



Office of the Director
of Corporate Enforcement

*Oifig an Stiúirthóra um
Fhorfheidhmiú Corparáideach*

Consultation Paper C/2006/2

Draft ODCE Guidance on the Governance of Apartment Owners' Management Companies

12 December 2006

Introduction

1. The Office of the Director of Corporate Enforcement (ODCE) has received a steady stream of complaints in recent years about the governance of apartment developments and specifically the management companies which:
 - own and control common areas in the developments (such as gardens, car parks, entrances, corridors and stairways) and
 - arrange for the provision of common services to the apartment owners (such as insurance, waste disposal, security, building maintenance, etc.).

2. The Companies Acts have relevance to these governance issues, and in its role of investigating suspected breaches of the Acts, the ODCE has involved itself in rectifying defaults in areas like:
 - the failure of management companies to give the owners of apartments who are members of the management company the statutory financial and other information in relation to the performance of the company;
 - the failure of management companies to notify the members of annual general meetings of the company, and
 - the dissolution of the company following the failure of its directors to file outstanding annual returns with the Companies Registration Office.

3. Because of the growth of apartments in Ireland's housing stock in recent years and the continuing incidence of reported difficulties, the Director of Corporate Enforcement has decided to publish, initially as a Consultation Paper, general guidance on the governance of apartment developments and on the rights and obligations from a company law perspective of the directors and members of the associated management companies. This draws on general guidance which is already available in various ODCE Information Books for company directors and members/shareholders¹. The particular purpose of this Draft Guidance is to improve compliance with the Companies Acts but also more generally to inform directors and members of their respective duties and responsibilities to the collective management of an apartment development.

Wider Concerns

4. Multi-unit developments like apartment complexes are valuable property assets. A complex with 100 apartments which may each be valued at, say, €300,000 approximately constitutes a property worth about €30

¹ These Information Books were published as Decision Notice D/2002/1, copies of which are available at <http://www.odce.ie/publications/decision.asp>.

million. Each of the apartment owners in that development has a financial stake in ensuring that it is maintained to a proper standard and that adequate reserves and sinking funds are accumulated to deal with medium to long term refurbishment needs, e.g., replacement of lifts. According to a recent Dublin City Council report, failure to invest in maintenance and refurbishment could in due course mean that:

“In some cases demolition and redevelopment will be the most economic and effective solution.”²

5. Because of the incidence and variety of emerging problems and the potential economic and social consequences, there have been proposals for amending legislation in this general area³. The ODCE is also aware that the Law Reform Commission will shortly publish a Discussion Paper on possible legislative change. Notwithstanding the potential value of such change, the ODCE believes that some of the current problems can be alleviated by a greater awareness on the part of all stakeholders of their rights and obligations with respect to the governance of these companies. This Consultation Paper and the associated Draft Guidance can help to meet this objective.

The Draft ODCE Guidance

6. While the ODCE recognises that the threat of adverse consequences such as those suggested by Dublin City Council cannot be avoided purely by better adherence to company law requirements, proper governance structures and arrangements are a necessary contributor to preserving the quality of apartment developments in the longer term. By improving understanding of the legal structures and provisions by which management companies can be governed and through which power and influence can be exercised, apartment owners will be in a better position to protect the value of their property.
7. The Draft ODCE Guidance (a copy of which is attached as **Annex 1** to this Consultation Paper) is intended therefore to assist apartment owners and other stakeholders to create and maintain good governance structures and arrangements for their management company. Of necessity however, the Draft Guidance discusses some issues which go beyond the company law area, although the ODCE claims no special knowledge of matters

² “Successful Apartment Living – A Role for Local Authorities in Private Residential Management Companies” (June 2006), page 32. A copy of this Report is available at http://www.dublincity.ie/press_news/news/successful_apartment_living.asp.

