

**ORDER SHEET****THE HIGH COURT OF SINDH, KARACHI**

Suit No. 753 of 2024

***Before: Mohammad Abdur Rahman,J***

Muhammad Faisal &amp; others

Versus

Sindh Building Control Authority &amp; others

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**Dated: Order with signature of Judge(s)**

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For hearing CMA No.10156 of 2024 (U/O. XXXIX Rules 1 &amp; 2 CPC)

Dates of Hearing : 1 August 2024, 2 August, 2024, 10 August 2024, 17 August 2024, 2 September 2024, 23 September 2024, 30 September 2024, 4 October 2024, 11 October 2024 and 11 February 2025.

Plaintiff : Through Mr. Rehman Aziz Malik Advocate

Defendant No.1 : M/s. Dhani Buksh Lashari

Defendant No.2 : Ms. Fauzia Khan, Advocate

Defendant No.3 : Mr. Mehmood Yousufi, Advocate

Defendant Nos.4, 5 7 & 8 : Mr. Pervaiz Ahmed Mastoi & Mr. Irshad Ali Shaikh, Additional Advocate Generals

Defendant No.6 : Mr. Akhtar Ali Mastoi, Advocate

Defendant No.9 : Mr. Mushtaq A. Memon Advocate

Defendant No.11 : Mr. Taimur A. Mirza Advocate

Defendant No.12 : Mr. Muhammad Abdullah, Advocate

Defendant No.13 : Mr. Muhammad Ilyas Warraich, Advocate

**ORDER**

**MOHAMMAD ABDUR RAHMAN, J.** This order will decide CMA No. 10156 of 2024 being an application under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure, 1908 that has been maintained by the Plaintiff seeking to:

- (a) restrain the Defendants No. 9 to 11 from:
  - (i) raising any further construction on Plot No. D-10 and D-25 Block A, North Nazimabad, Scheme No. 2, Karachi both admeasuring 1000 square yards (hereinafter referred to as the "Said Properties") and or from occupying the suit properties or any part thereof;
  - (ii) creating third party rights in the Said Properties in any manner whatsoever; and/or
  - (iii) parting with the possession of the Said Properties or any part(s) thereof;
- (b) restrain the Defendants No. 1 to 3 from:
  - (i) regularizing the illegalities in the construction that exists on the Said Properties;
- (c) restrain the Defendants No. 4 to 6
  - (i) from permitting the registration of the transfer of the Said Properties;
- (d) restrain the Defendants No. 15 and 16
  - (i) from installing utility connections over the Said Properties.

**A. Facts**

2. The facts that are material to the adjudication of this Application are not in dispute. The Karachi Development Authority (hereinafter referred to as the "KDA") had under the provisions of the Karachi Development Authority Order, 1957 (hereinafter referred to as the "KDA Order, 1957") caused for a statutory Improvement Scheme to be developed, which was given the name "KDA Improvement Scheme No. 2" entitled "North Nazimabad Town Expansion Scheme,"<sup>1</sup> and in terms of which

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<sup>1</sup> The Notification under Article 50 of the Karachi Development Authority Order sanctioning Karachi Development Authority Scheme No. 2 was published in the Gazette of West Pakistan Part 1-A dated 7 August 1964 at pg. 91-92.

Improvement Scheme the KDA caused plots to be developed and thereafter auctioned and leased inter alia to the general public.

3. Each of the Said Properties were leased by the KDA to the predecessor in interests of the Defendant No. 9 to 11. There is no dispute that the Said Properties, at the time when they were developed, auctioned and leased by the KDA, were developed, auctioned and leased as residential properties on a 99-year lease. As originally leased, the road on which Plot No. D-10, Block A, North Nazimabad, Scheme No. 2, Karachi was located is known as **Sharah-e-Shershah Soori** and which is one of the roads in the city of Karachi where the usage of plots abutting this road, with effect from 1 February 2004, have been permitted to being converted from residential to commercial.<sup>2</sup> Plot No. D-25 Block A, North Nazimabad, Scheme No. 2, Karachi backs Plot No. D-10, Block A, North Nazimabad, Scheme No. 2, Karachi and hence, when originally planned, did not abut **Shahrah e Shershah Suri**.

4. An application was made by the owners of the Said Properties to the Master Plan Department of the Sindh Building Control Authority (hereinafter referred to as the "SBCA") to amalgamate these two properties and which approval for amalgamation was granted by the Master Plan Department of the SBCA on 13 July 2017 and subsequently by the Karachi Development Authority (hereinafter referred to as the "KDA") on 3 November 2017. The property, after the amalgamation was sanctioned, was numbered as Plot No. D-10, Block A, North Nazimabad, Scheme No. 2, Karachi admeasuring 2000 square yards (hereinafter referred to as the "Suit Property") and was leased by the Karachi Development Authority (hereinafter referred to as the "KDA") on a residential lease for 99 years.

5. The Defendants No. 9 to 11 are the current owners and/or developers of the Said Properties and had, applied and on **22 August 2017** obtained a permission from the Master Plan Department, of the SBCA causing the usage of the Suit Property to be converted from a residential property to a commercial property. The sanction for conversion of the Suit Property was conditional and which inter alia imposed a condition as stated as hereinunder:

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<sup>2</sup> See Tajveez No. 3 of the Change of Land Use of City District Government, Bye Laws 2003 issued pursuant to City Council Resolution No. 383 dated 6 January 2004 and Regulation 18-13 of the KB&TPR,2002

“ ... 6. Building Plans shall be submitted for approval to SBCA. The relevant and applicable Rules and Regulations contained in KB&TPR-2002 amended upto date

7. Since plot in question is amalgamated with rare side plot abutting on the residential side therefore KB TPR 2002 (Amended upto date) clause 18-4.5 shall be applicable which is reproduced as under:

“ the residential plots facing declared commercial road and amalgamated with rear plot and if the rear plot adjoins residential plots on side on rear plot only parking floors shall be allowed provided that access shall be from front plot. The total allowable FAR shall be the FAR applicable on Front Plot plus the total covered area of parking floors at rear plots”

6. After having secured permission for conversion, the Defendants No. 9 to 11 twice applied to the SBCA for approval for construction on the Suit Property and which were sanctioned by the SBCA in the following terms:

- (i) on **9 September 2022** permission for construction of a “commercial” building comprising of Basement (Air Raid Shelter + Showrooms + Services + Parking) + Ground (Showrooms + Services+ Parking) + 1<sup>st</sup> Floor (Services + Parking) + 2<sup>nd</sup> Floor and 3<sup>rd</sup> Floors (Showroom + Parking) + 4<sup>th</sup> Floor to 6<sup>th</sup> Floors (Services + Parking) + 7<sup>th</sup> Floor (Recreation Area + Flats + Services) + 8<sup>th</sup> Floor to 19<sup>th</sup> Floors (Flats) + Roof (Solar Panels + Battery Room + Services) was sanctioned; and
- (ii) on **19 June 2023** obtained permission for construction of a “commercial” building comprising of a Basement (Air Raid Shelter + Showrooms + Services + Parking) + Ground (Showrooms + Services+ Parking) + 1<sup>st</sup> Floor (Showroom + Services + Parking) + 2<sup>nd</sup> Floor and 3<sup>rd</sup> Floors (Ballroom/ Showroom + Parking) + 4<sup>th</sup> Floor to 6<sup>th</sup> Floors (Services + Parking) + 7<sup>th</sup> Floor (Partly Parking + Services) + 8<sup>th</sup> Floor (Recreation Area + Flats + Services) + 9<sup>th</sup> to 29<sup>th</sup> Floors (Flats) + Roof (Solar Panels + Battery Room + Services) was sanctioned.

7. The Plaintiff is the owner/resident of Plot No. D-24, Block A, North Nazimabad, Scheme No. 2, Karachi and which property backs the Suit Property but which does not abut Sharah -e- Shershah Soori and hence the usage of which cannot be converted from residential to commercial. They are aggrieved by the construction that is being carried out on the

Suit Property and seek various injunctive relief which have been clarified in paragraph 1 of this order.

8. On an application bearing CMA No 10173 of 2024, the Nazir was appointed commissioner to verify the status of the construction and as to whether the construction on the Suit Property was in conformity with the approval sanctioned by the SBCA and who has by his report confirmed that there are no deviations from the approval granted as compared to ongoing construction being raised on the Suit Property.

**B. Contentions on behalf of the Plaintiff**

9. Mr. Rehman Aziz Malik has entered appearance on behalf of the Plaintiff. He maintained that the Plaintiff is the owner of a property that backs the Suit Property and who is aggrieved by the construction of a Basement (Air Raid Shelter + Showrooms + Services + Parking) + Ground (Showrooms + Services+ Parking) + 1<sup>st</sup> Floor (Showroom + Services + Parking) + 2<sup>nd</sup> Floor and 3<sup>rd</sup> Floors (Ballroom/ Showroom + Parking) + 4<sup>th</sup> Floor to 6<sup>th</sup> Floors (Services + Parking) + 7<sup>th</sup> Floor (Partly Parking + Services) + 8<sup>th</sup> Floor (Recreation Area + Flats + Services) + 9<sup>th</sup> to 29<sup>th</sup> Floors (Flats) + Roof (Solar Panels + Battery Room + Services) building thereon.

10. Regarding his locus standi to maintain the Suit, he relied on a decision of a Division Bench of this Court in a Constitution Petition reported as **Ardeshir Cowasjee and 7 others vs. Karachi Building Control Authority (KBCA) through Chief Controller of Buildings, Karachi and 3 others**<sup>3</sup> wherein it was held that a resident of a locality had a right to maintain a Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. He also relied on three orders of Learned Single Judges of this Court reported as **H.A. Rahim & Sons (Pvt.) Ltd. vs. Province Of Sindh**,<sup>4</sup>**Arif vs. Jaffar Public School through Principal/Administrator and 8 others**<sup>5</sup> and **Pakistan Defence Officers Housing Authority vs. Federation of Pakistan Through Secretary, Ministry Of Environmental Protection**<sup>6</sup> in which it was held that Section 42 of the Specific Relief Act, 1877 was not exhaustive and a suit for declaration could be maintained, under Section 9 of the Code of Civil Procedure, 1908, to declare an action of a public functionary as illegal.

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<sup>3</sup> PLD 2006 Karachi 63

<sup>4</sup> 2003 CLC 649

<sup>5</sup> 2002 MLD 1410

<sup>6</sup> PLD 2014 Karachi 511

11. He contended that the Plaintiff being a lessee of a property that was developed, auctioned and leased by the KDA under the same “building scheme” as the Suit Property, as per the rule in **Elliston vs. Reacher**<sup>7</sup> the Plaintiff had a right to enforce the terms of the covenant contained in the lease as between the KDA and the Defendants No. 9 to 11 and to maintain the status of the Suit Property as residential. He maintained that the common law rule in **Elliston vs. Reacher**<sup>8</sup> had been followed by this Court in the decision reported as **Ardeshir Cowasjee vs. Muhammad Naqi Nawab**<sup>9</sup> and where a learned Single Judge of this Court had, while finding that a building scheme was in existence, confirmed an injunction on the basis of a term of lease to which the Plaintiff in that suit was not a party, which term had restrained the usage of the property to any purpose other than residential and on the basis which this Court had prohibited the Defendant from deviating from the terms of the lease issued by the Karachi Municipal Corporation. Relying on Section 40 of the Transfer of Property Act, 1882, he said that such a restrictive covenant was enforceable by the Plaintiff as against the Defendants No. 9 to 11.

12. He further contended that the Supreme Court of Pakistan had in the decision reported as **Abdul Karim vs. Nasir Salim Baig**<sup>10</sup> passed an interim order, with effect from 22 January 2019, prohibiting the conversion of the land use of any property and which order still subsists and on account of which the SBCA could not have sanctioned the approval of the construction on the Suit Property on 19 June 2023. He next referred to a decision of the Supreme Court of Pakistan reported as **Suo Moto Case No. 3 of 2009**<sup>11</sup> which clarified that executive and judicial authorities were constitutionally obliged to implement the orders of the Supreme Court of Pakistan and submitted that it was hence the duty of this Court to implement the interim order passed by the Supreme Court of Pakistan in **Abdul Karim vs. Nasir Salim Baig**<sup>12</sup> and to restrain the conversion and usage of the Suit Property from residential to commercial.

13. Clarifying that the simpliciter declaration, by the City Council of the City District Government, Karachi, that plots abutting a “declared” road could be converted from residential to commercial did not ipso facto give

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<sup>7</sup> [1908] 2 Ch. 374

<sup>8</sup> [1908] 2 Ch. 374

<sup>9</sup> PLD 1993 Karachi 631

<sup>10</sup> 2020 SCMR 111

<sup>11</sup> 2015 SCMR 976

<sup>12</sup> 2020 SCMR 111

the Defendant No. 9 to 11 the right to deviate from the process that had to be followed prior to obtaining sanction of such conversion as was contained in the Change of Land Use of City District Government Karachi Bye-Laws, 2003 or, where applicable, the Karachi Building and Town Planning Regulations, 2002 (hereinafter referred to as the “KB&TPR, 2002”) and where there was a deviation from the same, an injunction must be granted. In this regard he relied on two decisions of the Supreme Court of Pakistan reported as **Muhammad Siddique vs. Federation of Pakistan through M/O Works and Housing and others**<sup>13</sup> and **Jawaid Mir Muhammadi vs. Haroon Mirza**<sup>14</sup> and three decisions of a Division Bench of this Court reported as **Jawaid and 6 others vs. Province of Sindh through Minister, Ministry of Local Government and 4 others**,<sup>15</sup> **Nighat Jamal vs. Province of Sindh**<sup>16</sup> and **Muhammad Nasir and 7 others vs. Government of Pakistan through Ministry of Housing and Town Planning, Islamabad and 6 others**<sup>17</sup> and two orders of Learned Single Judge of this Court reported as **Abdul Samad and 10 others vs. Ch. Abdul Waheed Nasir and 5 others**<sup>18</sup> and **Navid Hussain and 5 others vs. City District Government, Karachi (CDGK) through District Coordination Officer, Karachi and 4 others**<sup>19</sup> directing that a plot that had been illegally converted from residential to commercial in violation of the provisions of the Article 40 of the KDA Order, 1957 or the provisions of the Karachi Building and Town Planning Regulations 1979 could not be upheld. In this regard he contended that while public notices were issued inviting public objections prior to the Suit Property’s usage being converted from residential to commercial, in reality this has no impact as it should have been drawn to the attention of the Plaintiffs who are the immediate neighbours of the Suit Property. Relying on a judgment of the High Court of Calcutta reported as **Bhairab Chandra Sinha vs Kalidhan Roy Choudhury and Ors**<sup>20</sup> he submitted that where a public notice is mandated by law to be issued, a right to object will not be waived unless it is shown that the attention of person who had a right to object to such a notice, was in fact drawn to the said notification. This he contends was not done and as such he maintains that the Plaintiffs right to object cannot be considered as waived.

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<sup>13</sup> 2013 SCMR 1665; Upholding a decision of a Division Bench of this Court in CP No. D-1126 of 2006

<sup>14</sup> PLD 2007 SC 472

<sup>15</sup> 2019 CLC 1032

<sup>16</sup> 2010 YLR 2624

<sup>17</sup> 2014 CLC 1666

<sup>18</sup> 2017 YLR Note 426

<sup>19</sup> 2007 CLC 912, This decision was set aside on appeal by the Supreme Court of Pakistan in the decision reported as **Haji Amin vs. Navaid Hussain and others** 2008 SCMR 133

<sup>20</sup> AIR 1929 Calcutta 736

14. In terms of the injunctive relief, relying on a decision reported as **Al-Jamiul Arabia Ahsanul Uloom and Jamia Masjid and others vs. Syed Sibte Hasan and others**<sup>21</sup> he contended that where a weekly market was illegally established on an amenity plot meant for a playground, a learned Single Judge of this Court has held that where the action being complained of was premised on an illegality, an injunction must be granted. Relying further on a decision of the Supreme Court of Pakistan reported as **Government of Pakistan through Ministry of Finance vs. M.I. Cheema, Dy. Registrar, Federal Shariat Court and others**<sup>22</sup> he contended that a Court could grant interim relief even if it would tantamount to granting the final relief in the *lis* if the circumstances warranted it. He also relied on a decision of a Division Bench of this Court reported as **Porsche Middle East and Africa FZE and anothers vs. Akbar Adamjee and others**<sup>23</sup> in which it was held that the fact that the grant of the injunction would tantamount to granting one of many prayer clauses, would not impede a court from granting an injunction. He emphasised that a Division Bench of this Court in the decision reported as **Balaqamwala Oil Mills (Pvt.) Ltd vs. Shakarachi Trading A.G. and 2 others**<sup>24</sup> had held that it was open for a court while hearing an interim application for an injunction to mould the relief on the application in accordance of the circumstances of the *lis*. He further contended that a learned Single Judge of this Court in the decision reported as **Muhammad Anas Kapadia and 19 others vs. M. Farooq Haji Abdullah and 5 others**<sup>25</sup> has held that a challenge in the suit to the vires of a legislation would not preclude an injunction from being granted. On this basis he maintained that the application under order should be granted and the Defendants No. 9 to 11 should be restrained from raising any further construction on the Suit Property.

**C. Contentions on Behalf of the Defendant No. 11**

15. Mr. Taimur A. Mirza, entered appearance on behalf of the Defendants No 11 and maintained that **Sharah e Sher Shah Suri** had been declared, by the City Council of the City District Government Karachi, under the Change of Land Use of City District Government Karachi Bye-Laws, 2003 as a road on which the usage of plots located thereon could be converted from residential to commercial. He contended that an application was made to amalgamate the Said

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<sup>21</sup> 1999 YLR 1634

<sup>22</sup> 1992 SCMR 1852

<sup>23</sup> PLD 2020 Sindh 415

<sup>24</sup> PLD 1990 Karachi 1

<sup>25</sup> 2007 CLC 943

Properties to the Master Plan Department of the SBCA and which had accorded their approval on 23 July 2017 and which amalgamation was finally sanctioned by the KDA on 3 November 2017.

16. He maintained that while in clause 5 of the sanction dated 3 November 2017 accorded by the KDA to the amalgamation an undertaking had been given by the applicant that they would not use the Suit Property other than for the purpose that it had been leased i.e., for residential use, he contended that such an undertaking did not prevent the Defendants No. 9 to 11 from making a subsequent application to seek conversion of the Suit Property from residential to commercial.

17. Regarding the commercialisation of the Suit Property he maintained that the Master Plan Department of the SBCA had accorded its sanction for the conversion of the usage of the Suit Property from residential to commercial on 22 August 2017 and the KDA followed suit granting its consent to the conversion of the usage on the same date that the Amalgamation had been sanctioned i.e., 3 November 2017. He maintained that in accordance with the procedure for conversion due notice was given by the issuance of a public notice in newspapers on 1 July 2017 and in response to which no person came forward to object. He submitted that the Plaintiffs having failed to object to the conversion of the usage of the Suit Property had waived their rights and could not at this belated stage challenge the construction on the Suit Property.

**D. Query from Court**

18. After hearing the Counsel for the Plaintiff and the Defendants No. 9 to 11, I had requested them to assist the court on issues that had not been addressed by any of them in the course of their arguments namely:

- (i) that on the date the approval was granted by the Master Plan Department of the SBCA to convert the Suit Property from residential to commercial i.e., 22 August 2017, as to whether the power to town plan had been conferred on the SBCA;
- (ii) as to whether the approval that has been accorded for the construction of flats on the Suit Property could not be accorded after the property has been converted to commercial and on which only commercial construction

could be raised as defined in Regulation 19-2.2.6 of the KB&TPR,2002; and

- (iii) as to the basis on which the Floor Area Ratio for the construction has been increased from 1:5.5 to 1:7 by the SBCA for construction on the Suit Property.

***E. Contentions of Mr. Mushtaq A Memon and Mr. Dhani Bax Lashari on the queries raised by the Court***

19. Mr. Mushtaq A Memon entered appearance on behalf of the Defendant No. 9 and through, no fault of his own, relied on a document entitled the Sindh Master Plan Authority Act, 2020 and which would give the impression that a statute had been passed by the Provincial Government to enact the same. As I had been similarly misled in the past, I had knowledge of the fact that no such statute had ever been passed by the Provincial Assembly of Sindh and many a publisher had negligently been indicating such a document to having been passed by the Provincial Assembly of Sindh when in fact it had not. This fact was also confirmed by the Additional Advocate General Sindh.

20. Mr. Mushtaq A. Memon thereafter referred the Court to Paragraph 13, 14 and 16 of the Plaint and contended that the Plaintiff had to make out a prima facie case on the allegations that had been raised in the Plaint. In this regard he relied on a decision of a Learned Division Bench of this Court reported as ***Muhammad Matin vs. Mrs. Dino Manekji Chinoy and others***<sup>26</sup> in which the perquisites of determining an injunction were identified by that Court. He also relied on a decision reported as ***Mrs. Dino Manekji Chinoy and 8 others vs. Muhammad Matin***<sup>27</sup> in which the decision of the Learned Division Bench was upheld. He further relied on an order passed by a Learned Single Judge of this Court reported as ***Sayyid Yousaf Husain Shirazi vs. Pakistan Defence Officers Housing Authority and 2 others***<sup>28</sup> and ***The Karachi Catholic Co-operative Housing Society Ltd. vs. Daphne Mary Mendonca***<sup>29</sup> in which similar observations were made by the Court.

21. Mr. Mushtaq A. Memon next directed the Courts attention to an order of a Learned Single Judge of this Court reported as ***Mst. Humaira***

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<sup>26</sup> PLD 1983 Karachi 387

<sup>27</sup> PLD 1983 Supreme Court 693

<sup>28</sup> 2010 MLD 1267

<sup>29</sup> 1990 MLD 2232

**Aslam vs. Abdul Rahim Rafi**<sup>30</sup> in which the Court when considering whether an injunction should be granted to restrain construction on a plot that abutted a road on which the usage of plots had been permitted to being converted from residential to commercial, had declined to grant an injunction. He finally relied on a judgment of a Learned Single Judge of this Court reported as **Abdul Ghafoor Memon vs. Mohammed and another**<sup>31</sup> to submit that delay in maintaining a suit would disentitle a plaintiff from obtaining an interim injunction.

22. Regarding the construction of flats on commercial plots, Mr. Mushtaq A. Memon drew the attention of this Court to the definition of the expression commercial plot as made in Sub-Section (e) of Section 2 of the Sindh Disposal of Urban Land Ordinance, 2002 and in which the definition of commercial has been expanded to include “commercial cum residential” usage and pressed for such a definition to be applied by the SBCA to the provisions of the KB&TPR, 2002 when sanctioning an approval to a construction.

23. Regarding the power of the SBCA to town plan, Mr. Mushtaq A Memon without dilating on any of the legal issues, choose instead to give an undertaking to the court that the construction on the Suit Property would be of a “commercial” nature and would be at a Floor Area Ratio of 1:5.5 and prayed for the application to be disposed of in those terms.

**F. Contentions of the SBCA on the queries raised by the Court**

24. Mr. Dhuni Bux Lashari conceded that flats, being residential in nature, had incorrectly been approved under Regulation 25-3 of the Karachi Building & Town Planning Regulations, 2002 as commercial in the approval accorded to the Defendants No. 9 to 11 under Sub-Section (1) of Section 6 of the Sindh Building Control Ordinance, 1979 and under which Regulation only commercial structures could be approved as defined in Regulation 19-2.2.6 of the KB&TPR, 2002.

**G. Order on CMA No. 10154 of 2024**

25. I have heard Mr. Rehman Aziz Malik, Mr. Taimur A. Mirza, Mr. Mushtaq A. Memon and Mr. Dhani Bux Lashari and have perused the record.

