted that the most common type of company used for multi-unit developments is the public company limited by guarantee not having a share capital. As Keane notes, using the company limited by guarantee has the twin advantages that the members will not be required to provide the company with any cash either on its formation or during the course of its active life and that the management of the company is normally entrusted to a council or committee elected by the members rather than a board

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[28] Office of the Director of Corporate Enforcement *Draft Guidance: the Governance of Apartment Owners' Management Companies*, para 2.3.

[29] (LRC CP 42-2006) para 4.16.

of directors. [30] These elements make the company limited by guarantee quite attractive in a multi-unit development setting.

3.25 However, the current *Companies Acts* 1963 to 2005 limit to 10 the maximum number of members of a private company limited by guarantee[31] so that, for larger multi-unit developments, this necessitates using a public company limited by guarantee, for which there is no upper membership limit. This indicates a significant disadvantage of the current company law code which the Company Law Review Group specifically addressed in its proposals made in 2007 for a new company law code. The Commission now turns to examine these proposals in detail in the context of multi-unit developments.

(3) The proposed new company law code, DACs and multi-unit developments

3.26 The Company Law Review Group (CLRG) was established on a statutory basis by the *Company Law Enforcement Act 2001* to review the existing company law code and to propose its reform and modernisation. In 2007, the CLRG published its final Report, which included the draft scheme of a *Companies Consolidation and Reform Bill*.[32] The Government has accepted the thrust of the CLRG's final Report and is committed to enactment of a new company law code based on the draft Scheme. Assuming the enactment of the draft scheme (which is unlikely to be before 2010),[33] the three main company types in Ireland will be the private company, the public company limited by guarantee (CLG) and the Designated Activity Company (DAC).

3.27 In its final Report, the CLRG states that "the reformed and streamlined companies' code should be effective, intelligible to company law directors and shareholders, and that the law should be cognisant as to how business is transacted."[34] The main focus of the CLRG's Report was what might be described as commercial (shareholder) companies, which it recommends should be based on the model of a private company (this

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30 Keane, *Company Law* (4th ed)(Tottel Publishing, 2007), para 4.34.

31 *Companies Act 1963*, s.33.

32 See Company Law Review Group, *Report on General Scheme of Companies Consolidation and Reform Bill 2007*, available at www.clrg.org

33 In May 2008, the Minister for Enterprise, Trade and Employment reappointed the members of the CLRG for a 2 year period in order to facilitate the drafting of a *Companies Consolidation and Reform Bill* by 2009: see www.entemp.ie/press/2008/20080506a.htm

34 Company Law Review Group *Report on General Scheme of Companies Consolidation and Reform Bill 2007*, p.8.

represents the overwhelming majority of registered companies). Nonetheless, the CLRG was conscious that the new company law code should not adopt a "one size fits all" approach and that it needed to make provision for specific or niche forms of companies. The CLRG therefore included provision for Designated Activity Companies (DACs) in its draft scheme of a *Companies Consolidation and Reform Bill.*

3.28 The DAC proposal is intended in particular to deal with existing companies who may wish to retain a statement of their main objects in their documents of incorporation, as under the existing company law code. The concept of a company with a designated activity regulated by the company law code also reflects the existing provisions of the *Companies Act 1990* under which it is possible to incorporate an "investment company." [35] The 1990 Act provides that the activity-specific contents of the memorandum of association of such a company can vary from the standard memorandum provided for in the general company law code.[36] There are three main advantages which the Commission sees in using the DAC model in the context of multi-unit developments.

3.29 The first advantage is that the DAC envisaged by the CLRG would be available as a structure for companies wishing specifically to maintain clearly identified objects.[37] The CLRG's new company law code provides that a private company would not have a memorandum of association setting out its objects.[38] As envisaged by the CLRG, a DAC would be a private company limited by shares or by guarantee, with a memorandum and articles of association and an objects clause which would outline its designated activity (as under the current law). The Commission considers that an owners' management company for a multi-unit development should have a standardised memorandum and articles of association in order to provide clarity for owners as to its functions. Because the DAC proposed by the CLRG will retain these elements, the Commission considers that the DAC is the most appropriate company structure for multi-unit developments.

3.30 A second major advantage of the DAC is that the CLRG addressed the problem in the existing company law code, discussed above,[39] which limits

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35 See Part 13 of the *Companies Act 1990*, as amended.

36 Section 253ff of the 1990 Act, as amended.

37 For further discussion of the nature of DACs, see the Commission's *Report on Charitable Trusts and Legal Structures for Charities* (LRC 80-2006), para 2.76.

38 Company Law Review Group *Report on General Scheme of Companies Consolidation and Reform Bill 2007*, p.75.

39 See paragraph 3.27 above.

private companies limited by guarantee to a maximum of 10 members, thus requiring multi-unit development owners' management companies to be public. The CLRG addressed this problem by proposing that, under the new company law code, the proposed DAC[40] when used as an owners' management company will not have an upper limit on members. The Commission welcomes this proposal.[41] Indeed, it is notable that the CLRG specifically envisaged that the DAC would be used in the context of multi-unit developments, which reinforces the Commission's view that the DAC proposal is suited to this setting.

3.31 The third advantage is that the CLRG envisaged that it should be quite easy to convert an existing company into a DAC, namely, by the members of the company passing an ordinary resolution to this effect.[42]

3.32 These advantages are reinforced by other elements of the CLRG's proposed company law code. Even though a DAC must have an objects clause, the proposed company law code includes protection for creditors. Thus, the directors of a DAC could be held liable for actions of the DAC outside its powers (*ultra vires* acts) in the form of a personal action against the directors. A person dealing with a DAC would not be bound to enquire as to whether a particular activity is within its powers (*intra vires*). For all these reasons, the Commission has concluded that a form of DAC tailored to the multi-unit development context should be in place. The Commission now turns to some of the specific elements applicable to a DAC-type owners' management company.

3.33 The requirement to incorporate a DAC-type owners' management company would also be beneficial from an administrative perspective. In the Consultation Paper, the Commission noted that the Companies Registration Office (CRO) currently has no means of establishing how many companies registered in Ireland are owners' management companies. As a result, the Commission 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 Commission's recommendation in this Report should underpin this view. Once this obligation is in place, the CRO will be able to "tag" such companies in a manner that remains consistent with the EC NACE classification

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40 Company Law Review Group *Report on General Scheme of Companies Consolidation and Reform Bill 2007*, Chapter 7.3.

41 The Commission made a submission to this effect to the CLRG in 2002 and was pleased that the CLRG incorporated this suggestion into the *General Scheme of Companies Consolidation and Reform Bill.*

42 See Chapter 6, Head 37(1) of Part A2 of the General Scheme of the *Companies Consolidation and Reform Bill*, see www.clrg.org .

system for economic activities[43] which is already used by the CRO on the incorporation of a company.[44]

3.34 The Commission recommends that the Companies Registration Office facilitate NACE categorisation for owners' management companies on incorporation.

(4) Incorporation of the owners' management company

3.35 The Commission examines first the issue of when the owners' management company should be incorporated in the Companies Registration Office (CRO). In the Commission's view, it is important that it is incorporated before the completion of the conveyance of any unit within a multi-unit development and that responsibility for incorporation should be a matter for the developer. The Commission notes that, as a matter of current conveyancing practice, the existence of an owners' management company is already a prerequisite in order to satisfy the Law Society's standard requisitions on title for multi-unit developments.[45]

3.36 The Commission has also concluded that, in order to avoid any ambiguity, the owners' management company should be incorporated at an early stage of a development rather than (as happens currently in some cases) just before conveyance of the first unit sold. In this respect, the Commission considers that it is entirely appropriate that, during the early development phase of a multi-unit development, the developer should have responsibility for incorporation of the owners' management company and have effective control over it. As units in the multi-unit development are sold, effective control will begin to pass to the unit owners, who are also members of the owners'

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43 NACE is the European Community Classification System for Economic Activities and is based on the International Standard Industrial Classification of all Economic Activities, ISIC. See Regulation (EC) No.1893/2006 of 20 December 2006, establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains, OJ No. L 393, 30 December 2006, p. 1. The 2006 EC Regulation requires EC Member States to implement the NACE Revision 2 for statistical purposes.

44 The CRO requires those wishing to incorporate a company to use the NACE classification system: see www.cro.ie/en/nace-code-classification.aspx. (LRC CP 42-2006) para 4.63.

45 See: Law Society of Ireland, *Objections and Requisitions on Title*.

management company, and this will culminate in transfer of control when the development has been completed.[46]

3.37 As the Commission is of the clear view that incorporation should occur during the early development stage, the costs (including pre-incorporation costs) of incorporation should be borne by the developer. To avoid any doubt on this matter, the Commission has, therefore, concluded that the owners' management company should not have any incorporation costs imposed on it.

3.38 The Commission recommends that the developer must incorporate an owners' management company prior to any conveyance of a unit in a multi-unit development.

3.39 The Commission recommends that the costs (including pre-incorporation costs) of incorporation of an owners' management company should be borne by the developer.

(5) Definition

3.40 In the Consultation Paper, the Commission discussed the issue of a statutory definition of an owners' management company.[47] The Commission considers that the potential inflexibility of such a definition coupled with the CLRG's proposed DAC model means that a statutory definition is not necessarily required. Furthermore, the Commission considers that the default objects clause in the constitution of a management company, which is discussed in the next section, will provide ample definition. Accordingly, the Commission does not recommend the adoption of a statutory definition of an owners' management company.

3.41 The Commission does not recommend the adoption of a statutory definition of an owners' management company.

(6) Name of the Owners' Management Company

3.42 A different issue arises as to whether the name of an owners' management company should be specified by law. Under existing company

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[46] This is based on an assumption of a multi-unit development involving a single-block development. In the case of a multi-unit development involving multiple blocks, the Commission acknowledges that, in some cases, control may pass as each block is completed while, in others, a single owners' management company may be used as the vehicle for all the blocks, in which case full control may not pass until all blocks are completed. In this respect, the Commission accepts that it is not possible to be prescriptive about the arrangements for multiple-block developments.

[47] (LRC CP 42-2006) paras 4.32-4.34.

law, limited liability companies must include the word 'limited' or 'teoranta' to the end of the company name.[48] The Company Law Review Group has also recommended that any company incorporated under the proposed new company law code should be required to adhere to the appropriate designated ending according to its type.[49] The Commission considers that giving owners' management companies a specific statutory name underlines the reality to unit owners that they comprise the membership and have control over the owners' management company and also have ownership of the title. Given that the majority of management company members do not have a background in company membership, the Commission believes that it is essential that information with regard to the company is accessible and understandable. It also considers that a specific designation constitutes a practical and effective means of achieving this. Therefore, in the interests of bringing clarity to company members and those who deal with them, the Commission recommends a standardised company name for management companies and that, in future, owners' management companies should be referred to as "'X' Owners' Management Company(OMC) DAC".[50]

3.43 The Commission recommends that owners' management companies conduct their business under a statutory standardised name formula of "'X' Owners' Management Company (OMC) DAC".

(7) Objects clause and memorandum and articles of association

3.44 In the Consultation Paper, the Commission provisionally recommended that the stakeholders involved in owners' management companies should prescribe a standard set of provisions to be used in the constitutions of all owners' management companies. The Commission considers that this would be of particular importance during the development stage of a multi-unit development and it confirms in this Report the essential analysis underlying this provisional view. The Commission has already

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48 See Keane, *Company Law in the Republic of Ireland*, paragraph 5.15.

49 (LRC CP 42-2006) Appendix.

50 The Commission is conscious that, while the Government has accepted the recommendations in the *Final Report of the Company Law Review Group* (2007), including the proposal for a DAC (see paragraph 3.25, above), it is likely that a Government *Companies Consolidation Bill* will not be published before 2009 and is therefore unlikely to be enacted before 2010. For that reason, the draft Bill appended by the Commission to this Report refers to the existing companies code, with the assumption that, when the DAC envisaged by the CLRG is in place, the owners' management company (OMC) will be referred to as "OMC DAC."

recommended that, to ensure transparency for unit purchasers, the developer must incorporate an owners' management company at an early stage. To ensure an appropriate balance between the respective obligations and entitlements of the developer and the unit purchasers, the Commission considers it appropriate that, during the development stage, the objects of an owners' management company clearly reflect the time-limited and focused nature of its designated function or activity while units are being sold and the development is being completed. In that respect, the Commission recommends that, during the development stage, the objects of an owners' management company should be stated to be to convey the legal title of a unit in the multi-unit development to each unit purchaser and that it shall not prevent or frustrate any such conveyance, and that it shall ensure, to the extent required during that stage, the management and maintenance of the common areas of the multi-unit development and otherwise to comply with the obligations imposed on the company.

3.45 This is not to say that these objects or any such standardised management company constitution would be frozen for all time. Indeed, under the existing company law code it would be open to amendment on the adoption of a special resolution of the company. This would occur in cases where the objects clause needs to be altered to suit the particular situation of an owners' management company.[51] The Commission considers that this should remain the case in the future, in particular after the development phase has been completed. Thus, at some stage some time after the completion of the development, an owners' management company may wish to sell (say) part of the exterior land comprising the common areas. This would then necessitate an alteration of the objects clause of the memorandum of association to ensure that the action is not outside its powers (*ultra vires*). Another example would be where an owners' management company may wish to let car-parking spaces in the development. The Commission therefore recommends that, to provide for this level of flexibility, the objects clause of an owners' management company after the development stage should be to ensure the management and maintenance of the common areas of the multi-unit development and otherwise to comply with the obligations imposed on the company.

3.46 The Commission recommends that, during the development stage, the objects of an owners' management company shall be to convey the legal title of a unit in the multi-unit development to each unit purchaser and that it shall not prevent or frustrate any such conveyance, and that it shall ensure, to the extent required during that stage, the management and maintenance of the common areas of the multi-unit development and otherwise to comply with the

51 Section 10 of the *Companies Act 1963*.

obligations imposed on the company. The Commission also recommends that, after the development stage, the objects of an owners' management company shall be to ensure the management and maintenance of the common areas of the multi-unit development and otherwise to comply with the obligations imposed on the company.

3.47 The Commission now turns to the contents of the memorandum and articles of association of an owners' management company. The Commission's recommendation on the form of name for an owners' management company, OMC, also complements the Commission's view that a standardised memorandum of association be developed for owners' management companies. Such a memorandum of association would provide for more than simply ease of naming the company. It would also ensure greater consistency and consequent certainty in the operation of owners' management companies. This would, the Commission considers, also lead to familiarity amongst company members and other professionals (including legal practitioners) with the workings of owners' management companies. The Commission has already noted that this is consistent with the existing company law code in that an "investment company" incorporated under the *Companies Act 1990*[52] is subject to activity-specific contents for its memorandum of association, which varies from the standard memorandum provided for in the general company law code.[53] Accordingly, the Commission confirms the view in the Consultation Paper on this matter.

3.48 On this basis, therefore, the Commission recommends that the memorandum of association of an owners' management company should make provision for the following:

- the name of the company, " X Owners' Management Company (OMC) DAC";
- an objects clause for the development stage and the post-development stage on the basis of the recommendations to this effect already made;
- that each unit owner shall be a member of the company;
- that each member of the company holds one vote of equal weight as each other member;[54]
- that the company shall facilitate the conveyance of the legal title of a unit in the multi-unit development to each unit purchaser, and

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52 See Part 13 of the *Companies Act 1990*, as amended.

53 Section 253ff of the 1990 Act, as amended.

54 See paras 3.52-3.62, below.

- that in the event of a conveyance of a unit after its first conveyance, membership of the company transfers to the purchaser of the unit on completion of the conveyance.

3.49 The Commission also recommends that the articles of association of an owners' management company should make provision for the following:

- that the annual general meeting shall be held within every calendar year; and that every member of the company shall have at least 21 days notice of the annual general meeting;[55]
- that the annual general meetings shall take place within objectively reasonable proximity to the location of the multi-unit development and at objectively reasonable times (unless otherwise agreed by a 75% majority vote of the members of the company),
- that a scheme of annual service charges and a scheme for a building investment fund for the multi-unit development is established and maintained,
- the form and content of the annual returns of an owners' management company,[56] and
- the covenants and agreements for the multi-unit development.[57]

3.50 The Commission recommends that the memorandum of association of an owners' management company should make provision for the following:

- *the name of the company, " X Owners' Management Company (OMC) DAC";*
- *an objects clause for the developments stage and the post-development stage on the basis of the recommendations to this effect already made;*
- *that each unit owner shall be a member of the company;*
- *that each member of the company holds one vote of equal weight as each other member;*
- *that the company shall facilitate the conveyance of the legal title of a unit in the multi-unit development to each unit purchaser, and*
- *that in the event of a conveyance of a unit after its first conveyance, membership of the company transfers to the purchaser of the unit on completion of the conveyance.*

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55 Company members should have the option of receiving such notice by email as well as by post where this can be reasonably facilitated.

56 See paras 3.65-3.67 below.

57 See Chapter 4, below.

3.51 The Commission also recommends that the articles of association of an owners' management company should make provision for the following:

- *that the annual general meeting shall be held within every calendar year; and that every member of the company shall have at least 21 days notice of the annual general meeting;*
- *that the annual general meetings shall take place within objectively reasonable proximity to the location of the multi-unit development and at objectively reasonable times (unless otherwise agreed by a 75% majority vote of the members of the company),*
- *that a scheme of annual service charges and a scheme for a building investment fund for the multi-unit development is established and maintained,*
- *the form and content of the annual returns of an owners' management company, and*
- *the covenants and agreements for the multi-unit development.*

(8) Membership and voting rights

3.52 Under existing company law, because the unit owner becomes a member of the owners' management company on finalisation of sale of the unit, the purchaser must immediately be placed on the register of members of the company.[58] The Commission recommends that this should be a condition of the requisitions on title for purchase in a multi-unit development. The Commission also considers that the purchaser's solicitor must explain to the purchaser that he or she is now a member of the owners' management company and also to explain the duties and responsibilities the owner will hold as a member of the owners' management company. This is necessary in order to tackle the current understanding deficit experienced by purchasers of units and to avoid this for the future. A further measure open to solicitors is to provide unit purchasers with a copy of the ODCE's Guidance: the Governance of Apartment Owners' Management Companies.[59]

3.53 The 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 of a unit 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.

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58 Section 116, *Companies Act 1963*.

59 Office of the Director of Corporate Enforcement *Draft ODCE Guidance: The Governance of Apartment Owners' Management Companies*, December 2006.

3.54 In the Consultation Paper, the Commission discussed the voting rights in multi-unit developments and came to the provisional conclusion that there should be one vote per unit and that votes should be accorded to unit owners only.[60]

3.55 As to the voting rights per unit, in principle each unit owner holds an equal share in the ownership of the title to the development, unless they own, for example, two units, in which case they should hold two votes. The Commission acknowledges that in developments where there are units of differing sizes and, accordingly, differing amounts of service charges paid, a one-vote-per-unit approach may appear contentious. However, the Commission believes that the one vote per unit formula is vital in the interests of clarity for the running of the owners' management company and that this would not be possible if weighted voting was permitted. Accordingly, the Commission has concluded that its provisional view that there should be of one vote per unit should be confirmed in this Report.

3.56 The Commission recommends that there should be one vote per unit owner in owners' management companies and a prohibition on weighted voting.

3.57 As to who should have the right to vote in company meetings, the Commission has received a number of submissions. In particular, it was argued that the decisions of the owners' management company may have more day-to-day impact on long-term tenants than, say, investor unit owners who may have little interest in the operation of the owners' management company.

3.58 In the Commission's view, the necessity for unit owner-occupiers to have a vote in the owners' management company is clear. Owner-occupiers have an active financial investment in the owners' management company through the ownership of their unit and their quality of life is also affected by the actions of the company in terms of standards to which the development is run. Similarly, in the case of owner-investors who do not live in the development, the viability of the investment depends, at least in part, on the decisions of the owners' management company. Submissions received by the Commission argue that some owner-investors sometimes do not attend company meetings and that, as a result, the interests of tenant-occupiers may be adversely affected. On this basis, the submissions have argued that, in the case of absent owner-investors, voting rights should instead be vested in the tenant.

3.59 While tenants may have an interest in the working of the owners' management company, the Commission reiterates the view expressed in the Consultation Paper that this should not lead to the conclusion that they have an

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60 *Op cit*, paragraphs 4.85-4.95.

entitlement to vote at owners' management company meetings.[61] In the Commission's view it important to bear in mind that the unit owners have made the fiscal investment in the multi-unit development and they must, therefore, have the primary say over how their owners' management company is run. The interests of the unit owner may not, in this respect, be the same as those of an occupying tenant.

3.60 Nonetheless, the Commission acknowledges that tenants have a legitimate interest in good governance arrangements in the multi-unit development. The Commission has observed earlier that, in the case of local authorities who own property in a given development, it should be mandatory for those authorities to have their interests represented at the meetings of the owners' management company. There is no reason in principle why local authority tenants should not approach the relevant local authority in advance of the meeting setting out the interests they wish to have represented on their behalf. The same approach applies to private tenants in approaching the unit owner, their landlord.

3.61 Indeed, the Commission notes that the existing company law code already provides that a member of any company, including a unit owner in a multi-unit development, may nominate any other person to act as his or her proxy at a company meeting. The Commission considers that this existing discretion should not be seen as compulsory, whether in general or in the specific context of multi-unit developments.

3.62 The Commission recommends that unit owners in multi-unit developments should retain the discretion under the existing company law code to nominate any other person as their proxy at meetings of the owners' management company.

(9) Reports, Accounts and Auditing

3.63 The Commission provisionally recommended in the Consultation Paper that the accounts annexed to the annual return for owners' management companies should take the form of an income and expenditure balance sheet rather than a profit and loss account[62] and we do not see any reason to depart from this. This is because profit and loss accounts are more suited to the financial status of going concerns and they therefore include details such as breakdown of the worth of the company's capital assets. In other words, the level of complexity of the accounts is potentially unnecessary for an owners' management company. On the other hand, an income and expenditure balance sheet would provide a rather more comprehensible and relevant set of accounts

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61 *Op cit,* paragraphs 4.85-4.95

62 (LRC CP 42-2006) paras 4.43-4.44.

for management company members. The Commission accordingly recommends that the accounts annexed to the annual return of an owners' management company be in the form of an income and expenditure balance sheet rather than a profit and loss account

3.64 The Commission recommends that the accounts annexed to the annual return of an owners' management company be in the form of an income and expenditure balance sheet rather than a profit and loss account.

3.65 It has been noted that an obstacle in compiling statistical information about management companies is that the annual returns filed by owners' management companies contained very little useful information about the company. This was so even where such owners' management companies had complied fully with company law requirements. [63] As a result, members of the company have limited access to on-the-record information unless they contact the owners' management company directly. The Companies Acts 1963 to 2005 require certain minimum amounts of detail to be included in the directors' reports.[64] However, it appears that these minimum standards are of limited use to owners' management company membership and other interested parties in the annual operation of a company. This brings the Commission to the conclusion that, while a certain level of detail should be included in the annual return, the current content of annual returns required from management companies needs to be reconsidered. The ODCE, in its Draft Guidance, suggests that changing the way that accounts are presented in the directors' reports, and the amount of detail included in them will result in more useful information being distributed to company members. The ODCE indicated that the directors of an owners' management company "would be well advised not to shy away from delivering a "warts and all" Directors' Report to their members." The ODCE also noted that "a company is free to amend its Articles to adopt additional internal rules over and above those which apply under the Companies Acts."[65]

3.66 The Commission agrees with this advice of the ODCE and accordingly recommends that the proposed standardised Articles of Association should specify an alternative requirement in terms of the information to be included in the annual return.

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63 Dublin City Council *Successful Apartment Living Part 2: Survey of Service Charges, Design, Management and Owners' Attitudes in 193 Private Apartment Schemes in Dublin City*, June 2007, p.3.

64 Section 158, *Companies Act 1963*.

65 *Op cit*, paras 14.8-14.9.

3.67 The Commission recommends that the articles of association for an owners' management company should specify an alternative requirement in terms of the information to be included in the directors' report in the annual return for owners' management companies.

3.68 In the Consultation Paper, the Commission also provisionally recommended that directors' reports should include a list of the assets of the owners' management company, its insurance details and whether the development is fully compliant with fire and safety legislation.[66] The Commission confirms that recommendation in this Report. The Commission considers that it is particularly important from the perspective of countering the understanding deficit and also in terms of transparency generally. This information is also important to potential purchasers of units in the development.

3.69 The Commission recommends that the annual directors' report for an owners' management company should include a list of its assets, its insurance details, and whether the development is fully compliant with fire and safety legislation.

3.70 To sum up the Commission's approach in this area, the form and content of the annual returns of an owners' management company should, the Commission recommends, therefore include the following:

- the accounts of the company in the form of a statement of income and expenditure,
- a statement of the annual service charge or charges,
- a statement of the current level of the building investment fund and the annual contribution to it,
- a statement of any planned expenditure for the following calendar year,
- a statement of the assets of the company,
- a statement of the content of and extent of cover provided by any insurance policy held by the company, and
- the fire safety certificate issued under the Building Control Acts 1990 and 2007 for the multi-unit development.

3.71 The Commission recommends that the form and content of the annual returns of an owners' management company should include the following:

- *the accounts of the company in the form of a statement of income and expenditure,*
- *a statement of the annual service charge or charges,*
- *a statement of the current level of the building investment fund and the annual contribution to it,*

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66 *Op cit,* para 4.49.

- *a statement of any planned expenditure for the following calendar year,*
- *a statement of the assets of the company,*
- *a statement of the content of and extent of cover provided by any insurance policy held by the company, and*
- *the fire safety certificate issued under the Building Control Acts 1990 and 2007 for the multi-unit development.*

3.72 The Commission wishes to draw attention to three further points in this area. First, having different requirements for the types of accounts to be submitted for companies with a certain function is already relatively common. For example, both credit institutions and insurance undertakings have to meet different reporting requirements by comparison with other companies.[67] Secondly, the accounting requirements and formats of the *Companies (Amendment) Act 1986* were enacted to implement the provisions of the 1978 Companies Directive, 78/660/EEC. It has been brought to the Commission's attention that under the 1978 Directive, where the owners' management company is trading for profit, it will have to continue submitting a profit and loss account as part of the annual return. The Commission believes that where this is the case, the company in question should be obliged to submit both a profit and loss account and an income and expenditure balance sheet on the basis of the principles already outlined.

3.73 Third, it is useful to observe the system of enforcement of compliance with the Companies Acts in the United Kingdom in the context of annual returns. There, a computer-generated form of the previous year's details are sent out to the company's registered address and the company can then make any necessary amendments to it before sending it back.[68] This system alerts companies that their annual return is due shortly and provides a straightforward means of administration and company law compliance for the directors. In the Commission's view, the introduction of a similar company law administration scheme would make running an owners' management company easier and this in turn would mean that directorship in the company would be more attractive and would also improve the rate of corporate compliance. This is a matter for the CRO to consider in the future.

(10) Sanctions for not complying with company law: strike-off

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67 See *European Communities (Credit Institutions: Accounts) Regulations 1992, S.I. 294 of 1992*, and *European Communities Insurance Undertakings: Accounts) Regulations 1996*, *S.I. 23 of 1996* respectively.

68 See Thorne J and Prentice D (editors), *Butterworths Company Law Guide* (4th ed) Butterworth's London, 2002; paras14.30-14.32.

3.74 Sanctions imposed under company law in the context of owners' management companies can be divided into two broad categories. The first category concerns the potential for an owners' management company to be struck off the Register of Companies for failing to comply with the administrative requirements of the Companies Acts, including the filing of annual returns already discussed. The second category deals with the direct and personal liability of directors who fail to fulfil their responsibilities to the company and the members (unit owners). This section will consider strike-off and the next section will deal with the liability of directors.

3.75 In the Consultation Paper,[69] the Commission noted that there had been a number of owners' management companies struck off the Register of Companies, the most common reason being for not filing annual returns under the Companies Acts.[70] It appears that these failures may, at least in some instances, be associated with developments where the developer has not completed all aspects of the project and, in addition, has allowed the owners' management company to "wither away." In other cases, non-filing may have arisen because some directors of owners' management companies have no prior experience of sitting on a board of directors. In the Commission's view, therefore, strike-off is another aspect of two difficulties with multi-unit developments: the unsatisfactory governance arrangements that occurred (and remain) in some multi-unit developments and the understanding deficit of some unit owners.

3.76 The Commission must underline, however, that in general terms strike-off is an entirely suitable sanction for non-compliant companies. Nonetheless, it presents quite unsatisfactory aspects that are particular to the multi-unit development setting. First, in many instances, the effect of strike-off may only become apparent when a particular unit owner wishes to sell their individual apartment. A potential purchaser will be advised not to purchase if the owners' management company has been struck off the Register of Companies. In this setting, strike-off imposes a disproportionate (unintended) penalty on an individual unit owner who may be required personally to pay for the restoration to the Companies Register when he or she wishes to sell a single apartment. A second effect of strike off is that the property involved in the owners' management company's assets is vested in the State under the *State Property Act 1954*. While this may, at first sight, appear to be a windfall for the State, it is in reality a burden on it. This also means that the owners' management company no longer has control over the title originally vested in it

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69 *Op cit*, Chapter 4.

