MCHI - CREDAI

Ref. No. MCHI/GEN/14-15/054

August 8, 2014

To,
Smt Medha Gadgil (I.A.S.)
Additional Chief Secretary
Dept of Environment,
Govt of Maharashtra,
Mantralaya,
Mumbai - 400032

Respected Madam,

The Maharashtra Chamber of Housing Industry ["**MCHI**"], is a representative body of leading developers engaged in housing and real estate Development in the city of Mumbai. One of the functions of the Petitioner is to liase between members and local authorities, Central and State Governments. The members of MCHI are accountable for supplying/ providing 80 to 90% of houses/ flats in Mumbai and in its vicinity.

Our Association of Developers are facing some issues/difficulties, herein below are some brief insight:

Re.1: Writ Petition filed before the Hon'ble Bombay High Court challenging the Office Memorandum dated 31st October, 2013 and the Circular dated 17th January, 2014 and 31st January, 2014

Background

On 14th September 2006, the Central Government through the Ministry of Environment and Forest ("**MOEF**"), in exercise of powers conferred by the provisions of the said Act issued a notification known as the Environment Impact Assessment Notification, 2006 (EIA Notification). The EIA Notification *inter alia* provides that prior environmental clearance shall be mandatory for building and construction projects above 20,000 sq. mtrs. The EIA Notification contains the procedure for obtaining the environmental clearance. Pertinently, the EIA Notification prescribes a period of 105 days from the date of receipt of the application to decide the application. The Notification further provides that if within 105 days from the receipt of the application the Regulatory authority has not refused prior environment clearance the project proponent has deemed environment clearance.

On 12th December 2012, MOEF issued an Office Memorandum in relation to the procedure for dealing with cases of violations of Environment (Protection) Act, 1986 and EIA Notification. The said OM broadly provided that in cases where the

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violation is noticed, the application for EC for such projects shall be deferred until credible action is taken by the concerned authority.

The project proponents were under tremendous pressure for non-consideration of applications for environment clearance as the SEAC of the State was unable to keep up with the applications as a result of which the project proponents were not able to commence their construction. At the same time the authorities were not accepting the deemed environment clearance in terms of the EIA Notification. Various Writ Petitions came to be filed in the Hon'ble Bombay High Court in which the issue was raised that in the building construction projects since the threshold limit is 20,000 sq. mts., the project must be allowed to go ahead at least up to 20,000 sq. mts., without insisting on obtaining prior environmental clearance. This was for the sound and logical reason that even if environment clearance is ultimately refused, the projects of less than 20,000 sq. mts. could not be treated as breach or violation of EIA Notification. This contention has been accepted in series of decisions of the Hon'ble Bombay High Court and Planning Authorities have been directed to allow the project proponents to go ahead with the construction up to 20,000 sq. mts. without insisting on environment clearance under the EIA Notification.

Considering the orders passed by Hon'ble High Court at Bombay, the Secretary, Environment Department, the Government of Maharashtra issued an Office Memorandum dated 29th June, 2013, wherein it was provided that residential projects wherein construction of 20,000m^2 has been initiated shall not be treated as violation. The said Office Memorandum was issued in light of the decisions of the Hon'ble Bombay High Court.

In the meantime, the National Green Tribunal, Pune Bench, passed two Orders whereby it was observed that commencement of construction work upto 20,000 sq. mtrs., without obtaining prior environmental clearance is in violation of the EIA Notification. It may be mentioned here that the aforesaid observations are in complete contravention to the decisions of the High Court / settled position in law.

In furtherance of the Orders passed by the National Green Tribunal, on 31st October 2013, yet another Office Memorandum was issued. By the said Office Memorandum the earlier Circular dated 29th June, 2013 was reviewed and taken back. The said Office Memorandum further provided that if any construction plan above 20000 m^2 is approved (for Residential/Commercial/Rental Housing Scheme/SRA/Industrial Construction etc.) by the Planning Authority and part Commencement Certificate below 20000 m^2 issued for commencement of the construction work to the Project Proponent without making mandatory to obtain prior EC, then such construction will be treated as a violation of the provision of the EIA Notification 2006.

The Hon'ble Bombay High Court has passed an Order on 18th December, 2013 in Writ Petition (L) No. 2305 of 2013 in Vardhaman Developers vs. Union of India & Ors., wherein it rejected the contention of the authorities relating to Office Memorandum dated 31st October, 2013 and directed the authorities to allow

development up to 20,000 sq. mts., without insisting on obtaining a prior environmental clearance.

Despite the aforesaid order dated 18th December, 2013 passed by the Hon'ble Bombay High Court, on 17th January 2014 a Circular was issued wherein whilst the authorities referred to the aforesaid Order passed by this Hon'ble Court but in complete disregard to the said Order it stated that only in case of redevelopment projects where rehabilitation of tenants in SRA/Dilapidated/Cess buildings is involved, construction of rehab component below 20,000 m^2 without obtaining prior environmental clearance may not be considered as a violation of the EIA Notification.

