



D. J. KHAMBATA

ADVOCATE GENERAL OF MAHARASHTRA
SENIOR ADVOCATE, I.L.M. (HARVARD)

Ex-parte

Municipal Corporation of Greater Mumbai

... Querist

OPINION

1. The Querist is a statutory body established under the provisions of the Mumbai Municipal Corporation Act, 1888 and is also a Planning Authority under the provisions of the Maharashtra Regional and Town Planning Act, 1966 ("the MRTP Act") and the Development Control Regulations for Greater Mumbai, 1991 framed thereunder ("the DCR 1991").
2. DC Regulation 33(1) facilitates the grant of floor space index ("FSI") and transferable development rights ("TDR") to owners of plots who exercise the option of availing of FSI in lieu of surrender of their lands affected by road widening/D.P. Roads. The built up area that is permissible on the remainder of the plot increases after handing over of the portion of the plot to be used for road widening. This provision was available under the Development Control Rules 1967 ("DCR 1967") vide Regulation 10(2) as well, but not with regard to TDR.
3. The Querist has been acquiring lands for road widening free of cost and free from encumbrances in lieu of FSI and TDR benefits.
4. Many buildings in Mumbai's suburbs and extended suburbs ("suburbs") which were approved in the past with such benefits are now coming forward for redevelopment by demolition of the existing building and reconstruction thereof as per the DCR 1991.

Since the entire building is demolished and the plot rendered vacant, the permissible FSI will have to be computed as per the limits set out in DC Regulation 32. By this time the setback area previously surrendered for road widening, no longer forms part of the plot. The issue that arises is whether the redevelopment is permissible only to the extent of the FSI permissible (under DC Regulation 32) on the remaining plot at the time of the redevelopment. This would mean that the built up area authorisedly constructed in lieu of setback would not get protected and the built up area sanctioned for redevelopment would exclude such built up area. An additional fact to be kept in mind is that the earlier owner is usually not in the picture as third-party rights may have been created.

5. In the light of the above, my opinion is sought on the following :
 - a. Whether the built-up area, if any, approved earlier towards additional FSI in lieu of surrender of land for any of the public purposes in accordance with Regulation 33(1) of DCR 1991 or Rule 10(2) would get protected when plans are submitted for redevelopment?
 - b. Whether the FSI of receiving plots would be allowed to be exceeded beyond permissible zone limits and the granted TDR benefits would be permitted to be reutilized once the building constructed is brought down for redevelopment purposes?
 - c. Whether the FSI/TDR granted for the land affected by reservation/roads would get protected after transferring the ownership of the land in the name of MCGM on permanent basis in case of redevelopment?
 - d. Whether FSI/TDR can be termed as benefits arising out of land?
 - e. When buildings constructed in lieu of additional FSI come forward for redevelopment, whether the FSI so availed would get protected?
6. The relevant provisions of the DCR 1991 are as follows:

"Regulation 32:

“32. Floor Space Indices and Tenement Density.—

The maximum permissible Floor Space Indices and tenement densities for various occupancies and locations and for various use zones are given in Table – 14 hereunder.

.....[TABLE 14].....

Provided that FSI may be permitted to exceed upto 1.33 subject to following conditions :-

- (1) Additional 0.33 FSI is optional and non-transferable. It is to be granted as on application and to be used on the same plot.*
- (2) The total maximum permissible FSI, with 1.33 FSI, Road FSI and TDR shall be restricted to 2.00.*
- (3) As per concept of TDR, additional FSI shall be permissible on gross plot area.*
- (4) Additional FSI available as per Regulation 33, shall be related to basic FSI of 1.00 only.*
- (5)-(13) ”*

Regulation 33:

“33. Additional Floor Space Index which may be allowed in certain categories.-

- (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 a 1.5 mt. high compound wall leaving the set back 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 or 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% FSI on land so surrendered to the Corporation and/or FSI towards road area constructed, will be utilizable on the remainder of the land upto a limit of 40% in respect of plots situated in Mumbai City and 80% in respect of plots situated in the suburbs and extended suburbs of the area of the plot remaining

after such surrender and the balance FSI 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 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 public street as defined in sub-section (3) of section 288 of the Mumbai Municipal Corporation Act, 1888."

