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**An Ghníomhaireacht
Tithíochta**
The Housing Agency

OWNERS' MANAGEMENT COMPANIES

**A CONCISE GUIDE
FOR DIRECTORS**



MAY 2021



10

Considerations for directors of owners' management companies

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FOREWORD

The owners' management company (OMC) is the glue that binds together the separate interests held by owners of property where there are shared structures or services that cannot be provided individually or separated from each other.

OMCs are established for three main reasons:

- To manage and maintain common areas in multi-unit developments.
- To be the legal owner of the common areas on behalf of the owners of the homes.
- To be the legal owner of the beneficial or reversionary interest of each home.

The Housing Agency's vision is to promote the building of sustainable communities. Communities in multi-unit developments such as apartments rely on robust OMCs for them to be successful and sustainable.

Considering the growth in the number of OMCs as a component of housing in Ireland, and the importance of good governance of OMCs for all stakeholders in the sector, The Housing Agency and Chartered Accountants Ireland have collaborated to produce this guide.

The Housing Agency is pleased to be involved with this publication, which supports the Agency's strategic themes of being a centre of knowledge on housing, and meeting governance and service commitments.

John O'Connor
Chief Executive
The Housing Agency

More and more people live in multi-unit developments and OMCs play an increasingly important role in managing, maintaining and holding legal title of the common areas within these communities. The directors of an OMC, though they are often volunteers, bear the ultimate responsibility for the management of the company and to ensure that it fulfils its purpose. Their role, therefore, can impact on the value of properties as well as the quality of residents' living environment, their homes.

An OMC, like any legal entity, and regardless of its size, is bound by various legal and regulatory requirements and has multiple stakeholders, including members of the company, residents and the local community. Good governance will ensure that an OMC meets its obligations and the expectations of its stakeholders.

Chartered Accountants Ireland is delighted to collaborate with The Housing Agency in producing this unique and important guide for the directors of OMCs. Designed and written with the governance requirements of OMCs in mind, we hope it will provide helpful and practical guidance to achieve good governance.

Barry Dempsey
Chief Executive
Chartered Accountants Ireland

INTRODUCTION

An increasing proportion of Ireland's population lives in apartments and houses that are part of multi-unit developments (hereinafter referred to as 'estates') relying on common areas, or shared spaces and services. In most cases, the shared facilities for the benefit of the residents are controlled and operated by an owners' management company (OMC) on behalf of its members, who may be owner-occupiers or landlords.

An OMC is usually a corporate entity. It sits at the centre of relationships between residents (owner-occupiers and tenants), landlords, and property management agents. OMCs engage with stakeholders, including service providers, and professional advisors such as accountants, auditors, and solicitors. They interact with residents' associations and regulators or government bodies, for example social and public housing associations.

Most OMCs are not-for-profit, or mutual trading bodies. Most directors of OMCs are not paid for their commitment and time. Notwithstanding a voluntary ethos, as a steward of a company's affairs, a director of an OMC should be aware of their duties and responsibilities under company law. The role of director involves the application of sound financial management and corporate governance best practice. A director must act in the best interests of the company while having regard to the interests of all the company's stakeholders.

The purpose of this guide is to assist directors of OMCs, particularly newly appointed directors, by highlighting 10 areas of corporate governance considered most relevant to them. Attention is also drawn to the importance of receiving expert advice where complex legal, financial, and construction or property issues arise.

This guidance is non-statutory and is general in nature. It is not intended to be comprehensive. It is subject and secondary to the provisions of the relevant legal framework applicable to OMCs, including but not limited to the Multi-Unit Developments Act 2011 (the MUD Act 2011), the Companies Act 2014, as amended, and contract law. In the event of a conflict between the content of this guidance and legal requirements, the latter prevails. References and links to sources of further information are provided throughout this guide.

The role of director involves the application of sound financial management and corporate governance best practice.

DIRECTORS' DUTIES

1

A director is a fiduciary, which is a person that acts on behalf of another and is in a position of trust and good faith. A fiduciary is expected to put others' best interests ahead of their own. While there is a significant body of case law setting precedents as to whether a fiduciary has acted appropriately, there are specific statutory requirements with which a company director must comply. **Figure 1** summarises section 228 of the Companies Act 2014's statement of the principal fiduciary duties of a company director.

Figure 1: The principal fiduciary duties of a company director (summary)

A director must:

- act in good faith in what the director considers to be the interests of the company;
- act honestly and responsibly in relation to the conduct of the company's affairs;
- act in accordance with the company's constitution and exercise their powers only for the purposes allowed by law;
- not use the company's property, information, or opportunities for their own or anyone else's benefit, subject to permission or authorisation by the company;
- not agree to restrict their power to exercise an independent judgement (subject to certain exceptions);
- avoid conflicts between their duties to the company and self-interests, unless released by the company from their duty in relation to the matter concerned;
- exercise the care, skill and diligence which would be taken in the same circumstances by a reasonable person having both the knowledge and experience that may reasonably be expected of a person in the same position as the director, and the knowledge and experience the director has;
- have regard to the interests of the company's employees and its members.

