



DR. BIRENDRA SARAF
ADVOCATE GENERAL

AG/586/2023

1st Floor, Chamber No.5,
High Court Extension Bldg.
Fort, Mumbai 400 032.

OPINION

Housing Department,
Government of Maharashtra

...

Querist

Query:

1. My opinion is sought by the Urban Development Department, Government of Maharashtra ('UDD') vide their letter dated 28th June 2023 on the following issue:

'Whether the MOD Circular dated 18th May 2011 is applicable or the MOD Guidelines dated 21st October 2016 are to be followed?'

2. I have been furnished the following letters / communications addressed by the Military Authorities and local planning bodies.
 - a. 18 May 2011 Guidelines alongwith the March 2015 and November 2015 amendments by Ministry of Defense.
 - b. 21 October 2016 Guidelines by Ministry of Defense.
 - c. 23 December 2022 Guidelines by Ministry of Defense.
 - d. 28 September 2022 letter addressed by Lt. Gen. H S Kahlon, SM General Officer.
 - e. 23 February 2023 letter addressed by Ministry of Defense.
 - f. 21 March 2023 letter addressed by Dte. Gen. LW & E / Land (Policy & Plg.).
 - g. 24 March 2023 and 27 March 2023 letter addressed by OIC Land and Legal to the Slum Rehabilitation Authority.
 - h. 17 April 2023 letter addressed by the State of Maharashtra to the Municipal Corporation of Greater Mumbai and the Slum Rehabilitation Authority.

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- i. 19 April 2023 letter by Lt. Gen. H S Kahlon to the Chief Secretary, State of Maharashtra.
- j. 20 April 2023 letter addressed by the Slum Rehabilitation Authority pertaining to certain slum schemes in Kandivali.
- k. 18 May 2023 and 14 July 2023 letters addressed by the SRA to the Urban Development Department.

Introduction:

3. The MoD had initially issued guidelines dated 18 May 2011, 18 March 2015 and 17 November 2015. In supersession of these earlier guidelines, the MoD issued guidelines dated 21 October 2016. Thereafter, on 23 December 2022, the MoD issued fresh guidelines in supersession of the 2016 Guidelines. The MoD vide its letter dated 23 February 2023, kept the 2022 Guidelines in abeyance. A detailed scheme of the Guidelines is discussed below.
4. The querist seeks an opinion as to whether the statutory authorities are required to follow the guidelines issued in 2011 or in 2016, in light of the stay on the 2022 Guidelines.

Scheme of the Circulars & relevant facts:

5. The Works of Defence Act, 1903 was enacted to provide for imposing restrictions upon the use and enjoyment of land in the vicinity of defence establishments.
6. It was felt that Works of Defence Act, 1903 which imposes restrictions on the use of land required comprehensive



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amendments. The process of amendment was put in motion. However, the same was taking time. In the meanwhile, in order to regulate grant of NOCs for construction near defence establishments, various Guidelines were issued from time to time.

A. 18th May 2011 - Guidelines for issuance of NOC for building construction:

7. The MoD issued Guidelines dated 18th May 2011 ('**2011 Guidelines**') which stated as under:

(a): *In places where local municipal laws require consultation with Station Commander before building plan is approved, Station Commander may convey its views within 4 months of receipt of such request. NOC shall be conveyed only to Government agencies or municipal authorities.*

(b): *Where no permission under local municipal laws are required, yet the Station Commander feels that within 100 meters (for multistorey building of more than four storeys that distance shall be 500 meters) radius of defence establishment can be a security hazard, it should refer the matter immediately to its next higher authority in the chain of its command. IN case the next higher authority is convinced, then the station commander may convey its objection / views to the local municipal authority / state government. In case such authorities do not take cognizance of the said objection, the matter may be taken to the higher authorities, if need be through AHQ / Ministry of Defence.*

(c): *Objection / views / NOC shall not be given by any authority other than station commander to the local municipality or the state government agencies and shall not be given directly to private parties / builders under any circumstances.*

(d): *NOC once issued will not be withdrawn without the approval of the Service Headquarters.*



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i. 18th March 2015 – Amendment to 2011 Guidelines.