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<sup>30</sup> PLD 2016 Sindh 598

<sup>31</sup> PLD 1975 Karachi 464

(i) **Locus Standi**

26. The issue of locus standi to maintain a suit in respect of matters relating to the violation of building control and town planning laws was first settled by the Supreme Court of Pakistan in the decision reported as **Mian Fazal Din vs. Lahore Improvement Trust and another**<sup>32</sup> and in which it was held that:

“ ... The next objection raised on behalf of the respondents is that the appellant had no such legal right in the matter as would entitle him to object to the sale of the land to the respondent No. 2 or to the erection of a mosque thereon. The mere expectation of a market being built on some future date opposite to his house could not possibly give him a right to insist upon lands in the Scheme being utilized strictly for the purposes originally indicated in the Scheme.

Learned counsel for the appellant, however, contends that the fact that he had been induced to purchase Plot No. 86 E/I by the special attraction of the market proposed to be built opposite to his plot did give him a sufficient right for this purpose as this was not merely an illusory or 'an imaginary right.

In support of this contention learned counsel has also placed strong reliance upon the observations contained in a judgment of the High Court of West Pakistan in the case of *Montgomery Flout and General Mills Ltd. v. Director, Food purchases* (P L D 1957 Lab. 914) by Kaikaus, J. (as he then was) :-

"It is true," observed the learned Judge, "that a petitioner must have some right if he applies to the Court for a direction or order under Article 170 (now Article 98 of the Constitution of Pakistan) but he need not have a right in that strict sense of the term which is mentioned above. Whenever an enactment empowers a public officer to pass orders that benefit or harm a citizen, the citizen gets a right that in a matter in which he is concerned an order be passed in accordance with law. This too is a right that can be enforced by the Court in the exercise of its jurisdiction under Article 170 of the Constitution of Pakistan. If the officer concerned, passes an order that is not in accordance with law, any person whose interests are affected by the order can maintain a petitioner for a writ or direction under Article 170. All orders of executive officers are subject to challenge by those affected by the orders, and a person would be "affected" even if he loses some benefit or advantage which he would have gained if the order was in accordance with law. A public officer passing an order on an application submitted to him does not grant the applicant a favour. He is only granting the applicant his right in the sense that he has a right to have the matter determined in accordance with law and justice. It will be observed that even a fundamental right may not be a "right" in the strict sense of the term. A right to acquire or hold property, a right to carry on a profession, a right to move about freely, etc. are not rights in the strict sense because they do not cast any corresponding duties on any person. They are what writers on jurisprudence call "liberties". In a wider sense these too are recognised as rights by jurisprudence and they can form the basis of a writ petition."

This decision was approved by this Court in the case of *Ikram Bus Service v: Board of Revenue* (PL D 1963 S C 564) where this Court stated that

Even an administrative body such as an R. T. A., is under a legal obligation to deal with all applicants before it fairly,

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<sup>32</sup> PLD 1969 Supreme Court 223

*justly and equitably and an applicant has a legal right to demand that the administrative body should determine the matter with whose decision it is charged, in accordance with the law.*

*It is clear from the above that the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he had a personal interest in the performance of the legal duty which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise.*

*Learned counsel has referred us to Halsbury's Laws of England, Volume 25, Third Edition, p. 389 in order to point out that his client had a real and substantial interest in the setting up of the market, for, an owner of a market is under a duty to provide a place for the holding of a market of a size sufficient for the convenient accommodation of all who are ready to buy and sell in the market. This postulates a corresponding right in the prospective users of the market to insist upon the provision of the requisite accommodation.*

*This principle was propounded by all the Judges in England in their unanimous opinion on the Islington Market Bill (L R (1880) 14 Ch. D 458) referred to them by the House of Lords. They opined that if "after having once appropriated a particular site for the use of the public as a market place, he (the grantee) afterwards employs or permits it or part of it, to be employed for other purposes" he cannot prevent others from selling outside the market, for, he owes a duty towards the members of the public to provide sufficient space for the legitimate purpose of selling within it. This is, because, "an obligation is cast upon him by his acceptance of the grant, to provide convenient accommodation for all who are ready to buy and sell in the public market." Furthermore that a failure on the part of the grantee to discharge this public duty would not only entail a forfeiture of the grant but also give a right of action to any private individual who should have received any special injury thereby.*

*As against this, learned counsel for the respondent No. 2 has referred us to the decision of the Court of Appeal in England in the case of Ex parte : Sidebotham In re: Sidebotham (L R (1880) 14 Ch. D 458) in support of his contention that for the purposes of such proceedings a person aggrieved "must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." It cannot, it is said, mean a person "who is disappointed of a benefit which he might have received if some order had been made."*

*This was a case in which the question which arose was as to whether a bankrupt or any of his creditors was entitled to appeal from an order of a Court refusing to act on a report by the Comptroller in Bankruptcy to the effect that a trustee in bankruptcy had been guilty of misfeasance, neglect or omission causing loss, to the estate, where the Comptroller himself had not preferred any appeal. The ratio of the decision there was that such a report was purely a matter between the Comptroller and the trustee and there was no decision or judgment or finding by the Court upon the report which could possibly have prejudiced any bankrupt or creditor or caused any embarrassment to such a person in any proceedings which he may wish to take against the trustee.*

*This principle governing an appeal cannot be invoked in the present case, particularly, since the abandonment of a privilege or facility undertaken to be provided by the Improvement Trust cannot but have prejudicially affected the residents of the locality who had come to live therein not only on the expectation but on the representation contained in the scheme, as sanctioned by the Government, that such a facility would be provided. The deprivation of such a facility would in our opinion, confer a sufficiently valuable right upon the residents of the scheme to enable them to maintain an application for enforcing the Trust*

to discharge its obligation of executing the Scheme as sanctioned by the Government."

This decision of the Supreme Court of Pakistan was rendered on appeal from a decision in a Petition and considered the locus standi of a person to maintain a Petition in respect of a construction that was being raised in deviation of a town planning scheme. In this context it was held that where a town planning scheme has been developed and maintained by a regulatory body, **any person who is an owner of property within that town planning scheme** has the requisite locus standi to maintain a Petition to challenge an action of that regulatory body that they consider to be illegal. The same issue, as to locus standi to maintain a Petition, was reconsidered by the Supreme Court of Pakistan in the decision reported as **Ardeshir Cowasjee and 10 others vs. Karachi Building Control Authority (KMC), Karachi**<sup>33</sup> and in which it was held that:

“ .. 12. Adverting to the question of locus standi of the appellants, we may observe that the Clifton beach is a place in Karachi, which is not only visited by the Karachi-cites, but generally people who are on short visit either from other parts of the country or from abroad also visit Clifton beach as it is a well-established place of public recreation since before the partition of India. The title of the memo of appeal indicates that most of the appellants reside in close proximity of the Park and, therefore, it cannot be urged that they have no locus standi to file the above Constitution petition. In our view, because of the location of the Park as highlighted hereinabove even a resident of a distant area like Layari Quarters could have filed the above Constitution Petition. In this regard, reference may be made to para 15 of the judgment in the case of Mst. Sardar Begum Farouqui and 6 others v. Rashid Khatoon and 2 others (1990 CLC 83 relevant at p.91) rendered by a Division Bench of the High Court of 12. Adverting to the question of locus standi of the appellants, we may observe that the Clifton beach is a place in Karachi, which is not only visited by the Karachi-cites, but generally people who are on short visit either from other parts of the country or from abroad also visit Clifton beach as it is a well established place of public recreation since before the partition of India. The title of the memo of appeal indicates that most of the appellants reside in close proximity of the Park and, therefore, it cannot be urged that they have no locus standi to file the above Constitution petition. **In our view, because of the location of the Park as highlighted hereinabove even a resident of a distant area like Layari Quarters could have filed the above Constitution Petition. In this regard, reference may be made to para 15 of the judgment in the case of Mst. Sardar Begum Farouqui and 6 others v. Rashid Khatoon and 2 others (1990 CLC 83 relevant at p.91) rendered by a Division Bench of the High Court of Sindh to which one of us (Ajmal Mian, CJ) was a party and the author of the judgment, which reads as follows:---**

**"15. Apparently the instant case falls within the category of public litigation as the public-at-large is interested to ensure that the constructions are not raised in violation of the building bye-laws and the Ordinance by misusing a status quo order of a Court. The intervention by this Court will discourage the aforesaid illegal practice obtaining in Karachi."**

**The concept of locus standi has undergone material change in case of public interest litigation. Reference may be made to the**

<sup>33</sup> 1999 SCMR 2883

judgment of this Court in the case of Ms. Shehla Zia and others v. WAPDA (PLD 1994 SC 693) in which a direct Constitution petition under Article 184(3) of the Constitution of the Islamic Republic of Pakistan (hereinafter referred to as the Constitution) was filed by some public spirited persons assailing construction of a grid station by the WAPDA in a thickly populated area. The above Constitution Petition was opposed by the counsel, who appeared on behalf of the WAPDA inter alia on the ground that no violation of the Fundamental Rights was involved. The above contention was repelled as under:--

"Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word 'life' is very significant as it covers all facets of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and Constitutionally. For the purposes of present controversy suffice to say that a person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, and factory, power station or such like installations.

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The Constitutional Law in America provides an extensive and wide meaning to the word 'life' which includes all such rights which are necessary and essential for leading a free, proper, comfortable and clear life. The requirement of acquiring knowledge, to establish home, the freedoms as contemplated by the Constitution, the personal rights and their enjoyment are nothing but part of life. A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedom and liberties. Any action taken which may create hazards of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law. In the present case this is the complaint the petitioners have made. In our view the word 'life' constitutionally is so wide that the danger and encroachment complained of would impinge fundamental right of a citizen. In this view of the matter-the petition is maintainable."

12. In our view, the appellants have the right to use the Park with all amenities as was envisaged under the approved K.D.A. Scheme No.5. The use of the Park involves enjoyment of life which is covered by the word life employed Article 9 of the Constitution as interpreted by this Court in the aboverquoted extract from the judgment in the case of Ms. Shehla Zia and others v. WAPDA (supra). The appellants, therefore, have the right to ensure that the official respondents do not grant approval of a plan in respect of the Plot which may be violative of the provision of the Order and the Regulations and which may impinge on their right of enjoyment of life.

Reference may also be made to the treatise Judicial Review of Administrative Action (Fifth Edition) by de Smith, Woolf & Jowell relied upon by Mr. Naim- ur-Rehman, wherein the authors have summarised the concept of locus standi in the context of 'sufficient interest' as under:--

"The general approach can be summarised as follows:--

(1) 'Sufficient interest' has to receive a generous interpretation. It has to be treated as a broad and flexible test.

(2) Only issues as to standing where the answer is obvious should be resolved on the application for leave. In other cases lack of standing should not prevent leave being granted.

(3) Issues as to standing at the leave stage do not depend on the remedy which is then being claimed.

(4) If the applicant has a special expertise in the subject-matter of the application that will be a factor in establishing sufficient interest. This applies whether the applicant is an individual or some type of association. The fact that the applicant's responsibility in relation to the subject of the application is recognised by statute is a strong indication of sufficient interest.

(5) A great variety of factors are capable of qualifying as sufficient interest. They are not confined to property or financial or other legal interests They can include civic (or community) environmental and cultural interests The interests can be future or contingent.

(6) The gravity of the issue which is the subject of the application is a factor taken into account in determining the outcome of questions of standing. The more serious the issue at stake the less significance will be attached to arguments based on the applicant's alleged lack of standing.

(7) In deciding what, if any, remedy to grant as a matter of discretion, the Court will take into account the extent of the applicant's interest. At this stage different remedies may require a different involvement by the applicant. "

The abovequoted passage from the well-known treatise indicates that the concept of locus standi has been whittled down inasmuch as the expression "sufficient interest", inter alia, includes civic or (community) environmental and cultural interests.'

13. We may also refer to the following judgments of this Court in which the concept of locus standi has been dilated upon in relation to a Constitution petition and, inter alia, it has been held that for maintaining a proceeding in writ jurisdiction, it is not necessary that a writ petitioner should have a right in the strict juristic sense, but it is enough if he discloses that he had a personal interest in the performance of the legal duty, which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or curtailment of a privilege in liberty or franchise:- -

(i) Mian Fazal Din v. Lahore Improvement Trust; Lahore and another (PLD 1969 SC 223).

(ii) Miss Benazir Bhutto v. Federation of Pakistan and another (PLD 1988 SC 416).

(iii) Mrs. Benazir Bhutto and another v. Federation of Pakistan and another (PLD 1989 SC 661)

(iv) Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473).

(v) Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-khairi and others v. Federation of Pakistan and others (PLD 1996 SC 324;

(iv) Malik Asad Ali and others v. Federation of Pakistan through Secretary. Law, Justice and Parliament Affairs, Islamabad and others (PLD 1998 SC 161).

(vii) Mohtarma Benazir Bhutto and another v. President of Pakistan and others (PLD 199F SC 388).

However, Mr. Farooq H. Naik has referred the case of Islamic Republic of Pakistan v. Muhammad Saeed (PLD 1961 SC 192), in which this Court with reference to Article 170 of the late Constitution of Pakistan, 1956 observed that in order to entitle a person to ask for the performance of any public duty by a mandamus, it is necessary for him to show that he has some particular ground for claiming such performance, apart from the fact that he is interested in the performance of such a duty as a member of a class of persons, we all of whom are equally interested therein.

The above case has no application to the present case. The appellants are entitled to a declaration in terms of subparagraph (ii) of paragraph (a) of clause (1) of Article 199 of the Constitution that the approval of the building plan of respondent No.5 in respect of the Plot is without lawful authority and of no legal effect in view of the violation of Articles 40 and 52-A of the Order read with para.3 of Schedule 'D' to the Regulations. As a consequential relief, the appellants are also entitled to seek removal of the unauthorised structure from the Plot. Even otherwise, the appellants have sufficient interest to ensure that the Plot should not be used for any other purpose than for which it was carved out pursuant of K.D.A. Scheme No.5."

The decision of the Full Bench of the Supreme Court of Pakistan, while reinforcing the principle laid down in **Mian Fazal Din vs. Lahore Improvement Trust and another**,<sup>34</sup> expanded the scope of a person's locus standi to maintain a Petition by holding that the enforcement of such rights can also be maintained, in what has come to be referred to as "public interest litigation," in a Petition. It would therefore seem that the Supreme Court of Pakistan had in that decision, redefined the basis for determining the locus standi of a person to maintain a Petition and held that even a person who is not a resident of a town planning scheme would, in the public interest, have the requisite locus standi to maintain a Petition to challenge a perceived illegal action of a regulatory body provided that the person could demonstrate that they had "sufficient interest" within the prescriptions as listed in that decision. On the basis of the above decision, in addition to a person who resided in a town planning scheme, any person who showed that they have "sufficient interest" could, in the public interest, maintain a Petition to challenge an illegality made by a regulator inter alia in the alteration of a town planning scheme or in respect of a construction within a town planning scheme.

27. While the above-mentioned decisions relate to the locus standi of a person to maintain a Petition, the question of whether or not such "rights" as identified in **Mian Fazal Din vs. Lahore Improvement Trust and another**<sup>35</sup> and **Ardeshir Cowasjee and 10 others vs. Karachi Building Control Authority (KMC), Karachi**<sup>36</sup> could or not be enforced in Suits,

<sup>34</sup> PLD 1969 Supreme Court 223

<sup>35</sup> PLD 1969 Supreme Court 223

<sup>36</sup> 1999 SCMR 2883

under Section 9 of the Code of Civil Procedure, 1908, was considered by Ata ur Rehman J., in the decision reported as **Messrs H.A. Rahim & Sons vs. Province of Sindh and another**<sup>37</sup> and in which decision, where the vires of a law was challenged in the Original Civil Jurisdiction of this Court, it was held that:

“ ... 9. There is another aspect of the matter. The present suit has been filed for declaration and permanent injunction. A suit for declaration would lie under section 42 of the Specific Relief Act whereunder persons seek declaration with regard to their legal character in the sense of status or with regard to any right to property. The case of Muhammad Farooq Khan v. Sulaiman A.G. Punjurani PLD 1979 Kar. 88 is referred. The term right to, property can mean both tangible and intangible rights. In coming to this conclusion reliance is placed on the case of T.J. Trust, Bombay v. CIT (Appeal) PLD 1958 SC (Ind :) 140 and Ahmed Arif v. CWT (1969) 2 CC, 471, wherein it has been held that the term property is a term of the widest import, and subject to any limitation or qualification which the context might require, it signifies every possible interest which a person can acquire, hold or enjoy. In case of Ahmed Ali v. The State PLD 1957 Lah. 207 it was held that "property" may not have a market value for the person concerned yet it may not be quantifiable in monetary terms. In the present case the plaintiff has claimed his right to be dealt in accordance with Constitution. This right is a valuable property right as citizen of the country, though intangible in nature. Even otherwise the plaintiff 'has in substance claimed that it is not obliged to pay a certain amount of money as fee under an alleged invalid law. In other words, he right in money is substantially in issue. Traditionally the Courts have construed section 42 of the Specific Relief Act very strictly resulting in non-suiting litigants on mere technicality. The Courts thereafter have developed techniques to defeat the technicalities and provide substantial justice to litigants through the process of construction and interpretation. In Muhammad Ilyas Hussain v. Cantonment Board PLD 1976 SC 785 the Supreme Court had observed that it was not always necessary for the plaintiff to sue for declaration for his title as substantive relief for injunction only as a consequential relief. In Hyderabad Municipal Corporation v. Fateh Jeans Ltd. 1991 MLD 284 a learned Single Judge of this Court while interpreting section 42 of the Specific Relief Act was pleased to hold that even if the person was not an owner of the property he could be entitled to a declaration in relation thereto. In ICP v. S. Ahmed Sarwana, Advocate 1987 MLD 2442 another learned Single Judge of this Court found that even where a person was disentitled to, declaratory relief under section 42, he could be granted permanent injunction. A somewhat similar view was also taken by another learned Single Judge of this Court in Shahid Mahmood v. KESC 1997 CLC 1936 wherein it was observed that even if the plaintiff could not be granted a declaration as to legal character, relief by way of permanent injunction to prevent breach of an obligation could always be granted and this was independent of his right to seek damages. The traditional strict view of section 42 that the same is exhaustive now seems to have watered down. Earlier also in Robert Fischer v. Secretary of State of India (1899) ILR 22 Mad. 270 (Privy Council it was held that section 4.2 of the Specific Relief Act was not exhaustive of the circumstances in which a person could ask for a declaratory relief. In the case of Shri Krishina Chandra v. Mahabir Parsad AIR 1933 All. 488 the Allahabad High Court categorically held that section 42 of the Specific Relief Act was not. exhaustive so as to exclude all other forms of declaratory suits. Similar view have been taken in the case of Vangipuram Venkatacharyulu v. Shri Rajah Vasireddi AIR 1935 Mad. 964, Desu Reddiar v. Srinivasa Reddi AIR 1936 Mad. 605 and Sisir Kumar Chandra v. Smt. Monrama Chandra AIR 1972 Cal. 283 at p.290. The Supreme Court of India has also recognized in Ramasraghava Reddy v. Sheshu Reddy AIR 1967 SC 436 that where the declaration sought by the plaintiff falls outside the purview of section 42 of the Specific Relief Act, the declaration could be governed

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<sup>37</sup> 2003 CLC 649

*by the general provisions of the Civil Procedure Code like section 9 or Order VII, rule 7, I subscribe to latter line of cases and hold that. Section 42 of the Specific Relief Act is not exhaustive of the circumstances in which declaration is to be given. A declaration may well be given in circumstances not covered by section 42 of the Specific Relief Act in which case the general provisions of law shall govern the declaration sought. It serves no useful purpose to beat about the bush and spend enormous time and effort only to determine the much debated issue as to whether a plaintiff possesses the legal character so as to afford him a declaration under section 42. No doubt there is some conflict in judicial authority as to whether section 42 is exhaustive, however, the line of authorities which spell out that section 42 if not exhaustive is to be given preference. Even in Pakistan there is direct authority for the proposition that the section 42 is not exhaustive. The case of Salimullah Beg v. Motia Begum PLD 1959 Lah. 429 is referred. The Court in substance has to see whether the plaintiff in the facts and circumstances of the case should or should not be granted a declaration. At the end of the day the Court has to dispense substantive justice and assess what is fair or unfair in the attaining circumstances. The case of Intiaz Ahmed v. Ghulam Ali PLD 1963 SC 382 is referred."*

The decision of the Learned Single Judge having held that Section 42 of the SRA, 1877 was not exhaustive and that it was therefore open for this Court to also grant relief that was available to a Court in its Constitutional Jurisdiction in the Original Civil Jurisdiction of a Court.

28. This decision was approved and followed by a Division Bench of this Court in the matter reported as **Arif Majeed vs. Board of Governors Karachi Grammar School**<sup>38</sup> wherein this Court allowed for a declaration to be issued regarding an illegality perpetuated by public functionaries or by persons performing duties akin to public functionaries and wherein it was held that:

" ... "18. We have given our anxious consideration to the question involved after having noticed that both view, as to Section 42 being exhaustive or otherwise have been taken by superior Courts in the subcontinent. Possibly one reason for divergence of judicial opinion appears to be that when the Specific Relief Act was enacted in 1877 the concept of rights which could be enforced through Courts was largely confined to "status" as understood in a feudal social context or rights pertaining to property in a laissez-faire economy. With the development of jurisprudence over more than a century a large number of other rights which did not strictly speaking, relate to status of an individual or deal with tangible property came to be recognized by law and some of them in the form of guaranteed fundamental rights. The right of privacy, to carry on the business of one's choice, access to public information and a large body of social and cultural rights neither relate to status in the traditional sense nor tangible property. Keeping in view the well-settled principle that wherever there is a right there must always be a remedy to enforce it persuaded Courts not to remain bound within the technicalities of Section 42 for the purposes of granting relief.

19. Moreover, Article 4 of the Constitution guarantees to every citizen the inalienable right to be treated in accordance with law. This guarantees, which has been often described as embodying the right of law does not operate merely against the instrumentalities of the state. Article 5 stipulates obedience to the law and the Constitution as the

<sup>38</sup> 2004 SBLR (Sindh) 433

*inviolable obligations of every citizen. It would indeed be anomalous to suggest that a victim of illegal action has to go without redress because sub-constitutional legislation does not lay down the mode for enforcing his rights. For this reasons too, we are persuaded to held that the view that the provisions of Section 42 of Specific Relief Act are not exhaustive seems to be preferable.*

Each of these decisions have held that the provisions of Section 42 of the SRA, 1877 are not exhaustive and it is open for a plaintiff to seek declaratory relief to challenge the vires of a law or to seek a declaration as to an illegal act committed by a public officer in excess of their jurisdiction and once such a declaration is given, needless to say, orders granting injunctive relief to restrain such an act could be issued by a Court in its Original Civil Jurisdiction. The other decisions relied on by Mr. Rehman Aziz Malik in this regard are apparently premised on each of these decisions.

29. In the subject suit, the Plaintiff is the neighbour of the plot owned and/or being developed by the Defendants No. 9 to 11 and hence would, when the decisions mentioned above are read together, have the requisite locus standi to maintain the Subject Suit so as to impugn the illegalities, alleged by him, to have been committed by various public officials in the alteration of the town planning scheme on the Suit Property as well as in respect of the construction of the Suit Property. The Plaintiff therefore has the requisite locus standi to maintain this Suit.

**(ii) Who is the Statutory Authority to regulate Town Planning in Karachi?**

30. The next issue that needs to be considered is as to which statutory body was, on **22 August 2017**, the relevant authority to sanction the conversion of the Suit Property from residential to commercial. Such regulatory powers are critical in the administration of local government in a city and are therefore politically and economically divisive as balancing the effective use of economic resources, such as land, against the health, security and well-being of the citizens of an area, is and will always remain a challenge. After considering the various laws and regulations, most of which tend to overlap in terms of subject matter jurisdiction, it seemed necessary to contextualise the statutes, regulations and authorities that have had the power to regulate town planning and building control in the

Province of Sindh<sup>39</sup> so as to understand who has and had has the requisite jurisdiction at the relevant time to amend the town planning scheme and to regulate building control in Karachi.

