

Residential Estate Management, The Agent's Perspective – a means to better practise

National Housing Conference
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Good afternoon ladies and Gentlemen

Private Residential Estate Management is attracting considerable negative media attention and debate. It is the subject of much needed reform as reflected in the various publications in recent times.

Many professional developers with whom my firm works have in the absence of an appropriate legal frame work worked with us in evolving good residential estate management practices. Amongst other things they facilitate the owner's involvement from the earliest point of occupation and they consider the appointment of an independent Building Surveyor as a suitable means to address snagging before affecting the transfer of the common areas.

Whilst my professional industry colleagues welcome wholeheartedly regulation and licensing of our industry as one means to address poor standards and services, this step alone will not ensure quality residential estate management. It is my experience that successful estate management practices can nearly always be attributed to the calibre of the developers, their professional team, the quality of design and construction together with but to a lesser extent the owner's involvement and interest and the quality of the management agent.

Whilst Apartment living has grown to form a substantial part of new housing, the Irish legal model and the management systems have evolved in the absence of a statutory framework, municipal guidance, and a cadre of professional agents. The root cause of complaints tends to stem from this and generally arise in the early stages of the development process.

Many of the existing weaknesses are well documented in recent reports so I intend to focus on specific areas, relevant to this audience, where I believe there are fundamental flaws in the existing process namely:

- The purchaser and the relevance of the architects opinions of compliance
- The Management Company - the absence of contractual rights together with the burden of legal responsibility
- The transfer of the common areas - the lack of defined structure or process,
- The Board of Directors - the transfer of governance to the owners
- The limitations of guarantee schemes as a means to address defects

In my conclusion I will recommend some steps that could be taken at the planning stage of apartment development which if implemented could serve to resolve issues that currently obstruct Good Estate Management, an approach that would require the creation of a contractual obligation through the planning system.

But firstly, let me address the Purchase and the relevance of the Architects opinion of compliance

It is a well known fact that Compliance with Planning permission and Building Regulations is part of the vendor's duty, and not a matter of "buyer beware". As a result, solicitors and mortgage institutions typically require Developers to provide purchasers with an Architects' opinion on compliance.

However, since the sales of apartments frequently occur in phases within an ongoing development, before site works and other works to the common areas are finished, the standard RIAI Opinion of Compliance represents a warranty, that the individual apartment complies with Planning Permission and Building Regulations with a "qualification" such as...

..."insofar as it is applicable the estate has been finished at that point in time in accordance with planning".

..And therein lies the problem.

Purchasers seldom understand that when items are referred to as "qualifications" that they are effectively excluded from an Architects Opinion of Compliance or highlighted as being 'not compliant'. That could be as fundamental as something just outside the owners apartment door.

Indeed most lease and contract documentation for individual units specifically reserve the right of the developer to alter the estate (even going so far as to eliminate certain amenities) with no warranty to finish out as per brochures or models of the estate.

Few purchasers appreciate the consequences of this caveat.

Unfortunately once the individual completes the purchase, their degree of protection and legal recourse is limited in relation to the quality and completion of anything outside their apartment door and in the common areas.

The second element I want to touch on today is The Management Company (MC) - the absence of contractual rights and the burden of legal responsibility

Where problems with completion of the common areas occur the purchasers turns to the MC and the Agent for collective remedy. However in terms of recourse the MC is actually a weaker entity than any one apartment owner and this is a problem.

The MC is formed and initially controlled by the developer. In real terms it is an 'empty vessel' into which the Developer vests the common areas on completion of the sale of the last unit.

The agreement to transfer does not necessarily contain any positive contractual obligations in favour of the MC by the developer either to build the development or to build to any specific standard. Therefore the MC has no contractual rights either in terms of the construction of the common areas (in particular the structural parts). However once vested with the common areas it has onerous obligations to maintain and repair those areas and structural parts including all services irrespective of the condition at the time of transfer.

In the event of common area defects, the MC seldom has any contractual rights to rely upon on behalf of all the owners as a collective body. Therefore on many occasions the owners may only be able to pursue a case in negligence (as opposed to Negligence AND in Contract) and such proceedings can be lengthy uncertain and costly.

The MC has no legal interest prior to transfer and therefore no right prior to the transfer to take legal action. So if the common areas have not been transferred to the MC and there are known defects the owners must then agree volunteers to take a legal action in their own individual names (with the attendant personal risk in relation to costs) on behalf of the owners collectively.

Accordingly, the MC has no basis in contract to seek redress in the event of common area defects.