7. Section 126(1) of the MRTP Act reads as follows:

"126. Acquisition of land required for public purposes specified in plans:-

(1) When after the publication of a draft Regional Plan, a Development or any other plan or town planning scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority may, except as otherwise provided in section 113A acquire the land,-

- (a) by an agreement by paying an amount agreed to, or*
- (b) in lieu of any such amount, by granting the land-owner or the lessee, subject, however, to the lessee paying the lessor or depositing with the Planning Authority, Development Authority or Appropriate Authority, as the case may be, for payment to the lessor, an amount equivalent to the value of the lessor's interest to be determined by any of the said Authorities concerned on the basis of the principles laid down in the Land Acquisition Act, 1894, Floor Space Index (FSI) or Transferable Development Rights (TDR) against the area of land surrendered free of cost and free from all encumbrances, and also further additional Floor Space Index or Transferable Development Rights against the development or construction of the amenity on the surrendered land at his cost, as the Final Development Control Regulations prepared in this behalf provide, or*
- (c) by making an application to the State Government for acquiring such land under the Land Acquisition Act, 1894 ..."*

8. It can be seen that the three methods of acquisition are : acquisition by way of an agreement, acquisition in lieu of FSI or TDR or acquisition by payment of monetary compensation. The following is to my mind obvious :

(i) Compensation in any of these forms, in order to constitute compensation, must be permanent and irrevocable;

(ii) If any of the forms of compensation is not permanent but transient then the "compensation" is illusory, leading to the unconstitutionality of the provision.

9. The concept of TDR was introduced in the DCR 1991 with a view to acquire land reserved or designated for public purposes without the Querist incurring a financial burden. The concept of TDR has been extended to Slum Rehabilitation Schemes in 1997. The TDR generated is allowed to be utilized on receivable plots in Mumbai (other than in the island city) as per the provisions of Appendix VIIA and VIIB of the DCR 1991. Clauses 13, 14 and 15 in Appendix VIIA and clauses 12, 13 and 14 of Appendix VIIB provide the quantum of TDR that can be received on receivable plots. Clause 13 in Appendix VIIB is germane and provides that "*Any TDR receiving plot shall not be eligible for more than 100% additional FSI.*"

10. The object of FSI or TDR under Section 126(1)(b) of the MRTP Act is to grant the land owner a recompense for the surrendered land. The measure of equivalence of value lost by the land owner fixed by Appendix VII to the DC Regulations 1991 is the area of construction/ development on the surrendered land. [Godrej & Boyce Mfg. Co. Ltd. v. State of Maharashtra (2009) 5 SCC 24 Paras 52 and 57]

11. It appears that most receiving plots in the suburbs (beyond the island city) are developed with an FSI of 2 (1+1 TDR) by utilizing either slum TDR or reservation/road TDR. As such, the built-up area existing on such receivable plots exceeds the normal plot potential in most plots in the suburbs. Buildings constructed by availing of the benefits of TDR which are now to be redeveloped, face the issue as to whether they can be reconstructed on the basis of use of that TDR.

12. DC Regulation 34 separates, by legal fiction, the development potential of a plot of land and renders it amenable to transfer to a person other than the owner of that plot.

However once the development rights are transferred they are to be used on another plot of land. Thus the TDR are immovable property rights that have a legal existence and exist as immovable property with all the legal incidents thereof under the Transfer of Property Act.

