

**REAL ESTATE REGULATORY AUTHORITY
HIMACHAL PRADESH**

In the matter of : -

Complaint No. HP RERA/OFL/2020-16

**Valley View Flat Owners Association through
its President Sh. Satish Chander Walia R/o Flat No.7
Valley View Flat, Post Office Mashobra,
Tehsil & District Shimla (H.P.)**

.....Complainant Association

Versus

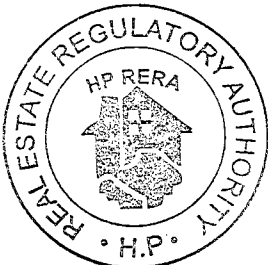
**Sh. Madhusudan Sood Son of Late Sh.
Raghuvar Dass, R/O Raghuvar Dass Bhawan,
V&PO Mashobra, District Shimla (H.P.)**

.....Non-Complainant/ Respondent

**Present: - Sh. Bipin C. Negi, Sr. Advocate along with Sh. Nitin
Thakur, Advocate for Complainant Association through
Webex.**

**Sh. Vishal Mohan, Advocate for respondent promoter,
through Webex**

**Shri Mayank Manta, Assistant District Attorney, RERA
Himachal Pradesh.**



Final Date of Hearing (Through WebEx): 27.03.2021.

Date of pronouncement of Order: 16.04.2021.

ORDER

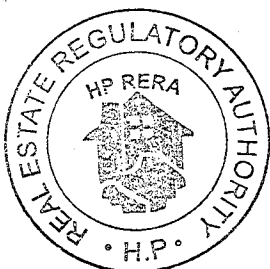
CORAM:- Chairperson and both Members

1. The present matter refers to a Complaint filed under the provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the Act).

2. **BRIEF FACTS OF THE CASE: -**

i) The complainant association filed the complaint before the Authority on 6th November, 2020 in "Form-M". It has been stated in the complaint that the members of the complainant association have bought flats from the respondent promoter of a real estate project raised on Khata Khatauni No 14 min/17 Khasra Nos 1/1,2,3,4,5,6 Khas 6 measuring 9070 Sq.ft situated at Mohal Mashobra, Tehsil and district Shimla, Himachal Pradesh.

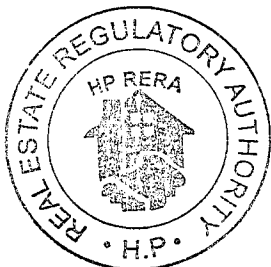
ii) That the map for the same was approved by the Municipal Corporation Shimla vide sanction order no 20(AP) dated 20.01.2009 for raising construction of a parking floor plus four



storeyed building. It has been submitted that the complainant association was registered on 23.10.2020.

iii) That vide judgment of this Authority dated 20.10.2020 passed in complaint bearing number RERA/HP/SHCTA/07200038 filed with respect to the present real estate project by one of the members of the complainant association, the terrace in question has been held to be a “common area”. It has been submitted that in the aforesaid judgement a fact has been noticed that the approach to the terrace in question is only through an attic which in turn is accessible by internal common staircases. It has been averred that the aforementioned factual observation is based on the revised cum completion plan as approved by Municipal Corporation in the month of January, 2020. It has been further noticed in the same judgement that as per the revised cum completion plan approved in the month of January, 2020, three open terraces and a sloping roof have been shown to be existing/completed.

iv) That in the facts and attending circumstances it can be gainfully stated that the attic in question is a common entrance to the terrace quite akin to a lobby as in the case of a lift. It has been averred that it would be highly illogical and impractical to conclude that attic, which connects internal common staircases

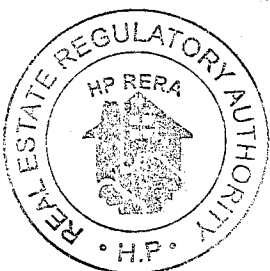


and terraces (both of which are “common areas”) is not a common area.

- v) That the respondent promoter has obstructed the common area, parking area and has caused inconvenience to the flat owners. The entrance to the car parking is inadequate for bigger vehicles thereby hindering access of the residents. The parking floor has been obstructed by the respondents by placing water tank. It has been further alleged that iron stilts have been placed in the parking area.
- vi) That an illegal ramp/iron staircase has been constructed over the set-back to Flats bearing Nos 11 and 12 situated on the first floor i.e. the floor immediately below the parking floor.
- vii) That there is an illegal basement on the site which has not been sanctioned in the initial approved plan. It has been submitted that the same needs to be opened appropriately by removal of stone/brick walls. It has been further submitted that vacant areas surrounding the building and forming part of the real estate project in question need to be appropriately landscaped and appropriate access needs to be provided to the members of the complainant association.
- viii) That the water harvesting is not in accordance with the sanctioned plan passed in 2009.

