

(2003) 02 BOM CK 0112

In the Bombay High Court

Case No : Writ Petition (PIL) No. 3048 of 2001

Nariman Point Association and Another

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 14-02-2003

Acts Referred:

Development Control Regulations for Greater Bombay, 1991 — Regulation 9
Maharashtra Regional and Town Planning Act, 1966 — Section 22, 31(1), 31(6)

Citation : (2003) 2 ALLMR 930 : (2003) 5 BomCR 273 : (2003) 3 MhLj 68

Hon'ble Judges : C.K. Thakker, C.J.; D.Y. Chandrachud, J

Bench : Division Bench

Advocate : P.A. Purandare, instructed by S.J. Billimoria, Virendra Tulzapurkar and R.G. Govilkar, for the Appellant; Niranjana Pandit, A.G.P. for respondent Nos. 1, 4 and 5, R.M. Sawant, for respondent No. 2, P.A. Sawant and N. Engineer, instructed by Desai and Diwanji and R.A. Dada F. Divetri and Shyam Mehta, instructed by Federal and Rashmikant, for the Respondent

Judgement

D.Y. Chandrachud, J.—Rule, returnable forthwith. Learned counsel for the respondents waive service. With the consent of the learned counsel taken up for hearing and final disposal.

2. In these proceedings under Article 226 of the Constitution, the petitioners have sought to challenge in a petition filed in the public interest, a project which involves the construction of a multistoreyed car park together with a commercial complex at Nariman Point, Mumbai.

3. The parcel of land in question comprises of Plot Nos. 240 and 240A situated at Block III of the Backbay Reclamation area. By a notification dated 15th June, 1983, the State Government appointed the Mumbai Metropolitan Region Development Authority ("MMRDA") as the Special Planning Authority for the undeveloped areas comprised within Blocks III, IV, V and VI of the Backbay Reclamation Scheme. That appointment came to be effected in terms of the provisions of Section 40(1)(c) of the Maharashtra Regional and Town Planning

Act, 1966 ("the Act"). By a notification dated 1st March, 1985 (and a corrigendum dated 1st July, 1986) MMRDA declared its intention to prepare a Development Plan for the aforesaid blocks. After a survey was carried out u/s 25 of the Act, MMRDA as the Special Planning Authority prepared a Draft Development Plan and by a notice dated 4th May, 1990 issued u/s 26 of the Act invited suggestions and objections to the draft plan. The planning committee considered the suggestions and objections received and following the procedure prescribed by Section 28, the draft plan was submitted to the State Government for its sanction on 8th October, 1991. The State Government by its resolution of 3rd March, 1993 returned the draft plan to MMRDA with a direction to resubmit the plan after incorporating certain modifications. MMRDA thereafter published notices on 21st and 22nd July, 1994 in the newspapers and resubmitted the draft development plan on 23rd September, 1994 for the sanction of the Government. Eventually, by notifications dated 3rd June, 2000 and 17th June, 2001, the Government of Maharashtra sanctioned the draft development plan for the Backbay Reclamation Scheme comprised within the aforesaid blocks, in exercise of powers conferred by Section 31 of the Act. The Government appointed 24th July, 2000 as the date on which the sanctioned development plan would come into force and 19th April, 2001 as the date on which a schedule of modifications would come into force.

4. The dispute in the present case relate to Plot Nos. 240 and 240A comprised within Block III of the Backbay Reclamation area. There is no dispute about the fact that under the final development plan which has been sanctioned and brought into force, Plot Nos. 240 and 240A have been earmarked for the purpose of multistoreyed car parking. The State Government had on 21st March, 1997 issued a Government Resolution notifying its decision to develop these plots for a multistoreyed car parking facility and sanction was accorded for MMRDA to entrust this work of development to private investors. The Government Resolution spelt out the terms of approval. MMRDA in its affidavit before the Court has stated that in pursuance of a conference which was held in February 1997, the "Advantage Maharashtra Global Investors Conference", the aforesaid decision was arrived at.

5. Pursuant to the decision of the State Government, MMRDA issued a notice inviting tenders for the construction of a multistoreyed car park and commercial centre which was published in the daily editions of the Times of India and Maharashtra Times on 28th February, 1997. The Tender Notice issued by MMRDA envisaged the construction by the successful tenderer of a multistoreyed car park on a plot area admeasuring 4952 sq.mtrs. The permissible built up area for the car park would be 17,500 sq.mtrs. and for a commercial centre thereon, 5598.23 sq.mtrs. (The plot area and the area of the commercial centre has since been corrected, the former by a Government notification dated 21st August, 1997). The obligations of the successful tenderer would inter alia, comprise of the following :

(i) Designing and construction of a multistoreyed car park of a built up area not exceeding 17,500 sq.mtrs. with a provision for atleast 500 car parking spaces of a standard size of 2.5 mtrs. X 5.5 mtrs. together with ancillary facilities;