13. The nature of floor space index and transferable development rights have been considered in Chheda Housing Development Corporation v. Bibijan Shaikh Farid (2007) 3 Mh LJ 402 :

"15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the Appellants in so far as the additional F.S.I. is concerned, are not entitled for an injunction to that extent. An immovable property under the General Clauses Act, 1897 under Section 3(26) has been defined as under:

(26). "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

If, therefore, any benefit arises out of the land, then it is immovable property. Considering Section 10 of the Specific Relief Act, such a benefit can be specifically enforced unless the respondents establish that compensation in money would be an adequate relief.

Can FSI/TDR be said to be a benefit arising from the land. Before answering that issue we may refer to some judgments for that purpose. ... From these judgments what appears is that a benefit arising from the land is immovable property. FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of TDR consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief."

14. In Sadoday Builders Private Ltd. and ors. v. The Jt. Charity Commissioner, Nagpur (2011) 6 Bom CR 42 the Bombay High Court came to the following conclusion :

"6. The Division Bench has held that since TDR is a benefit arising from the land, the same would be immoveable property and therefore, an agreement for use of TDR can be specifically enforced. The said dictum of the Division Bench is later on followed by a learned single Judge of this court in 2009(4) Mh.L.J. 533 in the

matter of Jitendra Bhimshi Shah ..vs.. Mulji Narpar Dedhia HUF and Pranay Investment and ors. The learned judge relying upon the judgment of the Division Bench in Chheda Housing Development Corporation (supra) has held that the TDR being an immovable property, all the incidents of immovable property would be attached to such an agreement to use TDR. ...”

15. In Jitendra Bhimshi Shah v. Mulji Narpar Dedhia HUF and Pranay Investment (2009) 4 Mh LJ 533 Para 23, the Bombay High Court also held that TDR is immovable property having all the incidents of immovable property.

16. DC Regulation 32 contemplates the use of FSI/TDR in addition to the maximum permissible FSI specified thereunder. Proviso 4 to Regulation 32 provides that “Additional FSI available as per Regulation 33, shall be related to basic FSI of 1.00 only.” The use of the word “related” indicates that DC Regulation 32 does not set a maximum that covers even additional FSI available under DC Regulation 33. “Basic FSI” is a reference to the maximum permissible FSI set out in DC Regulation 32. This means that the additional FSI available under either DC Regulations 33 or 34 will be over and above the maximum FSI specified in DC Regulation 32.

17. DC Regulation 33 also provides for additional FSI to be allowed for various categories specified therein including for educational, medical purposes. In these categories, the additional FSI is granted on the payment of premium or on compliance of certain conditions. Having paid for such additional FSI it is clear that the purchaser acquires property rights that entitle him to construct to the extent of such FSI.

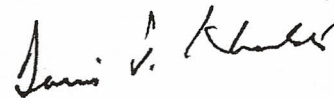
18. In the light of the settled law laid down in the above cases and the aforesaid discussion regarding to Regulations 32 and 33 of DCR 1991, my answers to the queries are as follows:

- a. Yes. Built-up area approved earlier towards additional FSI in lieu of surrender of land in accordance with Regulation 33(1) of DCR 1991 would get protected when plans are submitted for redevelopment. The additional

FSI granted is in lieu of the permanent acquisition of the owners land. Such FSI/TDR is a benefit arising out of the land and is immovable property which is transferable as such. Such FSI/TDR retains its existence and useability even upon demolition of the building initially constructed.

- b. The maximum FSI of the receiving plot may be allowed to be exceeded beyond the permissible limits and the granted TDR should be permitted to be reutilized over such maximum, once the building constructed is redeveloped;
 - c. FSI/TDR granted for land affected by reservation/roads is permanently protected after transferring the ownership of the land to the name of the MCGM. The FSI/TDR is a benefit accruing from the land, and is immovable property under the Transfer of Property Act.
 - d. Yes. FSI/TDR has been held to be a benefit arising out of land.
 - e. When buildings constructed in lieu of additional FSI come forward for redevelopment, the FSI already availed of is protected in the terms of what is stated above.
19. I have nothing further to add.

Dated 19th November 2013.



(D.J.Khambata)
Advocate General of Maharashtra