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2014

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O P I N I O N

1 Querist are Builders and Developers. They are interested in the development / redevelopment of land bearing Final Plot No. 7/B of Town Planning Scheme Borivali No.II (1st Variation Final(hereinafter referred to as the said land).The said land is situated in the R ward of Gr.Mumbai Municipal Corporation(MCGM) and forms a part of Town Planning Scheme Borivali on the east side of the railway track.. The Town Planning Scheme Borivali No. II,1st variation, is sanctioned by the State Government and scheme has come into force with effect from 15/4/1996.As per the sanctioned scheme the area of the said land is 6430.87 sq. mts. & the name of the owners of the said land as per the scheme is Shri. Moreshwar Waman Velkar & Smt. Sulochana Pandurang Velkar. The user of the said land as per scheme, is Commercial as per regulation no. 5 of the sanctioned scheme.

The State Government has sanctioned Revised Development Plan for R ward in the year 1993.The said land as per the revised development plan is mostly reserved for BEST Bus Station and is situated in Local Commercial Zone C-1.

The Town Planning Scheme Borivali No II (1st variation, Final)(herein after referred to as the said scheme)is proposed for second variation by the MCGM under section 92 of the Maharashtra Regional & Town Planning Act 1966(herein after referred to as the said Act) for the purposes of incorporating the Development Control Regulations for Gr. Mumbai 1991 and proposals of the sanctioned Revised Development Plan of R ward.

2 The Town Planning Scheme Borivali No II (Principal Scheme) was sanctioned by Government on 7/1/1931 to come into force with effect from 15/3/1931. In the principal scheme the said land was allotted Final Plot No.7/B. The MCGM undertook 1st variation of the said scheme under the provisions of the said Act and the same was sanctioned by the state government to come into force with effect from 15/4/1996. The F.P. No 7/B of the principal scheme is numbered as Original Plot No. 7/B and is allotted F.P.No.7/B in this scheme. On perusal of Form 1 of this scheme the area of O.P. No. 7/B is 6857.00 sq mts. and the area of the F. P. No. 7/B is 6430.87 sq. mts. This indicates that the O. P. No. 7/B is affected to the extent of area of 426.13 sq. mts in reconstitution of F.P. No 7/B. Further Form No.1 also indicates that there are structures on the F.P.No.7/B and the form reveals that no compensation is paid for the structures. There is also a remark in column 16 which mentions that the owner is allowed benefit of FSI of area affected by road widening under (old) D.C. regulation No. 10 (2).

3 Section 59 of the said Act makes provision for preparing Town Planning Schemes for the purposes of implementing the proposals in the final development plan. The sections 60 to 67 prescribe the procedure for preparing and submitting the draft scheme by the Planning Authority i.e. MCGM to state government for sanction. Section 68 empowers the state government to sanction the draft scheme and appoint Arbitrator. The Arbitrator after following the procedure prescribed, submits the final scheme to the state government for sanction.. The state government has power under section 86 to sanction the scheme. The effect of the final Scheme is narrated in section 88 of the said Act. This provision is mentioned below—

- (a) All lands required by the Planning Authority shall, unless it is otherwise determined in such scheme, vest absolutely in the planning authority free from all encumbrances,
- (b) All rights in the original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by Arbitrator.

(c) The Planning Authority shall hand over possession final plots to the owners to whom they are allotted in the final Scheme.

Sections 89 and 90 make provision for enforcement of the scheme.

It would thus be seen that liability to hand over possession (vacant and not symbolic) of final Plots as per scheme to the respective owners is on Planning Authority i.e. MCGM. The question of handing possession was raised in the writ petition filed by the Advance Builders (India) Pvt. Ltd versus The MCGM. The Apex court while deciding the Appeal filed by the MCGM, has held that because of the Enactment (every town Planning scheme is considered as a separate act), the MCGM is under legal obligation to perform duty cast upon it by law and handover possession of the final plot.

4 Experience gained by the state government in implementation of various schemes in Mumbai shows negligible implementation of the scheme. It was noticed that on account of the "contravening structures" existing in the scheme area it has become difficult to the Planning Authority (MCGM) to give possession of final plots under section 89 of the act to owners to whom these plots are allotted. It was also noted that on account of contravening structures, the owners to whom these final plots are allotted are not interested to develop these final plots as they are required to accommodate the tenants of the existing structures and therefore they have no incentive to develop these final plots. And to resolve this issue the State Government decided to amend the Development Control Regulations for GR. Mumbai, 1991 by adding new regulation no. 33(15) for the purposes of grant of incentive FSI for redevelopment of contravening structures included in the Final Plot namely,

