



D. J. KHAMBATA  
ADVOCATE GENERAL OF MAHARASHTRA  
SENIOR ADVOCATE, LL.M. (HARVARD)

cm  
08  
2014

Ex parte

Urban Development Department, Government of Maharashtra (through the Law  
and Judiciary Department)

...Querist

OPINION

(Your letters bearing Nos. TPB 4313/630/UD-11 dated 6.1.2014 and TPB  
4313/630/UD-11/CR-107/2013 dated 21.01.2014)

A. Brief Facts

1. The Development Control Regulations for Greater Mumbai, 1991 ("D. C. Regulations") have been in operation since 25 March, 1991. Regulations 56 and 57 of the D. C. Regulations pertain to conversion of General Industrial Zone (I-2) and Special Industrial Zone (I-3) to residential or commercial zone respectively.
2. Where a plot or layout in the industrial zone is converted into one in a residential zone, the area of the residential zone as a whole is increased. To sustain such increased residential area additional amenities are required. A provision exists in Regulations 56 and 57 for providing additional amenity space for lay out / sub-division of land in I-2 / I-3 zone admeasuring above 2 ha.
3. Amenity has been defined in D. C. Regulation 2(7) as follows:  
*"Amenity" means roads, streets, open spaces, parks, recreational grounds, play grounds, gardens, water supply, electric supply, street lighting, sewerage, drainage, public works and other utilities, services and conveniences.*
4. D. C. Regulation 57(4)(c) is concerned with conversion from Special Industrial Zone (I-3) to Residential Zone. By a notification dated 14 May 2007 issued under Section 37(2) of the Maharashtra Regional and Town Planning Act, 1966 ("the

MRTTP Act") the provisions of D. C. Regulations 56(3)(c) and 57(4)(c) were amended. Regulation 56(3)(c) provides as follows :-

*"(c) With the previous approval of the Commissioner, any open land or lands or industrial lands, in the General Industrial Zone (I-2 Zone) (including industrial estates) excluding lands of cotton textile mills, may be permitted to be utilized for any of the permissible users in the Residential Zone (R-1 Zone) or the Residential Zone with shop line (R-2 Zone) or for those in the Local Commercial Zone (C-1 Zone) subject to the following:*

*(i) The conversion of Industrial Zone to Residential/Commercial Zone in respect of closed industries shall not be permitted unless NOC from Labour Commissioner, Maharashtra State, Mumbai stating that all legal dues have been paid to the workers or satisfactory arrangement between management and workers have been made, is obtained.*

*Provided that where conversion has been permitted on the basis of this certificate, occupation certificate will not be given unless a no dues certificate is granted by Labour Commissioner. However, in respect of any open land in the industrial zone, where industry never existed, NOC from Labour Commissioner is not required.*

*The layout or sub division of such land shall be approved by the Commissioner, who will ensure that 5% land for public utilities and amenities like electric, sub-station, bus-station, sub-post office, police out post and such other amenities, as may be considered necessary, will be provided therein.*

*(ii) In such layouts or sub divisions having areas more than 2 Ha. but less than 5 ha., 20% land for public utilities and amenities like electric, sub-station, bus-station, sub-post office, police out post, garden, playground, school dispensary and such other amenities shall be provided.*

*In such layout or sub division each more than 5ha. in area, 25% land for public utilities and amenities like electric, sub-station, bus-station, sub-post office, police out post garden, playground, school dispensary and such other amenities shall be provided.*

*Provided that atleast 50% of the amenity space shall be designated as open space reservation.*

*These areas will be in addition to the recreational space as required to be provided under regulation No. 23.*

*(iii) The required segregating distance as prescribed under these regulations shall be provided within such land intended to be used for residential or commercial purposes.*

*(iv) Such residential or local commercial development shall be allowed within the permissible FSI of the nearby residential or commercial zone.*

*(v) Provision for public utilities, amenities and open space shall be considered to be reservation in the development plan and Transferable Development Rights as in Appendix VII or FSI of the same shall be available for utilization on the*



remaining land. Provided that public utility and amenity plots shall not be developed as per Regulation 9.

Note:

I. Conversion from industrial zone to residential / commercial zone shall be applicable to be part of area of land holding subject to condition that total area of the entire land holding shall be considered for deciding the percentage of land to be reserved if the said parts area of land for public amenity spaces, as per the said Regulation.

However, necessary segregating distance shall be provided from industrial use.

