

## Chapter VI

### **Promoter's Obligations**

**6.0.0** The Act seeks to protect the interest of allottees by casting obligations on the promoter to ensure fairness and transparency in their dealings with them, empowering the regulatory authority to enforce observance of such obligations and providing deterrence by way of stringent penal consequences for defaults. In general, the promoter has been made responsible for all obligations, responsibilities and functions under the Act, the rules and the regulations and also as per the agreement for sale. His responsibility under section 11(A)(a) is towards the allottees or the association of allottees till the conveyance of all the apartments, plots or buildings to the allottees and to their association. His responsibility towards allottees continues under section 14(3) even after conveyance in respect of structural defects brought to his notice within 5 years from the date of handing over possession. Under the provisions of sub-section (3) of section 18, if the promoter fails to discharge any obligation imposed on him under the Act or in accordance with agreement for sale, he shall be liable to pay compensation to the allottee as per the provisions of the Act. The obligations cast on the promoters and the responsibilities imposed are stated hereunder:

**To get the project registered with the regulatory authority [Sec. 3]**

**6.1.0** This is the basic starting point of regulatory framework under which any activity involving the allottees and interface with them can commence only thereafter. The registration serves the basic and most essential purpose of establishing the genuineness of the project and providing essential details concerning the project, the promoter and all persons connected with the project by bringing such information in public domain. For discussion about such obligation and matters relating to it chapter V may be referred to.

**To create a webpage and display the project [Sec. 11(1)]**

**6.2.0** After the project is registered, a login ID and password is provided by the Regulatory Authority to the promoter which enables him to have access to the authority's website and create a webpage for the project. The page is to display the prescribed information about the project, the antecedents of promoter and past activities, layout plans, approvals, time of completion and other details which a buyer would necessarily like to have. It also bring the disclosures on record and avoid any dispute as to what was disclosed.

**6.2.1** Any Advertisement or prospectus issued or published by the promoter has necessarily to mention prominently the website address of the Authority wherein all details of the registered projects have been entered and include the registration number obtained from the Authority as well as matters incidental thereto. The promoter is also to upload the quarterly updates of booking of apartments and garages, approvals obtained and pending and the status of the project.

**Not to advertise or make offer for sale without registering the project [Sec. 3(1)]**

**6.3.0** Section 3 of the Act prohibits a promoter from advertising, marketing, booking, selling or offering for sale any plot, apartment or building in the project in the planning area without registering the project unless, the project is such which does not require registration. Such exempted projects find mention in para 5.1.0.

In case any invitation to purchase is made by way of advertisement, prospectus or by any other means without getting the project registered, it is violation of the legal provision and might involve penal action in which case the amount of penalty can be up to the amount equal to 10% of the cost of the project as estimated by the Authority. In case of non-compliance of the order in this regard and continued defaults, the promoter may be made punishable with imprisonment for a term up to three years or with fine which may be up to further 10% of the estimated cost or, with imprisonment as well as fine.

**To make available certain documents at the time of booking and issue of allotment letter [ Sec. 11(3)]**

**6.4.0** The promoter is required to make available the following information to the allottee at the time of booking and issue of allotment letter:

- (a) sanctioned plans, layout plans along with specifications approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;
- (b) the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

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**To obtain the completion certificate or the occupancy certificate [Sec. 11(4)(b)]**

**6.5.0** The responsibility to obtain the completion certificate or the occupancy certificate or both as per laws of the relevant local authority or any other law in force in the concerned State/ Union Territory, is on the promoter who should, after obtaining it, make it available to the allottees individually or in case any association has been formed, to the association.

**6.5.1** In the absence of completion/occupancy certificate it will be unlawful for the promoter to hand over possession to the allottee. The failure to obtain such certificate will result in another default under section 18 i.e., his failure to give possession in accordance with the terms of agreement relating to the time of such handing over, leading to consequences laid down under that section.