70 *Companies Act 1963*, s.125.

or over any other property owned by it. Thus, at the individual and State level, strike-off as a sanction presents unwanted (and unintended) consequences.

3.77 In the Consultation Paper, the Commission provisionally suggested that, in response to these disproportionate and unwanted effects of strike-off, a moratorium on strike off of owners' management companies should be introduced as a temporary measure. In preparing this Report, the Commission concluded that this is not an appropriate step to take. While it is clear that the current effects of strike-off as described have the potential for imposing disproportionate burdens on individual unit owners and an unwelcome burden on the State, these reflect the overhang from the unfamiliarity with the consequences of ownership of multi-unit developments. It would not be appropriate, therefore to solve this problem by creating an exception to the existing company law code as this might, in itself, bring that well-established code into some (albeit limited) disrepute. From a practical perspective also, the Commission also accepts that it would be extremely difficult for the CRO to select out owners' management companies from the large list of companies to be struck off in a specific period. This is because, under the current law, it is difficult to track such companies from the full list in the Register of Companies. Indeed, it might be said that this reinforces the Commission's earlier recommendation that owners' management companies be registered with a specific identifiable name.[71] In the future, it would at least be possible for unit owners in an owners' management company to check if the company was in the OMC index in the CRO's provisional list of companies to be struck off.

3.78 The Commission accepts that, while restoration may impose a significant burden on a unit owner, this may become a less likely scenario in the future. The Commission is especially conscious that, even since the Consultation Paper was published in late 2006, a much greater level of awareness of the consequences of multi-unit ownership has taken hold, both in terms of the response of the State and of individual consumers.[72] There have also been some situations in which litigation, which imposes an even greater burden than restoration, has allowed for some remedial measures after strike-off but which has also created awareness of the need for preventative measures based on more proactive engagement.

3.79 For example, in *Re Heidelstone Co Ltd*[73] both the developer company which sold the apartments in a completed multi-unit development and the owners' management company had been struck off the Register of

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71 See paragraph 3.50, above.

72 See, generally, the Introduction to this Report.

73 [2006] IEHC 408, High Court, 24 November 2006.

Companies before the common areas had been transferred to the owners' management company. Of course, the developer company and/or the original owners' management company held the title to the common areas in trust for the unit owners and had, from a legal perspective, simply failed to actually transfer title. Rather than have the two companies restored to the Register of Companies, the unit owners had incorporated a new owners' management company and applied to the High Court for an order under section 26 of the *Trustee Act 1893* to transfer (vest) the interest of the developer company and/or the old owners' management company in the new owners' management company. In the specific circumstances of this case, Laffoy J agreed to this course of action and accepted that it was "probably more cost effective… and certainly a more clear cut solution to the title problem" to have incorporated a new owners' management company rather than to have the original management company restored to the Register of Companies. She accepted that an application could be brought under the company law code to have the developer company restored to the Register of Companies at any time up to 4 years after her decision. Even if that occurred, Laffoy J pointed out that the restored company's interest in the development would be subject to the trusts which had been clearly established in the case. On that basis, the vesting order under section 26 of the *Trustee Act 1893* did not affect any other entitlements or interests. It is notable that the State had also indicated to the Court that it had no real entitlement or interest in the development arising from the strike off of the companies.[74] The *Heidelstone* case indicates that suitable remedial measures may be available in some instances even where strike off occurs. The Commission accepts that this may involve significant expense for unit owners. Where unit owners act collectively, as in the *Heidelstone* case, the costs involved can be shared and the benefits of securing the interest in a valuable property are considerable.

3.80 In the *Heidelstone* case, Laffoy J commented that the problem dealt with in the case was, she suspected, "a problem which will be encountered with increasing frequency in relation to the sale of apartments and townhouses in developments carried out during the last four decades." The Commission accepts that this may, unfortunately, be correct. For that reason, the Commission considers that there are good reasons to provide for a clear structure for resolving problems that might arise, whether those in the *Heidelstone* case or other matters. The Commission discusses these remedial solutions elsewhere in this Report.[75]

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74 *State Property Act 1954*, s.28.

75 See Chapter 7, below.

3.81 *The Commission recommends that, to deal with the consequences of non-compliance with the company law code, such as strike off of owners' management companies, a clear structure of remedial solutions should be in place, which are described below.*[76]

3.82 The Commission has also explored alternative avenues for ensuring compliance by owners' management companies with company law requirements, and has concluded that more appropriate sanctions for non-compliance could also be developed. The Commission considers that a sanction which would counter non-compliance in a less severe way than strike-off would be to prohibit the sale of a unit in a development where the owners' management company of the development have failed to file annual returns in the preceding 2 years. The Commission considers that this is a suitable sanction for owners' management companies as it compels them to ensure that the company has been actively engaged in the financial management of the multi-unit development. While the Commission considers that this is a suitably proportionate sanction, it does not recommend that the strike-off sanction should not apply to owners' management companies. The Commission has concluded that the general company law code should, with the modifications set out in this Report apply to owners' management companies. The Commission anticipates that the totality of the reforms recommended in this Report – combined with the increasing awareness of the obligations of unit owners which is already emerging – will be sufficient to encourage good practice in corporate governance and that strike-off will, therefore, occur in the future only in those cases where extremely poor corporate governance has occurred.

3.83 The Commission recommends that units can not be sold in any development where the owners' management company has failed to file annual returns in the preceding 24 months.

(11) Sanctions for not complying with company law: director's liability

3.84 The second issue that arises in the context of non-compliance with the company law code is the personal liability of directors. As with strike-off, the Commission acknowledges that there has been an understanding deficit in this area too. The fiduciary duties of skill and care required by law of directors are crucial to the effective operation of any company, including owners' management companies. The duty of care normally expected of company directors is a subjective standard of 'reasonable expectation,' which is dependant on the director's actual knowledge and experience.[77] Added to this is

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[76] See paragraphs 7.28-7.36 below.

[77] *Re City Equitable Fire Insurance Ltd* [1925] Ch 407

that the person should take reasonable steps to place themselves in a position to bring an informed and independent judgment to bear on decision-making. [78] Directors may also face liability personally where they perform their duties negligently.[79]

3.85 It is clear that one reason why owners' management companies fail to comply with company law is because some directors do not fulfil their fiduciary duties as directors with due diligence. Some individuals may not have appreciated the legal effect of holding a directorship of an owners' management company, that it is seen as a title rather than a role with responsibilities.

3.86 One approach to failure by a director to fulfil his or her duties is to enforce the company law code to its full extent. Thus, the Office of the Director of Corporate Enforcement is empowered, in certain situations, to seek a disqualification order against a person who is a director of a company at the time a process of strike-off is commenced where the process ends with the company actually being struck off.[80] This has a profound effect where the director in question also holds directorship of other companies in a professional capacity.[81] It is thus obvious that the threat of ODCE action may have some effect insofar as it may affect directors who are also directors of other companies.

3.87 Alternatively and or additionally, where a director is negligent in performing his or her duties, a company has the option of enforcing financial liability against him or her.[82] This was underlined in the ODCE's Draft Guidance:

> "We think it at least conceivable that the directors and secretary who allowed the company to become struck-off could be required to reimburse a company for costs, expenses and damages which arose as a result of the strike-off. Section 383(3) of the *Companies Act 1963* provides that it is the duty of each director and secretary of a

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78 *AWA Ltd.. v. Daniels* (1992) 7 ASCR 759 at 864-865.

79 See Courtney, paragraph 10.064 where he observes that directors may incur tortious liability for negligent behaviour where not under indemnity of the type envisaged by the *Companies Act 1963*, Sch 1, Table A, Part I, model reg 138.

80 *Companies Act 1990*, s. 160(3A).

81 This may often particularly be the case where developers are still in control of the management company.

82 See Keane, paragraphs 27.127-27.129.

company to ensure that the requirements of the Companies Acts are complied with by the company."[83]

3.88 There is no doubt, therefore, that the full rigours of the law can apply where the directors of an owners' management company are in serious breach of the company law code. In this respect, the Commission welcomes the ODCE's intention to publish final Guidance on the Governance of Apartment Owners' Management Companies in the near future. It is envisaged that particular emphasis will be placed on the duties and potential liability of management company directors. Indeed, the Commission is aware that the ODCE's Draft Guidance and other general information campaigns have already raised awareness among members of owners' management companies and their directors of the importance of complying with the company law code.

3.89 The Commission emphasises, as in its discussion of strike-off, that the existing company law code should be allowed, in general, to apply in the context of multi-unit developments. Nonetheless, it anticipates that increasing knowledge of the implications of directorship will lead to less need in the future to consider the use of the sanctions discussed in this section of the Report. The Commission now turns to discuss the steps that have been taken to show that this expectation might be realised.

(12) Training for Officers of Management Companies

3.90 It is clear from the Commission's consultations leading to this Report 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. This is evident from the problems already discussed, including owners' management companies being struck off the Register of Companies.

3.91 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.[84] The Commission also received submissions to this effect. The benefits of this training would include heightened awareness of and compliance with company law obligations. It would also tackle the 'understanding deficit' surrounding management company membership.

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83 *Op cit*, paragraph 21.11.

84 *Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006, paragraph 6.3.6.

3.92 The Commission acknowledges that such a scheme would involve some expense for unit owners. In addition, it may be that a requirement to spend time on such training might be a disincentive for some people who would consider being a director. The Commission considers, however, that it is more likely that the benefits will far outweigh any costs and that those wishing to be directors will also see the benefits. The Commission is aware in this respect that the National Consumer Agency and FÁS, the national training agency, have worked on the development of training modules for prospective unit owners in multi-unit developments. The NCA is also examining the possibility of making these modules available online, which would doubtless facilitate ease of use for those taking them.

3.93 In addition to these training modules, the Commission considers that the publications on multi-unit developments from the NCA[85] and the Office of the Director of Corporate Enforcement[86] are excellent 'training manuals' and sources of information generally for owners' management company members.

D Minimum governance requirements for all multi-unit developments

3.94 In this Part, the Commission discusses which elements of the recommendations concerning company law should constitute minimum legal obligations applicable to all multi-unit developments, whether incorporated or unincorporated.

3.95 The Commission is conscious that, while it has expressed a clear preference for the Designated Activity Company (DAC) for larger multi-unit developments of 5 units or more, this will provide a clear corporate structure for future multi-developments only. In this respect, the Commission is aware that it would be difficult, both from a constitutional and practical perspective, to recommend compulsory conversion of existing multi-unit developments to the DAC structure. The Commission is also conscious that it has recommended that, for smaller developments of less than 5 units, a non-corporate structure – co-ownership – is appropriate. The Commission acknowledges that, even for the larger multi-unit developments, it is likely that, for the foreseeable future, some will continue to operate under the existing structure of a company limited

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85 See for example: *Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006.

86 Office of the Director of Corporate Enforcement *Draft ODCE Guidance: The Governance of Apartment Owners' Management Companies*, December 2006.

by guarantee while new developments will be structured around the proposed DAC (assuming that recommendation is implemented by the Oireachtas which is unlikely to happen before 2010).[87] It can, at the least, be said that for those larger developments clear external corporate regulatory systems will continue to apply to them. In the case of the smaller developments governed by co-ownership (which involves private contractual arrangements) there is currently no applicable external regulatory regime.

3.96 The Commission is conscious that this might be said to involve the potential for a confused regulatory picture in the future, in which there might be a temptation either to use the least onerous regulatory regime or to imagine that there could be complete "contracting out" of the appropriate legal requirements which the Commission recommends in this and other Chapters of this Report. The Commission's recommendations involve the implication that those engaged in the ownership of multi-unit developments should have a certain degree of flexibility in the precise form of the legal structure which they choose, particularly where the development involves less than 5 units. Equally, however, the Commission is firmly of the view that all multi-unit developments should be subject to certain core or minimum legal obligations in order to avoid the kind of difficulties which the Commission has already identified.[88]

3.97 The Commission has already applied the concept of imposing core legal obligations to its general reform and modernisation of land law[89] and it considers that a similar approach is appropriate in the case of multi-unit developments. These core legal obligations would apply as the minimum requirements applicable to all multi-unit developments, regardless of the precise legal structure actually used. The key core obligations envisaged by the Commission concern the essential governance arrangements which should apply to all multi-unit developments[90] and the essential elements concerning covenants and the associated use of such developments.[91] In this way, the developments will conform to a set of basic universal requirements while at the same time allowing those involved to incorporate additional requirements which would be appropriate to the particular development. The Commission is also

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87 See paragraph 3.26, above.

88 See the Introduction paragraphs 6-9, above.

89 See the Commission's *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005) and its *Report on the Law of Landlord and Tenant* (LRC 85-2007).

90 See paragraphs 3.99- 3.108, below.

91 See paragraphs 4.65-4.83 below.

mindful that the core obligations should not cut across other regulatory requirements under, for example, the company law code.

3.98 In applying the core legal obligations to all multi-unit developments, the Commission is aware that, for example, once an owners' management company is incorporated the legislative requirements of the company law code attach automatically. On the other hand, parties involved in co-ownership arrangements do not, in general, establish a separate legal entity which would be subject to a specific statutory code. The Commission is aware, however, that some recent statutory codes have included both incorporated and unincorporated entities within their scope. By way of example, the *Competition Act 2002*[92] and the *Safety, Health and Welfare at Work Act 2005*[93] define the term "undertaking" to include incorporated and unincorporated persons for the purposes of applying the provisions of those Acts. Thus, even though an unincorporated body such as a co-ownership arrangement does not, in general, exist as a separate legal entity, the scope of the term "undertaking" in the 2002 and 2005 Acts indicates that such a body is – for the purpose of those Acts - a recognised entity in law. The Commission considers that these existing statutory models (and the Commission's own approach in land-related reform proposals) indicate that certain core obligations and duties should apply to all multi-unit developments, whether incorporated or unincorporated. Accordingly, the Commission recommends that certain core legal obligations, in particular those concerning governance arrangements and covenants set out in this Report,[94] should be applicable to all multi-unit developments, whether incorporated or unincorporated.

3.99 The Commission recommends that certain minimum legal obligations, in particular those concerning governance arrangements and covenants set out in this Report, should be applicable to all multi-unit developments, whether incorporated or unincorporated.

3.100 The Commission now turns to the specific minimum legal obligations which should apply to all multi-unit developments in terms of governance arrangements.[95] The Commission has already set out in Part C its detailed recommendations for owners' management companies for future large developments of 5 units or more. This Part therefore deals with the extent to which those recommendations should apply to: (a) existing multi-unit

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92 See section 2 of the 2002 Act.

93 See section 2 of the 2005 Act.

94 See paragraphs 3.107-3.108 and Chapter 4, below.

95 The minimum requirements concerning covenants, service charges and building investments funds (sinking funds) are discussed in Chapters 4 and 6, below.

developments and (b) all multi-unit developments of 4 units or less, whether already in existence or developed in the future.

3.101 The Commission has already indicated that it would not be possible, from a constitutional perspective, to limit the property rights of those involved in multi-unit developments to the extent of imposing all the recommendations proposed in Part C to existing developments. In particular, the Commission considers that, where the memorandum and articles of association of existing owners' management companies have created weighted voting arrangements which greatly favour a developer – which is not in itself prohibited under the current company law code – it is not appropriate to interfere retrospectively with these arrangements. This is so even though they do not appear, in the Commission's view, to conform to good governance standards and as a result the Commission has recommended that future owners' management companies must operate on a "one unit one vote" basis.

3.102 Apart from this particular aspect of existing multi-unit developments, the Commission considers that the essential thrust of its other recommendations for governance set out in Part C should be applied both to existing multi-unit developments operating under a corporate structure and to smaller developments, notably the developments of less than 5 units which are generally operated under co-ownership arrangements. The Commission considers that, for those operating under the existing company law code or the statutory code for co-operatives, these other recommendations will not impose any burden, other than requiring minimum standards, such as that an annual meeting occur at a time and location that is convenient for unit owners, rather than a time and location which is, as at present, sometimes chosen (perhaps deliberately) because it is unsuited to unit owners. The Commission acknowledges that, in setting out these minimum requirements, it must state them in a manner that applies to all multi-unit "undertakings", whether incorporated or unincorporated. The Commission now turns to set out these minimum requirements, based on the key elements set out in Part C.

3.103 On the basis of the general approach set out above, therefore, the Commission has concluded that the following obligations should apply to (a) existing multi-unit developments and (b) all multi-unit developments of 4 units or less, whether already in existence or developed in the future.

3.104 In terms of general governance, the Commission recommends that each multi-unit developments referred to in this Part must: (a) hold an annual general meeting every calendar year and provide each unit owner at least 21 days notice of the annual general meeting; (b) hold the annual general meetings within objectively reasonable proximity to the location of the multi-unit development and at objectively reasonable times (unless otherwise agreed by a majority of the members); (c) establish and maintain a scheme of annual

service charges, (d) maintain the financial and other information specified below; (e) develop covenants and agreements for the multi-unit development, which must comply with the Commission's requirements on that issue;[96] and (f) comply with the requirement to maintain a scheme for a building investment fund (sinking fund) within 5 years of the coming into force of the Commission's recommendation on that issue.[97]

3.105 In terms of financial and other information, the Commission recommends that each multi-unit development referred to in this Part must maintain and communicate to each unit owner the following: (a) the accounts of the multi-unit development in the form of an annual statement of income and expenditure; (b) a statement of the annual service charge or charges; (c) a statement of the current level of the building investment fund and the annual contribution to it (subject to the 5 year transitional period referred to above); (d) a statement of any planned expenditure within the following calendar year; (e) a statement of the assets of the multi-unit development; (f) a statement of the content of and extent of cover provided by any insurance policy held by the multi-unit development; and (g) the fire safety certificate issued under the *Building Control Acts* 1990 and 2007 for the multi-unit development.

3.106 The Commission emphasises that these minimum requirements, or the other minimum requirements concerning covenants or a building investment fund (sinking fund) set out elsewhere in this Report, should not be seen as preventing a company which has been incorporated for the purposes of a multi-unit development pursuant to the *Companies Acts 1963 to 2006* or an industrial and provident society which has been incorporated for the purposes of a multi-unit development pursuant to the *Industrial and Provident Societies Act 1893* from incorporating as (that is, converting to) an owners' management company to which all the recommendations in Part C would apply. The purpose of the minimum requirements set out in this Part are simply to ensure that these minimum requirements can be clearly seen as the essential requirements with which all multi-unit developments must comply.

3.107 The Commission recommends that an existing multi-unit development and any multi-unit development of 4 units or less, whether already in existence or developed in the future, must comply with the following minimum requirements. In terms of general governance, the Commission recommends that each such multi-unit development must: (a) hold an annual general meeting every calendar year and provide each unit owner at least 21 days notice of the annual general meeting; (b) hold the annual general meetings within objectively reasonable proximity to the location of the multi-unit development and at

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96 See Chapter 4, below.

97 See Chapter 5, below.

objectively reasonable times (unless otherwise agreed by a majority of the members); (c) establish and maintain a scheme of annual service charges, (d) maintain the financial and other information specified below; (e) develop covenants and agreements for the multi-unit development, which must comply with the Commission's requirements on that issue; and (f) comply with the requirement to maintain a scheme for a building investment fund (sinking fund) within 5 years of the coming into force of the Commission's recommendation on that issue. In terms of financial and other information, each such multi-unit development must maintain and communicate to each unit owner the following: (a) the accounts of the multi-unit development in the form of an annual statement of income and expenditure; (b) a statement of the annual service charge or charges; (c) a statement of the current level of the building investment fund and the annual contribution to it (subject to the 5 year transitional period referred to above); (d) a statement of any planned expenditure within the following calendar year; (e) a statement of the assets of the multi-unit development; (f) a statement of the content of and extent of cover provided by any insurance policy held by the multi-unit development; and (g) the fire safety certificate issued under the Building Control Acts 1990 and 2007 for the multi-unit development.

3.108 The Commission recommends that these minimum requirements, or the other minimum requirements concerning covenants or a building investment fund (sinking fund) set out elsewhere in this Report, should not be interpreted as preventing a company which has been incorporated for the purposes of a multi-unit development pursuant to the Companies Acts 1963 to 2006 or an industrial and provident society which has been incorporated for the purposes of a multi-unit development pursuant to the Industrial and Provident Societies Act 1893 from incorporating as an owners' management company, OMC.

CHAPTER 4 TITLE AND CONVEYANCING

A Introduction

4.01 In this Chapter, the Commission sets out its recommendations on matters of title and conveyancing associated with multi-unit developments. This follows from the Commission's earlier recommendations in Chapter 2 that an owners' management company must be incorporated by the developer and that the title to the development vested in the company must be registered with the Land Registry. In Part B the Commission notes that its proposals apply to residential multi-unit developments only. The Commission also discusses in Part B the different title options which are available and will continue to be available in multi-unit developments. In Part C, the Commission turns to some of the aspects of the registration of the legal title to a multi-unit development in the Land Registry, which forms part of the Property Registration Authority. In Part D, the Commission discusses the detailed effects of the transfer of the legal title to the development, with the beneficial interest remaining with the developer. In particular, the Commission discusses the retention by the owners' management company of a portion of the unit purchase price until completion of the development and the consequent tax implications of this. In Part E, the Commission sets out the core obligations that should apply in the covenants that must be entered into between all the parties to a conveyance in a multi-unit development.

B Title issues

4.02 As the Commission has already noted,[1] many multi-unit developments are exclusively residential, comprising apartment complexes only. A significant number are "mixed purpose", involving a combination of apartments, commercial units (especially ground floor retail outlets) and duplexes or town houses. Other multi-unit developments are exclusively commercial, such as office blocks, shopping centres and industrial estates. These exclusively commercial developments involve quite different ownership

[1] See the Introduction, paragraph 2, above.

arrangements, notably relatively short leases and an owner/landlord who takes an active management role, whether directly or indirectly (through a property managing agent).[2] In that respect, the problems already discussed which apply to residential multi-unit developments do not arise in the exclusively commercial multi-unit developments. As a result, the Commission's recommendations in this Report are confined to developments which involve residential units. The Commission also considers that appropriate adaptations should be made to take account of the non-residential elements in a multi-unit development.[3]

4.03 The Commission recommends that its proposals for multi-unit developments apply to developments involving residential apartment complexes, with appropriate adaptation for "mixed use" developments that comprise residential and commercial units.

(1) Title Options

4.04 The Commission now turns to the variety of title arrangements that are available to deal with the different ownership structures that will be in place depending on the size of the development. As discussed in Chapter 3, the Commission has recommended that an owners' management company (OMC) operating under the company law code is the appropriate structure for larger multi-unit developments; those involving 5 units or more. The Commission has also recommended that co-ownership arrangements are appropriate for smaller multi-unit developments; those involving less than 5 units. These recommendations are reinforced by the title issues that arise in multi-unit developments. The Commission is aware that co-ownership arrangements for larger multi-unit developments would involve considerable complexity from the perspective of registration of title because it would be necessary to alter the details of ownership of title of the common areas each time a unit is sold.[4]

4.05 The Commission envisages that each title arrangement will provide a core set of legal provisions governing the following matters: (i) the estate or interest acquired by each unit owner in the unit; (ii) each unit owner's rights over other parts of the building or larger development (in particular common areas shared with other unit owners) and any persons or body owning them or responsible for their management; (iii) various rights and obligations attaching

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2 See (LRC CP 42-2006) 10.05.

3 Paragraph 4.08 below.

4 In addition, the practical difficulties in larger developments associated with tasks such as arranging the collection of service charge and building investment fund contributions as well as collective decision-making are lessened by having an organised and well-regulated system of governance in the form of a corporate entity.

to unit owners and any other person or body owning or responsible for managing other parts of the development.[5] In each case, therefore, the different title arrangements would contain a grant of basic rights such as easements of support and for use of common areas and facilities servicing the development. They would also contain various obligations in respect of payment of service charges and building investment fund contributions and use of individual units. The precise nature of such rights and obligations will obviously vary from development to development.[6] As regards small developments, involving less than 5 units, the Commission makes specific comments below on the detailed title arrangements.[7]

4.06 In terms of current title options, the Commission pointed out in the Consultation Paper[8] that the current legal position is that positive freehold covenants are not mutually enforceable between successive unit owners. This has led to existing multi-unit developments granting a leasehold interest to unit owners – typically, this is a very long lease of hundreds of years. The difficulty with the non-enforceability of freehold covenants will be remedied by the enactment of the *Land and Conveyancing Law Reform Bill 2006*, which provides for the enforceability of freehold covenants between successive owners, including those in a multi-unit development.[9]

4.07 The Commission notes that when the 2006 Bill is enacted it will therefore be possible to vest the freehold title to each unit in the unit owner, with mutual covenants dealing with arrangements for common areas.[10] The Commission does not envisage that this will become, or should be, the only title option for future developments.[11] The Commission considers that an element of flexibility should be retained for developers and their professional advisers, in line with standard conveyancing practice. The leasehold arrangement will, and

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5 See discussion on recommended covenants, paragraphs 4.65-4.78 below.

6 See further: paragraphs 4.65-4.78 below.

7 See paragraphs 4.09- 4.18 below.

8 Paragraph 8.07.

9 The 2006 Bill was passed by Seanad Éireann in November 2006 and is, at the time of writing (June 2008), at Committee Stage in Dáil Éireann. See further paragraph 4.67 below.

10 The freehold interest in the common areas would continue be owned by the owners' management company, of which each unit owner will be a member.

11 There is still the possibility that a developer may require a long leasehold title rather than a freehold one.

should, continue for those who wish to use that well-established title arrangement.[12]

4.08 Assuming the enactment of the *Land and Conveyancing Law Reform Bill 2006* therefore, the Commission can identify 8 possible title arrangements:

> Model A Large (5+ units) Freehold Residential Development with an owners' management company,
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> Model B Large (5+ units) Leasehold Residential Development with an owners' management company,
>
> Model C Large (5+ units) Freehold Mixed Development with an owners' management company,
>
> Model D Large (5+ units) Leasehold Mixed Development with an owners' management company,
>
> Model E Small (2-4 units) Freehold Residential Development with an owners' management company,
>
> Model F Small (2-4 units) Freehold Residential Development with a co-ownership scheme,
>
> Model G Small (2-4 units) Leasehold Residential Development with a co-ownership scheme, and
>
> Model H Small (2-4 units) Leasehold Residential Development with a co-ownership scheme.

(2) Small Developments of less than 5 units

4.09 The Commission now turns to discuss in detail why, from a title and conveyancing point of view, developments of 4 units or less should not be required to establish an owners' management company recommended in Chapter 3 for larger multi-unit developments of 5 units or more.

4.10 First, in the Consultation Paper, the Commission noted that the establishment of a highly structured and formalised management organisation may not be appropriate for smaller developments.[13] Smaller developments typically consist of townhouses which have been converted into two, three or four unit developments. There tends to be a lesser degree of interdependence

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12 See Consultation Paper paragraphs 10.08 – 10.09.

13 (LRC CP 42-2006) paragraph 8.14.

between unit owners in these developments as the common areas extend generally to a common entranceway and staircase. As a result, it is clear that it is unnecessary for an owners' management company to be established to undertake such a relatively limited ownership, maintenance and management role.

4.11 The Commission makes recommendations later in this Chapter with regard to requiring all parties to a conveyance of a unit in a multi-unit development to agree formally to and abide by certain core and immutable obligations.[14] In respect of small developments, the Commission acknowledges that the level of interdependence in developments of 4 units or less tends to be relatively low. Notwithstanding this, however, the Commission considers that insertion of the core and irreducible covenants in conveyancing documentation for units in smaller developments is desirable in the interests of clarity and certainty. The Commission accordingly recommends that, as in the case of larger developments, all parties to the conveyance of a unit in a small development should be subject to core and irreducible obligations.

4.12 In many instances, the governance of the common areas is covered by extensive provisions inserted in a co-ownership arrangement for the common areas agreed by the owners of the units in such a development.[15] The Commission provisionally recommended in the Consultation Paper that the Conveyancing Committee of the Law Society of Ireland should consider urgently issuing precedents for the legal documentation suitable for small multi-unit developments.[16] These precedents would include core obligations attributable to all parties to a conveyance of a unit in a multi-unit development. The Commission is satisfied that this recommendation has general support and, accordingly, reiterates it in this Report.

4.13 The Commission recommends that parties involved in the conveyance of a unit in a small development should be subject to core and irreducible obligations.[17]

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14 See paragraphs 4.65-4.78 below.