8. A proviso was introduced to the 2011 Guidelines, in para (b). The said proviso stated that the *NOC will not be required for constructions for which permissions have been granted prior to the 2011 Guidelines*. However, the proviso was not applicable to any amendments to the construction permissions with regard to height, when such amendment is made after 18th May 2011.

ii. 17th November 2015 – Further amendments to 2011 Guidelines in para (b).

9. Various representations were made by the public to the MoD with regard to restrictions placed by the 2011 Guidelines on building construction where high – rise buildings/structures already existed within 500 meters of the periphery of such establishments. Considering the representation, the MoD decided to add a second proviso to Para B. The proviso is as under:

“Whenever the building/ structures of 4 storeys or more already exists within 500 meters of the periphery of any Defence Establishment and the construction proposed is in line with or behind of such building / structure, the State Government / Municipal Corporation may, after obtaining comments from the LMK and giving due consideration to the same, decide whether to approve such proposal or not. LMA shall give his comments within a period of 30 days from the date of receipt of a reference from the State Government / Municipal Corporation.”

B. 21st October 2016 – Fresh guidelines for issuance of NOC for building construction.



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10. A number of representations were received by Ministry of Defence for reviewing the 2011 guidelines. Since the amendments to works of Defense Act, 1903 were pending, the Government decided to amend the 2011 Guidelines. Amending the 2011 Guidelines, fresh guidelines were issued on 21st October 2016 ('**2016 Guidelines**') which are as under:
- 'a. Security restrictions in respect of Defense establishments / installation located at 193 stations as listed in Part A of Annexure to this circular shall apply upto 10 meters from the outer wall of such Defense establishments / installations to maintain clear line of sight. Any construction or repair activities within such restrict zone of 10 meter will require prior No Objection Certificate from the Local Military Authority (LMA) / Defense establishment.*
- b. Security restrictions in respect of Defense establishments/ installations located at 149 stations as listed in part B of Annexure to this circular shall apply upto 100 meter from the outer wall of such Defence establishments / installations to maintain clear line of sight for effective surveillance. Any construction or repair activity shall not be permitted within 50 meters. Further. A height restriction of 3 meters (one Storey) shall be applicable for the distance from 50 meters to 100 meters. Any construction or repair activity within such restricted zone between 50 to 100 meters will require prior No Objection Certificate (NOC) from the local military authority (LMA) / Defense Establishment.'*
11. The 2016 Guidelines apart from specifying the Defense Establishments in Annexures A and B to the said Guidelines, also reduced the applicability of the restrictions to an outer limit of 100 meters as opposed to 500 meters in the 2011 Guidelines.
- i. 8th November 2016 - Circular by Urban Development Department:



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12. In pursuance of the revised guidelines dated 21st October 2016, the Urban Development Department issued a circular stating that the revised guidelines dated 21st October 2016 shall be binding for issuance of NOC for building permissions. This circular is in force till date.
13. I am also informed that the planning bodies such as MCGM have been following the 2016 Guidelines.

C. 23rd December 2022 - Fresh guidelines overriding the 2011 guidelines read with the amendments and the 2016 guidelines.

14. In supersession of the 2011 and 2016 guidelines, the Ministry of Defense issued fresh guidelines on 23rd December 2022. The 2022 Guidelines stated as under:

In supersession of the 2011 and 2016 guidelines, the Ministry of Defense issued fresh guidelines. The guidelines stated as under:

- i. *In places where the local municipal laws require consultation with the Station Commander before a building plan is approved, the Station Commander may convey its views after seeking approval from next higher authority not below the rank of Brigadier or equivalent within four months of receipt of such requests or within the specified period, if any, required by law. Objection/views/ NOC will be conveyed only to State Government agencies or to Municipal authorities, and under no circumstances shall be conveyed to builders / private parties.*
- ii. *Whether the local municipal laws do not require, yet the Station Commander feels that any construction coming up within 50 meters radius of defence*



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establishment which are listed at Annexure A is a security hazard, it should refer the matter immediately to its next higher authority in the chain of its command. In case the next higher authority is also so convinced, then the Station Commander may convey its objection/views to the local municipality or State Government agencies. In case the Municipal Authority / State Government do not take cognizance of the said objection, then the matter may be taken up with the higher authorities, if need be through AHQ/MOD. Provided that:-

