

A Critical Note on RERA & its Impact on RWAs

FREQUENTLY ASKED QUESTIONS & ANSWERS :

LAWS TAKEN INTO CONSIDERATION:

<u>S.No</u>	<u>Laws Applicable</u>
1.	The Societies Registration Act, 1860
2.	Real Estate (Regulation & Development) Act, 2016

ASSUMPTIONS

<u>S.No</u>	<u>Assumptions to Opinion</u>
1.	More than 50% of the Flats have been Sold/Booked
2.	There are at least Ten Signatories to the Memorandum of the RWA.
3.	At least Three Months have elapsed from the Date of 50% (Majority) of the Flats having been Booked.
4.	Conversation is on with the Builder for a Handover to the RWA.

1. ***At what stage can an RWA (Residents Welfare Association) be formed, for an Apartment Complex?***

Yes. An RWA can be formed any time, once the Majority of the Flats have been booked; and there are at least 10(Ten) Signatories to the Memorandum of the RWA.

As a matter of fact, according to the RERA Regulations and Guidelines of 2016, an RWA needs to be compulsorily formed within a period of 3(Three) Months of the Majority of the Flats been **booked**.

Resident Welfare Association (RWA) is an association of people who own houses in a particular BUILDING COMPLEX, which becomes responsible for the day-to-day functioning of the complex.

The RERA Act says that a developer has to hand over a housing project to the residents within a few months from the time he obtains the Occupancy Certificate (OC).

The real estate act pins the responsibility on developers and builders for providing and maintaining essential services, as specified in the service-level agreements, on reasonable charges, till the resident's association can take over.

RWA under RERA

*The guidelines in the Real Estate (Regulation and Development) Act, 2016, (Section 11: d & e) say that a Resident Welfare Association (RWA) must be established in a housing society within three months from the time that a majority of the houses there have been **booked**. If a*

developer does not take steps to form an RWA for such a society, the legal owners can themselves form such a body.

As per RERA guidelines issued by the Maharashtra government, builders or developers are obliged to form a RWA and transfer the "right of common areas" to that association after the sale of 50% of the apartments or condominium in the project.

The Societies Registration Act, 1860, mandates that at least 10 people (or residents) should give their names to the memorandum of association, who would then be eligible to occupy posts in the management body.

If more residents are interested in becoming members, elections have to be conducted. This association can make rules based on suggestions from residents and according to the rules. Known as society bylaws, every housing society has a different set of laws governing it, which are binding on each and every resident (and tenants, too).

2. Does an RWA have to be Compulsorily Registered; or can be formed on Consensus of constituting Members, without Formal Registration?

Any such RWA needs to be registered to be recognised as an entity, under the **SOCIETIES REGISTRATION ACT, 1860**. Only then the MOA and the Rules & Regulations can be binding upon its members.

3. ***What would be the status of an Unregistered RWA, from a Judicial Perspective, as well as Rights and Effectiveness of Collective Bargaining?***

There is nothing in Law, referred to as an 'Unregistered RWA'.

At the most it can be referred to as an 'Informal Association of People' with no Juridical Identity.

That is, it cannot form or enforce Rules & Regulations on its constituent members, or non-member associates.

It can neither Sue or be Sued collectively, as an Organization.

It cannot Collectively Bargain as an Organization.

4. ***What would be the Process of Handing Over of Administrative and Maintenance Affairs of the Society by the Builder to the Registered RWA?***

Each apartment complex or a independent block can have its own Apartment Owners' Association for maintenance of the apartment and its amenities. But before formation of the Apartment Owners Association, it is the duty of the builder to maintain the apartment and its amenities.

Most developers provide a corpus fund for the maintenance of the apartment and its amenities. The maintenance will be carried out by the builders till the formation of the Apartment Owners Association.

After completion of the project and formation of the Apartment Owners Association, the builder needs to handover the leftover money, audited accounts of the

maintenance fund and interest earned. Besides, the builder also has to handover the apartment and its amenities to the Apartment Owners Association.

Checklist for Handover from the builder

The Apartment Owners Association needs to get documents and audited accounts from the builder during the handover of the apartment. The following is a list of items that the builder has to handover to the Apartment Owners Association during the handover of the apartment and its amenities.