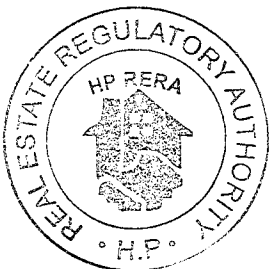
- ix) That the construction of the project has become an un-ending saga with no end in sight. It has been alleged that incomplete project is a major source of nuisance to the flat owners as majority of them are aged and had bought the flats in question with the idea of relaxing in the mountains.
- x) In view of the above facts, the complainant association has sought from the Authority to direct the respondent promoter to give clear and unhindered access of common areas such as attic to the members thereof, remove the water tank installed in the parking, install a bigger gate, clear the basement and hand it over to the members thereof, stop construction which is continuously going on or the same be completed within reasonable time, install water harvesting tank in accordance with the sanctioned plan passed in 2009, paint the building in question, remove the illegal ramp/staircase provided over set-back of flat numbers 11 and 12 and pay compensation @ 1 lakh per member for harassment and denial of facilities as promised.
- xi) **REPLY TO THE COMPLAINT**

The respondent/promoter has filed a detailed reply to the complaint on 30th November, 2020. It has been stated in the reply that the complaint is not maintainable as the reliefs sought by the complainant association are in fact same reliefs which

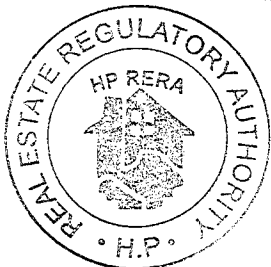


were earlier sought in complaint No. RERA/HP/SHTCA/07200038 which has been decided by the Authority on 20th October, 2020.

- xii) That majority of the flat owners had purchased the property before Real Estate Regulation Act came into being in the State of Himachal Pradesh and that this Authority has no jurisdiction to adjudicate the said complaint.
- xiii) That the complainant association is a registered society having been accorded registration on 23rd October, 2020, whereas redressal sought is prior to the incorporation of the society and since most of the flats have been purchased before enforcement of the Act *ibid*, the complainant association is not competent to maintain the present complaint.
- xiv) It has been submitted that whatever has been promised to the flat owners has already been delivered. That under the garb of the present complaint, the complainant association wants to make unlawful gain.
- xv) That the attic in question is not a common area akin to a lobby as in the case of lift and that attics are in fact attached to the top floor. It has been further submitted that no right in the attic has been sold to the members of the complainant association.



- xvi) That the entrance of the parking has been made strictly according to the sanctioned plan. It has been admitted that the respondent is duty bound to remove the guard room in the parking floor which has been held to be illegal by this Authority vide its order dated 20.10.2020. It has been further submitted that no addition or alteration post according of completion plan has been done at the best of the respondent.
- xvii) That there exists no illegal basement as alleged. It has been submitted that if there had been any such illegal basement, the map would not have been accorded valid sanction.
- xviii) That the water harvesting tank has been constructed in accordance with the sanctioned plan. Had it been not so, the Municipal Corporation, Shimla would not have been pleased to grant completion certificate. It has been further admitted that the respondent/promoter is duty bound to follow the directions of the Authority given in complaint No. RERA/HP/SHTCA/07200038.
- xix) That respondent promoter is well within his rights to complete the rest of the work. Even the perusal of the registration certificate accorded under the Act ibid would go on to reveal that for the completion, time till 2028 has been accorded and the flat owners have no right in stopping construction. It has been

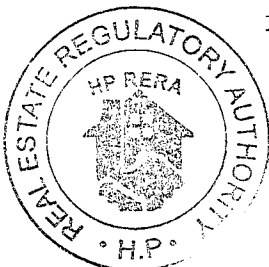


further stated that the respondent takes proper care not to hamper any of the occupants of the flats.

- xx) That the complainant association cannot direct the respondent to paint the building again after the lapse of more than 5-7 years.
- xxi) In view of the above, the respondent promoter has prayed that the present complaint being devoid of merits deserves dismissal. However, he has admitted that the water tank in the parking place has to be removed.

xxii) **REJOINDER TO THE REPLY**

The complainant association has submitted a detailed para-wise rejoinder on 11th of January, 2021, in response to the reply so filed by the respondent promoter. It has been submitted by the complainant association that most of the contents of the reply are wrong. It has been specifically submitted that the respondent promoter has failed to comply with the directions of the Authority given in complaint No. RERA/HP SHCTA/07200038, till the date of filing of the rejoinder. It has been alleged that respondent is raising iron staircase as an alternate approach to the terrace in violation of the sanctioned building plan and to subvert the directions passed by the Authority. It has been further submitted that the complainant association has written in this regard to the respondent promoter further putting him to caveat that if he did



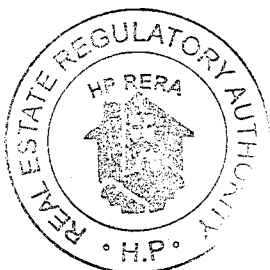
not stop, the Complainant association will seek implementation of the order by filing appropriate application before the Authority.

xxiii) It has been stated that the construction is still ongoing and causing distress to the members of the complainant association and that the association is well within their rights to approach the Learned Authority for redressal of their grievances. It has been affirmed that this Authority has jurisdiction to entertain the complaint. Further, it has been categorically denied that what was promised has been delivered to the flat owners and that the complainant association has tried to unlawfully gain by way of the present complaint. It has been specifically clarified that the quantity of the water harvesting tank should have been 10,000 litres, however the same is less than 5000 litres.

xxiv) In view of the above, the complainant association has prayed before the Authority that the complaint be allowed in view of the reliefs prayed therein and justice be done to the parties.