(ii) Handing over to MMRDA, or to its nominee, free of cost 250 spaces for the parking of cars together with ancillary facilities for operating a public pay and park car park. In the event that the successful tenderer was able to accommodate more than 500 cars, 25% of the additional car parking spaces would be handed over to MMRDA free of cost :

(iii) Designing and constructing a commercial centre with a built up area of 5598 sq.mtrs. at the cost of the tenderer of which an area admeasuring 2000 sq.mtrs of built up area would be handed over to MMRDA free of cost;

(iv) Payment to MMRDA at the end of the third year of the date of the agreement to lease 15% of the lease premium quoted, as a contribution towards the corpus of a fund to be created for the maintenance and improvement of the parking and commercial area handed over to MMRDA. Till then, the allottee would provide a bank guarantee to secure his obligation; (v) Completion of construction within a period of four years.

6. Since the petitioners have moved this Court in a petition which has purportedly been filed in the public interest, it would be necessary at this stage to note an important circumstance which would have a bearing upon the matter. An entity by the name of the Nariman Point Commercial Complex Association had submitted a proposal on 13th July, 1989 envisaging the development of a multistoreyed car parking facility on the very same plots which form the subject matter of dispute in these proceedings to the Chief Minister of the State. The proposal was forwarded by the Association to MMRDA on 12th November, 1994. The proposal for development envisaged the construction of a sheltered car parking facility for 500 cars, a cafeteria, and an automobile club. There has been no dispute in these proceedings that this proposal was, in fact, submitted by the petitioners and that it does contemplate, besides a covered multi storeyed car parking facility, the commercial use of a part of the premises. The proposal of the petitioners comprised of the development of a basement, ground floor and nine additional floors. MMRDA responded to this proposal on 8th December, 1994, by stating that the proposal could be considered only after the draft development plan was sanctioned and the proposed reservation was confirmed by the State Government.

7. The petitioners, it is common ground, did not submit a bid in response to the tender notice. Larsen & Toubro Limited, the sixth respondent, submitted a bid in response to the tender notice which was accepted by MMRDA by a resolution dated 23rd January, 1998. On 17th April, 1998. MMRDA addressed a letter to the sixth respondent communicating its formal acceptance of the tender, subject to the payment of a premium of Rs. 23 Crores in consideration of MMRDA agreeing to lease the plots of land bearing Nos. 240 and 240A admeasuring 5663.46

sq.mtrs. with a permissible built up area of 17,500 sq.mtrs. for the construction of a multistoreyed car park and 6402 sq.mtrs. for a commercial centre on a lease of 80 years. The sixth respondent was called upon to pay an amount of Rs. 10.50 Crores, representing 50% of the premium after the adjustment of the Earnest Money Deposit of Rs. 1.00 Crore within 30 days of the receipt of the letter. Correspondence was thereafter exchanged between the parties since, according to the sixth respondent, there were certain encumbrances on the two plots of land which were required to be removed by MMRDA. Two writ petitions were filed before this Court, the first being Writ Petition No. 2081 of 1998 by the Rotary Club of Bombay Sea Land Foundation and the second, being Writ Petition No. 2480 of 1998, by Larsen & Toubro Ltd., the sixth respondent to these proceedings. Larsen & Toubro Ltd. had paid the first installment of Rs. 10.5 Crores on 15th June, 1998. On 15th February, 1999, this Court disposed of the two writ petitions by an order passed in terms of Minutes. The dispute in the writ petition filed by the Rotary Club of Bombay Sea Land Foundation related to a public toilet facility on the existing plots. The writ petition filed by Larsen & Toubro Ltd. had arisen out of a notice issued by MMRDA on 8th November, 1998 purporting to terminate the allotment of the plots and to forfeit the EMD. Consequent upon the order passed by this Court in the Writ Petition, time was granted to Larsen & Toubro Ltd. to furnish a cheque for Rs. 11.50 Crores till 25th February, 1999 and, in view whereof, MMRDA agreed to withdraw its notice of termination. MMRDA in turn agreed that it would be entitled to encash the cheque immediately after unencumbered possession of the plot was handed over to the sixth respondent. There is no dispute about the fact that in pursuance of the order passed by this Court on 15th February, 1999, the second installment of Rs. 11.50 Crores was paid on 25th February, 1999.

8. A request was made by the sixth respondent for the execution of a sublease in favour of the seventh respondent as a special purpose vehicle promoted and incorporated for carrying out the proposed development of the land. A deed of sub-lease was accordingly executed on 3rd January, 2001 and was registered. Insofar as is material to these proceedings, it would be necessary to note that the deed of sub-lease incorporates the terms and conditions of the tender upon which the bid that had been submitted by the sixth respondent had been accepted by MMRDA.