The situation where The MC has limited contractual rights in relation to the construction and or condition of the property delivered but then has immediate and very onerous contractual obligations to maintain and repair once vested is often the basis of much disquiet and a poor platform for any professional agent involved in the management.

If that were not already a poor scenario, an additional burden is that the MC is a corporate body and therefore subject to Company Law and all Statutory Legislation including Health and Safety, Fire Services, Occupiers liability, Waste Management, Litter Pollution, Disability Law concerning access, Employment Law concerning janitors and The Residential Tenancies Act.....

Generally the owners have a perception that the MC holds their vested legal rights and interests but as you can see from the aforementioned the reality is very different.

Let me turn now to the transfer of the common areas - the lack of a defined structure or Process

In estates privately managed by MCs there tends to be no Bond arrangement such as exists to protect estates or lands that will be taken in charge by the local authority e.g. as regards design approval and milestone inspections of roads and drainage, construction, landscaped areas etc.

There is no defined structure for the process of the transfer of the common areas or for that process to include the requirement of an overall certificate of practical completion in compliance with planning permission and building regulations.

Often in the absence of the above the owners will engage an Independent Building Surveyor to prepare a professional snag report of the common areas, structural parts and services but the completion of same is completely dependent upon the willingness of the developer involved.

In the event that there is abject failure or refusal to transfer there is no compellability that can be called upon save through technical and costly High Court litigation.

Sometimes where there is an undue delay in the transfer of common areas, and defects are known to exist, the delay may deprive the owners of an efficient legal means or vehicle until after the 6 years statute of limitation has passed - at which time they may have real difficulties in pursuing redress.

The owners have no legal interest in the common areas until transferred so if defects exist the owners are left in a legal quagmire.

There is no onus on the developer to give notice of the transfer and therefore no opportunity for the owners to engage legal representation, particularly in regard to procuring delivery of the estate documentation.

The Estate Documentation should include but invariably falls short of some if not all of the following:

- The title documents and counter part leases
- Agreed Snag list and Practical Completion Certification
- As built drawings
- Warranties and other Guarantees, incl Test records for drainage, water and heating pipework
- Certifications for Fire Safety, Health and Safety, etc
- Certificate of Compliance with Planning and Building Regulations
- A schedule of plant, equipment and infrastructure defining expected useful life, recommended maintenance and details of the relevant suppliers and installation sub contractors.

This latter item is invaluable information in determining maintenance needs and the required sinking fund provision.

Overall this schedule of documentation is a prerequisite to Good Estate Management and provision to the MC should be a matter of standard practice and form part of a formal process to transfer .

Possible reasons why this process is hindered are that solicitors for the developer are not always retained to provide a wrap up service immediately following the completion of the sale of the last remaining unit. In addition, Architects are often not retained for the purpose of providing an overall certification of compliance with planning and building regulations of the common areas.

Moving on now to the final step in the process - The Board of Directors – the transfer of governance to the owners

Following the transfer of the common areas, the handover of the control of the Board Directorships of the MC from the developers to the owners occurs as the last remaining step in the development process.

The onerous legal responsibilities and obligations on directors of the MC can naturally lead to a lack of volunteers. Many owners who accept appointment do not understand the personal and legal responsibility they are assuming on behalf of the estate and all the other owners.

It is clear from what I have mentioned already that under today's practice the MC Directors responsibilities are very onerous. In particular, there is no method or means for the new owner/directors to determine whether the estate – roads, footpaths, drainage, mains water services, construction and structures have been transferred in a satisfactory condition to the MC of which they are now to become directors.

The subsequent challenges that owner/directors can face due to incomplete, defective or poorly finished sites can be very significant.

The newly elected owner / directors will at best take the decision to fund a levy, raising the cost of service charges, to undertake corrective work and at worst will allow continuous dilapidation.

The final point I want to discuss today is Home Bond and other such Defect Guarantee Schemes

Whilst purchasers gain a considerable level of assurance by buying in a development covered by Home Bond, in practice, owners complain that it fails to provide a process to address most apartment defects.

These schemes provide major structural defect warranties within specific time frames.

Therefore in practice, it is felt that this scheme serves to protect the lending/financial institutions in major building defects rather than owners against typical apartment defects.

Common area or common services defects may cause significant damage and expense. Water escape arising from defective services or poor workmanship can affect multiple apartments. This in turn can cause significant expense to the owners involved and to the management company in damage to the common areas.

A Private House purchased with this warranty enjoys a far greater level of protection as the dwelling is subject to compliance inspections by Home Bond.

These guarantee schemes are not developed to a similar standard in respect to apartment construction. There is no justifiable reason why apartment owners should not be provided with the same level of protection as a house purchaser within this scheme.