In addition to fiduciary duties, under the Companies Act 2014, directors have many general duties and responsibilities; for example, a responsibility to ensure the company complies with company law or a duty to disclose any interest in a contract made by the company.

An OMC, like any other entity, is required to comply with all applicable laws and regulations including, but not limited to, the MUD Act 2011, tax legislation, health and safety legislation, planning law and local authority byelaws. Some legislation will have a direct bearing on the role of a director of an OMC, as demonstrated by the two examples in **Figure 2**. A director of an OMC is expected to become familiar with relevant laws and regulations. They may find it useful or essential to seek professional advice, or refer to guidance issued by reputable sources.

Figure 2: Examples of other legislation, that also affect the requirements of a director of an OMC

- Section 16 of the MUD Act 2011 sets conditions on the term(s) each director is permitted to serve.
- Regulation 18 of the Property Services (Regulation) Act 2011 (Minimum Standards) Regulations 2020 prohibits a property management agent from being a director of an OMC to which the agent provides services, unless the agent is also a property owner in the estate.

A property owner in an estate with an OMC is automatically made a member of the OMC. Directors of an OMC are usually, but not required to be, members of the OMC. Where the director is a member of the OMC, these separate and distinct relationships to the company may give rise to conflicts of interest. As noted, it is always best practice for a director to ensure transparency by disclosing direct or indirect personal interests in any contract or transaction involving the OMC. For example, if a close relative or family member of a director of an OMC proposes to provide maintenance or other services to the estate.

A director of an OMC is involved in the stewardship of a company, the success of which can impact the value of their home and those of their neighbours. Serving as a director of an OMC is an opportunity to contribute to the community in which the individual resides or owns property.

It is reasonable to expect a level of scrutiny, at times accompanied by a level of constructive scepticism, from those overseeing the role of a director of an OMC. This may come from regulators, statutory auditors, or members of the company, including other residents and property owners in the estate.

Directors of an OMC may wish to consider having in place directors' and officers' (D&O) insurance to provide cover for board members for personal liability in relation to wrongful actions or incorrect decisions. It is important to have a clear understanding of the nature and extent of claims cover.

Further guidance on directors' duties is available from the Office of the Director of Corporate Enforcement (ODCE) (www.odce.ie) and the Companies Registration Office (CRO) (www.cro.ie).



BOARD EFFECTIVENESS

Acting as a director on an effective board can be a very satisfying and interesting experience. Nobody wants to waste time, especially voluntary time, on an ineffective board. Board effectiveness can reduce the risk of exposure to non-compliance with laws and regulations, causes for dispute, or directors not fulfilling their responsibilities. Taking time to ensure that the board is effective facilitates better-informed and higher-quality decision-making. In this way, all members of the OMC ultimately benefit. Prospects for the OMC's long-term sustainable success are enhanced. Consider the following six suggestions for increasing the effectiveness of an OMC board.

1. Ensure clarity as to directors' roles and responsibilities

Notwithstanding the legal and fiduciary duties of directors referred to above, and which apply to all directors, it is useful for the board to understand its role in achieving the purpose of the OMC. Directors of an OMC should be familiar with the terms of their appointment.

It is advisable for the board to appoint a chairperson and clearly outline their mandate. An effective board benefits from an open and engaged chairperson. The board is required under company law to appoint a company secretary. Duties and responsibilities of these roles should be clearly and formally communicated. A constructive relationship between the chairperson and the company secretary will assist with the smooth operation of the board. (The functions of the chairperson and the company secretary are discussed below.)

2. Assess the board's composition

A board of directors of an OMC will typically comprise 5 to 10 directors. The maximum number of directors will be set by the company's constitution. The Companies Act 2014 prescribes the minimum number of directors required for certain types of companies, e.g. companies limited by shares, companies limited by guarantee, etc.

Appointing directors who can make a positive contribution is one of the pillars of board effectiveness. Consideration should be given to the strengths and weaknesses of board members. The board might reflect on the diversity of its current and prospective directors in terms of demographics, professional background and experience.

Diverse board membership is more likely to result in effective decision-making. What might such diversity entail in the context of an OMC? With the proviso that all directors must act in members' best interests, representation of both owner-occupiers and landlord-owners can ensure a balance of views. Public and social housing providers, such as approved housing bodies or local authorities, may own properties in the estate. The original developer or commercial institutional landlords, such as real estate investment trusts (REITs) or private rented sector (PRS) firms, may also own properties. Board representation from among these stakeholders, or their tenants, will ensure that a wider range of interests is represented, as well as diversifying the board's skills and experience. This will inform better decision-making and deliver value to the OMC and its members.