II. In the layout, where Development Plan has provided any reservations,

A. If the area under Development Plan reservation is less than the required area of public amenity space as per the said Regulation, then only the difference between the area shall be provided for public amenity spaces.

B. If the area under Development Plan reservation is more than the required area of public amenity spaces as per the said regulation, then the provision for public amenity spaces is not necessary.

III. Out of the total floor area proposed to be utilized for residential development, 20% of the same shall be built of residential tenements having built up area upto 50 sq.mt." (emphasis supplied)

Note II to Regulation 57 (4)(c) is in pari materia with Note II to Regulation 56(3)(c).

5. By Notice No. TPB-4306/707/CR-100/2006/UD-11 dated 5 August 2008 the State Government proposed a modification to the Development Plan of L&N, S&T wards of Greater Mumbai in order to change the reservation of 15.25 m. wide "railway reservation" to 15.25 m. wide "development plan road", and invited suggestions / objections. A final decision on the proposed modification has not yet been taken.
6. Under D. C. Regulation 62(3) the State Government is empowered to interpret the D. C. Regulations. By Order No. TPB-4304/2770/CR-312/2004/UD-11 dated 12 November 2008 the State Government has provided the following decision under Regulation 62(3):

*"Point No. 1: Whether the word layout mentioned in the note in the notification under No. TPB 4304/2770/CR-312/04/UD-11 dated 14/5/07 shall be interpreted as the entire layout area under one ownership including the portion under Industrial/Commercial/Residential Zones or it shall be interpreted as only Industrial Zone area.*

*In preparation of Development plan, industrial area is not considered for provision of amenity spaces and therefore certain percentage of land is required to be provided while permitting residential/commercial user in industrial land. Therefore the layout mentioned in the note in the Notification dated 14 May 2007 shall be interpreted as only Industrial Zone area." (emphasis supplied)*

7. D. C. Regulation 33(1) provides for additional FSI for road widening and construction of new roads as follows:

*"(1) Road widening and Construction of new Roads :- The Commissioner may permit additional FSI on 100 per cent of the area required for road widening or for construction of new roads proposed under the development plan or those proposed under the Mumbai Municipal Corporation Act, 1888, excluding areas of internal means of access, if the owner (including the lessee) of such land surrenders such land for road widening or new road construction without claiming any compensation in lieu thereof and hands over the same to the Corporation free of encumbrances and after the owner or lessee has leveled the land to the surrounding ground level and after he has constructed 1.5 mt. high compound wall leaving the setback area ( or at a height stipulated by the commissioner) with a gate at the cost of the owner, and to the satisfaction of the Commissioner.*

*When an owner or lessee or Power of Attorney holder / Authority holder also develops or constructs the road on the surrendered land at his cost subject to such stipulations as may be prescribed by the Commissioner to his satisfaction, and hands over the said developed /constructed road to the Commissioner free of cost, he may be granted by the Commissioner additional FSI equal to 25% of the area of this construction/development done by him ( This modification will not apply in cases where road FSI is utilized and also full occupation certificate is granted.)*

*Such 100 per cent F. S. I. on land so surrendered to the Corporation and/or FSI towards road area constructed, will be utilizable on the remainder of the land up to a limit of 40 per cent in respect of plot situated in Mumbai City and 80 per cent in respect of plots situated in the suburbs and extended suburbs of the area of the plot remaining after such surrender and the balance F.S.I. remaining thereafter shall be allowed to be utilized as a Development Right in accordance with regulations governing Transfer of Development Rights (TDRs) in Appendix VII, or the full FSI of land surrendered to the Corporation may be allowed to be used as a Development Right in accordance with the Regulations governing Transfer of Development Rights (TDRs) in Appendix VII. Thereafter the road land shall be transferred in the City survey records in the name of the*



Corporation and shall vest it in becoming part of a public street as defined in sub-section (3) of section 288 of the Mumbai Municipal Corporation Act, 1888."

8. The Querist had sought the opinion of the Law and Judiciary Department as to whether the provisions of Note II under Regulation 57(4)(c) differentiated between sector level reservations and layout level reservations. The Law and Judiciary Department has opined that the provision was clear and unambiguous and did not require any further clarification.

