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Office of the  
Municipal Commissioner,  
Mahapalika Marg,  
Mumbai - 400 001.

No. : MDG/782

Date : 4/8/11

To,

Bombay Nursing Home Association  
having their office at 101,  
Mangalmurti CHS, Off. S.K. Bole Road,  
Agar Bazaar, Near Raheja Princess,  
Dadar (West), Mumbai.

Sub : Renewal of registration of Maternity and Nursing Homes  
Demand Notices and the circular dated 07.05.2011 issued  
by Corporation.

Ref : High Court O.O.C.J.

1. W.P. No. 795 of 2011

Dr.(Mrs.) Michelle Fonseca & Anrs.

V/s.

M.C.G.M. & Others

2. W.P. No. 793 of 2011

Bombay Nursing Home Association & Others.

V/s.

M.C.G.M. & Others.


Sir/Madam,

Pursuant to the orders dated 14.06.2011 passed by the Hon'ble High Court in the aforesaid Writ Petition, the hearing regarding the subject matter was held by Municipal Commissioner, M.C.G.M. on 25.07.2011. After hearing all the parties, the Hon'ble Municipal Commissioner has passed an order dated 03.08.2011, in the matter. The copy of the said order is enclosed herewith, as and by way of service upon you.

Kindly acknowledge the same.

Thanking you,

Yours faithfully,

  
4/8/11  
Personal Secretary to  
Municipal Commissioner

Encl:- as above.

**SUBODH KUMAR**  
I. A. S.  
Municipal Commissioner



No. : MDG/782

Date : 31/8/2011

OFFICE OF THE MUNICIPAL COMMISSIONER, M.C.G.M.

Re:-In the High Court of Judicature at Bombay  
Ordinary Original Civil Jurisdiction  
Writ Petition no.793 of 2011

Bombay Nursing Home  
Association &Ors. ...Petitioners  
V/s.  
Municipal Corporation  
of Brihan Mumbai. ..Respondents.

The Hon'ble High Court vide order dt. 14.6.2011  
has directed that :-

1. The petitioners to make representation to the Municipal Corporation within a period of 2 weeks from the date of the order in relation to the subject matter of demand notices /circular which are referred to in the prayer clause (a) of the petition and the circular dt. 7.5.2011 issued by the Corporation.
2. The Municipal Commissioner or the officer nominated by him shall hear the petitioner and make a speaking order in relation to demand notices /circulars which are referred to in prayer clause (a) of the petition and the circular dt. 7.5.2011 issued by the Corporation.

Pursuant to the said order a representation dt. 24.6.2011 is made in a representative capacity on behalf of applicants enlisted in the list at Exhibit 'A' therewith i.e. Bombay Nursing Home Association and 80 Ors. Though the Petitioners in the Writ Petition No.793 of 2011 were Bombay Nursing Home Assoc. & 50 Others.

A hearing was given by Municipal Commissioner on 25.7.2011 when the representative of the Bombay Nursing Home Association and Ors. were present.

Shri.Amit Hariani Counsel for the Bombay Nursing Home Association appeared and argued in detail on following issues of

- (A) Renewal of Registration under Bombay Nursing Home Registration Act, 1949.
- (B) Change of user under Development Control Regulation.
- (C) The charges levied and procedure prescribed by the Corporation vide circular dt. 4.2.2011 are without authority of law.

**(A) Renewal of Registration under Bombay Nursing Home Registration Act, 1949.**

It was initially pointed out that in accordance with the order of the Hon'ble High Court the applicants had submitted their representation dt. 24.6.2011 and have also applied for renewal of registration under Bombay Nursing



Home Registration Act, 1949. However, the Registration of the applicants have not been renewed so far. It was submitted that renewal of registration is under Bombay Nursing Home Registration Act, 1949 is separate and distinct from the change in user under Development Control Regulation 1991 and both needs to be dealt with separately.

It was further submitted that as per the order of the Hon'ble High Court the applications for renewal of registration of the petitioner's Maternity and Nursing Homes shall be considered by the corporation in accordance with law and if the petitioners are otherwise entitled for renewal the registration shall be renewed independently of the Demand Notices/Circulars. Therefore, the applications for renewal have to be allowed by the Corporation if the same are in accordance with law failing which, it would amount to contempt of the Hon'ble High Court Order.