**To obtain lease certificate [Sec. 11(4)(c)]**

**6.6.0** Where the real estate project is developed on a leasehold land, the promoter is responsible for obtaining the lease certificate from the relevant authorities specifying the period of lease and certifying that all dues and charges in regard thereto have been paid. The certificate needs to be made available to the allottees.

**To ensure veracity of advertisement [Sec. 12]**

**6.7.0** The advertisement, prospectus or any other document designed to canvass and invite the public to purchase should have information which is not incorrect, false or misleading. A buyer taking decision to buy on the basis of false, incorrect or misleading information contained in the advertisement and making an advance or deposit on that basis is entitled to be compensated by the promoter, if he sustains any loss or damage

by reason of acting on such information. The compensation is to be determined by the Adjudicating Officer appointed by the Authority and appeal lies against such determination to the Real Estate Appellate Tribunal. What applies to advertisement, equally applies to model apartment, plot or building which also generally move the buyers in taking the decision.

**6.7.1** Apart from compensation, the buyer has also the option to withdraw from the project in which case he is entitled to refund of entire money paid with interest at the rate as may be prescribed by the State Govt. in the rules to be framed and the compensation as may be determined by the Adjudicating Authority.

**Not to accept deposit or advance exceeding 10% of cost without executing agreement to sell [Sec. 13]**

**6.8.0** A promoter is prohibited from accepting any sum exceeding 10% of the cost of the apartment, plot or building as advance payment or application fee unless, he executes an agreement for sale with the allottee and gets it registered under the law relating to registration.

**6.8.1** The agreement for sale is to be in the form as may be prescribed in the rules and shall specify the particulars of development of the project along with specifications and internal development works and external development work, the dates and the manner by which payment towards the cost is to be made and the date on which possession of the apartment, plot or building is to be handed over. It will also mention the rate of interest payable by the promoter to the allottees and by the allottees to the promoter in case of their respective default which will be the same in both the cases.

**To keep 70% of the amount received in separate bank account  
[Sec. 4(1)(D)]**

**6.9.0** In order to ensure that the amount received by the promoter from the allottees of a particular real estate project is used towards meeting the land cost and cost of construction of that very project only, the law requires promoter to deposit 70% of the amount realized from time-to-time in respect of a particular project, in a separate account with a scheduled bank. The amount so deposited is to be used for the land cost as well as the cost of construction of that project only. To ensure this, the law provides that only so much amount can be withdrawn from this account as does not exceed the amount proportionate to the completion of the project as certified by an engineer, an architect and a chartered accountant in practice.

**6.9.1.** The promoter is further obliged to get his accounts audited within 6 months after the end of every financial year and produce statement of account certified by the chartered accountant in practice to the effect that the amounts collected has been utilized for the very project and the withdrawal from the bank account has been in accordance with the legal requirement i.e., in proportion to the work completed.

**6.9.2.** The provision is likely to be instrumental in preventing the prevailing practice of shifting the funds collected from one project to another project causing consequent delay in the completion of the project for which the amount was realized. Many a times projects are launched even before getting approvals and booking amount is realized which in the intervening period used for completion of some other project. The requirement of parking the funds in a separate account and withdrawing from it only for purpose of meeting the cost of that project will avoid the possibility of siphoning of funds from one project to another.

**6.9.3.** The provision, howsoever laudable, is likely to create some problem in cases where land cost, which forms the major component of total project cost, is met by the promoter out of his own funds before the amount starts coming from the project. Since the entire cost of land is paid but withdrawal is permitted only of proportionate amount based on the proportion of completion, the promoter may not be able to get the cost already incurred by him.