1. For the redevelopment/reconstruction of contravening structures situated in town planning scheme, additional FSI over and above permissible FSI prescribed under these regulations shall be admissible as under :--

a) In the redevelopment scheme the number of tenants as recorded in the town planning scheme book and residing in the contravening structures shall be accommodated by giving alternative accommodation in the redevelopment scheme having carpet area of 20.90 sq. mtr. each, irrespective of their original holding provided the overall FSI consumption of the final plot shall not exceed 3.19 in the City and 2.5 in the suburbs and extended suburbs.

b) The commercial user may be permitted in the redevelopment scheme to accommodate existing commercial tenant, provided the commercial area in the redevelopment scheme shall not exceed the original commercial area.

c) The tenants not listed in the records of the Town Planning Scheme but residing in the contravening structures or such structures which have come up after town planning scheme is finalized but are existing before 1.1.1995 and where structures and inhabitants names are appeared in the Legislative Assembly Voters list of 1995 shall also be eligible for being included in the redevelopment scheme,

d) Built up area equivalent to the area held by the tenant or 20.90 sq. mts. whichever is less shall be handed over free of cost to the respective tenant by the developer / owner, while for balance built-up area sum as may be mutually agreed to between tenant and owner /developer shall be paid by the tenant,

e) For the purposes of this redevelopment scheme the owner/developer shall get further additional FSI to the extent of 50% of the area of the structures covered under Sr. Nos. (a), (b), (c) and (d) above provided further that the overall FSI of the Final Plot shall not exceed 3.19 in City & 2.5 in the suburbs and extended suburbs.

notes are added for the purposes of implementation of this regulation.
for determination of contravening structures

Namely: -- Contravening structure shall mean,

i) Structure situated outside the Original Plot not included fully or partly within the Final Plot allotted to a person in the Town Planning Scheme.

ii) **Structures which are** partly included in the Final Plot allotted to a person and partly included in the roads/sites **reserved for public purposes** / adjoining Final Plot.

iii) Structures which are included in the scheme area but situated outside the Final Plot allotted to a person and are affected by sites reserved for public purposes, provided the Planning Authority has no objection or rehabilitation such structures.

iv) However in the common area comprising of Original Plot and Final Plot shall not be treated as contravening structures.

5 There has been prolonged litigation since 1985 for development of the said land between the occupants / tenants and the owners/developers and the M. C. G. M. The litigation has come to end in Oct.2002 by signing Consent Terms. The M. C. G. M. developers and tenants / occupants are all parties to the consent terms. The developers have agreed to provide alternative accommodation to all the parties as per redevelopment scheme prepared by the developers.

6 It is also to be noted that the said land was under acquisition by the MCGM for BEST Bus Station under L.A. Act 1894. Three Writ Petitions were filed in the Bombay High Court challenging the acquisition of the said land. The Hon'ble High Court allowed the Writ Petitions. Appeals were filed by the

MCGM. However the High Court took a view that the MCGM had no locus ^{to} file the appeals. Accordingly the Appeals were dismissed, by the Division Bench. The MCGM took up the matter to the Supreme Court.

It was finally settled after the developer agreeing to construct building on 3400 sq. mts. plot exclusively for BEST. The MCGM has confirmed and approved combined user on the said land for bus station and commercial purposes under resolution No.1353 dated 9/3/1990. **It is also agreed that MCGM will not pursue Land Acquisition proceedings** and the BEST shall use the portion earmarked as per consent terms exclusively for BEST.

7 The question that is to be addressed for this OPINION is whether the owner /developer is entitled to incentive 50% FSI permissible under Regulation No.33 (15) for redevelopment of the said land.

My answer to this is affirmative for the following reasons.

The said T.P. Scheme is in force from 15/4/ 1996. However due to prolonged litigation the said land could not be developed. The MCGM has also agreed not to pursue the acquisition proceedings in view of the consent terms filed in Supreme Court.

It is a fact that the T.P. Schemes in Mumbai could not be implemented mainly on account of the **contravening structures** existing on the Final Plots. The law is also very clear about handing over possession of Final Plots by the Planning Authority to the respective owners to whom such plots are allotted. In the instant case the said land is used for mixed users namely industrial, commercial, residential. Some of the users among the existing users are non conforming in the commercial zone. And such structures having these users would be classified as contravening structures. The intention of the State Government in adding new regulation no. 33 (15) is very clear i.e. the T.P. schemes have to be implemented and should not remain on paper.

In this situation and considering the facts and circumstances of the instant case the Owner/developers are entitled to receive incentive 50% FSI for the contravening structures situated on F.P.No.7/B which is reserved for BEST Bus Station in the revised development plan and for which purpose the MCGM has resolved to undertake 2nd variation of the said scheme. The details of area and eligibility of occupants will have to be decided by the MCGM as per the guidelines provided in sub clauses (a),(b),(c) of clause 1 of the schedule provided in Regulation No33(15).

Mumbai

(M.S.Hardikar) 13/12/2007