A chairperson should be conscious of 'volunteer fatigue' among board members. Succession planning – identifying new potential candidates for the board – should be kept in mind by all directors. Recruiting new directors is invariably made easier when there is an awareness of the OMC's activities among homeowners on the estate, where the board is seen as effective, and where participation offers a positive experience.

3. Effective decision-making

Timely receipt of information, access to knowledge, discussion, respectful challenge, alternative views, consensus to achieve timely closure, and an awareness of bias and conflicts of interest are some key factors necessary for effective decision-making. By keeping up to date with changes in law, regulation, and best practice, and by seeking advice from qualified professionals, directors can make better decisions.

Sub-committees of the board may be delegated specific functions or projects, for example finance, management of a sinking fund scheme, debtor management, or tendering of significant contracts, such as apartment block insurance. Sub-committees report to the board and provide recommendations for its approval.

Boards of directors should operate on a collegiate basis. Exercising due care and skill, combined with independent judgement, board members work together to arrive at an agreed position. While in the forum of board meetings individual directors may articulate their distinctive views, the board's deliberations should ultimately arrive at an agreed, common position, to which all directors are expected to adhere.

4. Proper induction to the board

Newly appointed directors should receive an induction so they can fulfil their roles. Before formally joining the board, a new director could attend a board meeting as an observer (subject to appropriate confidentiality). Individual support from the chairperson or another director may also be beneficial.

New directors should receive an 'induction pack' well in advance of their first board meeting, including copies of key governance documents, such as the OMC's constitution, the most recent financial statements and section 17 OMC annual report, details of any sinking fund scheme, a copy of the agreed annual budget, and the current risk register. New directors might be pointed to further information resources and guides to inform them about directors' duties and responsibilities (see **Section 1** above).

Board members should be conversant with the key title documents and contracts for the estate and the OMC. Among the most important documents are the head lease and the engagement letter with any property management agent contracted by the OMC. In addition to those key documents, the following may set out parties' rights and obligations in the estate:

- estate planning permission;
- development agreement;
- management company agreement;
- deed of transfer of common areas ¹;
- house rules.



1 The MUD Act 2011 prescribes the requirements for common areas to be transferred into the title of the OMC. In addition, Schedule 3 to the MUD Act 2011 prescribes the documentation that also must be handed over to the OMC when the development stage of an estate has ended.

5. Productive board meetings

The frequency of board meetings will be determined by the complexity and demands of the particular estate. In the normal course of events, it would be expected that the board of an OMC would meet at a minimum of four to six times per annum. The extent to which additional meetings or sub-committee meetings are required may depend on factors including, but not limited to, the size of the estate, the financial health of the OMC, the stage in the estate or building life cycle, and the experience and skillset of the board.

Board members should be afforded the opportunity to contribute to discussions at meetings. Over and above their statutory duty to avoid conflicts of interest, directors, including the chairperson, should endeavour to be aware of potential personal biases they may bring to their decision-making. Independent, considered judgement is a quality to be sought and valued in board members.

Respect for the people willing to act as directors of an OMC should be reflected in a professional approach taken to the conduct of the board's business, for example, by ensuring that board papers are properly prepared and circulated well in advance of each meeting.

6. Appointing a chairperson

The Companies Act 2014 provides that directors may elect a chairperson of their meetings. Electing a chairperson is an important step to achieving an effective board. While the chairperson is by law of equal standing to the other directors, care should be taken to select a director with the necessary skills for the role. In selecting a chairperson of an OMC, the competencies necessary may be seen to go beyond familiarity with corporate governance and finance, to extend to interpersonal, communication and initiative-taking skills.

The chairperson fulfils an important leadership role. They can be instrumental in setting expectations concerning the style and tone of board meetings and encouraging all directors to participate in discussions. Unlike a commercially trading for-profit company, an OMC does not have executive personnel such as a managing director. Therefore, it is usual for the chairperson to act as a liaison point with important stakeholders such as the property management agent.

Chapters 4 and 6 of Part 4 of the Companies Act 2014 refer to the role of the chairperson in various 'set pieces' of company business. For instance, the chairperson usually presides at board meetings and general meetings of the company. Unless the company's constitution provides otherwise, the chairperson will have the casting vote in the event of tied polls at meetings. The chairperson has responsibilities in relation to signing minutes of board meetings and general meetings. Minutes are important because they are the formal record of proceedings at meetings.

Guidance material on the position of chairperson is available from the ODCE (www.odce.ie) and the CRO (www.cro.ie).

PERFORMANCE VERSUS CONFORMANCE

Directors of an OMC are responsible not only for ensuring compliance by the entity with laws and regulations, timely preparation of financial information and overseeing the management of operations, they are also responsible for ensuring the long-term sustainable success of the OMC. In determining what success looks like for an OMC, its directors could ask the following questions:

- Is it maintaining the common areas in a reasonable state?
- Is it improving the quality of life for residents and increasing the value of owners' investment in the estate?
- Is it establishing a sinking fund scheme in compliance with minimum requirements of the MUD Act 2011? Is it ensuring that the sinking fund is adequate to cover significant capital costs when they arise, with completion of all works to a high standard?
- Is it ensuring that the OMC manages to carry out its functions with minimum effort?
- Is it proactively engaging with residents and owners, updating them or seeking their input on initiatives, and ensuring that the needs of the entire membership are considered?
- Is it effectively communicating with all stakeholders in the estate
- Is there effective communication between OMC members and residents and the board, or the property management agent, as appropriate?