9. On 22nd January, 2001 a proposal for the development of the plots was submitted. A representation was received by MMRDA from the petitioners opposing the development of the land in question and on 8th May, 2001 the Metropolitan Commissioner called a meeting of the office bearers of the first petitioner association. The first petitioner sought inspection of the detailed proposal for the development of the project and it has been stated before the Court on affidavit that inspection was granted to the architect of the petitioners on 23rd and 25th May, 2001. On 20th August, 2001, a commencement certificate was issued by MMRDA for work upto the plinth level. An IOD was thereafter issued on 12th October, 2001. On 7th June, 2002, a locational clearance came to

be granted by the Commissioner of Police following which on 10th July, 2002 a further commencement certificate for the development of the superstructure above the plinth came to be granted. The Court has been informed that the work of construction has substantially progressed and slabs have been cast for the basement, ground floor and nine floors of the proposed complex.

10. In the submissions which have been urged before this Court the petitioners seek to contend that the user of the two plots for the construction of a multiplex cinema theatre, though coupled with a user for car parking, is impermissible. The submission of the petitioners is that Plot Nos. 240 and 240A have been reserved specifically for public parking in the sanctioned development plan and that any user other than that specified in the development plan can be made only after the plan is modified in accordance with the provisions of the Maharashtra Regional and Town Planning Act, 1966. Moreover, it has been urged on behalf of the petitioners that reliance cannot be placed on Development Control Regulation 9(IV)(i) since in their submission, even under the aforesaid Regulation, the dominant use of the land must be for the purpose of car parking, while only an ancillary or subsidiary use can be permitted for other purposes. The petitioners contend that the dominant purpose is totally destroyed and the use to which the land has been put is essentially for subsidiary purposes. Finally, it has been urged that no study was undertaken for assessing the environmental impact of permitting a multiplex cinema theatre complex and that not material has been produced to support the NOC of the Commissioner of Police.

11. In assessing the tenability of the submissions which have been urged on behalf of the petitioners, it would at the outset be necessary to have regard to the provisions of the Act, insofar as they relate to the contents of a Development Plan. Section 22 of the Act stipulates that "a Development plan shall generally indicate the manner in which the use of land in the area of a Planning Authority shall be regulated, and the manner in which the development of land therein shall be carried out." Section 22 thereafter catalogues various matters which a Development Plan may incorporate. These matters include in Clause (a), proposals for allocating the use of land for purposes such as residential, industrial, commercial, agricultural and recreational; in Clause (b), proposals for designation of lands for public purposes; and in Clause (c), proposals for designation of areas for open spaces, green belts and gardens, Clause (m) of Section 22 is relevant for the purpose of the present proceedings and provides that a Development Plan may also provide for the following matters :

"(m) provisions for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority including imposition of conditions and restrictions in regard to the open space to be maintained about buildings, the percentage of building area for a plot, the location, number, size, height, number of storeys and character of buildings and density of population allowed in a specified area, the use and purposes to which buildings or specified areas of land may or may not be appropriated, the sub-

division of plots, the discontinuance of objectionable users of land in any area in reasonable periods, parking space and loading and unloading space for any building and the sizes of projections and advertisement signs and boarding and other matters as may be considered necessary for carrying out the objects of this Act."

Thus, under Clause (m) of Section 22, the development plan is to make provisions inter alia for permission to be granted for controlling and regulating the use and development of land within the jurisdiction of a local authority and the use and purposes to which buildings or specified areas of land may or may not be appropriated. The Development Control Regulations for Greater Bombay, 1991 have been sanctioned by the State Government in exercise of powers conferred by Sub-section (1) of Section 31 of the Act. These Regulations form part of the contents of the Development Plan u/s 22(m). Section 31(1) empowers the State Government to sanction the draft development plan. Under Sub-section (6) of Section 31, a Development plan which has come into operation is designated as the final development plan. The Development Control Regulations for Greater Bombay, 1991, are, therefore, conceptually and in law a part of the sanctioned final development plan. That the Development Control Regulations would be a part of the sanctioned final development plan is abundantly clear from Clause (m) of Section 22 of the Act.

12. Insofar as these proceedings are concerned, Plot Nos. 240 and 240A fall in the C-I Zone (the Local Commercial Zone). In fact, as far back as on 22nd May, 1998 a clarification was issued by MMRDA that these two plots were located in the Commercial Zone under the then draft development proposal. On 20th October, 2000, MMRDA clarified that under the sanctioned development plan for the Backbay Reclamation Scheme, the lands in question fell in the C-I zone and could be developed in accordance with the provisions of Development Control Regulation 9(IV)(i). MMRDA as already noted earlier, is the Special Planning Authority appointed by the State Government inter alia for Blocks III, IV, V and VI of the Backbay Reclamation Scheme u/s 40(I)(c) of the Act. MMRDA in its affidavit filed before this Court on 26th February, 2002 has stated that the Development Control Regulations for Greater Mumbai framed by the Municipal Corporation of Greater Mumbai and sanctioned by the State Government have been applied to the development of lands falling within the area of the Special Planning Authority, comprised in Blocks III to VI of the Backbay Reclamation Scheme, subject to the modification that the expression "Mumbai Municipal Corporation" and "the Municipal Commissioner" shall be substituted by the expression "Executive Committee of MMRDA" and "Metropolitan Commissioner" respectively.