3. ARGUMENTS ADVANCED

The arguments in this case were part-heard on 24th of February, 2021. Shri Bipin C. Negi, Ld. Senior Advocate alongwith Shri Nitin Thakur, Ld. Advocate representing the complainant association started his arguments by referring to various paragraphs of the order of this Authority with respect to the

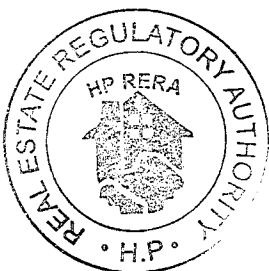


present real estate project in the matter of **Sh. Satish Chander Walia V. Sh. Madhusudan Sood dated 20.10.2020** so as to give a background to the present matter. He specifically drew attention of this Authority to para 16 of the order (supra) wherein the issues required to be adjudicated in that matter have been framed. He then referred to para 17 of the same order wherein the Authority has held that it has jurisdiction to adjudicate that case. He further referred to para 18 of the same order wherein the issue pertaining to the common areas has been dealt. He argued that in para 19 of the order supra the kitchen, toilet and the guard room in the parking area have been held to be unauthorized constructions. Thereafter, he drew attention of the Authority to a finding of the Authority in para 19 of the order supra that the *“approach to the terrace is through attic only which is further approachable by the two internal staircases that connects all the floors of the building.”* He argued that as per section 2(n) (ii) of the Act ibid “staircase” and as per section 2(n) (iii) “terraces” are common areas. He again referred to para 20 at page 21 of the order supra wherein the terraces have been held to be a part of common area. He further argued that as per direction no. iii. in para 25 of the same order at page 28, the common areas were to be handed over to the association of allottees



(complainant association) within one month of its registration as part completion/occupancy had been issued in January 2020. He informed the Authority that in compliance of this direction, the Association has been registered on 23.10.2020 (Registration certificate appended as Annexure P-1 of the complaint). Then he contended that as per one of the directions of the order supra (at page 29 of that order), the question as to whether “attic” is a common area or not has not been determined in that matter and that this is one of the reasons for filing the present complaint.

4. The Ld. Counsel requested the Authority to refer to the letter of the complainant association dated 09.12.2020 (Annexure RC-1 of the rejoinder) whereby the compliance of para 25(iii) of the order supra was sought from the respondent promoter and it was informed that the same has not been complied till date. He further drew attention of the Authority to initial sanctioned plan dated 20.01.2009 of the concerned project (Annexure P-3 of the complaint) and contended that this is the most relevant document as this was the plan shown to the members of the complainant association at the time of the purchase of their respective flats.
5. The Ld. Counsel further referred to section 11(4) (a) of the Act *ibid*. The same has been reproduced hereunder-



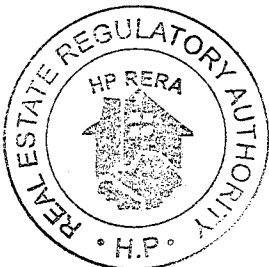
“(4) The promoter shall—

(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.”

He argued that as per the aforementioned section the obligations of the respondent promoter under the Act *ibid* and towards the allottees or the association of allottees will continue till the conveyance of all the flats or the common areas, as the case may be. He contended that since five flats are still unsold his obligations still subsist.

He also relied upon section 14 subsections (1) and (2) of the Act *ibid* which have been reproduced hereunder-

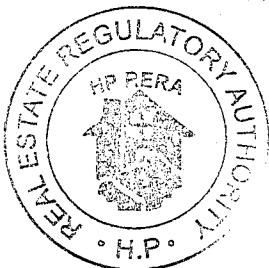


14. (1) *The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.*

(2) *Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—*

(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

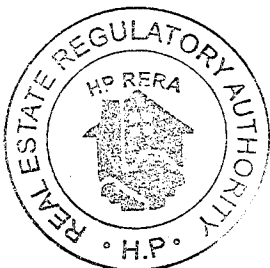


Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation.—For the purpose of this clause, the allottees, 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, etc., 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.

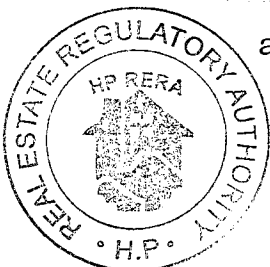
In view of this provision, he contended that there is a statutory embargo on the respondent promoter to make any structural



changes in contravention to the sanctioned plan (in the present case Initial approved plan 2009 supra) in the concerned project without the consent of the 2/3rd of the allottees. He contended that the ramp and the staircase constructed over the set back of flats no. 11 and 12, below the parking floor as well as the iron stilts erected in the parking floor are major structural changes which have been undertaken without the consent of the flat owners and thus, violative of section 14 of the Act *ibid*.

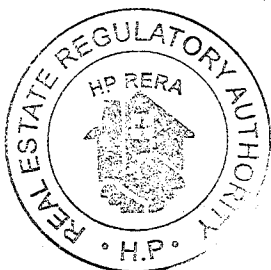
6. He further argued that as per section 2(n) of the act *ibid*, the terraces and staircases are common areas. Moreover, the terrace has been held to be a common area in the order supra by the Authority itself. He contended that, there has been a categorical finding in the previous order that the terrace can be accessed only through attic which in turn is connected to two internal staircases. He further argued that since both terrace and staircases are common areas it would only be logical and practical to hold the attic (which connects them) to be a common area in this peculiar situation.

7. The Ld. Counsel contended that the entrance in the parking floor is inadequate for bigger cars causing inconvenience to the flat owners and that a bigger gate needs to be installed. He further argued that the water tank placed in the parking area is also



causing obstruction and the same needs to be removed. He again reiterated that the stilts in the parking and ramp/iron staircase have been raised in violation of the initial sanctioned plan and also without the consent of the flat owners. He referred to these structures as material alterations resulting in the violation of section 14 of the Act *ibid*. On being asked by the Authority as to when were these aforementioned structures (ramps/staircases and stilts) constructed, the Ld. Counsel replied on instructions from the respondent promoter that the same were constructed in the years 2016-17 around the time when flats no. 11 and 12 were sold by the respondent promoter. On being further asked that whether these structures exist in the revised plan of 2020, the Ld. Counsel replied that even if they have been approved in the revised plan, the illegality in respect of section 14 of the Act still subsists as the consent of the flat owners has not been taken by the respondent promoter. However, it was stated that the revised plan of 2020 has not been placed on record.