15 The co-ownership typically contemplated in smaller developments would involve each unit owner holding title individually their particular unit and holding the freehold of the development overall as a tenancy in common. See further LRC (CP 42-2006), paragraphs 10.26-10.32.

16 The Commission is aware that the commercial publishers have also played a valuable role in the publication of relevant precedents: see in particular *Laffoy's Conveyancing Precedents.*

17 See paragraphs 4.65-4.83 below.

4.14 The Commission recommends that the Conveyancing Committee of the Law Society of Ireland should consider urgently issuing precedents for the legal documentation suitable for small multi-unit developments. These precedents will include core obligations attributable to all parties to a conveyance of a unit in a multi-unit development.

4.15 Second, the Commission notes that its definition of a small development, one of less than 5 units, is consistent with the view of the Department of Environment, Heritage and Local Government. In its 2008 Circular on Taking in Charge,[18] it was noted that "management companies are normally necessary for multi-unit structures of four dwellings or more". It must be noted that, in this context, the Department identified circumstances under which it may be appropriate to require owners' management companies to be established, even where a development has 4 units or less.[19] Such circumstances would include a situation where a development has a large amount of external areas and a high level of amenities which need to be managed. Practicality dictates in that type of development that a formalised management structure should be in place, regardless of the number of units in the development. Notwithstanding this, it seems fair to assume that in general terms, the Department is satisfied that the level of interdependence and common areas commensurate with smaller developments renders it unnecessary for an owners' management company to be incorporated.

4.16 Third, it is established that co-ownership agreements are a useful means of managing and maintaining smaller developments.[20] This has deeper practical implications for registration of title. Registration of title is a relatively straightforward matter where the transfer of the freehold of the common parts is to a management company - a single entity. However where a co-ownership model is being used for ownership of the common parts, as is the case for many small developments, the system of ownership involves the registration of title jointly to a number of people as tenants in common. The folio to the property which is registered in the Land Registry needs to be amended to reflect the

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18 Department of Environment, Heritage and Local Government, Annex to Circular Letter PD 1/08, *Taking in Charge of Residential Developments/Management Arrangements*: Framework for a Comprehensive Taking in Charge Policy, February 2008, paragraph 5.2.

19 Such circumstances include situations where owners' management companies are necessary to maintain external private shared facilities that are exclusive to the development; and developments where there exists a facility which is inappropriate for a local authority to take in charge *eg* highly landscaped open spaces or allocated car park spaces. *Ibid*, paragraph 5.3.

20 See paragraph 4.18 below.

names of the additional joint owners each time there is a transfer of a unit. For small developments, this is relatively uncomplicated as, under the Commission's proposals, there can be no more than 4 units in a co-ownership agreement for residential multi-unit developments.

4.17 For larger developments, which can have hundreds of units, using a similar arrangement would be more complex as the room for error is much greater.[21] As a result, a co-ownership arrangement from a registration of title perspective is at best unwieldy and at worst potentially unworkable for larger developments. Where an error occurs in the registration of units in a co-owned development, the results can have extreme adverse title implications - for example, the development may end up with more registered sub-leases than there are units or the number of unit owners may not correlate to the number of co-owners for the common areas. As a result, it is important that the potential difficulties associated with registration of title for multi-unit developments, where developments have many units, is minimised. Accordingly, the Commission has concluded that, from a title point of view, 'small developments' should be defined as developments which consist of no more than 4 dwellings; and that the co-ownership model of ownership of the common parts of the development should be confined to small developments only.

4.18 Finally, while the Commission does not recommend that an owners' management company must be in place for small developments, this does not in any way prevent a developer (or at a later stage the unit owners) from incorporating an owners' management company for the development if they so choose. Furthermore, the Commission notes that multi-unit developments with 4 units or less may be required to incorporate a management company where it is required to do so by a planning authority under the circumstances outlined in the 2008 Circular on Taking in Charge from the Department of the Environment, Heritage and Local Government.

C Registration

4.19 The *Registration of Deeds and Title Act 2006* established the Property Registration Authority (PRA) in order to bring the management and control of the Land Registry and the Registry of Deeds under a single authority.[22] Another key function of the PRA is to promote and extend the registration of ownership of land.[23] Since 2006, the PRA has already

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21 The process of registration for large developments is outlined at paragraphs 4.19-4.32 below.

22 S.10 (1)(a), *Registration of Deeds and Title Act 2006*.

23 S.10 (1)(b), *Registration of Deeds and Title Act 2006*.

significantly advanced the registration of title in Ireland.[24] Among its key objectives for the coming years is to: "advance the completion of the Irish Land Register by extending Compulsory First Registration (CFR) while arresting the growth of unregistered titles."[25] In 2008, compulsory registration was significantly extended.[26]

(1) Compulsory registration

4.20 The Commission has stated in Chapters 2 and 3 that it considers it appropriate that the developer should have responsibility for the incorporation of the owners' management company during the early development stage and also transfer the legal title to the company at this early stage. The Commission has concluded that, consistently with the PRA's strategy of extending registration of title and to assist the simplification and clarification of multi-unit development arrangements, the legal title of all new large multi-unit developments should be compulsorily registrable. In substance, this requirement would involve the developer registering the legal title to the development with the Land Registry, if it is not already registered. The Commission has concluded that the appropriate sanction would be that no conveyance of any unit in the development could be completed until the title to the development had been registered.[27] The Commission accordingly recommends that the completion of a conveyance for the sale of any unit in a multi-unit development shall be void unless the statutory requirement to register the development has been satisfied.

4.21 The Commission also considers that the Land Registry Rules should provide that any application to register the title of a multi-unit development should be accompanied by a copy of the certificate of incorporation of an

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24 See: J. O'Sullivan, *eRegistration and eConveyancing in Ireland: The Story so Far*, delivered at the Property Registration Authority's 'Registering the World' Conference, October 2007.

25 Property Registration Authority of Ireland *Strategic Plan 2008-2010*, p.9. See also, s.24 of the *Registration of Title Act 1964*, as amended by s.53 of the *Registration of Deeds and Title Act 2006*.

26 The *Registration of Title Act 1964 (Compulsory Registration of Ownership) (Clare, Kilkenny, Louth, Sligo, Wexford and Wicklow) Order 2008* (S.I. No. 81 of 2008) provides (with effect from 10 October 2008) for the compulsory registration of ownership of land in the 6 counties referred to in the title of the Order. This had the effect of doubling the total number of 'compulsory registration' counties to 12.

27 Registration can of course take place on a block by block basis provided that the common areas for a specific block are identified. See paragraphs 4.61-4.65 below.

owners' management company, thus ensuring that the correct owners' management company model has been adopted for the development in question. The effect is that it would be impossible to register the title to a development with the Land Registry unless an owners' management company has been incorporated. Where an application for registration has been lodged in the Land Registry, it will be possible for a developer to market a multi-unit development but it will not be possible to complete the conveyance of the first unit in the development until the legal title to the development has been registered in the name of the owners' management company. It will therefore be necessary to furnish evidence of registration of title at the time of completion of any conveyance.

4.22 The Commission recommends that legislation should provide that the completion of a conveyance for the sale of any unit in a multi-unit development shall be void unless the requirement to register the development with the Land Registry has been completed.

(2) Detailed aspects of compulsory registration

4.23 The Commission considers that the active involvement of the PRA in the conveyancing of multi-unit developments has a further benefit. The Land Registry will be obliged to reject the registration of a development unless the application for registration is for the transfer of title to an owners' management company or the application is by an owners' management company. Thus, to summarise, in order to register the title of a multi-unit development, the developer must a) vest the legal title of the development in the owners' management company, b) register the title of the development under the name of the owners' management company, and c) prove that the company is the correct company model. This may only be achieved through the provision by the developer of the certificate of incorporation from the Companies Registration Office which will be proof that the company is an owners' management company.

4.24 Registration of title of a development at the Land Registry involves the opening (creation) of a registry file for that development known as a folio, which comprises the following:

- "Part 1 provides the details of the property. These include description, location, land registry plan reference and also any rights that would attach to the property. The area of the property is usually shown.
- Part 2 contains details of the registered owners and the quality of the title and would also include any cautions or inhibitions registered against the property.

- Part 3 contains details of all burdens[28] registered against the property. These would include mortgages, rights of way, fishing and sporting rights etc. Most folios have a filed plan map[29] of the property attached"[30]

4.25 When the title to a development is registered with the Land Registry, the folio will comprise one of three broad categories of registration. The first category, and the most common system in current use, is that the freehold of the development as a whole, along with the leasehold interests of the individual units, will be registered. The leasehold interests in this case will be registered as a burden on the freehold folio of the owners' management company and contain details of the various leasehold covenants.

4.26 A second major option, which may become more prevalent with the enactment of the *Land and Conveyancing Law Reform Bill 2006*, is that the freehold of each unit will be registered, and the freehold of the common areas will be registered. The freehold of each unit will be registered in the name of the unit owner while the freehold of the common areas will be registered in the name of the owners' management company. Also included in the folio for the development under this category will be the mutual covenants which will be agreed between the purchasers of units and the owners' management company.[31]

4.27 The third category for registration of title would be for a long lease to the development to be registered in the name of the owners' management company, with sub-leases being registered in the names of the individual unit owners. As with the first category mentioned, the sub leases will be registered as a burden on the head lease.

4.28 In order to give effect to the recommendation for compulsory registration of multi-unit developments, the Commission recommends that section 24(1) of the *Registration of Title Act 1964*. (as amended by section 52 of the *Registration of Deeds and Title Act 2006*), which deals with compulsory registration, should be amended by the insertion of a new category of classes of property which the Minister for Justice, Equality and Law Reform may by Order

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28 This includes, for example, any long leases registered as a burden on the freehold title of the property.

29 The map is especially important for clarity in the context of phased developments- see paragraphs 4.61-4.65 below.

30 See the Property Registration Authority website:

http://www.prai.ie/eng/frequently_asked_questions/land_registry_faqs.html

31 For more on covenants, see Part E of this Chapter.

require to have compulsorily registered. The new category would be "any multi-unit development which comprises 5 or more residential units."

4.29 As regards small developments, the Commission considers that, while a compulsion to register need not be imposed immediately for all new such developments, this might be done at a later stage as part of the general programme for extending compulsory registration of title. If and when that is done, the same principles as outlined above should apply.

4.30 The Commission considers that the PRA will require some resources to expedite the procedure for dealing with multi-unit developments to include appropriate digital mapping,[32] which will assist in the identification of the individual units on registration of each development. Given the importance of multi-unit developments in meeting future housing needs, the Commission considers that any extra resources necessary to develop special procedures should be regarded as a priority. This has been the approach adopted in many other jurisdictions,[33] but the Commission acknowledges that this is largely a policy matter for Government to consider. It may be that a special unit should be created by the PRA to deal with multi-unit developments, but that is also a policy matter for the PRA. Moreover, the amount of clarity which this will bring to the ownership of units and the development overall which will result from compulsory registration will, in the Commission's view, have a significant impact on reducing the frequency of problems with multi-unit developments. In particular, requiring the developer to register the development in the name of the owners' management company before the conveyance of any unit can be concluded will make evident the consequences of failure to so transfer.

4.31 The Commission also considers that the PRA might consider the registration of existing developments (where they are not already registered). Again this might be tied in with the programme for extension of compulsory registration of title. If a special procedure for multi-unit developments was implemented, it may be that existing developments could be targeted in the future. This could also be tied in with the "rescue" provisions mentioned later.[34] The Commission can now summarise its recommendations under this heading.

4.32 The Commission recommends that –

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32 The Commission is aware of the considerable progress made by the PRA with regard to its digital mapping project.

33 See Consultation Paper Chapter 9. Respondents to the Paper have also drawn attention to this point.

34 See Chapter 7 below

1. The title to all new large developments should be compulsory registrable (if not already registered). The Commission therefore recommends that section 24(1) of the Registration of Title Act 1964 (as amended by section 53 of the Registration of Deeds and Title Act 2006) be further amended to insert the following new paragraph: "(d) any multi-unit development which comprises 5 or more residential units.";

2. Land Registry Rules should provide that any application to register the title of a multi-unit development should not be acted on by the Property Registration Authority (PRA) unless accompanied by a certificate of incorporation of an owners' management company (OMC);

3. The completion of a conveyance for the sale of any unit in such a multi-unit development shall be void unless the requirements to register the entire development have been completed.

D Conveyancing issues

4.33 Having considered title issues, it is now necessary to examine some conveyancing implications of the reforms recommended on transfer and registration of title in this Chapter. Key reforms recommended by the Commission aimed at resolving the transfer issues which are likely to arise for future developments are also discussed.

(1) Transfer of legal title only to owners' management company

4.34 It is important to note that the Commission, in recommending the transfer of title to the owners' management company at the early stage of development, has confined this to recommending that at this stage, it is the legal title only that is transferred. In effect, this means that the beneficial interest remains with the developer. The Commission has acknowledged (Chapter 3) that it is entirely appropriate that the developer retains control over the owners' management company during the development stage as he has the obligation to construct the development in accordance with planning permission and must be allowed the flexibility to do so. It must also be recognised that the developer is the owner of the development until sales are completed. The effect of the arrangement will be that the owners' management company, in return for the transfer of the registered legal title to it, will hold the title to the multi-unit development in trust for the developer and its nominee until completion. This will consist of two elements. The common areas will be held in trust for the developer or its nominee (who will ultimately be the owners' management company) until completion of the development and the units in the development will be held in trust for the developer or its nominee. The nominee in this instance will be the unit purchasers.

(2) Owners' management company joins in conveyance with developer

4.35 In addition to the transfer of the legal ownership of the development to the owners' management company, it will be necessary during the development stage to have an agreement between the owners' management company and the developer to set out the mutual rights and obligations of each party during this period. [35] Since the developer is the owner of the beneficial interest in the development, the contracts for the sale of units will be between the developer and the potential unit purchaser.[36] On the completion of the sale of a unit and in order to vest both legal and beneficial title in the unit purchaser, the deed of conveyance will include three parties: the developer (to convey its beneficial interest), the owner's management company (to convey the legal interest) and the purchaser in whom the title to the unit will vest and who at that stage will automatically become a member of the owners' management company. The deed of conveyance will include covenants that bind all parties relevant to the development stage and post development stage. For example, the developer will continue to have obligations to both the purchaser and the owners' management company to complete and snag the development and also to ensure that the requirements of the company law code are complied with while the developer retains control over the board of directors during the development stage. The Commission recommends that the owners' management company join with the developer in the conveyance of each unit in the development from which mutual obligations will flow.

4.36 The Commission recommends that the owners' management company join with the developer in the conveyance of each unit in the development from which mutual obligations will flow.

4.37 The Commission's recommendations that there should be a prohibition on votes in the owners' management company weighted in favour of the developer, that each unit purchaser will automatically become a member of the OMC at the time of purchase, and that there will be one vote per unit; are to prevent any misuse of the company during the development stage.[37] The one vote per unit rule is especially pertinent where a development is completed because the developer will no longer have votes in the owners' management

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35 See paragraphs 4.65-4.83 below.

36 The Commission is aware that a separate issue arises where some developers have engaged in a process of 'resting in contract.' The Commission considers that its proposals in this Report do not affect this issue. This matter was recently debated in Dáil Éireann: *Dáil Debates*, April 9, 2008, vol. 651.

37 See Chapter 3 above.

company. Even where developers choose to retain units in the development for their own use, they will continue to have votes only in their capacity as unit owners.

4.38 As each unit is sold, the beneficial interest the developer continues to hold is incrementally reduced until, once the sale of the final unit is completed, the final vote the developer held in the owners' management company is handed over to the purchaser.[38] Registering the legal interest in the development and transferring title to the owners' management company from the outset of the development means that completion of the development is related solely to the structural completion which rightly is separated from conveyancing and title issues.

4.39 Furthermore, the Commission's recommendations will avoid complications which currently arise where there is no clear indication as to when the transfer to the owners' management company will take place.

(3) Retention by the owners' management company of a portion of the purchase price

4.40 Where developers transfer the legal title of the development before the development is properly snagged, it is arguably more difficult to compel them, from a purely practical viewpoint, to deal with any unresolved snagging problems,[39] notwithstanding the availability of both private and planning law enforcement options.[40] In realistic terms, enforcement through either private or planning law can be both lengthy and highly inconvenient. Indeed, serious delays may also take place in the completion of the development which in a strictly technical sense is acceptable under the planning laws as planning conditions typically allow up to five years from the permission being granted to complete the development.[41] As noted elsewhere, this can have a seriously deleterious effect on the quality of living environment of unit owners in the development. The Commission has therefore examined ways in which there would be a more immediate inducement for a developer to complete a

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38 This will be subject to the restrictions on the owners' management company during the development stage, as set out in Chapter 3 above.

39 The National Consumer Agency recommend that a snag list should be commissioned by the developer from an independent architect or engineer and that the developer would be obliged to deal with any matters arising to the satisfaction of the management company within three months of completion of the last unit within the development; see *ibid*.

40 See Chapter 1: Sustainability of Multi-Unit Developments.

41 S.40, *Planning and Development Act 2000*.

development in a timely manner. The Commission has concluded that it is appropriate that 5% of the purchase monies of each unit be paid by the purchaser to the owners' management company on the instructions of the developer to be held in trust for the developer pending certification of completion and snagging.[42] The rationale behind the Commission's recommendation that 5% of the purchase monies be held in trust by the owners' management company pending completion will now be analysed.

4.41 What the Commission envisages is that on finalisation of a contract for sale the unit owner will pay 95% of the purchase price of the unit to the developer, who until then is the owner of the beneficial interest of each unit. The remaining 5% of the purchase price will be held in trust by the owners' management company for the developer, pending satisfactory completion by the developer. Once snagging and certificated completion of the development[43] has been satisfactorily achieved, the owners' management company is obliged to transfer the 5% balance to the developer. Given that the developer is the person legally entitled to the funds, the developer will also be entitled to any interest earned on the 5% while it is being held in trust by the owners' management company. Of course, some developments will have been fully completed prior to the sale of the final units in the development, in which case the purchaser will pay 100% directly to the developer at the closing of the sale.

4.42 One consequence of this recommendation is that so long as the development is not properly completed or snagged there is a delay to the developer in receiving the balance of purchase price. Coupled with the Commission's recommendations[44] that the owners' management company is in place prior to the completion of any sale of the units in a development, this system has significant implications. The most important is that the developer would have a clear inducement to complete the development in a timely manner to a standard which fulfils the expectations of the certifying architect. The development must be completed to the owners' management company's satisfaction, that is, it must be properly certified and snagged. Thus, the Commission's proposal clearly underpins good practice with regard to timetabling, building and snagging standards in multi-unit development construction; which in turn, the Commission believes, will inspire further confidence amongst consumers.

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42 See paragraphs 2.27 - 2.39 above

43 See the Commission's recommendation on a statutory definition of 'completion' in paragraphs 2.29-2.35 above.

44 See paragraph 2.20 above.

4.43 Aside from the obvious benefits of having a development completed punctually and to a high standard, the Commission considers that its proposals will be of further benefit to unit owners as it will counter the knowledge deficit. The completion of the development and the handover of the 5% balance of the purchase money will signal for unit owners an important milestone in the life cycle of the development. It will emphasise to them that they will have control over the owners' management company and, by extension, over ownership interests in the common areas and structure of the development.

4.44 Furthermore, the Commission considers that this recommendation will be straightforward in terms of practical implementation. The operation of the proposal is broadly analogous to the system used by local authorities and developers with development bonds. As a result, developers have experience with the operation of this type of scheme.

4.45 A final and key benefit is that under the recommended system, where the developer has not properly snagged the development on completion, there is a fund available which can be used for the purpose of completion.

4.46 The Commission recommends that pending completion of a multi-unit development or a phase of it, 5% of the purchase price of each unit will be held in an interest-bearing account in the name of the owners' management company on trust for the developer.

(4) Taxation

4.47 The Commission is concerned that its recommendation will be tax neutral and will not introduce any additional charge to taxation. It is therefore necessary to look in particular at both the charge to Value-Added Tax and stamp duty and comment on how these charges will apply under the new proposals the Commission has recommended. To do so, it is important to summarise the key elements in this Chapter, in particular the sequence of events:

- The transfer of legal title to the owners' management company (OMC), which will be compulsorily registrable, before the completion of the conveyance of a unit to a unit purchaser. This transfer will be for a zero consideration - the developer will remain the beneficial owner of the multi-unit development.
- The contractual arrangement between the developer and the Owner's Management Company will provide that the OMC will hold the multi-unit development in trust for the developer and its nominee. The OMC will be obliged to facilitate the completion and sale of units in the multi-unit development by the developer and not to frustrate or prevent the conveyance of any unit in the development.

- A contract for the sale of a unit in a multi-unit development will be between developer and unit purchaser. The developer will agree to procure the transfer of the legal title from the OMC.
- The parties to the conveyance will be the developer (who will convey the beneficial interest), the OMC (who will convey the legal interest) and the unit purchaser. The consideration is payable by the unit purchaser to the developer, 95% will paid immediately to the developer on completion of the sale and the balance of 5% will be paid by the purchaser to the OMC on the instructions of the developer to be held in trust for the developer pending completion of the development.[45]

4.48 The Commission now turns to examine the taxation implication of these proposed arrangements.

(a) Value Added Tax:

4.49 Under the *Value-Added Tax Act 1972* a charge to Value-Added Tax (VAT) arises in relation to property which must have been developed[46] and must be supplied for consideration in the course of business (the 'supply' of 'immovable goods').[47] The building of a multi-unit development would therefore be a circumstance where the land is developed or altered in such a manner as to give rise to a charge to VAT. Until 2008, supply in relation to goods was defined as 'the transfer of ownership of the goods by agreement.'[48] Section 85 of the *Finance Act 2008*[49] amends this definition and provides that "in the case of immovable goods, 'supply' shall be regarded as including -

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45 If completion of the development has already occurred before the sale of the unit then 100% of purchase price is payable immediately to the developer.

46 S1(1) of the 1972 Act defines 'development' and 'developed' as follows: "Development in relation to any land means - (a) the construction, demolition, extension, alteration or reconstruction of any building on the land, or (b) the carrying out of any engineering or other operation in, on, over, or under the land to adapt it for materially altered use, and developed shall be constructed accordingly."

47 Sections 2, 3 and 4 *Value-Added Tax Act 1972*.

48 Section 3(1) *VAT Act 1972*.

49 With effect from 1 July 2008 inserts a new Section 1C to the *VAT Act 1972*.

"the transfer in substance[50] of the right to dispose of immovable goods as owner or the transfer in substance of the right to dispose of immovable goods, and

transactions where the holder of an estate or interest in immovable goods enters into a contract or agreement with another person in relation to the creation, establishment, alteration, surrender, relinquishment or termination of rights in respect of immovable goods… are payable pursuant to or associated with the contract or agreement."

4.50 As this indicates, the supply of property for VAT purposes involves the transfer of ownership or the transfer in substance of the right to dispose of the property whether as owner or otherwise. The transfer of the right to dispose of property is usually regarded as taking place when the contract for the sale of the property is completed. [51] The *Value Added Tax Act 1972* did not state when a disposal takes place.[52] However, 'completion' in respect of property, with effect from 1 July 2008[53] means that the development of the property has reached the state, apart from only such finishing or fitting work that would normally be carried out by or on behalf of the person who will use them, where the property can be used for the purposes for which it was designed. It is also useful to note that an essential requirement for completion is the connection of all utility services required for the purposes for which the property was designed.

4.51 The person who is accountable for and liable to pay the tax charged, the 'taxable person' is defined in the 1972 Act as a person who engages in the 'supply' of the immovable goods in the course or furtherance of business, in other words the developer.

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50 The term 'in substance' is taken to mean not only the freehold of a property but also other interests in the property that amount to effective ownership. For instance, many apartment owners do not hold the freehold of the property. For property law reasons they generally have a very long interest in the property, for instance a 99 or 999 year lease. *VAT on Property Guide,* Revenue Commissioners April 2008.

51 *VAT on Property Guide* Revenue Commissioners, April 2008.

52 In practice this has been treated as the time of the completion of the contract. Even where a deposit is paid in advance a VAT charge did not arise on the payment of the deposit as an advance payment as it is held by a solicitor as stakeholder and not released until the completion of the sale.

53 Section 4B (1) of the *VAT Act 1972* as inserted by Section 88 of the *Finance Act 2008* which will come into effect from 1 July 2008.

4.52 Under the existing arrangements, the contract for sale and transfer of title is directly between developer[54] and unit purchaser and a charge for VAT arises on the 'supply' of the immovable property which has been developed by the developer as a multi-unit development. Under the Commission's recommendation and also taking account of the amendments to the *VAT Act 1972* which take effect from 1 July 2008 there will be no change in the manner in which the charge to VAT will arise. The reason for this is that no consideration will be payable for the transfer of the legal title to the OMC (the beneficial ownership will remain with the developer), the OMC will not be the 'supplier' of the immovable property as this will continue to be the developer who will contract with the unit purchaser for the sale of a unit in the development and the obligation to develop the property remains firmly with the developer.

4.53 For the avoidance of doubt the Commission recommends that the *Value Added Tax Act 1972* should clearly state that the supply would be regarded for VAT purposes as being made by the developer (or the related landowner) and not by the OMC.

4.54 *The Commission recommends that the developer shall be the taxable person within the meaning of section 3 of the Value Added Tax Act 1972 as amended by section 85 of the Finance Act 2008*.

4.55 As already stated; the 'supply' of property is usually regarded as taking place when the contract for the sale of the property is completed. Currently when the contract is completed the full consideration which is payable under the contract is payable to the developer[55]and this is the taxable consideration for the supply of the property for the purposes of the *VAT Act*. The Commission's recommendation provides that on the completion of the contract 95% of the consideration is payable immediately to the developer and the balance of 5% is held in trust by the OMC for the developer until completion of the multi-unit development as distinct from the completion of the individual unit. However, at the time of completion of each unit the developer becomes entitled to the full amount of the consideration payable by the unit purchaser under the contract of sale albeit that the developer is not in actual receipt of the 5% balance until a later date.[56] The Commission therefore recommends that

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54 It is recognised that the building work may be carried out by a building company as distinct from the actual owner of the property which may mean an apportionment of the VAT charge to each separately.

55 This includes the handing over of deposit which has been held by solicitor on the signing of the contract.

56 In many cases the completion of the multi-unit development will have taken place before the sale of individual units in the development and therefore the developer

the taxable consideration for VAT purposes would be 100% chargeable at the time of completion. This would include the 5% to be paid to the OMC in trust, with no portion of the tax charge being deferred as a result of the arrangement.[57]

4.56 The Commission recommends that the Value Added Tax Act 1972 be amended to provide that the taxable consideration for VAT purposes will be for the entire consideration paid by the purchaser of a unit at the time of the conveyance of the unit.

(b) Stamp Duty

4.57 Under the stamp duty code, a liability to stamp duty can arise in relation to the transfer of real property under and by reference to the head of charge in Schedule 1 of the *Stamp Duties Consolidation Act 1999* entitled "*Conveyance or Transfer on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance."* A liability under this head of charge is payable on the instrument of transfer - the conveyance - where the underlying transaction is by way of sale of by way of voluntary disposition.[58]

4.58 Section 30(5) of the 1999 Act provides that a charge to stamp duty shall not arise in relation to certain conveyances or transfers which include a conveyance or transfer under which no beneficial interest passes in the property conveyed or transferred.[59] The Commission's recommendation, for the purposes of better governance of the multi-unit development sector, is that before the completion of any conveyance there is a transfer of the legal interest by the developer to the OMC. This conveyance or transfer will come within the terms of section 30(5) of the 1999 Act and be exempt from stamp duty.

4.59 Therefore, assuming the implementation of the Commission's recommendation, stamp duty will continue to be payable (as currently) by the

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will take receipt of 100% of the consideration at the date of the completion of the contract.

57 If the supply was by different parties, for example if there was a separate building agreement and conveyance, the VAT consideration would still include 100% of the consideration payable and be apportioned accordingly between such parties.

58 Section 30(1) of the 1999 Act provides that "any conveyance or transfer operating as a voluntary disposition *inter vivos* shall be chargeable with the stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale."

59 See section 30(5) (c) of the *Stamp Duties Consolidated Act 1999.*

purchaser on the transfer or conveyance of the unit in the multi-unit development where the parties to the conveyance will still be the developer[60] and the purchaser. but will (if the Commission's recommendation is implemented) also include the OMC to convey the legal interest. The Commission however recommends that, for the avoidance of doubt, section 30(5) of the *Stamp Duties Consolidation Act* be amended to include a further paragraph (f) where the legal title only to a multi-unit development is transferred to an owners' management company.

4.60 The Commission recommends that section 30(5) of the Stamp Duties Consolidation Act 1999 be amended to include a further paragraph (f) where the legal title only to a multi-unit development is transferred to an Owner's Management Company.

