

Multi-Units Development Act 2011 (Heading)

This Act, commonly referred to as, "The **MUD Act**" was commenced by Ministerial Order on the 1st April 2011 and was enacted in order to address many short-comings of the common legal structures used in Multi Unit Developments, to provide a statutory framework to regulate the operation of Management Companies and to provide effective redress where difficulties arise. The Act is divided into a number of Schedules to deal with specific types of developments. Some important definitions contained in the Act must be considered. They are as follows:

"Common Areas" means all those parts of a MUD designated, or which it is intended to designate as common areas and including where relevant all structural parts of a building and shall include, in particular:

- (a) the external walls, foundations and roofs of internal load bearing walls;
- (b) the entrance halls, landings, lifts, lift shafts, staircases and passages;
- (c) the access roads, footpaths, kerbs, paved, planted and landscaped areas and boundary walls;
- (d) Architectural and water features;
- (e) Such other areas which are from time to time provided for common use and enjoyment by the owners of the Units, their servants, agents, tenants and licensees;
- (f) All ducts and conduits other than such ducts and conduits within or serving only one Unit in the Development;
- (g) Cisterns, tanks, sewers, drains, pipes, wires, central heating boilers other than such items within and serving only one Unit in the development.

The Developer can retain certain flexibility to decide what should be included or excluded from a Common Area with the proviso that there are provisions in the Act which restrict the omission of parts of the development reasonably necessary for the use and enjoyment by the residential Unit owners of the development.

"Developer" means the person who carries out or arranges for the development or construction of a MUD.

It is debatable as to whether a Receiver appointed by a Lending Institution could, therefore, be treated as a Developer.

"Multi-Unit Development" ("MUD") means the development on land on which there stands erected a building or buildings comprising Unit or Units and that;

- (a) as respects such Unit, it is intended that amenities, facilities and services are to be shared, and;
- (b) subject to Section 2(1) the Development contains not less than five residential Units (there are certain provisions to cover Units of less than five).

"Mixed Use Multi-Unit Development" means a MUD of which a commercial Unit, (other than a child care facility) form part of the development.

The focus of the Act is on residential rather than commercial Units. However, where there is a mixed development, the Act still applies but certain flexibility is given allowing commercial Units to be treated differently to residential Units.

“Relevant parts” means in relation to a Unit those parts of the common areas of a MUD necessary for the enjoyment of quiet and peaceful occupation of such Unit.

“Residential Unit” means the Unit in a MUD which is;

- (a) designed for;
 - (i) use and occupation as a house, apartment, flat or other dwelling, and
 - (ii) has self containing facilities, (ie. bathroom and cooking facilities); or
- (b) designed and used as a child care facility and such facility is not intended to primarily share amenities services and facilities with commercial units in the development.

APPLICATION OF THE ACT –

The Act provides that only those common areas, either exclusive to the residential Units or common to both the residential and commercial Units must be transferred to the Management Company. Common areas exclusive to the commercial units are not obliged to be transferred to the Management Company but nothing in the Act prohibits their transfer as such. Section 2(4) of the Act provides that those Sections of the Act relating to the allocation of voting rights (Section 14(1)) and apportionment of service charge, (Sections 18 to 21) in mixed used MUDs can be different as between different classes of Units provided such allocation and apportionment is fair and equitable. All relevant matters are taken into account when assessing whether allocation or apportionment is fair and equitable, including the respective level of use by different classes of Units, and their invitees. Therefore, where a Commercial Unit pays a higher service charge based on a more extensive footfall coming to the premises, it is only fair and reasonable that they would have a greater voting rights in any decision making within the OMC.

TRANSFER OF COMMON AREAS AND REVERSION –

The obligation is imposed not only on the Developer but the owner of the lands to transfer the common areas to a OMC. If a premises was built under Licence the obligation rests not only on the developer but on the land owner to ensure the common areas are transferred.

I am assuming that as of the 1st April 2011, more than 80% of the residential units have been sold, and as such Section 5 of the Act applies in relation to the transfer of the common areas. In this situation, the Developer must ensure that the transfer takes place within six months of the commencement of the Act, ie. before the 1st October 2011 which means that the Developer will lose control over the common areas. The actual procedure for arranging the transfer of the common areas will have to be discussed with the Developer's Solicitor, as there may be some Units which are unsold and the Developer will have to decide how the ownership of same is to be held. Various considerations will have to be taken into account by The Developer and its Lender in deciding which route to take.