Achieving success may seem straightforward; however, practical limitations will apply. Restricted availability of finance or cash flow, differing and sometimes conflicting needs of members, or fluctuating levels of commitment from directors, will have some impact on the ability to agree, let alone achieve, objectives for the estate.

Nevertheless, it is incumbent on the board, as stewards of the OMC, to step back occasionally and consider the OMC's current position and where it is headed. Even though the OMC does not act for commercial gain, it is the custodian of something very important: the physical, built environment within which people live. Having a documented strategy, or a plan, with a time horizon of longer than one year, may help the board to make decisions in the best long-term interests of the OMC's members. For example, determining an appropriate sinking fund involves forecasting and estimating the likelihood of a significant non-recurring capital project arising and, if it does, its likely cost.

Directors of OMCs may engage experts such as building surveyors and engineers to assist in their deliberations. However, the board will also have to consider the ease or otherwise with which necessary funds may be raised, for example, through sinking fund contribution increases. Early consideration of these types of issues can enable the raising of funds in a timely manner; it reduces the likelihood of sudden large increases in contributions required from members.



THE COMPANY CONSTITUTION AND REGISTER OF MEMBERS

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Before discussing the company constitution and the register of members of an OMC, it is important to note that there are key distinctions between OMCs and entities trading commercially for profit. Most OMCs are incorporated as companies limited by guarantee (CLGs), which have members rather than shareholders. Members' liability on the dissolution of an OMC (which, given its function, is unlikely) is limited to a nominal sum, usually €10, as stipulated in the company's constitution.

The constitution of an owners' management company

The constitution of an OMC sets out the rules and regulations for internal governance of the company. It itemises the rights, powers and duties of various stakeholders, principally the directors and members of the OMC.

The constitution of an OMC is a very important document and should be carefully drafted and reviewed. The use of any template should be carefully scrutinised to ensure it is tailored appropriately. In cases of dispute or issues regarding the governance of the OMC, the constitution is normally the first point of reference for determining what is permissible. The services of a legal or company secretarial advisor are recommended in the drawing up or amending of the constitution of an OMC.

While the company's constitution must conform to the provisions of the Companies Act 2014, the legislation allows for discretion and variation of the articles of the constitution in certain respects. For example, the facility to set the maximum number of directors or to vary the quorum for a general meeting. Directors of OMCs may wish to consider constitution articles that, for example, link voting rights to good standing in payment of annual management charges. The company's constitution can prescribe a requirement, in addition to any company law requirement, for the financial statements of the OMC to be subject to a statutory audit.

Within the variations permitted, it is a matter for the OMC's members to approve changes to its constitution. Amendments are effected by way of special resolution at general meetings.

The register of members

The register of members is an important governance document for an OMC. As the definitive record of the membership of the company, the register of members is the basis for determining matters such as individuals' entitlement to vote at an annual general meeting.

The Companies Act 2014 requires that a company must keep a register of its members. The Act prescribes what must be entered in the register, including particulars such as the names and addresses of members. The company secretary, working with the OMC's agent, will usually be responsible for maintenance of the register.

Under the MUD Act 2011, membership of an OMC transfers automatically with ownership of a property. A new owner automatically becomes a member of the OMC as part of the property conveyance.

The Companies Act 2014 provides that a register of members is a public document. It must be made available by the company for inspection by any member of the company, and, subject to conditions including the payment of a small fee, for inspection by any other person. Copies of the register or parts of the register must be provided, subject to similar conditions, to anyone requesting them. Directors of an OMC should consider how the OMC meets its obligations under the Companies Act 2014 in relation to access to the register.

FINANCES, CASH AND DEBTORS

The directors are ultimately responsible for the sound financial management of the OMC's affairs. Their responsibilities include ensuring that the OMC has sufficient revenue to cover its expenses, arranging for the collection of cash in a timely manner to cover debts as they fall due, and building up sufficient reserves to cover significant future capital works or refurbishments.