The counsel relied on the Judgement dt. 10.2.2009 in Dadar Avanti CHS. Ltd and Anr. V/s. M.C.G.M &Ors Reported in 2009(3) Bombay C.R.817 and also on the order dt, 6.4.2009 of the Hon'ble Supreme Court. It was submitted that both these Judgements are on the issue of requirements of separate means of access/staircase to Nursing Homes, Maternity Homes etc on ground floor, 1<sup>st</sup> floor and 2<sup>nd</sup> floor of the residential buildings and have not dealt with the provisions of Bombay Nursing Home Registration Act. As per the said Judgements under

Regulation 51(iii) Nursing Homes, Maternity Homes cannot be permitted in residential buildings without separate means of access/staircase. The Corporation has issued circular dt. 30.11.2009 stating that the Hon'ble Supreme Court has given directions that the Nursing Homes should not be allowed unless the change of user is made by the competent authority. If the change of user is not effected as per Regulation 51(iii), then the registration certificate should not be renewed.

Thereafter the MCGM has issued another circular dated 8.10.2010 and the last paragraph of the circular is misplaced as in case of new proposals of registration of Nursing Homes all MOH are directed to obtain the change of user certificate from the competent authority before registering the Nursing Home. Both the circulars are misinterpretation of the High Court and Supreme Court Order also there is no such requirement even in D.C.R'.

The applicants submitted that these circulars wrongly linked the issue of "Renewal of Registration certificate under BNHR Act" and "to change of user under DCR 1991". Both are independent and separate statutes and their provisions cannot be inter-linked. The Corporation has wrongly applied the Judgement of the Hon'ble Bombay High Court and the Supreme in Dr. Nerkar's case. In both these judgements there is no discussion under the provisions of BNHR Act and the Hon'ble Court have nowhere directed that the registration of Nursing Home

under BNHR Act should not be renewed until change of user DCR 1991 is obtained.

The State Govt. has issued notification dt. 30.7.2010 where a proviso has been added to Regulation 51(iii) of DCR 1991.

*" Provided that the Commissioner may, after due investigation and consultation with the Executive Health Officer, allow the condition for separate means of access/staircase as mentioned above to be relaxed, if he is convinced that no nuisance is likely to be caused to the residents of the building by such relaxation. However, such relaxation shall not be permitted in new buildings"*

In view of the notification the Commissioner was empowered to relax the condition for separate means of access/staircase on E.H.O. certifying that no nuisance is likely to be caused to the residents.

In the circular dt. 5.7.2007 there are two categories:-

1. Nursing Homes which are registered prior to 31.3.2007. may be renewed foregoing the requirement of change of user but are required to submit Indemnity Bond against any dispute with the owner of the premises.
2. Application for Nursing Homes Registration which are received after 1.4.2007 in such cases change of user as per D.C.R should be insisted.



**(B) As regards the change of user under DCR:**

it was submitted that the present DCR 1991 came into force on 25.3.1991 and prior to that the DCR 1967 was applicable. Some of the Nursing Homes, Maternity Homes, Polyclinics which were established prior to 25.3.1991. In the said cases, Rule 7(iii) of DCR 67 would apply

" Rule 7. Use Provision In Residential Zones:- In residential zones, building or premises shall be used for the following purposes and their accessory uses.

(i)

(ii)

(iii) Medical and dental practitioners, clinics and dispensaries."

It was pointed out that some Clinics eg. Clinic of the applicant No.4. Dr. Lalmalani in Exhibit 'C' annexed to the representation falls in the category of Clinics under Rule 7(iii) of the D.C. Rule,1967 which does not contemplate seeking of any permission from the corporation and it was lawful for the applicants to establish their Nursing Homes, Maternity Homes and Clinics in any residential premises which was specifically permitted in Residential Zone and no separate permission was required.

D.C.R-7(ix) of DCR 67 provides for using of residential premises for hospitals with special written permission of the Commissioner. Many of the applicants who are represented today have these valid permissions

from the corporation for using the premises for the purpose of hospitals. Many of these are established even prior to 1967 and have special permission which have been submitted to the authorities.

