To,

Date : 16/06/2022

The Chairperson,

The Real Estate Regulatory Authority,

Housefin Bhavan, Bandra Kurla complex,

C-21 E-Block, Bandra E, Mumbai

Subject : Circular dated 30.07.2021 and saleability of covered parking space.

Respected Sir,

I recently came across a Circular of Maha RERA dated 30.07.2021, Circular No. 36 of 2021(hereinafter referred as the 'Circular'), mainly for clarifying that open parking areas cannot be sold/allotted for monetary consideration and a direction at point No. (iv), which is my immediate concern, that 'garage/covered parking space when sold/allotted for monetary consideration the details of the same should be mentioned in the agreement for sale'. So while the Circular directs that the promoter should mention details of the covered parking space sold/allotted for monetary consideration in the agreement for sale, it also conveys that as per The Real Estate Regulatory Authority (hereinafter referred to as 'the Authority'), there is no restriction on the sale of any covered parking space, which in fact has created confusion and a debate between the Allottees/Purchasers of Flats and promoters is respect of whether any covered parking spaces, can be sold by the promoters.

It appears that as per the Authority, sale / allotment of covered parking spaces for monetary considerations is permitted as per the provisions of The Real Estate (Regulation and Development) Act.2016 (in short RERA) and Maharashtra Real Estate (Regulation and Development) (Registration of real estate projects, Registration of real estate agents, rates of interest, and disclosures *on* website) Rules 2017, (in short referred as 'Maha. Rules'), based on which the Authority is empowered to issue the Circular.

However, any such interpretation permitting the sale of covered parking space would be frustrating the purpose of RERA and contrary to its provisions, which limits itself by defining only a Garage which can be sold along with an Appartment as against other parking areas, and neither do Maha.Rules permit the same and I wish to place my views regarding the same for your consideration –

The Circular, while referring to definition of garage and common areas more particularly section 2(n)(iii) which includes 'open parking' in common areas, proceeds to clarify that promoter cannot sell open parking. The Circular also clarifies the steps to be taken by the promoter if covered parking space is sold / allotted for monetary consideration. As a result of these two clarifications the obvious question that arises is the status of covered parking space i.e. whether covered parking falls under common areas or not, and if it does not, then certainly such covered parking space can be sold. It is therefore necessary to discuss the various provisions on parking.

As regards saleability of Parking space, the few relevant provisions are the definitions of 'Garage' , 'Apartment' & 'Common areas' as defined by RERA and 'Covered parking space' as defined by Maha. Rules.

RERA deals with parking by defining a 'garage' at section 2(y) and 'common areas' at section 2(n) along with Section 4(2)(h) & 4(2)(i) which refer to sale of an apartment and garage respectively and also by defining 'Apartment' at section 2(e) .

As per the first part of the definition of a garage under section 2(y) of RERA a parking space shall qualify as a 'garage' if it has a 'roof and walls on three sides' thereby signifying that it is a space separate from other spaces adjacent to it, and the requirement of 'walls on three sides' clearly differentiates it from basement parking, stilt parking & podium parking.

Further the second part of the definition of a garage specifically rules out other parking spaces which are unenclosed or uncovered such as open parking areas from its ambit

however; this does not mean that all enclosed or covered parking spaces can therefore be sold as garages, as that would mean permitting sale of all parking spaces except for open parking spaces contrary to DCR or UDCPR framed under local laws which is certainly not intended by RERA (refer section 88 of RERA). Accordingly covered parking space as defined by the Maha.Rules does not fall within the definition of a Garage under the RERA and neither do the wordings of the section sec 2(y) suggest the possibility of any other type of parking coming within the ambit of the definition clause.

The explicit exclusion of open parking areas from the definition of a 'garage' and its specific inclusion in the definition of common areas certainly seems to be creating the confusion that, other parking spaces apart from 'open parking areas' can be sold. However, the words 'such as' before 'open parking areas' in the definition of a Garage certainly indicate that the exclusion was not intended to be limited to only open parking areas. Rather the exclusion would cover all other parking areas which are unenclosed or uncovered like Podium parking space (at times covered with PVC or metal roofs), Open parking space which are covered with PVC or metal roofs or Unenclosed and covered parking space like Stilt parking space or parking spaces with common enclosure and a roof like basement parking.

Further an 'apartment' as defined under section 2(e) of RERA is an exhaustive definition which does not specifically cover parking spaces like Stilt parking, basement parking, or podium parking space. An apartment is defined as a 'block, chamber, dwelling unit, flat and other types mentioned therein, being a separate and self contained part of immovable property, including one or more rooms or enclosed spaces, located in one or more floors or any part thereof, in a building for any of the uses as stipulated in the definition. The separateness and being self contained for one of the uses stipulated in the definition distinguishes an apartment from any type of a covered parking spaces which are in common use. Thus covered parking spaces unlike garages do not fall within the definition of an apartment which can be sold along with the flat or independently as a flat and neither can garages be sold independently. These definition's of an apartment, garage and common areas under RERA are in line with the

observations of the Hon'ble Supreme Court, in the case of Nihalchand Laloochand Pvt.ltd. vs Panchali Cooperative Housing Society ltd., while dealing with the definition of a Flat, Garage and common areas under Maharashtra Ownership Flats Act. 1963, in fact this leaves no scope for selling of covered parking spaces as defined under the Maha. Rules. and RERA.