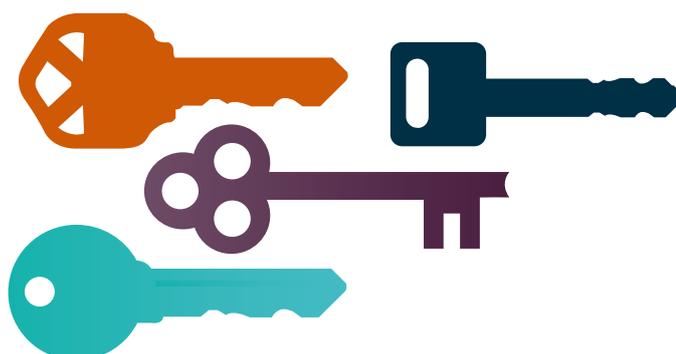
To ensure that annual charges are set at the appropriate level, the directors of an OMC should be familiar with the requirements of the MUD Act 2011, as well as the estate's head lease. The costs of the day-to-day running of the estate are usually reflected in its service charge budget. Budgets are usually calculated by a property management agent under the instruction of the board of directors.

Expenditure on long-term maintenance of a non-recurring nature is reflected in the sinking fund scheme. Taken together, these costs (referred to in the MUD Act 2011 as "owners' management company annual charges") are apportioned to the properties in the estate. Apportionment is usually prescribed in the head lease by reference to factors such as property types (apartment, house, commercial unit, etc.), floor area, or the location of the property within the building – first floor, second floor, etc. In this way the annual charge for each property is determined.

Without revenue from annual charges set at the correct level and collected in a timely manner, an OMC may struggle to deliver estate services. It may not be adequately resourced to provide for long-term maintenance by way of accumulation of cash in the sinking fund.

Annual charge debtors outstanding are known to be a significant challenge for many OMCs. If the OMC has a debt collection policy, its effectiveness should be reviewed regularly. If such a policy is not in place, the directors should consider establishing one, and agreeing the terms of the policy at a members' meeting. This can secure early buy-in from the members to the approach the OMC takes to collecting debt on behalf of all its members. Notification of the OMC's debt collection policy with the annual charge invoice to members is an effective way to encourage payment. Conformance of the policy with the terms of the head lease and the constitution of the OMC should be considered.

The appointment of a debtor sub-committee by the board may be an effective way to improve debt recovery. Professionalism and respect for confidentiality are necessary in circumstances where directors are required to review their neighbours' good standing as to payment of annual charges. Legal remedies, and when to use them, may require consideration; the point at which case escalation is necessary will be a matter of judgement for the board.



Active monitoring and management of cash flow and debtors is a critical finance function in an OMC. **Figure 3** summarises some of the key financial information that the board could seek as part of its regular monitoring of this area. It is advisable for the board to apply an inquiring mindset in reviewing the information presented and to understand the reasons for significant variances. It is appropriate to evaluate and, on occasion, respectfully challenge any significant estimates and judgements applied to such information. This can aid the financial decision-making process and reduce the risk of any unwelcome surprises.

Figure 3: Key financial information to be regularly reviewed by the board

- Bank balances – current account and sinking fund
- Service charge income:
 - Invoiced year to date (YTD) vs. collected YTD
 - Budgeted annual service charge income vs. current forecast (i.e. budget adjusted for anything unexpected)
- Service charge aged debtors (in descending balance) and by property/owner
- Property management expenses – actual YTD vs. budgeted YTD
- Sinking fund contribution – invoiced YTD vs. collected YTD
- Sinking fund balance vs. expected upcoming sinking fund expenditure
- Sinking fund balance target in 1 year, 3 years, 5 years+²

Guidance on the calculation of annual charges, including sinking funds, is available from professional bodies such as the Society of Chartered Surveyors Ireland (www.scsi.ie) and the Institute of Professional Auctioneers and Valuers (www.ipav.ie).



² To determine the adequacy of the sinking fund balance target and identify any urgent repairs, the board can commission a building survey and sinking fund report to assess current condition and time remaining until likely replacement or upgrade (as appropriate) of common areas, and estimates of replacement costs.

COMPANY ACCOUNTS AND STATUTORY AUDIT

Company accounts

Sound financial management depends on the availability of relevant and up-to-date financial information and reports. It is helpful to distinguish between differing types, formats and levels of financial and reporting records for OMCs. Inevitably, there is overlap or commonality in the nature of the information provided in each type of record.

- **Section 17 owners' management company annual report**

This is information prepared by an OMC for its members under section 17 of the MUD Act 2011. It must be provided to members at least 10 days before the AGM. The property management agent, in consultation with the directors of the OMC, will usually prepare this report. Section 17 sets out the minimum content. (Further guidance will be available from the property management agent.)

- **Accounting records**

These are the primary books and records of the company, including, for example, invoices, bank statements, cheque books, ledgers and asset registers. The basic requirements for maintaining accounting records are outlined in the Companies Act 2014. It is an offence for a director to fail to take all reasonable steps to maintain adequate accounting records. While outsourcing the task is a practical way to assist compliance with these requirements, as noted elsewhere, it is the directors who are ultimately responsible. Therefore, they should maintain sufficient oversight to ensure adequate records are being kept.