Dr.Purandare's hospital was established in 1975 and named then as Rohini Hospital and has permission under Rule 7(ix)

It was submitted that Regulation 3(5)of DCR 1991 which reads as under:-

Regulation 3(5) Applicability

(5) Exclusions – Nothing in these regulations shall require the removal, alteration or abandonment or prevent the continuance of the lawful established use or occupancy of an existing building or its use unless, in the opinion of the Commissioner, such a building is unsafe or constitutes a hazard to the safety of adjacent property.

In view of the above said provisions change of user is not required for those nursing homes, maternity homes, clinic and hospitals which were established prior to 25.3.1991 ie. The date when DCR 1991 came into effect and the use of the residential premises of these Nursing Homes is protected and no action can be taken against them.

As regards the Nursing Homes, Maternity Homes, and hospitals established after 25.3.1991. Reg. 51 of DCR 1991 applies, which reads as follows :-



Apart from residential use, the following uses and specified ancillary uses to the extent of 50 per cent of the floor space of the principal use shall be permitted in buildings, premises or plots in the purely residential zones :-

- (i)
- (ii) Medical and Dental Practitioners  
dispensaries or clinics including diagnostic clinics with a restriction of one dispensary or clinic per building be permitted on the ground for just above the stilts or on the first floor.
- (iii) Nursing homes, polyclinics, maternity homes and medical practitioners / consultants in different disciplines of medical sciences in independent building or independent part of buildings on the ground floor, floor 1, floor 2 with separate access / staircase from within the building or outside but not within the prescribed marginal open spaces in any case, and with the special permission of the Commissioner.

Provided that the Commissioner may, after due investigation and consultation with the Executive Health Officer, allow the condition for separate

means of access/staircase as mentioned above to be relaxed, if he is convinced that no nuisance is likely to be caused to the residents of the building by such relaxation. However, such relaxation shall not be permitted in new buildings.

- (iv) Professional offices and studies of a resident of the premises and incidental to such residential use, or medical and dental practitioner's dispensaries or clinics or a resident of the building with only out patient treatment facilities without any indoor work, each no occupying a floor area exceeding 30 sq.mtrs.

Hence only those Nursing Homes, Maternity Homes, Polyclinics falling under Regulation 51(iii) DCR 1991 are required to obtain special permission of the Commissioner.

Under DC Regulation 51(iv) a separate provision has been made for dispensaries/clinics having outpatient treatment facilities. Therefore, DC Regulation 51(ii) and 51(iii) are applicable to dispensaries, clinics, Nursing homes and maternity homes having inpatient treatment.

**(C) Charges levied and the Procedure prescribed by Corporation vide circular dt. 4.2.2011 are without**

**authority of law.**

It was submitted that when DC Regulation 1991 came into force there was no provision for levy assessment or recovery of any charges for permitting change of user and therefore, Chapter VI-A containing section 124A to 124L was introduced in the MRTTP Act 1966 which authorises the Planning Authority or Development Authority to levy charges whether by way of premium for use or change of use of the building for which the permission is required under the Act and the charges can be levied at the rates specified under the provisions of Chapter VI-A.

The circular dt. 4.2.2011 provides for premium rate to be levied as 25% of the developed land rate given in stamp duty ready reckoner issued by the Govt. for the year of date of approval of regularization and that the land rate shall be enhanced by Factor 1.5 for the Industry and 2 for commercial. The said circular also provides that for change of user /activity within the approved or authentic building shall be 30% of the premium rate.

The said circular is not under chapter VI-A of the MRTTP Act.

Under Section 124B(3) the Authority may enhance or reduce the rate of Development charges by a resolution passed at a special meeting. After the resolution Authority shall obtain previous sanction of the State Government. Thereafter only such development charges can be brought into force. These provisions are not



complied with.