CONTINUING RIGHTS AND OBLIGATIONS –

Section 6 – Each OMC is obliged under the Act, at the Developer’s request, to join in any assurances required to assure good and marketable title to a purchaser of a Unit within a MUD to any nominee of the Developer. Therefore, the OMC cannot refuse to execute a Transfer. If it does, the Developer can issue proceedings in the Circuit Court under Section 24 for an Order requiring the OMC to comply.

Section 7 –

The Developer is obliged to ensure completion of the development in accordance with Planning Acts and Building Regulations.

Section 9(1) –

The Transfer of the Common Areas does not preclude the Developer passing back and forth over any of the parts of the common areas reasonably necessary to complete the development or carry out works to adjoining land.

Section 9(2).

In exercising the rights given to the Developer under Section 9.1 the Developer must indemnify the OMC for any claims against the OMC in respect of any act or omission by the Developer in course of undertaking completion works.

Section 9 (3)

To cover the obligation to indemnify, the Developer at its own cost, must maintain adequate insurance with an authorised Insurer in respect of all risks associated with the Developer's use and occupation of the MUD.

Section 9 (4) and (5).

When carrying out the completion of the Development, the Developer must take all reasonable steps necessary to minimise inconvenience to the Unit owners and must ensure that access to the development is maintained in a clean and safe fashion. Similarly under Section 9,(6) the OMC is not to obstruct the Developer in exercising any rights in relation to the MUD or completing out the development of any adjacent land in order to comply with its obligations.

Section 31. (2).

Where the development of MUD has completed, the Developer is obliged to furnish to each OMC the documentation as specified in Schedule 3, including Opinions on Compliance with Planning Acts and Building Regulations, copies of all relevant consents, receipts for all Planning and financial contributions, as built Drawings, plant and equipment, warranties, maintenance and service contracts, test records, original title documents and all financial management accounts as required by law to be retained by an OMC including the Safety File.

MEMBERS SHARES, VOTING RIGHTS, DIRECTORSHIPS AND SERVICE CONTRACTS.

Section 8 provides for the automatic vesting in the Unit owner or any future owner and the acquisition of the Unit of the Shares in the OMC. This means the powers, rights and entitlements of the member automatically vest in the Unit owner and the Unit owner is obliged to perform all the obligations (including the payment of service charge) relating to that membership. The automatic vesting of these rights does not affect the OMC's

obligation to keep a Members' Register or to issue a Share Certificate of Membership Certificate as soon as practical after notification of the change in ownership. The Unit owner (whether residential or commercial) is obliged to provide all his or her details together with details of any Tenant or other occupant to the OMC.

Voting Rights.

Under Section 14, each Residential Unit is to have one vote of equal value and no other person is to have a voting right. This applies to all MUDs and mixed use developments, subject to the right as stated above for different classes of Units to have different voting rights provided it is fair and reasonable. This section also prohibits the Developer's original Nominee Members exercising disproportionate voting rights. Section 14, however, relates to the voting rights in new MUDs.

Section 15 deals with voting rights in existing MUDs and Members of existing solely residential MUDs which are not subject to Section 14 and have voting rights otherwise, then in accordance with Section 14 can only exercise those voting rights otherwise then in accordance with Section 14 if authorised to do so by Circuit Court Order, having made an Application under Section 24 of the Act.

I feel that it would be unlikely that any such Application would be made. Therefore, unless exceptional circumstances exist, in solely residential MUDs, both new and existing voting would be exercised on one equal vote per Unit basis.

Section 16 prohibits the appointment of a Director of an OMC after the 1st April, 2011 for life or for a period of greater than three years.

Regulation and operation of OMCs.

Section 17 – Annual meetings and reports.

Sections 17, 18 and 19 deal with matters which, in my view, cause the most concern to owners of residential Units and members of an MUD. I will be more specific in relation to this part of the Act.

An OMC is obliged under Section 17(1) to;

- (i) prepare and furnish to each member an annual report which complies with Section 17(ii) and,
- (ii) hold a meeting at least once a year to consider the annual report. 21 days notice is to be given to each member of the annual meeting and a copy of the annual report is to be given to each member at least 10 days prior to the meeting. The meeting must take place within reasonable proximity of the MUD unless 75% of the members agree otherwise in writing. These rules are in addition to and not a replacement of any internal rules of the OMC concerned.