(a) **History of Town Planning in the Province of Sindh.**

31. Town Planning in Province of Sindh is not new, the Indus Valley Civilization was one of the first to boast organised settlements, which included a planned lay out of cities, effective sewage systems and security for its residents. In terms of town planning and building control relating to Karachi, after the annexation of the Province of Sindh by the British, the first form of local government that was established in Karachi were precursors to Cantonments which administered lands controlled by the military and which continue to subsist today under the Cantonments Act, 1924 and which inter alia regulate town planning and building control in those areas. In 1846, however, a conservancy board was established to control the spread of cholera in the city of Karachi. This board, primarily because of the efforts of Sir Henry Bartle Frere, metamorphosed into a Municipal Commission in 1852, and a Municipal Committee the following year. The Municipal Committee fought many battles for the administrative control of and ownership of land in the city and which eventually was resolved when Sir Henry Bartle Frere, became Governor of the Province of Bombay and allowed the ownership of land in Karachi to be first jointly held by the Province of Bombay and the Municipal Committee and eventually independently by the Municipal Committee.<sup>40</sup> This dichotomy of ownership of land and the “settlement” that was reached was influenced primarily by two factors i.e., the ability to earn revenue against the ability to properly administer land and which on account of competition as between the Province of Sindh and Municipality for such revenue, continues to impact the development of the city of Karachi.<sup>41</sup>

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<sup>39</sup> A similar summary, upto the year 1982, was undertaken by Saleem Akhtar, J, in the decision reported as **Muhammad Munir vs. Ahmad Ally Memon and 2 others** PLD 1982 KHI 425 at pgs. 431-433

<sup>40</sup> See the Preamble to the Rules for the Management and Disposal of Waste Lands within Municipal Limits of Karachi available at pgs 480 to 500 of the **Karachi Municipal Corporation Rule Book 1947**, 1<sup>st</sup> Revised Edition, Excelsior Electric Printing Works, Karachi; by virtue of Resolution No. 6072 dated 3 November 1873 passed by the Governor of Bombay the beneficial interest in all “waste lands” within the Karachi Municipal District were granted to the Karachi Municipality

<sup>41</sup> See the **Management and Disposal of Waste Lands within the Municipal Limits of Karachi**, available at pgs 480 to 500 of the **Karachi Municipal Corporation Rule Book 1947**, 1<sup>st</sup> Revised Edition, Excelsior Electric Printing Works, Karachi

(b) **Common Law Regulation – Building Schemes**

32. At the time of the annexation of the Province of Sindh by the British there existed no “statutory” system of town planning. Rights in this regard came to be regulated under the common law through the enforcement of restrictive covenants that “run with the land” and which covenants restricted a person from using their property contrary to the terms of those covenants and which came to be known as a “building scheme.” The principle was first settled in the United Kingdom in the decision of **Tulk vs. Moxhay**<sup>42</sup> and the terms for enforcement of which were clarified in **Elliston vs. Reacher**<sup>43</sup> in the following terms:

“ I pass, therefore, to the consideration of the question whether the plaintiffs can enforce these restrictive covenants. In my judgment, in order to bring the principles of *Renals v. Cowlshaw and Spicer v. Martin* into operation it must be proved (1.) that both the plaintiffs and defendants derive title under a common vendor; (2.) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3.) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4.) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to ensure for the benefit of the other lots included in the general scheme whether or not they were also to ensure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with reference to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a \*385 vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point. It is also observable that the equity arising out of the establishment of the four points I have mentioned has been sometimes explained by the implication of mutual contracts between the various purchasers, and sometimes by the implication of a contract between each purchaser and the common vendor, that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each purchase is in equity an assign of the benefit of these covenants.”

<sup>42</sup> (1848) 41 ER 1143; See also a decision reported as **Re Louis and the Conveyancing Act** [1971] 1 NSWLR 164 wherein it was held that these rights are in rem and can be enforced by and against subsequent purchasers of the land subject to the Building Scheme.

<sup>43</sup> [1908] 2 Ch 374, See also **Renals v Cowlshaw** (1879)11 ChD 866; **Re Dolphin's Conveyance** [1970] Ch 654,; and **Whitgift vs. Socks** 2001 EWCA Civ 1732

There has been much debate in our courts as to whether such restrictive covenants are enforceable under Section 40 of the Transfer of Property Act, 1882 or whether they have to give way to the doctrine of privity of contract. While, two Single judges of this Court in the decisions reported as *Ardeshir Cowasjee vs. Muhammad Naqi Nawab*<sup>44</sup> and *Navid Hussain vs. City District Government Karachi (CDGK) through District Coordination Officer, Karachi*<sup>45</sup> was pleased to consider that such covenants could be enforced by a person irrelevant as to whether they were party to the lease containing the restrictive covenant, in *Moosa Bhajji v. Hashwani Sales and Services Ltd. and others*,<sup>46</sup> *R. G Sehwanji Co-operative Housing Society Ltd. v. Haji Ahmed and others*,<sup>47</sup>, *Muhammad Munir v Ahmad Ally Memon and 2 others*<sup>48</sup> and *Zaheer Ahmed Chaudhry vs. City District Government Karachi and others*<sup>49</sup> a contrary view was taken.

(c) *the Bombay District Municipal Act, 1901, the Bombay Municipal Borough Act, 1925, The Sindh Town Planning Act, 1915 and the City of Karachi Municipal Act, 1933*

33. In terms of the Urban Town Planning, post the Industrial Revolution, town planning, was first introduced into the Sub-Continent by Patrick Geddes against the back drop of various pandemics that had plagued parts of this region and which led to the display of an exhibition known as the Cities and Town Planning Exhibition in Madras, to promote town planning as means of improving public health in this region.<sup>50</sup> On the backdrop of this event, statutory Town Planning was introduced into Karachi through the Bombay Town Planning Act, 1915<sup>51</sup> and which formalised the manner in which a statutory “scheme” would be developed over an area to ensure that the future development of property within that scheme was rational and thereby balanced the economic interests of the owners of the land as against the health, security and well-being of the citizens of an area. Two “Town planning” Schemes were notified under the statute in Karachi, the First in the area known as “Mewa Shah” and the Second in the area known as “Garden Quarters.”<sup>52</sup>

<sup>44</sup> PLD 1993 Karachi 631;

<sup>45</sup> 2007 CLC 912, This decision was set aside on appeal by the Supreme Court of Pakistan in the decision reported as *Haji Amin vs. Navaid Hussain and others* 2008 SCMR 133

<sup>46</sup> PLD 1982 Kar.940

<sup>47</sup> PLD 1983 Kar.11

<sup>48</sup> PLD 1982 Kar.425

<sup>49</sup> 2006 YLR 2537

<sup>50</sup> Tyrwhitt, J (1947) *Partick Geddes in India*, London, Lund Humphries

<sup>51</sup> Mirams A. E. (1916) *What the Bombay Town Planning Act means to Karachi*.

<sup>52</sup> See *The Bombay Government Gazette* Part I dated 8 June 1926 at pg. 1260 in respect of the intention to make the Scheme for Garden and *The Bombay Government Gazette* Part I dated 7

34. The manner in which a town planning scheme was to be developed and regulated under the Sindh Town Planning Act, 1915 was clarified by A.E. Mirams the then City Surveyor of Bombay and wherein it was clarified as hereinunder:<sup>53</sup>

“ ... *Section 1 – The Town Planning Act was passed because it is desirable that land should be developed on orderly lines with the object of securing proper sanitary conditions, amenity and convenience to not only the people in the particular area but in the neighbourhood. ...*

*Section 3 is of enormous importance as it gives the Town Planning Authority statutory powers of the most far-reaching character. Armed with this section there should be little to hinder the authority from the preparation of a really pucca scheme.*

*The power of construction, alteration or removal of roads and bridges would naturally be expected as would the sanction to define the sites as open spaces, gardens, recreation grounds, schools and markets and other public buildings....*

*Clause (i) will appeal any all sanitarians. It allows of regulations for the provision of proper open spaces about buildings and also enables the local authority to make building bye-laws. It further allows of defined areas being set apart for special kinds of buildings.*

*Section 9, 10 and 14 clearly lay down the procedure to be followed by the local authority desirous of carrying out a scheme and indicate six simple but necessary steps.*

*First - By resolution to declare its intention to make a scheme for a specified area*

*Second - To send within 21 days a copy of the resolution for publication in the Bombay Government Gazette.*

*Third - To apply to the Governor-in-Council for sanction to the making of the scheme.*

*Fourth – Prepare a draft scheme after the notification of Governor-in-Council’s consent has been received. Attention is drawn to the clause which provides for consultation with the owners. This is symptomatic of good government and means taking the people into the municipal confidence.*

*It is an axiom of Town Planning that to be a success a town planning scheme must have the support of the people.*

*Fifth – Publish the draft scheme within one year of receipt of Governor-in-Council’s consent to the making of the scheme.*

*The Sixth and final step is the submission by the local authority of the draft scheme, with any objections the local authority may have received to it, to the Governor-in-Council with an application for its sanction.*

*Section 16 to 28 deal with finance... The effect of Section 16 is to give power to acquire the necessary lands for the scheme, at the cost of the scheme.*

*Section 17 is the “Increment” section and should be clearly understood. To ascertain the meaning of increment or increased value under this section, first consider the case of a plot of land in the final scheme after the whole thing has been carried out.*

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June 1928 at pg. 1174 in respect of the sanction of the Scheme for the area known as “Garden” and which today is known as “Garden East” and “Garden West”

<sup>53</sup> Mirams A.E. (1916) **What the Bombay Town Planning Act means to Karachi** at pg. 7- 9.

*Assume that it was worth originally Rs. 100 when the scheme was declared by the local authority. Now ascertain its value on the day the final scheme comes into operation, having regard to the potentialities and considering its possibilities as a building site and so fourth, say it is Rs. 500. The difference of Rs. 400 will be the increment. It should be noticed however it is only improvement of land value that is to be considered and no notice is to be taken of buildings.*

*Section 18 – The costs are to be met and contribution from owners who have been benefited. But a maximum of one half of the increment derived from the scheme by each owner is as much as he can be called upon to pay. That is to say if his increment was Rs.400 then he could not called upon to pay more that Rs. 200 towards the cost of scheme.*

*Section 19 - Makes it clear that if land is taken from a person he shall be credited with the value of it and if on the other hand an owner has given to him land of greater value that he originally possesses (without thinking about the benefits derived from the scheme) then he shall be charged in his account with the excess. That is only fair and reasonable.*

*It is perfectly clear that some provision must be made for settling differences of opinion and giving an impartial judgment on the several questions which arise of a Town Planning Scheme.*

*The Act provides in the first instances in section 29 after the draft scheme has been sanctioned for the appointment by the Governor-in-Council of an Arbitrator.*

*It is perfectly clear that it was the desire of the legislature to leave no stone unturned to provide an absolutely impartial authority which would at once appeal to the people especially in connection with the financial side of the question.*

*Section 33 provides for the constitution of a Tribunal of Arbitration which in the District of Karachi shall be as follows:-*

*President – Such additional Judicial Commissioner as may be appointed by the Judicial Commissioner*

*Two Assesors - one is the Arbitrator referred to above. The other would be an impartial person to be appointed by such Additional Judicial Commissioner (the President).*

*I do not think a more unbiased Tribunal could be set up. Mark you, there is nothing in the Act to prevent either the owners of the Municipality, or both jointly submitting suggestions to the District Judge, Chief Justice or the Judicial Commissioner, as the case may be as to the latter appointment. It would not be an impartial Tribunal if say the owners were to be allowed to appoint a representative. The tendency of such a representative would always be reduce the contribution payable to the owners as against the municipality, and similarly if the municipality were allowed to appoint representative he would have tendency to always argue in favour of the municipality as against the owners. That would defeat the whole object of impartiality. On the other hand under section 35 the owners can be represented before the Tribunal and do can the municipality if needs be, so that there be no fear that both sides would have an equal chance of stating their case.”*

35. The Sindh Town Planning Act, 1915 operated independently of the various other municipal statutes that existed at that time. Over time the Municipal Committee that had been established in 1852, came to exercise jurisdiction under the Bombay District Municipal Act, 1901, the Bombay Municipal Borough Act, 1925, each of which regulated the construction of Buildings and Town Planning and which were replaced, with relevance to

the City of Karachi, with the City of Karachi Municipal Act, 1933 and which remained in force up to the year 1960. It therefore seems that while town planning could be administered under either the Municipal Statutes of the Sindh Town Planning Act, 1915, the power to administratively control the construction of building vested under various municipal acts as subsisting from time to time.

**(d) The Karachi Improvement Trust Act, 1950 and the KDA Order, 1957**

36. The independence of Pakistan created various civic problems particularly for the city of Karachi. In terms of administration, it was found that there were numerous agencies in Karachi each of which administered land and each of which were operating within their administrative area independent one of the other. An attempt was made to resolve this administrative issue by the passing of the Karachi Improvement Trust Act, 1950 and which purported to bring all these administrative agencies in Karachi under one umbrella to better administer the city. Surprisingly, the Act did not seem to be effective and was eventually repealed by the KDA Order, 1957 and by which a statutory body known as the KDA was enacted. The KDA operated under a Director General and was empowered to develop “schemes,” that were very similar to “town planning schemes” that were developed under the Bombay Town Planning Act, 1915, and which were defined in that statute to be known as “Improvement Schemes.”

37. The KDA Order, 1957 constituted a Governing Body under Clause (1) of Article 4 and which conferred the powers of the “general direction and administration” of the KDA on that Governing Body. Clause (2) of Article 4 of the KDA Order, 1957 fettered the discretion of the Governing Body that was conferred under Clause (1) of Article 4 and which states that:

“ ... *The Governing Body in discharging its function shall act on sound principles of development, town planning and housing with special regard to the re-housing of affected persons and shall be guided on questions of policy by such directions as Provincial Government may from time to time to give.”*

Under Clause (3) of Article 11 of the of the KDA Order, 1957 a power was given to the KDA to frame a “scheme” for submission to the Provincial Government and who under Clause (4) of Article 11 had a right to sanction, reject or revise such “schemes”.

38. Under section 12 of the KDA Order, 1957 an area which was to be subject to a scheme was declared as a “controlled area” and which declaration permitted the KDA to generally give directions in that area. Such powers were generally issued to prevent the transfer of lands during the period when the improvement scheme was being developed and sanctioned, so as to not to allow persons, where a scheme that was being developed, to indulge in speculation of the land.

39. Chapter IV of the KDA Order, 1957 is entitled “Development, Improvement, Housing and others Schemes”. Under Section 28 it was envisaged that all schemes that came within the purview of the KDA Order, 1957 were to be schemes for a “public purpose.” The KDA, in terms of Clause (3) of Article 11 of the KDA Order, 1957, prepared for submission, what were defined in that statute as “Improvement Schemes,” for the sanction of the Provincial Government under Clause (4) of Article 11 of the KDA Order, 1957. A sub-classification of “Improvement Schemes” was made in Article 30 of the KDA Order, 1957 as hereinunder:

“ ... 30. *Types of Improvement Scheme.*

*An improvement scheme shall be one of the following kinds or a combination of any two or more of such kinds or of any special incidents thereof, namely :-*

- (a) *a general improvement scheme;*
- (b) *a rebuilding scheme*
- (c) *a re-housing scheme*
- (d) *a street scheme*
- (e) *a deferred street scheme*
- (f) *a development scheme*
- (g) *a housing accommodation scheme*
- (h) *a town-expansion scheme*
- (i) *a zonal plan scheme*
- (j) *a transport scheme*
- (k) *a drainage and dewage disposal scheme,*
- (l) *a scheme for the re-distribution of sites; and*
- (m) *health and welfare schemes”*

What the elements of the various “Improvement Schemes,” that had been identified in Article 30 of the KDA Order, 1957, were to constitute in some of the types of “Improvement Schemes,” were clarified in Articles 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the KDA Order, 1957. It would therefore seem that the Governing Body of the KDA had the power under Clause (3) of Article 4 of the KDA Order, 1957 to frame any one of the improvement schemes that had been identified in Article 30 of the Karachi Development Authority Order, 1958 and subject to the sanction of the Provincial Government under Clause (4) of Article 4 of the KDA Order, 1957 to thereafter develop and implement those “Improvement schemes”.

40. The manner in which an “Improvement Scheme” was to be framed was clarified under Article 42 of the KDA Order, 1957 and which required an “official representation” to be made by one of the statutory bodies listed therein or by the Provincial Government. When such an “official representation” is made, the KDA is statutorily obligated to consider the official representations in terms of Article 43 and Article 44 of the KDA Order, 1957 and make a decision to frame the scheme. If the “improvement scheme” is framed by the KDA a process of delimitation of the area comprised in the improvement scheme and wide publications of the improvement scheme in newspapers for three consecutive weeks are statutorily prescribed under Article 45 of the KDA Order, 1957. Thereafter a consultative process is to occur under Article 46 of the KDA Order, 1957 and whereafter the statutory bodies, that are listed therein, have a right to give their comments and suggestions on the “improvement scheme”. After the publication of the first notice of the improvement scheme, a notice of acquisition of land is to be issued to all persons who hold properties within the area comprised in the improvement scheme indicating an intention to acquire their land for the purposes of implementing the “improvement scheme.” The final right under Article 50 of the KDA Order, 1957, vesting with the Provincial Government to sanction the “Improvement Scheme,” the same would take effect when a notification to such an effect is published in the Official Gazette confirming such an approval and which in terms of clause (2) of Article 50 of the KDA Order, 1957 would be “*conclusive evidence that the scheme had been duly framed and sanctioned.*” A limited right to alter a scheme is given in Article 51 of the KDA Order, 1957 and whereby it is possible to alter a scheme **at any time prior to completion of the Scheme.**<sup>54</sup> No provision having been made in the KDA Order, 1957 to amend the scheme after it has been completed, could only mean that to amend a scheme that had been completed could only be achieved by a new scheme being made in the manner stipulated within the KDA Order, 1957.<sup>55</sup>

41. The KDA, thereafter under the provisions of the KDA Order, 1957 developed 45 schemes, a number of which were implemented and which continue to subsist today. The KDA, under its constituting statute, administered both town planning and building control within all of the schemes that had been developed by it. In addition, the KDA entered into various license agreements with cooperative societies and also developed master plans for some of those cooperative societies.

<sup>54</sup> See **Works Cooperative Housing Society and another vs. The Karachi Development Authority, Karachi** PLD 1969 Supreme Court 391

<sup>55</sup> Referred to in **Abdul Razzak vs. Karachi Building Control Authority and others** PLD 1994 SC 512 as an Urban Renewal.

(e) **Municipal Administration Ordinance, 1960, Sindh Peoples Local Government Ordinance, 1972 and Sindh Local Government Ordinance, 1979**

42. While, the KDA continued to be the principal town planning agency in the city of Karachi and which also regulated the construction of building within the areas planned and developed by it, the Karachi Municipal Corporation continued to subsist and regulated the ownership of land, town planning and building control within the areas owned by it. In terms of its jurisdiction, the City of Karachi Municipal Act, 1933 was repealed by the Municipal Administration Ordinance, 1960 and which was in turn repealed by the Sindh Peoples Local Government Ordinance, 1972 and which was also in turn repealed by the Sindh Local Government Ordinance, 1979. Each of these statutes regulated both Building Control and Town Planning with the territorial jurisdiction of the Karachi Municipal Corporation. However, as the Sindh Town Planning Act, 1915 was not specifically repealed by any of these statutes, it would seem that it would continue to regulate the two town planning schemes in areas that had been planned under that statute.

(f) **Ownership and Administration of the City of Karachi**

43. It would therefore seem that at this time the dichotomy of ownership and administrative control that had been limited to the Karachi Municipal Corporation and the Government of Bombay had multiplied and as a consequence of which 17 agencies owned and/or administered areas in Karachi and which were Cantonment Board Karachi, Cantonment Board Faisal, Cantonment Board Clifton, Cantonment Board Korangi Creek, Cantonment Board Malir, Cantonment Board Manora, Military Estates Officer, Karachi Circle, Karachi Municipal Corporation, KDA, Malir Development Authority, Lyari Development Authority, the Province of Sindh the Board of Revenue, Karachi Port Trust, Port Qasim Authority, the Ministry of Housing and Works, Federation of Pakistan, the Ministry of Railways, Federation of Pakistan and the Civil Aviation Authority,

(g) **The Sindh Building Control Ordinance, 1979**

44. It seems that with the intent to consolidate such administrative powers, on 3 March 1979, the Sindh Building Control Ordinance, 1979 (hereinafter referred to as the "SBCO, 1979") was promulgated and which gave absolute powers of Building Control to an Authority constituted under Section 4 of that Ordinance to regulate building control in the Province of Sindh and which, for the city of Karachi, initially came to be known as the

Karachi Building Control Authority and which is at present known as the SBCA. The power that was conferred on the SBCA, under the SBCO, 1979, was to regulate the construction of buildings and the sections of which had no mention of regulating town planning. The provisions of the SBCO, 1979 prima facie seemed to overlap with the building control functions that were conferred on the Karachi Municipal Corporation under the Sindh Peoples Local Government Ordinance, 1972 and the Sindh Local Government Ordinance, 1979 and on the KDA under the KDA Order, 1957 but which overlap was dealt with in Section 2 of the SBCO, 1979 which reads as hereinunder:

“ ... 2: - *Non-application of a law.*

*Nothing contained in any other law for the time being in force shall apply to any matter regulated by this Ordinance.”*

A literal reading of this provision, would lead to the conclusion that it would confer exclusive jurisdiction over the subject matter within its domain and negate the application of any law to any matter that is regulated by the SBCO, 1979.<sup>56</sup> In practice this “administrative land mine” was politically dealt with by notifying departments of the KMC and the KDA as the authority under Section 4 of the SBCO, 1979 thereby “pacifying” the administrative overlap as between the various statutes.

**(h) The Sindh Local Government Ordinance, 2001**

45. The situation remained consistent until the passing of the Sindh Local Government Ordinance, 2001 and which repealed the Sindh Local Government Ordinance, 1979 and which inter alia created a new municipal body that was known as the City District Government Karachi and which purported to give administrative control over the entire city of Karachi, sans Cantonments, to that statutory body including, but not limited to, areas that were owned and controlled by the Province of Sindh.

**(i) Sindh Development Authorities (Laws) Ordinance, 2002 – Repeal of the KDA Order, 1957**

46. As the Sindh Local Government Ordinance, 2001 did not repeal the KDA Order, 1957 a separate statute known as the Sindh Development Authorities (Laws) Ordinance, 2002 was promulgated and which inter alia repealed the KDA Order, 1957. This statute had one operative section and which read as hereinunder:

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<sup>56</sup> See the unreported decision in CP No. D-6115 of 2025 entitled **Saad Aqil vs. Province of Sindh and others**

“ 2. The laws specified in the Schedule below are hereby repealed.”

The Schedule to the Sindh Development Authorities (Laws) Ordinance, 2002 at Serial No. 1 listed the KDA Order, 1957 indicating that with effect from 1 July 2002, that statute stood repealed. Interestingly, the statute did not have any section whereby either the corpus of the KDA was to be transposed into the City District Government Karachi or for that matter contain a savings clause whereby the actions of the KDA prior to 1 July 2002 were saved. Notwithstanding the same, such actions as had occurred under the KDA Order, 1957. would as prescribed under the provisions Section 4 of the Sindh General Clauses Act, 1956 be saved and the land, at that time not being in any persons ownership would have as per Sub-Article (1) of Article 172 of the Constitution of the Islamic Republic of Pakistan, 1973 have vested in the Provincial Government.

