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Sub : Areas requiring clarifications under RERA

We have come across certain issues which we feel need clarifications. In the interest of clarity and uniformity in implementation, we request clarification in respect of the below mentioned issues in reference to the mentioned background relating to them.

Registration

1.0 Registration of a project is mandatory under the Act. Failure to get the project registered visits with penalty and prosecution provided under Section 59 Of the Act. Apart from the penal provisions, the law prohibits a promoter from advertising, soliciting customers and selling the plots, apartments or building without getting the projects registered, contravention whereof also visits with penal consequences.

1.1 There is no clarity about the status of unregistered projects. Certain projects which are to be registered may not be registered by the promoter for whatever reason. There are projects which are exempt from the requirement of registration. The status of such projects is not specified under the Act or the Rules as to whether such projects are subject to the regulatory provisions of the Act or not.

1.2 One view can be that projects which are registrable but not registered and those which are not to be registered remain outside the purview of RERA and, for all purposes will be governed by MOFA. The other view can be that getting registered is one of the obligations with consequences provided for non-compliance and all the provisions of RERA laying down obligations of the promoters, agents and allottees remain applicable in respect of unregistered

projects as well. The question has assumed particular significance in respect of obligation to deposit 70% of realization in the separate bank account.

1.3 Answer to Q. 2,5 and 12 of the Additional FAQ 2 issued by the MahaRERA states that complaints to MahaRERA have to be against registered projects only. This seems to suggest that MahaRERA will regulate the registered projects only. In view of the uncertainty in the matter, however, a clarification is solicited.

1.4 RERA Rules requires ongoing projects to be registered within a period of 90 days. As a general rule any advertisement/sale is prohibited before registration. Maharashtra, however, has allowed this period of 90 days as a free period during which period sale etc. can take place even without registration. In other words the operation of Section 3 insofar as it relates to prohibition to advertise and/or sell before registration in case of ongoing project, has been deferred in Maharashtra by a period of 90 days and the provision will apply only from the expiry of 90 days.

1.5 Is such deferment only for above purpose or impact other provisions also. We may, in this connection, refer to Answer to Q. 11 of Additional FAQ 2 which states that ongoing projects have time till 30th July to register. If before doing registration, the project has got OC/BCC, the project has been completed as per section 5(3) of the Act and hence does not require registration. Under RERA, if OC stands issued by the date of commencement of the Act, the ongoing project is not to be registered which means that issue of OC thereafter will not avoid registration. The response referred to above gives relevance to the date of registration in place of the date of commencement of the Act. The scope of deferment will impact other areas also.

Promoters

2.0 There are cases where builders have entered into agreements with the Authorities like municipal corporation etc. for construction of affordable housing to be handed over to them, free of any charge, in consideration of additional FSI in the remaining area, without having to purchase TDR. The concerned Authority, in all probability, will sell these units. As per RERA, it is a project in which the person constructing and person selling are different and accordingly, both are co-promoters and are to be shown as such in the details to be submitted along with the application for registration.

2.1 In cases like this, issue arises as to whether the State or the Authority like MHADA or Municipal Corporation etc. are to be impleaded as co-promoter and

whether such co-promoter will be subject to all the duties and responsibilities under the Act. Whether such Authority will also be liable to deposit 70% realization in a separate bank account.

2.2 Most of the societies are going through the process of redevelopment under which they appoint a developer who is assigned development rights over society land in consideration of flats for the members, free of charge. There are divergent views in respect of whether society in such redevelopment arrangement, is a co-promoter with the developer, or not. In reply to question no. 6 of FAQ-2 MahaRERA has stated that the existing members are members of the society which is a co-promoter in the redevelopment project. In RERA, the object of selling the plot, apartment or building is essential for a project to be called real estate project and for a person to be promoter. Since the society will not be selling the apartments in the newly constructed building but only providing them to its members in lieu of their flats in the old building, it is for consideration whether the society will fall within the term promoter so as to be liable as co-promoter with the builder. Such societies may have to be distinguished from primary co-operative societies constructing apartments or buildings for their members for initial allotment. A clarification in the matter will be useful for many societies.