³ See, for example, the Report of the Auctioneering/Estate Agency Review Group (July 2005). Chapter 13 deals with the subject of management companies. A copy of this Report is available at <http://www.justice.ie/80256E010039C5AF/vWeb/pcJUSQ6HADNE-en>. See also the National Consumer Agency publication entitled “Property Management Companies and You” and the related Report entitled “Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings” by DKM Consultants Ltd. in association with Kevin O’Higgins Solicitors (October 2006). A copy of both publications is available at http://www.consumerconnect.ie/eng/Hot_Topics/Campaigns/Property_Management_Companies/.

extending beyond our statutory remit. In particular, we have tried to produce an overview of the subject so that the role which the Companies Acts can play in developing good governance will be more readily apparent.

8. The Draft Guidance identifies three distinct phases in the development of management companies, viz:
 - 1) the 'developer only phase' which occurs following the incorporation of the management company by the developer but before the sale of any of the apartments in the apartment development. In essence, the developer controls, either directly or indirectly, the management company at this stage;
 - 2) the 'developer and owners phase' where, following the sale of some apartments, both the developer and the apartment owners have an interest in the management company. However, the developer usually remains in control of the company at this stage, and while the apartment owners, as members of the company, will have certain rights in company law to information on the company's performance, their influence on company direction and operations is often limited by the company's internal governance rules (or 'articles of association');
 - 3) the 'members only phase' where, following the transfer of the common areas in the complex, the apartment owners assume control of the management company and become responsible for the upkeep of the development.
9. While the provisions of company law operate at all three phases, the distinct interests of the developer and the members and of the members among themselves increase the potential for differences of opinion and disputes in phases 2) and 3) above. The Companies Acts lay down the framework or ground rules in which this engagement is to take place on a fair and transparent basis. This Draft Guidance is intended to help all parties contribute to the governance of management companies in the manner contemplated by the law.

Issues for Consideration in this Consultation Process

10. The Director of Corporate Enforcement invites comments from all interested parties on the format and content of the Draft Guidance, prior to the preparation and issue of Final ODCE Guidance on this subject. He specifically seeks comment on the following questions:
 - a) recognising that its primary purpose is to explain the relevant company law and wider provisions, is the Draft Guidance in the format outlined at Annex 1 clear and useful?
 - b) are there any omissions or issues which you would like to see discussed or better explained?

c) should the ODCE's Final Guidance be in a similar form supplemented perhaps by a short list of key governance requirements?

11. The articles of association of many apartment owners' management companies are derived from the model rules contained in Table C of the Companies Act 1963. The ODCE is conscious that some modernisation and improvement of these rules could be achieved with a view to adapting them to the particular needs of management companies. Accordingly, it has made in paragraphs 19.8 and 19.9 of the Draft Guidance certain suggestions which could improve a management company's standard articles of association. The Director would therefore appreciate comment on the following question:

d) are the proposals for change to the standard articles of association which are contained in paragraphs 19.8 and 19.9 of the Draft Guidance helpful and appropriate or would they give rise to unrecognised disadvantages?

12. While the Draft Guidance at Annex 1 has particularly been developed with apartment owners' management companies in mind, the ODCE is conscious that there are also management companies charged with the upkeep of housing estates or other mixed use developments such as combinations of shops and apartments. Because the ODCE has not received the same volume of complaints in relation to these forms of management company, the Director would appreciate comment on the following question:

e) are there distinct features of the management companies for housing estates or mixed use developments which require specific attention in the development of our Final Guidance?

13. If you have any comments on the questions posed at a) to e) above, please send them in writing no later than close of business on 30 March 2007 to:

consultation@odce.ie or

Ms Maria Leavy
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14. Our Final Guidance in 2007 will take account of the comments and submissions received in response to this Consultation Paper. Copies of this Consultation Paper and attachment are available at www.odce.ie, and our Final Guidance will also be placed on our website in due course.

**Office of the Director of Corporate Enforcement
12 December 2006**