(5) Phased Developments

4.61 The term 'phased developments' refers to large developments which are completed a block at a time. This incremental approach to the completion of the development has important implications for the amount of time needed to complete the development and, in turn, for the point at which the unit owners take full control of the owners' management company. As noted elsewhere in this Report, the Commission considers it imperative that developers complete the development and cede any outstanding control in the owners' management company at the earliest possible opportunity.[61] Accordingly, it is necessary to make some observations aimed especially at phased developments.

4.62 First, the Commission takes the view where a development is going to be completed on a block-by-block basis it should be open to the developer to decide whether to incorporate a separate owners' management company for each block or, alternatively, to incorporate a single company for the entire development. If a single company is incorporated, it should be open to the developer to incorporate an owners' management company initially and then transfer the legal title for each block purchased on a phased basis to the owners' management company as the units within each separate block become available for sale.

4.63 Second, it is extremely important that all parties to the conveyance of a unit in a phased development are completely clear as to of what the transfer of the title comprises. For this reason, the Commission recommends that the

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60 The Commission is aware of a current practice whereby a developer acquires land on which a multi-unit development is to be built but does not take an actual conveyance of the interest in these lands; the lands 'rest in contract' until the interest is transferred to the purchaser.

61 See Chapter 2 above.

title of each phase is clearly mapped out and the boundaries are delineated. On registration with the Land Registry, a map clearly showing the boundaries of each phase must be provided for inclusion in the folio of the development. Details of the boundaries of each phase should be available for perusal by potential buyers. It is important that there is certainty in this matter so that the owners' management company is aware of the areas exactly for which they hold ownership and responsibility. Obvious problems could arise where there is ambiguity as to whether an owners' management company has control over a given area. For example, there may be the opportunity for some developers to argue that a particular piece of undeveloped land on the site actually continues to belong to them rather than to the owners' management company. Another example of potential resulting problems would be where an owners' management company chose not to take responsibility for a particular part of the development as it believes that it does not come within its remit, leading to that area falling into disrepair. Accordingly, certainty is vital when establishing, particularly in the case of phased developments, the boundaries of the property which is being transferred to the owners' management company.

4.64 Third, for phased developments it will often be necessary to include easements to allow for access from the entrance of the overall development to other parts of the development, even though the legal interest in the entire development may not be held by a single owners' management company. The terms of these easements should be clearly established, explained to all owners' management company members, and registered in the Land Registry on registration of the title of the development. The Commission recognises that easements may be extinguished if adjoining or adjacent blocks come under the control of an owners' management company where the developer opts to have a single 'expanding' company for a multi-block phased development after the development stage.

E Covenants

4.65 Having considered title issues; it is now necessary to examine the duties and responsibilities the parties to the conveyance of a unit in a multi-unit development should owe to one another.

4.66 As a result of the level of interdependent living necessarily involved in multi-unit developments, parties to the purchase of an apartment unit owe a range of duties to each other. These rights and obligations are arguably more numerous and complex in this jurisdiction in comparison with others because of the Irish system of apartment ownership. Accordingly, it is appropriate that a mechanism be in place to ensure that the mutual rights and obligations are

respected.[62] The parties to the purchase of the long lease (or alternatively, assuming the enactment of the *Land and Conveyancing Law Reform Bill 2006*, the freehold of the unit) are typically the unit purchaser, the developer and the owners' management company.[63] Under existing good practice, the owners' management company is included as a party to the conveyance to enable it to "join in its commitment to both the developer and the purchaser to undertake the various obligations of managing the building and to take over the common areas when called upon to do so by the developer."[64]

4.67 Covenants are undertakings or promises laid out in a deed. Traditionally, positive covenants were not enforceable against successors in freehold title. Hence the reason that the Irish apartment-ownership system has evolved into a process involving the purchase of a long lease for the unit along with a share in the freehold of the development, which has worked very satisfactorily. Covenants are enforceable against successors in leasehold title. As already mentioned, the *Land and Conveyancing Law Reform Bill 2006* allows for positive covenants to be enforced against successors in freehold title.[65] This change in the law will mean that the choice to purchase freehold title of an apartment unit will be available in addition to the current option of a leasehold interest.[66]

4.68 Covenants may be positive or negative in nature. Positive covenants compel the lessee (unit owners and/or occupants of the units) to do something (*eg* pay service charges), while negative covenants require lessees to refrain from doing something (*eg* any act that would impact negatively upon the other unit owners' right to quiet enjoyment of their property).

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62 *Ie*, under the existing system, the purchaser buys a long lease of the unit and a share in the freehold of the development. The Commission recommends in this Report, of course, that there should also be the option to purchase the freehold of a unit; and this would automatically come with mutually enforceable covenants for unit owners.

63 See: *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings,* Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006, p. 28.

64 The requirement of the existence of a management company is already laid out in the Law Society's *Objections and Requisitions on Title*. See further paragraph 3.36 above.

65 See paragraph 4.06 above.

66 At paragraph 4.08 above.

4.69 The duties owed by all three parties can vary from conveyancing agreement to conveyancing agreement. As a result, the obligations between the parties can be inconsistent as the conveyancing documentation laying out the requirements expected of developers and unit buyers can vary from development to development and even from unit to unit. These also vary depending on whether the development is in the course of being developed or at post-development stage. A key source of conflict in multi-unit developments arises due to the consequent lack of certainty in the scope of the rights and responsibilities held by each party.

4.70 As a result, the Commission considers that there are some basic undertakings which all parties to the sale of a unit in a multi-unit development should be obliged to make as a matter of statutory requirements. The inclusion of these core and irreducible obligations will not preclude the right of the parties to insert further covenants at their discretion. However, the Commission recommends the mandatory inclusion of certain covenants in every conveyancing agreement for the purchase of a unit in a multi-unit development. The Commission recommends that there can be no contracting out of these core covenants. The Commission recommends that these core and irreducible obligations should reflect the stage of a multi-unit development. 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.[67] 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.[68]

4.71 The Commission has concluded that these obligations should be clearly set out and standardised in every conveyancing agreement for the sale of a unit in a multi-unit development. This would have a number of benefits. It would generate uniformity of practice with regard to developers' obligations for developments. This uniformity of practice would in turn allow unit owners to have greater certainty concerning their rights and obligations. Provision for these core and irreducible obligations will create a clear and formalised reference point for the rights and responsibilities expected of the parties involved in the sale of a unit.

4.72 Core and immutable obligations expected of every developer would involve:

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67 See further, paragraphs 4.72 and 4.73 below.

68 For more on house rules, see paragraph 4.76 below.

At development stage:

- 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;

At post-development stage:

- 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.

4.73 Core and immutable duties expected of the owners' management company would involve:

- 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,[69]
- an obligation to enforce the covenants in the unit owners' lease agreements.

The owners' management company will, in any event, have an obligation to fulfil these duties under the terms of the objects clause in the memorandum of

[69] It is also an obligation of the directors of the owners' management company to ensure that this covenant is abided by.

association for owners' management companies recommended by the Commission in Chapter 3.

4.74 As noted above, the covenants agreed by unit owners will be mutually enforceable against all other unit owners, and by the owners' management company. Core and immutable obligations expected of the unit purchaser which will form part of the covenants involve:

- 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.

4.75 Enumerating the responsibilities of the parties to the conveyance in this manner is beneficial in a number of ways. It focuses the minds of the parties on their duties in each of their capacities. It provides each party with a very clear list of what is expected of them in writing. It also, where any of the parties fail in their listed duties, provides a formal legal instrument for the parties to refer to in enforcing the covenants. It also similarly provides this function to the courts where legal action is brought against parties failing to meet their responsibilities. Requiring all of the covenants to be agreed by the parties to the conveyance of a unit in all developments of 5 or more units injects a further element of uniformity into the workings of multi-unit developments in this jurisdiction.[70] This is likely to have the further effect of engendering wider understanding amongst all groups in the sector including unit owners,

[70] 'Small developments' of less than 5 units will similarly have standardised conveyancing agreements and core and irreducible obligations will have to be subscribed to by the parties. The content of the standardised documentation will be slightly different however, as the Commission does not propose that it should be mandatory that an owners' management company be incorporated for the ownership and management of small developments.

developers, legal practitioners and various other stakeholders as to how multi-unit developments operate.

4.76 A necessary consequence of the introduction of core and immutable covenants for apartment owners is the development of standardised house rules. Breach of these house rules should be regarded as breach of the covenant which deals with an undertaking by the unit owner (and any lessees of the unit owner) to abide by all house rules. It is recommended that these house rules be annexed to the conveyancing agreement.[71]

4.77 Finally, it is necessary to note that the list recommended by the Commission is non-exhaustive. The Commission recommends that the Conveyancing Committee of the Law Society, along with other key stakeholders in the multi-unit development sector, may have input into devising a standard set of covenants to be included in the conveyance of every unit. Unit purchasers should be required to sign a certificate declaring that they understand the covenants and the implications of the covenants. Furthermore, the list of covenants eventually compiled as standard documentation should not preclude the ability of the parties to insert their own covenants on a development by development basis should they so wish. Any additional covenants inserted must be fair to all parties involved. Thus, the Commission recommends that there should be a suite of irreducible and core covenants to be signed that can not be opted out of by law by parties to the conveyance.

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:

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[71] It should be noted however that with regard to house rules, these are not necessarily core and immutable and may be subject to change if the owners' management company so decides.

- *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,*[72]
- *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;*

[72] It is also an obligation of the directors of the owners' management company to ensure that this covenant is abided by.

- *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.*

4.83 The Commission also recommends that the Conveyancing Committee of the Law Society along with other key stakeholders in the multi-unit development sector may have input into devising a standard set of covenants to be included in the conveyance of every unit in a multi-unit development.

CHAPTER 5 MANAGING AGENTS

A Introduction

5.01 In this Chapter the Commission discusses the role of property managing agents in multi-unit developments. In the Consultation Paper, the Commission examined a number of difficulties associated with lack of clarity over the role of managing agents, particularly with regard to the extent of their administrative role in owners' management companies. In this Chapter, the Commission takes stock of developments since the Consultation Paper was published and welcomes in particular the imminent publication of a *Property Services Regulatory Authority Bill 2008* which will provide for the regulation and licensing of managing agents by the National Property Services Regulatory Authority (NPSRA). In Part B, the Commission sets out some of the difficulties associated with the current arrangements concerning the role of property managing agents. In Part C, the Commission outlines the functions and powers proposed for the NPSRA which will counter the current deficiencies arising from lack of regulation in the sector. In Part D, the Commission analyses specific problems which need to be addressed concerning managing agents.

B Overview of difficulties concerning managing agents

5.02 In the Consultation Paper, and in this Report, the Commission notes the important and positive role which well-directed and professional services from property managing agents can play in multi-unit developments. It is clear that, in the context of commercial multi-unit developments such as shopping centres and office blocks, well-directed and professional property managing agents have had a positive role. It is equally clear that the role of property managing agents in residential multi-unit developments has, in some instances, been detrimental to the proper management of the development.

5.03 Some of this detrimental effect can, in the Commission's view, be attributed to the understanding deficit among unit owners concerning the appropriate governance arrangements that should delineate the respective roles of the owners' management company and the property managing agent. Undoubtedly, too, the genuine difficulties that have arisen have sometimes resulted from the appointment by developers of property managing agents at a very early stage before any unit has been sold and where, as a result, the

managing agent has de facto control over, or at least a very controlling attitude towards, the administrative functions of the owners' management company and the multi-unit development itself.

5.04 The Commission has already referred in the Introduction to the difficulty with some property managing agents merging their proper role as property service advisers with an inappropriate administrative role as company secretary of the owners' management company (including all administration associated with, for example company annual general meetings). As a result, if such a property managing agent notifies unit owners of an increased annual service charge, (and in the Commission's view in some instances the increase is neither explained nor justified) some owners have refused to pay because they may perceive it as an unjustified demand from the property managing agent or the developer. They may not appreciate that a refusal to pay an increased service charge could mean that the grass is not cut, windows are not cleaned and the lifts are not serviced. Such owners may, also, ultimately be acting against their own interests in terms of the long-term value and sustainability of their property.

5.05 The Commission has already noted in Chapter 3 the consequent problems that then arise because if all service charges are unpaid, it may lead to no accounts for the owners' management company being filed, and the company may be struck off the register of companies. In turn, this makes it difficult to sell the apartment without the considerable expense for an individual owner of having the company restored to the register of companies.

5.06 After the Consultation Paper was published, the Commission received a great number of submissions from unit owners in multi-unit developments on the subject of managing agents and the Commission also received submissions from representatives of managing agents. The Commission accepts that there are many successfully managed developments in the State with competent managing agents and satisfied unit owners. The Commission accepts that some of the problems for good managing agents is that they are faced with poor governance arrangements that can be traced back to events that occurred in the development stage, such as taking in charge delays or failure by developers to transfer the freehold of the development in a timely manner. In this respect, the Commission notes that these problems would be tackled by its recommendation that the legal title of the development should be vested in the owners' management company at the beginning of the development.[1]

5.07 While some problems can be traced back in this way, the Commission also concurs with the views of some unit owners who made

[1] See Chapter 2, above.

submissions that a number of problems arise from poor communication by property managing agents, in particular concerning the basis for service charges (especially when they are being increased). The Commission also accepts that real problems arise from the inappropriate level of administrative control exercised by managing agents when they act as the effective company secretary of the owners' management company. These submissions, and analysis published by Dublin City Council,[2] also raised the general absence of regulatory control of managing agents.

5.08 In the remainder of this Chapter, the Commission discusses its proposals for resolving some of these matters. The Commission begins by reviewing the extremely important effect which the proposed regulatory control of managing agents by the National Property Services Regulatory Authority is likely to have on the Commission's approach to these problems.

C National Property Services Regulatory Authority

5.09 The 2005 *Report of the Auctioneering/Estate Agency Review Group*[3] recommended the establishment of the National Property Services Regulatory Authority (NPSRA), which it proposed should be responsible for overseeing the practices of, amongst other groups, managing agents:

> "Property management frequently involves large sums of clients' money. The Group believes, therefore, that it is appropriate and proper to require persons wishing to operate as property management agents to demonstrate that they have the necessary financial safeguards in place to protect their clients. Thus the Group recommends that property management agents be required to hold a licence under the Regulatory Authority... Property management agencies will thereby be made subject to oversight by the Regulatory Authority."[4]

The 2005 Report also recommended that property management agents should be licensed by the NPSRA and be made subject to the proposed vetting and complaints procedures to be overseen by the NPSRA.[5]

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2 Dublin City Council *Successful Apartment Living Part II,* July 2007, p.5. See further, paragraph 5.34 below.

3 Auctioneering/Estate Agency Review Group *Report to the Minister for Justice, Equality and Law Reform*, July 2005.

4 *Ibid*, paragraph 13.1.

5 *Ibid*.

5.10 The Report also recommended that the NPRSA, in conjunction with the Law Society and consumer interests, should actively promote better consumer awareness of the issues arising from the ownership and management of multi-unit developments.[6] The Commission endorses this and believes that the implementation of this proposal, coupled with the efforts of the National Consumer Agency and the Office of the Director of Corporate Enforcement will, over time, greatly assist with provision of clear information as to the appropriate role of a managing agent.

5.11 Shortly after the Commission's Consultation Paper was published in 2006, the Minister for Justice, Equality and Law Reform published the *General Scheme of the Property Services Regulatory Authority Bill*[7] which provided for the implementation of the 2005 Report. The NPSRA has since been established on an interim non-statutory basis[8] and the Commission understands that the Government's *Property Services Regulatory Authority Bill 2008*, which will provide the statutory basis for the NPSRA, will be published in the near future.[9] The *General Scheme of the Property Services Regulatory Authority Bill* provides a comprehensive overview of the functions envisaged for the NPSRA. As will be seen, it is clear that the General Scheme, if replicated in the Government's *Property Services Regulatory Authority Bill 2008*, will address the key concerns about the regulation of managing agents identified in the Commission's Consultation Paper and submissions received by the Commission since then. The Commission now turns to examine the main features of the General Scheme.

5.12 Head 2 of the *General Scheme of the Property Services Regulatory Authority Bill* states that the NPSRA will regulate auctioneers, estate agents and (even more significantly for this Report) those who provide "property services." These are defined in Head 2 as including: "services related to the management of an apartment complex… carried out on behalf of a management company."[10]

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6 *Op cit*, Recommendation No. 42.

7 Available at www.justice.ie (published on 21 December 2006; the Commission's Consultation Paper was published on 19 December 2006).

8 See www.npsra.ie

9 Government Legislation Programme for Summer 2008 (published on 1 April 2008), available at www.taoiseach.ie

10 The full definition of "property services" in Head 2 of the General Scheme is: "services related to the management of an apartment complex, housing estate or other estate containing housing carried out on behalf of a management company, including administrative services and the procurement of the maintenance, repair, improvement and insurance of the areas of the complex or estate in relation to

5.13 Head 9 of the *General Scheme of the Property Services Regulatory Authority Bill* states that amongst the NPSRA's principal tasks will be:

- to operate a licensing system;
- to set entry qualifications and delivery standards;
- to disseminate information for the protection of consumers;
- to carry out investigations (in response to complaints or at its own initiative); and
- to impose sanctions where appropriate.

5.14 The NPSRA will be able to grant and renew licences, and to suspend or revoke licences, which creates a compelling sanction in case of wrongdoing by managing agents. The NPSRA will also establish and maintain a register of licensees.[11] A further function of the NPSRA will be to "specify and enforce standards, including appropriate ethical standards, to be observed in the provision of property services by licensees."[12] The Commission, like the Auctioneering and Estate Agency Review Group, does not believe that there are currently any significant concerns about property management agencies behaving dishonestly or incompetently. Notwithstanding this, the Commission welcomes the fact that the Code of Practice for Managing Agents proposed in the General Scheme of the Bill[13] is being devised by the interim NPSRA as a matter of priority. The Commission understands that this will be published some time during 2008. The Commission believes that the publication of this Code of Practice will engender a heightened awareness of the standards and levels of service to be applied within the sector. It will also provide a reference point for consumers who wish to examine what the best practice guidelines for managing agents are in the day to day running of multi-unit developments.

5.15 Under the General Scheme of the Bill, rigorous conditions must be met in order to obtain a licence. These include proof that the applicant has the required level of personal indemnity insurance as well as certification by a suitably qualified person that proper financial and control systems are in place for the protection of clients' money.[14] Applicants will also be required to hold a

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which responsibility for maintenance, repair, improvement and insurance has been vested in the management company."

11 Head 9(2).

12 Head 9(4).

13 Head 18(1).

14 Part 3 of the General Scheme of the Bill (licences to provide property services).

valid tax clearance certificate.[15] Operation of a property management agency in the absence of a licence will be an offence.[16]

5.16 The role of the NPSRA in the dissemination of information for the protection of consumers is in part to counter the consumer understanding deficit identified by the National Consumer Agency and noted by the Commission in the Consultation Paper. The NPSRA will also be authorised to undertake or commission "research projects and other activities relating to property services in order to promote and improve standards for the provision of those services and public awareness of them."[17]

5.17 The National Consumer Agency's 2006 *Report on Management Fees and Service Charges*[18] raised the prospect of the creation of nationally recognised professional qualifications for managing agents. The Commission supports this and believes that such a move would complement the ongoing development of the multi-unit development sector generally. Moreover, in the eyes of the public it would lend further legitimacy to the activities of managing agents. The NCA recommended that such qualifications should be developed by a body specially established to represent residential management agents and to create awareness amongst the property sector as well as national and local government of the role of professional management agents. The *General Scheme of the Property Services Regulatory Authority Bill* states that another function of the NPSRA is to "specify and enforce... qualification requirements, including educational and training levels". The NCA has expressed the view that there may be scope for the Irish Property and Facility Management Association to have some input with the NPRSA into devising a strategy for an educational qualification for managing agents.[19] The Commission concurs with this view and the General Scheme also provides for this.[20]

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15 Head 31: Tax clearance.

16 See paragraph 5.19 above.

17 Head 9(2)(g).

18 *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings,* Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006, paragraph 6.4.3.

19 *Ibid*, paragraph 6.4.1.

20 Head 13 of the General Scheme of the Bill states: "The Authority may from time to time appoint such and so many advisory committees and such and so many consultants or advisers as it may consider necessary to assist it in the performance of its functions."

5.18 Head 25 of the *General Scheme of the Bill* provides for investigations to be made by the NPSRA into the practices of managing agents in order to satisfy itself that the NPSRA's standards are being complied with. Again, the existence of such a function will operate to reassure unit owners in multi-unit developments that their managing agents' actions are standard-based. Key to this remit is the power to require managing agents under investigation to supply the NPSRA with information it needs. Head 25 also enables the NPSRA to investigate where it believes that property management services are being provided on an unlicensed basis. The NPSRA is also given powers of entry and inspection to enable it to exercise its functions.[21] The General Scheme of the Bill also makes provision for any client of a property service provider who suffers loss as a result of a service provider's dishonesty to be eligible for compensation.[22]

5.19 Head 43 states: "Any person may make a complaint in writing to the Authority against a licensee in relation to the provision of a property service... including an alleged contravention by the licensee of any provision of this Act or regulations made under it." Head 43 also envisages a range of options open to the NPSRA where it is satisfied that the complaints are justified. The NPSRA may reprimand the managing agent at fault or offer a caution, warning or advice in order to prevent recurrence of such failures. In more serious cases, the NPSRA will have the power to suspend or even revoke an offending managing agent's licence.[23] Any provision of property management services without the holding of a licence is prohibited under the General Scheme of the Bill. It will be punishable on summary conviction by a maximum fine of €3,000 and/or 12 months imprisonment and, on indictment, by an unlimited fine and/or a maximum of 5 years imprisonment.[24]

D Reforms concerning some key challenges

5.20 As the Commission has already noted, a key problem concerning managing agents is a lack of communication between them and owners' management company members, and confusion as to the role and function of both. Other problems concerning service charges and building investment funds are addressed by the Commission's recommendations in Chapter 6. The remainder of the Chapter deals with proposals which the Commission considers

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21 Head 27: Power of entry and inspection

22 Head 53: Compensation for loss due to dishonesty.

23 Head 43(3), in Part 4 (complaints against licensees).

24 Head 42: Prohibition of unlicensed property service.

may supplement the hugely important general reforms involved in the *General Scheme of the Property Services Regulatory Authority Bill*.

5.21 An issue that was raised a number of times in submissions to the Commission was the concern that unit owners believe they are not getting value for money for property management services received. A few points need to be raised in this regard. First, the Commission is satisfied that alleviation of the understanding deficit among unit owners in the future will lead to the realisation that there is a competitive market of managing agents in the State. As a result, if they are dissatisfied with a particular property management agency, they will be aware that there are a number of alternative agencies available for engagement, and that the NPSRA will be available to regulate poor behaviour.

5.22 Second, it is useful to note here that the Commission recommends later in this Report that the advice given by managing agents to developers initially, and to the owners' management companies subsequently, with regard to the calculation of service charges by managing agents must meet basic standards of fairness and reasonableness. This is intended to ensure that such concerns in the future will be largely avoided.[25] Coupled with the Codes of Practice proposed in the General Scheme of the *Property Services Regulatory Authority Bill*,[26] this should lead to greater cognisance among managing agents of the importance of dealing with clients in a fair and transparent manner.

5.23 Third, the *General Scheme of the Property Services Regulatory Authority Bill* also provides that where the NPSRA suspects that a value of property which has been provided by a licensee (estate agent or auctioneer) is in any way unreasonable, it has the power to investigate. In doing so, it can compel the licensee to provide evidence of the reasonableness of any advised value stated by the licensee.[27] Where the NPSRA is satisfied that the value offered by the licensee is unreasonable, it can reprimand, provide a warning to, caution or advise the licensee. Alternatively, it can impose a sanction.[28] The Commission considers that similar powers should apply in the context of managing agents, where it is suspected that the quotations offered or expenses returned by the agents to an owners' management company are unreasonable. This power would, naturally, only operate where the NPSRA is satisfied that the complaint received is not vexatious or frivolous. Accordingly, the Commission recommends that the powers proposed by Head 62 of the General Scheme of

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25 See paragraph 6.62 above.

26 See paragraph 5.14 above.

27 Head 62: Evidence of reasonableness of advised value.

28 Heads 62(2) and (3) respectively.

the Bill be extended to situations where advised prices of services provided by managing agents are patently unreasonable.

5.24 The Commission recommends that the powers provided for under Head 62 of the 2006 General Scheme of the Property Services Regulatory Authority Bill (concerning the powers of investigation and sanction of the proposed National Property Services Regulatory Authority) be extended to situations where advised prices for services provided by property managing agents are unreasonable.

5.25 The Commission is also concerned about alleged 'tied arrangements' between managing agents and other firms which have been brought to its attention. Such arrangements comprise property management firms receiving 'soft payments' or other incentives from undertakings such as insurance companies,[29] cleaning companies or other sub-contractors in return for first refusal on work which needs to be done for management companies. The net effect of this is that rather than shopping around for quotations leading to the most competitive tenders for an individual owners' management company or residents' association, the managing agents automatically use a particular undertaking for the work. These practices represent a serious lack of transparency in the operation of property managing agents. Clients who contract for a service assume that their best interests will be accommodated. If tied arrangements are in place, this may not be the case as the managing agents do not appear to be looking for the best value for money on behalf of the owners' management companies which engage them.

5.26 The Commission emphasises that it does not believe that this constitutes common practice amongst managing agents generally. Notwithstanding this, it is imperative that where these practices exist, they should be eliminated as they are damaging both to owners' management companies, from the perspective of competitiveness; and also to managing agents in a wider context, who suffer from the actions of a minority.

5.27 Accordingly, the Commission recommends that the NPSRA should be empowered to impose sanctions against managing agents where they establish that managing agents are engaging in uncompetitive practices establishing tied arrangements with other firms. Furthermore, the Commission notes that the Competition Authority may have a role to play in this context.

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29 The debate in the commercial context of insurance companies dealing in so-called soft 'contingent' commissions emphasises the need to avoid such situations arising in a private residential context. See: *EU Might Crack Down on EU Contingent Commission Payments*, Financial Times, 24 January 2007.

5.28 The Commission recommends that the National Property Services Regulatory Authority should be empowered to impose sanctions on managing agents who engage in anti-competitive practices.

5.29 The third discreet problem identified by the Commission is the blurring of the lines between the functions of the management company and the functions of managing agents. In the Consultation Paper, the Commission noted with concern the phenomenon of managing agents in certain circumstances assuming control of the owners' management company to the extent that they are effectively acting as company secretary or shadow director of the company.[30] The Commission noted that "the scope of the management undertaken by managing agents differs from arrangement to arrangement."[31] This has had the unfortunate effect of some owners' management companies allowing managing agents to take control to the extent that the managing agent takes responsibility for: scheduling the annual general meeting of the owners' management companies; filing annual returns; controlling company accounts and other tasks which under the *Companies' Acts* are the obligation of the company directors.[32] Unquestionably, owners' management company directors may call on managing agents for administrative and secretarial assistance in undertaking these tasks, but it must be emphasised that responsibility for these should ultimately rest with the directors. Thus, the Commission accepts that the owners' management company should continue to exercise the power to delegate the administrative functions associated with these responsibilities to its managing agent. This is not to say, however, that managing agents should assume or should be asked to assume the official responsibilities of the company secretary and the Commission recommends that this should be prohibited.[33]

5.30 *The Commission recommends that property managing agents should be prohibited from exercising the role of secretary in an owners' management company.*

5.31 A fourth issue discussed in the Consultation Paper was the use of standard form contracts for managing agents which the Commission recommended should be developed by the NPRSA.[34] The Commission

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30 *Op cit*, paragraph 5.03.

31 *Ibid*.

32 Failure of the board of directors to ensure that these basic tasks are undertaken by the company constitutes a breach of fiduciary duty.

33 See Chapter 3 generally and in particular paragraph 3.87 above.

34 *Op cit*, para 5.19.

envisaged the development of standardisation to encourage greater uniformity in the operation of multi-unit developments. As a result, the Commission recommends the development of model contracts and letters of engagement. These will serve as a basic template on which owners' management companies will be able to make clear what services they expect the managing agents to provide. The Commission considers that the development of model letters of engagement will lead to clarity for both unit owners and managing agents. This will in turn lead to greater consumer confidence for unit owners in their experiences of dealing with managing agents. The Commission also considers that the literature accompanying the model letter of engagement should define the outer parameters of what work the owners' management company should be entitled to delegate to the managing agent. This will ameliorate the confusion as to the appropriate extent of the control that managing agents should have in the administration of a development.

5.32 The Commission recommends that the National Property Services Regulatory Authority should develop a model contract and model letter of engagement concerning the services to be provided by managing agents to owners' management companies.