**To adhere to sanctioned plans and project specifications  
[Sec. 14]**

**6.10.0** The webpage of the project contains details of sanctioned plan or layout plans and also specifications approved by the authorities. These are also made part of agreement for sale. The promoter is under the obligation to develop and complete the project in accordance with such approved plans and specifications disclosed to the allottees and not to depart in any manner including in the matter of fixtures, fittings, amenities and common areas in respect of any apartment, plot or building. He is prohibited from making any addition or alteration in the plan, specifications, fixtures, fittings and amenities unless he obtains the previous consent of the person who bought it on the faith of such disclosure. He can only make such minor additions or alterations as may be required by the allottee himself or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorized Architect or Engineer after proper declaration and intimation to the allottee. The explanation to the provision explains the import of minor additions and alterations as under

*“Explanation- For the purpose of this clause, “minor additions or alterations” excludes structural change*

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*including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc."*

**6.10.1** The obligation to adhere to the sanctioned plan in respect of individual apartment, plot or building as stated above is not affected by any stipulation contained in any law, contract or agreement and holds good in spite of any contrary stipulation to this effect. The obligation is absolute unaffected by anything contained in any law, contract or agreement.

**6.10.2** There are situations where the promoter wants to construct floors in existing buildings or additional buildings or wings not disclosed in original sanctioned layout plan to exploit the available Floor Space Index. In some cases, he may seek to make alteration in common areas within the project. The Act prohibits him from doing so unless he obtains the previous written consent of at least two-thirds of the allottees (other than the promoter) who have agreed to take apartments in the approved buildings. For counting the two-third number, the allottee who is allotted more than one apartment in his own name or in the name of his family, is to be treated as one allottee only. In case apartment etc. are booked by persons such as companies or firms or association of individuals in their name and also in the name of their associated enterprises or related enterprises all such allottees will be counted as one allottee only.



In the absence of any provision defining 'associated enterprises' and 'related enterprises', the application of the provision may involve disputes leading to litigation.

The obligation to adhere to the development as per sanctioned plan of the building or the layout takes care of a common grievance of the allottees in such matter. The necessity of obtaining previous written consent of the specified number of allottees is likely to put the matter beyond disputes.

**To refund the amount received in case of failure to give possession in time [Sec. 18(1)]**

**6.11.0** If the promoter fails to complete the project or is unable to give possession of the building, apartment or plot in accordance with the terms of the agreement for sale or within the time specified therein, the allottee has the option either to withdraw from the project or to continue with it. In the former case, the promoter is under an obligation to return the amount received by him with interest at the rate to be prescribed by the State Government in the rules and also to pay compensation as may be determined by the Adjudicating Officer.

**6.11.1** In case the allottee decides to continue with the transaction, the promoter will be liable for interest for every month of delay computed till the date of handing over of the possession, at the prescribed rate. The responsibility of the promoter to refund the amount along with interest and compensation remains the same even when the failure to complete and give possession in time is due to discontinuance of business as developer on account of suspension or revocation of the registration or for any other reason.

**6.11.2** The allottees any other remedy under any other Act remains unaffected by such refund of consideration and payment of interest and compensation.

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**To compensate the allottee for loss due to defective title of the land [Sec. 18(2)]**

**6.12.0** In case the allottee sustains any loss due to defective title of the land on which the project is being developed or has been developed, the promoter will be under an obligation to compensate the allottee by the amount and in the manner as may be determined by the Adjudicating Authority. The allottee's claim arising from loss due to defective title of the promoter will not be barred by limitation under the Limitation Act or any other Act in force.

**To enable formation of association or society of the allottees or a federation of the same [Sec. 11(4)(e)]**

**6.13.0** The Act being a regulatory Act to regulate the construction, sale, management and transfer, deals with matters up to the stage construction is complete and possession is handed over to the allottees except for the limited purpose of rectifying the defects brought to promoter's notice within 5 years of handing over of the possession. The apartments being only an identified part of the building, the management of the building does not rest with individual allottees but with a body representing all the allottees in the project. The law, therefore, envisages formation of a collective body which can be a co-operative society with allottees as members or, a company with allottees as shareholders or, any other association of allottees in accordance with the applicable law of the State. Once such collective body is formed, the promoter is supposed to hand over the management of the building, its common area, amenities and facilities to the collective body and thereafter, the management is carried out in accordance with the law applicable to such collective entity. In case, therefore, it is decided to form a co-operative society in Maharashtra, the provisions of Maharashtra Co-operative Societies Act become applicable for

regulating the relationship of the allottee members *inter se* and with the society.