***(j) Repeal of the Sindh Local Government Ordinance, 2001, the Reenactment of the Sindh Local Government Ordinance, 1979, the Sindh Peoples Local Government Act, 2013 and the Sindh Local Government Act, 2013, Amendments to the Sindh Building Control Authority, 1979 and the Repeal of the Sindh Town Planning Act, 1915***

47. The issue as to the repeal of the KDA Order, 1957 becomes academic on account of the fact that by the Sindh (Repeal of the Sindh Local Government, Ordinance, 2001 and Revival of the Sindh Local Government Ordinance, 1979) Act, 2011, the Sindh Local Government Ordinance, 2001 was repealed and the Sindh Local Government Ordinance, 1979 was revived as if it had never been repealed and by virtue of Section 4 of that statute all orders that were made and actions that were done under the Sindh Local Government Ordinance, 2001 were saved subject to the right of the Chief Minister or any authority or officer authorized by him to alter, repeal or amend such actions. Additionally, the KDA Order, 1957 that had been repealed by the Sindh Development Authorities (Laws) Ordinance, 2002 was revived by the Karachi Development Authority (Revival and Amending) Act, 2016 restoring the administration of both those entities to the position before the repeal of each of those statutes and hence the anomalies created was statutorily reversed.

48. The Sindh Local Government Ordinance, 1979, that had been re-enacted was repealed by the Sindh Peoples Local Government Act, 2012 and which in turn was repealed by the Sindh Local Government Act, 2013 and each of which statutes inter alia conferred the power on the

municipality to town plan. However, on 2 November 2013, by the promulgation of Sindh Local Government (Amendment) Act, 2013, the provisions of Entries 32 to 37 of the Second Schedule of the Sindh Local Government Act, 2013 that conferred the power to town plan on the Karachi Metropolitan Corporation were omitted from that statute. **It would therefore seem that from 2 November 2013 the Karachi Metropolitan Corporation did not have any powers under the provisions of the Sindh Local Government Act, 2013 to town plan and the SBCO, 1979 also did not have such powers under that enactment. Similarly, at that time the KDA Order, 1957, having been repealed. no power to town plan existed under that statute, leaving the sole statute that regulated town planning in the Province of Sindh being the Karachi Metropolitan Corporation under the provisions of the Sindh Town Planning Act, 1915.** This position was rectified on 19 March 2014 by the promulgations of the Sindh Building Control (Amendment) Act, 2014. This statute while tacitly recognizing that the power to town plan did not exist within the provisions of the SBCO, 1979 made amendments to the preamble, inserted Section 7B to 7E into the SBCO, 1979 to town plan and additionally gave powers in Sub-Section (2) of Section 21A of the SBCO, 1979 to the SBCA to frame regulations for town planning and after which a Master Plan Department of the SBCA was created. The fact that amendments had to be made to include town planning within the purview of the SBCO, 1979, to my mind, indicate that the power to town plan never existed in the SBCO, 1979 prior to that date and which were for the first time conferred on the SBCA by that statute.

**(k) The Current Status of the Laws regulating Town Planning and Building Control in Karachi**

49. The status of each of the statutes regulating town planning and building control as existing today in the Province of Sindh are as hereunder:

S No.	Name of statute	Date of Enactment/ Revival	Name of Repealing statute	Date of Repeal	Revived by Statute	Date of Revival
1.	Sindh District Municipal Act, 1901	1 April 1901	Sindh Municipal Administration Ordinance, 1960	11 April 1960		
2.	Sindh Town Planning Act, 1915	6 March 1915	The Sindh Building Control (Amendment) Act, 2014	7 February 2014		
3.	Sindh Municipal Borough Act, 1925	8 June 1926	Sindh Municipal Administration Ordinance, 1960	11 April 1960		
4.	The City of Karachi Municipal Act, 1933	14 October 1933	Section 186 to 192, 193 to 201, 203 and 204 to 211 of The City of Karachi	13 December 1957		

			Municipal Act, 1933 were repealed by the KDA Order, 1957  The remaining Sections were repealed by the Sindh Municipal Administration Ordinance, 1960	11 April 1960		
	Karachi Improvement Trust Act, 1950	6 May 1950	KDA Order, 1957	13 December 1957		
	KDA Order, 1957	13 December 1957	Sindh Development Authorities (Laws) Ordinance, 2002	1 July 2002	The Karachi Development Authority (Revival And Amending) Act, 2016	9 May 2016
	Sindh Municipal Administration Ordinance, 1960	11 April 1960	Sindh Peoples Local Government Ordinance, 1972	18 February 1972		
	Sindh Peoples Local Government Ordinance, 1972	18 February 1972	Sindh Local Government Ordinance, 1979			
	Sindh Building Control Ordinance, 1979	3 March 1979				
	Sindh Local Government Ordinance, 1979	25 July 1979	Sindh Local Government Ordinance, 2001	6 August 2001	Sindh (Repeal of the Sindh Local Government Ordinance, 2001 and Revival of the Sindh Local Government ordinance, 1979) Act, 2011	15 July 2011
	Sindh Local Government Ordinance, 1979	15 July 2011	Sindh Peoples Local Government Act, 2012	22 October 2012		
	Sindh Peoples Local Government Act, 2012	22 October 2012	Sindh Local Government Act, 2013	16 September 2013		
	Sindh Local Government Act, 2013	16 September 2013	Sindh Local Government (Amendment) Act, 2013 the provisions of Entries 32 to 37 of the Second Schedule	2 November 2013		

The Karachi Metropolitan Corporation statutorily having its right to regulate town planning and building control removed from it by the Provincial Assembly of Sindh, it is therefore apparent that at present there are only two laws that regulate town planning and building control in the Province of Sindh and which are the SBCO, 1979 and the KDA Order, 1957.

**(I) Decisions of the Supreme Court of Pakistan**

(a) **Master Plan Department of the SBCA**

50. Independent of Statute under the directions of the Supreme Court of Pakistan in CP NO. 815-K of 2016, the Master Plan Department of the SBCA that existed under the provisions of the SBCO, 1979 was, by a notification dated 18 February 2020 issued by the Secretary to the Government of Sindh, separated from the SBCA and established as a separate authority known as the “Sindh Master Plan Authority” and which seems to be administratively working without any statutory framework under the Local Government and Housing, Town Planning Department, Government of Sindh! It was at one time believed that this authority was operating under the provisions of a statute entitled “the Sindh Master Plan Authority Act, 2020 but which statute has been confirmed as having never been passed by the Provincial Assembly of Sindh.

51. It also seems that after the revival of the KDA, by a notification dated 18 October 2022, the Department of Planning and Urban Design of the KDA, that had been merged into the Sindh Master Plan Authority after the abolition of the KDA was demerged from that authority and remerged into the KDA.

(b) **Restraint on Commercialisation**

52. Mr. Rehman Aziz Malik has referred the Court to the decision of the Supreme Court of Pakistan reported as **Abdul Karim vs. Nasir Salim Baig**<sup>57</sup> and in which it has been clarified, as an interim measure, that all commercialisation of plots should be stopped.

53. An interpretation was cast on this decision by the SBCA who issued a Circular and in which it was stated hereinunder:

“ ...

CIRCULAR

NO.SBCA/PS-CE/2002/44: Pursuant to the letter received from Senior Director Master Plan Authority vide letter No. Sr.Dir/SMPA/2022/2290/L dated 07.06.2022, received through SBCA's portal, confirming that the case of commercialization of different plots and sizes on different roads of Karachi were finalized/approved as per the commercialization policy and as defined in KB&TPR-2002 (amended upto date) and all conversions were made after due process of law and approved before the order passed by the Honorable Supreme Court of Pakistan on 22.01.2019, in C.P. No. 815-K of 2016.

2. In view of above and in the light of legal advice rendered by the Advocate General Sindh, dated 29.11.2019, received through Local

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<sup>57</sup> 2020 SCMR 111

*Government and House Town Planning, Govt. of Sindh vide dated 09.12.2019 such cases may be processed as per the judgment, prior reviewing each case from Sindh Master Plan Authority before finalization.*

*Muhammad Ishaque Khuhro  
Director General, Chief Executive SBCA"*

That in terms of this circular, premised on the opinion of the Advocate General Sindh, the SBCA have taken the opinion that the order passed by the Supreme Court of Pakistan applied prospectively and therefore any conversion of properties that had been done prior to the order passed by the Supreme Court of Pakistan were not impacted and could be processed by it.

**(c) Article 140 A of the Constitution of the Islamic Republic of Pakistan, 1973**

54. Finally, a challenge was made before the Supreme Court of Pakistan regarding the manner in which the administrative powers of Municipalities had been statutorily taken over by the Province of Sindh. In the decision reported as **MQM (Pakistan) and others Vs. Pakistan through Secretary Cabinet Division, Government of Pakistan and others**<sup>58</sup> the Supreme Court of Pakistan while interpreting the provisions of Article 140 A of the Constitution of the Islamic Republic of Pakistan, 1973 held that:

“ ... We tend to agree with the operative part of the judgment of this Court in *Imrana Tiwana's case* (supra) and thus, would dispose of this petition in the following terms:-

(i) Elected Local Government are presently not in existence in the Province of Sindh. The Provincial Government through its agencies is performing their duties and functions. In the vacuum resulting from the absence of an elected Local Government in Sindh, the initiation, approval and execution of any of the duties and functions of the elected local government are allowed to be carried out by the provincial government and no new project following within the domain of the elected local government shall be undertaken by the provincial government or its agency without prior consultation and consent unless withheld without justified reasons, as the case may be of the elected local government in respect of such project.

(ii) Article 140A of the Constitution of Islamic Republic of Pakistan casts a mandatory obligation on the Provinces to establish Local Government possessing meaningful authority and responsibility in the political arena, administrative and financial matters. It is the duty of a province through the Provincial Government and the Provincial Assembly to purposefully empower Local Governments in the province so as to comply with their mandatory obligation under Article 140A of the Constitution.

(iii) The powers in relation to master plan and spatial planning which historically belongs to the elected local government have been superimposed with similar functions vesting in the provincial laws. To the extent of conflict in the exercise of their respective powers and functions by the elected local government and the statutory authorities or on account of legal provisions having overriding effect, Article 140A

<sup>58</sup> PLD 2022 Supreme Court 439

of the Constitution confers primacy upon the authority vesting in an elected local government over the powers conferred by law on the provincial government or agency thereof. Notwithstanding the above, the provincial government in any case is "under a duty to establish harmonious working relationship with an elected local government" wherein respect is accorded to the views and decisions of the latter.

(iv) Thus, the laws made by the provincial government i.e. the Sindh Building Control Ordinance, 1979, KDA Order No.5 of 1957, Malir Development Authority Act, 1993, Liyari Development Authority Act, 1993, Karachi Water and Sewerage Board Act, 1996, Hyderabad Development Authority Act, 1976, Sehwan Development Authority Act, 1993, Larkana Development Authority Act, 1994, any dispensation pertaining to the Board of Revenue or the Master Plan Department or any other Development Authority in the province of Sindh and the Sindh Mass Transit Authority Act, 2014, the Sindh Food Authority Act, 2016, the Sindh Environmental Protection Agency Act, 2014, purporting to override and conflicting action taken by an elected local government are held to be against the scheme of the Constitution and the provincial government is directed to bring all those laws in accord with the mandate of Article 140A of the Constitution.

(v) The Government of Sindh shall ensure that all local governments in the province of Sindh do get their share in the divisible pool of funds by implementing the Provincial Financial Commission Award and also to ensure that no arrears in this regard are accumulated and if, there are arrears, the same are released.

(vi) Sections 74 and 75(1) of the Act of 2013 are against the principle enshrined in the Objectives Resolution and the fundamental rights enacted in Articles 9, 14 and 25 of the Constitution and are also contrary to and in direct conflict with Article 140A of the Constitution and thus, declared ultra vires and struck down.

**It would seem that the Supreme Court of Pakistan while interpreting Article 140A of the Constitution of the Islamic Republic of Pakistan, 1973 has clarified that the jurisdiction to perform certain functions are and always will fall with the administrative domain of the local government and which functions cannot even be statutorily taken away from Municipalities. It would therefore seem that the current jurisdiction that is exercised by each of the departments of the Government of Sindh, inter alia in respect of town planning and building control, is as per the decision of the Supreme Court of Pakistan being in MQM (Pakistan) and others vs. Pakistan through Secretary Cabinet Division, Government of Pakistan and others<sup>59</sup> being done in violation of Article 140 A of the Constitution of the Islamic Republic of Pakistan, 1973 and which powers are to be devolved to the Karachi Metropolitan Corporation.**

**(iii) Which Rules/Regulations Govern Town Planning in Karachi?**

**(a) Overlap of Town Planning Functions between the Sindh Local Government Ordinance, 2001 and the Sindh Building Control Ordinance, 1979 and The Karachi Building Control and Town Planning Regulations, 1979**

<sup>59</sup> PLD 2022 Supreme Court 439

55. The situation is further complicated by various regulations that have been made from time to time under the provisions of the SBCO, 1979 and the Sindh Local Government Ordinance, 2001 each of which overlapped with the others jurisdiction. Initially, regulations regarding town planning and building control were drafted independently for each of the administrative agencies of Karachi. A need was however felt to amalgamate all these laws into one code and which were drafted and came to be known as the Karachi Building and Town Planning Regulations 1979. However, primarily on account of the fact that the SBCO, 1979 in Section 20 only contained a power to make Rules and did not contain a power to make Regulations, it was originally thought, at a time when Martial Law had been imposed in the Province of Sindh, to implement these Regulations through the Martial Law Administrator i.e., Governor of Sindh and on account of which the Notification that was originally drafted to bring the Karachi Building and Town Planning Regulations, 1979 into effect was originally indicated as to be brought into force as hereinunder:<sup>60</sup>

“ ... No...In exercise of the powers conferred by Article No. 142 (c) of the Constitution of the Islamic Republic of Pakistan, 1973 read with part 1, item (37) of the Federal Legislative List, the Governor of Sind is pleased to make the following. Regulations for the whole Karachi Division...”

However, instead of exercising jurisdiction as aforesaid through the Sindh Building (Amendment) Ordinance No. III of 1982 dated 6th March 1982, Section 21 of the SBCO, 1979 was inserted into the SBCO, 1979 and which read as hereinunder:

“ ... **21-A. Regulations.**

(1) The Authority, may frame Regulations not inconsistent with the provisions of this Ordinance and the rules made thereunder, for carrying out the purposes of this Ordinance.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for

(a) The recruitment, tenure of office, terms and conditions of service of the officers, advisers, experts, consultants and employees appointed by the Authority and disciplinary action against them;

(b) the manner of approval, grant of no objection certificates to builders or developers and rates of fees therefore;

(c) the manner of grant of occupancy certificate and fees therefore;

(d) the manner of attestation of documents or information;

<sup>60</sup> See Multiline Associates vs. Ardeshir Cowasjee and others 1995 SCMR 362 at paragraph 31 and 32.

- (e) *the manner of preparation, supervision' and submission building plans;*
  - (f) *the qualifications, manner of grant and terms and conditions of a fees for licences to architects, building designers, inspecting engineers, inspecting architects, building supervisors, structural engineers, town planners and regulation of their functions and remuneration;*
  - (g) *the manner of grant and terms and conditions of licence builders or developers and fees for such licences;*
  - (h) *procedure for cancellation of transfer or sale;*
  - (i) *the details of the building or plot required to be mentioned in the advertisement for its sale by the builder or developer, as the case may be;*
  - (j) *rates of fees for supplying copies of any document of information*
  - (k) *terms and conditions of compounding of offences;*
  - (l) *rates of interest payable under this Ordinance.*
- (3) *The Karachi Building and Town Planning Regulations, 1979, in the case of the Authority of Karachi and the bye-laws of the council concerned in other cases, duly published shall until the regulations are framed under the section, be deemed to be the regulations, not framed; provided that they are not inconsistent with the provisions of this Ordinance and the rules framed thereunder."*

While Sub-Section (1) of Section 21 A of the SBCO, 1979 conferred the power on the "authority" to make regulations not inconsistent with the provisions of the SBCO, 1979 and Sub-Section (2) of Section 21 A of the SBCO, 1979 determined what was to be the scope of such regulations, Sub-Section (3) of Section 21A of the SBCO, 1979 is a deeming clause which stated that the Karachi Building & Town Planning Regulations, 1979 were to be deemed to be regulations for the city of Karachi **until regulations were framed under Sub-Section (1) of Section 21 A of the SBCO, 1979.** In respect of all other districts of Sindh, bye-laws of councils that regulated construction, which had been notified under the provisions of the Sindh Local Government Ordinance, 1979, were to be deemed to be the Regulations for those areas. On account of the manner in which they were brought into force there was some dispute as to the validity of the Karachi Building and Town Planning Regulations, 1979 and which was resolved by the Supreme Court of Pakistan in **Multiline Associates vs. Ardeshir Cowasjee and others**<sup>61</sup> and in which it was held as hereinunder:

" ... 34. In section 21-A(3) of the Sindh Buildings Control Ordinance, 1979, as stated above, the words "to be deemed to be Regulations" have been used in the circumstances mentioned above, which clearly show that Karachi Building and Town Planning Regulations, 1979 were in

<sup>61</sup> 1995 SCMR 362 at Paragraph 33 to Paragraph 35; See also **Excell Builders vs. Ardeshir Cowasjee** 1999 SCMR 2089

*existence and already available, and were to be acted upon until fresh regulations were framed as provided under section 21-A(1) of the said Ordinance. Therefore, words "to be deemed" have not been used to connote something which is imaginary and non-existent but refers to specific regulations which were in existence and comprehensive. Even if they are not published in the Gazette under this Ordinance or under any other previous law, then also as draft regulations they have complete statutory sanction conferred upon them by section 21-A(3) by naming them specifically. Hence, they can be construed and acted upon as regulations for the purpose of this Ordinance until fresh regulations are made provided these Regulations as such are not inconsistent with the provisions of this Ordinance and rules framed thereunder. In peculiar circumstances of this case and reasons stated above, we are of the view that in this case deeming clause cannot be equated with legal fiction supporting imagination of state of affairs which did not exist."*

**(b) "Inconsistent" with the provisions of the Sindh Building Control Ordinance, 1979**

56. However, both the Karachi Building and Town Planning Regulations, 1979 and the bye-laws of the councils were subject to the proviso contained that Sub-Section (3) of Section 21 A of the SBCO, 1979 and which clarified that the deeming provision would not apply in the event that the Karachi Building and Town Planning Regulations, 1979 and the bye-laws of the councils **were inconsistent** with the provisions of the SBCO, 1979 and no interpretation was given in either of those judgements as to whether or not any part of the Karachi Building and Town Planning Regulations, 1979 were inconsistent with the provisions of the SBCO, 1979.

57. The expression "inconsistent" in such a context has come to be defined by the Supreme Court of Pakistan in the decision reported as **Chittaranjan Cotton Mills Ltd vs. Staff Union**<sup>62</sup> and in which it was held that:

" ... *Inconsistency involves incompatibility in substance and in spirit, and not merely in form. As defined in Black's Law Dictionary, "inconsistent" means, inter alia, "mutually repugnant . . . . . so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other".*

*In an English case reported as In re : An Arbitration between John Knight and Tabernacle Permanent Building Society ((1891) 60 LJOB 633), Fry L. J. observed while interpreting the words "inconsistent with the Act", that inconsistency would result if the obligations imposed by the subsequent Act "would be so at variance with the machinery and procedure indicated by the previous Act that if that obligation were added, the machinery of the previous Act would not work".*

Similarly, in the decision reported as **Province of West Pakistan and Another vs. Mahboob Ali and Another**<sup>63</sup>

<sup>62</sup> PLD 1971 Supreme Court 197

<sup>63</sup> PLD 1976 Supreme Court 483

“ ... As respects rule 2(h) it has already been pointed out that it merely enlarged the definition of Local Council in Article 2(24) and that too for the purpose of the 1963 Rules. The question therefore is whether it is correct to say that rule 2(h) is repugnant or inconsistent to Article 2(24) and should therefore be condemned as *ultra vires*. According to the Oxford Dictionary the word "repugnant" means "contrary or contradictory to, inconsistent or incompatible with, divergent from, standing against something else." In *Union SS Co. of New Zealand v. The Commonwealth* ((1925) 36 C L R 130) it was observed that no doubt the word repugnant is often used loosely or rhetorically but in considering the Acts of parliament the strict meaning should *prima facie* be applied. According to *Corpus Juris Secundum* Vol. 42 P. 541 the word "inconsistent" is of broad signification implying contradiction, qualities which cannot co-exist, not merely a lack of uniformity in details; and judicially defined as meaning contradictory inharmonious, logically incompatible; contrary the one to the other, so that both cannot stand; mutually repugnant or contradictory. Things are said to be inconsistent when they are contrary the one to the other, or, so that one infers the negation, destruction, or falsity of the other; or the acceptance or establishment of the one implies the abrogation or abandonment of the other, as in speaking of 'inconsistent defenses?', or the repeal by a statute of all laws inconsistent herewith.”

The decisions of the Supreme Court of Pakistan suggest that when interpreting such an expression in the context of Sub-Section (3) of Section 21A of the SBCO, 1979 to find “inconsistency” one has to make a comparison as between those two instruments to see whether the Karachi Building and Town Planning Regulations, 1979 in any manner contradict the provisions of the SBCO, 1979. As there were no powers of town planning that existed in the originally promulgated SBCO, 1979 hence a comparison is not possible and therefore it would not be possible for one to “*infer[s] the negation, destruction, or falsity of the other; or the acceptance or establishment of the one implies the abrogation or abandonment of the other*”. The same rationale could also be applied while interpreting the provisions of Sub-Section (1) of Section 21A of the SBCO, 1979 in respect of the interpretation of the expression “inconsistent” as used therein in the context of the provisions of any regulations that were framed under that Section i.e., the KB&TPR, 2002.

**(c) Change of Land use of City District Government Karachi Bye-Laws, 2003 and the KB&TPR, 2002**

58. That issue being settled, a further issue seems to have arisen in 2003, when the City District Government, Karachi notified bye-laws for town planning known as the Change of Land use of City District Government Karachi Bye-Laws, 2003 which were notified under Section 192 of the Sindh Local Government Ordinance, 2001 and which gave the authority to change the land use of properties in the city of Karachi to the City District Government. On this account, a question arose before this court as to which authority had jurisdiction to town plan on the basis that as the SBCO, 1979 did not have the power to town plan as to whether delegated legislation in the form of the KB&TPR, 2002 could be framed

beyond the purview of that statute<sup>64</sup> or whether that was in the sole domain of the City District Government Karachi under the provisions of the Sindh Local Government Ordinance, 2001. This question, which is independent of the issue of inconsistency that has been discussed hereinabove, was decided by a Division Bench of this Court in the decision reported as **Zaheer Ahmed Chaudhry and others vs. City District Government Karachi and others**<sup>65</sup> and in which where a challenge was made to the provisions of the town planning provisions contained in the KB&TPR, 2002, that were notified under Sub-Section (1) of Section 21 A of the SBCO, 1979 and in which it was held that:

“ ... Now we take up contention raised by the learned Advocates for the petitioners that the Karachi Building and Town Planning Regulations, 2002 as well as its predecessor Karachi Building and Town Planning Regulations, 1979 are beyond the scope of Sindh Buildings Control Ordinance 1979 and are therefore ultra vires, having no legal effect. This contention is based on the premise that the Sindh Buildings Control Ordinance, 1979 was promulgated to regulate the planning, quality of construction and Building Controls. The matters pertaining to Building Control and Town Planning are entirely distinct and separate therefore the scope of Sindh Buildings Control Ordinance, 1979 is confined to the approval of Buildings Plans, demolition of the buildings, quality of the buildings, supervision of the construction of the buildings, matters pertaining to the safe and sound construction, structural design of any building, grant of license to architects, building designer, structural engineers, town planners builders and developers and the ancillary and incidental thereto and is not extended to the matters pertaining to the town planning and does not include the land use classification, density standards, Construction or roads and streets development plans, zoning regulations etc.