5.33 The Commission considers that the reforms discussed in this Chapter and in the remainder of this Report should alleviate the key challenges to good property management which the Commission considers can, and should, include the appropriate involvement of managing agents. Among the key reforms involved in this respect are:

- the proposed regulation of property managing agents by the National Property Services Regulatory Authority;
- the core obligations which the Commission recommends should be applicable to all apartment dwellers;
- the core covenants to be included in every conveyancing agreement for units in apartment developments;
- the introduction of model contracts for managing agents;
- the introduction of model letters of engagement for managing agents;
- standardised constitutions for owners' management companies.

These changes are likely to lead, in the Commission's view, to better property management practice in multi-unit developments.

5.34 A final problem identified in the Consultation Paper is that some managing agents decline to provide services to developments with less than 50 units. The Commission understands that this occurs in some circumstances because managing agents consider that it is not cost effective for them in terms

of the time and effort involved in such multi-unit developments. Given this reality of market conditions, rather than any issue of deficiency in legal regulation, the Commission is not in a position to make any recommendation in this regard. The Commission can only express a hope that the general reforms of the sector already mentioned may enable some service providers to see these types of multi-unit developments to be viable in the future.

CHAPTER 6 BUILDING INVESTMENT FUNDS AND SERVICE CHARGES

A Introduction

6.01 This Chapter focuses on the two aspects of ongoing expense for unit owners in the post-completion stage of a multi-unit development: building investment funds (sinking funds[1]) and service charges. From the submissions received by the Commission following the publication of the Consultation Paper, it was clear that clarification in respect of the unit owners' rights and responsibilities in relation to these charges is required.

6.02 In Part B, the Commission examines the law surrounding building investment funds both in Ireland and abroad, and concludes that they are crucial to the continuing viability of multi-unit developments. As a result, the Commission recommends the mandatory establishment of building investment funds for all large developments: those of 5 units or more. The Commission also outlines key points concerning the legislative governance of building investment funds. In Part C, the Commission discusses service charges. The variety of ways in which the amount calculated and charged to each unit owner is evaluated and the Commission concludes that best practice guidelines must be developed to facilitate consistency in the operation of multi-unit developments. The Commission also makes recommendations on the level of information which should be provided to unit owners in the break-down analysis of the service charge.

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[1] In this Report, the Commission uses the term 'building investment fund' rather than the more commonly used term "sinking fund." The Commission does not consider that "sinking fund" conveys with accuracy (or optimism) the protective nature of the fund to which it refers, while "building investment fund" more clearly signifies the intention to preserve the value of the multi-unit development by ensuring that a definite long-term sum is available to deal with major capital expenditure in the future.

B Building Investment Funds

(1) Overview

6.03 In the Consultation Paper, the Commission discussed the importance for owners' management companies to make provision for the repairs, upgrades, replacements, improvements and other general contingency expenses which inevitably arise from the wear and tear on the structural and external fabric of the development over time.

6.04 Research suggests that a high proportion of multi-unit developments in Ireland have no building investment fund in place.[2] This is particularly worrying in the case of older developments, where substantial amounts of work may be necessary in the relatively near future. It is clearly preferable for unit owners to spread the cost over a period of many years, rather than having to pay considerable costs in a single lump sum.

6.05 Where there is no building investment fund accumulated to meet costs, the money required for the repair or replacement work will generally be added to the year's service charge as a lump sum; and this often constitutes a significant amount of money. A 2007 study by Dublin City Council noted:

> "In a recent review, the adequacy of sinking fund in a simple scheme was examined, one which did not have CCTV, underground car parking or any water or sewerage pumps. This review found that the sinking fund amount needed for a ten year refurbishment cycle is estimated to be approximately €420 per unit per annum."[3]

6.06 On this basis, if a building investment fund is not built up over, say, 10 years, each unit owner could suddenly face a bill of €4,200, in a development with relatively modest amenities. As noted in the Consultation Paper, when coupled with service charges, some unit owners may have difficulty in meeting this bill.[4]

6.07 The alternative to not paying for the necessary upgrading and structural expenses is that the development will fall into disrepair over time, thus reducing the value of the property. It will also reduce the quality of the living environment for residents of the development. On this basis, in the Consultation

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2 Dublin City Council *Successful Apartment Living Part 2: Survey of Service Charges, Design, Management and Owners' Attitudes in 193 Private Apartment Schemes in Dublin City*, June 2007.

3 *Ibid,* paragraph 4.6.

4 (LRC CP- 42-2006) at paragraph 4.116.

Paper, the Commission provisionally recommended that there should be a clear statutory obligation on owners' management companies to establish building investment funds.[5] The Commission now turns to review the approaches adopted in other jurisdictions on building investment funds and to make its final recommendation on this matter.

(2) Mandatory building investment fund

6.08 Building investment funds, or sinking funds, are not compulsory in all common law States[6] (those which share a similar legal heritage with Ireland) but there is an increasing trend towards making them mandatory. Canadian provinces[7] and Australian states and territories[8] have responded to the potentially serious long-term problems for such developments with specific legislative provision for the mandatory establishment of sinking funds. South Africa has enacted legislation requiring establishment of a general fund for

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5 (LRC CP 42-2006), paragraph 4.121.

6 In Scotland, whose legal system is greatly influenced by the civil law legal tradition (which applies in most of the Continental European states and their former colonies) its law of the "tenement" (which applies to a house comprised of flats or apartments) has no concept of common property. Thus, those who live on the top floor of a tenement are solely responsible for the roof; those who live on given floors are responsible for the stairway up to their floor. In practice, it appears that the related costs are spread more evenly. Indeed, it appears that the Scottish law of the tenement evolved from the need to provide for apartments which, in turn, arose primarily from the partitioning of townhouses into apartments. See the Scottish Law Commission *Report on the Law of the Tenement* (Scot Law Com No 162).

7 In Canada, five provinces have enacted legislation providing for the mandatory establishment of sinking funds in apartment developments: in Alberta: the *Condominium Property Act 2000*, R.S.A., c. C-22, s.38; in Saskatchewan: the *Condominium Property Act 1993*, , s.55, 58-61; in Ontario: the *Condominium Act 1998*, c.19, s.93-95; in Nova Scotia: the *Condominium Act 1989* , R.S.N.S., c.85, s.31; and in Manitoba: *Condominium Act* C.C.S.M. c.C170, s.26-30. Many of these pieces of legislation are accompanied by further enabling legislation and guidelines.

8 In Australia, four states or territories have enacted legislation providing for the mandatory establishment of sinking funds for apartment developments. These are, in Australian Capital Territories: *Unit Titles Act 2001*, s.61-56; in New South Wales, the *Strata Schemes Management Act 1996*, s.66-74; in South Australia: *Community Titles Act 1996*, s.116; and in Queensland, the *Building Units and Group Titles Act 1980*, s.38.

every development for the purposes of, amongst other things: "reasonable provision for future maintenance and repairs."[9]

6.09 In England and Wales, the *Commonhold and Leasehold Reform Act 2002* requires the mandatory establishment of a reserve fund in certain circumstances.[10] Similarly, the Singapore *Building Maintenance and Strata Management Act 2004* requires the establishment of a fund which covers service charges, administrative costs and all expenses normally associated with building investment funds prior to the establishment of the owners association.[11]

6.10 A number of elements of the legislation in these States should be noted. In the case of smaller developments, legislation generally provides that reserve funds should be set up only at the discretion of the owners' associations.[12] The Commission sees great merit in this approach.[13]

6.11 Legislation dealing with reserve funds in other countries varies in terms of detail on the type of expenditure to be covered. For example, s.116 of the South Australian *Community Titles Act 1996* provides that the fund should be used only for 'non-recurrent expenditure'. This in turn is defined as "expenditure for a particular purpose that is normally made less frequently than once a year". Some legislation uses a basic, catch-all formula:

> "a reserve fund shall be used solely for the purpose of major repair and replacement of the common elements and assets of the [owners' association]".[14]

Provisions in other jurisdictions take a more considered and detailed approach.[15]

6.12 The Commission considers that a composite of both approaches is preferable. As discussed later, in the interests of avoiding any misunderstanding as to the function of building maintenance funds, the Commission recommends

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9 *Sectional Titles Act 1986*, s.37 (1)(a).

10 See section 39(1), *Commonhold and Leasehold Reform Act 2002*.

11 *Building Maintenance and Strata Management Act 2004*, section 16.

12 See for example, s.70 of the New South Wales *Strata Schemes Management Act* 1996and s.62 of the Australian Capital Territories *Unit Titles Act 2001*.

13 See paragraph 6.32 below.

14 *Ontario Condominium Act*, S.O. 1998 c.19, section 93(2).

15 See for example the Australian Capital Territories *Unit Titles Act 2001,* s. 61(3) which lists the particular circumstances under which owners corporations may make payments from their reserve funds.

that best practice guidelines should be devised which list the expenses which should be covered by the fund.[16] The Commission recognises that this list cannot, and should not, be exhaustive.

6.13 As noted above,[17] section 39 of the England and Wales *Commonhold and Leasehold Reform Act 2002* provides for the establishment of a reserve fund, although this is not mandatory but rather contingent on certain conditions. The directors of the "commonhold association" (that is, the equivalent of an owners' management company) can set up a reserve fund at the direction of the members, at their own discretion, or in response to the results of a 'reserve study'. A reserve study is an inspection of the common parts of the development which must take place at least every 10 years in order to determine whether the establishment of a reserve fund is necessary.[18] It is clear that this scheme allows for more flexibility for unit owners in deciding whether to establish a fund.

6.14 The Commission does not, however, favour this approach and has concluded that a mandatory approach, as provisionally recommended in the Consultation Paper, is preferable on a number of grounds. First, when the cost of large-scale repair or replacement within the development arises, the unit owners do not have to make a large payout as they have accumulated funds developed over many years through relatively small annual contributions to cover such costs. Secondly, as evidenced by some of the problems now appearing in Ireland, where the establishment of a fund is prudent but currently discretionary, it is common for developments to opt against the establishment until funds are needed urgently. Thirdly, for unit owners in Ireland, as already noted, the existence of a mature building investment fund will prove a valuable asset tied to the property on sale of the unit and forms part of the capital value of the property. This will be particularly pertinent when there is a requirement to give details of the building investment fund levels by auctioneers and estate agents at the time of sale.[19]

6.15 The Commission acknowledges that there are possible concerns surrounding building investment funds. It can be argued for example that the establishment of a mandatory sinking fund requirement necessarily results in the removal of an element of choice for owners' management companies as to whether building investment funds should be accumulated at all. A view held by

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16 See paragraph 6.38 below.

17 See paragraph 6.09 above.

18 Department for Constitutional Affairs, *Non Statutory Guidance on the Commonhold Regulations 2004.*

19 See paragraphs 6.26-6.29 below.

some owners' management companies is that it would be more convenient to request a single lump sum from its members in the event of any major capital expenditure being necessary. However, as noted, it will often inevitably be difficult for some unit owners to meet such demands. Moreover, having an existing fund in place for each owners' management company will encourage the company to make expenditure on renewing and/or upgrading the development as necessary. Unit owners will have the opportunity to vote on decisions which involve making outlays and the levels of those outlays.

6.16 Encouraging a culture of expenditure on upgrading and capital maintenance will ensure that multi-unit developments will not become derelict in the future. It can also further inculcate in unit owners at the time of purchase the realisation that expenditure on their property, as in the case of more traditional housing, does not end in the signing of the conveyancing agreement. At least a minimum level of maintenance and upgrades will be inevitable in the lifetime of the property. Furthermore, it must be emphasised that the unit owners retain full responsibility to decide on what, and when, the building investment fund is spent. On that basis, their right to choose is not circumscribed. The nature of interdependent ownership in multi-unit developments is such that the unit owners collectively hold a mutual obligation to each other to fund repair and maintenance expenses in the development collectively in accordance with the covenants they have entered into when purchasing.

6.17 Another view is that a mandatory building investment fund is not necessary because it may be possible for owners' management companies to take out a loan in order to undertake major capital expenditure. It is questionable, however, as to whether financial institutions would be willing to lend to owners' management companies, given that the main asset, the freehold of the development, is of relatively nominal value unless there is (say) land forming part of the development which has development potential.

6.18 While the freehold estate of a large piece of property is in itself quite valuable, the fact that there are numerous long leases[20] attached to it diminish its value in real terms quite considerably. Accordingly, it is doubtful whether the commercial reality exists where owners' management companies are in a position to offer the necessary security where expensive capital expenditure has to be made. In any event, loan repayments plus interest costs would be an additional charge on the annual service charge, resulting ultimately in more expense in the long term for unit owners.

6.19 The Commission has concluded that the establishment of building investment funds should not be compulsory in the case of smaller

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[20] Or, when the *Land and Conveyancing Law Reform Bill 2006* is enacted, freehold titles of the freehold with mutual covenants to be performed.

developments of 4 units or less. In this respect, the Commission has also recommended that a corporate structure is unnecessary in smaller developments. This is because the scale of interdependence and the size of the development and common areas - and corresponding cost of maintenance and repair - tend to be on a less expensive scale. As a result, management and maintenance of the common areas can be suitably addressed in covenants contained in the conveyancing agreement.

6.20 Accordingly, the Commission confirms the view it took in the Consultation Paper and recommends a mandatory statutory requirement for the establishment of a building investment fund for all larger multi-unit developments, that is, those involving 5 units or more.[21]

6.21 *The Commission recommends a mandatory statutory requirement for the establishment of a building investment fund for all larger multi-unit developments, that is, those involving 5 units or more.*

(3) Detailed aspects of building investment funds

6.22 The legislation on building investment funds in other States covers issues such as establishment,[22] authority to make decisions on use of the building investment fund and provisions for the accumulation of funds for developments which have already been in existence for some time.

6.23 Authority to make decisions on use of the fund (within the uses prescribed by legislation or regulation) is universally left to the management association (the equivalent of the owners' management company). The type of vote necessary to finalise a decision on use of the funds varies between jurisdictions or individual company constitutions. The Commission considers that, in this State, it would be preferable for the board of the directors of the owners' management company to decide how the building investment fund is spent.[23] The directors tend to be best appraised of the appropriate avenues to

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21 This will also form part of the memorandum and articles of association for owners' management companies: see Chapter 3, above. It will also become a standard provision in conveyancing documents.

22 The language used for the establishment of reserve funds is generally to the point: "The [management] corporation shall establish and maintain one or more reserve funds:" see section 93 of the Ontario *Condominium Act* SO 1998, c19.

23 Butterworth's *Company Law Guide* (4th ed Butterworths 2002) notes at paragraph 8.42 that "it is commonly the case that… shareholders may only vote on matters of direct concern to them." See also the House of Lords decision of *Bushell v Faith* [1969] 1 All ER 1002, [1970] AC 1099. This appears to be consistent with the advice given by the Attorney General, Paul Gallagher SC, in this State in the context of voting rights of shareholders in the former State airline, Aer Lingus plc:

pursue on spending the funds of the owners' management company' for the good of the development. This is because they have more regular input than other unit owners into decisions on the management and maintenance of the development generally. Delegating authority to the board of directors is efficient in the context of administrative burden, rather than requiring majority agreement of the unit owners before any of the building investment fund is to be spent. Moreover, unit owners will have the opportunity to express an opinion and make submissions at the owners' management company's annual general meeting on the prospective expenditure of the building investment fund. The Scottish Law Commission has observed that the Scottish common law rule insisting on a unanimous vote of all unit owners has proven contentious and has resulted in deterioration in some developments.[24] The Commission concurs with this and recommends that majority approval only of the board of directors of the owners' management company should be necessary before any building investment fund money can be withdrawn from its special separate account.

6.24 The Commission recommends that majority approval of the board of directors of the owners' management company will be necessary for any expenditure of the building investment fund; and that this should be provided for in the owners' management company model Articles of Association.

6.25 The purposes for which a building investment fund may be used have been outlined above. It is worth noting, in the interests of clarity, the purposes for which a building investment fund should not be used. Firstly, it should not be used to fund the day-to-day recurrent expenses involved in general maintenance and upkeep of the development. Secondly, it must be underlined that, as in the case of service charges (discussed below in this Chapter), the building investment fund should never be used to pay for snagging problems during the development stage, as the developer is directly responsible for these.

6.26 The existence and level of maturity of a building investment fund is an important element of the value of a unit, and indeed, of the value of a development as a whole. A development where the owners' management company has far-sightedly established a building investment fund in the early days will hold an important and valuable means of ensuring the longevity of the development without requiring unit owners to pay substantial once off sums when large-scale repairs or upgrades need to be made. A corollary to this is

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see "Minister Quashes Shannon Hopes" *The Irish Times* 11 September 2007. Accordingly, the view that the board of directors should take decisions of strategic importance to a multi-unit development, such as building investment fund expenditure, is consistent with existing company law.

24 Scottish Law Commission *Report on the Law of the Tenement* (1998 Scot Law Com No 162) paragraphs 2.19-2.22.

that unit owners in developments which have accumulated more mature building investment funds, where the development is in a relatively good condition, will ultimately have a more valuable property to sell than a similar development without a fund because the building investment fund will constitute part of the value of the property. Furthermore, availability of details of a well-managed building investment fund will indicate to prospective purchasers the overall competence and prudence of the development's management organisation.

6.27 Because the building investment fund accumulated by the owners' management company forms part of the asset value of the development as a whole, contributions by unit owners to building investment funds are not refunded to unit owners on the sale of the property. It is the owners' management company who ultimately hold responsibility through the accumulation, maintenance and expenditure of the building investment fund to maintain standards of their multi-unit development, which ultimately impact on its value. This is also the case for developments operated under co-ownership agreements rather than through the management company structure.

6.28 In this respect, the Commission also recommends that, on sale of a unit, it should be necessary for any agent responsible for the sale of property to provide information on the value of the building investment fund. It is vital in the interests of transparency in the sale process that the prospective purchaser is aware of the existence and value of the fund relative to the overall condition and age of the property. The purpose of this is to place the prospective purchaser in a good position to assess the level of funding that may be required in the event of repairs being necessary for the building. Accordingly, the Commission recommends that the statutory code of practice to be prepared under the proposed *Property Services Regulatory Bill 2008* should include an obligation on estate agents and auctioneers that, when advertising a unit in a multi-unit development for sale, they must provide details of the building investment fund to any potential buyer, together with a report on the expected depreciation of the development's structure, fixtures and fittings.[25]

6.29 The Commission recommends that the statutory code of practice to be prepared under the proposed Property Services Regulatory Bill 2008 should include an obligation on estate agents and auctioneers that, when advertising a unit in a multi-unit development for sale, they must provide details of the

[25] This report would include details on the projected lifespan of, for example, the roof, any lift and security fixtures such as gates and CCTV cameras. This report will enable buyers to evaluate the overall value of the development, while factoring in anticipated expenditure under the existing building investment fund.

building investment fund to any potential buyer, together with a report on the expected depreciation of the development's structure, fixtures and fittings.

6.30 In the Consultation Paper, the Commission discussed its concern about the potential 'ghettoisation' of areas where multi-unit developments are of poor quality or are not adequately maintained are discussed.[26] The Commission is strongly of the view that there is an overall social benefit in ensuring that the fastest growing type of housing in Ireland, apartments, remains viable on a long-term basis. Based on the social policy aspect of the importance of building maintenance funds, the Commission has concluded that any interest earned on the building maintenance fund monies should be statutorily exempt from Deposit Interest Retention Tax (DIRT).[27] The Commission considers that owners' management companies should also be exempt from further possible reporting requirements such as returns to the Revenue Commissioners on interest earned.[28]

6.31 The Commission recommends that building investment fund monies should be statutorily exempt from any charge to tax for the purposes of the Taxes Consolidation Act 1997.

6.32 In the Consultation Paper the Commission provisionally recommended that building investment funds should be held in a special protected account separate from the owners' management companies' working accounts.[29] In line with the social view of the building investment fund, and the separate taxation treatment that should be given to it, the Commission reiterates the view in the Consultation Paper that the building investment fund monies must be kept in a bank account separate to any other account operated by either the owners' management company or property managing agent.[30] This

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26 *Op cit*, at paragraph 2.04.

27 Deposit Interest Retention Tax (DIRT) is charged at the standard rate of income tax (20%) and is levied on the interest made from funds on deposit in bank accounts in Ireland. Arguably, a further justification for the waiving of taxation on building investment funds is the fact that apartment owners do not avail of benefits such as tax relief on, eg, bin charges, of which occupiers of more 'traditional' housing can avail.

28 Where the management undertaking is a corporate structure, the Commission notes that it must continue to comply with its reporting requirements to the Companies Registration Office.

29 (LRC CP 42-2006) at paragraph 4.122.

30 This is in line with the United Kingdom's Royal Institute of Chartered Surveyors (RICS) recommendations from their code of practice for residential development management.

also reinforces the need to avoid any confusion that may arise as to the appropriate application of the building investment fund and other monies collected, for example for day-to-day service charges.

6.33 In proposing the establishment of reserve funds in England and Wales,[31] the UK Government was mindful that:

> "...the existence of substantial funds gives opportunity for irregularities, management and fraud, although the structure of the commonhold association should help to constrain this risk."[32]

6.34 The Commission is satisfied that its requirement that building investment fund monies must be kept separate from service charge money means that such issues will not be a cause for concern in this State. Details of the building investment fund accumulation and expenditure will form part of the annual reporting requirements and there will be an obligation to distribute such information to all unit owners. This level of transparency will deter potential irregularity.

6.35 The Commission recommends that the building investment fund monies must be kept in a bank account separate to any other account operated by either the owners' management company or property managing agent.

6.36 For the purposes of this Report, the term 'multi-unit developments' refers to both private gated developments consisting of apartments and/or houses, and apartment developments. The Commission considers that the requirement for mandatory building investment funds should apply only to owners' management companies of apartment developments, or, in the case of mixed use developments,[33] to the parts of the development comprising apartments. The basis for this view is that, in the case of houses, the freehold owners are responsible for the building structure of their own unit and the commonly-owned parts tend to be less extensive. The lower degree of interdependence means that poor maintenance of a given unit will impact adversely to a high degree on the individual unit owner only. This is not the case in apartment buildings where the degree of interdependence is such that all units depend on the integrity of the building structure and as a result, all unit owners should be under a positive obligation as a collective to contribute to the building investment fund in order to safeguard their mutual interest. Notwithstanding this, the Commission recognises that while it should not be

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31 Section 39 of the *Commonhold and Leasehold Reform Act 2002*.

32 See the Department of Constitutional Affairs' response to the Commonhold Consultation Exercise; see http://www.dca.gov.uk/consult/general/chresp.htm

33 *Ie*, a development comprised of both houses and apartments.

mandatory for gated developments to establish a building investment fund it is good practice to do so as a means of protecting the longer term value of the development generally.

6.37 The Commission is of the clear view that only unit owners - not tenants - should pay contributions to the building investment fund. This view reflects the rationale behind the fund: to maintain the value and viability of the unit owner's capital asset. Furthermore, difficulties have arisen in England with tenants paying so-called depreciation allowances. In *Secretary of State for the Environment v Possfund (North West) Ltd*,[34] it was decided that tenants are not entitled to a refund on monies contributed to the reserve fund on expiry of the lease.[35] In effect, tenants have little to gain by paying into the fund, as they receive no benefit from ensuring that the long-term value of the development is maintained. Arguably, any depreciation suffered by the unit owner in the value of the unit is implicitly reflected in the rent charged to the tenant. In contrast with the tenant, the unit owner protects the value of his or her investment by making contributions to the building investment fund, the purpose of which is to make contingency for longer-term major expenses.

6.38 This Report has made extensive reference to the knowledge deficit in the sector. A list that would set out the circumstances in which it is appropriate to use a building investment fund would greatly assist in avoiding potential ambiguity, abuse or misuse of the building investment fund by owners' management companies. Such a list should be developed in conjunction with all those involved in the multi-unit development sector. Accordingly, the Commission recommends that a study be undertaken by the National Consumer Agency in conjunction with the National Property Services Regulatory Authority in order to devise a list of the purposes for which building investment fund monies should be used.

6.39 The Commission recommends that a study be undertaken by the National Consumer Agency in conjunction with the National Property Services Regulatory Authority in order to devise a list of the purposes for which building investment fund monies should be used.

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34 *Secretary of State for the Environment v Possfund (North West) Ltd*, [1997] 2 EGLR 56.

35 Although note that this case dealt with a commercial tenancy. The law of other jurisdictions is quite explicit on this point in a residential context. See, for example, section 26(2) of the State of Manitoba *Condominium Act* CCSM c.170: "The money in the reserve fund of a corporation is an asset of the corporation and no part thereof shall be refunded or distributed to any owner of a unit..."

6.40 The calculation and apportionment of service charge and building investment fund contributions were recurring themes in the submissions received by the Commission following the publication of the Consultation Paper. The question of apportionment is especially relevant where a development contains units of varying sizes. The provision of a statutory guide as to which aspects of the development's expenses should be covered by service charges and building investment fund monies is also open to debate.

6.41 The Irish Property and Facility Management Association (IPFMA) has noted that there is currently no information template for owners' management companies as to how fund costs should be calculated and explaining for which expenses the fund should cover.[36] It is important to note also that the developer initially, and after that, the owners' management company hold primary responsibility in keeping all unit owners informed of all relevant information relating to developments' building investment funds. The Commission agrees with the view of the IPFMA that there is an urgent need for best practice guidelines to be produced in this context in Ireland. The National Property Services Regulatory Authority would be the best-placed body to prepare and publish these guidelines. This is because, as the body responsible for licensing and regulation of managing agents, it will have available expertise in this area and this function is already envisaged in the 2006 *General Scheme of the Property Services Regulatory Authority Bill.*[37] The Commission accordingly recommends that a study be undertaken by the National Property Services Regulatory Authority in order to devise best practice guidelines as to how building investment fund costs should be calculated.

6.42 The Commission recommends that a study be undertaken by the National Property Services Regulatory Authority in order to devise best practice guidelines as to how building investment fund costs should be calculated.

(4) Existing Developments

6.43 For existing developments; the question of whether to require a building investment fund is more complicated. The current problem posed by

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36 See further the recommendations at paragraphs 6.60 and 6.66 below.

37 Head 9 of the *General Scheme* states that the NPSRA shall "(f) to such extent and in such manner as it considers appropriate, disseminate information in relation to such standards, qualifications and requirements; (g) take such action as it considers appropriate to increase public awareness of property services and the cost to consumers of such services (including management companies) as well as the risks and benefits associated with the provision of those services; (h) undertake or commission, or collaborate or assist in, research projects and other activities relating to property services in order to promote and improve standards for the provision of those services and public awareness of them."

older multi-unit developments which have not yet established a building investment fund with which to cover costs is one of growing seriousness. It is clear that it will take some time before existing older developments have accumulated a building investment fund which is adequate to cover their prospective capital expenses. However, the Commission recognises that the fact of establishment of the fund in itself constitutes some progress in protecting the longer-term value of the original investment.

6.44 Questions might be raised as to the extent to which the State should dictate how an individual's private property should be managed, and whether a mandatory requirement applicable to existing developments could constitute an interference with the individual's constitutional right to private property.[38] The Commission notes that there are a number of instances where the exigencies of the common good result in necessary conditions being attached to private property ownership. For example, owners of buildings which are subject to preservation orders are limited in the changes they can make to their own private property.[39] Indeed, the requirement of planning permission before construction can take place is an example of how the right to private property is not absolute. [40]

6.45 Similarly, compulsory purchase orders and demolition orders are often made by the State over private property on public policy grounds. In short, all property owners have obligations as well as rights over their private property. The Commission considers that to enable sustainability of apartments as a viable form of housing for a large segment of the population, the requirement that unit owners in existing developments pay into a building investment fund is necessary. It can also be argued that, given the interdependent nature of multi-unit development living, by paying into a building investment fund, the unit owner is helping to vindicate the property rights of the other unit owners of the development by enabling them to maintain the structure and value of the property which they own jointly.

6.46 Accordingly, the Commission considers that notwithstanding this limitation on the unit owners' exercise of control over their own private property,

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38 This right is guaranteed by Article 43 of the Constitution and under Protocol 1, Article 1, of the Council of Europe's *Convention on Human Rights and Fundamental Freedoms (1950)*. See generally: Hogan and Whyte, *JM Kelly*: *The Irish Constitution*, 4th ed. (Lexis Nexis, Dublin 2003).

39 As governed by Part IV of the *Planning and Development Act 2000*.

40 See the conclusions reached by Kenny J on the nature of constitutional property rights in *Central Dublin Development Association v Attorney General* (1969) 109 ILTR 69, 86.

common good and public policy considerations necessarily outweigh this and has concluded that the establishment of a building investment fund for existing developments should also be mandatory. Such a condition of ownership is implicit in the interdependent nature of ownership in a multi-unit development.