**6.13.1** In case of layout plan, where the development of law consists of construction of several buildings such societies or associations are formed for each building separately and for management of area and facilities common to all the buildings, an Apex Body or Federation is constituted with membership of individual societies.

**6.13.2** The Act requires the promoter and allottees to form an association or society or co-operative society or a federation of the same under the applicable law of the State. The time within which such association or society is to be formed and the manner of constituting it will be governed by the relevant law. In case, however, there is no law governing such association in any State, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project.

**6.13.3** The provision as it exists, does not appear to cast responsibility on the promoter of formation of such entity of allottees and to decide the nature of entity to be formed. The promoter under the provision is to enable such formation which imply creating circumstances for such formation and extending all co-operation in the process of formation of the entity decided to be formed by the allottees. This might involve problem in practical working as the allottees are spread over, unknown to each other and may find difficult to come together for taking a decision and acting on it. In the States which have their own legislations, as in Maharashtra, the responsibility of deciding the nature of collective entity viz., co-operative housing society or company or any other association is on the promoter who

has also to take action for formation. Maharashtra State has gone a step further by providing for unilateral registration at the instance of allottees if the promoter fails to discharge his duty and is reluctant to co-operate. In the absence of a similar provision casting responsibility of formation on any specific person – promoter or allottees – the word 'enable' can be subject to different meanings and a clarification in respect thereof will be required.

**To provide essential services till handing over to the association of allottees [Sec. 11(4)(d)]**

**6.14.0** As mentioned earlier the management of the land and building and the common area and facilities eventually is to be taken over by the association of allottees. The Act provides that till it is done and maintenance work is taken over by such association/ society, the promoter will have the responsibility of providing and maintaining the essential services, on reasonable charges.

**To execute conveyance in favour of allottees and their association [Sec. 11(4)(f)]**

**6.15.0** As mentioned, after the project is complete, occupation certificate is issued by the competent authority and possession is handed over to the allottee, the legal title over the building or the apartment or the plot is to be passed on to the allottee and the association of allottees by executing a registered conveyance deed in their favour.

**6.15.1** The Act requires the promoter to execute registered conveyance deed of the apartment, plot or building in favour of the allottee and pass on to him all title document pertaining thereto within the period prescribed under the local laws. In case there is no local law providing for execution of conveyance

deed and related matters, the conveyance deed in favour of allottee should be executed and registered within a period of three months from the date of issue of occupancy certificate.

**6.15.2** While the conveyance deed of building, plot or apartment is to be executed in favour of the allottee, the law requires conveyance of the undivided proportionate title of the allottee in the common area, to be executed in favour of the association of allottees. This should also be done within a period of three months from the issue of occupancy certificate, if there is no local law prescribing such period.

**6.15.3** 'Common area' has been defined in Sec. 2(n) to include

- i) *the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;*
- ii) *the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;*
- iii) *the common basements, terraces, parks, play areas, open parking areas and common storage spaces;*
- iv) *the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;*
- v) *installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;*
- vi) *the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;*

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- vii) *all community and commercial facilities as provided in the real estate project;*
- viii) *all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use."*

**6.15.4** It is seen that common area, *inter alia*, includes the entire land and amenities built thereon for the real estate project or its phase, if the project is developed in phases. The provision will, therefore, require not only conveyance of land to a different entity viz., the association of allottees or Competent Authority but also appropriation thereof belonging to individual allottees. Modalities of such conveyance will have to be worked out and prescribed by the appropriate Government in the rules to be framed.