We have carefully considered the contentions raised by the learned Advocate for the petitioners and the learned Advocate for respondents who have submitted that the Honourable Supreme Court has already held that the Karachi Building and Town Planning Regulations, 1979 have the statutory force and the Karachi Building and Town Planning Regulations, 2002 have merely replaced the earlier Regulations and therefore no scope is left for this Court to arrive at any conclusion to the contrary. The contention raised by the learned Advocate for respondents are not without substance as we are bound by the decisions of the Honourable Supreme Court. In addition to the above contention we find that section 21 of the Sindh Buildings Control Ordinance, 1979 empowers the government to make rules for the purpose of giving effect to provisions of this Ordinance. Under section 21-A the Authority has been empowered to frame the Regulations not inconsistent with the provisions of the Ordinance and rules made there under section 18 the Government meaning thereby the Government of Sindh has been empowered to delegate any of the powers vested in it, to the Authority. The learned counsel for the petitioners have not contended that the Government of Sindh is not empowered to frame the Town Planning Regulations or the Provincial legislature of Sindh was not competent to enact subsection (3) of section 21-A of Sindh

<sup>64</sup> See **Province of East Pakistan vs. Nur Ahmad and another** PLD 1964 SC 451; **Khawaja Ahmad Hassan vs. Government of Punjab** 2005 SCMR 186; **Zarai Taraqiat Bank Limited and others vs. Said Rehman and others** 2013 SCMR 642; **Azam Wazir Khan vs. Messrs Industrial Development Bank of Pakistan and others** 2013 SCMR 678; **Muhammad Amin Muhammad Bashir Limited vs. Government of Pakistan through Secretary Ministry of Finance, Central Secretariat Islamabad and others** 2015 SCMR 630; **Mir Shabbir Ali Khan Bijrani and 3 others vs. Federation of Pakistan and others** PLD 2018 Sindh 603. **Messrs Asio African Co. (Pvt.) Ltd. and others vs. Federation of Pakistan** 2019 PTD 1368

<sup>65</sup> 2006 YLR 2537

*Buildings Control Ordinance, 1979 were given statutory recognition and had further made provision for framing of the Regulations. Notwithstanding the Sindh Buildings Control Ordinance, 1979 being a law predominantly dealing with the matters pertaining to the Building Control, the Provincial legislature has and always had the authority to enact laws pertaining to town planning. It may be a case of bad drafting by the draftsman but merely on account of inept drafting of legislation it shall not become a bad law. As the Provincial legislature had the authority to enact laws pertaining to the Town Planning, it could do it by enacting a separate statute in this behalf or through the delegated legislation by conferring power to frame the Regulations in this behalf on the authority under the Sindh Buildings Control Ordinance, 1979. The Provincial legislature could do it through amendment in any provincial law such as Sindh Town Planning Act, 1915. The Sindh Buildings Control Ordinance, 1979 or the Sindh Local Government Ordinance, 2001 or its predecessor law the Sindh Local Government Ordinance, 1979. So long the provincial legislature has the authority to enact laws pertaining to Town Planning no objection can be raised to the validity of law enacted under the authority of provincial legislature by making amendment in any of the provincial law. It is advisable that if a law is enacted particularly for dealing with the specific subject, the matters relating to such subject should be dealt with under a separate statute but if any matter or subject connected therewith, is dealt with by amendment in another special law it shall not become invalid, so long it is within the competence of the legislature under the Constitution. If something could be done in a particular manner but has been done in a manner which is not advisable, it shall not render the law, as invalid. Subsection (3) of section 21-A enacted by provincial legislature of Sindh, specifically speaks of Building Control and Town Planning and therefore if the authority has framed a composite regulation known as Karachi Building and Town Planning Regulations, 2002, then it would not become invalid merely because the Sindh Buildings Control Ordinance, 1979 deals predominantly with the matters pertaining to the Building Control. The Regulations have been framed in exercise of the powers conferred by section 21-A of the Sindh Buildings Control Ordinance, 1979 and admittedly subsection (3) of section 21-A specifically authorizes the authority under the Ordinance to frame the Building Control and Town Planning Regulation. For the purpose of validity and virus of delegated/subordinate legislation in the form of rules, regulations or notification it is sufficient if the particular section under which the recourse to delegated/subordinate legislation has been resorted to empowers to do so. We are therefore of the considered opinion that the Honourable Supreme Court while holding that the Karachi Building and Town Planning Regulations, 1979 has the statutory force must have kept this principle of law in view and consequently it is held that the Karachi Building and Town Planning Regulations, 1979 and the Karachi Building and Town Planning Regulations, 2002 which has replaced the earlier regulations have been framed competently in exercise of the authority under section 21-A(3) of the Sindh Buildings Control Ordinance, 1979 and is therefore intra virus, legal, valid and has statutory force."*

However, a different view was taken by another Division Bench of this Court in the decision reported as **Mst. Umatullah through Attorney vs. Province of Sindh through Secretary Ministry of Housing and Town Planning Karachi and 6 others**<sup>66</sup> and in which it was held as hereinunder:

" ... 53. From all the material produced by the petitioner and respondents it appears that sub-division, conversion of the residential plot into "CNG Station" has been carried out under the KB&TP Regulations 2002 and not under the "Change of Land Use and Master Planning Bye-Laws, 2003" framed under SLGO, 2001 which is the governing substantive

<sup>66</sup> PLD 2010 Karachi 236

*law relating to change in land use, which include sub-division and conversion of one category of plot into another. NOC by the TMA North-Nazimabad dated 18-12-2007 was issued as no objections were received by them. It may be observed that as per bye-laws 3-2 and 3-3 of the "Change of Land Use and Master Planning Bye-Laws-2003" on expiry of the period inviting objections the concerned Town Administration is required to hold public hearing, in which the concerned officer of the Master Plan, is also required to attend the hearing along with the objections received, which exercise admittedly was not carried out. In short "Change of Land Use and Master Planning Bye-Laws 2003" were neither invoked nor at all adhered to. There is nothing on record to show that the Committee constituted under Bye Law 9 ibid has approved any change in master plan of the area, change of land use, which in turn is required to be placed and approved by the District Council.*

*54. In view of the foregoing discussion regulations contained in Chapter 18 of the KB&TP Regulations, 2002, not being substantive law regulating land use plan, classification and reclassification of land. It is only Zila (District Council) in terms of Section 40 of the Sindh Local Government Ordinance, 2001 competent to approve master plans, zoning, land use plan, including classification and reclassification of land, environment control, urban design, urban renewal and ecological balance. Therefore, Chapter 18 of the KB&TP Regulations, 2002 cannot be invoked for sub-division, amalgamation and or for change of land use, therefore, use of such power or the procedure provided therein travels beyond the scope and ambit of Sindh Buildings Control Ordinance, 1979 as conferred under Section 21-A of the SBCO, 1979."*

To my mind there can be no question that the decisions are in conflict with each other. The decision in **Zaheer Ahmed Chaudhry and others vs. City District Government Karachi and others**<sup>67</sup> had specifically upheld the power of the SBCA to town plan under the provisions of the SBCO, 1979 and through the KB&TPR, 2002 while the decision in **Mst. Umatullah through Attorney vs. Province of Sindh through Secretary Ministry of Housing and Town Planning Karachi and 6 others**<sup>68</sup> specifically holds that Chapter 18 of the KB&TPR, 2002 which relates to Land Usage was "beyond the scope and ambit of Sindh Buildings Control Ordinance, 1979" and which power had to be regulated by the Change of Land Use of City District Government Karachi Bye-Laws, 2003 made under the provisions of the Sindh Local Government Ordinance, 2001.

59. I am aware that the issue regarding the conflict as between these two judgements is pending adjudication before a Full Bench of this Court in CP No. D-274 of 2005 and which issue may well have some relevance with regard to change of land use of properties during the period when both the KB&TPR, 2002 and the Change of Land Use of City District Government Karachi Bye-Laws, 2003 were both in force. To my mind, the question before the Full Bench may now have to also be considered in the context of the various amendments made to Entries 32 to 37 of the Second Schedule of the Sindh Local Government Act, 2013 removing town planning

<sup>67</sup> 2006 YLR 2537

<sup>68</sup> PLD 2010 Karachi 236

from the purview of that statute and the amendments made to the SBCO, 1979 inserting the power to town plan into that statute thereby rendering the Change of Land use of City District Government Karachi Bye-Laws, 2003 as redundant without any savings clause.

60. **Independent of those questions,** it would also have to be considered as to what powers as to town planning have been conferred on the SBCA under the SBCO, 1979 and whether the various town planning powers that are conferred on the SBCA, through the KB&TPR, 2002 would go beyond the scope of those powers or not, especially in the context as to whether the various resolutions that have been passed from time to time under various enactments, declaring various plots on roads in Karachi amenable for conversion from residential to commercial, can be ratified under those regulations? Additionally, a question would also arise as to whether after the revival of the KDA Order, 1957 areas that had been planned by the KDA would be regulated by the provisions of the KDA Order, 1957 or as to whether it could be regulated by the SBCO, 1979 and the Karachi Building and Town Planning Regulations 2002? On account of the fact that the commercialization of the Suit Property was approved on 22 August 2017 by the Master Plan Department of the SBCA and which was given effect to by the KDA on 13 November 2017, each of these questions arise in these proceedings.

**(iv) Commercialisation of Plots in Karachi**

61. The only issue that is to be considered, as far as the conversion of the usage of the Suit Property from residential to commercial is concerned, is as to whether such conversion can be upheld keeping in mind that the conversion was carried out on 22 August 2017 by the Master Plan Department of the SBCA and which was given effect to by the KDA on 13 November 2017 and as to whether each of these authorities had the requisite jurisdiction on those dates under their enabling statutes to convert the usage of the Suit Property and as to whether this factor should be a basis for finding a prima facie case regarding the illegality of the conversion of the usage Suit Property .

62. The issue of the legality of such conversions has come before this Court on numerous occasions. However, each of these decisions need to be considered in the context of the law under which such a power to convert the usage of a property from residential to commercial on designated roads was conferred. In Karachi the designation of such roads, the usage of plots located on which can be converted from

residential to commercial, has been done under four separate notifications and Bye Laws and which are as hereinunder:

(a) **Sindh Government Gazette dated 13 April 1978**

63. The first notification that permitted the conversion of the usage of plots from residential to commercial on a designated road was a notification dated 13 April 1978 issued by the Government of Sindh and which the permitted usage of residential plots along "Drigh Road," now renamed as Shahrah e Faisal, from the Aisha Bawany School upto the Malir Bridge to being converted from residential to commercial.

(b) **Resolution 220 of 1 May 1980 passed by the Governing body of the KDA.**

64. The next notification that permitted the conversion of plots from residential to commercial on designated roads was issued by the Governing Body of the KDA and which notification read as hereinunder:

" ... RESOLUTION NO.220

11.5.1980

COMMERCIALIZATION OF ROAD OF WIDTH  
PLOT ARE BEING ISSUED AS COMMERCIAL  
IN K.D.A SCHEME AND COLONIES

(The Items Noes presented  
by Director (POUD)

(ITEM No.7)

RESOLUTION

NO.220

The question of commercialization of roads on which plots are being misused for commercial purpose in K.D.A. Scheme/Colonies was discussed in detail and the following were taken.

RESOLVED THAT APPROVAL be accorded for commercialisation of the following roads. Premises in different areas of the city on payment of extra charge at the rates given against each

NAZIMABAD

Rent Per Sq. Yd.

- |    |   |                      |
|----|---|----------------------|
| A) | Road (Left side) from 1 <sup>st</sup><br>Chowrangi 36/1/A/1 to Bridge upto<br>15/1/c/III Sub-Block C, Block III<br>Road between Rolex Cinema and Sub Block<br>Nos.GLF upto 'A' Road & upto Plot no.4. | Rs.300/- per sq. yd. |
| B) | From Plot No.20/5/0/1 to 9/1/F/1 Plot<br>No.506/8/4/1, Flat No.8/6/A/1 upto 'A'<br>Both side, Plot No.1/1/D/1 to 1/7/D/1  | Rs.300/- per sq. yd. |
| C) | Plot No.21/5/t/III upto Plot No.15/119/D/III<br>21/12/T/III to 15/19/F/III  | Rs.300/- per sq. yd. |

NORTH NAZIMABAD

150' WIDE Road Shahrah-e-Jehangir  
Upto Moghal Chock, Block 'N'  
Existing Marriage Halls be  
Commercialized (to be used for  
Marriage Hall) only.

Rs.300/- per sq. yd.

3) SCHEME NO.16 (F.B) AREAA) Shahrah-e-Pakistan from Karimabad  
to Chourangi Sohrab Goth (left side)B) Road between Block 12-13 (70' wide  
Up to Block 17-18C) Road between Block 19-20 (70' wide  
Up to bridge.

Rs.300/- per sq. yd.

D) Road between Blocks 13-17 (100' wide  
Up to bridge.E) Road between Block 2-3/7-8/9-14 upto  
Chowrangi Block-16.F) 40' wide road Block 2,8 and 9 from  
Plot Nos.1713 to 1532 Block No.15.

G) Plot No. D-47, Block-4

4. SCHEME NO.24(GULSHAN-E-IQBAL)  
MAIN ROAD (UNIVERSITY ROAD)

I) Existing Marriage Hall be regularized on

II) Main University Road (including adjacent plots  
yd.

Rs.300/- per sq.

On back row.

III) Circular Road and Rashid Minhas Road

5) SCHEME NO.19.Only Shahrah-Quaideen is approved for  
Commercialization subject to normal  
yd.

Rs.300/- per sq.

Restrictions.

6. SCHEME NO.5i) Commercialization of the plots on main road |  
Clifton be allowed |

Rs.400/- per sq. yd.

ii) Commercialization of Plot No.F-17/A and B |  
Block-7 adjacent to Existing Commercial area |7. DRIGH COLONY

A) Road (Block 2) between Plot No.C/40-C/241. |

B) Road (Block 2) between Plot No.C 480-C/871. |

C) Road (Block 3) between Plot No.C-420-C 781. |

D) Road (Block 3) between Plot No.C-8 10/c/1021 |

E) Road (Block 1) between Plot No.C/113-C/405(one side). |

Rs.100/- per sq. yd.

F) Road (Block 1) between Plot No.C-122-0/413. |

G) Road (Block 1) between Plot No.C-712-C/995. |

- H) Road (Block 4) between Plot No.C-200-c/201. |  
 I) Road (Block 4) between Plot No.C-210 -C/561. |  
 J) Road (Block 2) between Plot No.C-490-880 and 881-991 |

8. MALIR COLONY

Main Road between Sector 1& 3 | Rs.100/- per sq. yd.

9. MALIR EXTENSION

- A) Road from Sector No. 1 to the end of Block-F |  
 |  
 B) Road from end of Block F to Sector No.10. | Rs.100/- per sq. yd.  
 |  
 C) Road between Block-F Sector 10, Block-G |  
 And Sector No.11. |

10) KORANGI/LANDHI

- A) Road from Sector No.11 to the end of Block-F |  
 B) Road from end of Block11 to Sector No.10. |  
 | Rs 100 per sq. yd.  
 C) Road between Block 'F' Sector 10 Block-G |  
 And Sector No.11 |

11) AURANGI

- A) Road starting from the end of Sector 8&9  
 Chowrangi of 6 & 7 Sector  
 B) Road from 6 & 7 to the end of 7-A & 1-A.  
 C) 70' wide Road starting from Sector 9 to 12 Chourangi and 5 & 11 to Road '100'  
 wide

12 QASBA

Road between Sector 2 & 3 from junction with  
 100' wide to junction with 60' wide Road.

13. NORTH KARACHI

No commercialization be allowed except by  
 Special permission.

14) PECHS/KCHS UNION/OTHER SOCIETIES

Similar exercise be done in Society Area after  
 Conducting a field survey, Land Inspector be  
 Deputed for this purpose, commercialization be  
 Allowed where necessary including Khalid Bin  
 Waleed Road. The present arrangement should  
 Continue where commercialization is allowed  
 By Master Plan after inviting public objections  
 In individual cases. | Rs.300/- per sq. yd.

15 SHAHRAH-E-FAISAL (MAIN ROAD)

The rates for commercialization of plots/  
 Premises on main road Shahrah-e-Faisal be  
 Raised to Rs.300/- per sq. yd. | Rs.300/- per sq. yd.

FURTHER RESOLVED that the following points as mentioned in the Item  
Note be approved:-

- A) Notice of unauthorised use for commercialization  
Purpose may be issued by Director (L-II)
- B) The number of storeys, plot ratio and other Buildings Regulations will be on  
fixed by Master Plan Department for each area.
- C) Marriage Hall will be used only for Marriage Ceremony.
- D) Security Fee be charge No.20/- per sq. yds and composition on existing rate.
- E) Bank/Post office (Industrial plot) to dealt with  
Separately after inviting public objections.

(Action: Director (P &UD)Director

As is apparent under this notification residential plots along the abovementioned roads were permitted to being converted from residential to commercial. Various challenges have been made to conversions of plots under this resolution and which reported judgments include:

(i) **Ardeshir Cowasjee and 4 others vs. Clifton Cantonment Board and 20 others**<sup>69</sup>

A Petition was maintained challenging the conversion of the usage of Plot No. G-7, Block 9, Karachi Development Authority Scheme No. 5, Karachi from residential to commercial under Resolution 220 of 1 May 1980.

Dismissing the Petition, a Division Bench of this Court on a plea taken that the conversion should have been done in conformity with Clause (4) of Article 40 of the KDA Order, 1957, held that the provisions of Clause (4) of Article 40 of the KDA Order, 1957 were not mandatory and a public notice did not need to be issued prior to the conversion of the usage of the plot.

It was also held that presumption of legality had to be attributed to Resolution 220 of 1 May 1980 under Article 129 of the Qaunun e Shahdat Order, 1984 and on the basis of which the usage of the plot had been properly converted.

(ii) **Messrs Excell Builders and others vs. Ardeshir Cowasjee and others**<sup>70</sup>

<sup>69</sup> 1998 MLD 1818

<sup>70</sup> 1999 SCMR 2089

Plot No. 2, Frere Town Quarters No. 3, Karachi that was leased by the Karachi Municipal Corporation and the usage of which was converted by the KMC from residential to commercial. A plea was maintained that such conversion of a plot had to be made under Resolution 220 of the KDA dated 11 May 1980 by complying with Article 40 and 52 A of the KDA Order, 1957 and Schedule D of the Karachi Building and Town Planning Regulations, 1979.

Before this Court, a Division Bench had opined that it was open for the Karachi Municipal Corporation to convert the usage of the plot from residential to commercial and as a number of other plots in the area had already been converted by the Karachi Municipal Corporation, it was not necessary to follow the provisions of the KDA Order, 1957. This proposition was upheld by the Supreme Court of Pakistan.

It would therefore seem that in this decision the Supreme Court of Pakistan has held that it is the lessor's prerogative to convert the usage of a property from residential to commercial.

**(iii) Ali Asghar and 3 others vs. Creator Builders and 3 others<sup>71</sup>**

This related to the conversion of Plots No. 154-A, 154-B, 154-C, 154-D, Block 2, Pakistan Employees Cooperative Housing Society Limited, Karachi and the usage of which properties had been converted by the Karachi Development Authority, Karachi Building Control Authority and the Pakistan Employees Cooperative Housing Society Limited from residential to commercial

The Petitioners had raised a plea that if the property was to be converted from residential to commercial it could only be done by the Karachi Development Authority in terms of Clause (4) of Article 40 of the KDA Order, 1957 and the provisions of which, in terms of inviting for objections had not been complied with.

A Division Bench of this Court had inter alia dismissed the Petition, without considering the prescriptions of Clause (4) of Article 40 of the KDA Order, 1957, on the grounds that all approvals had been accorded and the Petition suffered from Laches

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<sup>71</sup> 2001 SCMR 279

The Supreme Court of Pakistan refused to grant Leave to Appeal holding that:

“ 7. *The Learned Counsel for the petitioners has failed to explain as to why in the instant case when the President of Pakistan was the lessor, permission for change in use should be obtained from the authority as provided under clause (4) of Article 40 of the K.D.A. Order, (5 of 1957). The covenants of lease in respect of the plots specifically mentioned that in case change in use of the plots consent was to , be obtained from the lessor, who lease the plots in favour of the respondents, would be competent to give such permission. The respondents have admittedly obtained NOC from the Government of Pakistan, Ministry of Housing and Works, therefore, in the instant case, it would not be said that the respondents have not obtained permission from the competent authority for the change in use of the plots in question.*”

While a decision of the Supreme Court of Pakistan refusing leave to appeal is not binding, the reasons for refusing leave to appeal follow the contention that it is the lessor of the property that has the right to convert the plot from residential to commercial.

**(iv) Irfan vs. Karachi Buildings Control Authority and 5 others**<sup>72</sup>

This related to conversion of Plot No. ST-H-1, Block 8 Karachi Development Authority Scheme No. 5, Karachi and which originally allotted for a clinic cum commercial use and the usage of which was subsequently converted to G.C. Category and which also impugned the conversion of the usage of Plot No. G-1. Block 8 Karachi Development Authority Scheme No. 5, Karachi and which was also converted to a GC Category for commercial use.

When it was argued before a Division Bench of this Court, that the process indicated in Article 40 of the KDA Order, 1957 would be applicable to such a conversion, a Division Bench of this Court held that:

“ *The decisions of this Court in various petitions including Muhammad Hanif v. Samina Sibtain C.P. No.D-1153 of 2003 and Captain Muhammad Aslam v. K.B.C.A. and others C.P. No.771 of 2004 are also relevant on the subject-matter in question. Additionally, the categorical statement of Mr. Umer Qureshi, learned counsel for Clifton Cantonment Board that the main Clifton Road has been declared commercial and the high-rise buildings have been allowed and that there was no restriction in law about the height of such buildings provided a set back to the case of petitioners. So also the statement of learned Additional Advocate-General on behalf of Government of Sindh that the entire area where the subject-matter falls is commercial and the cancelled approved plan has been restored militates against the petitioners case. ...*

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<sup>72</sup> 2005 CLC 694

28. As regards question of conversion of the questioned plots into commercial, this issue seems to be a closed chapter. In view of what has been stated in the instant petitions as also from the facts stated in *Excell Builders case 1999 SCMR 2089* which relate to Glass Towers, a building situated near the buildings/plots which are the subject-matter of these petitions, the commercialization of plots on main Clifton Road was permitted by way of a resolution passed by the governing body of Karachi Development Authority and the process of commercialization of residential plots commenced from the year 1980 and onwards, as a result whereof a large number of plots in the vicinity on main Clifton Road stood commercialized. As observed by the Division Bench of this Court in *Excell Builders case* and further reflected in para-21 of this judgment by now a number of multistoreyed structures have been raised on main Clifton Road. Even from para-18 of aforesaid judgment of Honourable Supreme Court it transpired that conversion of residential plot on main road into commercial plots were not found to be a questionable act. It was only observed that the Building Bye-Laws, Regulations etc. be not violated."

The Division Bench of this Court followed the earlier decisions of the Supreme Court of Pakistan reported as **Messrs. Excell Builders and others vs. Ardeshir Cowasjee and others**<sup>73</sup> and another decision of a Division Bench of this Court reported as **Muhammad Hanif vs. Sameena Sibtain**<sup>74</sup> and dismissed the Petitions.

(v) **Jawad Mir Muhammadi and others vs. Haroon Mirza and others.**<sup>75</sup>

This related to the conversion of Plot No. 141-A, Block 2, Pakistan Employees Cooperative Housing Society Limited, Karachi and in which it was held that:

" ... 13. From a perusal of the above quotations from the judgment in the case of *Ardeshir Cowasjee 1999 SCMR 2883* following inferences or deductions can be made:--

(i) that plot designated as an amenity plot and reserved for a public benefit/facility such as hospital, school, college, library, park, play ground, community centre, etc. the nature or user thereof can never be converted for residential or commercial use;

(ii) that a residential plot can be converted into a commercial or commercial-cum-residential in accordance with the provisions of KDA Order, Ordinance and the Regulations as there is no specific bar of such conversion in all the said laws/regulations;

(iii) that there is no impediment in the construction of high rise building on a plot after change/conversion of its user from residential to commercial or residential-cum-commercial provided that the provisions relating to the conversion of plot and commercialization contained in the laws/regulations referred to hereinabove are complied with and the concerned authorities undertake to provide new infra structure for provision of enhanced water supply, electricity, gas, provide better sewerage system, roads and ensure enjoyment of peaceful life to the residents of the locality;

<sup>73</sup> 1999 SCMR 2089

<sup>74</sup> 2007 YLR 3113

<sup>75</sup> PLD 2007 Supreme Court 472

(iv) that construction of a high rise building not strictly in accordance with the provisions of law and suffering from irregularities can be regularized by compounding the irregularities and payment of composite fee provided that there is no violation of the laws/regulations and further that the violations are of the nature which can be regularized ...

