

COVER ARTICLE**Real Estate Law; a Mischief on the Mend:****A Review of the Real Estate Development and  
Management Act 2010**

Barrister Asif Bin Anwar<sup>1</sup>

Individual houses built at the land owners' own initiative for residential needs have just begun to be some of those rare phenomena. Development of land for residential use has now emerged as a major sector for commercial enterprises to contribute. A few factors are responsible for a brisk transformation in the entire frame of mind of landowners in the urban areas. Scarcity of available land area for decent habitation is just one to address. However, such demands were not capable of causing a steep hike in the sale value of land until the real estate business has witnessed a fascinating growth. A sharp increase in the price of engineering and construction materials, lack of capital and inadequate credit facility have shifted the focus on more commercial ventures for effective use of land. Changes in the scenario are manifold; mostly positive, particularly in addressing the pressing concern of housing

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<sup>1</sup> The author is a Barrister-at-Law of the Honourable Society of Lincoln's Inn, and an Advocate of the Supreme Court of Bangladesh. He is also working as a Senior Lecturer & Principle Academic Guidance Tutor at the London College of Legal Studies (South)

problems and bringing modernity and professionalism in the real estate sector. For a fact, land owners have found scopes for using their properties as an exceptionally valuable investment, an opportunity, quite uncommon until recent times. Nevertheless, the escalating concerns are environmental hazards and infringement of plans for greater urbanization with a longer vision.

Although the broader policy perspective is to facilitate the growth of the sector on a smoother surface, the real estate sector was viewed to have generated a number of issues requiring governance. Plainly put, the issues may be rested in two categories; firstly the ones requiring compliance with environmental needs and secondly, creating a balance in legal rights in terms of bargain amongst the three parties involved in each of the real estate deals, namely the land owner, the developer and the purchaser. It is the latter that has been substantively addressed in the Real Estate Development and Management Act 2010. However, the actual implication of the law will have to be considered in juxtaposition with a number of other statutes such as Real Estate Development and Management Rules 2011, Land Development for Private Residential Projects Rules, 2004, The Building Construction Act 1952, Town Improvement Act 1953, Transfer of Property Act 1882 and the Registration Act 1908.

The Act defines “Real Estate” as to mean a land property in the form of residential or organizational or commercial plot or apartment or flat, organizational or mixed floor space built or

developed for the purpose of sale and purchase<sup>2</sup>. Hence, a building however constructed on a piece of land, will not form part of real estate unless wholly or partly constructed for sale and consequently will not attract any provision of the concerned Act. The scope of the Act has been made further limited to private or mixed initiatives, excluding the ventures which are wholly governmental. Joint-Venture assignments of the government with private sector developers would however fall within the ambit of the Act<sup>3</sup>.

The provisions of the Act will apply invariably to projects undertaken by the land owner himself or by the developer in his own land, if the purpose of the project is for sale of any real estate<sup>4</sup>.

As a part of the governing process in the overall management and operation of the system, every Developer Organization must secure a number of permissions to operate business and shall be under supervision of the relevant governing authority. The government has been empowered to establish a governing authority for a given area or may even proclaim any government or autonomous body as the governing authority for a particular area by gazette notification. In absence of any such establishment or proclamation the relevant Town Development Authority or the City Corporation

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<sup>2</sup> Section 2(12) of the Real Estate Development and Management Act 2010

<sup>3</sup> Section 3(2)

<sup>4</sup> Section 7(1)

(as may be necessary in the former's absence), the municipal corporation, the relevant Cantonment Board, or for the area falling outside their jurisdiction, the National Housing Authority shall act as the relevant governing authority<sup>5</sup>. The business of a developer is most commonly carried out by a company incorporated in the Registrar of Joint Stock Companies and Firms, although there is nothing in the law that forbids the operation of the same through a partnership firm or a proprietorship. However, every developer must further be registered with the relevant governing authority, for lawful operation of business or as the case may be, the developer may be required to secure the said registration from the government, whereas the operation area of the business is meant to be the whole of Bangladesh<sup>6</sup>.