13. Development Control Regulation 9 deals with land uses and the manner of development. Regulation 9 lays down that "the uses of all lands situated within the municipal limits of Greater Bombay, which have been allocated, designated or reserved for certain purposes in the development plan shall be regulated in

regard to type and manner of development/redevelopment, according to Table-4". Table-4 in turn is entitled "Land uses and the Manner of Development". Items I, II and III are respectively entitled "Residential", "Commercial" and "Industrial". Item IV of Table-4 is entitled "Transportation" and sub-item (i) thereof is entitled "Parking Lot (PL)". For clarity of exposition, it would be necessary to refer to the aforesaid entry in Table-4 in its entirety. For convenience of description, the aforesaid entry is referred to as D. C. Regulation 9 IV (i) :

Table-4

Land uses and the Manner of Development

Serial No. Use (Allocation, designation or reservation) Person/ Authority who may develop Condition subject to which development is permissible

(1) (2) (3) (4)

IV Transportation - (i) Parking Lot (PL)

Corporation/Public Authority/Public Organisation/Owner

The Corporation may acquire the land and develop, operate and maintain the parking lot.

or

A public authority or a public organisation or the owner may be allowed to develop the parking lot for the public according to the design, specification and conditions prescribed by the Commissioner, utilising the full built-up area equal to the FSI available on the plot for the purpose of providing the parking spaces. The operation and maintenance of the facility will be decided by the Commissioner irrespective of the authority, organisation or person who develops the facility.

The parking spaces may be in the basement or open spaces or under the. stilts or on the upper floors. The Corporation or the owner will be entitled to thereafter have the full permissible FSI of the plot, without taking into account the areas utilised for providing the parking spaces for the other permissible users of the plot."

14. Table 4 of Development Control Regulation 9 thus spells out land uses under various heads such as residential, commercial, industrial, transportation and public or semi-public. Table-4 specifies the person or authority which may develop the land and spells out the conditions subject to which development is permissible. Development Control Regulation 9 IV (i) contemplates that in the case of land reserved for a parking lot, the Municipal Corporation may by itself acquire the land and develop, operate and maintain the parking lot. Alternatively, a public authority or organisation or the owner himself may be allowed to develop the parking lot for the public, subject to the design, specifications and

conditions of the Municipal Commissioner. The public authority, organisation or the owner, as the case may be, must, however, utilise the full built-up area equal to the Floor Space Index (FSI) available on the plot for the purpose of providing parking spaces.

15. The involvement of a body other than the Municipal Corporation in implementing a reservation contained in the sanctioned Development Plan which is enunciated in Development Control Regulation 9 IV(i) is not confined to the development of parking lots alone. In the case of several other public reservations, Table-4 enables the actual development and implementation of the public reservation to be entrusted to an entity or organisation other than the Municipal Corporation itself. The reasons for this approach are not far to seek. The final development plan which has been sanctioned by the State Government may provide for the designation of lands for public purposes and for various reservations which are intended to provide salutary public amenities. The planning authority which is entrusted with the task of implementing the development plan may, however, not be in a position to implement the reservation. In urban areas, such reservations provided in the development plan are often not fulfilled because the lands are encroached upon or because the public authority lacks adequate funds that are necessary to achieve the object of the reservation. Often, the delay in implementing reservations conceived in the interests of the public leads to a progressive encroachment of lands. In view of this practical reality, the Development Control Regulations of 1991 adopt a conscious policy of encouraging public participation in the process of implementing reservations conceived in the public interest so that the benefit of a public amenity is made available to the community.

16. Entrepreneurs who, however, assist in implementing reservations contained in the development plan are provided some incentive for the investment and the expense which they undertake. The incentive which is provided to the entrepreneur is highlighted in the provision which has been made in regard to the reservation for parking lots in the Development Control Regulations. The Regulations spell out the obligations which the developer must discharge and the recompense which is to be provided upon the discharge of those obligations. Regulation 9 IV(i) provides that the public authority, organisation or the owner who is permitted to develop the parking lot must utilise the full built-up area equal to the FSI available to the plot for the purpose of providing parking spaces. Where the development is carried out by the Municipal Corporation, the Corporation and in cases where the development is by a public authority, public organisation or the owner, the latter are entitled to thereafter have the full permissible FSI of the plot, without taking into account the areas utilised for providing the parking spaces for the other permissible users of the plot.