#### B. Queries

9. In light of the foregoing, the following queries arise for my consideration:

- i. As per the provisions of Note II B below Regulation 57(4)(c) in the layout "where Development Plan has provided any reservations", if the area under Development Plan reservation is more than the required area of public amenity space as per the said Regulation, then only the difference between the area shall be provided for public amenity space; and if the area under Development Plan reservation is more than the required area of public amenity space as per the said Regulation then the provision for public amenity space is not necessary. The use of the words "any reservations" in Note II shows that the aforesaid provision does not differentiate between the Development Plan reservations similar to layout level amenities and those which are of the nature of City level amenities. In such a situation, can a landowner / developer be denied the benefit of adjustment of amenity space against D. P. reservation for "railways" as per Note II below D. C. Regulation 57(4)(c) on the ground that in preparation of the Development plan, industrial area is not considered for the provision of amenity spaces and therefore a certain percentage of land is required to be provided as amenity space while permitting residential / commercial user in industrial land.
- ii. Whether it would be legally permissible to consider conversion of Industrial Zone to Residential Zone by excluding the area of city level / town level reservations from the area of the industrial zone.

- iii. In case of D. P. Road, Regulation 33(1) provides that the area under road can be utilized on remaining plot irrespective of zones in which the road passes. Whether it would be appropriate to allow additional FSI of the area under the proposed D. P. road on the remaining plot area and at the same time adjust the area of such road against the required amenity space as per Note II below Regulation 57(4)(c).

C. Query (i)

10. Regulation 57(4)(c) prescribes certain conditions for the utilization of certain land in the Special Industrial Zone for any of the permissible users in the Residential/Commercial Zones i.e. for conversion to the Residential/Commercial Zone. One of the conditions on which this conversion may take place under Regulation 57(4)(c) is a requirement that the Commissioner provide a certain percentage of the land being converted from Industrial to Residential Zone for public utilities and amenities. Note II to Regulation 57(4)(c) clarifies, however, that where in the layout there is "any reservation" in the Development Plan then that reservation should be adjusted against the requirement for public utilities and amenities.
11. Note II is intelligible: if the concerned layout is already burdened with Development Plan reservations it would be unfair to burden the owner with additional reservations for public amenity, spaces, over and above these Development Plan reservations.
12. Section 22 of the MRTP Act sets out what the contents of a Development Plan should be and *inter alia* provides as follows:

**"22. Contents of Development Plan:-** A Development plan shall generally indicate the manner in which the use of land in the area of the Planning Authority shall be regulated, and also indicate the manner in which the development of land therein shall be carried out. In particular, it shall provide so far as may be necessary for all or any of the following matters, that is to say,-

...

(d) transports and communications, such as roads, high-ways, park ways, railways, water-ways, canals and airports, including their extension and development;  
..."

Therefore, "railways" is one of the categories of reservations that may be provided in a Development Plan.

13. D. C. Regulation 9 prescribes the different land uses and the manner of development. Table 4 under Regulation 9 specifies different conditions for development in relation to the "Use (Allocation designation or reservation)". In this table, "*Railway Siding, Workshops. And other Railway Uses*" is category (i) under the heading "*III. Industrial*". Therefore, land reserved for railways may fall within the layout of the land in the Industrial Zone that is proposed to be converted to Residential/Commercial Zone.
14. If in fact the reservation for "railways" is within the layout of the land being converted from Industrial Zone to Residential/Commercial Zone, there is no question of the landowner / developer being denied the benefit of adjustment of amenity space against D. P. reservation for "railways" as per Note II to D. C. Regulation 57(4)(c). The said Note II permits such adjustment in the case of any reservation in the Development Plan pertaining to the area being converted and this includes a reservation for railways.
15. Note II does not have the effect of extinguishing the requirement of the owner to provide 20% of the Layout land for "public amenity space". That requirement continues. However, if there exists a reservation in the Development Plan the area under such reservation is deemed to be set off against the area required to be surrendered for the "public amenity space" and is treated as being in satisfaction of the obligation to reserve and surrender the said "public amenity space".
16. Consequently, in the event of the reservation in the Development Plan being deleted or reduced in area, the obligation to provide area for public amenity spaces towards the requirement of Regulation 57(4)(c) would have to be complied with. In such an eventuality, the difference between the area under



Development Plan reservation and the required area of public amenity space or the whole of such reservation for public amenity space, as the case may be as per the said Regulation should be provided for the public amenity space.