6.47 In order to meet the difficulties which this requirement imposes on existing developments the Commission also recommends that a transitional period of 5 years should apply before this would come into effect for existing developments. The Commission recommends that, once the 5 year transitional period has passed, any conveyance for a multi-unit development which does not have a building investment fund will be regarded as void.[41] The Commission recommends that it be statutorily provided for that it will be unlawful to contract out of any provision relating to the necessity for the existence of a building investment fund in the finalisation of the sale of a unit.

6.48 The Commission recommends that existing large multi-unit developments, that is which involve 5 units or more, must establish a building investment fund within 5 years.

6.49 The Commission recommends that any conveyance which purports to contract out of the requirement to establish a building investment fund shall be void.

6.50 One policy issue which the Commission envisages arising is the additional expense incurred by some individuals in contributing to the building investment fund. The level of additional expense may be particularly onerous for people who have invested in affordable housing, who may neither have anticipated nor be able to afford building investment fund contributions which are beyond their means. While the Commission considers that the potential for consideration of individual subsidies or tax relief for such unit owners in this context may be relevant, it makes no recommendation on this because it is a policy matter. The Commission merely comments that such consideration would arguably reduce the financial hardship which affordable housing unit owners would incur as a result of the introduction of a mandatory building investment fund.

C Multi-Unit Development Service Charges

6.51 As noted in the introduction to this Report, service charges involve a contentious element of the running of multi-unit developments in the post-completion phase.

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41 This statutory requirement will necessitate the insertion of a new requisition on title in the Law Society's *Objections and Requisitions on Title* that there is a building investment fund in existence.

6.52 The Commission acknowledges that the level of dissatisfaction with service charges, leading to their non-payment by some unit owners, can be attributed at least in part to the understanding deficit problem. Many people when buying their apartments are simply not aware that they will also have a responsibility to pay for maintenance of the common parts and building structure.[42] Accordingly, problems surrounding service charges may be tackled in part by the provision of greater information, which has clearly already begun to happen even in the relatively short period since the publication of the Consultation Paper.

6.53 However, there are also clearly situations where unit owner dissatisfaction with regard to service charges is justified. The Consultation Paper pointed to the lack of regulation to ensure transparency and equitable apportionment in the calculation of service charges.[43] The Commission indicated that a statutory obligation should be imposed on developers, while retaining a controlling interest in the owners' management company; and on the owners' management company itself to set service charge costs which are 'reasonable' and 'appropriate' in accordance with an objective standard.[44] Moreover, questionable practices such as the developer setting service charges at an artificially low level for the first couple of years of the development in order to appeal to prospective buyers were identified.[45] It also appears that other unsatisfactory practices such as unit owners absorbing the service charges of units which remain unsold by the developer continue to arise in some instances.[46] Non-payment of service charges by unit owners is in itself a very serious problem which can have far-reaching consequences for the development.[47]

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42 See Dublin City Council *Successful Apartment Living Part 2: Survey of Service Charges, Design, Management and Owners' Attitudes in 193 Private Apartment Schemes in Dublin City*, June 2007, p. 95.

43 (LRC CP 42-2006) Chapter 5.

44 *Ibid*, paragraph 4.107.

45 The Commission accepts that the maintenance costs tend to be lower generally in the earlier years of the development as the effects of wear and tear are minimal for newly-built developments.

46 The developer, as owner of such units, should have responsibility for the service charge payment for those units.

47 See Van der Merwe and Muniz-Arguelles "Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme" (2006)16 Duke Journal of Comparative & International Law 125, at pp.126-127.

6.54 The Commission also notes that, where unit owners rent out their properties to tenants, it is general practice that most of the expenses are the responsibility of the unit owner. The Commission recognises the rationale behind this. The tenant should only be required to pay for 'consumer' expenses which they use on an immediate daily level such as refuse collection charges and subscriptions to services such as internet broadband and cable television. The unit owner, on the other hand, should be responsible for the proportion of the service charge which covers the common areas' electricity, maintenance and upkeep of the common areas generally. The rationale behind this is that, as the proper day-to-day management will sustain the capital value of the development, the unit owner derives a direct long-term benefit from payment of the proportion of the service charge which covers the upkeep of the common areas. Hence, it is the responsibility of the unit owner, and not of the tenant, to pay the service charge demanded by the owners' management company; although the tenant should be obliged to pay for any day-to-day services which they use.

6.55 While the Commission accepts that service charges give rise to many difficulties in practice, it is equally important to recognise that, from a day-to-day perspective, they are an essential component of the viability of multi-unit developments, the everyday mirror image of a building investment fund. The Commission accordingly recommends that, in the interests of sustaining that viability, all multi-unit developments must be required to maintain a scheme of annual service charges. This should apply to all multi-unit developments, regardless of size. The Commission makes detailed recommendations as to the precise nature of the service charges in the remainder of this Chapter.

6.56 The Commission recommends that all multi-unit developments must maintain a scheme of annual service charges.

(1) Service charges: Provision of Information

6.57 Prospective purchasers of units should be furnished with details of apportionment of service charge for their unit in the sales brochure. However, it appears that in practice, purchasers do not learn of apportionment levels until signing the final sales agreement with their solicitor. A consequence of this is that purchasers are generally far too committed to purchasing the property at that stage to focus clearly on the implications of service charges. This suggests a lack of understanding amongst many purchasers as to the implications of buying a unit, particularly an apartment, in a multi-unit development. Moreover, it is not merely the lack of awareness at purchase stage which is of concern to the Commission. The Commission is aware that the levels of transparency and detailing of expenses by the managing agents to the owners' management companies and/or by the owners' management companies to the unit owners are below a desirable standard in many cases. That this is the case is hardly

surprising, as such standards are currently left to the discretion of the parties involved.

6.58 Hence, it is clear that the information received, and in some instances, sought for, by unit owners on the existence and breakdown of service charges is poor in many cases. The Commission is strongly of the view that adequate information on the breakdown of service charges must be provided to unit owners. The detail should be such as to allow unit owners to see clearly how a final figure was reached, how their contribution to the fund was calculated and where it was spent. Where relevant, comparative quotations received for services should also be given.[48] The Commission recommends that the National Property Services Regulatory Authority (which will shortly take statutory responsibility for overseeing the work of managing agents) in conjunction with the National Consumer Agency should devise guidelines illustrating the appropriate amount of detail to include on a breakdown of expenses. Even where a development does not employ a managing agent, such guidelines will become standard industry practice.

6.59 The last point that must be stressed in the context of provision of information is that unit owners are often provided with all relevant information with regard to apportionment of the service charge at the time of conveyance of the unit.[49] When the conveyancing agreement is being finalised, the buyer's solicitor will usually explain what the level of apportionment is for the unit. At this stage, the buyer has the power to refuse to buy if apportionment of charges appears uncompetitive. Key provisions in the conveyancing agreement which the prospective buyer should look out for include the provision apportioning the service charge and also clauses which power to the owners' management company to adjust the financial year to suit the bookkeeping options of the (developer-controlled) owners' management company.[50]

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48 One of the services which the management company and the managing agent may agree to in the contract of engagement is for the managing agent to seek quotes on behalf of the management company for the most competitive price for particular services.

49 Although best practice dictates that levels of apportionment should be set out in the sales brochure.

50 See J Gollogley, *The Basis for Recovery: The Developer/Landlord's Perspective*, Law Society of Ireland CPD Seminar, June 7, 2007, p. 32. Another clause for which prospective buyers should be especially vigilant is one restraining them from objecting to further development on the sites common areas. This was discussed in Chapter 2.

6.60 The Commission recommends that that the National Property Services Regulatory Authority in conjunction with the National Consumer Agency devise guidelines explaining the correct amount of information to be given to the unit owners in the breakdown of service charges.

(2) Apportionment of service charges

6.61 With regard to apportionment of charges amongst unit owners, it has been observed that

> "The aim should be to seek an equitable distribution of the charge among the [unit owners]. To do this, the specific proportions should be written into the lease, whether based on rateable valuation or area of floor..."[51]

Even though the above was written in a commercial context, it may be argued that the same principles are very true in the case of residential developments.

6.62 It is clear thus that a number of fundamental guiding principles are necessary. Firstly, on a general level and as a matter of course, an obligation to pay the service charges levied by the owners' management company will form a core obligation as part of the covenants agreed to by unit owners on purchase of a unit. Secondly, it is very important that the apportionment of the service charge as it appears in the conveyancing agreement is easily understandable by the unit buyer. Thirdly, the Commission recommends that the party responsible for drafting the clause in the conveyancing agreement which concerns the apportionment of the service charges, must adhere to the basic criteria that the apportionment must be appropriate, reasonable and equitable.

6.63 Apportionment of service charges can vary from development to development. Sometimes service charges are divided equally amongst all units. It may be argued that this is an inequitable system where units within a development vary in size. The Commission's research suggests that the most common mechanism is to apportion the charge in accordance with the square metre/footage ratio of the unit against the total square metre/footage within all units of a given development. Although this seems to be a fairer means of calculation; it may be argued that it is not necessarily the most satisfactory. The square metre/footage system may be criticised on the grounds that the service charge primarily contributes towards overheads for common areas so the size of the individual units is largely irrelevant. However, the Commission accepts that this system is used as a formula of convenience as it would clearly be impossible to calculate the use the residents of individual units make of the common areas. Service charges may also be weighted based on the number of

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[51] Law Society of Ireland, *Landlord and Tenant Law* (edited by Gabriel Brennan) (2nd ed, OUP 2006) paragraph 10.2.6.

bedrooms in a given apartment. The rationale behind this seems to be based on increased square metre/footage and the presupposition that more bedrooms equate to more apartment dwellers which in turn equates to greater intensity of use of the common areas. Service charges may also vary between identical individual units as the unit owners may opt to avail of differing services. For example, clearly a unit owner who opts to lease extra car-parking spaces along with the unit will have this extra cost reflected in the service charge.

6.64 The details of proportion of the overall service charge a unit owner is obliged to pay are usually contained in the conveyancing agreement. The Commission strongly believes that, regardless of how the service is apportioned between units, the apportionment of the service charge and building investment fund contributions are appropriate and reasonable.[52] Good practice dictates that developers, when inserting the clause into the conveyancing agreement which deals with apportionment should carefully choose a method which will result in all future unit owners being treated as fairly as possible. The Commission believes that these principles should be incorporated into any best practice code for apportionment of service charges developed for this jurisdiction.

6.65 No best practice code for apportionment of service charges currently exists in Ireland. To an extent, this is understandable as developments can vary vastly in the range and quality of services they provide,[53] making the development of a standardised code difficult. It has been recommended elsewhere that developers, when devising conveyancing agreements, should allow for flexibility in the agreements to allow scope for change, for example, if the owners' management company opts to expand the services available within the development.[54] Currently, many chartered surveyors in Ireland use the United Kingdom's Royal Institute of Chartered Surveyors' best practice guidelines.[55] The Commission recommends that the National Property Services Regulatory Authority in conjunction with the National Consumer Agency examine the possibility of producing similar guidelines specifically tailored to the Irish multi-unit development situation.

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52 See LRC (CP 42-2006) paragraph 4.07.

53 See further, paragraph 6.67 below.

54 See: J O'Connor, *Service Cost Areas and Types of Services: The Estate Management Perspective*; a paper presented at a CPD Seminar at the Law Society, 07/06/2007.

55 Royal Institute of Chartered Surveyors, *Service Charge Residential Management Code and Additional Advice to Landlords, Tenants and Agents*; (RICS 1997) ISBN 0854066438.

6.66 The Commission recommends that the National Property Services Regulatory Authority in conjunction with the National Consumer Agency examine the possibility of producing best practice guidelines for apportionment of service charges, specifically tailored to the Irish multi-unit development situation.

(3) Calculation of service charges

6.67 The amount a unit owner can expect to be charged varies from development to development. As some developments offer a wider range of facilities or have high maintenance common areas, the overall service charge for the development will naturally reflect this. Accordingly, it would be impossible to publish an annual estimate of what the service charges for multi-unit developments generally should amount to, given the varying expenses attributable to each individual development. The Commission does however believe that there is scope for an enumeration of the headings of expenditure related to the service charge to be included in the constitutional documents of the owners' management company. This would clarify for unit owners from the outset the purpose for which they are paying their service charges; and hence, will tackle the understanding deficit and operate to prevent future disputes on the subject. The Commission has already made it clear that there should be an absolute prohibition on expenditure of service charge funds on snagging problems for every development.[56]

6.68 An issue brought to the Commission's attention in the context of calculation of service charges is an apparent lack of confidence on the part of many unit owners that their managing agents have found the most competitive rates for the services which they are mandated to organise on behalf of the unit owners. To an extent, the Commission considers that there is an onus on the owners' management company to source the best quality and value for money managing agents,[57] or, as an alternative, undertake to run the actual day to day management and maintenance of the development themselves[58] or simply to

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56 See the recommendation in this Report at paragraph 2.39.

57 A condition of the contract between the managing agent and the management undertaking could oblige, for example, the managing agents to seek a number of quotations for each service engaged by them on behalf of the management undertaking.

58 That is, to take on the responsibilities in the development commonly undertaken by the managing agents. In many circumstances however, especially in the case of larger developments, the viability of such an option is questionable as it may result in an extremely onerous work burden on the people within the owners' management company who opt to take responsibility for the day to day running of the development.

change their managing agent if they are not happy with the services provided. Notwithstanding this however, the Commission is concerned that if such arrangements between managing agents and service provision companies is the case in practice, it should be examined to ensure that no anti-competitive practices are occurring.[59] Moreover, the Commission takes the view that if there is any potential conflict of interest arising as a result of a relationship or arrangement between managing agents and service providers, this should be disclosed from the outset to owners' management companies interested in engaging a particular managing agent.

(4) Mixed-use developments

6.69 As already discussed, 'mixed-use developments' refers to developments which serve more than one function. Developments which comprise both residential and commercial units would be an example of this. Such developments are increasingly common, particularly in high-density urban areas where space is at a premium. Best practice dictates that, in the case of mixed-use developments, separate schemes are implemented in the calculation of service charges of units with different functions.[60] This is the case not only because different services are used and common services are used to a differing extent but also because the intensity of use can be very different.[61] For example, use of waste facilities may be far greater for, say, a restaurant unit than for a residential unit. Another example would be that there is no obligation on residential unit owners to obtain public liability insurance and, therefore, residential unit owners should not be liable for such costs in a mixed development. Accordingly, unit purchasers and their solicitors should be very careful to ensure that the service charge regime which covers non-residential units is different to those covering residential units.

6.70 Furthermore, it may be argued that it is in the developers' interests to remain cognisant of apportionment of charges in mixed developments as failure to apportion equitably "could make apartments more difficult to sell and put them at a commercial disadvantage against other developments in the locality offering a more competitive service charge."[62]

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59 This is discussed further in the Managing Agents chapter, below.

60 *Eg:* residential or commercial.

61 J Gollogley, *The Basis for Recovery: The Developer/Landlord's Perspective*, Law Society of Ireland CPD Seminar, June 7, 2007, p.24.

62 *Ibid*, p.25.

(5) Telecommunications and media services

6.71 A related issue concerns the engagement by developers of telecommunications and media service providers. These arrangements affect the provision of telecommunications and cable television service in both 'traditional' housing estates and other multi-unit developments, such as apartment blocks. These so-called "islands of monopoly," which have been created by exclusive supply arrangements with developers, may also contravene anti-competitive regulations and accordingly, the Commission believes that there is also scope for investigation in this context by the Competition Authority.[63]

[63] Arguably, this problem will diminish in the future with the spread of wireless satellite systems.

CHAPTER 7 REMEDIAL MEASURES AND REHABILITATION AND RESCUE OF DEVELOPMENTS

A Introduction

7.01 In this Chapter, the Commission turns to the remedial arrangements that are required to deal with some multi-unit developments which do not meet the statutory regime proposed by the Commission. This includes the need to deal with non-payment of service charges by individual unit owners. More significantly, in the medium to long term the Commission recognises the need to deal with fundamental problems that might arise in a development, such as a serious deficit in a building investment fund (sinking fund).

7.02 In Part B, the Commission provides an outline of the preventative measures that are, to some extent, already in existence to deal with dispute resolution and those which are planned. In Part C, the Commission discusses the resolution of non-payment of service charge and building investment fund contributions. The Commission considers a range of options and recommends that the jurisdiction of the Small Claims Court should be extended to deal with disputes which centre on failure of individual unit owners to pay these charges. In Part D, the Commission deals with developments where the unit owners may be faced with large rehabilitation bills and the Commission has concluded that it needs to make specific recommendations on the appropriate form of rescue and rehabilitation for such developments.

B Remedial measures and the regulatory setting

7.03 In this Part, the Commission outlines the preventative measures that are, to some extent, already in existence in terms of the emerging regulatory system that has already begun to emerge since the publication of the Consultation Paper in 2006. A fully functioning regulatory system, such as the system envisaged for the National Property Services Regulatory Authority (NPSRA), would have the capacity to prevent, through a combination of licensing and supervisory arrangements and the development of national guidelines, the occurrence of misunderstandings and poor governance practice in terms of the relationship between unit owners and managing agents. Similarly, the Commission's proposals concerning owners' management companies may clarify the appropriate respective roles of developer and unit

purchasers. Over time, the type of problems that have characterised multi-unit developments in Ireland may decrease, though they will not disappear completely.

7.04 In some cases, remedial devises are already in place, even if not necessarily availed of as often as they could be. One example is the planning enforcement measures available to both individuals and planning authorities which, combined with the gradual roll out of recent planning guidelines, have the potential to address many issues at the early planning and development stages.[1] Another is the educative role of the Office of the Director of Corporate Enforcement and the enforcement powers at its disposal in respect of a company or its directors who are not in compliance with company law requirements.[2]

7.05 In preparing this Report, the Commission is aware that some developments have been able to overcome complex problems (a number of which have been rightly well-publicised in the media) after an extended period of dispute and a steep learning curve for unit owners. Some have been able to overcome, for example, the strike-off of an owners' management company using existing legal remedies, though this has been at considerable personal expense for individual apartment owners, including in some instances the cost of litigation.[3] The Commission is also conscious that, while some unit owners will in the future continue to be able to make suitable arrangements for the rescue of a development, a series of specific solutions tailored to multi-unit developments is also required.[4] This is especially important in the context of developments where the unit owners may be faced with large rehabilitation bills, and the Commission has concluded that it needs to make specific recommendations on the appropriate form of rescue for such developments. The Commission turns first, however, to the more immediate issue of non-payment of both service charges and building investment fund contributions.

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1 See Chapter 1.

2 See Chapter 3 and www.odce.ie.

3 See, for example, the discussion of *In re Heidelstone Co Ltd* [2006] IEHC 408; High Court, 24 November 2006, in Chapter 3, above.

4 In this context, the Commission also strongly advocates the use of increasingly available alternative dispute resolution mechanisms including mediation and subsequently, where necessary, arbitration.

C Remedial measures for non-payment of Service Charges and Building Investment Fund Contributions

7.06 It is clear to the Commission that ensuring the payment of both service charges and building investment fund contributions is an issue which needs to be addressed urgently. Non-payment by unit owners hinders effective management and leads to a great deal of frustration and further administrative burden for the owners' management company and/or for managing agents. Good cash flow, prompt payment and co-operation between unit owners are key features of the viability of management organisations and non-payment has the potential to seriously thwart this. Formal enforcement methods for non-payment requires court-based action, which may ultimately result in further expense and inconvenience for the owners' management company.[5] Where the owners' management company fails, however, to ensure payment and allows the cost to be absorbed by the other unit owners, this leads to disillusionment and a wider propensity for non-payment.

7.07 Ultimately, the snowball effect of non-payment can result, in extreme cases, in dereliction and consequent devaluation within a relatively short timeframe for a development. Consequently, the Commission considers that speedy, equitable and straightforward enforcement options must be open to owners' management companies and other residents' associations in order to create a wider culture of compliance with payment of service charges and building investment fund contributions. The Commission believes that court action should only be used as a last resort and that alternative enforcement mechanisms should be examined and developed.

7.08 Non-payment of service charges is also a major issue in other jurisdictions who, as a result, have developed a wide range of innovative and generally successful enforcement mechanisms. These range from denial of right to vote at company meetings (to a certain extent), through "name and shame" sanctions, to suspension of services and, ultimately, formidably high interest rates on monies outstanding.[6] Sanctions are imposed upon defaulters by the courts or, in some circumstances, by the management associations themselves. Those who fail to pay their service charges can generally be divided into two categories: financially sound unit owners who can afford to pay but opt not to, for whatever reason, and unit owners who are not in a financially

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5 The management undertaking, as owner of the reversionary interest of the unit can invoke a landlord's remedies for breach of covenant by a tenant. *Cf* Wylie *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998).

6 See further van der Merwe and Muniz-Arguelles, "Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme" (2006)16 Duke Journal of Comparative & International Law 125, at p.128.

sound position and cannot afford to pay. In many jurisdictions, unit owners who come under each category are treated differently.[7] For those who cannot pay in many jurisdictions[8] liens are automatically imposed over the property and, sometimes, even the over the contents of the property in the case of default in payment.[9]

7.09 In this State, the most widely used enforcement mechanisms are the threat of legal action and, if that is not effective, the initiation of a claim against the unit owner for breach of a covenant agreement in the District Court. The Commission turns now to discuss and briefly assess the range of enforcement mechanisms available in other jurisdictions.

(i) Use of rent money to pay the service charge

7.10 In the case of unit owners who are financially sound and can afford to pay their service charges, alternative mechanisms are used. The Commission is aware that some unit owners hold the view that owner-investors are sometimes uninterested in the day to day maintenance of the development, although the Commission believes that this does not apply in general. The difficulties associated with enforcement are exacerbated in cases where the unit owner lives overseas. The Canadian province of Ontario, for example, specifically targets unit owners who fail to pay service charges by requiring tenants of the defaulting landlord to pay the service charge value to the owners' management company rather than paying rent to the landlord. Thus, the payment can constitute payment towards rent under the lease.[10]

7.11 This diversion of funds away from the unit owner constitutes a relatively straightforward means of enforcement. Where the unit is not leased and the owner defaults on a service charge payment, an automatic priority lien is created over the unit.[11] As a result, the Commission believes that it is open to the Oireachtas to consider providing, as an enforcement option, that where an 'owner-investor' defaults on payment of service charges or building investment fund contributions, the rent payable by the tenant to the unit owner should be

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7 See*:* van der Merwe and Muniz-Arguelles, "Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme" (2006)16 Duke Journal of Comparative & International Law 125

8 *Ie:* France, Ontario, British Colombia, Spain, Singapore, Puerto Rico and the United States.

9 These are "rights of security as against property for money owned"- Coughlan, p.lvii.

10 Section 87(6), Ontario *Condominium Act,* 1998 C.19.

11 Section 86 (1) Ontario *Condominium Act* 1998 C.19.

diverted to the owners' management company. Alternatively, diversion of rent from the owner-investor to the owners' management company could be provided as an option for the owners' management company to include as a covenant in the conveyancing agreement on a contractual basis.

(ii) Penalty for late payment

7.12 Another potential enforcement mechanism is the imposition of a penalty for late payment. This sanction is used in Puerto Rico and Singapore. In Puerto Rico, 10% interest may be charged on any contributions which are more than 15 days overdue. In Singapore, unit owners can be prosecuted for failure to pay within 2 weeks of a written demand for payment from the management company, the maximum fine being a fine of S$10,000 plus a sum not exceeding S$100 for every day the service charge remains unpaid.[12] It has been noted that the daily fine mechanism can prove to be very effective.[13] However, it may also be counterproductive. It can be argued that both sanctions will punish the unit owners who, it transpires after the finalisation of the sale of the unit, simply do not have the money to pay the service charge, thus exacerbating their financial problems. Moreover, it is questionable as to whether the relatively draconian penalty fees system in Singapore constitutes a proportionate punishment to offset any harm suffered. Accordingly, the Commission considers that this would not be a constructive response to non-payment in this jurisdiction.

(iii) Liens

7.13 A clear disadvantage of the lien system is that the owners' management company has to wait until the unit is sold until it can recoup money owed to it. Owners' management companies are generally very dependant on a strong and current cash flow system to function properly. Another disadvantage is the expense and inconvenience the owners' management company will be subject to as a result of enforcing the lien. Furthermore, it may be some years before the unit owners who default on payment sell the unit, resulting in a huge delay in recouping the defaulted payment. Notwithstanding these concerns however, it is arguable that the current apartment ownership scheme in Ireland is suitable for the creation of an equitable lien over a unit,[14] as the owners' management company has *de facto* control over the unit owner's share in the freehold.

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12 Singapore *Building Maintenance and Strata Management Act* (Act 47 of 2004), art 40(10).

13 Van der Merwe and Muniz-Arguelles, p. 132.

14 On liens, see Coughlan *Property Law* (Gill and Macmillan, 2nd ed, 1998) at p. 351.

7.14 However, even though these liens may be a useful device of enforcement in theory, their efficacy must be questioned as an immediate sanction. Because of the clear inconvenience and expense to the company to have to apply to the courts to enforce an equitable lien coupled with the delay in recovery of payment, it is doubtful that this mechanism is the most appropriate. The Commission has therefore concluded that liens would be an unsuitable method of enforcement of payment in the context of service and building investment fund charges in Ireland.

(iv) Loss of voting rights

7.15 It is common in some jurisdictions to suffer a loss of voting rights in the owners' management company as a result of failure to pay the service charges. This measure is triggered as a result of default on payment after a specified time. On the one hand, this appears to be a reasonably proportionate solution. A key function of the owners' management company is, after all, to manage the building through the control and expenditure of the service charge and the building investment fund. It could also be argued, however, that by buying property in a multi-unit development, the unit owner automatically buys into a range of rights and responsibilities, the nature of which would justify a fine or a restriction on rights in the event of non-payment of the contributions. In any case, such a restriction generally applies only to regular voting and not votes which require a special resolution.

7.16 On the other hand however, loss of control over maintenance and upkeep of a unit owner's portion of freehold could be regarded as an unwarranted curtailment of the constitutional right to private property. As a result, the Commission considers that denial of voting rights is not a suitable remedial device.

(v) Other sanctions

7.17 Other alternative mechanisms open to owners' management companies overseas include name and shame sanctions, deprivation of services and summary proceedings through the courts. Name and shame sanctions are already used in this jurisdiction with varying effect. They are most useful in the context of owner-occupiers, and have a lesser effect on so-called owner investors, who do not reside in the development. With regard to summary proceedings through the court, the Commission is aware that these are similarly available currently as an enforcement mechanism in this jurisdiction. Notwithstanding this however, the Commission strongly believes that in the context of such disputes, it is undesirable that the parties involved should have to go through a formal court process. Lastly, while the deprivation of services is a proportionate response to the non-payment of service charges, it will often be

very difficult to enforce in practice.[15] Accordingly, these sanctions would not be appropriate in an Irish context.

(vi) Small claims court

7.18 Another option open in Ireland would be to confer jurisdiction for disputes relating to non-payment of service charges on the Small Claims Court, which forms part of the District Court. At present, the Court cannot deal with disputes concerning the breach of a lease,[16] which could be interpreted as including the non-payment of service charges and building investment fund contributions. However, it is clear that failure to pay in fact amounts to a contract debt, which is within the jurisdiction of the Small Claims Court. It is worth noting that the monetary jurisdiction of the Small Claims Court is currently limited to claims of €2,000 or less.[17]

7.19 The rationale behind the Small Claims Court's prohibition on dealing with disputes between landlords and tenants is because of breaches of lease agreements are handled by the Private Residential Tenancies Board under the *Residential Tenancies Act 2004*. The *Civil Law (Miscellaneous Provisions) Bill 2006,*[18] when enacted will, however, limit the PRTB's functions in this regard to residential tenancies which do not include leaseholds held by apartment owners. Consequently, it seems clear that although the mediation, adjudication and tribunal proceedings that the Board offers would be valuable options open to owners' management companies, they will, shortly, not be available for this purpose.

7.20 As a result, there is currently no straightforward mechanism for recovery of service charges. The Small Claims Court, given the ease of use and level of damages, could be a viable means of recovery of service charges; provided its mandate was amended to enable it to hear disputes based around breach of lease agreements.

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15 For example, clearly it is impossible to prevent someone from using the common areas if these areas constitute a means of access to the unit.

16 *District Court (Small Claims Procedure) Rules 1991* (S.I. No. 310 of 1991) as amended.

17 The increase to €2,000 was made by the *District Court (Small Claims) (Amendment) Rules 2006* (S.I. No. 4 of 2006).

18 Bill No. 20 of 2006. The Bill has passed Dáil Éireann and is currently (June 2008) before Seanad Éireann.

(vii) Mediation and adjudication

7.21 Mediation and adjudication are used as the primary means of dispute resolution in the context of landlords and tenants under the supervision of the Private Residential Tenancies Board in this jurisdiction.[19] Use of such relatively proactive and non-adversarial methods of resolution arguably has a place in the realm of enforcement of payment of the service charge and building investment fund contributions. In practice, owners' management companies and individual unit owners often reach a stalemate due to lack of engagement, compromise or effort towards equitable understanding.