Ongoing Projects

3.0 The law or the Rules do not define the term “Ongoing project”. We have to take a meaning as generally understood. Projects may be in different stages of development at the commencement of the Act. What will make them ongoing project putting them to the requirement of registration? Is it ongoing construction or sale or both or any other criteria?

3.1 In answer to Q. 9 in Additional FAQ 2 it is stated that if the project does not have layout/building plan approval and if no booking or sale of flats have taken place, the project will not be called an ongoing project. In other words where neither construction has started nor any booking has taken place, it will not be ongoing. What if booking has taken place but construction has not started. Will it be ongoing ? What if advertisement has taken place and construction also started but no booking has taken place. Whether it will be ongoing?

3.2 In answer to Q. 14, it is stated that an ongoing project is one where construction is still not complete, OC is yet to be obtained and building has not been occupied by

allottees. It needs to be clarified whether these determining situations are cumulative or alternative or to be considered in different permutations. For instance, if construction is fully complete and all units are sold and occupied, will it be ongoing project only for the reason that OC was not received on the day of commencement of the Act. If it is so, there will be a very large number of projects to be registered which may prove unproductive as there will hardly be anything left for RERA to regulate.

3.3 It also needs clarification as to whether it is booking/sale of the apartment or occupation by allottees, which will be relevant for such determination.

Deposit in and withdrawal from the separate bank account

4.0 Rule 5 provides for the manner in which the amount that is required to be deposited and can be withdrawn in respect of new projects. So far as ongoing projects are concerned, it provides for the amount to be deposited but is silent about the amount that can be withdrawn. The draft rules provided that the rule in respect of new project will mutatis mutandis apply to ongoing projects but, the same is missing in the final rules.

4.1 In ongoing projects only the amount to be realized, and not the amount realized, is to be deposited which should imply that for withdrawal only the estimated cost of the balance project and the actual cost incurred for the balance project should be taken into account. There is, however, need for an authentic clarification.

4.2 Rule 5 provides for amount to be realized to be deposited in separate bank account in case of ongoing projects. The words 'to be realised' are not followed by the date from which the realization is to be reckoned. Does it envisage realization from the date of registration or the date of commencement of the Act.? On this will depend whether in case of ongoing project, realization within the permitted period of 90 days for registration will be subject to deposit or not.

4.3 Neither the Act nor the Rules prescribe the periodicity for making deposit which raises a question as to whether 70% of each individual receipt is to be deposited or there is some periodicity prescribed for the same. It is presumed that the realization need not directly go to the separate earmarked bank account. It

should initially go to the common bank account and from there 70% thereof can go to the separate bank account.

4.4 There is a special issue arising in cases of redevelopment projects of immovable property where development is carried on the land belonging to person other than the developer. In such cases, the developer as well as the landowner are the promoters as the project is deemed to be jointly developed. The question as to whether they should open bank accounts separately has been dealt with in MahaRERA order dated 11th. May, 2017 and maintenance of separate accounts has been ordered.

4.5 If separate accounts are to be opened, the landowner will have to deposit 70% of the realization in respect of his share of constructed portion. The landowner, however, will not be incurring any cost which will mean that all his money will remain blocked till OC is received. This does not appear to be the legislative intent and a solution needs to be found.

4.6 A possible solution can either be to prescribe a single bank account for the project in which all the realizations are deposited and withdrawn as per rule 5 or, to lay down the manner of apportioning the total cost incurred between the land cost and construction cost. In substance, the cost incurred in construction of the landowner's portion is virtually the land cost for the development of the project and, if the cost relating to landowner's portion is termed as the land cost, the landowner will be able to withdraw the proportionate cost out of his deposits.

4.7 In cases of ongoing projects, some of the plots or apartments might have been sold or booked prior to registration. It has been clarified that the registration takes place not only with reference to the balance project but the whole project and such sold/booked units will also be governed by RERA. There may be situations where although the units were sold pre-registration but the amount in respect thereof is realized afterwards. It is not clear whether such realization is subject to deposit requirement up to the date of registration. A confirmation will help.

Advertisements

5.0 Every layout project offers certain amenities like swimming pool, gymnasium, club house etc. which are common facilities for all the buildings/wings in the layout. Such facilities are, however, included in the approved plan of only one of the buildings in the layout. It is desirable for the promoters to inform the potential buyers of other buildings about such facilities which impacts their decision to buy. A reference to answer to question 53 in FAQ 1 prohibits mention in the advertisement of whatever is not shown in the approved plan. This raises a question about the legality of mentioning such facilities in the advertisement of other buildings.