It is mandatory for all developers to mention the registration number and the sanction number of the authorized plan by the relevant authority with memo numbers and dates of such grants in its published prospectus<sup>7</sup>. No developer is allowed to publish advertisements in public media for sale of any real estate without first securing the planning permission and the Power of Executing Deeds in favour of the purchaser from the land owner<sup>8</sup>. Similarly, a developer cannot also without having complied with the above requirements sell or enter into a contract for sale of any real estate

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<sup>5</sup> Section 4

<sup>6</sup> Section 5

<sup>7</sup> Section 6(1)

<sup>8</sup> Section 6(2)

with any purchaser<sup>9</sup>. Further, it is a right of the purchaser and an obligation of the developer to inspect and to show the all the relevant documents concerning the title of the land<sup>10</sup>. This has a far reaching consequence on the rights of the purchaser, particularly enabling a purchaser to enquire on the substances. This is also likely to encourage investment on part of the purchaser with assurance of safety.

All matters involving the transfer, sale, purchase and registration would mostly be governed by the express provisions of the agreement between the parties. However, the Act imposes specific obligations on the developer, with a view to offering enhanced protection to the purchaser. In consequence, the prospectus or the allotment letter issued to the purchaser must disclose the detailed area of the real estate, the details of the project including proper explanation and analysis of the parts sold. The detailed terms of reference for the sale and purchase must be categorically included in the sale contract. The developer may only change allocated plot or flat already agreed for sale to the purchaser with the consent of the purchaser. Further, no developer may receive any payment from the purchaser beyond the terms of the contract. However, such additional payment may be received if the purchaser requires

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<sup>9</sup> Section 6(3)

<sup>10</sup> Section 6(4)

fittings and fixtures of enhanced quality in the proposed real estate and accordingly executes a supplementary contract to that effect<sup>11</sup>.

A practical concern for the purchasers happened to be the fact that until recently no law was in place requiring a completion of the registration of the property by the developer apart from the enforcement provisions of the Transfer of Property Act and the Registration Act. The 2010 Act provides for a specific requirement on part of the Developer to complete execution and handover of the deed and registration of the property in the name of the purchaser within 3 (three) months of the completion of payment by the purchaser. If there appears any discrepancy in the volume of the flat or plot sold, that must be adjusted within 3 (three) months of the handover at the purchase rate. At the time of the contract between the developer and the land owner, the land owner must execute a Power of Attorney to the developer to execute sale deed and complete registration in favour of the purchaser of the developer's part of the property. In absence of such provisions in the Power of Attorney, the developer after the completion of the project may request the land owner in writing to execute the deed in favour of the purchaser and the land owner will be obliged to do the same within 15 (fifteen) days from the receipt of the notice, failing which the purchaser will be able to complete the registration

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<sup>11</sup> Section 8

by executing the sale deed, as if he, himself, is the owner of the land<sup>12</sup>.

The developer has before it a long list of compliance factors under different legal provisions. A specific obligation on part of the developer to the purchaser is to ensure that a finished flat would include amongst others the following attributes<sup>13</sup>; namely- (a) It must have proper facility for circulation of air and light, (b) All utility services such as water, gas, electricity, sewerage must be properly installed before the handover; however the developer may not be held responsible for any delay if such delay is caused due to any limitation on part of the service providers<sup>14</sup>.

The purchasers often come across draconian terms of the contract giving the developer a right of cancellation of the allotment, upon a failure of the purchaser to pay instalments as per agreement on a singular occasion or for minor breaches of the express provisions. The Act takes care of the same as it provides for a requirement that notwithstanding the provisions of the contract, the allotment to the purchaser cannot be cancelled on ground of non-payment without first giving him a 60 (Sixty) days notice through the registered post. In case of cancellation, the purchaser must be returned his money in full within 3 (three) months from the date of such cancellation.