The Applicants relied on the judgement of Bombay High Court in the case of Amit Maru & Others V/s. Sate of Maharashtra & Others reported in 2010 vol. 112(6) BLR 2501. This was a PIL challenging the notification issued by the State Government increasing the F.S.I. in suburbs of Mumbai from 1 to 1.33 and levying premium for grant of such F.S.I. It was held that prior to inception of Chp VI-A, MRTTP Act did not contain any provision for levy or collection of Development charges and that the permissible levy, Development charges range only from Rs. 40 to 250 per sq.mtrs.

Once the legislature had provided for development charge under section 124A it was not open for the State Government or Planning Authority to contend that under the guise of giving grant of additional F.S.I. they are entitled to charge for the purpose of providing amenities.

The Hon'ble High Court accordingly struck down the notification imposing such levy. The S.L.P. was also dismissed by the Hon'ble Supreme Court.

Even after the amendment by Government the law remains that the penalty cannot be levied outside the MRTTP Act.

Without prejudice this general circular should not apply to the Doctor by profession who render services to the society at large. It was contended that the Doctors should be charged at the lesser rate

Doctor Mrs. Michelle Fonseca and Other had filed Writ Petition No.795 of 2011 for the same prayers. Advocate Shri Balsara argued on their behalf. He adopted all the arguments of Shri Amit Hariani, Counsel for Bombay Nursing Home Association. He further submitted that their Nursing Home existed since 1967 however, the date of registration is 20.6.1974 i.e. prior to DCR 1991. Their Nursing Home is on the ground floor and has a separate entrance and that his case is covered under Regulation 3(5) of DCR, 1991.

**My findings are as follows :-**

**(A) Renewal of Registration under Bombay Nursing Home Registration Act, 1949.**

As per the order dated 24.6.2011 passed by the Hon'ble High Court applications for renewal of the Nursing Home / Maternity Homes and Clinics license under the Bombay Nursing Home Registration Act, 1949 will be considered independently of the Demand Notice already issued but shall be subject to the owners of the Nursing Home / Maternity Homes and Clinics paying as per the new demand notice within 15 days from the receipt of the approval for change of user / activity of their premises failing which, the registration granted shall be revoked.

**(B) As regards the change of user under DCR**

As regards the change of user it is true that under

Rule-7(iii) of DCR 1967 and Regulation 51 of DCR 1991 certain non-residential activity can be permitted in residential zone. Though from zoning point of view, various users /activities are permissible under this head, there are certain activities which differ from actual residential activity. Certain activities are also of commercial nature, though permitted in residential zone, for example, banks, clinics, nursing homes, hospitals are permissible in residential zone. These activities are commercial in nature and in such cases they have their own/independent requirements from planning point of view. This also invites changes / additions /alterations in the plan. Therefore, notice under section 342 of the MMC Act for changes including the user /activity is required to be given. The Change of user may be permitted if the question of FSI is not involved as the same will not amount to new development under MRTP Act. When a non-residential activity is made permissible under Residential Zone, it only means building plans showing such usage in earmarked areas are approvable.

By virtue of the fact that any building is situated in residential zone and if the user is permissible in the residential zone as per DCR 1967 or 1991 and if in the original sanctioned plan of the building, the premises are shown either as Nursing Home, Maternity Home, Medical and Dental Practitioner's Clinics and Dispensaries of Group Medical Centre then permission for change of user will not be required.



However, if any such premises in the original sanctioned plan of the building are shown as residential premises and if the same are being used for Nursing Home, Maternity Home, Medical and Dental Practitioner's Clinics and Dispensaries of Group Medical Centre, the owner will have to apply for change of user and changes proposed in the residential layout, if any, by following due procedure.

Further, in cases where in the original sanctioned plan of the building the said premises are shown as commercial user say for Shop/office etc, even then, the owner will have to apply for change of activity by following due procedure as in such cases additions, alteration and change of activity are involved.

In all cases where such permission is earlier not taken for such change of user/activity then, the owner will have to apply under section 342 of the MMC Act and follow due procedure.

Under Regulation 51 of DCR 1991 In purely residential zone (R-1 Zone ) ancillary uses mentioned therein are permitted. Under Regulation 51(iii) Nursing Homes, Polyclinics, Maternity Homes and medical practitioners/consultants in different disciplines of medical sciences in independent buildings or independent parts of buildings on the ground floor, floor 1 and 2 with separate means of access/staircase from within the building or outside, but not within the prescribed marginal open spaces

in any case, and with special permission of the Commissioner.