17. In other words, what the regulation seeks to achieve is to ensure that first and foremost, the reservation for the public purpose of a parking lot is duly fulfilled. The incentive is that thereafter the entity undertaking development is

entitled to the full permissible FSI of the plot which, in a sense is the recompense provided by the law for the development of the parking lot free of cost. Similar provisions have been made, for instance, in the case of reservations for dispensaries, health and welfare centres, maternity homes, libraries, and post and telegraph offices. The Development Control Regulations which are part of the sanctioned final development plan specifically contemplate the involvement of an entity other than the Municipal Corporation itself or the Special Planning Authority in the implementation of such reservations. The manner, in which the entity which is selected for the purpose of implementing the reservation can develop the plot after the public reservation has been fulfilled, is also laid down. The full permissible FSI of the plot can be utilised for the other permissible users of the plot. In determining what the other permissible users are, reference has to be necessarily made to the relevant regulations contained in Part IV of the Development Control Regulations for Greater Bombay, 1991. Part IV is entitled "Land use Classification and Uses permitted."

18. In the present case, the admitted position is that the land falls in the Local Commercial Zone or C-I Zone. Plot Nos. 240 and 240A of Block III of the Backbay Reclamation Scheme have admittedly been reserved and designated in the sanctioned final Development Plan for the purpose of multistoreyed car parking. The two plots fall in the C-I zone. Regulation 53 of the Development Control Regulations defines the uses which are permitted in the C-I Zone or, Local Commercial Zone. Clause (i) of Regulation 53 lays down that any uses permitted in a residential zone with a shop line (R-2 Zone) are permissible in the C-I Zone. The users permissible in a residential zone with shop line (R-2 Zone) are spelt out in Development Control Regulation 52. The uses permissible in such a zone include in Regulation 52(8)(i), Drive-in-theatres, theatres cinemas, club-houses, assembly or concert halls and such other places of entertainment on roads with a width not exceeding 25 mtrs. These uses, it has been stipulated, may be permitted in combination with permissible non-residential uses except that of petrol pump, with the special permission of the Commissioner.

19. In this view of the matter, therefore, the submission of the petitioners that the use of the land in question for the purpose of a multiplex or a commercial complex cannot lawfully be made without the modification of the development plan, is without merit. The sanctioned Development Plan of which the Development Control Regulations are a part expressly contemplates that once the full permissible FSI of the plot is utilised for effectuating the reservation of a parking lot, the full permissible FSI of the plot can be utilised for other permissible users of the plot. The manner of development that has been carried out is consistent with Development Control Regulation 9IV(i). MMRDA had invited tenders for effectuating the reservation of a multistoreyed parking lot on Plot Nos. 240 and 240A. The terms and conditions on which development was to take place were clearly spelt out in the Tender Notice. The Tender conditions provided the extent of the area that would be (i) utilised for the purpose of the parking, (ii) handed over for parking spaces to MMRDA free of cost, (iii) developed for

commercial use and the part thereof that would be handed over to MMRDA free of cost. Commercial utilization was expressly contemplated by the terms of the Tender Notice which received wide publicity. Development Control Regulation 9, read with entry IV(i) of Table-4, as noted earlier permits this, once the entire FSI of the plot is utilised for a multistoreyed parking lot. The utilisation of the entire permissible FSI of the plots for the multistoreyed car parking facility subserves the dominant purpose of the reservation.

20. In paragraph 22 of its affidavit dated 26th February, 2002, MMRDA has stated that the built up area which would be deployed for commercial purposes would admeasure 6368.39 sq.mtrs. which is as follows :

MTDC Office 152.326 sq.m. (2.39%)

Public Toilet 105.376 sq.m. (1.65%)

Food stalls nad food court 1742.3 sq.m. (27.35%)

restaurants and shops 1964.584 sq.m. (30.84%)

Health Club 146.36 sq.m. (2.30%)

Cinema Halls 2257.45 sq.m. (35.47%)

Total 6368.396 sq.m. (100%)

21. The requirement of parking for the aforesaid commercial use is 212 car parking spaces. The MMRDA has stated that this requirement is satisfied in the proposal on the same plot in accordance with the provisions of the Development Control Regulations. In addition, 288 car parking spaces will be available for general use, out of which 250 car parking spaces will remain with MMRDA for being operated as a general public parking facility.

22. Development Control Regulation 36 deals with parking spaces and specifies that where a property is developed or redeveloped, parking spaces at the scale laid down in the regulations shall be provided. Parking spaces include those in basements, stilts or on upper floors. Under Regulation 38(18)(iii) ramps have to be provided for basement and upper storeyed parking. Table 15 of Regulation 36 lays down in entry 9 thereof, the requirement of parking in cinemas and theatres. Counsel for MMRDA, the Special Planning Authority, urged that all these relevant provisions have been borne in mind in designing the tender conditions. The petitioners have not demonstrated before us any breach of ,the tender conditions or of the Development Control Regulations.