16. Before determination the fact of judgment of Ardeshir Cowasjee 1999 SCMR 2883 it will be appropriate to take into consideration the contention of Mr. Naemur Rehman that the entire process of the conversion of the plot in dispute from residential to commercial-cum-residential by respondent No.2 and the approval/consent to the said conversion by respondent No.14 is in contravention of the law, thus illegal and since the very conversion was illegal, no activity in the nature of construction of high rise building could be undertaken on the plot. Mr. Naeemur Rehman for his contention had placed reliance on Article 40(4)(5)&(6) and Article 52-A(2) and (3) of KDA Order great emphasis had been laid that question of conversion of the user of the plot and approval/consent thereof accorded by respondent No.14, it will be useful to reproduce the aforesaid Articles:

Article 40(4)(5)(6):

(4) If any person desires to use any land for any purpose other than that laid down in the Zonal Plan Scheme notified under clause (3), he may apply to the authority for permission to do so and the Authority may order a public hearing and give notice to all persons it deems affected.

(5) If the Authority refused permission to any person, such may within thirty days of the Authority's refusal, move the Provincial Government for a revision of the case.

(6) The decision of the Provincial Government on any such revision shall be final.

52-A. (1) -----

(2) The Authority or the Housing Society may at any time prior to utilization of any plot reserved for the purpose mentioned in subsection (1), apply to the Commissioner for conversion of such plot to any other purpose.

(3) The Commissioner shall, on receipt of an application under subsection (2), invite objections from the general public through a notice published in one English and vernacular leading local daily newspaper and the objections, if any, shall be submitted to the Commissioner within 30 days from the date of the publication of the notice.

17. From perusal of the above two Articles conversion of the user/nature of the plot can be ordered by the authority only after issuance of a public notice calling upon the residents of the locality to submit their objections to the said conversion and deciding the same after providing them opportunity of hearing. It is a mandatory requirement and order passed in violation of mandatory requirement would not be in consonance with law. However, from the material on record it stands established that after the residents of the area had come to know of the construction of the high rise building on the plot in question they had objected to the same before the relevant authorities and in pursuance of their agitation/objection, permission/approval for construction of the high rise building was cancelled. Thereafter a revised plan, which included 4th, 5th and 6th floors, was submitted and was approved. **As regard the contention that on the objections of the appellants and the residents, respondent No.14 did not grant permission/sanction to the conversion of the nature of the plot it is to be noted that respondent No.14 did not at any stage refuse the same. The matter remained under consideration and on 22-8-1994 respondent No.14 granted permission/sanction for conversion of the user of the disputed plot. From the above acts**

*it is to be inferred that though the provisions of Articles 40 and 52-A(2)&(3) relative to issuance of public notice were not strictly complied with but there was substantial compliance thereof as the appellants and other concerned had objected to the same and their views were considered. In the circumstances the orders of respondents 2 and 14 relating to conversion of the nature of the plot in dispute cannot be said to be contrary to law.*"

The above decision of the Supreme Court of Pakistan clarifies that even where there was a mandatory requirement to issue a public notice under Clause (4) of Article 40 of the KDA Order, 1957, the same, even if it is a mandatory requirement of the statute, is not required to be complied with in form and it is sufficient if it is complied with in substance and as long as the objectors had notice of the conversion and they had an opportunity to place their objections before the requisite forum.

(vi) **Muhammad Siddique and another vs. Federation of Pakistan through M/o Works and Housing and others**<sup>76</sup>

This related to the conversion of Plot No. 44-A, Block 1 Moulana Muhammad Ali Johar Memorial Cooperative Housing Society Limited, Karachi and in which conversion of a plot from residential to commercial was accorded by the lessor i.e., Ministry of Housing and Works Federation of Pakistan, the Karachi Development Authority and Moulana Muhammad Ali Johar Memorial Cooperative Housing Society Limited the Supreme Court of Pakistan while striking down the conversion of the property held that:

" ... We may observe that even when the conversion of a residential plot on the main roads into a commercial plot is warranted on account of a change in the situation, the legal requirements of public notice, inter alia, as envisaged by Article 40 of the K.D.A, Order (if applicable) and para- 3 of Schedule 3 to the Regulations is to be complied with. Secondly, simpliciter conversion of a residential plot into commercial does not warrant granting of permission for a high rise building having 1718 floors, but the Government or the Authority is under obligation to keep in view the quantum of water, electricity, gas, sewerage lines, streets and roads etc. available in the locality involved and efforts should be made to allow minimum floors so that the same may cause less inconvenience and discomfort to the inhabitants of the locality involved.

*This Court however, in the case of Jawad Mir Muhammadi (ibid) deduced some of the principles including the one that, "a residential plot can be converted into a commercial or commercial cum residential in accordance with the provisions of the KDA Order, Ordinance, and the Regulations s there is no specific bar of such conversion in all the said laws/regulations."*

The judgment of the Supreme Court of Pakistan prescribes that the conversion of the usage of a property from residential to

<sup>76</sup> 2013 SCMR 1665

commercial mandatorily required compliance of the provisions of Clause (4) of Article 40 of the KDA Order, 1957.

(c) **Notification dated 20 July 1998 passed by the Government of Sindh**

65. The next notification that permitted the conversion of the usage of plots from residential to commercial on designated roads was issued by the Province of Sindh and which notification read as hereinunder:

“ ... Karachi dated the 20 July 1998

NOTIFICATION

No.PS/DS(B)/S&GAD/4806/98. In supersession of previous notification No.PA(D)S&GAD/4496/98 dated 12th February, 1998, Government of Sindh are pleased to take the following measures to check the unbalanced expansion of Karachi

a) Regularization of high-rise buildings constructed in violation of the approved plan as without approval of the plan shall not be allowed under any circumstances.

b) Permission/regularization of additional floors in addition to the approved plan shall not be allowed as the Karachi Building and Town Planning Regulations do not provide for grant of additional floors over and above the zoning regulation Hence no relaxation shall be made under any circumstances whatsoever.

c) Building plan, commercial, industrial or residential, shall be allowed strictly according to the plot ratio standard prescribed under the rules and regulations of the Development Authority (and not through resolutions of Governing Body) and there shall be no relaxation made under any circumstances in respect of the plot ratio

d) Commercialization of plots/land shall only be allowed on six roads which were declared commercial by Government of Sindh in 1989 viz:-

- i) Shalrah-e-Pakistan (Teen Hatti Bridge to Scheme-16)
- ii) University Road (Scheme 24/36)
- iii) Nazimabad "A" Road (left side of Main Road towards Paposh Nagar and extension upto Lasbella Bridge on left side.
- iv) Rashid Minhas Road (Scheme No.16/36)
- v) Shalrah-e-Faisal.
- vi) Tariq Road and its extension upto Bahadurabad Commercial Area and Sindhi Muslim Society upto Shalrah-e-Faisal.

Commercialization of any plot/land other than the six roads mentioned above shall not be entertained under any circumstances.

e) -----

f) Amalgamation of plots of 600 sq. yds and above shall not be allowed in any circumstances.

h) For restoration and de-freezing of plots/a Committee comprising of following is constituted:

- a Secretary HTP Member
- b. Secretary Law. Member

- |     |   |                  |
|-----|---|------------------|
| c.  | <i>Director General of concerned Development Authority</i>  | <i>Member</i>    |
| d.  | <i>Member (LU) BOR<br/>(In case of revenue land only).</i>  | <i>Member</i>    |
| 10. | <i>Member or Director<br/>Land Management (as the case be)<br/>Of the concerned Development Authority</i> | <i>Secretary</i> |

*The recommendations of the said Committee shall be submitted to the Chief Minister through the Minister HIP or through \_\_\_\_ (in case of revenue land only) for \_\_\_\_\_*

*(i) Exchange of plots be banned in respect of the scheme of Overseas Pakistanis, encroached plots and such cases of hardship subject to final approval by the Chief Minister*

*The policy shall be revised after one year in the light of the prevailing capacity and category of City's civic and utility services delivery system by a Committee comprising the following:*

- |     |   |                         |
|-----|---|-------------------------|
| 1.  | <i>Minister for LG &amp; RDD</i>                  | <i>Convener</i>         |
| 2.  | <i>Minister for HIP</i>                           | <i>Member</i>           |
| 3.  | <i>Advisor to Chief Minister<br/>For Finance.</i> | <i>Member</i>           |
| 4.  | <i>Chief Secretary Sindh</i>                      | <i>Member</i>           |
| 5.  | <i>Secretary to Chief Minister</i>                | <i>Member</i>           |
| 6.  | <i>Secretary LG</i>                               | <i>Member</i>           |
| 7.  | <i>Secretary Law.</i>                             | <i>Member</i>           |
| 8.  | <i>Secretary HTP</i>                              | <i>Member/Secretary</i> |
| 9.  | <i>Commissioner Karachi Div.</i>                  | <i>Member</i>           |
| 10. | <i>Director General, KDA</i>                      |                         |

*The Committee shall submit its recommendations to the Chief Minister for consideration/approval.*

*3. Total ban on allotment of plots of any category as already imposed shall continue to be enforced.*

*4. In order to ensure proper parking facilities by commercial buildings and to avoid traffic congestion, the approval of plan of the commercial buildings will be allowed in three steps viz (1) upto plinth level, (ii) first floor level and (iii) final plan. If a violation of approved plan is detected or any stage no further approval shall be granted.*

*CHIEF SECRETARY, SINDH*

As is apparent under this notification residential plots along the abovementioned roads were permitted to being converted from residential

to commercial. Various decisions were made by this Court in respect of this resolution and which include:

(i) **Muhammad Hanif vs. Sameena Sibtain**<sup>77</sup>

This related to the conversion of the usage of Plot No. 172-P, Tariq Road, Block 2, Pakistan Employees Cooperative Housing Society Limited, Karachi. The conversion of the property was sanctioned by the Pakistan Employees Cooperative Housing Society Limited and the Karachi Municipal Corporation.

While considering who had the authority to convert the plot, a Division Bench of this Court stated that the provisions of Article 40 of the KDA Order, 1957 were to be considered. In terms thereof a Notification dated 20 July 1998 had been issued by the Government of Sindh and which had inter alia declared plots located on Tariq Road to be amenable to conversion and on the basis of which a Division Bench of this Court held that the provisions of Clause (3) of Article 40 of the KDA Order, 1957 had been complied with and upheld the conversion of the property.

(ii) **Aslam and others vs. Karachi Buildings Control Authority and 5 others**<sup>78</sup> also reported as **Sheikh Naeem Ahmed and others vs. Province of Sindh and others**<sup>79</sup>

Three Petitions were heard together and which related to conversion of plots located on Rashid Minhas Road and Shaheed e Millat Road the usage of the plots on which roads had also been declared as amenable to conversion on the premise of the Notification dated 20 July 1998.

The issue in these Petitions was not in respect of the conversion but as to the claim for the charges levied for the conversion of the plots and as to whether it could, on account of the repeal of the KDA Order, 1957, be levied by the City District Government Karachi under the Change of Land Use of City District Government Karachi Bye-Laws, 2003. Following the order passed in **Muhammad Hanif vs. Sameena Sibtain**<sup>80</sup> a Division Bench of this Court held that:

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<sup>77</sup> 2007 YLR 3113

<sup>78</sup> 2005 CLC 759

<sup>79</sup> 2006 CLC 1231

<sup>80</sup> 2007 YLR 3113

“ ... 10. With profound respect, we are not persuaded by the arguments of the learned counsel for the respondent No.4. The submissions are ex facie contrary to the language of section 6 of the General Clause Act. Once a vested right has accrued in favour of a party under a statute, which statute is subsequently repealed, such right cannot be disregarded. The amendment in Zonal Plan Scheme, by virtue of a Notification of the Provincial Government, would not bring any change on the repeal of the K.D.A. Order and the rights accrued thereunder to the owners having their properties located on six different roads which were declared commercial would remain intact and such roads and the properties on them would continue to have the status of commercial premises irrespective of the repeal of the K.D.A. Order.”

(iii) **Zainab Garments (Pvt.) Ltd. through Chief Executive and others vs. Federation of Pakistan through Secretary Ministry of Housing and Works, Islamabad and another**<sup>81</sup>

This related to the conversion of the usage of Plot No. 2 A, Molana Muhammad Ali Johar Cooperative Housing Society Limited, Karachi and Plot No. 19-A, Block 6, Pakistan Employees Cooperative Housing Society Limited, Karachi and as to whether a fee was payable for the conversion of usage of these properties when an application for conversion had been made prior to the Change of Land Use of City District Government Karachi Bye-Laws,.

A Division bench of this Court following the decisions in **Muhammad Hanif vs. Sameena Sibtain**,<sup>82</sup> **Aslam and others vs. Karachi Buildings Control Authority and 5 others**,<sup>83</sup> and **Sheikh Naeem Ahmed and others vs. Province of Sindh and others**<sup>84</sup> held that no fee was payable to the City District Government Karachi for such conversion.

(iv) **Karachi Development Authority through its Director General Civil Centre, Gulshan-e-Iqbal vs. Mst Hawa Bai and others – Civil Appeal No. 319 of 2006**

This Appeal was preferred by the City District Government Karachi as against the orders passed in **Aslam and others vs. Karachi Buildings Control Authority and 5 others**,<sup>85</sup> **Sheikh Naeem Ahmed and others vs. Province of Sindh and others**<sup>86</sup> and **Zainab Garments (Pvt.) Ltd. through Chief Executive and others vs. Federation of Pakistan through Secretary Ministry**

<sup>81</sup> PLD 2010 Karachi 374

<sup>82</sup> 2007 YLR 3113

<sup>83</sup> 2005 CLC 759

<sup>84</sup> 2006 CLC 1231

<sup>85</sup> 2005 CLC 759

<sup>86</sup> 2006 CLC 1231

**of Housing and Works, Islamabad and another**<sup>87</sup> and other unreported judgements on the same issue. Before the Supreme Court of Pakistan, the City District Government Karachi did not challenge the validity of the conversion of the usage of the plots but only claimed a right to a fee.

The Supreme Court while allowing the Appeal held that:

“ ... 2. Having gone through the documents on the record particularly the Change of Land Use and Master Planning Bye-Laws 2003 which are approved vide Resolution 383 dated 6.1.2004 by the appellant upon which reliance has been placed by the respondents, we are of the considered view that though the respondents can seek commercialisation of their respective properties, but not without payment of commercialization fee/charges. However the rate of commercialization fee/charges at a particular of time is undoubtedly a question that needs to be determined on a case to case basis which, as mentioned earlier, has not been so done by the learned High Court in the impugned judgments. ... In light whereof, these appeals are allowed to the extent that the matters are remanded to the learned High Court where the respondents' writ petitions shall be deemed to be pending before it which should determine the rate of commercialization fee in each case.

**(d) Conversions under the Change of Land Use City District Government Karachi Bye-Laws 2003**

66. Under these Bye-laws power was conferred by the City Council on a Committee constituted under Clause 9 of these Bye-Laws to declare plots that were located on at least a 100-foot-wide road as commercial were amenable to conversion from residential to commercial. These Bye-laws in Clause 10 purports to repeal all existing Bye-Laws or resolutions of and which reads as hereinafter:

” منسوخی

تبدیلی استعمال آراضی کے کالعدم ادارہ ترقیات کراچی، کالعدم بلدیہ عظمی کراچی، ملیر ڈیولپمنٹ پروجیکٹ، لیاری ڈیولپمنٹ پروجیکٹ، کراچی بلڈنگ کنٹرول اتھارٹی یا کسی بھی ادارے کے موجودہ نافذ ذیلی قوانین یا قرارداد میں جو ان ذیلی قوانین سے متصادم ہوں، منظوری کی تاریخ سے

” منسوخ سمجھے

جائینگے۔

and which translates into English as hereinafter:

“ ... 10. Repeal of Bye-laws

*Those existing bye-laws or resolutions of defunct KDA, defunct KM.C, Malir Development Project, Lyari Development Projects Karachi Building Control Authority (KBCA) or any authority which are contrary to these bye-laws shall be deemed repealed from the date of approval.”*

It would therefore seem that after that date, all the resolutions on the basis of which conversion of plots were earlier sanctioned were repealed. The City Council thereafter approved three separate “proposals” and on the basis of which plots abutting the following roads, some of which had previously been approved, were “re-approved” and other new roads were “approved for commercialisation” and which were as hereinunder:

“	...	<u>ROADS NAME</u>
		<i>Road 1... North Nazimabad 300 feet wide Shara-i-Shershah Soori. Board Office Chowrangi to Sakhi Hassan Chowrangi both sides (Block B to Block N) (Block A to Block J).</i>
		<i>Road 2... North Nazimabad Shara-i-Jehangir. Nazeer Chaman Plot ST-12, Block H to Clinic ST-2, Block-H opposite ST-1. Taimoria Library Block-L to Bagh-i-Mahabat Khan Plot ST-8. Block-L.</i>
		<i>Road 3... Khayaban-1-Iqbal Clifton Road Bridge to Do Talwar. Plot No.G-1 to ST-12 Park Opposite Columbus Hotel to G-8.</i>
		<i>Road 4 .. Khayaban-1-Jami. Plot No. ST-10 to ST-13 PB. Opposite ST-12 Parking to ST-13.</i>
		<i>Road 5..... Khalid Bin Waleed Road. Plot No. K-107 to 168 G Church (Both sides).</i>
		<i>Road 6.... Jamaluddin Afghani Road. T.V. Station to Plot No.1 (Area of both sides adjacent to Shaheed-i-Millat).</i>
		<i>Road 7.....Allama Iqbal Road. P.E.C.H.S Kashmir Road to Jheel Park (Both sides).</i>
		<i>Road 8..... Sir Syed Ahmed Road. Tariq Road to Khalid Bin Waleed Road (Both sides).</i>
		<i>Road 9..... Shaheed-i-Millat Road (P.E.C.H.S). Hyder Ali to Jail Chowrangi (Both sides).</i>
		<i>Road 10..... Chowdhry Khaleek-uz-Zaman Road Block 6 &amp; G. Askari Market to Choudhry Khaleeq-uz-Zaman Colony.</i>
		<i>Road 11..... Beach Avenue Road. Police Station Darakshan to Cassino Chowrangi.</i>

I am aware that some of the plots abutting roads on these areas came under the control of some Cantonments. It would therefore seem that, as per the decision of a Division Bench of this Court reported as **Zeeshan Buildings vs. Karachi Building Control Authority**<sup>88</sup> any matter relating to local governments, which must include the functions of town planning and building control, on account of the provisions of Article 142 of the Constitution of the Islamic Republic of Pakistan, 1973, cannot be legislated on by the Provincial Government or for that matter Local Governments and hence to the extent the jurisdiction that was exercised

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<sup>88</sup> 1992 MLD 2259

over such plots would have to be considered. However, as this issue has not been raised in these proceedings, they need not be considered by me.

67. Various challenges have been made to conversions of plots under these Bye-Laws and which have been decided by this court and which include:

(i) **Mrs. Farida vs. New Allied Electronics Industries (Pvt.) Ltd. and others;**<sup>89</sup>

This Petition impugned the conversion of Plot No. F-99, Khayaban e Roomi, Block 7, Karachi Development Authority Scheme No. 5, Karachi which had been made under the provisions of the Change of Land Use of City District Government Karachi Bye-Laws, 2003

A challenge was inter alia made as to whether the commercialization of the plot should have been made under the provisions of Regulation 18-5.1.1 of the KB&TPR, 2002 or under the provisions of the provisions of the Change of Land Use of City District Government Karachi Bye-Laws, 2003. A Division Bench of this Court held that:

“ ... After careful consideration of the above arguments of the learned counsel for the parties and the case-law we are inclined to hold that the contention of the learned counsel for the petitioners is devoid of merit because the notifications issued by the City District Government in official gazette of the Government of Sindh is a prima facie proof that the acts referred to in these notifications have been performed in accordance with the law, by-laws, and regulations as provided under Article 129(e) of the Qanun- e-Shahadat Order, 1984, until and unless some tangible evidence is brought on record by the party alleging contrary to the same. The case of Saghir Ahmed, supra is applicable in all fours. The language of the regulation 18.5.1.1 clearly shows that the conversion of the residential plot into commercial is permissible in accordance with the uniform commercialization policy so formulated and in this case conversion has been made in accordance with the commercialization policy of the City District Government and the other conditions of the regulation that the same should have been notified in the government gazette which has been done as admittedly by the petitioners, and no individual plot out side the policy has been considered for commercialization policy. In these circumstances, we are in agreement with the learned counsel for the respondent No.1 that in the instant petition this Court cannot interfere into the acts of the respondents with regard to the commercialization of the plot in question.”

(ii) **Nighat Jamal vs. Province of Sindh and others;**<sup>90</sup>

This Petition impugned the conversion of Plot No. 122, Block 3, Bahadur Yar Jang Cooperative Housing Society Limited, Karachi

<sup>89</sup> 2009 YLR 1896

<sup>90</sup> 2010 YLR 2624

Khayaban e Roomi, Block 7, under the provisions of the Change of Land Use of City District Government Karachi Bye-Laws, 2003.

A Division Bench of this Court after tracing the manner in which the authority to commercialise plots has evolved held that such a power vested with the City District Government Karachi under the provisions of the Sindh Local Government Ordinance, 2001 and relied on the judgment reported as **Mrs. Farida vs. New Allied Electronics Industries (Pvt.) Ltd. and others**<sup>91</sup> to hold that the provisions of the Change of Land Use of City District Government Karachi Bye-Laws, 2003 would regulate such conversion and that the process indicated in those Bye-laws including public objections would also have to be complied with.

(iii) **Salim Godil vs. Province of Sindh through Secretary and others**<sup>92</sup>

Two Petitions were filed in respect of the conversion of Plot No. F-96, Khayaban e Roomi, Block 7, Karachi Development Authority Scheme No. 5, Karachi.

A Division Bench of this Court held that the conversion, which had been granted by the City District Government Karachi could not be cancelled on the grounds that such commercialisation was a security risk but held that it was necessary to obtain an Environmental NOC from the Sindh Environmental Protection Agency under the provisions of the Pakistan Environmental Protection Act, 1997 read with the Pakistan Environmental Protection Agency Review of Initial Environmental Examination and Environmental Impact Assessment Regulations, 2000 before the plot could be converted from residential to commercial.

(iv) **Amber Alibhai and 6 others vs. Muhammad Ghulam Jan Muhammad and 10 others**<sup>93</sup>

This Petition impugned the conversion of Plot No. 161-A, Block 3, Pakistan Employees Cooperative Housing Society Limited, Karachi under the provisions of the Change of Land Use of City District Government Karachi Bye-Laws, 2003

A Division Bench of this Court reiterated a proposition that once a road had been “declared as commercia”, the status of individual plots on that road automatically stood converted. It was further stated that as per the decision of the Supreme Court of Pakistan in

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<sup>91</sup> 2009 YLR 1896

<sup>92</sup> 2014 CLD 222

<sup>93</sup> 2016 MLD 1208

**Jawad Mir Muhammadi and others vs. Haroon Mirza and others**<sup>94</sup> it was possible for the authority to convert individual plots from residential to commercial.