17. If this does not follow on deletion / reduction of the Development Plan reservation, the provisions of Note II may operate in a discriminatory and inequitable manner since a landowner who did not have any Development Plan reservation would be required to provide the full percentage of area for "public amenity space" while a landowner whose layout bore such a reservation would get an undue benefit and advantage once the Development Plan reservation was deleted / reduced.

18. A road is an 'amenity' both under Section 2(2) of the MRTP Act as well as under D. C. Regulation 3 [Godrej & Boyce Mfg. Co. Ltd. v. State of Maharashtra, (2009) 5 SCC 24, para 28]

D. Query (ii)

19. Any reservation in the Development Plan falling within the layout area of the land of which user is to be converted from Industrial to Residential/Commercial Zone under Regulation 57(4)(c) is to be considered, even if it is a city level reservation. The term "any reservation" is clear and unambiguous. It makes no distinction between Layout reservations and sector level reservations.

E. Query (iii)

20. Under Regulation 33(1) the owner is required to surrender the land in the manner prescribed before the benefit of the additional FSI is made available. Once Regulation 33(1) is complied with and the land surrendered the owner would be entitled to FSI in lieu thereof as consideration therefore [Godrej & Boyce Mfg. Co. Ltd. v. State of Maharashtra, (2009) 5 SCC 24 at paras 52, 57, 58]. This is true for any land under reservation that is surrendered under D. C. Regulation 34 which reads as follows :-



**"34. Transfer of Development Rights.**

*In certain circumstances, the development potential of a plot of land may be separated from the land itself and may be made available to the owner of the land in the form of Transferable Development Rights (TDR). These rights may be made available and subject to the Regulations in Appendix VII hereto.*

*(i) Provision for Proposed Nalla / Nalla Widening / Training and appurtenant service roads thereto shall be considered to be "reservation" in the Development Plan and if the FSI of such land is not possible to be consumed on the remaining land as envisaged under Regulation 35, with prior approval of the Government, the owner shall be eligible for grant of TDR on handing over the land free of cost for such purpose as in Appendix VII. However, as per the provision of Regulation 15 of Appendix VII, the owner shall be insisted to pay pro rata charges for cost of construction of compound wall instead of retaining wall:*

*Provided that when Proposed Nalla / Nalla Widening / Training and appurtenant service road thereto is passing through the lands affected by any other reservation of the Development Plan, then TDR of the land can be granted only once either for D. P. Reservation or deemed reservation mentioned above for nalla etc. Efforts shall be made to cover / to train the nalla suitably so that the said land can be used for its intended purpose as proposed in the Development Plan. However, if such covering nalla is not feasible / viable then the nalla and appurtenant service road shall be developed as per requirement and the said other reservation of the Development Plan affecting the said land shall be deemed to be deleted / modified to that extent."*

21. It all depends on whether there is a reservation on the land or not. If there is a D. P. reservation, the provisions of Note II will apply regardless of whether FSI is available on surrender of the land.
22. However, once the land is surrendered in accordance with the provisions of Regulation 33(1) in advance of the conversion, it will not be part of the land in the Industrial Zone being converted to any of the users in the Residential/Commercial Zone under Regulation 57(4)(c). In such situations therefore the benefit of Note II to Regulation 57(4)(c) would not be available.
23. Where the land surrendered in accordance with Regulation 33(1) does fall within the layout of the land being converted and there is a Development Plan reservation for the road, the erstwhile landowner would get the benefit under Regulation 33(1) and the benefit of the adjustment under Note II to Regulation 57(4)(c) would also be available.

24. I have nothing further to add.

*D.J. Khambata*

Dated :- March 18, 2014.

(D.J.Khambata)  
Advocate-General of Maharashtra

Encl. : File No.TBP-4313/630/UD-11/PRA.KRA.107/13.

To,  
Shri Manu Kumar Srivastava,  
Principal Secretary to Government,  
Urban Development Department (1)  
Nirmal Bhavan, 2<sup>nd</sup> floor, Nariman Point,  
Mumbai-400 021



24. I have nothing further to add.

*D.J. Khambata*

Dated :- March 18, 2014.

(D.J.Khambata)  
Advocate-General of Maharashtra

Encl. : File No.TBP-4313/630/UD-11/PRA.KRA.107/13.

To,  
Shri Manu Kumar Srivastava,  
Principal Secretary to Government,  
Urban Development Department (1)  
Nirmal Bhavan, 2<sup>nd</sup> floor, Nariman Point,  
Mumbai-400 021