Provided that the Commissioner may after due investigation and consultation with the Executive Health Officer, allow the condition for separate means of access /staircase as mentioned above to be relaxed, if he is convinced that no nuisance is likely to be caused to the residents of the buildings by such relaxation. However, such relaxation shall not be permitted to the new building.

Therefore the Nursing Homes, Maternity Homes, Clinics etc. by virtue of the fact that they are situated in purely residential zone they are not automatically permitted as contended by the Petitioners. Such Nursing Homes etc. are liable to make an application for change of user, and if otherwise fulfills all the other conditions / requisites including nuisance then, they can be permitted to change the user / activity. For cases under regulation 51(iii) special permission of the Commissioner is required.

Regulation 3(5) of the DC Regulation 1991 reads as under :-

(5) Exclusions – Nothing in these regulations shall require the removal, alteration or abandonment or prevent the continuance of the lawfully established use or occupancy of an existing building or its use unless, in the

opinion of the Commissioner, such a building is unsafe or constitutes a hazard to the safety of adjacent property.

As per the aforesaid regulation only lawfully established user or occupancy of an existing building is protected. Therefore, only those Nursing Homes etc. prior to 25.3.1991 if they are already existing as per the sanctioned plan of the building or have already obtained change of user / activity under DCR 1967 can be termed as "lawful use" and are protected under Regulation 3(5) of DCR 1991.

The circular dated 4.2.2011 is a general circular and it applies to all cases of change of user / activity within approved / authentic buildings and Nursing Home etc. cannot be charged at a lesser rate, on the ground that they are rendering services to the society at large as contended.

The Counsel has relied on the judgement of the Hon'ble High Court in PIL filed by Amit Maru & Others V/s. State of Maharashtra reported in 2010 Volume 112(6) BLR 2501. In that case the State Government had issued a notification increasing the F.S.I in suburbs of Mumbai from 1 to 1.33 and levied premium for grant of such F.S.I. The said judgement is not applicable to the present case of Nursing Homes, Maternity Home and Clinics as when an application for changer of user is made under section 342 of the M.M.C. Act the same is without involving F.S.I. and will not amount to new development under the MRTP Act.



Further the State Government has amended section 22(m) of the MRTP Act which is deemed to have been substituted with effect from 11.1.1967 namely :-

"Including imposition of fees, charges and premium at such rate, as may be fixed, by the State Government or the Planning Authority from time to time, for grant of an additional F.S.I. or for special permissions or for use of discretionary powers under relevant DCR".

In view of the above, I pass the following orders.



**ORDER**

(A)(i) As per the order dated 24.6.2011 passed by the Hon'ble High Court applications for renewal of the Nursing Home / Maternity Homes and Clinics registration under the Bombay Nursing Home Registration Act, 1949 shall be considered independently of the Demand Notice already issued, but shall be subject to the owners of the Nursing Home / Maternity Homes and Clinics paying as per the new demand notice within 15 days from the receipt of the approval for change of user / activity of their premises failing which, the registration granted shall be revoked.

(ii) Nursing Home which operate in that part of the building where building approval was taken, showing use for such activity, will not need the change of user now. They shall be renewed forthwith without any consideration.

(B) All the Petitioners who are not in lawful use of

Nursing Home, Maternity Home, Clinics are liable to apply for change of user / activity by following due procedure. If their proposals are approved then a fresh Demand Notice will be issued calling upon the Applicant to pay within 15 days the amount mentioned therein failing which the registration issued under Bombay Nursing Home Registration Act, 1949 will be revoked.

If their proposal for change of user / activity is rejected then the said registration issued under Bombay Nursing Home Registration Act, 1949 will be revoked.

(C) The procedure prescribed by the Corporation vide circular dt. 4.2.2011 will be followed and the fees/charges/penalty will be levied accordingly.

As per the order of the Hon'ble High Court dated 14.6.2011 this order will remain in abeyance for a period of four weeks from 03/08/2011.

*(Signature)*  
**Municipal Commissioner**

Date - 3<sup>rd</sup> Day of August, 2011.