8. The Ld. Counsel further contended that keeping in view the topography of the land in question, the building in question has been raised on pillars which have been raised from the ground level to the first floor. Thereafter the sanctioned floors have been raised. He stated that as a result, vacant space has been created

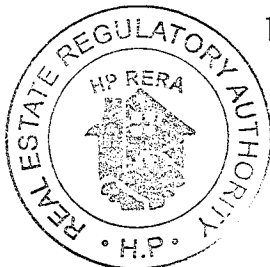


below the sanctioned first floor and the ground level. The Ld. Counsel alleged that same is being illegally used as a basement by the respondent promoter purportedly for stacking material. The Ld. Counsel has argued that as per the bye laws of the competent authority, this space needs to be clogged but the respondent promoter has just covered it and closes and opens it at will. He drew attention of the court to the initial sanctioned plan (2009) and stated that whereas in the plan a retaining wall has been shown in front of this vacant space, no such wall exists on the ground. He argued that the respondent promoter should either clog or shut this space or the same may be handed over to the complainant association.

9. The Ld. Counsel informed the Authority that the toilet, kitchen and guard room in question in the previous case supra pertaining to the present real estate project have still not been removed.

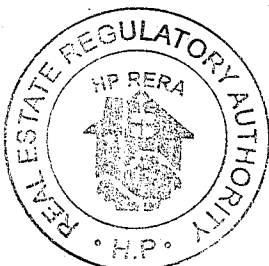
10. However, he admitted that the site in question has been fenced but also stated that the same has been done in a shoddy manner.

11. The Ld. Counsel for the respondent promoter, Sh. Vishal Mohan has argued before the Authority that the present complaint has been filed by the association in haste as time given for



compliance of directions in the previous order dated 20.10.2020 of this Authority had not lapsed at the time of filing of the complaint on 06.11.2020. He has contended that the present complaint is not maintainable as the reliefs sought in the complaint are identical to the reliefs that were sought in the previous complaint No. RERA/HP/SHTCA/07200038 decided on 20.10.2020 (hereinafter referred to as previous case) with respect to the same project. He further argued that the issues, particulars and the subject matter (concerned project) are identical in both the complaints. To substantiate his claim, he relied upon a judgment of the **Hon'ble Apex Court decided on the 2nd March,2020 titled Samta Naidu & Anr. V. State of Madhya Pradesh and Anr.** wherein it has been held that a second complaint on the same set of facts is not maintainable.

12. The Ld. Counsel has further argued that it is an admitted position that the initial/proposed plan was sanctioned by the Municipal Corporation in the year 2009. He contended that majority of the flat owners have purchased the respective flats before the commencement of the Act *ibid*. He asserted that concerned project was complete in its totality and sold prior to the commencement of the Act *ibid*.



13. He drew the attention of the court to Section 19(3) of the Act *ibid* which reads as under-

“(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4.”

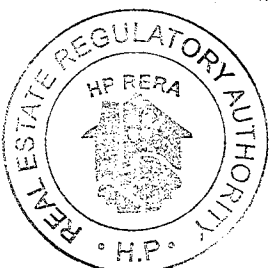
Relying upon the aforementioned provision, the Ld. Counsel argued that “attic” has not been declared as a common area in the declaration made by the respondent/promoter in pursuance to provision of section 4(2) of the Act *ibid*.

14. The Ld. Counsel then referred to para 25(vii) of the order *supra* of this Authority which is reproduced hereunder-

“Whether attic is a common area or not has not been determined at this stage. The association of allottees or the respondent promoter is at liberty to produce relevant record/drawings to enable the Authority to determine the same or can mutually settle the issue.”

Relying on this direction, the Ld. Counsel has asserted that in order to determine the question of attic being a common area or not, either of the party must produce any document/drawing etc.

He further argued that the complainant association has produced the initial sanctioned plan of 2009 and, in that map/plan, no

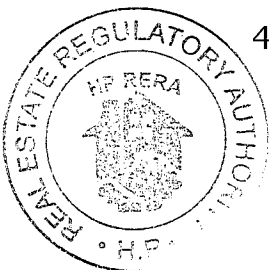


attic exists. He contended that the roof as shown in that map is a sliding roof from both sides without an attic. However, he has admitted that he is bound to give an approach to the terraces.

15. The Ld. Counsel has argued that ramp/staircases in question have been raised before 2016 i.e. prior to the commencement of the Act *ibid* and that the proceedings are prospective in nature and therefore, no question of consent of flat owners under section 14 arises. He further stated that the same have been raised as one of the flat owners living on the floor just below the parking floor is suffering from arthritis. He contended that there is no illegal basement and argued that the contention of the complainant association that he must either close the alleged basement or hand it over to the association is rather odd as if the alleged basement is illegal then how can it be handed over to the association.

16. In respect of the contention of the complainant association as to the construction of the bigger gate in the parking area, the Ld. Counsel has argued that the current gate has been raised as per the sanctioned plan and that he cannot commit an illegal act by replacing/modifying the same.

17. The Ld. Counsel then drew the attention of the court to the para 4 of the sale deed between the respondent promoter and one of



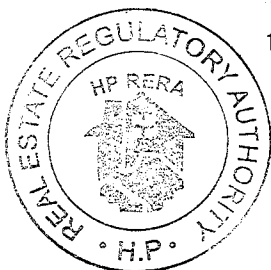
the flat owners dated 21st July, 2014. The same has been reproduced hereunder-

“4. That the purchaser has right to use all easementary rights, common path, common stairs, common drainages, common sewerage and all existing fittings, fixtures, air, light, water etc. of the property hereby sold.”