Subsequently, by and under a Circular dated 30th January, 2014 issued by Government of Maharashtra, through the Principal Secretary, Environment Department, it is mandatory for all project proponents to first get the building plans sanctioned and only upon a clarification being issued by the local authorities that the plans are in conformity with the local planning rules and provisions, shall the project proponent submit an application for Environmental Clearance.

Effect of the aforesaid Office Memorandum/Circular

Construction projects are being held up due to the operation of the Office Memorandum as the project proponents cannot proceed with construction work upto 20,000 sq. mtrs., in the event the project is not a redevelopment project involving rehabilitation of tenants in SRA/Dilapidated/Cessed Buildings, without obtaining prior environmental clearance.

The projects are further delayed as the process of approval is time consuming. The applications are not processed within a period of 105 days nor are deemed clearances granted in the event the applications are not processed within 105 days from the date of its submission.

In addition to the aforesaid, the Circular dated 31st January, 2014 makes it a condition precedent that prior to submission of the application for environmental clearance, permission of the Planning Authority is required to be obtained, thereby further delaying the approval process for construction projects. Such delays in commencement of the construction of projects, will result in / has resulted in multiplicity of proceedings being filed by the consumers against the developers (for delay in handing over of projects) as well as proceedings by the developers against the authorities / State bodies due to delay in sanctioning of approvals. This has resulted in huge expenses towards litigation costs both for developers as well as the authorities, including the State Government, which is wholly unnecessary and completely avoidable.

Legal challenges to the aforesaid Office Memorandum/Circular

- Both the Office Memorandum and the Circular have been issued in complete violation of the provisions of the Act and the Rules.

- The said Memorandum and the Circular is contrary to the EIA Notification in as much as the EIA Notification does not stipulate that prior permission

of the Planning authority needs to be obtained before submitting an application for environmental clearance.

- In fact that EIA Notification stipulates that clearances from any other regulatory authorities/bodies shall not be required prior to obtaining environmental clearance.

- The Office Memorandum and the Circular are in the nature of administrative orders and do not have any statutory force. Reference may be made to the Judgment and Order passed by the Hon'ble Supreme Court in the matter of ***Godrej and Boyce Manufacturing Co. Ltd. Versus State of Maharashtra & Ors.*** [Reported at (2009) 5SCC 24] and ***Municipal Corporation of Greater Mumbai and Anr. V/s. Yeshwant Jagannath Vaity and Ors.*** *[reported at AIR 2011 SC 1916]*

- The Office Memorandum is issued without any basis and is a clear case of non-application of mind, in as much as the distinction sought to be made between redevelopment projects and other projects is without any rational and/or justification and there is no intelligible differentia in the distinction sought to be made.

- The Office Memorandum is in any event contrary to the judgment and the order(s) passed by the Hon'ble Bombay High Court. The basis of issuing the Office Memorandum being the Orders passed by National Green Tribunal is erroneous. National Green Tribunal is a tribunal constituted under the National Green Tribunal Act, 2010 having jurisdiction to try civil cases in which substantial question relating to the environment is involved and the tribunal is subordinate to this Hon'ble Court and therefore is subject to judicial superintendence of this Hon'ble Court under Article 227 of the Constitution of India. This has been recorded by this Hon'ble Court in an Order dated 2nd July, 2013 in the case of Adarsh Cooperative Housing Society Ltd. vs. Union of India & Ors where this Hon'ble Court declined to transfer the writ petition to the National Green Tribunal. Thus, the Tribunal was bound by the decisions of the Hon'ble Bombay High Court.

- As per the provisions of the EIA Notification, a project proponent is required to attach a copy of the Conceptual Plan along with the application seeking environmental clearance. The Conceptual Plan so submitted contains various details about the project such as Internal Roads, Developable Area, etc., based on which the State Level Environmental Impact Assessment Authority can assess the increase in population and impact on the environment due to such increase in the population and the development of the project. Thus, the observations made in the Circular are without any basis.

For the reasons aforesaid the Office Memorandum and the Circular deserve to be quashed/re-called.

Re. 2: Issuance of OM/Circulars/Notification by MOEF Department.

It is observed, and we are bringing it to your kind notice, that the orders of the Government in the Ministry of Environment & Forest, guidelines from the State Committee issued via notifications, known as Environment Impact Assessment (EIA) Notification, 2006 onwards, are giving sometimes conflicting/contradicting directions. Sometimes the notification prescribes the period of 105 days from the receipt of the application to decide the application. If not decided, it is considered to be Deemed Environmental Clearance. But it doesn't happen !

Similarly, OMs were issued on various occasions i.e. 29th June 2013, 31st October 2013, even the Government of Maharashtra declared for residential projects with construction of 20000 sq. mtrs, where Environmental Clearance is not required.