- **Management accounts**

Management accounts are financial reports produced for the OMC at regular intervals (decided by the board) during a defined financial period. Designed to assist directors in their oversight and decision-making, they typically include:

- an up-to-date statement of income and expenditure;
- a statement of assets (especially cash and debtors) and liabilities at a defined point in time;
- an updated budget statement, showing budget versus actual performance YTD and adjustments to forecasts;
- additional financial reports, including certain up-to-date key financial information.

In certain situations, especially if the OMC is experiencing or expecting cash flow difficulties, the management accounts will also include cash flow forecasts.

Unlike statutory financial statements (see below), management accounts do not have to follow a standard format. However, it is useful that the financial information be presented on an accrual basis, i.e. transactions are accounted for on the basis of when revenue/income is earned and expenses are incurred, as opposed to when cash is received.



- **Statutory financial statements**

The statutory financial statements comprise the Income Statement, Statement of Financial Position, Statement of Income and Retained Earnings (where applicable), Statement of Cash Flows (where applicable) and Notes to the Financial Statements containing further information required by company law (such as accounting policies, and disclosures) and financial reporting standards. A Directors' Report may be required to be included with the statutory financial statements.

The directors may choose, especially where a statutory audit has been performed, to include a Directors' Responsibilities Statement. The level of detail in the statutory financial statements provided to company members is not necessarily the same as that in the accounts filed with the CRO. The OMC's company secretary or accountant may advise further. (Additional information is also available from the CRO at www.cro.ie.)

- **Audited financial statements**

These are financial statements that have been subjected to an independent statutory audit carried out in accordance with International Standards on Auditing (ISAs) and the Companies Act 2014. The statutory auditor's report will provide an opinion as to whether the financial statements:

- give a true and fair view of the assets, liabilities and financial position at the end of the financial year, and of its surplus/deficit for the year;
- have been properly prepared in accordance with the relevant applicable financial reporting standards; and
- have been properly prepared in accordance with the requirements of the Companies Act 2014.

The report will state whether the auditor has obtained all the information and explanations considered necessary for the purpose of the audit.

The scope of the statutory audit is set out in an audit engagement letter, normally agreed by the board or appointed signatories on behalf of the board. The scope of the audit will be in accordance with the ISAs.³

A firm of accountants may assist with the presentation of the financial statements in the format required by financial reporting standards and company law.



³ Chartered Accountants Ireland have published a toolkit of procedures for auditors to follow in carrying out a statutory audit of an OMC (Owners Management Company PQAs 2018, available from www.charteredaccountants.ie).

The statutory audit

The Companies Act 2014 provides an exemption from statutory audit for companies of a certain size. The full criteria that must be met to avail of this exemption are set out in the Companies Act 2014. However, an OMC may incorporate into its constitution a statutory audit requirement.

Company law provides for situations where a member or members of a company may serve notice on the company requiring it to have an independent statutory audit performed, for example, any one member of a CLG, or not less than 10% of the voting rights in the case of a company limited by shares.

In deciding whether to 'opt-in' to have an independent statutory audit, directors and members should consider factors including:

- reinstatement or insurable value of the common areas owned by the OMC;
- the significance of the OMC to residents' property values, sound legal title, and the quality of the estate's public and private realm;
- the value of an audit in terms of assurance, transparency and good governance as perceived by the directors and members of the OMC;
- the scope of an independent statutory audit and whether it will provide the level of assurance sought, or whether an alternative assurance engagement would be more appropriate.

While an independent statutory audit will be focused on delivering a particular level of assurance, a statutory auditor's letter to the directors of an OMC outlining their audit findings may deliver further value to the board, highlighting areas such as financial or administrative practices meriting improvement. Financial trends and potential weaknesses can also be highlighted.

In addition to understanding the scope of the statutory audit, directors should also be made aware of what is outside that scope. Doing so should reduce the risk of over-reliance on the statutory audit for matters that may not be considered or reviewed by the statutory auditor. Directors are ultimately responsible for ensuring that the financial statements present a true and fair view, including an accurate account of the affairs of the OMC.

THE ROLE OF THE COMPANY SECRETARY

The role and functions of the company secretary underpin good corporate governance. Defined in the Companies Act 2014, the role is assigned by the board to a competent person. The company secretary reports to the board, supports the chairperson and assists the board and its sub-committees. The maintenance by the company secretary of accurate meeting minutes and other board papers is essential to the orderly running of an OMC's affairs. Other duties include timely filing of correct and complete returns with the CRO and other regulatory bodies.

It may be that a suitably competent director of an OMC is willing to undertake the role of company secretary and attend to the duties and filings. Alternatively, as discussed below, a specialist provider may be appointed to hold the office of company secretary; or the board may appoint the property management agent as the company secretary (see below with regard to outsourcing). In any case, it is important that the duties of the company secretary are understood, and that the person in the role is committed to ensuring good governance of the OMC.

Detailed guides on the role of the company secretary are available from the ODCE (www.odce.ie) and the CRO (www.cro.ie).