Under Section 17(2) the Annual Report must include:

- (a) A Statement of Income and Expenditure for the period of the Report;

- (b) A Statement of Assets and Liabilities of the OMC;
- (c) (where obliged to maintain a sinking fund under Section 19) A Statement of the funds standing to the credit of the sinking fund and details of the annual sinking fund contribution and apportionment;
- (d) A Statement of the amount of the annual service charge and the basis of such charge in respect of the period covered by the Report.
- (e) A Statement of the projected or agreed annual service charge to the current period;
- (f) A Statement of the planned capital or non-recurring expenditure;
- (g) A Statement of the insured value of the MUD, the annual insurance premium, the name of the insurance Company and summary of principal insured risks.
- (h) A general Statement of the fire safety equipment installed in the development and the arrangements for its maintenance;
- (i) A Statement fully disclosing any Contracts entered into or in force between the OMC and a Director or Shadow Director of the Company or a person who is connected with such person.

Section 18 – Annual Service Charge scheme:

Section 18(1) provides that each OMC has to establish an annual service charge scheme for which the OMC may discharge ongoing expenditure reasonably incurred on the insurance, maintenance or repair of the common areas and on the provision of shared services.

Section 18(2) provides that the annual charge will not be levied for a particular period unless it has been considered at a General Meeting called to purpose which include the approval of the estimated service charge for the coming period. Where the estimated service charge for the coming year is disapproved by at least 75% of those present and voting, the proposed service charge will not be levied but the previous year's charge will continue to apply until a new service charge for the coming year is approved. 60% or more of those present at the meeting can amend the proposal for the coming period.

Section 18(3) states that the categories for the estimated service charge is to be broken down as follows:

- (a) Insurance
- (b) General maintenance
- (c) Repairs
- (d) Waste management
- (e) Cleaning
- (f) Gardening and landscaping.
- (g) Concierges and security services
- (h) Legal services and accounts preparation
- (i) Other expenditure arising in connection with the maintenance, repair and management of the common areas anticipated to arise.

Section 18(6) and (7) make it clear that all costs associated with the original development are not to be recovered through the service charge but remain the responsibility of the Developer as does service charge referable to any unsold Units, provided however, where there has been a failure on the part of the Developer to carry out works and provided certain conditions are met a vote by 75% or more of the members of OMC can authorise the use of the service charge for the purpose of carrying out such works.

Section 18(10) obliges each owner of a Unit in MUD (whether the original Developer or not) to pay all service charges levied in accordance with Section 18. The Developer's obligation to pay service charge for any unsold Units commences from the date the sale of the first residential Unit for the relevant part of the MUD completes.

Under Section 22 service charges is levied under Section 18 and sinking fund contributions levied under Section 19 may be recovered as a simple contract debt.

While service charges do not have to be the same for each Unit, they do have to be calculated on a transparent basis and apportioned equitably between Unit owners. There is provision for the Minister for Justice to issue further Regulations regarding service charges.

Section 19 – Sinking fund.

This Section provides that each OMC must establish a sinking fund to provide funds for exceptional items of expenditure of a non-recurring nature within the later of three years from the transfer of a Unit within a MUD or 18 months from the commencement of Section 19. Each Unit owners' contribution is to be €200.00 or such other amount as agreed at a meeting of the members as a contribution for the year concerned. Similar obligations regarding the payment of service charges by Unit owners and Developers under Section 18 apply to payment of contributions towards the sinking fund under Section 19.

It is important to note that sinking fund contributions are to be held in a separate account and are not to be used to pay those items of current expenditure intended to be recovered through the service charge. Once more, you should note that the Minister may make further regulations in the future regarding sinking fund contributions and expenditure.

Section 23 House Rules

The OMC is entitled to make house rules (to be approved at a meeting of the OMC) relating the effective operation and maintenance of the Development to ensure the quiet and peaceful occupation of the Units generally in the Development.

Section 24.

Provides for the procedure to apply to the Circuit Court to deal with any disputes for non-compliance of the Act.

Sections 27 and 28 deal with mediation proceedings

Section 30 provides for the swift restoration of a Management Company to the Register of Companies, where the company has been struck off in the last six years.