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<sup>12</sup> Section 9

<sup>13</sup> Section 11

<sup>14</sup> Section 13

The purchaser shall however have to pay an interest at a rate of 10% for delay in payment. In the event of delay in payment for 3 (three) times or more, the developer may be entitled to cancel the allotment<sup>15</sup>.

If, on the other hand, the developer fails to handover the property to the purchaser within the stipulated period of the contract, the developer shall return all moneys paid by the purchaser with compensation within 6 (six) months in maximum 3 (three) instalments. The rate of compensation will be the one stated in the contract. In case the contract is silent on the matter, it will be 15% on the total amount paid by the purchaser<sup>16</sup>.

The developer may mortgage the land or a part of it or a part of the structure which is the subject matter of the project. However, such a mortgage may only be executed with the consent of the landowner. Nevertheless, no property which is subject to mortgage cannot be sold to a purchaser or cannot as well be a subject matter for a contract for sale<sup>17</sup>.

The 2010 Act provides for a number of criminal sanctions mostly to ensure high degree of caution and diligence on part of the developer and the land owner. This has resulted in exposing the

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<sup>15</sup> Section 14

<sup>16</sup> Section 15

<sup>17</sup> Section 16

substantively civil liability to a state of delicacy; blurring the boundary so as to make it practically non-existent.

Punitive sanctions are available for operating business without registration, for starting a project prior to approval, for failure to connect utility services. Such sanctions include imprisonment and/or fine<sup>18</sup>. A number of offences are created for the developer's failure to give notice before cancellation of the allotment, mortgaging the land in breach of section 16, discussed above and changing the contracted real estate without the permission of the purchaser<sup>19</sup>. Severe sanction would lie for the developers failure to use promised materials or for the use of sub-standard materials in the flat or plot, or for fraud on part of the developer in that where the developer without any reason keeps the work of the flat or plot incomplete and does not pay any compensation to the landowner or the purchaser any compensation or benefit<sup>20</sup>. A developer shall also be criminally liable for failure to hand over the possession of the part of the project belonging to the landowner; whereas in reciprocity the landowner will be similarly liable for failing to handover vacant possession of his land after completion of the development contract<sup>21</sup>. Liability of the shareholders, directors and officials of the developer company will be personal and inevitable

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<sup>18</sup> Sections 19 and 20

<sup>19</sup> Sections 21-24

<sup>20</sup> Sections 25-27

<sup>21</sup> Sections 30 and 28

under the punitive provisions if they are proved to be parties of the offences with the required knowledge<sup>22</sup>.

The offences described above will be triable by the Magistrate's Court. Any money recovered as a punitive sanction may be distributed between the state and the aggrieved land owner or the purchaser, as the case may be, in equal shares<sup>23</sup>. As a matter of relief for the concerned parties all these offences are bailable and are also subject matters for amicable settlement. Moreover, the offences are also non-cognizable in nature and hence complaints may only be instituted in the court and not at the police station<sup>24</sup>.

Dispute resolutions under the Act are accommodative to usual contractual terms. It provides for and encourages amicable settlement and Arbitration within the Arbitration Act 2001. However, the Act further provides that notwithstanding anything contained in the Arbitration Act 2001, an award of the Arbitration Tribunal shall be binding on the parties and no party can raise any objection in any court of law against such awards. However, in case of a failure on part of the parties to establish an Arbitration Tribunal, any party will be entitled to institute a case in an appropriate civil court.

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<sup>22</sup> Section 31

<sup>23</sup> Section 35

<sup>24</sup> Section 32-34

Much of the Act's contents and provisions are aimed at remedying the state of despair and the plight of the landowners and purchasers against the exploitation in the hands of developers, of respective bargaining powers, which at the moment is heavily tilted towards the developers. While, the provisions seem justified for the current conditions, need for a re-assessment may not be far away with the change of scenario when good commercial practices will fall into place. The welcome features as they appear now, may begin to leave pot holes in the seemingly smooth avenue, unless timely adjustments are brought in.