- **Proof of approved floor plans:** Builder has to handover documents and proof of approved floor plans to Apartment Owners Association during handover of the apartment and its amenities.
- **Copy of Building plan and approval plan:** All building plans need to be approved by the local authority. The builder has to handover a copy of the building plan and approval plan to the Association to prove that the apartment and all its amenities are constructed as per the plan approved by the concerned authority.
- **NOC from local authority:** No objection Certificate or NOC is issued only to an apartment or building that does not object to the covenant of the certificate. Builder has to handover the NOC from the pollution board, electricity, water and fire department needed for the Apartment Owners Association.
- **Completion Certificate (CC):** An apartment or building cannot be occupied without a Completion Certificate. Issuing of Completion Certificate will ensure that the owner has

constructed the building as per an approved plan. The builder has to handover the Completion Certificate to the Association.

- **Transfer utility connection:** It is the duty of the builder to transfer the utility connection to the Association during handover of the apartment and its amenities. In case the builder fails to transfer the utility connection, he has to give an NOC to the Apartment Owners Association for transferring utility connections such as electricity and water connection to the Association.
- **Handover of documents:** Handover of documents such as original registration documents, parental documents, drawings, concerned authority approvals etc. to the association.

Other documents or items to handover

Following are other important documents or items that a builder needs to handover to the Association along with the handover of the apartment and its amenities.

- Audited accounts of the maintenance and interest earned
- Details of deposit, if any
- Apartment tax related details
- Insurance details for the building
- Handover of the left over money
- Handover of the office room, departmental stores, records, documents etc. to the association.
- Contract or agreement details of maintenance staffs and security service
- Issue of consent letter from the Electricity Board for change of name

- List of amenities in the apartment
- List of services offered by builder after handover of apartment
- Handover of the function hall, parking lot, swimming pool and other amenities to the association
- Contracts on the structural issues
- Insurance details for the building
- Car Parking allocation and marking
- Repairs or service (for any of the houses, if the owner asks for it)

After the formation of the Apartment Owners Association, the builder has to handover the maintenance fund or corpus fund to the Apartment Owners Association. In some cases, the builder keeps some income generating areas with him though the Association is formed. The Act gives apartment owners alone the right to generate income from common areas and facilities in the apartment. In case the builder fails or refuses to hand over the apartment or its amenities after completion of construction and formation of the Apartment Owners Association, a criminal offence could be filed against the builder by the association. After formation of the RWA or apartment owners association, the builder has to handover the maintenance fund as well as the documents relating to the apartment and its amenities to the Apartment Owners Association.

5. ***Is it compulsory for every Flat Owner of the Society to be a Member of the RWA, or is it Voluntary?***

An RWA is a voluntary legal body. Therefore, flat buyers may or may not join a particular registered RWA. However, if a registered RWA takes over the premises, any resident in the

premises would be bound by registered RWA, in so far as administration and maintenance of the buildings is concerned. They can always apply and become a member of the already registered RWA at any stage later on.

6. ***In case membership to the Registered RWA is Voluntary, what would be the minimum number of Members required to constitute a Valid RWA?***

A minimum of Seven Signatories to the Memorandum are required, in order to constitute an RWA.

However, would advise a minimum of 10 Signatories, to be procedurally safe.

7. ***Can a Flat Owner, who had earlier refused to be a Member of the RWA, apply to be a Member at a later date?***

As already mentioned above, any Flat Owner is at the liberty to apply and become a Member of the RWA, at any later date, by following and complying with the due process; and Rules & Regulations, as applicable to the RWA.

8. ***Will decisions taken by a Legally Valid and Registered RWA be binding on any other Flat Owner of the same Society, who has not consented to be a Member? And, what kinds of decisions by the RWA can be so enforceable, if at all?***

Where, the Registered RWA has legally taken over the Premises from the Builder, following the 'Handing Over Procedures'; every bonafide Flat Owner, within the said Premises would have to abide by all the Democratic decisions of the RWA, from the perspective of Administration, Repairs & Maintenance and Budgetary matters.