- a) For all other Defence Establishment not listed at Annexure A, the said prescribed distance shall be 100 meter (for multistoried building of more than four storey, the distance shall be 500 meter) from the periphery;
- b) In such Defence Establishments not listed at Annexure A, whenever buildings/ structures of four storey or more already exist within 500 meters of the periphery of any Defence Establishment and the construction proposed is in the line with or behind i.e. in the shadow or shield of such building / structure, the State Government/ Municipal Corporation may, after obtaining comments from the LMA and giving due consideration to the same, decide whether to approve such proposals or not. LMA shall give his comments within a period of 30 days from the date of receipt of a reference from the State Government / Municipal Corporation.
- iii. NOC from LMA/ Defence Establishment would not be required in respect of a construction for which permission had been issued by the competent authority prior to 18.05.2011. However, this proviso shall not apply to any amendment to said construction permission with regard to height, if such amendment has been allowed after 18.05.2011.
- iv. Objection / views/NOC shall not be given by any authority other than Station Commander to the local municipality or State Government agencies and shall



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not be given directly to private parties / builders under any circumstances.

- v. *NOC once issued will not be withdrawn without the approval of the Service HQrs. However, MOD reserves the right to review any NOC granted by the Station Commander and pass such orders thereon as deemed fit.*
- vi. *These instructions will not apply where constructions are regulated by the provisions of the existing acts/notification viz. Cantonment Act, 2006, Air Craft Act, MoCA 1934, Gazette Notification SO 54(E) dated 14.01.2011 (as revised from time to time), Works of Defence Act, 1903, etc. In such case provisions of the concerned Act/ Notification will continue to prevail.*

D. 2022 guidelines kept in abeyance:

15. The Government of India, Ministry of Defence by a communication dated 23 February, 2023 with the approval of the Competent Authority directed that the circular dated 23 December, 2022 be kept in abeyance.
16. At the time when the 2022 guidelines were issued, the 2016 guidelines were in force. In my opinion, ordinarily on the 2022 guidelines being kept in abeyance, the 2016 guidelines which were in force prior to the introduction of the 2022 guidelines would continue to operate. There is nothing in the communication dated 23 February 2023 or Guidelines dated 22nd December 2022 which suggests that the 2016 guidelines are to be ignored and all concerned should follow the 2011 guidelines.

E. Decision by the Jharkhand High Court.



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17. The Hon'ble Jharkhand High Court in the case of **Writ Petition No. 788 of 2022 – Union of India vs. State of Jharkhand & Ors** had the occasion to address a similar issue concerning the 2011 guidelines and the 2016 guidelines. In the said case, the Union of India had submitted that the 2016 guidelines had not been accepted by the Army and letters to that effect had been issued on 20th February 2020 and 6th October 2020. Thereafter, it was submitted that the 2011 and the 2016 Guidelines had to be read together. The relevant submissions of the Additional Solicitor General are as under:

'11. ... Mr. Anil Kumar has also submitted that subsequently the same was clarified on 6.10.2020 as the Guideline of 21.10.2016 had not been accepted by the Army as the same had been issued by the Ministry of Defence without taking security concerns of the Army into account thus reviewing the Guidelines dated 18.5.2011. Another Guideline was issued on 23.12.2022 in supersession of the Guideline dated 18.5.2011 and 21.10.2016 though the same has been subsequently kept in abeyance by virtue of communication dated 23.2.2023. According to Mr. Anil Kumar, the Guideline dated 18.5.2011 read with the Guideline dated 21.10.2016 shall prevail and in both the writ petitions since the respondent. 2 and 5 are carrying on their construction activity within a distance of 100 meters from the defence establishment, a No Objection Certificate is a mandatory requirement and thus such construction activity is not under a valid sanctity of law.' (emphasis supplied)

18. After considering the said letters and the 2011 and 2016 guidelines, the Hon'ble Court observed that the 2016 guidelines are binding and in force. The relevant findings of the Hon'ble Court are as under:

'18. In the said Guideline, the defence Establishment/installation have been categorized into two