Relying on the aforementioned paragraph of the sale deed, he has argued that the complainant association do not have any right over the attic as the same has not been sold to them along with their respective flats.

18. REBUTTAL

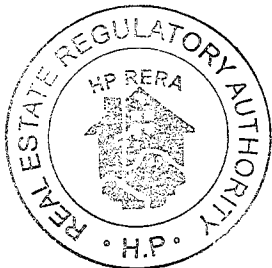
The Ld. Counsel for the complainant association, Sh. Bipin C. Negi has rebutted the stance adopted by the Ld. Counsel for respondent promoter. He has affirmed that the Authority has jurisdiction to entertain the present complaint. He has contended that the issues in the present complaint are different. He has further submitted that the mere fact of registration of the concerned project with the Authority is sufficient enough to prove that the complaint is maintainable. He has reiterated all his claims in general and has specifically stated that if the access to the terraces is not accorded though the attic, the right of the



complainant association over the terrace will be illusory. He has further contended that the respondent promoter is illegally raising an iron staircase to approach the terrace without permission of the competent authority as well as without the consent of the 2/3rd of the flat owners. He further argued that the contention of the respondent promoter that he has raised the ramps/staircase for the welfare of one of the flat owners who is suffering from arthritis, has not been mentioned in his reply. He stated that these aforementioned structures as well the iron staircase being raised by him as an approach to the terrace are illegal as no document has been placed on record to prove that these alterations have been sanctioned.

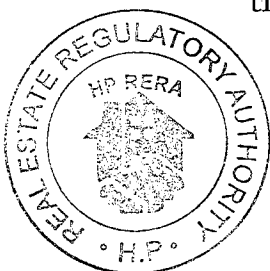
19. ARGUMENTS ADVANCED ON THE REVISED PLAN 2020

During the course of the arguments, it had come to the knowledge of the Authority that a revised plan in respect of the concerned real estate project has been approved in the year 2020. The Authority was of the view that most of the issues in the present complaint cannot be decided without referring to the revised plan of 2020. Since the same had not been placed on record by either of the parties, the Authority being guided by the principles of natural justice as per the mandate of Section 38(2) and in the exercise of the powers granted to it under Section



35 of the Act ibid directed the respondent promoter to submit the copy of the approved revised plan as additional document and proceeded to hear the parties on this document(revised approval of 2020) on 27th March,2021. The Ld. Senior Advocate for the complainant association started his arguments comparing the two sanctioned plans i.e. the initial plan which got sanction on 20.10.2009 and the revised plan of 2020. He contended that in the initial plan the area under the roof has been shown to be a storage space. He further contended that in the same map no staircase leading to the roof has been shown. Thereafter, the Ld. Counsel invited the attention of the Authority to the revised plan and contended that in this plan the entire structure of the roof has been altered and that there are three terraces and the staircase is going up to the storage space. The Ld. Counsel has termed these alterations as violative of Section 14 of the Act ibid as no consent of the flat owners was sought before bringing about these structural changes.

- 20.** The Ld. Counsel has further contended that even in the revised plan, the space beneath the roof has been shown to be containing water tanks. Relying on this, he asserted that the space beneath the roof in both the plans have been shown to be a storage space.

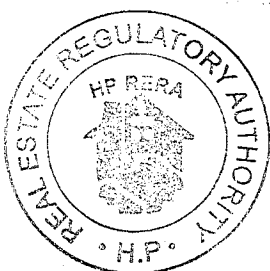


He further drew attention of this Authority to section 2 (n) (iii) of the Act *ibid* which has been reproduced hereunder-

*“(iii) the common basements, terraces, parks, play areas, open parking areas and **common storage spaces;**”*

On the basis of this provision, the Ld. Counsel contended that since the area below the roof has been shown to be storage space in both plans, therefore the same is a common area, the access to which cannot be denied by the respondent promoter.

21. He argued that the capacity of the rain-water harvesting tank in the revised map is shown to be 13000 litres whereas what has been built in the name of rain-water harvesting tank is of much less capacity.
22. The Ld. Counsel for respondent promoter has argued that the respondent promoter has delivered everything that was promised by him. He contended specifically that no permission as per section 14 of the Act was required as apart from one flat, all the flats had been sold and handed over before the commencement of the Act. *Ibid*. He asserted that the flat owners have no right in the space under the roof apart from the right to access the water tanks. On being asked by the Authority, he contended that till the disposal of all the flats the respondent promoter will have unhindered right over the space under the roof.



23. REBUTTAL

The Ld. Counsel for the complainants has rebutted the contentions of the respondent promoter and has submitted that the provisions of the Act ibid act as reasonable restrictions over his constitutional right to property with respect to the area under the roof. He contended that the areas under the roof is storage space and thus, is a common area and the access to the same cannot be denied to the members of the complainant association.

