

The legal status of owners' associations in light of recent developments

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The most recent implementation by DLD is in the form of two circulars. The first circular was issued on 26 February 2014 for all Owners' Associations ("OA"), being Circulation No. 1 of 2014 on Regulating Service Fees Claims ("OA Circular"). The second circular was issued on 10 March 2014 for property developers, being Circulation No. 2 of 2014 on Establishment of Owners Associations ("Developer Circular").

Jointly Owned Property Concept - An Overview

In order to understand the purpose of these two circulars, it is crucial for one to understand the general concept of a jointly owned property and the current practice in Dubai.

A jointly owned property is an ownership concept allowing the division of a property into privately owned units and collectively owned common areas. An OA is formed upon the registration of the first sale of a unit in a development and the owners of all the units would automatically become a member of the OA (Article 17 of JOP Law). It is a not-for-profit legal entity and has the right to sue in its capacity and to own assets (Article 18 of the JOP Law). An OA will manage, operate and maintain the collectively owned common areas (the performance of which would require collection of service fees from all unit owners) together with appropriate licensing to be issued to the OA for such purpose (Article 21 of the JOP Law). As a result, the OA would need to be registered and granted a licence in order to be fully functional in its own rights as required under the JOP Law.

Unfortunately, there has been very little progress in the OA registration and licensing process following the enactment of the JOP Law. This has rendered an OA lacking the ability to fully function as a legal entity in reality (e.g. to enter into contract, to open bank account, to sue and be sued, etc). As a result, many developers remain involved in the management of their developments and they also hold a utility services account for the development in their names.

The Real Estate Regulatory Agency ("RERA") previously introduced a temporary measure by granting an "Interim OA" status to some OAs for specific functional purposes in relation to some developments in Dubai. The degree to which the Board of an Interim OA controls the management of a development can vary significantly and is heavily dependent on the cooperation from the developer to jointly control and manage the development. Such approach may not be ideal as a breakdown in the relationship between the Interim OA and the developer would cause problems. This has proved the case in some developments in Dubai.

Alongside a number of recent media releases and reports that OA registration is now in progress and escrow accounts can now be set up by an OA for some developments in Dubai, the introduction of the Developer Circular and the OA Circular could be considered as a further attempt by the DLD to instil more functionality to the OA. This is demonstrated by:

1. imposing a mandatory requirement for OA establishment on developers in the Developer Circular; and
2. confirming the OA's right to collect service fees in the OA Circular.

Mandatory OA establishment

The Developer Circular imposes a mandatory OA establishment requirement on the developers in relation to completed development projects under the following circumstances:

1. after the developers have been managing their developments for one year; or
2. when there is a complaint about the developer's mismanagement or negligence during the first year after the completion of the development and following the revocation of the developer's management power.

For OA establishment, the developers must submit the following documents to DLD for approval:

1. Architectural drawings and survey plans;
2. Common Areas Site Plan;
3. Building Management Statement;
4. Jointly Owned Property Declaration; and
5. Volumetric subdivision plan.

An association manager should be appointed by the OA to manage the jointly owned property. A corporate association manager must be one that is registered with RERA.

The Developer Circular unfortunately is silent as to how the OA registration and licensing process is to be implemented. Without any contrary requirements by DLD, one could assume that the registration requirements set out in Articles 23 and 25 of the Direction for General Regulation Concerning Jointly Owned Properties issued by DLD in 2010 are still applicable, whilst the actual implementation mechanism remains to be determined, clarified and confirmed by DLD.

If a developer fails to comply with the Developer Circular, it is liable to pay a fine (in addition to any other penalty available by law). The amount of such fine is not specified. DLD may have kept it generic so that the amount of fine could be determined on a case by case basis for effective deterrence depending on the seriousness of breach by the developers.

As a best practice going forward, developers should:

1. start considering, planning and preparing for the OA establishment following their project's completion;
2. ensure the OA for their developments is approved in accordance with DLD's requirements (i.e. by submitting the required documents, service fee calculation, etc to DLD); and
3. continue with the current practice for Interim OA application with DLD until the formal OA registration and licensing process is implemented and fully understood.

OA's rights to collect service fees

On the basis that the service fee calculations have been approved by RERA, the OA Circular states that an OA has a right to collect service fees. An auditor approved by RERA should be engaged by the OA in preparation of a certified financial report in relation to service fee for the past years. The service fees calculation for a development project (including a villa community development) must be in accordance with the methods put in place by RERA. The apportionment of service fee amongst unit owners for completed projects will be based on the net area stated in the title deed for the units forming the development.

In the event of a service fee dispute after a unit owner has been invoiced, the OA must ensure that a notarised notice is served at the owner's address and evidenced by delivery confirmation. If the owner refuses to pay the service fees, the OA can instigate legal proceedings in a competent court, as the OA has a lien over every unit for unpaid service fees pursuant to Article 25 of the JOP Law, and is required to inform RERA in writing of such action.

Notwithstanding an owner's failure to pay the service fees, the OA is prohibited to discontinue public utility services to the unit or make a claim for additional fees (other than the RERA approved service fees).

If an OA fails to comply with the OA Circular, the enforcement mechanism for non-compliance is either the payment of a fine or a call for the re-election of a new OA Board. Again, the amount of the fine is not specified in the OA Circular.

Conclusion

Despite expectation following some media releases and reports that the OA registration and licensing process will be further clarified and implemented, the issuance of the Developer Circular and OA Circular does not provide the much needed clarification that one would have hoped for. However, the introduction of the Developer Circular and OA Circular has no doubt highlighted DLD's intention to recognise the OA's legal status by gradually shifting developers' management functions to the OA.