OUTSOURCING

The extent to which an OMC employs third-party service providers is likely to be determined by the size of the estate and the breadth of services required or desired. The complexity of a particular function, such as the role of company secretary, or the accounting and bookkeeping requirements, will influence whether the work is outsourced to a third party.

The directors of an OMC should consider the risks involved where there is a lack of necessary skills and experience, and where assistance from professionals with the requisite expertise is appropriate. For example, directors may wish to consider the risks involved in undertaking the management of the estate without the services of a property management agent. There may also be situations in which independent advice, external to the board, would be helpful or essential.

In addition, directors should be aware of creating a relationship between principal and agent, whereby the OMC acts as principal in appointing third parties (e.g. property management agent) to carry out specific functions or activities. A principal-agent relationship can be established even where a formal written agreement has not been put in place, i.e. it could arise under a verbal agreement. If an OMC has established an agency relationship with a third party, as principal the OMC remains ultimately responsible for how functions or activities are carried out or performed on its behalf.

When considering contracts with service providers, directors should be aware that the MUD Act 2011 prohibits an OMC from entering into a contract that runs for a period in excess of three years' duration.

While there is no statutory requirement to outsource functions, the following are typical of the types of functions outsourced by OMCs.

Property management / operations

Property management agents must be licensed under the Property Services (Regulation) Act 2011. They offer a range of services, from estate property management (e.g. arranging maintenance in common areas or waste management tendering) to company secretarial services and communication with members and/or residents, etc. The services of a proactive property management agent can prove an invaluable support for the directors of an OMC. For issues outside their expertise, a property management agent can also act as an initial sounding board and help to identify professionals with relevant expertise to provide further assistance or advice to the OMC.

The relationship, service levels, etc., between an OMC and the property management agent must be governed by a letter of engagement, or contract, between the parties. Mandatory and variable terms of the contract are clearly defined in the Property Services Regulatory Authority's "Letter of Engagement 'D' – The provision of Property Management Services" (see www.psr.ie). The Housing Agency has issued guidance, "Engaging a Property Management Agent: Guidance for Owners' Management Companies" (see www.housingagency.ie), which covers important issues, including the scope of services provided by a property management agent and value for money considerations.

Estates will occasionally need building work carried out and it is important that the board of an OMC ensure that such works comply with planning regulations, building standards, health and safety requirements, etc. The board should seek expert advice where such works are being planned.

Company secretarial

Such services are available from accountancy firms, law firms, property management agents and specialist company secretarial service providers. While a suitably competent director may undertake the role and functions of company secretary, some OMCs choose to appoint a specialist provider for advice, support and/or administrative services to the director or other person appointed to the role.

Where a property management agent is the company secretary of an OMC the potential for conflicts of interest should be considered. For example, who would take board meeting minutes when directors are discussing the renewal of the property management agent's contract? (A solution could be temporarily to task a director to take minutes of such deliberations.)

Financial management

Unless the OMC is of sufficient size to afford its own staff to manage finances, invoicing, debtor management, payments, etc., these activities are likely to be outsourced to either a property management agent or an accountancy firm.

As is the case concerning other services for which a provider is engaged, the parties should agree in a letter of engagement as to the scope of the service provider's responsibilities for budgeting, management accounting, financial management, debt collection, etc. This includes agreeing the regularity of reporting required by the board and what it wants reported. (Guidance on board oversight of finances, debtors and cash and management accounts is provided above in **Section 5** and **Section 6**.)

The board of an OMC is responsible for ensuring proper access for providers to accounting and other records so that they can perform the services for which they are engaged. In situations where the service provider may be managing or processing personal data, the requirements of data protection law will need to be considered.

Maintaining and preparing company accounts

This is likely to be outsourced to a property management agent or an accountancy firm. It may even be the case that one service provider, usually the property management agent, maintains the accounting records, prepares management accounts and the section 17 OMC annual report, and another provider prepares the statutory financial statements.

As is the case with financial management, the board of an OMC retains responsibility for ensuring proper access to information that enables the service provider to perform the service. Ultimate responsibility for maintaining adequate accounting records, preparing financial statements that give a true and fair view, etc., rests with the directors.

Statutory audit

Irish company law requires that a statutory audit can be undertaken only by a suitably qualified member of a recognised accountancy body (RAB) who has been registered as an auditor. Not all accountancy firms provide statutory audit services and the Register of Auditors, hosted by the CRO, can be referenced for a list of names and addresses of persons or firms who have been registered as auditors by RABs in Ireland. (See www.cro.ie for further details.)

Legal advice

Formal legal advice should be taken only from a qualified practising solicitor or barrister, as appropriate, competent in the area of law for which advice is sought. The Law Society of Ireland maintains a current register of practising solicitors at www.lawsociety.ie. The Bar of Ireland provides information on how certain parties may gain direct professional access to barristers' services (see www.lawlibrary.ie).

In cases where mediation is sought to facilitate dispute resolution, there are private providers, in addition to legal professionals, that may be in position to provide a competent mediation service (see the Mediators' Institute of Ireland website at www.themii.ie).