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parts, Part A and Part B. The Annexure as at Part A to the Guidelines incorporates Ranchi Military Station at serial no. 181. Therefore only clause (a) would be applicable to the facts of the present case. The requirement of a No Objection Certificate in case of a construction activity carried on would arise only when such construction or repair activity is being done within the restricted area of 10 meters. The restriction of 100 meters as per Guideline dated 18.5.2011 was tempered down to 10 meters as per the fresh Guidelines. Though clause (b) imposes a height restriction but no such restriction is contemplated in clause (a) of the said Guideline. Admittedly the respondent no. 2 and 5 are carrying on their construction activity beyond 10 meters from the outer wall of the Defence establishment i.e. Ranchi Military Station.

23. The reliance placed by Mr. Gadodia in the aforesaid judgment was in response to the Guideline dated 23.12.2022 and its applicability/non applicability from a retrospective date which has been answered in the said judgement. Irrespective of the presence of the Guideline dated 23.12.2022, the case of the respondent no. 2 in WPC No. 2573 of 2022 shall be governed by the Guideline dated 21.10.2016. In Union of India Vs. G & CT of Delhi & Others (Supra), it has already been noticed that the effect of amendment will be replacing the old Guideline of 2011/2015 and the issue of NOC for building construction shall be governed by the Guideline dated 21.10.2016 with effect from 21.10.2016.'

19. It is thus apparent that the contention of stay of the 2016 guidelines had been considered by the Hon'ble Jharkhand High Court and had been rejected. It was held that the 2016 guidelines are in force.

Communications addressed by Defense Officers:

20. The Lt. General, General Officer Commanding addressed a letter dated 28th September 2022 to the Chief Secretary, Government of Maharashtra stating that the 2011 Guidelines put a restriction on



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any construction upto 500 meters. It is further stated that the 2011 Guidelines were revised and the restrictions were reduced to 100 meters and that since these revised 2016 Guidelines had a serious security implication, MoD in February 2020 stated that the 2016 Guidelines were under review. Consequently, directions were passed by the Apex Military Authority that all military stations and cantonments shall follow the 2011 Guidelines. This decision of the Apex Military Authority or the communication of February 2020 is nowhere on record.

21. Though the said communication states that in February, 2020, it was decided that 2016 guidelines be reviewed and consequently, directions were passed by the Apex Military Authority that all military stations and cantonments shall follow 2011 guidelines, no such directions/ instructions have been forwarded by any authority either to the State Government nor a copy thereof has been furnished by anyone. It is pertinent that the circulars of 2011, 2015, 2016, 2022 and the communication kept the 2022 guidelines in abeyance were all issued by the Government of India, Ministry of Defence. There is no communication brought to my notice issued by the Government of India, Ministry of Defence to the effect that the military stations and cantonments should follow the 2011 guidelines. Though the letter dated 28 September, 2022 issued by the General Commanding Officer states so, no document has been furnished to support the same. The communication of the Local Military Authority is not an analysis of security concern of any particular project, but is a general statement as to which guideline would apply without furnishing any document to support the same



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22. The Slum Rehabilitation Authority ('SRA') being a planning authority grants sanctions and building permissions to slum schemes which are being constructed. Few of these schemes are being executed in the vicinity of Defense Establishments. The Local Military Authority of such establishments has addressed various letters to the SRA requesting them to issue Stop Work Notices against such constructions due to the same being in violation of the 2011 Guidelines. As per the SRA, since the 2016 Guidelines and the Circulars of UDD issued pursuant to the 2016 Guidelines were in force, no Stop Work Notices were issued.
23. Due to receipt of multiple similar letters from the Local Military Authority by the SRA regarding various slum schemes, the SRA addressed a letter dated 6th April 2023 to Additional Chief Secretary, UDD, requesting clarifications regarding issuance of building permissions for 4 slum rehabilitation schemes and sought clarification regarding which Guidelines to follow.
24. On 19th April 2023, The Lt. General, General Officer Commanding addressed a letter to the Government of Maharashtra stating that since the 2022 Guidelines were kept in abeyance till further orders, the 2011 Guidelines with the 2015 amendments are required to be followed.
25. On 29th July 2023, the Brigadier - Station Commander addressed a similar letter to the District Collector, CEO - SRA, Dy. Chief Engineer - MCGM and other stating that since the 2022 Guidelines were kept in abeyance, the 2011 Guidelines were in vogue and the same were to be followed.