24. CONCLUSIONS/FINDINGS OF THE AUTHORITY: -

We have heard the arguments advanced by the Ld. Counsels for the complainant association and respondent promotor and perused the record pertaining to the case. We have duly considered the entire submissions and contentions submitted before us during the course of arguments. This Authority is of the view that there are two issues that require the consideration and adjudication, namely :-

- A) Whether this Authority has the jurisdiction to adjudicate upon the present Complainant or not?
- B) Whether the Complainant Association is entitled to get the following relief(s) as prayed for?
 - i) Clear and unhindered access of the common areas such as attic



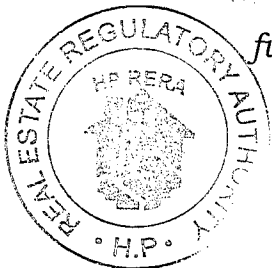
- ii) Removal of the water tank installed in the parking
- iii) Installation of a bigger gate at the parking floor
- iv) Clearing and handing over of the basement to the members of the association
- v) Stoppage of ongoing construction works
- vi) Installation of the water tanks in accordance with the sanctioned plan
- vii) Painting of the building in question
- viii) Removal of illegal ramp/iron staircase which has been provided over the set-back to flat bearing nos. 11 and 12
- ix) Compensation at the rate of Rupees 1 Lakh per member.

25. This Authority after careful examination of the statutory provisions of the Real Estate (Regulation & Development) Act, 2016, deliberates the matter by explaining various provisions of the Act in this regard.

As per the provisions of Section 11(4) of the Act, it is provided that,

“The promoter shall—

“be responsible for all obligations, responsibilities and functions under the provisions of this Act or the Rules and



regulations made there under of 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.”

The provisions of Section 17 of the Act are primarily important to specify herein. Section 17 of the Act *ibid* provides as under,

“ (1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws:

Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent



authority, as the case may be, within thirty days after obtaining the occupancy certificate.”

Under Section 34(f) of the Act, it is the duty of the Authority to-

f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder

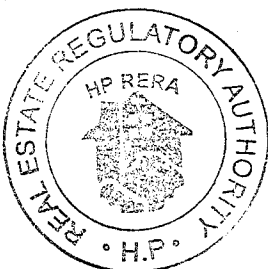
Further Section 38 (1) of the Act says

“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 there under.”

Further, Section 37 of the Act empowers the Authority to issue directions in discharge of its function provided under the Act.

The Authority also has power to impose penalties under Section 59 to 63 for various contraventions of the provisions of the Act.

Moreover, most of the issues raised before the Authority through this present complaint have not been finally decided in the previous complaint bearing No. RERA/HP/SHTCA/07200038 which also pertained to the real estate project in question herein. Even the issue in respect of the attic being a common area or not, was explicitly left open by the Authority in the previous complaint. Therefore, the contention of the Ld. Counsel of the respondent promoter



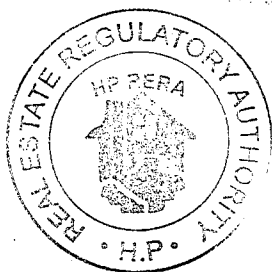
that the two complaints (previous and the present one) are based on identical facts is not tenable.

The Ld. Counsel for the respondent promoter has further contended that the Authority has no jurisdiction in respect of the present complaint as most of the flats in the project in question had been sold and constructed before the commencement of the Act *ibid*. This contention of Ld. Counsel is not tenable as it is an admitted position that five out of total sixteen flats are still under construction and it is also a fact that the concerned project is registered with the Authority as an “ongoing project”.

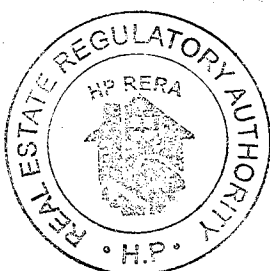
Thus, in view of the above, it is very clear that the Authority has power to adjudicate upon the present case.

26. Other Issues to be adjudicated upon:

Before these issues are taken up one by one, an important issue pertaining to the mandatory consent under section 14 of the Act *ibid*, which is necessary for the just disposal of the case and was raised by the Ld. Counsel for the complainant association, is required to be adjudicated upon. There is no doubt that the consent of 2/3rd allottees, as per the section 14 (2) (ii) of the Act *ibid*, was very much required for obtaining



the revised approval of 2020 and the same was not obtained by the promoter. However, as per the argument of the Ld. Counsel for the respondent promoter, no change was affected in the respective flat(s) of the allottees and moreover the respective sale deeds for almost all flats had been done prior to the submission of the drawings which were approved in January, 2020 and only change was in the roof design and introduction of three terraces at roof level. It was also argued by the Ld. Counsel of the respondent promoter that the domestic NOCs for electrical connections were released by the competent authority on the basis of the revised approval of January 2020. The authority holds that the requirement of the consent of 2/3rd of the total allottees is a mandatory requirement as per the provisions of the Act and the same had not been adhered to by the respondent but the authority at this belated stage in this particular complaint matter, where the domestic electrical and water connections to various allottees have been issued on the same basis and any adverse order or direction from the Authority on this issue will only harm the interest of the allottees who are members of the complainant association and thus the Authority, in this



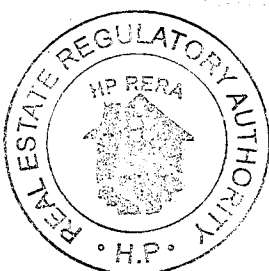
complaint matter, owing to the facts of the case, is not inclined to pass any direction.

27. With regards to the issue of attic being a common area and unhindered access to the same:

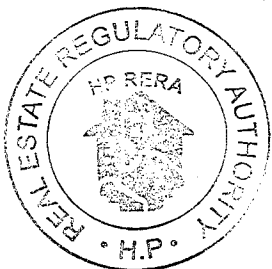
The Authority seeks to place reliance upon the provisions of Section 2 (n) of the Act, which provides as under: -

“Common areas” mean—(i) the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;
(ii) the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings; (iii) the common basements, terraces, parks, play areas, open parking areas and **common storage spaces**;
(iv) the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;
(v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;
(vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;
(vii) all community and commercial facilities as provided in the real estate project;
(viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use.”