And the Hon'ble High Court was also very clear in passing the judgment on 18th December 2013, wherein it rejected the contentions of the authorities relating to OM dtd. 31st October 2013 and directed the authorities to allow development up to 20000 sq. mtrs. without insisting on obtaining a prior environmental clearance.

The Office Memorandum as the project proponents cannot proceed with construction work upto 20,000 sq. mtrs., even if the project is a redevelopment project involving rehabilitation of tenants in SRA/Dilapidated/Cessed Buildings, without obtaining prior environmental clearance.

There should be no distinction sought to be made between redevelopment projects, SRA, Rental Housing Projects and other projects without any rational justification.

Circular dated 30th January, 2014 issued by Government of Maharashtra, through the Principal Secretary, Environment Department, it is mandatory for all project proponents to first get the building plans sanctioned and only upon a clarification being issued by the local authorities that the plans are in conformity with the local planning rules and provisions, shall the project proponent submit an application for Environmental Clearance.

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Re. 3: Writ Petition filed against the Maharashtra Pollution Control Board with regard to the insistence on obtaining its prior consent under the provisions of Section 21 and 25 of the Air and the Water Act, respectively, even in case of residential projects, contrary to the Order dated 23rd January, 2012 passed by the Hon'ble Division Bench of the Hon'ble Delhi High Court.

Background

For the purpose of ensuring and controlling prevention of water and air pollution in the State of Maharashtra, the Pollution Control Board, constituted by the State Government under Section 4 and 5 of the Water and the Air Act, is responsible for inspecting sewage and/ or trade effluent treatment and disposal facilities and air pollution control systems.

Section 25 (1) (a) of the Water Act provides that without the previous consent of the State Board, no person shall establish and/ or take any steps to establish any industry, operation or process which is likely to discharge sewage or trade effluent.

Under Section 21 of the Air Act, a person is required to obtain previous consent of the State Board in order to establish and/ or operate any industrial plant in an air pollution control area.

The Hon'ble Division Bench of the Delhi High Court in a batch of Writ Petitions filed before it dealt with the scope of the aforesaid sections, whereby it held that with respect to the applicability of Section 25 of the Water Act, prior consent of the State Board is required in respect of shopping malls and commercial shopping complexes. The said Order however, recorded that with regard to residential housing complexes no such permission under Section 25 of the Water Act was required to be obtained. The said Order further held that prior consent of the State Board under the Air Act would be needed where a building is proposed to be constructed wherefrom trade would be carried on and since from a shopping mall and commercial shopping complex trade is carried on, prior consent under the Air Act would be required when commercial shopping complexes and shopping malls are established, however, no such permission was required in case of residential complexes.

Despite a representation being made to the Maharashtra State Pollution Control Board, by MCHI to apply the ruling of the Hon'ble Delhi High Court to the state of Maharashtra no response was received from the State Board.

Effect of non-applicability of the aforesaid judgment to the State of Maharashtra

The insistence of obtaining prior consent of the State Pollution control Board with respect to residential projects, which is not contemplated under the Water and the Air Act, is causing unnecessary delays in construction projects pertaining to residential complexes.

It has the effect of creating one more avenue/window of obtaining approvals in the already lengthy and time consuming process of approvals.

Legal Challenges to the non-application of the judgment of the Hon'ble Delhi High Court

- The Hon'ble Division Bench of the Delhi High Court has interpreted the concept of 'to operate' and has rightly held that it is not applicable to a residential complex and therefore no permission under Section 21 of the Air

Act is required to be obtained from the State Pollution Control Board with respect to construction of residential complexes.

- The Hon'ble High Court has held that 'establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent' means to take steps to establish any industry, establishment or undertaking where activity of a practical, technical nature, at the core of which are ongoing acts, in a series directed at a particular end. The same is not applicable in case of residential complexes.

- The State Pollution Board in not applying the ruling of the Hon'ble Delhi High Court is attempting to interpret the legislation and transgress into the domain of the judiciary, which is impermissible.

- Both, the Water and the Air Act being central legislation and applicable uniformly in all states, the interpretation given by the Hon'ble Delhi High Court ought to be applied and/ or extended by the State Pollution Control Board in the state of Maharashtra.

- The action of the State Pollution Control Board is without jurisdiction and authority of law and is a colourable exercise of powers where none exists and therefore is ultra vires, bad in law and liable to be quashed.

  For the reasons aforesaid the interpretation sought to be given by the Hon'ble Delhi High Court ought to be applied to the state of Maharashtra and the State Board be directed not to insist on obtaining its prior permission under Section 25 and 21 of the Water and Air Act respectively, with respect to construction projects involving residential housing complexes.

We would also humbly request you that atleast two meetings per week of all the committees (like SEAC-I, SEIAA, SEAC-II etc.), until the backlog is cleared, could be arranged please; so that projects/proposals are further taken up for faster execution.

Yours Sincerely,
For MCHI-CREDAI

Deepak Goradia
Vice President