I have a number of proposals I wish to offer as solutions for your consideration

There is no doubt that the current planning process does not provide consistent or adequate protection in the conditions of planning for the owners in apartment schemes as a collective group.

Planning conditions are frequently too weak or even non-existent to allow recourse for remedy through the Planning Enforcement Office for completion issues.

I still believe that there is an opportunity to consider addressing some of the problems I have covered through the planning process.

The best time for the Planning Authority (or An Bord Pleanála on appeal) to set down conditions in order to protect long term residential amenity is when the value of a residential development site is being crystallised by the grant of planning permission. It is much harder to achieve protection at a later stage in the development process.

Firstly I want to suggest a Bond System for Private Residential Estates

I believe that a fundamental weakness in the process is that there is no requirement to provide an overall estate certificate of completion and compliance with planning and building regulations. No undertaking to build or complete the development is given either to the purchaser or the MC and this leads to the lack of remedy for unit owners who subsequently encounter substantive issues.

In estates which will be taken in charge or part in charge, Planning Authorities commonly require a cash lodgement or bond with a financial institution, as security for the completion of the common areas.

Local Authorities do not expect to take apartment common areas in charge and so do not routinely require security bonds in their planning conditions.

Whilst questions are regularly raised on the usefulness of such Bonds particularly in their adequacy and effective and timely enforcement, it can be argued that the long term residential

amenity of apartments requires such Bonds; even where the MC will take responsibility for all the common areas.

It might even be argued that in private estates the Bond System is especially useful given the interdependent nature of ownership.

Surely private apartment purchasers, who undertake to pay through a MC to maintain common areas of an estate, are entitled to the same level of protection as private house purchasers who enjoy, at no cost, the benefit of having their roads, drains and open spaces taken in charge and maintained by the local authority?

My second proposal entails the use of Planning Conditions as a contractual obligation

To secure an adequate degree of protection for the unit owners that the common areas, services and structures are completed satisfactorily the conditions of planning should look for the developer to:

1. To provide a Bond at an agreed amount per dwelling to the local Authority, until satisfactory completion of common areas. In large schemes, the Bond could be redeemable in relation to different blocks and defined boundaries before the vesting process- provided that all independent certification processes are completed.
2. Planning conditions should require a developer to contract - both with the apartment purchasers and with the MC - to provide each of them with an Architects Opinion on Compliance with Planning Permission and Building Control. This should be provided before the planning authority releases its completion Bond.
3. The developer should be obliged to complete the development's common areas in an expeditious manner, within the duration of the relevant planning permission.
4. Planning conditions should stipulate that each of the three parties - apartment purchasers, the MC and the planning authority - should be given an architect's certificate of practical completion, certifying that common areas are fit for possession by the MC. In large developments, such certificates could be issued as a series of certificates of partial practical completion, covering individual phases or areas of the development, so that the large scale of a development does not delay the issue of such a certificate and the recourse it offers.
5. The Planning conditions should also oblige the developer to vest the common areas in the MC after all of the above formalities are completed. This should not be dependent on the sale of the last unit, which is a common precondition inserted in common area contracts.

These provisions would address the weaknesses in the process of multi unit development by providing a contractual obligation on the developers' part to complete the estate and transfer in compliance with planning. It would also give the purchaser and the management company recourse through the courts and through the planning enforcement office, if necessary, to secure the completion of the common areas.

If the needs of sustainable estate management can be systematically built into conditions of planning permission (and compliance submissions approved on foot of those conditions), those planning conditions will more readily be seen as a positive element of creating long term investment and community value, and less as a bothersome issue for apartment owners and MC's.

In conclusion

As I noted at the beginning of this talk, many of the problems highlighted in the media of late arise from a widespread lack of public understanding of management companies. This is very understandable, given the complex and opaque system and the poor legal framework in which it operates.

There is much falling between the stools in the legal framework and system processes. These gaps and failures disadvantage the purchasers of apartments.

In the opening of my paper I referred to successful residential developments in Ireland and the professional approach these developers take with my firm, which I might add they perceive as a competitive disadvantage. They deliver a first class product in a shape and form which facilitates efficient Residential Estate Management and a well run complex. I believe they illustrate a willingness for a better legal frame work and system to be rolled out on a formal and wider level thus ensuring the future sustainability of apartment living in Ireland.

Ann Fitzgerald, Executive Chair of the National Consumer Association in a recent comment sums up the issues in residential estate management when she said;

“Consumers in Ireland have more protection when buying a €30 kettle, than a €300,000 house or apartment in a multi unit development”

That’s something we all need to consider in order to provide a means to better practice in this reform driven environment.

Thank you

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