23. On behalf of the petitioners, it was sought to be urged before us that the total number of car parking spaces which would be made available for the pay and park facility to be used by the public would only comprise of 148 spaces which in fact would be less than the approximately 200 spaces available on the two open plots of land. In response to a query of the Court, however, Counsel for MMRDA has clearly stated that 250 car parking spaces will remain with MMRDA

for being used as parking for the general public. Moreover, it has been clarified in paragraph 22 of MMRDA's affidavit, that 212 car parking spaces which are required to be maintained in connection with the commercial uses admeasuring 6368.39 sq.mtrs. are independent of the 250 car parking spaces which will remain with MMRDA for the use of the general public. We record that assurance and direct that it shall be scrupulously observed.

24. On behalf of the sixth and seventh respondents, it was attempted to be submitted during the course of the hearing that the requirement of 102 car parking spaces for the food stalls and food court which are to be handed over to MMRDA must be met out of the 250 car parking spaces available to the public. It is not possible for us to accept that submission urged on behalf of the sixth and seventh respondents. Tender condition 9(a) clearly stipulates that "the allottee shall hand over to the MMRDA or its nominee free of cost 250 car spaces along with ancillary facilities for operating a public pay and park car park." Moreover, in case the allottee is able to accommodate more than 500 cars, he shall hand over free of cost 25 percent of the additional car spaces to MMRDA or its nominee. There is merit in the position of MMRDA that the obligation to maintain parking facilities as an incident of the permissible commercial user under Clause 9(b) is independent of the obligation to hand over 250 parking spaces to MMRDA for a public pay and park. Learned counsel for the seventh respondent urged that under Clause 9(c) of the Tender conditions, the allottee is free to use his share of car parking spaces for operating a car park, or to dispose it off for captive use; and that the market price of these 102 spaces would be between Rs. 10 to 15 Crores which is part of the profit element of the developer. We decline to accept the suggestion that the requirement of maintaining 250 car parking spaces is liable to be reduced, as suggested by the seventh respondent. If the submission of the seventh respondent were to be accepted, that would result in a reduction in the extent of parking spaces available even below the 200 spaces available in the open plots of land. That cannot be countenanced. We have made it abundantly clear during the course of the hearing, which we now reaffirm in the course of this judgment that in accordance with the terms of the tender and the affidavit filed before this Court by MMRDA, 250 car parking spaces have to be handed over by the sixth and seventh respondents to MMRDA which shall be maintained as a pay and park facility for the general public. These 250 car parking spaces shall be in addition to those car parking spaces which are required to be maintained, and as, the case may be, to be handed over to MMRDA as an incident of the utilisation of commercial space.

25. A sanctioned Development Plan constitutes, as it were the corner stone of urban planning. The Maharashtra Regional & Town Planning Act, 1966 provides for a detailed process of preparing and finalising a Development Plan. The Development Plan goes through a series of processes consisting of the declaration of an intention to prepare the Development Plan (Section 23), surveys and preparation of land use maps (Section 25), preparation and publication of a notice of the Draft Development Plan (section 26), inviting of

suggestions and objections (Section 28), the consideration of objections by the planning Committee [Section 28(3)], re-publication in certain cases (Section 29) and the sanctioning of the draft Development Plan by the State Government (Section 31). The members of the public are associated in the process of the evolution of a Development Plan since a vital element in that process is the invitation of suggestions and objections. Once promulgated, the final Development Plan acquires a sanctity, which the law protects. Development in contravention of a sanctioned Development Plan is proscribed and any attempt either by a public authority or a private developer to violate the sanctity of a sanctioned Development Plan has to be frowned upon. Section 43 imposes a restriction on Development upon the declaration of intent to prepare a Development Plan. The Planning Authority is required by Section 46 to have regard to the provisions of any Draft, or final plan or proposals in considering an application for permission.

26. In *Bangalore Medical Trust Vs. B.S. Muddappa and others*, , an attempt was made to convert a public park into a private nursing home. Section 38A of the Bangalore Development Act, 1976, as amended, expressly provided that the authority shall not sell or otherwise dispose of any area reserved for public parks and playgrounds and civic amenities, for any other purpose and any disposition so made shall be null and void. The Supreme Court held that it was implicit in the Act that land once appropriated, applied or earmarked, by formation of open spaces or for building purposes or for other development in accordance with a duly sanctioned scheme should not be used for any other purposes unless the scheme itself, which is statutory in character, is formally altered in accordance with law. Similarly, in *Dr. G.N. Khajuria and others Vs. Delhi Development Authority and others*, , land which had been reserved for a park in a residential colony was sought to be allotted by the DDA for a nursery school. That action was held to be contrary to law. In *Dadar Avanti Co-op, Housing Society Ltd., Bombay Vs. Municipal Corpn. of Greater Bombay and others*, a residential flat in a co-operative housing society was sought to be put to non residential use by maintaining a surgical nursing home. The Supreme Court held that under the Development Control Regulations in force when the application for change of user was made, it was not permissible to allow a change of user from residential to commercial purposes. The Court held that in such a case, at the point when a change of user is intended, if the Regulations do not permit such a change, the authority concerned would have no power to allow a change of user. The subsequent Regulations of 1991, however, empowered the authority to allow a change of use and the Supreme Court, therefore, granted permission to the applicant to move the authority afresh for orders in accordance with the subsequent Regulations. In *M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others*, , an underground shopping complex was sought to be constructed in a park. The Supreme Court noted that the relevant legislation in the State of U.P. provided for the maintenance of parks and prohibited the construction of buildings which would affect the utility of a park except with the previous