9. ***Can a second RWA be also Legally Registered within the same Building Society? If so, what would be the status of the Second Society so registered?***

If one association has been formed , registered; and has the support of majority of residents your application may not be accepted by registrar of societies.

SOME IMPORTANT PROVISIONS OF THE ACT EXTRACTED:

7. (1) The Authority may, on receipt of a complaint or *suo motu* in this behalf or on the recommendation of the competent authority, revoke the registration granted under section 5, after being satisfied that—

(a) the promoter makes default in doing anything required by or under this Act or the rules or the regulations made thereunder;

(b) the promoter violates any of the terms or conditions of the approval given by the competent authority;

(c) the promoter is involved in any kind of unfair practice or irregularities.

Explanation.—For the purposes of this clause, the term "unfair practice means" a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following

practices, namely:—

(A) the practice of making any statement, whether in writing or by visible representation which,—

(i) falsely represents that the services are of a particular standard or grade;

(ii) represents that the promoter has approval or affiliation which such

promoter does not have;

- (iii) makes a false or misleading representation concerning the services;
- (B) the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;
- (d) the promoter indulges in any fraudulent practices.

(4) The Authority, upon the revocation of the registration,—

- (a) shall debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;
- (b) shall facilitate the remaining development works to be carried out in accordance with the provisions of section 8;
- (c) shall direct the bank holding the project back account, specified under subclause (D) of clause (I) of sub-section (2) of section 4, to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;
- (d) may, to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

Revocation
of
registration.

SEC. 1] THE GAZETTE OF INDIA EXTRAORDINARY 11

8. Upon lapse of the registration or on revocation of the registration under this Act, the Authority, may consult the appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority: Provided that no direction, decision or order of the Authority under this section shall take effect until the expiry of the period of appeal provided under the provisions of this Act: Provided further that in case of revocation of registration of a project under this Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.

CHAPTER III

FUNCTIONS AND DUTIES OF PROMOTER

11. (1) The promoter shall, upon receiving his Login Id and password under clause (a) of sub-section (1) or under sub-section (2) of section 5, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing, including

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- (a) details of the registration granted by the Authority;
- (b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;
- (c) quarterly up-to-date the list of number of garages booked;
- (d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;
- (e) quarterly up-to-date status of the project; and
- (f) such other information and documents as may be specified by the regulations

made by the Authority.

(2) The advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

(3) The promoter at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:—

(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.

Functions and
duties of
promoter.

SEC. 1] THE GAZETTE OF INDIA EXTRAORDINARY 13

(4) The promoter shall—

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

(b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;

(c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;

(d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;

(e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable: Provided that in the absence of local laws, 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;

(f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act;

(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has

collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person;

(h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then

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notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;

(5) The promoter may cancel the allotment only in terms of the agreement for sale:

Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause.

(6) The promoter shall prepare and maintain all such other details as may be specified, from time to time, by regulations made by the Authority.

15. (1) The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority:

Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

Explanation.—For the purpose of this sub-section, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

(2) On the transfer or assignment being permitted by the allottees and the Authority under sub-section (1), the intending promoter shall be required to independently comply with all the pending obligations under the provisions of this Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees:

Provided that any transfer or assignment permitted under provisions of this section shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.

31. (1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

Explanation.—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

(2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be specified by regulations.

38. (1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that—

(a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

(b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely,

then the Authority, may *suo motu*, make reference in respect of such issue to the Competition Commission of India.

60. If any promoter provides false information or contravenes the provisions of section 4, he shall be liable to a penalty which may extend up to five per cent. of the estimated

cost of the real estate project, as determined by the Authority.

61. If any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate

project as determined by the Authority.

62. If any real estate agent fails to comply with or contravenes the provisions of section 9 or section 10, he shall be liable to a penalty of ten thousand rupees for every day during which such default continues, which may cumulatively extend up to five per cent. of the cost of plot, apartment or buildings, as the case may be, of the real estate project, for which the sale or purchase has been facilitated as determined by the Authority.

63. If any promoter, who fails to comply with, or contravenes any of the orders or directions of the Authority, he shall be liable to a penalty for every day during which such default continues, which may cumulatively extend up to five per cent., of the estimated cost of the real estate project as determined by the Authority.