7.22 Given the efficacy and relative success of alternative means of dispute resolution for landlord and tenant disputes, the Commission believes that mediation and adjudication are good candidates for enforcement of payments for owners' management companies. As processes, they are relatively cheap, informal and non-adversarial, which is desirable for dispute resolution for people who have to live in close proximity to each other. However, with the imminent enactment of the *Civil Law (Miscellaneous Provisions) Bill 2006*, the responsibility to resolve disputes involving owners' management companies of multi-unit developments will not lie with the PRTB.

7.23 In this setting, the Commission notes that many disputes with regard to non-payment of charges would be avoided if the parties involved fully understood their rights and responsibilities in the context of calculation and payment of service charge and building investment fund contributions. As a result, the Commission recommends that the National Consumer Agency continue to raise awareness, educate unit owners and tackle the information and knowledge deficit through their publications.[20]

7.24 The Commission recommends that the National Consumer Agency continue to raise awareness and educate the public on the matter of building investment funds and service charges.

7.25 The Commission also welcomes the establishment of a complaints and investigation procedure which will be available to unit owners and owners' management companies where they are unhappy with the actions of their managing agents. This service will be provided by the National Property Services Regulatory Authority (NPSRA), and it is envisaged that, in such instances, a mediation and dispute resolution procedure would be available

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19 See further: www.prtb.ie .

20 For example, in October 2006 the National Consumer Agency published an information leaflet, *Property Management Companies and You,* for owners and prospective purchasers of multi-unit development apartments.

through them. The NPSRA will also be empowered to impose sanctions against rogue managing agents.[21] The Commission is confident that vesting these dual responsibilities in the NPSRA will encourage consumer trust in the activities of managing agents once they are perceived to be properly regulated.[22]

7.26 As non-payment of service charges and sinking funds appears to be a primary source of dispute between owners' management companies and individual unit owners, the Commission recommends the development of a protocol specifically for the enforcement of payment in those particular situations. Having appraised the options open for enforcement, the Commission considers that the availability of a system which is relatively non-adversarial and very accessible to individuals is imperative. The Commission has concluded that the type of mechanism which would best reflect these ideals is the use of the Small Claims Court. The Small Claims procedure is "an alternative method of commencing and dealing with a civil proceeding in respect of a small claim."[23] Accordingly, it combines the elements of relative informality which are a characteristic of alternative dispute resolution mechanisms with the benefit of an organised procedure through which the enforcement can operate. The Commission also recommends that the jurisdiction of the Small Claims Court for the purpose of multi-unit development-based disputes should be extended to reflect the monetary jurisdiction that may be necessary for service charge and building investment fund disputes. Accordingly, the Commission welcomes the recommendation of the Legal Costs Implementation Advisory Group that the monetary jurisdiction of the Small Claims Court should be extended to €3,000.[24] The Commission believes that, for claims involving outstanding sums exceeding this limit, it would be appropriate for the parties to use conventional court mechanisms.

7.27 The Commission 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.

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21 See chapter on Managing Agents, above.

22 The role of the National Property Services Regulatory Authority in the context of managing agents is discussed extensively in Chapter 5, above.

23 See further: http://courts.ie/courts.ie/library3.nsf/WebPageCurrentWeb/37871905AEE98CAE8025715C0051B827?OpenDocument&l=en .

24 *Report of the Legal Costs Implementation Advisory Group*, November 2006; paragraph 6.6.

D Rescue and Rehabilitation

7.28 In the Consultation Paper the Commission discussed the need for "rescue" provisions which would be available to resolve problems arising in respect of the operation of any existing or future multi-unit development.[25] Where problems do not fall into the categories of dispute resolution outlined above, parties would be enabled to apply to the Circuit Court for a remedial "rescue" order. The Commission's provisional recommendations have been approved by those who made submissions on the Consultation Paper and, having reflected on the issue, the Commission confirms those views in this Report.

7.29 In the Consultation Paper, the Commission recommended that, given the many permutations which could potentially give rise to the engagement of rescue provisions, they should be sufficiently broad and flexible to cover any eventuality.[26] An application for a remedial order from the Circuit Court under the rescue provisions should only be presented if it involves the resolution of a problem preventing the development from running soundly, which cannot otherwise be resolved and which denies legitimate expectations held by parties with an interest in the multi-unit development. Accordingly, applications which are frivolous or vexatious, or which have the potential to be resolved by other dispute resolution mechanisms, will not be suitable for this proposed remedy.

7.30 As mentioned, the range of problems open for resolution by the proposed rescue jurisdiction will be considerable. For example, it could be used where it transpires that the conveyancing documentation is defective and needs substantial amendment to enable the multi-unit development to function properly. Similarly, it could be used where there is an ongoing dispute in the apportionment of the service charge and building investment fund contributions in the conveyancing agreements of the units. A third potential instance would be where unit owners take the view, in the post-development stage, that covenants[27] contained in the lease agreements are open for amendment.

7.31 Another situation would be comparable to the examinership jurisdiction in the *Companies Acts 1963 to 2006* under which a company can obtain protection from creditors where there is a financial deficit in the company. In the case of a multi-unit development, this could include a situation where no building investment fund, or no adequate one, has been established and there

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25 The Commission envisages however that rescue provisions will be primarily used to resolve problems arising in existing developments.

26 LRC (CP 42-2006) paragraph 10.24.

27 Not including the core and irreducible covenants proposed in Chapter 4.

is an immediate problem with the roof of an apartment complex. The unit owners in that situation might apply to the Court with a scheme of arrangement, or rescue plan, under which they might suggest that a secured loan could be obtained subject to certain conditions in order to allow the multi-unit development to secure the roof – and the apartment building – and then return to the normal state of governance after a certain period (when a building investment fund would be in place).

7.32 The Commission also reiterates here the non-exhaustive list of examples given in the Consultation Paper of remedial orders it is envisaged would be available under the rescue provisions. These include:[28]

- requiring the legal documentation relating to the scheme to be amended so as to confer rights or to impose obligations which are necessary to make it work effectively or as intended;
- establishment of a management system or modification of the existing one, including replacement of the existing owners' management company or one that has ceased to function and cannot be restored;
- appointment of a professional administrator to take over management pending establishment of a new system;
- amendment of the constitution of the owners' management company, including its powers and duties;
- ordering a minority of unit owners to co-operate in such matters, subject to provision of compensation, where appropriate.

7.33 In the provisional recommendations in the Consultation Paper, the Commission recommended that it should apply to any interested party involved in multi-unit developments.[29] The Commission considers that the concept of 'interested party' should be interpreted widely to extend to all public bodies that have involvement or interest in the multi-unit development sector including the ODCE, the NPSRA and the NCA. The Commission also reiterates here its provisional recommendation that any person or body with an interest in the application being made should be given notice of the application.[30]

7.34 The Commission noted that, where relevant, the jurisdiction being proposed under the rescue provisions would supplement the provisions in existing legislation, for example the taking in charge provisions in section 180 of the *Planning and Development Act 2000*. It would also supplement the

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28 LRC (CP 42-2006) paragraph 11.18.

29 LRC (CP 42-2006) paragraph 11.15.

30 *Ibid*, paragraph 11.12.

jurisdiction of the Companies Registrar or the High Court to restore to the Companies' Register an owners' management company which had been struck off. An application for this can be made by any member of the company (an apartment owner) or creditor within 20 years of the date of dissolution of the company.[31].

7.35 The Commission considers that a major consideration for the Circuit Court in dealing with an application for a remedial order should be compliance, so far as this is practicable, with the statutory requirements proposed in this Report for developments of 5 units or more. The order could provide, for example, that an existing development should convert to the owners' management company (OMC) model recommended in this Report if it is satisfied that this would enable the development to operate more smoothly.

7.36 The Commission now turns to set out its detailed recommendations on rescue provisions.

7.37 *The Commission recommends that the Circuit Court shall have jurisdiction to make a remedial order to enable the rescue and rehabilitation of existing or future multi-unit developments, based on the following elements: the application may be made by any person or body interested in the multi-unit development, excluding unsecured creditors; the Court shall have jurisdiction to deal with any matter which prevents the development from functioning effectively or denies to those interested legitimate expectations and which cannot be solved otherwise; notice of the application should be served on any other interested person or body and such other person or body shall have the right to make representations at the hearing of the application; and the Court shall have a wide discretion as to the remedial orders it can make.*

7.38 The Commission appreciates the importance of providing the Court with some form of starting point in determining the range of discretion to be exercised. In the Consultation Paper, the Commission recommended that any party applying for a remedial order should be required to put forward in the application a draft order or scheme for the approval of the Court. This proposal has a number of benefits. First, in view of the complexities of multi-unit developments, it is important that the Court is not left in a vacuum in considering how to exercise its discretion. Second, the devising of a draft order or scheme brings focus to the parties in determining, before the application is made, what the most desirable outcome would be. This in turn raises the potential for the parties to settle the difficulty prior to the application for a rescue provision being brought before the Court.

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[31] Currently, only the High Court has jurisdiction to restore companies to the Companies Register under s.12B(3) of the *Companies Act 1963,* as inserted by the *Companies (Amendment) Act 1982.*

7.39 The Commission envisages there rescue provisions may be used where an impasse is reached between a majority and minority of unit owners on a decision of the owners' management company. As noted in the Consultation Paper:

> "Even if that minority is motivated by malice or other negative factors such as stubbornness or disinterest, it may not be guilty of any breach of obligation and, to an extent, is entitled to stand on strict legal rights. If the only solution is to amend those rights in some way, constitutional requirements dictate two things. The first is that the solution would have to be based on the interests of all those involved, taken as a whole. The other is that, to the extent that the vested rights of any person are affected adversely without consent, appropriate compensation would have to be made."[32]

7.40 In granting the remedial order, the Commission considers that a number of guiding principles should be provided to enable the Court to ensure the general long-term efficacy of rescue provisions. First, the interests of all of the parties potentially affected by such an order must be considered. Second, the Court must be able to hear applications from any party with an interest in the development. Third, the Court will take into account the implications of the statutory scheme for multi-unit developments recommended by the Commission in this Report. Finally, general principles of equity will be applied by the Court in determining what type of order to make, with the result, as mentioned above, that any person who establishes that a vested interest will be adversely affected by the order must be taken into account. The Commission now turns to set out its recommendations on this aspect of the rescue jurisdiction.

7.41 The Commission recommends that the applicant for a remedial order should be required to put forward in the application a draft order or scheme for the approval of the Court. The Commission also recommends that, in the exercise of its discretion and in making any remedial order, the Court shall have regard to:

- *representations made to it by any interested person;*
- *the interests of all interested persons, taken as a whole;*
- *the desirability of compliance with the provisions of the [draft Multi-Unit Developments Bill 2008 in this Report] applicable to new multi-unit developments of 5 units or more;*
- *the Property Registration Authority's programme for compulsory registration of title;*
- *the need to take into account the legitimate vested interests of any party adversely affected by any order.*

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32 LRC (CP 42-2006) 11.17.

CHAPTER 8 SUMMARY OF RECOMMENDATIONS

8.01 The 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]

8.02 The Commission recommends that, insofar as it is practicable, the guidelines concerning the size and quality of design of new multi-unit developments should be given directive status by the Department of Environment, Heritage and Local Government under the Planning and Development Act 2000. [Paragraph 1.17]

8.03 The Commission recommends that the wording of s.180(6) of the Planning and Development Act 2000, which allows occupiers as well as unit owners to vote on the question of taking in charge of a multi-unit development, be reconsidered in light of the practical difficulties which the current wording presents. [Paragraph 1.34]

8.04 The Commission recommends that a study be conducted by the Department of the Environment, Heritage and Local Government with a view to developing a focused and sustainable planning strategy for the multi-unit development sector in the wider context of the preparation of national planning guidance for planning authorities. The Commission also recommends that the study should include a review of the effectiveness of enforcement mechanisms under the planning legislation as applied to multi-unit developments. [Paragraph 1.58]

8.05 The Commission 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. [Paragraph 2.09]

8.06 The Commission supports the recommendation in the 2005 Report of the Auctioneering/Estate Agency Review Group that where new units are being sold off plan, scalable drawings and/or measurements must be given and justifiable estimates of service charges provided. The Commission also

recommends that the basis of measurement must be provided. [Paragraph 2.11]

8.07 The Commission recommends that the developer must incorporate an owners' management company before the conveyance of any unit in a multi-unit development is completed. [Paragraph 2.21]

8.08 The Commission recommends that, following incorporation, the legal title to the development will vest in the owners' management company and will become compulsorily registrable with the Land Registry, with the developer retaining the beneficial interest in each unit. [Paragraph 2.24]

8.09 The Commission recommends that the developer must ensure that the owners' management company keeps appropriate records of service provision contracts, such as those of a property managing agent. The Commission also recommends that, on the incorporation of the owners' management company (or as soon as is practicable after this), the company retains for the benefit of the unit owners the following: warranties and other guarantees, including test records for drainage, water and heating pipework; fire safety certificates under the Building Control Act 1990; and certificates of compliance with planning requirements and with the Building Regulations. [Paragraph 2.28]

8.10 The Commission recommends that 'completion' should be defined by law as compliance with planning conditions and the statutory building code, as certified by a professional person in accordance with the Building Control Acts 2000 and 2007. [Paragraph 2.35]

8.11 The Commission recommends that service charges must never be used to pay for 'snagging problems' or any other expenses incurred by the developer in completing the development. [Paragraph 2.39]

8.12 The Commission recommends that an Owners' Management Company (OMC), based on the Designated Activity Company (DAC) envisaged in the Company Law Review Group's draft Companies Consolidation and Reform Bill, is the preferred legal structure for larger multi-unit developments; that is, those of 5 units or more. [Paragraph 3.11]

8.13 The Commission recommends that, for any existing multi-unit developments which are based on the structure of a co-operative society, there should be a simple, cost-effective means of conversion to the Commission's preferred corporate structure, the Owners' Management Company (OMC), based on the Designated Activity Company (DAC) envisaged in the Company Law Review Group's draft Companies Consolidation and Reform Bill. [Paragraph 3.14]

8.14 The Commission recommends that, in the case of smaller multi-unit developments, of less than 5 units, the appropriate legal structure is a co-ownership arrangement. [Paragraph 3.18]

8.15 The Commission recommends that the Companies Registration Office facilitate NACE categorisation for owners' management companies on incorporation. [Paragraph 3.34]

8.16 The Commission recommends that the developer must incorporate an owners' management company prior to any conveyance of a unit in a multi-unit development. [Paragraph 3.38]

8.17 The Commission recommends that the costs (including pre-incorporation costs) of incorporation of an owners' management company should be borne by the developer. [Paragraph 3.39]

8.18 The Commission does not recommend the adoption of a statutory definition of an owners' management company. [Paragraph 3.41]

8.19 The Commission recommends that owners' management companies conduct their business under a statutory standardised name formula of "'X' Owners' Management Company (OMC) DAC". [Paragraph 3.43]

8.20 The Commission recommends that, during the development stage, the objects of an owners' management company shall be to convey the legal title of a unit in the multi-unit development to each unit purchaser and that it shall not prevent or frustrate any such conveyance, and that it shall ensure, to the extent required during that stage, the management and maintenance of the common areas of the multi-unit development and otherwise to comply with the obligations imposed on the company. The Commission also recommends that, after the development stage, the objects of an owners' management company shall be to ensure the management and maintenance of the common areas of the multi-unit development and otherwise to comply with the obligations imposed on the company. [Paragraph 3.46]

8.21 The Commission recommends that the memorandum of association of an owners' management company should make provision for the following:

- the name of the company, " X Owners' Management Company (OMC) DAC";
- an objects clause for the developments stage and the post-development stage on the basis of the recommendations to this effect already made;
- that each unit owner shall be a member of the company;
- that each member of the company holds one vote of equal weight as each other member;

- that the company shall facilitate the conveyance of the legal title of a unit in the multi-unit development to each unit purchaser, and
- that in the event of a conveyance of a unit after its first conveyance, membership of the company transfers to the purchaser of the unit on completion of the conveyance. [Paragraph 3.50]

8.22 The Commission also recommends that the articles of association of an owners' management company should make provision for the following:

- that the annual general meeting shall be held within every calendar year; and that every member of the company shall have at least 21 days notice of the annual general meeting;
- that the annual general meetings shall take place within objectively reasonable proximity to the location of the multi-unit development and at objectively reasonable times (unless otherwise agreed by a 75% majority vote of the members of the company),
- that a scheme of annual service charges and a scheme for a building investment fund for the multi-unit development is established and maintained,
- the form and content of the annual returns of an owners' management company, and
- the covenants and agreements for the multi-unit development. [Paragraph 3.51]

8.23 The 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]

8.24 The Commission recommends that there should be one vote per unit owner in owners' management companies and a prohibition on weighted voting. [Paragraph 3.56]

8.25 The Commission recommends that unit owners in multi-unit developments should retain the discretion under the existing company law code to nominate any other person as their proxy at meetings of the owners' management company. [Paragraph 3.62]

8.26 The Commission recommends that the accounts annexed to the annual return of an owners' management company be in the form of an income and expenditure balance sheet rather than a profit and loss account. [Paragraph 3.64]

8.27 The Commission recommends that the articles of association for an owners' management company should specify an alternative requirement in terms of the information to be included in the directors' report in the annual return for owners' management companies. [Paragraph 3.67]

8.28 The Commission recommends that the annual directors' report for an owners' management company should include a list of its assets, its insurance details, and whether the development is fully compliant with fire and safety legislation. [Paragraph 3.69]

8.29 The Commission recommends that the form and content of the annual returns of an owners' management company should include the following:

- the accounts of the company in the form of a statement of income and expenditure,
- a statement of the annual service charge or charges,
- a statement of the current level of the building investment fund and the annual contribution to it,
- a statement of any planned expenditure for the following calendar year,
- a statement of the assets of the company,
- a statement of the content of and extent of cover provided by any insurance policy held by the company, and
- the fire safety certificate issued under the Building Control Acts 1990 and 2007 for the multi-unit development. [Paragraph 3.71]

8.30 The Commission recommends that units can not be sold in any development where the owners' management company has failed to file annual returns in the preceding 24 months. [Paragraph 3.83]

8.31 The Commission recommends that certain minimum legal obligations, in particular those concerning governance arrangements and covenants set out in this Report, should be applicable to all multi-unit developments, whether incorporated or unincorporated. [Paragraph 3.99]

8.32 The Commission recommends that an existing multi-unit development and any multi-unit development of 4 units or less, whether already in existence or developed in the future, must comply with the following minimum requirements. In terms of general governance, the Commission recommends that each such multi-unit development must: (a) hold an annual general meeting every calendar year and provide each unit owner at least 21 days notice of the annual general meeting; (b) hold the annual general meetings within objectively reasonable proximity to the location of the multi-unit development and at objectively reasonable times (unless otherwise agreed by a majority of the members); (c) establish and maintain a scheme of annual service charges, (d) maintain the financial and other information specified below; (e) develop

covenants and agreements for the multi-unit development, which must comply with the Commission's requirements on that issue; and (f) comply with the requirement to maintain a scheme for a building investment fund (sinking fund) within 5 years of the coming into force of the Commission's recommendation on that issue. In terms of financial and other information, each such multi-unit development must maintain and communicate to each unit owner the following: (a) the accounts of the multi-unit development in the form of an annual statement of income and expenditure; (b) a statement of the annual service charge or charges; (c) a statement of the current level of the building investment fund and the annual contribution to it (subject to the 5 year transitional period referred to above); (d) a statement of any planned expenditure within the following calendar year; (e) a statement of the assets of the multi-unit development; (f) a statement of the content of and extent of cover provided by any insurance policy held by the multi-unit development; and (g) the fire safety certificate issued under the Building Control Acts 1990 and 2007 for the multi-unit development. [Paragraph 3.107]

8.33 The Commission recommends that these minimum requirements, or the other minimum requirements concerning covenants or a building investment fund (sinking fund) set out elsewhere in this Report, should not be interpreted as preventing a company which has been incorporated for the purposes of a multi-unit development pursuant to the Companies Acts 1963 to 2006 or an industrial and provident society which has been incorporated for the purposes of a multi-unit development pursuant to the Industrial and Provident Societies Act 1893 from incorporating as an owners' management company, OMC. [Paragraph 3.108]

8.34 The Commission recommends that the statutory structure it is proposing should be confined to developments involving residential units, with appropriate adaptation for "mixed" developments. [Paragraph 4.03]

8.35 The Commission recommends that parties involved in the conveyance of a unit in a small development should be subject to core and irreducible obligations. [Paragraph 4.13]

8.36 The Commission recommends that the Law Society's Conveyancing Committee should consider urgently the issue of precedents for the legal documentation suitable for small multi-unit developments or arrangements for publication of such precedents by legal publishers. These precedents will include core obligations attributable to all parties to a conveyance of a unit in a multi-unit development. [Paragraph 4.14]

8.37 The Commission recommends that legislation should provide that the completion of a conveyance for the sale of any unit in a multi-unit development shall be void unless the requirement to register the development with the Land Registry has been completed. [Paragraph 4.22]

8.38 The Commission recommends that –

1. The title to all new large developments should be compulsory registrable (if not already registered). The Commission therefore recommends that section 24(1) of the *Registration of Title Act 1964* (as amended by section 53 of the *Registration of Deeds and Title Act 2006* be further amended to insert the following new paragraph: "(d) any multi-unit development which comprises 5 or more residential units.";
2. Land Registry Rules should provide that any application to register the title of a multi-unit development should not be acted on by the Property Registration Authority (PRA) unless accompanied by a certificate of incorporation of an owners' management company (OMC);
3. The completion of a conveyance for the sale of any unit in such a multi-unit development shall be void unless the requirements to register the entire development have been completed.

[Paragraph 4.32]

8.39 The Commission recommends that pending completion of a multi-unit development or phase thereof, 5% of the purchase price of each unit will be held in an interest-bearing account in the name of the owners' management company on trust for the developer. [Paragraph 4.46]

8.40 The Commission recommends that the developer shall be the taxable person within the meaning of section 3 of the *Value-Added Tax Act 1972* as amended by section 85 of the Finance Act 2008. [Paragraph 4.54]

8.41 The Commission recommends that the *Value-Added Tax Act 1972* be amended to provide that the taxable consideration for VAT purposes will be for the entire consideration paid by the purchaser of a unit at the time of the conveyance of the unit. [Paragraph 4.56]

8.42 The Commission recommends that section 30(5) of the *Stamp Duties Consolidation Act 1999* be amended to include a further paragraph (f) where the legal title only to a multi-unit development is transferred to an Owner's Management Company. [Paragraph 4.60]

8.43 The Commission recommends that there should be a suite of irreducible and core covenants that can not be opted out of by parties to the conveyance. [Paragraph 4.78]

8.44 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. [Paragraph 4.79]

8.45 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. [Paragraph 4.80]

8.46 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,
- an obligation to enforce the covenants in the unit owners' lease agreements. [Paragraph 4.81]

8.47 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. [Paragraph 4.82]

8.48 The Commission recommends that the Conveyancing Committee of the Law Society along with other key stakeholders in the multi-unit development sector may have input into devising a standard set of covenants to be included in the conveyance of every unit. [Paragraph 4.83]

8.49 The Commission recommends that the powers provided for under Head 62 of the 2006 General Scheme of the Property Services Regulatory Authority Bill (concerning the powers of investigation and sanction of the proposed National Property Services Regulatory Authority) be extended to situations where advised prices for services provided by property managing agents are unreasonable. [Paragraph 5.24]

8.50 The Commission recommends that the National Property Services Regulatory Authority should be empowered to impose sanctions on managing agents who engage in anti-competitive practices. [Paragraph 5.28]

8.51 The Commission recommends that property managing agents should be prohibited from exercising the role of secretary in an owners' management company. [Paragraph 5.30]

8.52 The Commission recommends that the National Property Services Regulatory Authority should develop a model contract and model letter of engagement concerning the services to be provided by managing agents to owners' management companies. [Paragraph 5.32]

8.53 The Commission recommends a mandatory statutory requirement for the establishment of a building investment fund for all larger multi-unit developments, that is, those involving 5 units or more. [Paragraph 6.21]

8.54 The Commission recommends that majority approval of the board of directors of the owners' management company will be necessary for any expenditure of the building investment fund; and that this should be provided for in the owners' management company model Articles of Association. [Paragraph 6.24]

8.55 The Commission recommends that the statutory code of practice to be prepared under the proposed Property Services Regulatory Bill 2008 should include an obligation on estate agents and auctioneers that, when advertising a unit in a multi-unit development for sale, they must provide details of the building investment fund to any potential buyer, together with a report on the expected depreciation of the development's structure, fixtures and fittings. [Paragraph 6.29]

8.56 The Commission recommends that building investment fund monies should be statutorily exempt from any charge to tax for the purposes of the *Taxes Consolidation Act 1997*. [Paragraph 6.31]

8.57 The Commission recommends that the building investment funds monies must be kept in a bank account separate to any other account operated by either the owners' management company or property managing agent. [Paragraph 6.35]

8.58 The Commission recommends a study be undertaken by the National Consumer Agency in conjunction with the National Property Services Regulatory Authority in order to devise a list of the purposes for which the building investment fund may be used. [Paragraph 6.39]

8.59 The Commission recommends that a study be undertaken by the National Property Services Regulatory Authority in order to devise best practice guidelines as to how building investment fund costs should be calculated. [Paragraph 6.42]

8.60 The Commission recommends that existing large multi-unit developments; *ie* those which involve 5 units or more, must establish a building investment fund within 5 years. [Paragraph 6.48]

8.61 The Commission recommends any conveyance which purports to contract out of the requirement to establish a building investment fund shall be void. [Paragraph 6.49]

8.62 The Commission recommends all multi-unit developments must maintain a scheme of annual service charges. [Paragraph 6.56]

8.63 The Commission recommends that that the National Property Services Regulatory Authority in conjunction with the National Consumer Agency devise guidelines explaining the correct amount of information to be given to the unit owners in the breakdown of charges. [Paragraph 6.60]

8.64 The Commission recommends that the National Property Services Regulatory Authority in conjunction with the National Consumer Agency examine the possibility of producing best practice guidelines for apportionment of service charges, specifically tailored to the Irish multi-unit development situation. [Paragraph 6.66]

8.65 The Commission recommends that the National Consumer Agency continue to raise awareness and educate the public on the matter of building investment funds and service charges. [Paragraph 7.24]

The Commission 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. [Paragraph 7.27]

8.66 The Commission recommends that the Circuit Court shall have jurisdiction to make a remedial order to enable the rescue and rehabilitation of existing or future multi-unit developments, based on the following elements: the application may be made by any person or body interested in the multi-unit development, excluding unsecured creditors; the Court shall have jurisdiction to deal with any matter which prevents the development from functioning effectively or denies to those interested legitimate expectations and which cannot be solved otherwise; notice of the application should be served on any other interested person or body and such other person or body shall have the right to make representations at the hearing of the application; and the Court shall have a wide discretion as to the remedial orders it can make. [Paragraph 7.37]

8.67 The Commission recommends that the applicant for a remedial order should be required to put forward in the application a draft order or scheme for the approval of the Court. The Commission also recommends that, in the exercise of its discretion and in making any remedial order, the Court shall have regard to:

- representations made to it by any interested person;
- the interests of all interested persons, taken as a whole;
- the desirability of compliance with the provisions of the [draft Multi-Unit Developments Bill 2008 in this Report] applicable to new multi-unit developments of 5 units or more;
- the Property Registration Authority's programme for compulsory registration of title;
- the need to take into account the legitimate vested interests of any party adversely affected by any order. [Paragraph 7.41]

APPENDIX A **SUMMARY OF TITLE RECOMMENDATIONS**

This Appendix contains a narrative summary of the title and conveyancing steps involved in the Commission's proposed scheme for multi-unit developments contained in this Report.

At the end of the narrative summary, the Commission includes 3 Tables which outline in graphic form the essential elements of the Commission's proposed scheme.

1 Developer decides to develop a Multi-Unit Development (MUD). (*The term MUD is used in this summary to indicate the actual part of the site being developed whether in whole or part.)*

2 Developer prepares the site and applies for planning permission.

3 Developer decides whether the site is being developed in its entirety as a MUD or whether it will be developed on a phased basis.

4 An Owners' Management Company (OMC) must be incorporated. (*This is modelled on the Designated Activity Company (DAC) envisaged by the Company Law Review Group and will have defined objects but statutorily limited to the type of activity in which it can engage. In particular, during the development stage of the MUD and up to completion of the MUD it cannot engage in any development activity*).

5 The legal title of the MUD must be transferred to the OMC and title registered in the Land Registry in the name of the OMC. Boundaries must be clearly identified. (*This can be done on a phased basis ie transfer of title for each separate block with the common areas for that block clearly identified*).