sanction of the concerned authority. These were, therefore, all cases where in violation of the sanctioned development plan, land which had been reserved for a public purpose was sought to be utilised for another purpose which was contrary to the sanctioned plan. This was clearly unlawful and was held to be so. In *C.R. Dalvi v. Municipal Corporation of Greater Mumbai*, 1987 Mh.L.J. 373, a learned Single Judge, Mr. Justice S. P. Bharucha (as the learned Chief Justice then was) held that "a plot of land assessed as a playground under the Development Plan cannot be utilised for any purpose other than the play of children and similar recreational activities". We respectfully endorse this principle. In the present case, the sanctioned development plan expressly contemplates that once the full permissible FSI of the plot is used for providing parking spaces, it would be lawful to utilise the entire permissible FSI of the plot for other permissible users in accordance with law. Therefore, the scheme which has been propounded by MMRDA was in accordance with the sanctioned development plan. There is, therefore no illegality in the scheme embodied in the Tender Notice and which is now in the process of being implemented by the sixth and seventh respondents.

27. Before concluding with this aspect of the matter, it would be necessary to advert to the judgment of the Supreme Court in *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, . That was a case where it was sought to be urged before the Supreme Court that a plot of land which had been acquired for the public purpose of constructing a bus station for the BEST Undertaking was being used for a commercial purpose and that this was not permissible. The Supreme Court noted that the plea was rejected by the High Court holding that a substantial portion of the acquired plot was being utilised for the purpose for which it had been acquired and, the commercial use to which a small portion was being put would substantially augment the income of the Corporation for the benefit of the public at large. A Bench of three learned Judges of the Supreme Court held that it could not be said that the plot had been used for a purpose different from that for which it had been acquired. The Court held that the plot was being substantially used for the purpose for which it was acquired and the additional use of the property did not make the use as one for an altogether different purpose. In *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*, , Mr. Justice M.N. Venkatachaliah (as the learned Chief Justice then was) speaking for a Bench of three learned Judges of the Supreme Court laid down the principle that a self financing scheme does not lie beyond the powers of a local authority merely by a reason of the particular policy behind it. The jurisdiction of the reviewing Court, the Supreme Court held, would in such case be limited :

"On a consideration of the matter, it appears to us that the argument that a project envisaging a self-financing scheme, by reasons alone of the particular policy behind it, is beyond the powers of the local authority is somewhat too broadly stated to be acceptable. A project, otherwise legal, does not become any the less permissible by reason alone that the local authority, instead of executing the project itself, had entered into an agreement with a developer for its

financing and execution. The criticism of the project being "unconventional" does not add to or advance the legal contention any further. The question is not whether it is unconventional by the standard of the extant practices, but whether there was something in the law rendering it impermissible. There is, no doubt, a degree of public accountability in all governmental enterprises. But, the present question is one of the extent and scope of judicial review over such matters. With the expansion of the State's presence in the field of trade and commerce and of the range of economic and, commercial enterprises of government and its instrumentalities there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost over-runs in projects, balancing of costs against time scale, quality control, cost benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expedencies. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of the administrator's right to trial and error, as long as both trial and error are bona fide and within the limits of authority."

In *Bombay Environmental Action Group v. State of Maharashtra*, 2001(4) Mh.L.J. 260, a Division Bench of this Court consisting of the Chief Justice Mr. Justice B. P. Singh (as the learned Chief Justice then was) and Mr. Justice V. C. Daga rejected a challenge to the utilisation of commercial space below a flyover, which was based on the contention that this would constitute a change in user under the Development Plan. The Division Bench held thus :

"The designated area of the development plan is high way or road and there is, therefore, no change in user. The area is mainly used for road. The original use is indicated in the development plan and when coupled with some other use making the original use of designated area possible, is not a total change or not a totally different use. Therefore, commercial use of the space below fly-over is permissible under MRTTP Act considering the facts and circumstances of the present case,"

28. In the aforesaid circumstances, having given our careful consideration to the principal challenge, we do not find any illegality or arbitrariness in the development of the two plots of land in the manner in which MMRDA has sought to achieve the reservation for a multistoreyed parking lot. At this stage, it would also be necessary to take note of the fact that in prayer Clause (a) of the petition, the petitioners seek a direction to the State Government to withdraw the amendment to the Regional plan of the Nariman Point area permitting construction of a shopping mall, restaurants and cinema hall in the multistoreyed building to be constructed on Plot Nos. 240 and 240A. As already noted, there has been no amendment to the regional plan at all and therefore, the grant of relief in terms of prayer Clause (a) is clearly not warranted. The other reliefs as

prayed cannot be granted for the reasons which are indicated earlier.