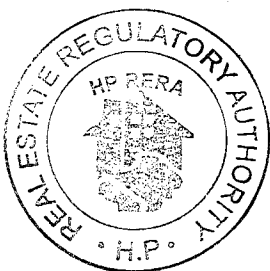
In the instant case, the roof of the building, as per the approval drawing of 2009, was plain sloping roof without any dormers and terraces and the internal space formed within



the slope of the roof, which is referred to as attic, was shown to be used for placing water tank and both the common internal staircases were not proposed up to this attic level. However, in the revised approval of 2020, both the common central staircases were constructed right up to the attic level and the access to the terraces was provided by way of the same staircases through the attic. The revised approved drawing also showed in section CD that the water tanks were placed in attic. The definition of common area 2(n)(iii) makes it clear that every place which is a common storage space, is a common area. The drawings got approved by the respondent promoter in 2009 as well as in 2020 showed clearly that the space within the roof structure, which is termed as attic in common parlance, was used for placing water storage tank for the users of the building/ allottees, thereby the said space/ attic qualifies to be termed as common storage space and thus the attic, as per the provision 2(n)(iii) of the Real Estate(Regulation and Development) Act 2016 is a **common area** as it will be used as common storage space as per approved plans. Further, it has already been held in the order dated 20.10.2020 in the complaint matter of Sh. Satish Chander Walia Vs



Madhusudan Sood, in the same project, that the open terrace is a common area. The Authority also relied upon the clause 2(XII) of form "A" as prescribed under rule 3(2) of Himachal Pradesh Real Estate (Regulation and Development) Rules 2017, which makes it mandatory for every promoter to publish details about number, type, and carpet area of apartment for sale in the project along with the area of exclusive balcony and verandah areas and the exclusive open terrace areas with the apartment, if any. The registered project of the respondent promoter, does not show any exclusive open terrace area with any apartment in the details filled and published in form "A" on the website of the Authority. Further, the revised approved drawings of 2020 also show the terrace as open terrace and not as "Exclusive open terrace". Therefore, there is no ambiguity in the open terraces being common areas in this project. Thus, it is held that the attic apart from being a common area by virtue of being common storage area as held above and also being as an ante space to other common area, "open terrace" which is to be approached by the allottees from the common stair cases is undoubtedly a common area in the project, which is



required to be handed over to the association of allottees after the completion of the project.

The revised approval of 2020 show that few works are yet to be executed in the attic and in the ground floor of the said project. The validity period of the project, as per the registration certificate, as issued by HP, RERA, is up to 7 Nov 2028. It has been argued by the Ld. Counsel for the respondent promoter that five flats out of sixteen are yet to be completed by the promoter and he may so do it well within the validity period of the registration.

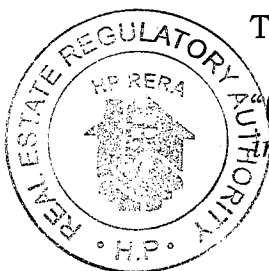
The Authority agrees with the contention of the Ld. Counsel for the respondent promoter that the responding promoter is well within his rights to complete the balance work in the ground floor and attic of the building before the expiry of the validity period.

The section 11(4)(a) provides *that*

“the promoter, is responsible for all obligations, responsibilities, and functions under the provisions of this Act or the rules and regulations made thereunder of 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 building, 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”.

The section 17 of the Act, provides that

(1) *The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate*



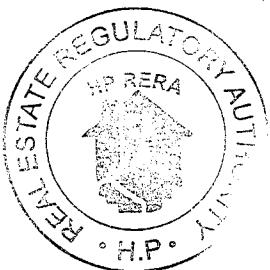
title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws:

Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the occupancy certificate.”

In pursuant to the above stated provisions of the Act, the promoter is required to complete the remaining construction/ finishing works of the real estate project within the validity period as per the registration certificate and is under obligation to hand over the common areas to the association of allottees within three months from the date of completion certificate by whatever name it is called as per relevant applicable laws. However, respondent promoter is at liberty, without compromising on the safety of the inhabitants of the building, to allow the residents of the



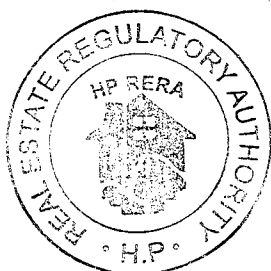
building an unhindered access to attic and common terrace after the works have been finished in the whole/part of attic and terrace(s), before the completion certificate is issued.

28. The issue of installed water tank in the parking floor:

The respondent promoter could not show any such approval, neither in the approved drawing of 2009 nor in the latest approved drawing of January 2020, allowing him to place any water tank in the parking floor, So the placement/ installation of the water tank in the parking floor is a work beyond the approved plan.

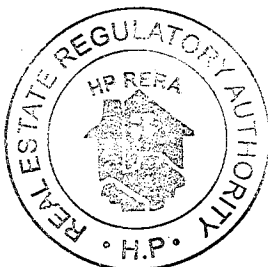
29. The issue of bigger gate:

The Ld. Counsel for the respondent has drawn the attention of this Authority to the parking floor plan and site plan portion in the approved drawing of January 2009 where it is clearly mentioned that the connecting bridge is 3.0 metres wide and the same has been constructed at site. The Ld. Counsel for the complainant association did not produce any document or drawing which shows that the constructed gate is in violation of any by-law or approved drawing.