- (v) **Ardeshir Cowasjee and 7 others vs. Karachi Building Control Authority (KBCA) through Chief Controller of Buildings, Karachi and 3 others**,<sup>95</sup>

This Petition related to the conversion of Plot No. FL-10/5, Khayaban e Roomi, Karachi Development Authority Scheme No. 5, Karachi from its status as a “Flat Site” to Commercial that was made by the City District Government under the Change of Land Use of City District Government Karachi Bye-Laws, 2003

A Division Bench of this Court relying on the decision reported as **Irfan vs. Karachi Buildings Control Authority and 5 others**<sup>96</sup> stated that as it was within the jurisdictional competence of the City Council to convert the usage of plots on a road to be subject to being converted from residential to commercial.

- (vi) **Mst. Ummatullah through Attorney vs. Province of Sindh through Secretary Ministry of Housing and Town Planning, Karachi and 6 others**<sup>97</sup>

This Petition related to the use of Plot No. E-20, Block F, Scheme No. 2, North Nazimabad Karachi as a CNG Station and which was permitted by an amendment made to Regulation 18-12.2 of the KB&TPR, 2002 by permitting such usage on a residential plot.

A Division Bench of this Court held that it was not within the purview of the SBCO, 1979 to town plan and which came within the domain of the City District Government Karachi under the provisions of the Sindh Local Government Ordinance, 2001 and which rendered the approvals granted under the amendment made to Regulation 18-12.2 of the KB&TPR, 2002 as illegal.

- (vii) **Muhammad Anas Kapadia and 19 others vs. Mr. Farooq Haji Abdullah and 5 others**,<sup>98</sup>

This related to the conversion of Plot No.9, Shaheed e Millat Road Block 3, Modern Cooperative Housing Society, Karachi from

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<sup>94</sup> PLD 2007 Supreme Court 472

<sup>95</sup> PLD 2006 Karachi 63

<sup>96</sup> 2005 CLC 694

<sup>97</sup> PLD 2010 Karachi 236

<sup>98</sup> 2007 CLC 943

residential to commercial under the provisions of the Change of Land Use of City District Government Karachi Bye-Laws, 2003

On the hearing of an injunction application, a Learned Single Judge of this Court was inter alia pleased to allow the injunction on the ground that:

“ ... *The bye-laws framed by defendant No.2 do not provide for any approval from the lessor. Apparently the NOC issued by defendant No.2 is in violation of lease conditions and the defendant No.6 taking advantage of Bye-Laws, 2003 cannot violate the lease conditions.*”

It was therefore considered that when converting a plot from residential to commercial, obtaining permission from the lessor, which in this case was the Ministry of Housing and Works, Federation of Pakistan, was mandatory.

(viii) **Mrs. Zunaira Khan through Attorney vs. Federation of Pakistan through Secretary Ministry of Petroleum and Natural Resources and others**,<sup>99</sup>

This related to the conversion of the usage of Plot No.C-19, Shahrah e Noor Jehan Block R, North Nazimabad, Karachi from residential to commercial and its use as a CNG Station.

On the hearing of an injunction application, a Learned Single Judge of this Court, while dismissing the application, held that as the usage of plots on the road had been declared as amenable to conversion from residential to commercial, as such there was a presumption of legality attached to such actions and which presumption could not be unsettled at an interim stage.

(ix) **Haji Amin vs. Navaid Hussain and others**<sup>100</sup>

This related to the conversion of the usage of Plot 151A, located on the corner of Allama Iqbal Road and Khalid bin Waleed Road, Block 2, Pakistan Employees Cooperative Housing Society Limited, Karachi from residential to commercial .

The Supreme Court of Pakistan while dismissing the injunction application held that:

“ ... *Apart from aforesaid aspects of the case, in paragraph No.1 of the plaint, it has been stated that the impugned plot is a corner plot and is located at the junction of Allama Iqbal Road and Khalid Bin Waleed Road which roads have already been declared and*

<sup>99</sup> 2008 YLR 1701

<sup>100</sup> 2008 SCMR 133

approved by the City District Government Karachi/respondent No.7 as commercialized vide proposal No.2 published in the Sindh Government Gazette (Extraordinary) dated 12-2-2004; contention to the contrary put forth by the learned counsel for respondents Nos. 1 to 6 is devoid of substance for the reason that the Notification clearly speaks about the approval of the proposal No.2 in its opening sentence thus; for all intents and purposes it can hardly be said that the above said roads on their either sides and at their junction are not the commercial sites. The list of the buildings situated on both the sides available at page No.199, Part-III-A of the paper book shows existence of commercial buildings, which has not been disputed before us during arguments. In a case involving almost identical facts, the learned Division Bench of the High Court of Sindh, Karachi in High Court Appeal No.15 of 2007, copy placed before us by the learned counsel for the petitioner, has held in view of the Resolution No.383 that the suit property on which the parties were litigating is a commercial road being situated on Khalid Bin Waleed Road. In the parawise comments submitted on behalf of respondent No.10 in High Court Appeal No.251 of 2006 mentions that N.O.C. for commercialization of the plot from master plan and Environment Control Department, Karachi and Building Controls Authority was received with the approved commercial site-plan of the plot in question and after having received the charges amounting to Rs.4,00,000 from the petitioner, the plot in question as commercial one was mutated in the record of Office of the Ministry of Housing & Works, Government of Pakistan duly conveyed to PECHS. As regards the alleged breach of the instrument containing restrictive clauses executed between the parties and non-publication of the notice inviting objections by respondent No.10 etc. for conversion of the plot as commercial, in the over all facts and circumstances of the case besides other relevant questions and issues that may arise out of pleadings of the parties, can effectively be determined in the suit in which the parties would also be entitled to produce their evidence in support of pleas and grounds. Also it was urged during the arguments by the learned counsel for plaintiffs/respondents that while concluding the impugned judgment it was specifically directed that the suit be decided expeditiously and preferable within six months. This order was passed on 5-12-2006 but till date even the trial has not been concluded. In the light of the above said facts and reasons, the documents available on record and pleadings of the parties, we are of the considered opinion that the impugned judgment and the order dated 9-6-2006 passed by the learned Single Judge in the High Court are not sustainable, accordingly by converting this petition into appeal the same are set aside as the appellant has been found entitled to recommence with the construction works in accordance with the approved building plan which shall be subject to the final adjudication of the suit. The observations recorded herein as to the claim of the petitioner to be entitled to raise construction on the site in question are tentative in nature, shall have no effect on the adjudication of lis on merits and the law. The result is that this appeal is allowed. No order as to costs.

This decision states that nearly all the issues that are raised in such matters require evidence but in the latter part of the order states that the decision shall “*have no effect of the adjudication of lis on merits and the law.*”

- (x) **Amir Noman and 2 others vs. Federation of Pakistan through Federal Secretary, Ministry of Housing and Works and 12 others**<sup>101</sup>

This related to the conversion of the usage of Plot No. 139A, Allama Iqbal Road, Block 2, Pakistan Employees Cooperative

<sup>101</sup> 2011 MLD 1577

Housing Society Limited, Karachi from residential to commercial and its use as a Marriage Hall.

On the hearing of an injunction application, a Learned Single Judge of this Court, while dismissing the application, held that as the usage of plots on the road had been declared as amenable to being converted from residential to commercial, the proposed activity could be carried out on the plot.

(xi) **Hira Jawed vs. Federation of Pakistan through its Federal Secretary, Ministry of Petroleum and Natural Resources Block "B" Islamabad Secretariat**<sup>102</sup>

This related to the conversion of Plot No. 140A, Allama Iqbal Road, Block 2, Pakistan Employees Cooperative Housing Society Limited, Karachi from residential to commercial and its use as a CNG Station

On the hearing of an injunction application, a Learned Single Judge of this Court, while allowing the application, held that as the usage of the plots on the road had been declared as being amenable to being converted from residential to commercial under the Change of Land Use of City District Government Karachi Bye-Laws, 2003, Bye-Law 7 prohibited the usage of such converted plot for the storage of dangerous articles inflammable matter or other dangerous articles and as the usage of the plot violated that Bye Law, the injunction was granted.

(xii) **Syed Tahir Hussain Mahmoodi and 7 others vs. Tayyab and others**<sup>103</sup>

This related to the conversion of the usage of Plot No. 152 A, Allama Iqbal Road Block 2, Pakistan Employees Cooperative Housing Society Limited, Karachi

On the hearing of an injunction application, a Learned Single Judge of this Court, while dismissing the application, held that as the usage of the plots on the road had been declared as being amendable to be converted from residential to commercial the proposed activity could be carried out on the plot.

(xiii) **Navaid Hussain vs. Jahangir Siddiqui though Attorney**<sup>104</sup>

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<sup>102</sup> 2009 YLR 424

<sup>103</sup> 2009 CLC 1254

This related to the conversion of Plot No. 151 N, Khalid Bin Waleed Road Block 2, Pakistan Employees Cooperative Housing Society Limited, Karachi

On the hearing of an injunction application in Appeal, a Division Bench of this Court, while dismissing the Appeal, held that as the usage of the plots on the road had been declared as commercial and the proper course for conversion was adopted, no case for the grant of an injunction had been made out.

(e) **the Karachi Building and Town Planning Regulations, 2002**

68. The provisions of the SBCO, 1979 indicate the powers of town planning that are available to the SBCA and which are contained in Section 7B to Section 7E of the SBCO, 1979 and which read as hereunder:

“ ... **7-B. Town Planning.**

*The Authority shall draw up a Master plan for all Districts of the Province which shall, among other matters provide for –*

*(a) a survey of the District including its history, statistics, public services and other prescribed particulars;*

*(b) development, expansion and improvement of any part of the District;*

*(c) restrictions, regulations and prohibitions to be imposed with regard to the development of sites, and erection and re-erection of buildings within the district;*

*(d) earmarking of land for mosques where necessary;*

*Provided that the Master Plan shall be presented to Government for its consideration and shall be given effect after approval by Government:*

**7-C. Site Development Scheme.**

*(1) Where a master plan has been drawn up and has been approved by Government with or without any modifications, no owner of land exceeding such areas as may be specified in this behalf in the master plan shall develop the site or erect or re-erect a building on any plot or land covered by the master plan, except in conformity with the provisions of a site development scheme sanctioned for the area in the prescribed manner.*

*(2) Among other matters, a site development scheme provide for*

*(a) the division of the site into plots;*

*(b) the streets, drains and open spaces to be provided;*

*(c) the land to be reserved for public purposes and to be transferred to the Council concerned;*

*(d) the land to be acquired by the Council concerned;*

- (e) *the works that shall be executed at the cost of the owners of the site or sites;*
- (f) *the price of plots;*
- (g) *the period during which the area shall be developed.*

**7-D. Execution of Site Development Scheme.**

(1) *The execution of a site development scheme shall be subject to the inspection of the Authority which may issue such directions with regard to the execution of the scheme as may be necessary and proper for the development of scheme.*

(2) *If any area is developed in contravention of the provisions of approved site development scheme, the Authority may, by notice in writing, require the owner of such area or the person who has contravened the provisions by making alteration in the site as may be specified in the notice, and where such alteration is not made or notwithstanding anything to the contrary contained in any law be carried out or caused to be carried out by the Authority in the prescribed manner, or the Authority may require and enforce the demolition of the offending structure and no compensation shall be payable therefore, to such owner or person.*

(3) *If an area for which a site development scheme has been approved, is not developed within the period provided in the site development scheme and further extension is not allowed by the Authority or if the development is not in conformity with the Site Development Scheme, the Authority may in the prescribed manner take over the development of the site and execute the necessary works and the cost incurred thereon by the Authority shall be deemed to be tax levied on the owner under this Ordinance.*

**7-D Erection and re-erection of buildings**

(1) *No person shall erect or re-erect a building or commence to erect or re-erect a building unless the site has been approved, and the building plan has been sanctioned by the Authority.*

(2) *A person intending to erect or re-erect a building shall apply for sanction in the manner provided in the bye-laws and shall pay such fees as may be levied by the Authority with the previous sanction of Government.*

(3) *All building applications presented under this paragraph shall be registered in the manner provided in the bye-laws and shall be disposed of as early as possible but not later than sixty days from the date of the registration of the application and if no order is passed on an application within sixty days of its registration, it shall be deemed to have been sanctioned to the extent to which it does not contravene the provisions of the building bye-laws and the Master Plan or Site Development Scheme, if any.*

(4) *The Authority may for reasons to be stated in writing reject a site plan or a building plan, but any person aggrieved thereby may appeal to Government within thirty days of the order of rejection, and the order passed by Government in appeal shall be final.*

(5) *The Authority may, sanction a site plan or a building plan, subject to such modifications or terms as may be specified in the order of sanction.*

(6) *Nothing in this paragraph shall apply to any work, addition or alteration which is declared by bye-laws to be exempt.*

**7-E. Completion of buildings, etc.**

(1) *Every person who has erected or re-erected a building shall, within thirty days of the completion of the building, report such completion to the Authority.*

(2) The Authority shall cause every building which has been completed to be inspected, and if it has been constructed in violation or contravention of any provisions of this Ordinance, if any, the Authority may require the alterations of the buildings so as to be in compliance therewith, and where such an alteration is not possible, the Authority may require the building or any part thereof to be demolished or, on the application of the owner of such building, compound, the offence of such contravention; provided that no offence shall be so compounded if it involves any violation or contravention of the provisions of a master plan or of a sanctioned Site Development Scheme.

(3) if a building is required to be demolished under the provisions of clause (2), and such requirement is not completed with, within the specified period, the Authority may have the building demolished through its own agency and the cost incurred thereon shall be deemed to be a tax levied on the owner or occupier of the building under this Ordinance and be recovered accordingly:

*Provided that no action shall be taken under this paragraph unless the person likely to be affected thereby is given an opportunity of being heard.*

#### **7-F. Regulation of buildings.**

(1) If any building or anything fixed thereon be deemed by the Authority to be in a ruinous state or likely to fall or in any way dangerous to any inhabitant of such building or of any neighbouring building or to any occupier thereof or to passers-by, the Authority may, by notice, require the owner or occupier of such building to take such action in regard to the building as may be specified in the notice and if there is default, the Authority may take necessary steps itself and the cost incurred thereon shall be deemed to be a tax levied on the owner or occupier of the building under this Ordinance and be recovered accordingly.

(2) If a building is in a dangerous condition, or otherwise unfit for human habitation, the Authority may prohibit the occupation of such building till it has been suitably repaired to the satisfaction of the Authority."

The provisions of Section 7B of the SBCO, 1979 empowers the Authority, as notified under Section 4 of the SBCO, 1979, to draw up a "Master Plan" for all Districts of the Province of Sindh and which "Master Plan" once drawn up has to be presented to the Government of Sindh for its consideration and approved by the Cabinet of the Government of Sindh who have the authority to make amendments thereto.<sup>105</sup> Section 7C of the SBCO, 1979 mandates that on the basis of the "Master Plan" notified under Section 7B of the SBCO, 1979 a "Site Development Scheme" should be drawn up for the "Area in the prescribed manner" and which as per the definition of the expression "prescribed" in Sub-Section (l) of Section 2 of the of the SBCO, 1979 must be as per rules developed under Section 21 of the SBCO, 1979. Since the date of the enactment of the Sindh Building Control (Amendment) Act, 2014 on 20 March 2014 no Master Plan has been notified for the District of Karachi under the provisions of Section 7B of the SBCO, 1979, nor have rules been framed

<sup>105</sup> As per the decision in Mustafa Impex, Karachi vs The Government of Pakistan Through Secretary Finance, Islamabad PLD 2016 Supreme Court 808

under Section 21 of the SBCO, 1979 to “prescribe” the manner in which a “Site Development Scheme” have to be made in terms of the “Master Plan” of the District of Karachi. To my mind this would mean that at present, under the provisions of the SBCO, 1979 prima facie no power to regulate town planning can be exercised by the SBCA and which would only come into play if and when a “Master Plan” for the District of Karachi is notified in terms of Section 7B of the SBCO, 1979.

69. I have also considered whether the SBCA could indirectly exercise powers under the provisions of the SBCO, 1979 to regulate town planning through regulations. In terms of the powers conferred under Sub-Section (1) and Sub-Section (2) of Section 21A of the SBCO, 1979, the power to make regulations is for “*carrying out the purposes of this Ordinance*” which in terms of the town planning functions under the SBCO, 1979 can only relate to Section 7B, 7C and 7D of the SBCO, 1979 and the regulations therefore framed **in terms of Sub-Section (1) of Section 21A of the SBCO, 1979** in respect of town planning cannot go beyond the purview of Sections 7B, 7C and 7D of the SBCO, 1979.

70. If one is to consider the provisions of the KB&TPR, 2002 in terms of the powers conferred under the provisions of Section 7B, 7C and 7D of the SBCO, 1979, to my mind, it is clear that none of the powers contained in those regulations can **at present** be exercised by the SBCA and it would only be when the Master Plan for the entire District of Karachi is notified in terms of Section 7B of the SBCO, 1979 that those regulations would take effect. I have some concerns, keeping in mind the directives of the Supreme Court of Pakistan in **MQM (Pakistan) and others Vs. Pakistan through Secretary Cabinet Division, Government of Pakistan and others**,<sup>106</sup> as to whether this can now be down as any actions taken to further the provisions of Section 7B and 7C of the SBCO, 1979 would on the basis of that decision prima facie be ultra vires of Article 140A of the Constitution of the Islamic Republic of Pakistan, 1973 and hence be liable to be struck down. Despite that the KB&TPR, 2002 has in Regulation 18-13 included the following roads the usage of the plots abutting which are being considered by them to being amenable to conversion from residential to commercial and which have now been expanded to 25 roads as hereinunder:

“ ... 18-13.1 Following roads are declared open for change of land use :

<sup>106</sup> PLD 2022 Supreme Court 439

- Road 1 *Sharah-e-Faisal (Metropole Hotel to Malir Bridge).*
- Road 2 *Tariq Road (Allah walli Chowrangi to Commercial Area of Bahdurabad and Sindhi Muslim Society to Shara-i-Faisal (Captain Farid Bukhari Road).*
- Road 3 *Rashid Minhas Road (Scheme No : 16, Scheme No : 24 and Scheme No : 36 (Both sides of Millenium Mall to Shafiq Moure).*
- Road 4 *University Road Scheme No. 24 and Scheme 36, (Safoora Chowrangi to Plot N o : ST-9 Block-14 (on both sides) Gutshan-e-labal.*
- Road 5 *Sharah-e-Pakistan Scheme No. 16 (Both sides of Teen Hutti Bridge to Sohrab Goth).*
- Road 6 *Nazimabad "A" Road (Lasbela Bridge to Circular Railway Line left sides).*
- Road 7 *North Nazimabad 300 ft wide Shara-i-Shershah Soori, (Both side of Board Office Chowrangi to Sakhi Hassan Chowrangi ie Block B to Block N & Block A to Block J).*
- Road 8 *North Nazimabad Shara-i-Jehangir, (Nazeer Chaman Plot ST-12, Block H to Clinic ST-2 Block-H opposite ST-1 Taimoria Library Block-L to Bagh-i-Mahabat Khan Plot ST-8, Block-L).*
- Road 9 *Khayaban-i-Iqbal Clifton Road Bridge to Do Talwar (Plot No : G-1 to ST-12 Park Opposite Columbus Hotel to G-8).*
- Road 10 *Khayaban-i-Jami (Plot No : ST-10 to ST-13 PB. Opposite ST-12 Parking to ST-13).*
- Road 11 *Khalid Bin Waleed Road (Plot No : K-107 to 168 G Church, Both sides).*
- Road 12 *Jamaluddin Afghani Road, T.V. Station to Plot No: 58 MSGP upto 40' feet wide road (on both sides adjacent to Shaheed-i-Millat).*
- Road 13 *Allama Iqbal Road, P.E.C.H.S., Kashmir road to Jheel Park (Both sides).*
- Road 14 *Sir Syed Ahmed Road, Tariq Road to Khalid Bin Waleed Road (Both sides).*
- Road 15 *Shaheed-i-Millat Road, P.E.C.H.S. Hyder Ali to Jail Chowrang (Both sides).*
- Road 16 *Choudhry Khalikhuzzaman Road Block 8 d 9 (Askari Market to Choudhry Khaleeq-uz-zaman Colony).*
- Road 17 *Beach Avenue Road, (Marine Research Academy Round About to Hyperstar: Chowrangi).*

Road 18	<i>Khayaban-i-Saadi (Bar B.Q Night Chow-rangi to Beach Avenue Road).</i>
Road 19	<i>Khayaban-i-Roomi.</i>
Road 20	<i>Nishtar Road to Dhoraji Road (Both sides of Zubaida Hospital to Stadium Road).</i>
Road 21	<i>Alamgir Road.</i>
Road 22	<i>Shahrah-e-Noor Jehan, Abdullah College Round About (Plot No : C-1 Block-A North Nazimabad) to Qalanderia Chowk (B-48 Block-I North: Nazimabad) (on both sides).</i>
Road 23	<i>Stadium Road (Southern side from Plot F-14 to F-22, Dawood CHS).</i>
Road 24	<i>Sharah-e-Usman (Sector 11-A, 11-B and 31-C, New Karachi Town only left side).</i>
Road 25	<i>Tipu Suitan Road (Both side from Plot N o 2 to Plot No. 22-A, DMCHS and Plot No-44 to Plot 1A, Modern CHS i.e. Sharah-e-Faisal to Shaheed-e-Millat Signal).</i>

Prima facie the power conferred under Section 7B, 7C and 7D of the SBCO, 1979, until the same are acted upon by the SBCA do confer any right on the SBCA to declare roads the usage of the plots on which can be converted from residential to any other use. It would also therefore seem that the provisions of the KB&TPR, 2002 which are regulating such powers are prima facie in excess of the provisions of the SBCO, 1979.

**(v) The Commercialisation of the Suit Property carried out on 22 August 2017 and 3 November 2017**

71. The Suit Property, jointly owned and/ or being developed by the Defendants No. 9 to 11, is part of a town planning scheme/improvement scheme known as the Karachi Development Authority Scheme No. 2 and which was designated as the “North Nazimabad Town Expansion Scheme.”<sup>107</sup> This improvement scheme, introduced by the KDA, was a “**Town Expansion Scheme**” as defined in Article 39 read with clause (h) of Article 30 of the KDA Order, 1957.

72. The first argument that was raised by Mr. Rehman Aziz Malik was that the mutual covenants that are contained in the lease executed by the KDA in favor of the Plaintiff for his property and in respect of the Suit Property create a building scheme and which permitted the Plaintiff to

<sup>107</sup> The Notification under Article 50 of the Karachi Development Authority Order sanctioning Karachi Development Authority Scheme No. 2 was published in the **Gazette of West Pakistan** Part 1-A dated 7 August 1964 at pg. 91-92.

restrain the change of the usage of the Suit Property from residential to commercial by directly enforcing that covenant as against the Defendants No. 9 to 13. The concept of a building scheme, in terms of the enforcement of restrictive covenants, as existing in the United Kingdom, has been codified in Paragraph 2 of Section 11 of the Transfer of Property Act, 1882 and Section 40 of the Transfer of Property Act, 1882. However, it is to be noted that this Court in the decisions reported as **Moosa Bhaiji vs. Hashwani Sales and Services Ltd. and others**,<sup>108</sup> **R. G Sehwanj Co-operative Housing Society Ltd. vs. Haji Ahmed and others**,<sup>109</sup>, **Muhammad Munir vs. Ahmad Ally Memon and 2 others**<sup>110</sup> and **Zaheer Ahmed Chaudhry vs. City District Government Karachi and others**.<sup>111</sup> have held that rights under a lease, primarily on account of the doctrine of privity of contract<sup>112</sup>, cannot be enforced by any person other than the lessor or the lessee and that such conditions restricting the usage of a property would not amount to restrictive covenants for the benefit of co-lessees under a building scheme. The basis for the argument as privity of contract would stem from Section 4 of the Transfer of Property Act, 1882 which states the provisions of “*The chapters and sections of this Act which relate to contracts shall be taken as part of one Contract Act, 1872*” and which would clearly include leases. However, as such rights are not controlled by contract and are rather statutorily controlled by the Second Paragraph of Section 11 of the Transfer of Property Act, 1882 and by Section 40 of the Transfer of Property Act, 1882 a restriction imposed on the owner in a lease e.g., that the land is used for a particular purpose, would to my mind have no impact on the lessor and could only be for the benefit of the other persons who are equally restricted in respect of the usage of their property under common restrictive covenants and such rights being specifically regulated by those section, the provisions of the Contract Act, 1872 and the doctrine of privity of contract as held in **Ardeshir Cowasjee vs. Muhammad Naqi Nawab**<sup>113</sup> and **Navid Hussain vs. City District Government Karachi (CDGK) through District Coordination Officer, Karachi**<sup>114</sup> cannot be pressed over a specific statutory provisions of the Transfer of Property Act, 1882 so as to negate those sections. However, keeping in mind that the Suit Property is part of a statutory town planning scheme and which regulates the rights inter se each of the parties I see no basis for making any decision on this issue

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<sup>108</sup> PLD 1982 Karachi 940

<sup>109</sup> PLD 1983 Karachi 11

<sup>110</sup> PLD 1982 Karachi 425

<sup>111</sup> 2006 YLR 2537

<sup>112</sup> However See. **Karachi Water and Sewage Board through Authorised Representative vs. Messrs Karachi Electric Supply Corporation and 3 others** 2012 CLD 1225

<sup>113</sup> PLD 1993 Karachi 631;

<sup>114</sup> 2007 CLC 912, this

save that as a statutory scheme has been introduced to regulate the area within which the Suit Property is located, the application of the common law “building scheme,” cannot be pressed in the presence of a statute which would regulate the obligations as between all the parties having rights within the scheme.