Further, 'covered parking space' as per Maha. RERA Rules, is an 'enclosed or covered area' for the type of parking spaces as listed in the definition of Covered parking space. The words 'enclosed or covered area' in the definition when read in context with the different types of covered parking spaces listed under the definition of 'covered parking space' signify enclosed or covered portions of the project consisting of several parking spaces which are in common use (having a common enclosure with a common roof and not separated from one another with walls). These are parking spaces developed in areas of a project which are in common use, and therefore as per the DCR and UDCPR prevailing in state of Maharashtra, these spaces/areas are free of FSI. The DCR and UDCPR regulations, by not including these areas in computation of FSI incentivize the builders to follow the mandatory requirements of parking etc. This is done by the regulations to ensure the availability of the basic infrastructure to the flat purchasers.

Accordingly, these covered parking spaces as defined by the Maha. Rules, under Rule 2(j), are 'necessary portions of the housing Project in common use and/or community facilities provided in a housing project' as per clauses (vii) & (viii) of sub-sec (n) of sec. 2 of RERA defining 'common areas' along with sec.2(n)(i), and are therefore not saleable. The definition of common areas in RERA at Section 2(n) is not an exhaustive one as such spelling out all common areas, and sub-clauses (vii) & (viii) referred above provide the necessary scope, to bring all covered parking spaces and other areas in common use (which are not explicitly stated in the definition) within the meaning of the definition of common areas. It is also important to note that basement parking space falls within the definition of 'covered parking space' and the same is a part of common basement which also happens to be a common area. What can be sold under RERA is an apartment and a garage. Covered parking spaces which are not covered by the

definition of a garage or by the definition of an apartment cannot be sold and they are a part of the common areas.

It is pertinent to note and delve upon how the promoter can sell these areas like Stilt parking space, podium parking space and basement parking space, when ultimately the promoter ceases to have any title on the same as the building and these areas become the property of the housing society after it is transferred to the housing society within the time prescribed by RERA or local law, once the occupation certificate is issued by the concerned authorities and the society is registered.

Further any interpretation of saleability of covered parking space by the authority, would lead to absurdities when the Authority has itself at point no. i in the Circular clarified that "open parking areas are provided free of FSI", which is certainly the reasoning for the clarification at point no.2 that "promoters are not entitled to sell / allot open parking areas for monetary consideration" and if that be the case how can the Authority permit the sale of basement, podium and stilt parking space, at point no. iv in the Circular which are also free of FSI as per DCR or UDCPR..

The Maha. Rules have defined 'covered parking space' so as to differentiate between a garage which can be sold under the central Act, and covered parking space which cannot be sold, since covered parking spaces continued to be interpreted as garages and were being sold in spite of ~~some~~ a land mark judgment of the Hon'ble Supreme Court. Therefore, unlike the central enactment RERA which defines a garage and refers to the sale of the same at section 4(2)(i), the Maha. Rules merely define 'covered parking space' without permitting or referring to sale of covered parking space in the Maha. Rules.

The only place where we can find some reference to the 'sale of covered parking space' is in the Model Sale Agreement at Annexure 'A' of the Maha. Rules, and the explanatory note to the Model Agreement makes the clauses of the Agreement applicable and valid provided the same are not inconsistent or contrary to the provisions of the Act, Rules and Regulations. The provisions of RERA and Maha. Rules do not in any manner permit

or refer to the sale of covered parking space, the said clause in the Model Agreement or any agreement between the promoter and allottee should be treated as void/invalid being contrary or inconsistent with the provisions of Act, Rules and Regulation. In any case the model Agreement at Annexure A cannot override the provisions of RERA or Maha. Rules.

The main purpose of enacting RERA was to safeguard the interest and rights of allottees / purchasers of flats. RERA, while defining a Garage and Apartment which alone can be sold under the provisions of the enactment, also defines common areas which are not saleable and ensures that these areas are the property of the Housing society. As observed and can be inferred by the Hon'ble Supreme Court in the case of Nihalchand laloochand judgment supra the promoter / builder can charge for common areas along with the flat while declaring the common areas but cannot sell them separately as they belong to the society. Therefore, any interpretation of the provisions of RERA or Maha. Rules treating covered parking space as saleable which are a part of common areas, as has been done by the Circular, would be frustrating the purpose behind enacting RERA and in contravention to its provisions.

Further even the Maha RERA website in the FAQ section clarifies that "covered parking as defined in the Maharashtra Real Estate (Regulation and Development) (Registration of real estate projects, Registration of real estate agents, rates of interest, and disclosures *on* website) Rules 2017 (hereinafter referred as 'Maha. Rules') is permitted to be sold". This content in the Q&A should be deleted or details in support of it should be published.

The Authority by issuing a Circular which is contrary to the provisions of RERA or Maha. Rules, is exercising Rule making powers not vested in it by law.

It is, therefore, suggested and requested that the Authority clarifies the provisions of RERA or Maha. Rules which permit the sale of covered parking as defined in the Maha.

Rules along with a detailed list of covered parking spaces which can be sold, if in case covered parking space is saleable as per the Authority. Alternatively an amended circular be issued clarifying that covered parking spaces cannot be sold.

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