30. The issue of basement under use/ basement being common area:

The Ld. Counsel for the complainant association has alleged that the respondent promoter has opened an unauthorized basement at the site in question without the sanction/approval of the competent authority and has stated that the same needs to be handed over to the complainant association being a common area whereas the Ld. Counsel for the respondent promoter has contended that the basement is closed and has referred to the revised approval drawing, where the same has been showed to be closed with a retaining wall from outside, as shown in section CD of the said approved drawing. The Ld. Counsel further argued that when there is no basement available in the building, thus the issue to designate the basement as common area, is non-existent. The Authority agrees with the contention of the Ld. Counsel of the respondent promoter that no basement has been approved in the building in question as per the approved plan, however if the respondent promoter has opened the basement in deviation from the approved plan, then the complainant association should approach the



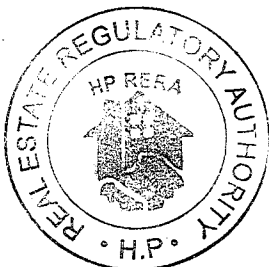
competent authority, MC Shimla in the instant case, for an appropriate action under the relevant laws.

31. The issue of ongoing construction/ direction to stop construction:

The Ld. counsel for the respondent promoter has drawn the attention of this Authority to the revised approval drawing of January, 2020 that permits him to complete the work and further the validity of the project as per the registration granted by HP, RERA permit him to complete the work before the expiry of the registration which is November, 2028 and the promoter has to complete the project within such validity period. The Ld. Counsel for the respondent promoter denied that he has been purposefully delaying the work. The Authority agrees with the arguments put forward by the Ld. Counsel for the respondent promoter that the remaining work of the project has to be finished within the validity period of the registration which is November, 2028.

32. The issue of water Harvesting Tank:

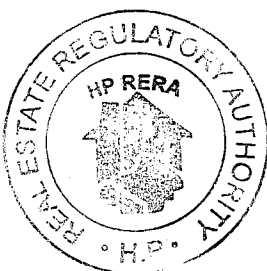
The Ld. Counsel for the respondent promoter has contended that the existing rain water harvesting tank on the site in question is not of the capacity as has been approved in the sanctioned plans. The Ld. Counsel for the respondent



promoter has drawn the attention of the Authority to the revised approval drawing, according to which two rain water harvesting tanks, of capacity 13000 ltrs and 6000 ltrs, totaling 19000 ltrs, have been constructed, as shown in green color, which as per the legend of the approved drawing is an existing work and has argued that had the aforesaid tanks not been of the prescribed capacity, the competent authority would not have granted approval to the revised/completion plan in 2020. The Authority is of the view that the rain-harvesting tanks should be of the same capacity as has been approved in the sanctioned plans and if it is not so then the complainant association should approach the competent authority for any appropriate action under the relevant laws.

33. Poor Quality of paint in the building:

With regards to the poor quality of the paint in the building because of ongoing construction, this authority holds that promoter, as provided for in section 14 of the Act *ibid*, is liable only for the structural defects for a period of five years after the completion of the work. The paint of the building is a maintenance issue and this Authority has no explicit mandate under the Act to adjudicate on maintenance issue.



The association of allottees / Resident Welfare Association, promoter also being a member of the same by virtue of his share of five unsold/ unbooked/unfinished flats in the project should maintain the allotted flats and allotted common area excluding the unfinished ground floor and attic as they have been living there.

34. Issue of steel staircase to flat no 11 and 12:

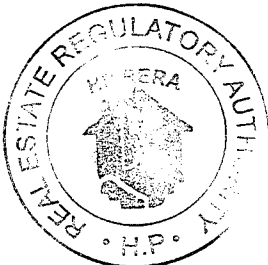
The Ld. Counsel for the respondent promoter could not show any approval, neither in the original approved drawing nor in the revised approval in January 2020, of the steel steps leading down to flat no 11 and 12. The Authority holds that the steel steps have been constructed without the approval of the competent authority.

35. The issue of compensation to allottees:

The Authority, as provided in the section 71 of the Real Estate (Development and Regulation) Act, 2016 has no jurisdiction to adjudicate upon the issue of compensation in any manner as the same vests with Adjudicating Officer as per abovesaid provision of the Act *ibid*.

36. RELIEF

Keeping in view of the above-mentioned facts/discussion, this Authority in exercise of power vested in under various



provisions of the Act ibid issues the following orders/directions:

- i. It is determined that the attic is a common area. The possession of the same is to be handed over to the association of allottees by the respondent promoter within three months from the date of issue of completion certificate.
- ii. The respondent promoter is directed to hand over the completed portion of the building which has been shown to be completed in the approved revised cum completion plan, to the association of allottees within a period of one month to enable the association to maintain the completed portion of the building , if they so desire.
- iii. The complainant association should approach the competent authority, i.e. M.C Shimla in the instant case, for taking appropriate action under the relevant laws about the construction works like water tank installation, steel staircases etc., in the parking floor, if not permissible and being beyond the approved drawings.
- iv. The promoter has not been given any permission for the basement floor as per the approved drawings, and any such floor if opened at site, is unauthorized. The



complainant association should approach the competent authority, i.e. M.C. Shimla in respect of the same for taking appropriate action under the relevant laws.

- v. The complainant association should approach the competent authority, MC Shimla, if the approved and completed rain harvesting tanks are not of prescribed/relevant size as per the sanctioned plans.
- vi. The association of allottees/individual allottee is at liberty to approach the Adjudicating Officer to demand compensation, as per the provision of section 71 of the Real Estate (Regulation and Development) Act, 2016.


B.C. Badalia
MEMBER


Dr. Shrikant Baldi
CHAIRPERSON


Rajeev Verma
MEMBER