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26. Considering the aforesaid Circulars and correspondence exchanged, my opinion is sought on the query as set - out above.

Consideration and Opinion

27. The 2011 Guidelines and amendments thereto were amended by the 2016 Guidelines. This amendment is by virtue of a communication from the MoD itself in the form of the 2016 Guidelines.
28. The 2016 Guidelines were issued by the MoD. The UDD in November 2016 issued a Circular directing that the permissions for constructions are to be issued in line with the 2016 Guidelines. The UDD appears to have issued further clarifications to its circular on 19th August 2019 and 22nd June 2020. This circular of the UDD appears to be in force.
29. There are no letters / communications addressed / issued by the MoD furnished to me which states that the 2016 Guidelines are not to be followed. The letter dated 28th September 2022 from the Lt. General, General Officer Commanding and letter dated 29th July 2023 from the Brigadier - Station Commander states that the 2011 Guidelines are to be followed since the 2022 Guidelines are in abeyance. The letter dated 28th September 2022 refers to a communication of February 2020 by the MoD and also a decision of the Apex Military Authority. I am informed that the communication referred to has not been forwarded to either the State Government or the Authorities.



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30. Thereafter, the 2022 Guidelines were issued by the MoD. These 2022 Guidelines came to be kept in abeyance by virtue of a communication dated 23rd February 2023 issued by the MoD itself. In the 2022 Guidelines as well, there is no mention of any letter by the Ministry of Defence or order of Apex Military Authority issuing a letter staying the operation of 2016 Guidelines. In fact, the 2022 Guidelines were issued in supersession of all earlier guidelines. There is no mention of any stay of the 2016 guidelines by any communication of the Ministry of Defense.
31. The Local Military Authority appears to be treating the 2016 Guidelines in abeyance because it is under review. In my opinion, even if the same are under review, there is no decision by the Ministry of Defense shown to me stating that the same are no longer in force and the earlier 2011 guidelines are to be followed. In my opinion, the LMA cannot unilaterally state that the 2011 Guidelines ought to be followed especially in light of the 2016 Guidelines and without any communication from the Ministry of Defense staying the same.
32. I am also informed that the Municipal Corporation of Greater Mumbai, and the other similar planning bodies have been following the 2016 guidelines.
33. In a decision of the decision of the Karnataka High Court in the case of *Writ Petition No. 40510 of 2017 - Jambo Plastics Pvt. Ltd. v. Chief Quality Assurances Establishment (Warship Equipment), Ministry of Defence*, all guidelines issued by Ministry of Defence have been struck down. In such a case, these guidelines



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may no longer have any effect. In any case, in my opinion, even assuming that the decision of the Karnataka High Court is relevant and applicable only in facts of the case before the High Court, in the absence of any communication by the Ministry of Defense, Government of India to the effect that the 2016 guidelines are stayed or that the 2011 are to be followed being furnished to me, in my opinion, on the 2022 guidelines being kept in abeyance, the guidelines then operative i.e. the 2016 Guidelines would operate and the same will have to be followed by the Local Military Authority while considering any applications for permissions. Since the Local Military Authority has till date not furnished any Notification / Executive Order / Decision of the Ministry of Defence staying the operation of the 2016 guidelines, in my opinion the 2016 guidelines amending the 2011 / 2015 guidelines will continue to operate.

34. It would be in the fitness of things that a communication is addressed to the Ministry of Defence and the local military authorities informing them that in the absence of any stay of the 2016 Guidelines, from the Ministry of Defence, the State instrumentalities are proceedings on the basis of the 2016 Guidelines which amends the 2011 and 2015 Guidelines.



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35. I clarify that my opinion is based on the documents furnished to me.

36. The query is answered accordingly.

Mumbai.

Dated :- 12 September 2023

(Dr. Birendra Saraf)
Advocate-General
State of Maharashtra.

To,
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