If appropriate, easements will be granted over entrance roads and services or over amenity land (if any).

Even though legal title is transferred at this early stage to the OMC, the **developer remains the beneficial owner.**

6 During the development stage, a contract for the sale of a unit in the MUD will be between the developer and potential purchaser under which the developer agrees to procure legal title in the form of a lease of the unit from OMC to purchaser (or perhaps a freehold title with mutual covenants assuming the enactment of the *Land and Conveyancing Law Reform Bill 2006*).

(*A contract for the sale of any unit cannot be completed, ie a conveyance cannot be finalised, unless the steps listed at 4 and 5 (OMC is incorporated and the title is registered in the name of the OMC) have been completed. If registration of title in the name of the OMC has not been completed at the time of the contract for sale, normal conveyancing practice will apply, namely, a special condition will provide for completion only on proof of registration. This would be similar to a situation pending the issue of a grant of probate in the case of a death on title. In other words, the contract will be a conditional one until the statutory obligations have been complied with*).

7 The OMC will transfer the legal title to the unit purchaser and will covenant to maintain the common areas of the MUD when completed.

The Developer will join in the conveyance to transfer its beneficial interest in a unit and to covenant to complete the MUD in accordance with the obligations under planning permission and in accordance with the contractual agreement with the OMC. (*The **unit** will, of course, have to be completed at the time of completion of the purchase by the potential unit owner; otherwise, in accordance with normal conveyancing practice, the purchaser will not close the purchase of the unit*).

95% of the purchase monies will be paid to the developer at the time of completion of the sale, and the balance of 5% of the purchase monies will be paid to the OMC **on the instructions of the developer**.
(*Pending completion, the 5% balance of purchase monies is to be held by the OMC in an interest-bearing account in trust for the developer. Any interest earned on the account will accrue to the developer*).

8 On completion of the purchase, a unit purchaser will obtain registered title to the unit:

- if the title to the unit is leasehold, then a leasehold title is carved out of the freehold of the MUD and registered as a burden on the freehold folio of the MUD which is owned by the OMC with the benefit of mutual covenants. (*In this case the freehold title of the OMC will consist of the freehold title of the units and freehold of the common areas*),

– if the title to the unit is freehold, the freehold title of the unit is registered along with mutual covenants with the OMC which is the freehold owner of the common areas (*subject to the enactment of the Land and Conveyancing Law Reform Bill 2006).*

(*The covenants to the purchaser will include a covenant from the OMC to manage the MUD on completion of the development and a covenant from the developer to complete the development in accordance with the plans for which planning permission has been obtained and in accordance with the contractual agreement between the purchaser and the OMC. The covenants by the purchaser will include covenants to comply with the obligations of being a unit owner in a MUD*).

On completion of the MUD, the OMC is owner of the legal and beneficial title in the MUD (common areas and head title) and the unit owner is the owner of the legal and beneficial interest in the unit.

Notes on the Owners' Management Company

During the development stage the OMC:

- Will own the legal interest (title) only in the MUD from commencement until the sale of units and completion of the common areas. After this, the OMC will own the appropriate legal *and* beneficial title.

- Has an obligation to transfer title to the developer or its nominee and has no veto in the matter of the sale of units and will not be a party to the contract for the sale of a unit. (*The nominees of the developer will be the unit purchasers*).

- Will commence its task of limited day-to-day management of services immediately (eg insurance, bin charges) but will not take over any obligation for the common areas (either internal or external) until completion.

'*Development stage' will include the period from the date of initial transfer of the legal title to the OMC to the date of completion*.

'*Completion of development' includes:*

- *completion of 'common area' and the furnishing of a certificate of completion in accordance with the Building Control Acts 1990 and 2007 and*
- *completion of all snagging items in the development.*

Notes on the developer

During the development stage the developer:

- Will owe appropriate and enforceable obligations to the OMC and to individual unit owners in the MUD.
- Will be responsible for all development and sale costs until completion.
- Will be responsible for the portion of service charges for any unsold units until completion of the development

(*If development of the MUD is on a phased basis, the developer will be entitled to develop the remaining phases of the MUD within the general planning framework outlined by the developer. Example: generally specify the number of blocks within the entire MUD development to include a general indication of the height and density and approximation of any amenity lands within the entire development. The developer thus has the flexibility to complete the development of the site in accordance with good estate management*).

Notes on the form of agreement between the developer and the Owners' Management Company (OMC):

Covenants by OMC

In consideration of the transfer of the legal registered title of the MUD to the OMC, the OMC will agree to:

- Hold the MUD in trust as follows:
  - The title to the MUD in trust for the developer or its nominee until completion of the development. This will consist of two elements:
    - The common areas in trust for the developer or its nominee until completion of the development [*the title will have to be clearly identified*]
    - The 'block' (consisting of [state number] units in the development in trust for the developer or its nominee (*the title will have to be identified).*

    (*The MUD will consist of the site on which the block is being developed and its common areas*).

- On the completion of a purchase by a purchaser of a unit
  - to transfer the legal title to the purchaser
  - to hold 5% of the proceeds of sale in trust for the developer (in an interest-bearing account to accrue to the developer) until such time as the development has been completed. (*95% of the sale price will be paid directly by the purchaser to the developer at the time of the closing of the purchase of the unit).*

- On completion of the development to hold the title in trust for itself (the OMC).

Covenants by developer

The developer will undertake to:

- Develop the development in accordance with the plans for which planning permission has been obtained.
- Will comply with all notifications and requirements of the planning authority.
- Notify the OMC of potential purchasers and be responsible for all costs in connection with
  - the marketing of the units in the MUD for sale and
  - the transfer of title from the OMC to each unit purchaser.
- Will be responsible for all taxes in connection with the development of the MUD.
- Be responsible for such charges as are specified in Schedule (which will specify common areas that have not been completed) until completion of the development of the MUD.
- During the development stage will be responsible for a proportion of all service charges in proportion to the number of units unsold.
- Will disclose the existence of any contracts entered into on behalf of the OMC prior to or on completion (including any contracts for the provision of property management services).
- During the development stage will file all returns for the purposes of the *Companies Acts* in the Companies Registration Office.

It will also be necessary to have a clear indication of the respective roles of the OMC and the developer in connection with the provision of management services during the development and post-completion stages. This can only be dealt with on a development by development basis based on the actual position in each development.

Arbitration and Mediation Clause [details to be inserted]

The remainder of this Appendix contains 3 Tables which outline in graphic form the essential elements of the Commission's proposed scheme.

Table 1: Developer and Owners' Management Company (OMC)

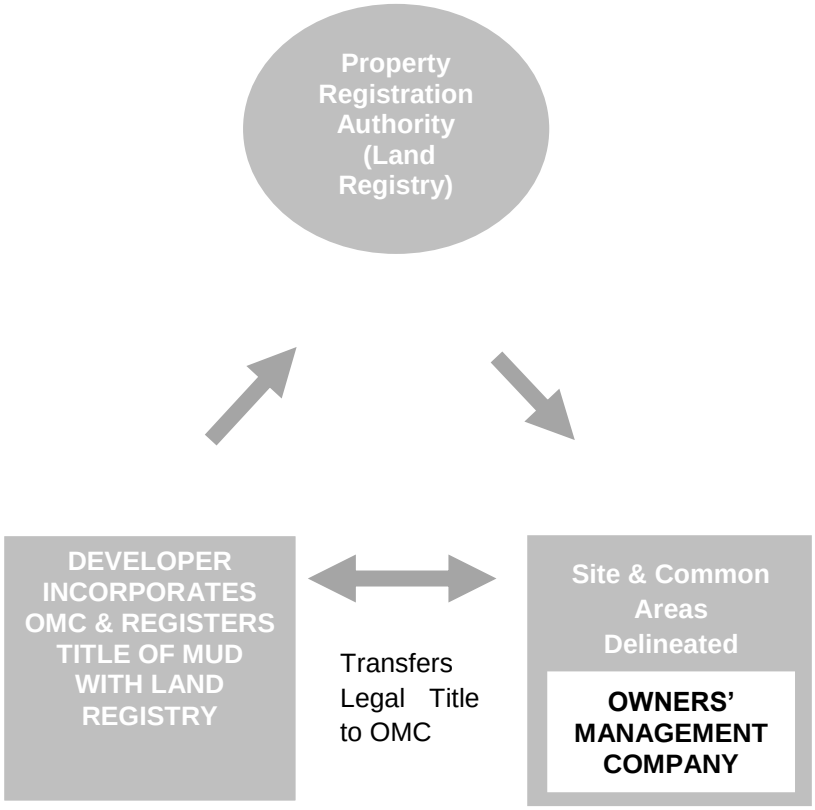


Table 2: Developer and Unit Owners

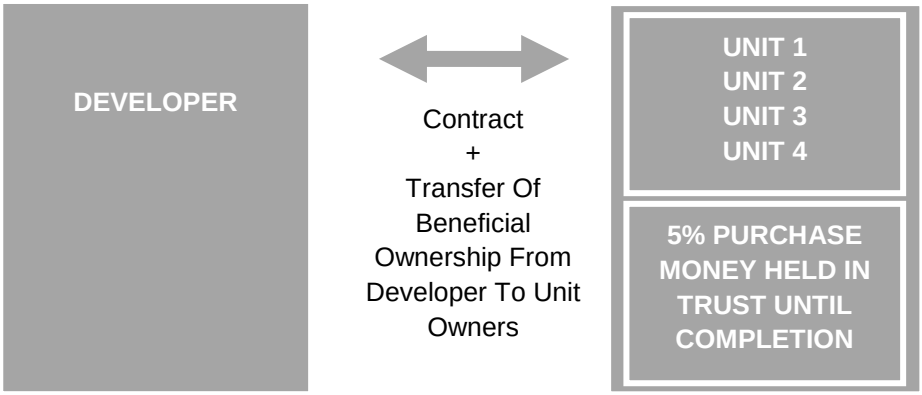
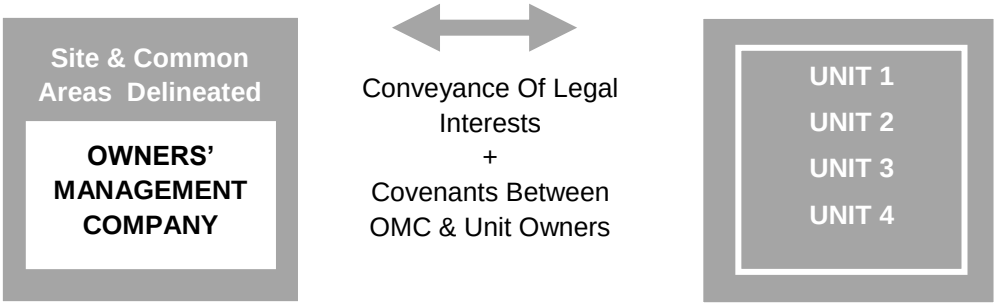


Table 3: Owners' Management Company and Unit Owners



APPENDIX B **DRAFT MULTI-UNIT DEVELOPMENTS BILL 2008**

DRAFT MULTI-UNIT DEVELOPMENTS BILL 2008

ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement
2. Definitions
3. Duties and entitlements of developer concerning a multi-unit development
4. Owners' management company in a multi-unit development
5. Conveyancing and covenants in multi-unit developments
6. Property managing agent and multi-unit developments
7. Annual service charges and building investment fund
8. Requirements applicable to existing and small multi-unit developments
9. Dispute resolution and rehabilitation of multi-unit developments
10. Conveyances and effect of non-compliance with this Act

Building Control Acts 1990 and 2007	
Companies Acts	
Finance Act 2008	2008, No.3
Industrial and Provident Societies Act 1893	56 & 57 Vic., c. 39
Planning and Development Act 2000	2000, No.30
Registration of Deeds and Title Act 2006	2006, No.12
Registration of Title Act 1964	1964, No.16
Stamp Duties Consolidation Act 1999	1999, No.31
Taxes Consolidation Act 1997	1997, No.39
Value Added Tax Act 1972	1972, No.22

DRAFT MULTI-UNIT DEVELOPMENTS BILL 2008

BILL

Entitled

AN ACT TO MAKE PROVISION IN CONNECTION WITH AND TO REFORM THE LAW OF MULTI-UNIT DEVELOPMENTS, INCLUDING APARTMENT DEVELOPMENTS, TO AMEND THE REGISTRATION OF TITLE ACT 1964, TO AMEND THE STAMP DUTIES CONSOLIDATION ACT 1999, TO AMEND THE VALUE-ADDED TAX ACT 1972, TO AMEND THE TAXES CONSOLIDATION ACT 1997, TO APPLY THE COMPANIES ACTS 1963 TO 2006 TO CERTAIN MULTI-UNIT DEVELOPMENTS AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Short title and commencement

1.— (1) This Act may be cited as the *Multi-Unit Developments Act 2008*.

(2) This Act comes into force on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes and different provisions.

(3) Where the Minister proposes to make any order or orders under *subsection (2)*, he or she shall, before doing so, consult with such other (if any) Minister of the Government as the Minister considers appropriate having regard to the functions of that other Minister of the Government.

Definitions

2. — In this Act, unless the context otherwise requires —

"annual service charge" means the annual charge or charges referred to in *sections 4 and 7* which are reasonably required for the annual maintenance of a multi-unit development;

"building investment fund" means the fund referred to in *sections 4 and 7* and established and maintained for the purpose of reasonable expenditure on the capital maintenance of the common areas of a multi-unit development;

"common areas" means those parts of a multi-unit development designated as common areas, including where relevant access and side roads, architectural features, circulation areas, footpaths, internal common stairways, open spaces, parking areas and utility rooms;

"developer" means the person who carries out the development and construction of a multi-unit development having obtained planning permission for the multi-unit development under the *Planning and Development Act 2000*;

"development stage" means the period which begins when any unit is made available for sale and ends after all construction works and ancillary works (including works on the common areas) for the multi-unit development have been completed and after certificates of compliance with the *Building Control Acts 1990* and *2007* have been issued;

"Minister" means the Minister for Justice, Equality and Law Reform;

"multi-unit development" means land that includes a building which was designed and intended for use and occupation as units of 2 or more apartments or flats or other dwelling within such a building or connected building on the same land, but the provisions of this Act shall not apply to a unit or units in the building designed and intended for non-residential (including commercial) use;

"owners' management company" has the meaning assigned by *section 4*;

"unit" means a unit in a multi-unit development designed for use and occupation as an apartment or flat or other dwelling, or for non-residential (including commercial) use;

"unit owner" means the person to whom the interest or estate in a unit is conveyed.

Explanatory note
Section 2 implements the recommendation in paragraph 2.35.

Duties and entitlements of developer concerning a multi-unit development

3. — (1) Where required in accordance with *section 4*, the developer shall —

(*a*) incorporate an owners' management company prior to the completion of the conveyance to a unit owner of any unit in a multi-unit development, and

(*b*) vest the legal title of that multi-unit development in the owners' management company.

(2) The developer shall 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.*

(3) Section 24 of the *Registration of Title Act 1964* (as amended by section 53 of the *Registration of Deeds and Title Act 2006*) is amended in subsection (1) by the insertion of the following after paragraph (*c*) ", or (*d*) a multi-unit development within the meaning of the *Multi-Unit Developments Act 2008*,".

(4) Before the Property Registration Authority registers the title vested in an owners' management company in accordance with the *Registration of Title Act 1964,* it shall ensure that an owners' management company has been incorporated in accordance with *section 4.*

(5) During the development stage, the owners' management company shall hold the legal title to the multi-unit development in trust for the developer or his or her nominee.

(6) Section 30(5) of the *Stamp Duties Consolidation Act 1999* is amended in subsection (5) by the insertion of the following after paragraph (*e)* ", or (*f*) where the legal title only to a multi-unit development is transferred to an Owner's Management Company in accordance with the *Multi-Unit Developments Act 2008*.".

(7) The developer shall bear the pre-incorporation costs of the owners' management company and all the development costs of the multi-unit developments and shall ensure that no such costs are imposed on or incurred by the owners' management company.

(8) Nothing in this section or the other provisions of this Act shall be interpreted as precluding any person from making an application to the Property Registration Authority to register the title of any multi-unit development in existence at the commencement of this Act or of any multi-unit development of

4 units or less, or as precluding the Property Registration Authority from registering the title to any such multi-unit development.

Explanatory note
Section 3 implements the recommendations in paragraphs 2.21, 2.24, 3.46, 3.39, 4.60 and 4.79.

Owners' management company in a multi-unit development
4.— (1) From the commencement of this section, an owners' management company shall be incorporated under the *Companies Acts* for a multi-unit development which comprises 5 units or more and shall carry out the functions referred to in this Act.

(2) The title "owners' management company" and the letters "OMC" shall appear in legible characters on all documents signed and issued by or on behalf of an owners' management company, and the owners' management company shall ensure that it is represented as being such a company.[1]

(3) The objects and functions of an owners' management company shall be —

(*a*) during the development stage, to convey the legal title of a unit in the multi-unit development to each unit purchaser and that it shall not prevent or frustrate any such conveyance, and to ensure (in a manner that is consistent with the object and function to convey that legal title and not to prevent or frustrate it) the management and maintenance of the common areas of the multi-unit development and otherwise to comply with the obligations imposed on the company by this Act,

(*b*) after the development stage, to ensure the management and maintenance of common areas of the multi-unit development and otherwise to comply with the obligations imposed on the company by this Act.

(4) Notwithstanding anything in the *Companies Acts*, the memorandum of association of an owners' management company shall make provision for the following —

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[1] The Commission has recommended in the Report hat when the designated activity company (DAC) envisaged by the Company Law Review Group in its draft *Companies Consolidation Bill* is in place, the OMC will be referred to as "OMC DAC."

(*a*) the name of the company in accordance with *subsection (2)*,

(*b*) an objects clause in accordance with *subsection (3)*,

(*c*) that each unit owner shall be a member of the company,

(*d*) that each member of the company holds one vote of equal weight as each other member, and

(*e*) that, in the event of a sale of a unit after its first sale, each subsequent unit owner shall be a member of the company on completion of the conveyance.

(5) Notwithstanding anything in the *Companies Acts*, the articles of association of an owners' management company shall make provision for the following —

(*a*) that an annual general meeting shall be held within every calendar year;

(*b)* that every member of the company shall receive at least 21 days notice of the annual general meeting,

(*c*) that the annual general meeting shall take place within reasonable proximity to the multi-unit development and at reasonable times (unless otherwise agreed by a 75% majority vote of the members of the company),

(*d*) that a scheme of annual service charges and a scheme for a building investment fund for the multi-unit development is established and maintained,

(*e*) the form and content of the annual returns of an owners' management company specified in *subsection (6)*, and

(*f*) the covenants and agreements for the multi-unit development, which shall comply with the requirements of *section 5*.

(6) Notwithstanding anything in the *Companies Acts*, the annual returns of an owners' management company shall include the following —

(*a*) the accounts of the company in the form of a statement of income and expenditure,

(*b*) a statement of the annual service charge or charges,

(*c*) a statement of the current level of the building investment fund and the annual contribution to it,

(*d*) a statement of any planned expenditure for the following calendar year,

(*e*) a statement of the assets of the company,

(*f*) a statement of the content of and extent of cover provided by any insurance policy (if any) held by the company,

(*g*) the fire safety certificate issued under the *Building Control Acts 1990* and *2007* for the multi-unit development.

(7) Subject to the provisions of this section and the other provisions of this Act, the *Companies Acts* shall apply with the necessary modifications to an owners' management company.

(8) A multi-unit development which comprises 4 units or less may be developed and maintained on the basis of a co-ownership agreement between the unit owners.

Explanatory note
Section 4 implements the recommendations in paragraphs 3.11, 3.43, 3.46, 3.50, 3.51, and 3.71.

Conveyancing and covenants in multi-unit developments
5.— (1) Where a conveyance of a unit occurs during the development stage of a multi-unit development, the purchaser of a unit shall, on completion of the conveyance of the unit to the purchaser, pay 5% of the consideration for the purchase to the owners' management company, which shall hold each such sum in trust for the developer until the development stage has been completed.

(2) The owners' management company shall not transfer the sums referred to in *subsection (1)* until the development stage has been completed.

(3) Notwithstanding *subsection (1)*, the developer shall be the taxable person within the meaning of section 3 of the *Value-Added Tax Act 1972* (as amended by section 85 of the *Finance Act 2008*) for the entire consideration paid by the purchaser of a unit at the time of the conveyance of the unit.

(4) Without prejudice to any other covenants which may be entered into, the covenants to be included in the articles of association of an owners' management company shall include the following —

(*a*) that each unit owner shall abide by all house rules of the multi-unit development,

(*b*) that each unit owner shall discharge the responsibilities expected as a member of the owners' management company, including payment of service charges and contributions to the building investment fund,

(*c*) that each unit owner shall obtain the permission of the board of directors of the owners' management company before making any external or structural alteration to the unit owner's unit,

(*d*) that each unit owner shall provide up-to-date and accurate contact details to the owners' management company,

(*e*) that each unit owner shall inform his or her tenant (if any) of the house rules of the multi-unit development, and shall take all reasonable steps to ensure that any such tenant abides by those rules.

Explanatory note
Section 5 implements the recommendations in paragraphs 4.46, 4.54 and 4.82.

Property managing agent and multi-unit developments
6. — A property managing agent who provides property management services (within the meaning of section 2 of the *National Property Services Regulatory Authority Act 2008)*[2] for a multi-unit development shall not perform the functions of company secretary (within the meaning of the *Companies Acts*) of the owners' management company of that multi-unit development.

Explanatory note
Section 6 implements the recommendation in paragraph 5.30.

[2] This is a reference to the definition in Head 2 of the draft *Scheme of the Property Services Regulatory Authority Bill* published by the Department of Justice, Equality and Law Reform in December 2006. As mentioned in the Introduction to this Report, the Government Legislation Programme (April 2008) indicates that a *National Property Services Regulatory Authority Bill 2008* is to be published shortly.

Annual service charges and building investment fund

7.— (1) An owners' management company shall, as soon as is practicable, establish and maintain a scheme of annual service charges for its multi-unit development.

(2) An owners' management company shall, as soon as is practicable, establish and maintain a scheme for a building investment fund for its multi-unit development.

(3) The funds standing to a building investment fund shall be held in an identified interest-bearing bank account separate to any other funds of the owners' management company.

(4) For the purposes of the *Taxes Consolidation Act 1997*, no tax shall be chargeable in respect of any interest accruing to an owners' management company where such interest arises from funds in a building investment fund.

Explanatory note

Section 7 implements the recommendations in paragraphs 6.21, 6.31 and 6.56

Requirements applicable to existing and small multi-unit developments

8.— (1) This section applies to —

(*a*) a multi-unit development in existence at the commencement of this Act, and

(*b)* any multi-unit development of 4 units or less.

(2) A multi-unit development to which this section applies shall —

(*a*) hold an annual general meeting every calendar year and provide each unit owner with at least 21 days notice of the annual general meeting,

(*b*) hold the annual general meetings within objectively reasonable proximity to the location of the multi-unit development and at objectively reasonable times (unless otherwise agreed by a majority of the members),

(*c*) establish and maintain a scheme of annual service charges,

(*d*) maintain the financial and other information specified in *subsection (3)*,

(*e*) develop covenants and agreements for the multi-unit development, which shall comply with the requirements of *subsection (4)*, and

(*f*) comply with *subsection (5)*.

(3) A multi-unit development to which this section applies shall maintain and communicate to each unit owner the following financial and other information—

(*a*) the accounts of the multi-unit development in the form of an annual statement of income and expenditure,

(*b*) a statement of the annual service charge or charges,

(*c*) subject to *subsection (5)*, a statement of the current level of the building investment fund and the annual contribution to it,

(*d*) a statement of any planned expenditure for the following calendar year,

(*e*) a statement of the assets of the multi-unit development,

(*f*) a statement of the content of and extent of cover provided by any insurance policy held by the multi-unit development, and

(*g*) the fire safety certificate issued under the Building Control Acts 1990 and 2007 for the multi-unit development.

(4) A multi-unit development to which this section applies shall, without prejudice to any other covenants which may be entered into, ensure that such covenants include the following —

(*a*) that each unit owner shall abide by all house rules of the multi-unit development,

(*b*) that each unit owner shall discharge the responsibilities expected of them, including payment of service charges and contributions to the building investment fund,

(*c*) that each unit owner shall obtain the permission of the board of directors of the company or the other co-owners, as the case may be, before making any external or structural alteration to the unit owner's unit,

(*d*) that each unit owner shall provide up-to-date and accurate contact details to the company or the other co-owners, as the case may be,

(*e*) that each unit owner shall inform his or her tenant (if any) of the house rules of the multi-unit development, and shall take all reasonable steps to ensure that any such tenant abides by those rules.

(5) (*a*) A multi-unit development to which this section applies shall, within 5 years of the commencement of this *subsection*, establish and maintain a scheme for a building investment fund for the multi-unit development.

(*b*) The funds standing to a building investment fund shall be held in an identified interest-bearing bank account separate to any other funds of the multi-unit development.

(*c*) For the purposes of the *Taxes Consolidation Act 1997*, no tax shall be chargeable in respect of any interest accruing to a multi-unit development to which this section applies where such interest arises from funds in a building investment fund.

(6) Where this section applies to a corporate body, the obligations imposed on the multi-unit development by this section shall be taken to be obligations of the corporate body in which is vested the legal title of that multi-unit development.

(7) Where this section applies to an unincorporated body or to a co-ownership agreement, the obligations imposed on the multi-unit development by this section shall be taken to be obligations of the members of the unincorporated body or on the co-owners, as the case may be.

(8) Nothing in this section or in the other provisions of this Act shall be interpreted as preventing a company which has been incorporated for the purposes of administering the affairs of a multi-unit development pursuant to the *Companies Acts* or an industrial and provident society which has been incorporated for the purposes of administering the affairs of a multi-unit development pursuant to the *Industrial and Provident Societies Act 1893* from incorporating as an owners' management company pursuant to *section 4*.

(7) Nothing in this section or in the other provisions of this Act shall be interpreted as preventing a company which has been incorporated for the purposes of a multi-unit development pursuant to the *Companies Acts 1963* to *2006* or an industrial and provident society which has been incorporated for the

purposes of a multi-unit development pursuant to the *Industrial and Provident Societies Act 1893* from incorporating as an owners' management company pursuant to *section 4*.

Explanatory note
Section 8 implements the recommendations in paragraphs 3.107, 3.108, 3.69, 4.73, 4.74 and 6.31.

Dispute resolution and rehabilitation of multi-unit developments
9.— (1) Without prejudice to the remaining provisions of this section, the Small Claims Court shall have jurisdiction not exceeding the sum of €3,000 concerning the non-payment by a unit owner of an annual service charge or of a contribution to a building investment fund.

(2) Where, in an application under *subsection (3)* (referred to in this section as an application for rehabilitation), it appears to the Circuit Court that the circumstances involved in the application either prevents a multi-unit development from functioning effectively or denies to the applicant legitimate expectations and which cannot be resolved otherwise, or both, the Court may make such order or orders it deems necessary that would be likely to facilitate the future effective functioning of the multi-unit development or the legitimate expectation of the applicant, or both.

(3) An application for rehabilitation seeking an order or orders under *subsection (2)* —

(*a*) may be made by any interested party,

(*b*) shall be supported by a compromise or scheme of arrangement, a statement of assets and liabilities and such other evidence as the court may require for the purpose of showing that there is good reason for believing that the multi-unit development will be capable of facilitating the future effective functioning of the multi-unit development or the legitimate expectation of the applicant, or both,

(*c*) shall be on notice to any other interested person and such other person shall have the right to make representations at the hearing of the application.

(4) The Court shall, in exercising its discretion to make an order or orders under *subsection (2)*, have regard to:

(*a*) representations made to it by any interested person,

(*b*) the interests of all interested persons, taken as a whole,

(*c*) the desirability of compliance with the provisions of this Act applicable to new multi-unit developments of 5 units or more,

(*d*) the objective of compulsory registration of title conferred on the Property Registration Authority, and

(*e*) the legitimate vested interests of any party adversely affected by any such order.

(5) In this section "interested party" includes a director or member of an owner's management company, or a director or member of any other corporate body which has been incorporated for the purposes of administering the affairs of a multi-unit development or a co-owner in a multi-unit development, as the case may be, but shall not include an unsecured creditor of a multi-unit development.

Explanatory note

Section 9 implements the recommendations in paragraphs 7.37 and 7.41.

Conveyances and effect of non-compliance with this Act

10.— (1) No conveyance of a multi-unit development shall be completed unless the accounts of the owners' management company for the period ending 24 months before the date of the conveyance shall have been filed.

(2) Subject to *section 9(2)*, any conveyance or purported conveyance which does not comply with the requirements of this Act shall be void.

Explanatory note

Section 10 implements the recommendation in paragraph 3.83.

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This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to all legislative changes.

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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975