*4 Sept 2016*

**Challenge 1: Inclusion of Ongoing Projects will cause disruption of the Industry, delay /stop projects and ultimately affect all stakeholders: customers, suppliers, supppliers, contractors, investors, bankers**

Legal Basis: Law cannot become the reason for default of existing contracts

We welcome the move of the Government to include all projects under RERA. However the Government needs to make provision for the special practical issues which will be faced by all stakeholders Promoters, Allottees, Bankers, JV Partners, Landowners, Investors etc.

Some indicative issues which will severaly affect the ongoing projects are listed below as an illustration to show that the Act has not taken into consideration the fact that blanket application of all provisions to ongoing projects will not be possible:

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| --- | --- | --- | --- |
| Sr. No. | Sec No. | Section reference | Issue |
| 1 | 3(2)(b) | Projects with completion certificate as on date of commencement of Act not required to be registered under the Act | Competent Authorities (Muncipal Corporations/Plan Sanctioning Authorities) are not issuing completion certificate.  Even the projects which have been duly completed in all respects will have to register under the Act which will lead to defeating the purpose proper regulation. |
| 2 | 4(2)(l)(d) | Deposit of 70% amount in separate account maintainted with Scheduled Bank | 1. Act applies to whole of India including small towns in remote area where in many cases Promoters have taken funding from an entity other than Scheduled Bank ie non scheduled Co-operative Bank, Co-operative Credit Society etc and pledged cash flows to be deposited in their account. How will they be able to able to open Account in Scheduled Bank without closing this Loan as the existing lender will not allow diversion of cash flows 2. Projects have existing escrow arrangements with Banks, Equity Fund, Private Investor etc as part of a Loan/Equity Agreements wherein certain percentage of collection from customers is to be first used for repayment of loan and interest. If the Act applies to thes projects, Promoters will have to either violate the Act or the Agreement and both will have severe penal consequences. 3. Similar to point 2 above, Promoters also have obligations under Joint Venture / Development Agreements to Landowners where a percentage of collections from customers has to be shared at source with the landowner. If the Act applies to thes projects, Promoters will have to either violate the Act or the Agreement and both will have severe penal consequences. |

**Challenge 2: Obligation of Promoter to get Occupancy Certificate is an impossible act (OC)**

***Legal Basis: Law cannot make a person do an impossible act***

***Point 1: Date of Possession depends on OC***

Date of possession has to mentioned in the Agreement for Sale. Possession can only be given on getting the Occupancy Certificate from Competent Authority. Promoter has no control over Competent Authority nor does RERA prescribe any timeline. Yet, responsibility on promoter as per Sec 11(4)(b) to obtain the OC.

(There is a chance that the assurance of the Promoter in the Agreement for Sale of date of possession may be void ab initio.)

***Point 2: OC definition includes provision of civic amenieties***

OC to be issued only to building with “provision of civic infrastructure such as water, sanitation and electricity to” as per definition of OC in Sec 2(zf)

***Can Central Government indirectly define the rules which are in purview of Local civic byelaws?***

***Can the Act indirectly make Developer for responsible for consequences due to delay in possession if civic amenities are not provided by Competent Authority?***

***Point 3: Unequal contract: Obligation of allottee to take possession starts from OC***

After the Promoter has completed his part of the agreement by completing the building and applying for OC, the obligation of the allottee to complete his part of the contract of making final payment, take possession etc. is linked to an external factor ie OC as per Sec 19(10).

***Can the Law be a means to make unequal contract?***

Refer Sections:

a) Sec 2(zf) Definition of Occupancy Certificate

b) Sec 11(4)(b) – Promoter responsible to obtain Occupancy Certificate

c) Sec 17(2) – Possession after OC

**Challenge 2: Can Act cannot force disclosure of confidential business information / strategies / trade secrets**

*Legal Basis: Protection to one party (allottees) cannot be basis of disclosure for business secrets of the other (Promoter)*

Disclosure on Website of confidential Business Information will not only harm the business interests of the Promoter but also can lead to uninteneded threats to the Project affecting the interests of the customers.

Disclsoure of the following condidential business information of the Project should not be required:

Section 11(1)(b): quarterly up-to-date the list of number and types of apartments or plots, as 25

the case may be, booked

Section 11(1)(c): quarterly up-to-date the list of number of garages booked

Section 11(1)(e): quarterly up-to-date status of the project

Section 11(3)(b): the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity

(Note: The stagewise schedule depends on permissions to be received from several authorities and not in entire control of the promoter. The provision of water, sanitation and electricity although responsibility of the promoter is dependent on various authorities)

Section 11(4)(b): Obtaining and making available completion and occupancy certificates to allottees and assoiciation

(Dependent on Authorities)

Further, as per our understanding such public disclosure is not required by any other industry in Service Sector.

Exammples:

Airlines companies do not disclose the number of seats available in a flight

Hotels do not disclose the number of rooms vacant

**Challenge 3: Law creates liabilities on Parties for which they are not directly responsible**

Legal Basis: Joint and Several liabilities of Promoter and Joint Venture Partner

As the land prices have increased exponentially over the last decade, the Real Estate industry has developed a practice of entering into Joint Venture / Joint Development Agreements with Landowners. In this Agreement the Landowner gets deferred consideration over the period of the project instead of upfront payment. This enables the promoter to reduce the upfront investment and thus provide housing to consumers at reasonable cost. The Landowner has no responsibility of develoment other ensuring the clear title of land. However under RERA he will also become a Promoter and have the same obligations as the actual Developer including quality of construction, timely possession etc.

***If Landowner is made a Promoter under the Act, this successful model of supply of “low cost” land will stop completely as Landowners will not like to part of “joint and several” liability under RERA for acts where they have no control.***

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