29. Finally, it will be necessary to deal with the subsidiary contention that no independent study was carried out as regards the impact of the construction of a multiplex on the traffic in the vicinity. The sixth and seventh respondents have placed on record a compilation containing the correspondence between them and the police authorities. We find from the correspondence that all relevant material was placed by the sixth and seventh respondents before the Commissioner of Police. We do not find that the grant of permission by the police authorities to the petitioners is vitiated for any reason. No sufficient reason has been made out for interfering with the grant of the NOC by the Commissioner of Police in his letter dated 7th June, 2000. In addition to the provision of 250 car parking spaces which have to be handed over to MMRDA for maintaining a pay and park facility, provision has been made for parking spaces ancillary to the commercial user permitted on the plots in question. This is in accordance with the Development Control Regulations which form part of the sanctioned Development Plan. The Development Plan was sanctioned after it went through an elaborate statutory procedure laid down in the Act. There is hence no merit in the contention.

30. Before concluding, it would be necessary to have regard to the objection urged on behalf of the respondents, particularly the sixth and seventh respondents to the maintainability of the petition on the ground that it suffers from laches. In the judgment of this Court in the Andheri Flyover case, 2001(4) Mh.LJ 260, Bombay Environmental Action Group v. State of Maharashtra, the Division Bench adverted to the judgment of the Supreme Court in Narmada Bachao Andolan v. Union of India, JT 2000 (Supp2) SC 6. The Division Bench held that a delay in the execution of a project means an overrun in costs. Consequently, it was held that a challenge to a project after its execution has commenced should be thrown out at the very threshold on the ground of laches, if the petitioner had knowledge of such a decision and could have approached the Court at that time. In the present case, in paragraph 8 of the Writ petition the petitioners admit that in June 1998, information was gathered that the seventh respondent was to put up a multi storeyed car parking facility on the plots of land in question. The attention of the Court has also been drawn on behalf of the sixth and seventh respondents to the fact that on 23rd and 25th May, 2001 inspection of the relevant documents was furnished to the petitioners by MMRDA. This has also been stated in the affidavit filed by MMRDA before this Court. The Writ Petition was filed before this Court only in December, 2001. By the present time, a substantial part of the construction work has been carried out. Counsel for the sixth and seventh respondents has stated before the Court that an amount of Rs. 23 Crores has been paid over to MMRDA. Rs. 1 Crore as EMD on 1st July, 1997, Rs. 10.5 Crores on 15th June, 1998 and Rs. 11.5 Crores on 25th February, 1999. The construction commenced in October 2001. On behalf of the petitioners it was urged that initially the commencement certificate was granted only for the work upto the plinth level and that the certificate for work above the plinth level was granted only on 10th July, 2002. The seventh respondent was

served and was joined as a party on 14th February, 2002. Be that as it may, in the present case, the petitioners were clearly aware as far back as in June 1998 of the award of contract and, on 23rd May, 2001 they took inspection of the relevant documents. In a matter such as the present, the Court would be slow to interfere with the construction and with the implementation of the project when there has been a significant delay on the part of the petitioners in moving the Court. The question of latches is one to be addressed in the facts of each case, where the issue arises. In the present case, there has been a significant delay on the part of the petitioners even after they obtained knowledge of the project and thereafter, since the date on which inspection of documents was taken. Moreover, as already noted earlier, the petitioners had themselves submitted a proposal in 1989 for the construction of a multistoreyed car parking facility and that proposal also envisaged utilisation of commercial space as a part of the overall development of the plots of land in question for multistoreyed car parking.

31. Be that as it may, having regard to the nature of the case, we have also inquired into the merits of the challenge urged on behalf of the petitioners. We do not find any illegality so as to warrant the interference of this Court. However, for the reasons already recorded in the earlier part of the judgment, we clarify and direct that the sixth and seventh respondents shall be liable to hand over 250 car parking spaces along with ancillary facilities to the Mumbai Metropolitan Region Development Authority (MMRDA), the Second respondent, free of cost in terms of Clause 9(a) of the Tender conditions. This figure shall be independent of the parking facilities required to be maintained as an incident of the commercial use of the plots and shall not stand reduced on any account whatsoever. Subject to this clarification, we decline to interfere. The Writ Petition shall accordingly stand disposed of. There shall be no order as to costs.