**6.15.5** The obligation to convey the land and building is contained in State legislations also but with a difference. Under the Maharashtra Ownership Flats Act, 1963, the conveyance of land as well as building is to be effected to the association of allottees except when the building is submitted to the provisions of the Maharashtra Apartments Ownership Act, 1970 in which case the building as well as undivided proportionate share in common areas is conveyed to the allottee. This is a much simpler practice. Conveyance of land under MOFA takes with it all the facilities avoiding separate determination. However, the experience in this matter has been that there is general reluctance on the part of the promoters to part with the legal title in the hope of making additional construction on land by exploiting the unutilized permissible constructible area, referred to as FSI, which is existing or may be obtained in future. Recognizing such practice the Govt. of Maharashtra has introduced a provision for deemed conveyance under which, on the application by the allottees the competent Authority has

been empowered to direct, after giving an opportunity to the promoter, the Registering Authorities to register the deed of conveyance on the basis of which necessary mutation can be made in revenue records. The provision has been quite effective in Maharashtra and if a similar arrangement is made in this Act, it will be a remedy to the Co-operative Society, Company or Association or Apartment Owners and can work in addition to the deterrence by way of penalty.

**Pay all outgoings till transfer of physical possession [Sec. 11(4)(g)]**

**6.16.0** The promoter is obliged to pay all outgoings including land cost, ground rent, municipal or other taxes, charges for water or electricity, maintenance charges, mortgage loan and interest thereon and all other liabilities payable to competent authorities, banks and financial institutions relating to the project, out of money collected from the allottees till he hands over physical possession to allottees or their association.

In case he fails to pay such outgoings which remain pending on the handing over of possession, he continues to remain liable even after the property is transferred to the allottees or their association and is also liable for the cost of any legal proceedings which may be taken against him by the person or authority to which the amount was payable.

**Not to create any charge after execution of agreement for sale [Sec. 11(4)(h)]**

**6.17.0** The promoter is prohibited from creating any charge on the apartment, plot or building after the agreement for sale is executed. If any charge is created in contravention of the provision, even if there is any contrary provision in any other law, such charge will not affect the right and interest of the allottee.

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**To get the project insured [Sec. 16]**

**6.18.0** The promoter is under an obligation to obtain all such insurances as the appropriate government may notify which may include -

- i) the title of the land and building, and
- ii) construction of the real estate project

He is liable to pay all premiums in respect of insurances relating to the project till the project along with the insurance is transferred to the association of allottees. The insurance shall be for the benefit of the allottees or their association and shall stand transferred to their benefit when the agreement for sale is entered with them. All documents relating thereto shall be handed over to the association of allottees when such association is formed.

**Not to assign his majority rights and liabilities to a Third Party [Sec. 15]**

**6.19.0** Having got the project registered and having started the sale of building, apartment or plot, the promoter cannot leave it midway by transferring his majority rights and liabilities to a third party. Such assignments can be possible only with prior written consent of at least 2/3<sup>rd</sup> number of allottees and approval of the Regulatory Authority. In working out the number of allottees whose consent is required, the promoter himself will not be taken as an allottee. Further, in case the buildings, apartments or plots are booked in the name of family members, all such family members together are to be taken as one allottee only. Similarly if the buildings, apartments or plots are booked in the name of concerns viz., companies, firms or other associations and also in the name of their associated or



related entities, the concern and its associated/related entities together will be considered a single allottee.

**6.19.1** In case the transfer takes place after obtaining the consent of at least 2/3<sup>rd</sup> allottees and approval of the Authority, the transferee will step into the shoes of the transferor. This will mean that the rights of the persons who became the allottee prior to such transfer will remain unaffected. Further, the new promoter will now be required to independently comply with all the obligations to which the outgoing promoter would have been subjected to had the transfer not taken place. In case of any default in complying with such pending obligations, the incoming promoter will be liable to all the consequences which the erstwhile promoter would have been subjected to had he not transferred the rights and liabilities under the project.

**6.19.2** The transfer so effected will not result in extension of time to the new promoter for completing the real estate project and he will be bound by the time period for completion declared by the erstwhile promoter in his declaration which is displayed on the website.

