

Real Estate Update

November 23, 2009

MODEL REAL ESTATE (REGULATION OF DEVELOPMENT) ACT - TOWARDS PROMOTING REAL DEVELOPMENT AT LAST?

The Union Ministry of Housing and Urban Poverty Alleviation ("**Ministry**") has published the draft Model Real Estate (Regulation of Development) Act ("**Model Act**"). The Model Act, as the name suggests, proposes to lay down what is expected to be a regulation for adoption by all states within India. The Model Act proposes to establish a regulatory authority to control and promote construction, sale, transfer and management of colonies, residential buildings, apartments and other similar properties.

KEY PROVISIONS OF THE MODEL ACT

The key provisions of the Model Act have been summarized below:

1. **Establishment of a Real Estate Regulatory Authority** – The Model Act provides for establishment of a Real Estate Regulatory Authority ("**Regulatory Authority**"), to comprise of a Chairperson and two members to be appointed from amongst persons having special knowledge and professional experience in the field of public administration.

2. **Registration with the Regulatory Authority**. – The Model Act provides for compulsory registration of all real estate projects where:

- (i) the area of land proposed to be developed exceeds one thousand square meters; or
- (ii) the number of apartments proposed to be constructed exceeds four.

For obtaining registration, besides furnishing other details and information, the Promoter¹ would have to furnish a bank guarantee equal to 5 % of the estimated costs of development works to the local authority or other authority having power to give permission for construction or development of land. The registration is valid for three years. Where delay in completion of the project is for reasons beyond the control of the Promoter, he can seek 2 renewals of 1 year each.

3. **Obligations of Promoter** – The Model Act defines rather exhaustively who can be termed a "Promoter" and goes on to detail the obligations and responsibilities of the Promoter. The key obligations include:

- (i) To make available to all persons intending to buy a plot or apartment, all information and documents relating to the property. This would include a full and true disclosure of the nature of the title which has to be duly certified by a revenue authority not below the rank of Sub – divisional Magistrate.
- (ii) File with the Regulatory Authority, copy of every advertisement or prospectus he intends to publish or issue for inviting persons to purchase plots or apartments and make advances or deposits for the same.
- (iii) Upload on the website of the Regulatory Authority, all details of the project and the names of property dealers or brokers dealing in the project.
- (iv) Enter into a registered Agreement for Sale in a specified format, with the allottee intending to purchase the plot or apartment before accepting any deposit or advance.
- (v) Not mortgage the plot or apartment without the consent of the person intending to purchase it after execution of the Agreement for Sale.

4. **Transparency and Powers of the Regulatory Authority** – The Regulatory Authority shall host the website of records of all real estate projects in its jurisdiction and shall ensure compliance of the obligations cast upon the Promoters and allottees. The Regulatory Authority has the power to decide any dispute between a Promoter and an allottee regarding failure on either part to meet its obligations.

5. **Establishment of Appellate Tribunal** – The Model Act provides for establishment of a Real Estate Appellate Tribunal ("**Appellate Tribunal**") to adjudicate any dispute and hear and dispose of appeal against any direction, decision or order of the Regulatory Authority. The Model Act also ousts the jurisdiction of civil courts to entertain any suit or proceeding in respect of any matter which the Regulatory Authority or Appellate Tribunal is empowered to determine.

6. **Offences & Penalties** - In order to give teeth to the provisions of the Act, penalties have been prescribed for violations of the provisions of the Act. The penalties range from up to three years imprisonment for not registering a project or for not complying with the orders of the Appellate Tribunal to monetary penalties which may be ascertained on a daily basis for non compliance or as a percentage of the development costs or sale price.

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This Model Act is a welcome step as it seeks to bring in much – needed transparency by seeking to regulate the so far unregulated real estate sector in India. When enacted, it will provide considerable relief to the ordinary investor who has to go through many obstacles in purchasing property and at times is even duped by small developers, builders or brokers. By imposing strict obligations on the Promoters, the Model Act seeks to ensure that construction is completed in a timely manner and on completion the buyer gets the property as per the specifications that he had been promised. Further, by seeking to establish the Regulatory Authority and Appellate Tribunal, the Model Act provides for a forum where disputes could be heard by a specialized expert body, which would result in expeditious dispensation of justice. Litigation in India is known to be prolonged process and only remedies available to a consumer in a dispute with a developer are to file a suit in a court of law or approach the consumer courts. With the enactment of the Model Act, the consumers will now be able to have their grievances redressed through a specialized body.

The Model Act also ensures that allottees do not default in making payments and the Promoters receive periodical payments. By providing for penalties for both the Promoters and allottees, the Model Act seeks to ensure that non-compliances would be minimal. Thus once enacted, the Model Act will ensure that all real estate transactions are carried out in a just, fair and lawful manner.

Furthermore, the Model Act makes an Agreement for Sale compulsorily registrable. The Indian Registration Act, 1908 does not provide for compulsory registration of an Agreement for Sale since such an agreement by itself does not create any interest in immoveable property but merely gives the right to obtain another document, which when executed would create right, title and interest in immoveable property. Through various amendments in local state laws a few states in India have provided for compulsory registration of the Agreement for Sale. However, with the enactment of the Model Act by the States all Agreements for Sale would require mandatory registration, so far as purchase of properties under the new law are concerned. This would further protect the interests of property purchasers.

CONCLUSION

Though the Model Act is a boon for property purchasers, it has however received much criticism from developers for not providing relief for them in getting permissions and approvals expeditiously. The developers in India have long complained about the delay and difficulty in obtaining approvals for construction from various government agencies and the need for single window approvals. This issue has not been addressed in the Model Act. The Model Act also does not make it clear whether it will be applicable only to projects where construction has not been commenced or also to existing projects where development has already been initiated. Lastly, though the Model Act provides for a list of disclosures to be furnished by the Promoter, the list could be made more exhaustive so as to bring real estate practices in India in conformity with the best practices of the western world.

- Gautam Dembla, Chittaranjan Datar, Shafaq Uraizee Sapre & Nishchal Joshipura

1 Promoter is defined as:

I. a person who constructs or causes to be constructed a residential building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

II. a person who develops a colony for the purpose of selling to other persons all or some of the plots, whether with or without structures thereon;

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Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business

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