ANNUAL GENERAL MEETINGS

In the case of most OMCs, the requirements relevant to the timing of the holding of an Annual General Meeting (AGM) are as follows:⁴

- under the MUD Act 2011 and the Companies Act 2014 an AGM must be held in each year;
- under the Companies Act 2014 no more than 15 months may elapse between AGMs;
- the meeting must take place within reasonable proximity to the estate and at a reasonable time (unless at least 75% of members agree otherwise);
- companies must lay their statutory financial statements before members within nine months of the date of the financial year end. There is no requirement for approval of these by the members – an AGM is a forum for members to discuss and query the statutory financial statements with directors;
- the section 17 OMC annual report (referred to above) must also be presented for consideration at the AGM.

If the OMC is presenting audited financial statements, the statutory auditor is entitled to receive notice of, attend and be heard at the AGM. The property management agent (who may also be the company secretary) should be in attendance.



⁴ At the time of publication, some requirements of the Companies Act 2014 for general meetings are temporarily amended by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020.

Directors of an OMC should consider the extent to which an AGM is a forum for members to express their views on the management of the estate. Preparation for an AGM, particularly time spent on the composition and communication of the section 17 OMC annual report, should assist with the smooth running of the meeting. Clear, consistent communication and information-sharing at the AGM will support the legitimacy of directors' decision-making and the overall long-term plans for the OMC and the estate.

Figure 4 outlines a sample agenda for the AGM of an OMC.

Guidance in relation to AGMs is available from the ODCE (www.odce.ie) and the CRO (www.cro.ie).

Figure 4: Sample agenda for an AGM of an owners' management company

AGENDA:

1. Welcome and introductions
2. Attendance and apologies
3. Approval of previous general meeting minutes
4. Board composition – resignations, appointments and re-appointments/elections
5. Presentation of statutory financial statements / audited financial statements for the year ending ...
6. Presentation of the section 17 OMC annual report for the year ending ...
7. Appointment / re-appointment of statutory auditor [if applicable] and board authority to fix auditor's remuneration
8. Consideration of the proposed OMC budget for the year ending ...
 - (a) expected operational expenditure overview;
 - (b) update on major works and expected sinking fund expenditure
9. Resolution for the agreement of the proposed:
 - (a) annual service charge [required to be considered in accordance with section 18 of the Multi-Unit Developments Act 2011], and;
 - (b) sinking fund contribution [as per section 19 of the Multi-Unit Developments Act 2011]
10. Additional items [these can be proposed by the members (subject to due notice and conditions) in advance of the AGM, or directors may decide to propose other resolutions or items to address specific matters, e.g. discussion of debt collection policy, a proposed change to the constitution of the company, house rules, etc.]
11. Any other business (AOB)

DISPUTE RESOLUTION

Dispute resolution in relation to multi-unit developments is governed by sections 24 to 29 of the MUD Act 2011. These sections include provision for mediation. The Circuit Court has jurisdiction for enforcement of the provisions of the MUD Act 2011.

The ODCE has responsibility for encouraging compliance with, and responding to, allegations of breaches of the requirements of company law. Details of the ODCE's complaints process and other information is available at www.odce.ie.

The Property Services Regulatory Authority (PSRA) licenses and regulates property services providers (including property management agents) under the Property Services (Regulation) Act 2011. It also has a mandate to investigate complaints of improper conduct made against licensed property services providers. The PSRA may initiate investigations for the purpose of ensuring compliance with the law. Details of the complaints process are available at www.psr.ie.

Other agencies

Disputes may arise between landlords and tenants in the estate. Resolution of these disputes is usually a matter for the Residential Tenancies Board (RTB). Information and resources are available from www.rtb.ie.

In cases where there are issues in relation to the ownership of an estate's common areas, title may be investigated with the Property Registration Authority (www.prai.ie), which will advise whether a Deed of Transfer of common areas has been registered.

An estate can be 'a place of work' for service providers and others. The Health and Safety Authority (HSA) is the national statutory body with responsibility for ensuring that workers (employed and self-employed) and those affected by work activity are protected from work-related injury and ill-health. The HSA enforces occupational health and safety law, promotes accident prevention, and provides information and advice across all sectors (www.hsa.ie).

Organisations such as the Apartment Owners' Network (www.apartmentownersnetwork.org) and others may assist with providing links to peers in the sector and access to useful resources that can assist OMCs, their members and directors.

The Housing Agency provides resources and guidance as part of its remit to promote the supply of housing that meets current and future needs, and as a centre of expert knowledge on housing. Resources and guidance can be accessed at www.housingagency.ie.

The Companies Registration Office (CRO) is the central repository of public statutory information on Irish companies and business names. Functions of the CRO include the incorporation of companies, receipt and registration of company documents, enforcement of the Companies Act 2014 in relation to the filing obligations of companies, and making information available to the public, via www.cro.ie.

Disclaimer

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