5.1 In this connection, it is relevant to mention that the layout plan which will be showing such facilities, is required to be submitted with registration application and is also to be displayed on the website. No harm, therefore, appears to be caused if such facilities are permitted to be mentioned in the application for initial phase or building in the layout.

Apartments/ Buildings

6.0 The Act seeks to regulate sale of plots, apartments or buildings. The apartment or building as per the definition of these terms as per the Act are those which are used or intended to be used for any residential or commercial use such as residence, office, shop, showroom, or godown or for carrying on any business, occupation, profession or trade or for any other type of use ancillary to the purpose specified. In both the definitions the intended use is residential or commercial. The specific types mentioned in the definition of apartment also fall within these uses only. The word “industrial” is conspicuous by its absence which is leading to a doubt as to whether RERA governs construction of industrial units.

6.1 There are divergent views on the issue. As per one view, the absence of the word ‘industrial’ is a conscious omission. The legislature does not intend RERA to govern industrial construction. The other view gives a wider meaning to the word commercial and feels that commercial include industrial as well. An authoritative view is therefore, solicited.

Land Cost

7.0 Explanation III to rule 5 lays down the manner of determining the construction cost. It specifically excludes interest on sum which the promoter has raised by way of loan for the purpose of purchase of land for the project or for obtaining the development rights over such land.

7.1 Explanation I which lays down the cost includable in land cost is silent about interest mentioned above. A question arises as to whether interest on loan borrowed for purchase of land which is excluded from construction cost, can form part of land cost.

7.2 The list of cost mentioned in explanation I is inclusive and not exhaustive. In the scheme of RERA, it appears that what is excluded from construction cost being relatable to land, can be taken to be part of land cost. This view finds support from

the proforma certificate of the Chartered Accountant which includes interest cost incurred on land in the land cost. An authoritative clarification however, will be necessary.

Apartments on Long Lease

8.0 RERA applies to sale, allotment or transfer of plot, apartment or building by the promoter. The definition of 'allottee' clearly states that it will not include a person to whom such plot, apartment or building, as the case may be, is given on rent. A question in this connection arises as to whether a long term lease can be taken as sale. Although, a long term lease is technically a lease, a long term lease with provision for extension gives right of occupation for a long period and may be taken to be a viable and proven form of ownership. It needs to be clarified whether long term lease will tantamount to sale for the purpose of RERA and if so, how a long term lease will be defined.

Unsold Stock

9.0 Under the scheme of RERA any sale without registration of the project is prohibited. There will be situations where a project was registered up to a particular date and, for valid reasons, the registration was extended but the entire stock of plots or apartments could not be sold even by the extended, date of registration although the promoter had completed construction and obtained O.C. Will it be permissible for the promoter to sell the remaining units when registration has lapsed. Such situations will not be uncommon and some ways may have to be devised to meet them.

In the background of aforementioned facts, MahaRERA is requested to clarify the following issues in the background indicated above.

- 1. Whether the rights and obligations of promoters, allottees and agents under RERA are relevant to such stakeholders in projects which are- (A) Required to be registered but not registered for any reason;**

Ans: Promoters are, liable u/s 59, for contravention of Section 3 of RERA Act

and (B) Exempt from the requirement of registration as per the Act.

Ans: Provisions of RERA will apply only to registered projects

[Paras 1.0 to 1.3]

- 2. Whether the provision in Maharashtra rules to permit advertisement/sale within 90 days from commencement of the Act even without registration impacts any other provision of the Act**

Ans: MahaRERA follows Maharashtra Government Rules. It may have been the intention of Govt. of Maharashtra to not bring the Real Estate Industry to a standstill on 1st May 2017 by stopping sales in ongoing projects. Hence a window of 90 days has been provided.

[Paras 1.4 &1.5]

- 3. Whether the State or its institutions can be impleaded as promoters and whether they will be subject to all the duties and obligations under the Act, Rules and Regulations.**

Ans: They can be impleaded as co-promoters. Duties, obligations and liabilities of co-promoters will be determined by the agreement they sign with the promoter. Only if the co-promoters get an area share to sell, they will have interaction with buyers and therefore they should be liable to adhere to the fiscal discipline norms of 70% deposits in designated accounts.

[Paras 2.0 &2.1]

- 4. Whether the society going for redevelopment, where it gets flats for the members and not for sale, is a promoter to be impleaded as a co-promoter.**

Ans: Society being a landowner who is getting its revenue share, in kind, as constructed area+ additional area for its members, is a co-promoter. However, the area it gets for its member is revenue share and not area share because it is not for sale to new buyers.

[Para 2.2]

5. Whether a project in which bookings were done but construction has not started will be treated as an ongoing project under RERA.

Ans: Yes, as third party rights have got created.

[Para 3.1]

5.1 Whether a project in which construction had started and advertisements were also made but no booking has taken place will be treated as ongoing project under RERA

Ans: Yes, as advertisement for sale were made.

[Para 3.1]

6. Whether the following projects will be ongoing within the meaning of the Act-

(a) In which construction was complete but sale/booking had not taken place of all the units on the relevant date.

Ans: If OC is obtained, it is not ongoing

(b) In which all the units stood sold but construction was going on the relevant date.

Ans: Yes, because construction is going on and OC not obtained.

(c) In which construction as well as sale was complete on the relevant date but OC was not received.

Ans: If construction completed and apartment occupied but no OC, then it is not ongoing

[Paras 3.2 & 3.3]

7. Whether the relevant date for purposes of above will be 30th July in Maharashtra or the date of commencement of the Act i.e.,1st May.

Ans: Irrespective of 1st May or 30th July, 2017, if a project is constructed and OC obtained and prior to OC no advertisement or sale has been effected, then such project does not require registration.

- 8. Whether withdrawal from bank account in the case of ongoing project will be based on total estimated cost and total expenditure incurred or, on the balance estimated cost and expenditure on the balance project. [Para 4.1]**

Ans: This will be clarified by MahaRERA circular

- 9. Whether the expression ‘to be realized‘ in Rule 5 in the context of 70% deposit in case of ongoing project refers to amount to be realized from the date of commencement of the Act or from the date of registration [Para 4.2]**

Ans: This will be clarified by MahaRERA circular

- 10. Whether deposit in separate bank account is based on individual realization or, on the total realization during a prescribed period- say monthly or quarterly.**

Ans: 70% of every realization from the allottees has to be deposited in the separate account. [Para 4.3]

- 11. Whether in redevelopment projects, the cost of construction of landowner’s share in constructed units can be taken as land cost and whether it will be permissible for the landowner to withdraw an amount equal to the cost incurred which is proportionate to his share in the constructed area as per the redevelopment agreement. [Para 4.4 to 4.6]**

Ans: Question is not clear. If promoter+land owner are developing jointly as one entity, then they open and operate one single designated account. If land owner receives his share as revenue share or area share then he I a co-promoter.

- 12. Whether the amount realized post- registration in respect of the units sold pre-registration of ongoing project is subject to**

the requirement of deposit in separate bank account for a period of 90 days w.e.f. 01.05.2017 [Para 4.7]

Ans: Yes, but not for 90 days only but till OC is obtained.

13. Whether advertisement of a building in the layout can include the common facilities which will be available to the buyers in that building but are part of the approved plan of some other building of the layout. [Para 5.0 &5.1]

Ans: Yes, as long as the common facilities are registered in some phase, same or different, of the project.

14. Whether RERA have jurisdiction over the projects involving construction of units for industrial use [Para 6.0 & 6.1]

Ans: Yes, the online registration portal of MahaRERA mentions so.

15. Whether long term lease tantamounts to transfer for the purpose of RERA? [para 8.0]

Ans: Yes

16. Suppose a new project was registered upto 31.12.2017, the Promoter got extension of one year upto 31.12.2018. He obtained OC in October, 2018 but could not sell all apartments upto 31.12.2018. Without registration he cannot sell any apartment. What should a promoter do under such circumstances? [Para 9.0]

Ans: After OC no registration is needed. Hence, sale of apartments in building with OC does not require MahaRERA registration.

17. Whether the interest paid on the amount borrowed for acquiring land will be treated as the cost of land ? [Paras 7.0 to 7.2]

Ans: Yes