73. To my mind, the Suit Property being owned by the KDA, one would have to see how the KDA could exercise its right to convert the usage of a property from residential to commercial under the statutory improvement scheme as notified by it. To begin with there can be no doubt that the Suit Property comes within a scheme known as “North Nazimabad Town Expansion Scheme”<sup>115</sup> and which is a “**Town Expansion Scheme**” as defined in Article 39 read with clause (h) of Article 30 of the KDA Order, 1957. Further, in terms of the question as to which authority has the right to convert the usage of a property from residential to commercial in such a scheme, the decisions of the Supreme Court of Pakistan in **Messrs Excell Builders and others vs. Ardeshir Cowasjee and others**<sup>116</sup> and **Ali Asghar and 3 others vs. Creator Builders and 3 others**<sup>117</sup> state that it is the lessor alone who has the right to convert a property and that the provisions of the KDA Order, 1957 would have no role in respect of the conversion of a property from residential to commercial, save for where the lessor of the property is the KDA itself. However, the decisions of Division Benches of this Court in **Muhammad Hanif vs. Sameena Sibtain**,<sup>118</sup> **Aslam and others vs. Karachi Buildings Control Authority and 5 others**<sup>119</sup> also reported as **Sheikh Naeem Ahmed and others vs. Province of Sindh and others**,<sup>120</sup> and **Zainab Garments (Pvt.) Ltd. through Chief Executive and others vs. Federation of Pakistan through Secretary Ministry of Housing and Works, Islamabad and another**<sup>121</sup> while considering what has come to be known as “strip commercialisation” have held that such a power is controlled by Article 40 of the KDA Order, 1957 and is what is classified as a “Zonal Plan Scheme.” These decisions apply the provisions of Article 40 of the KDA Order, 1957, even in respect of properties that are not owned by the KDA, and have held that it would be the basis of which a property could be converted from residential to commercial **and which hence would imply that the lessors approval is hence not required**. Finally, the Supreme

<sup>115</sup> The Notification under Article 50 of the Karachi Development Authority Order sanctioning Karachi Development Authority Scheme No. 2 was published in the Gazette of West Pakistan Part 1-A dated 7 August 1964 at pg. 91-92.

<sup>116</sup> 1999 SCMR 2089

<sup>117</sup> 2001 SCMR 279

<sup>118</sup> 2007 YLR 3113

<sup>119</sup> 2005 CLC 759

<sup>120</sup> 2006 CLC 1231

<sup>121</sup> PLD 2010 Karachi 374

Court of Pakistan in the decision reported as **Muhammad Siddique and another vs. Federation of Pakistan through M/o Works and Housing and others**<sup>122</sup> has relied on the provisions of the Karachi Building and Town Planning Regulations, 1979 to be the regulation that would control the conversion of properties and in which powers are conferred on the Commissioner Karachi to exercise this authority. These decisions to my mind are on this issue clearly in conflict one with the other.

74. In the circumstances, as the Suit Property is owned by the KDA and is located within an improvement scheme planned and implemented by the KDA I have considered the powers of the KDA in terms of the KDA Order, 1957. To convert the usage of a single plot from within a notified improvement scheme from residential to commercial and also consider the manner in which such a statutory notified scheme can be modified once it is completed. After considering the provisions of the KDA Order, 1957, the only provision that I have been able to find that permits the conversion of the usage a plot after the completion of the improvement scheme is found in Clause (5) of Article 40 of the KDA Order, 1957 and which conversion remains subjective to a plot located with an improvement scheme notified as a “Zonal Plan Scheme” and whereby the KDA can convert the usage of a plot within that scheme but which, to my mind could only be done within the prescriptions of Clause (2) of Article 4 of the KDA Order, 1957. No such power to amend being available in respect of any other forms of improvement schemes, it would therefore seem that such a power cannot be exercised by the KDA in any other type of improvement scheme. In the context of the Suit Property, it is noted located within a notified Zonal Plan Scheme and therefore it would prima facie not be possible to convert the usage of the Suit Property from residential to commercial under that statute.

75. As the decisions of various Division Benches of this Court have considered the conversion of usage of a plot on designated roads in terms of Article 40 of the KDA Order, 1957, it would be necessary to consider that provisions. In terms of a literal interpretation of Article 40 of the KDA Order, 1957, to my mind, each of the clauses of Article 40 of the KDA Order, 1957 have to be read together and have to also be considered in light of the remaining provisions of the KDA Order, 1957 so that the statute should be read a whole. Firstly, under Clause (1) of Article 40 of the KDA Order, 1957 the authority to make a “Zonal Plan Scheme” vests in the KDA and who is obligated when making such a scheme to indicate

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<sup>122</sup> 2013 SCMR 1665

the area reserved for *“residential purposes, commercial purposes, industrial purposes, agricultural purposes, open spaces, height, coverage, type, density, spacing and any other purpose.”* Clause (2) of Article 40 of the KDA Order, 1957 then prescribes that the KDA will follow the procedure as indicated in Article 36 of the KDA Order, 1957 for a “Deferred Street Scheme” in formulating a “Zonal Plan Scheme” and which prescribes that first a Resolution would have to be passed by the Governing Body of the KDA and which would thereafter follow the process indicated in Clause (2) of Article 36 of the KDA Order, 1957 in formulating that “Zonal Plan Scheme.” Once that is done the KDA would forward the “Zonal Plan Scheme” to the Provincial Government for its sanction. **After** the Provincial Government sanctions the “Zonal Plan Scheme” then if a person wishes convert his property to a usage different than that which is prescribed in the notified “Zonal Plan Scheme” then an application would be made to the KDA and who would convene a hearing for all persons affected and permit the conversion of the property to a usage other than as identified in the “Zonal Plan Scheme” or reject the conversion. Any person aggrieved with any order passed by the KDA under Clause (4) of Article 40 of the KDA Order, 1957 is thereafter afforded a redressal process in Clause (5) and (6) of Article 40 of the KDA Order, 1957 before the Provincial Government.

76. So as to read that section in conjunction with the other sections of the KDA Order, 1957 it would seem that while the KDA can clearly prepare such a “Zonal Plan Scheme” and which can be approved by passing a resolution of its Governing Body, the discretion on the basis of which the Governing Body is to act in passing such a resolution is, to my mind, fettered by Clause (2) of Article 4 of the KDA Order, 1957 which requires any decision of the Governing Body to be based *“on sound principles of development, town planning and housing with special regard to the re-housing of affected persons and shall be guided on question of policy by such direction as Provincial Government may from time to time give.”* As such if the resolution passed by the Governing Body of the KDA is found not to be conformity with the standards as indicated in clause (2) of Article 4 of the KDA Order, 1957 it can independently be impugned. Additionally, in terms of the procedure to be adopted for notifying a “Zonal Plan Scheme,” being a subspecies of an “improvement scheme,” such a scheme would have to prepared and published in the official gazette as every other “improvement scheme” in accordance with Article 45 of the KDA Order, 1957 and thereafter like every other “improvement scheme” notified under an order of the Provincial Government in terms of Article 50 Of the KDA Order, 1957; such notification in terms of Clause (2) of Article

50 being “conclusive evidence that the scheme has been duly framed and sanctioned. To my mind each of these procedures affecting rights of a wide range of people would be mandatory as to not comply with such rights of notice would interfere directly with various persons right to their property rendering such a scheme as mandatory.

77. However, the interpretation cast by a Division Bench of this Court on Article 40 of the KDA Order, 1957 in **Muhammad Hanif vs. Sameena Sibtain**,<sup>123</sup> which was followed by other Division Benches of this Court in **Aslam and others vs. Karachi Buildings Control Authority and 5 others**<sup>124</sup> also reported as **Sheikh Naeem Ahmed and others vs. Province of Sindh and others**,<sup>125</sup> and **Zainab Garments (Pvt.) Ltd. through Chief Executive and others vs. Federation of Pakistan through Secretary Ministry of Housing and Works, Islamabad and another**,<sup>126</sup> in terms of the Notification dated 20 July 1998 considers as hereinunder:

“ ... After some efforts Mr. Shahid Jameeluddin learned counsel for respondent No. 2 succeeded in placing before us a Notification dated 20 July 1998, issued by the Chief Secretary, Sindh containing several decision relating to the construction of building, Clause (b) of the aforesaid notification stipulated that Commercialization of plots should be allowed on six roads which were declared commercial by the Government of Sindh in 1989 which included Tariq Road and its extensions upto Bahadurabad commercial area. it is therefore, evident that the Zonal Plan Scheme was amended in 1998 in terms of Article 40 (3) and Tariq Road has been declared commercial area by the Sindh Government. Once this fact is established no question of granting permission in deviation of the Scheme in terms of Article 40 (4) arises.”

The Plot in question in **Muhammad Hanif vs. Sameena Sibtain**,<sup>127</sup> was located on Tariq Road in an area known as the Pakistan Employees Cooperative Housing Society Limited and of which area the lessor is the Ministry of Housing and Works, Federation of Pakistan and not the KDA. While the town planning of the area was developed by the KDA under a license entered into it by the Pakistan Employees Cooperative Housing Society Limited **but such scheme as developed and implemented by the KDA was never notified as a “Zonal Plan Scheme” under Article 40 read with Article 45 and Article 50 of the KDA Order, 1957.** Respectfully, if it is considered that the “Zonal Plan Scheme was **amended** by the Notification dated 20 July 1998 in terms of Clause (3) of Article 40 of the KDA Order, 1957, then clearly a “Zonal Plan Scheme” would have had to have first been made in terms of Clause (1) of Article

<sup>123</sup> 2007 YLR 3113

<sup>124</sup> 2005 CLC 759

<sup>125</sup> 2006 CLC 1231

<sup>126</sup> PLD 2010 Karachi 374

<sup>127</sup> 2007 YLR 3113

40 of the KDA Order, 1957, prepared and published in the official gazette, as every other “improvement scheme,” in accordance with Article 45 of the KDA Order, 1957 and thereafter like every other “improvement scheme” notified under an order of the Provincial Government in terms of Article 50 of the KDA Order, 1957. If this was not done then no question of an **amendment** to the “Zonal Plan Scheme” in terms of Clause (3) of Article 40 of the KDA Order, 1957 could be considered. Similarly, the plots in **Aslam and others vs. Karachi Buildings Control Authority and 5 others**<sup>128</sup> also reported as **Sheikh Naeem Ahmed and others vs. Province of Sindh and others**,<sup>129</sup> and **Zainab Garments (Pvt.) Ltd. through Chief Executive and others vs. Federation of Pakistan through Secretary Ministry of Housing and Works, Islamabad and another**,<sup>130</sup> are all located in areas leased by either the Karachi Municipal Corporation or the Ministry of Housing and Works, Federation of Pakistan and each of which were also not notified as a Scheme under the provisions of the KDA Order, 1957. Further as the lands which were converted in each of these decision were not owned by the KDA, then as per the decisions of the Supreme Court of Pakistan reported as **Messrs Excell Builders and others vs. Ardeshir Cowasjee and others**<sup>131</sup> and **Ali Asghar and 3 others vs. Creator Builders and 3 others**<sup>132</sup> the KDA could not have exercised jurisdiction over those properties to convert the properties from one use to another.

78. In addition, even in respect of the interpretation of clause (4) of Article 40 of the KDA Order, 1957 that has been given by the Courts there seems to be inconsistency. The decision of a Division Bench of this Court in **Ardeshir Cowasjee and 4 others vs. Clifton Cantonment Board and 20 others**<sup>133</sup> and of the Supreme Court of Pakistan in **Jawad Mir Muhammadi and others vs. Haroon Mirza and others**.<sup>134</sup> clarify that the requirement of a hearing prior to the notification of a “Zonal Scheme as conferred under Clause (4) of Article 40 is not mandatory while the decision of the Supreme Court Pakistan in the decision reported as **Muhammad Siddique and another vs. Federation of Pakistan through M/o Works and Housing and others**<sup>135</sup> conversely states that a hearing is a mandatory.

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<sup>128</sup> 2005 CLC 759

<sup>129</sup> 2006 CLC 1231

<sup>130</sup> PLD 2010 Karachi 374

<sup>131</sup> 1999 SCMR 2089

<sup>132</sup> 2001 SCMR 279

<sup>133</sup> 1998 MLD 1818

<sup>134</sup> PLD 2007 Supreme Court 472

<sup>135</sup> 2013 SCMR 1665

79. In this Suit, the Suit Property is owned by the KDA and who, as per the decisions of the Supreme Court of Pakistan in **Messrs Excell Builders and others vs. Ardeshir Cowasjee and others**<sup>136</sup> and **Ali Asghar and 3 others vs. Creator Builders and 3 others**,<sup>137</sup> has the jurisdiction to regulate the town planning of the area in which the Suit Property is located. Being a regulatory body, would require the KDA when exercising a power to convert usage of a plot within the perimeters of the powers conferred on it under the provisions of the KDA Order, 1957. Firstly, having examined that statute, the only power that exists in that statute which permits the conversion of the usage of a property, after an improvement scheme has been sanctioned, is Clause (5) of Article 40 of the KDA Order, 1957 and which permits such a usage where the improvement scheme notified is a “Zonal Plan Scheme”. The Suit Property not being planned with a notified “Zonal Plan Scheme” and rather being planned as a “Town Expansion Scheme,” Clause (5) of Article 40 of the KDA Order, 1957 cannot be pressed to apply. Additionally, I can see no provision within the KDA Order, 1957 that could be considered a basis so as to ratify the power exercised by the Master Plan Department of the SBCA to convert the Suit Property from residential to commercial under that statute. Further, while a power has been conferred in Article 51 of the KDA Order, 1957 to alter a scheme after its sanction, save for Clause (5) fo Article 40 of the KDA Order, 1957, such a power is only exercisable by the Provincial Government “*after the scheme has been sanctioned by the Provincial Government and before it has been completed*” and there therefore exists no power in the KDA Order, 1957 to modify a scheme **after it has been completed**. The only way that a scheme can be altered after completion would therefore be through an urban renewal as clarified by the Supreme Court of Pakistan in the decision reported as **Abdul Razzak vs. Karachi Building Control Authority and others**<sup>138</sup> and which would entail formulating and implementing a new scheme after carrying out acquisition of land in conformity with the provisions of the KDA Order, 1957. This has not been done and as such one can safely say prima facie no provision of the KDA Order, 1957 can be relied to justify the conversion of the usage of the Suit Property from residential to commercial.

80. Regarding the law on the basis of which the usage of the Suit Property was converted, during the period when the KDA Order, 1957 had been repealed, the conversion of the usage of plots abutting certain roads

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<sup>136</sup> 1999 SCMR 2089

<sup>137</sup> 2001 SCMR 279

<sup>138</sup> PLD 1994 Supreme Court 512

had been approved under the provisions of the Change of Land Use City District Government Karachi Bye Laws, 2003 by the City Council of the City District Government, Karachi and which, aside from the plots that abutted Shahrah e Faisal and which were located in the area known as Sindh Muslim Cooperative Housing Society Limited, each of the roads that were notified by the City District Government, Karachi comprised of roads on which the properties were either leased by the Karachi Development Authority or by the Ministry of Housing and Works, Federation of Pakistan. Again a question arises as to whether, as per the decision of the Supreme Court of Pakistan in **Messrs Excell Builders and others vs. Ardeshir Cowasjee and others**<sup>139</sup> and **Ali Asghar and 3 others vs. Creator Builders and 3 others**<sup>140</sup> any authority other than the lessor could have exercised an administrative right to convert the usage of a property that it did not own? The answer to this question is not straight forward. When the Sindh Local Government Ordinance, 2001 was in force, by virtue of Sub-Section (a) of Section 40 of the Sindh Local Government Ordinance, 2001, the Zila Council in a City District, which for the purposes of the City of Karachi was the City Council of the City District Government Karachi, was conferred with the power to town plan. On this basis the City Council of the City District Government Karachi passed resolutions permitting the conversion of plots located on various roads including, but not limited to, Sharah e Sher Shah Suri on which the Suit Property is located under the Change of Land Use City District Government Karachi Bye-Laws, 2003 and which would therefore on account of the repeal of the KDA Order, 1957 prima facie appear to be in the administrative authority of the Zila Council. This position is reinforced by the 18<sup>th</sup> amendment made to the Constitution of the Islamic Republic of Pakistan, 1973 and by which Article 140A of the Constitution of the Islamic Republic of Pakistan, 1973 was introduced and which as per the interpretation cast on that Article by the Supreme Court of Pakistan in **MQM (Pakistan) and others vs. Pakistan through Secretary Cabinet Division, Government of Pakistan and others**<sup>141</sup> has inter alia clarified that the issue of authority to act in respect of town planning and building control can only be exercised by the elected local government. It is therefore apparent that at the time when the Change of Land Use City District Government Karachi Bye-Laws, 2003 were notified the City Council had the administrative power in respect of town planning in the City of Karachi and which included having such administrative power over the Suit Property.

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<sup>139</sup> 1999 SCMR 2089

<sup>140</sup> 2001 SCMR 279

<sup>141</sup> PLD 2022 Supreme Court 439

81. While the repeal of Entries 32 to 37 of the Second Schedule of the Sindh Local Government Act, 2013, on 2 November 2013, by the promulgation of Sindh Local Government (Amendment) Act, 2013, omitted the power of the Karachi Metropolitan Corporation to administer town planning, clearly the Change of Land Use City District Government Karachi Bye-Laws, 2003 that otherwise would have continued by virtue of Section 23 of the Sindh General Clauses Act, 1956, *prima facie* cannot now be considered to exist as they would clearly be beyond the scope of the provisions of the Sindh Local Government Act, 2013<sup>142</sup> and therefore *prima facie* cannot be the basis for considering the validity of an action made for converting a property from residential to commercial.

82. With regards to the provisions of the KB&TPR, 2002, while Regulation 18-13 of those regulations clarifies that the Shahrah e Sher Shah Suri is a road, plots on which can be converted from residential to commercial. In respect of the powers that the SBCA have been conferred with to town plan under Section 7B and 7C of the SBCO, 1979 have been addressed above and in which *prima facie* it seems that the SBCA having not acted on the provisions of those two sections cannot exercise a right to town plan under the provisions of the KB&TPR, 2002. Finally, such a power, after the decision of the Supreme Court of Pakistan in **MQM (Pakistan) and others vs. Pakistan through Secretary Cabinet Division, Government of Pakistan and others**<sup>143</sup> can now only be exercised by the Karachi Metropolitan Corporation but which at present, while constitutionally empowered, is not statutorily empowered to carry out such an authority.

83. Having considered all the laws that could have been relevant to the conversion of the Suit Property from residential to commercial, *prima facie* on 17 August 2017 the date on which the Suit Property was converted from residential to commercial by the Master Plan Department of the

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<sup>142</sup> See **Province of East Pakistan and another vs. Nur Ahmad and another** PLD 1964 Supreme Court 451; **Mian Ziauddin vs. Punjab Local Government and others** 1985 SCMR 365; **Khawaja Ahmad Hasan vs. Government of Punjab and others** 2005 SCMR 186; **In the Matter of Suo Moto Case No. 13 of 2009** PLD 2011 Supreme Court 619; **Zarai Taraqi Bank Limited and others vs. Said Rahman** 2013 SCMR 642; **Azam Wazir Khan vs. Messrs Industrial Development Bank of Pakistan and others** 2013 SCMR 678; **Muhammad Amin Muhammad Bashir Limited vs. Government of Pakistan through Secretary Ministry of Finance, Central Secretariat Islamabad and others** 2015 SCMR 630; **Messrs Mustafa Impex, Karachi and others vs. The Government of Pakistan through Secretary Finance, Islamabad and others** PLD 2016 Supreme Court 808; **Syed Mehmood Akhtar Naqvi and others vs. Malik Israr, Senior Member Board of Revenue Sindh and others** PLD 2018 Supreme Court 468; **Mir Shabbir Ali Khan Bijrani and 3 others vs. Federation of Pakistan and others** PLD 2018 Sindh 603; **Messrs Asio African Co. (Pvt.) Ltd. and others vs. Federation of Pakistan and others** 2019 PTD 1368; **Shaukat Mehmood vs. Election Commission of Pakistan** PLD 2024 Supreme Court 653

<sup>143</sup> PLD 2022 Supreme Court 439

SBCA prima facie it would seem that the provisions of Section 7 B, 7C and 7D of the SBCO, 1979 having not been complied with, the Master Plan Department of the SBCA did not have the requisite jurisdiction to convert the usage of the Suit Property on that date. In respect of the KDA while such powers could have been exercised by the KDA on 3 November 2017 when it sanctioned the conversion of usage of the Suit Property from residential to commercial, prima facie it would seem that such an act could not have been done by the issuance of a letter and which prima facie could only have been done under the provisions of the KDA, Order, 1957, by creating a new scheme for the area within the perimeters of that statute as clarified hereinabove. Similarly, until the decision of the Supreme Court of Pakistan in in **MQM (Pakistan) and others vs. Pakistan through Secretary Cabinet Division, Government of Pakistan and others**<sup>144</sup> is implemented there does not seem to be any authority that could legally exercise such a power of conversion as prima facie every action taken would be in violation of that decision.

84. The question that would therefore arise would be as to whether, in the case of a vacuum of administrative power, prima facie a finding can be made by this Court that the approval granted by the Master Plan Department of the SBCA dated 17 August 2017 or the approval granted by the KDA on 3 November 2017 converting the usage of the Suit Property from residential to commercial was illegal. In this regard reference can be made to the “defacto doctrine” that had been settled by the Supreme Court of Pakistan and held that in the event that it is found that a public officer or for that matter an administrative body lacked de jure authority then while a *lis* could be maintained to challenge their office, such an action cannot be maintained in collateral proceedings to impugn actions of such officers or such administrative bodies.

85. The de facto doctrine was clarified by the Supreme Court of Pakistan in the decision reported as **Lt. Col. Farzand Ali and others vs. Province of West Pakistan through the Secretary, Department of Agriculture, Government of West Pakistan, Lahore**<sup>145</sup> and in which it was inter alia held:

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<sup>144</sup> PLD 2022 Supreme Court 439

<sup>145</sup> PLD 1970 Supreme Court 98; See also **Mehmood Khan Achakzai and others vs. Federation of Pakistan and others** PLD 1997 Supreme Court 426; **Malik Asad Ali vs. Federation of Pakistan through Secretary, Law Justice and Parliament Affairs, Islamabad and others** PLD 1998 Supreme Court 161; **Mehram Ali and others vs. Federation of Pakistan and others** PLD 1998 Supreme Court 1445; **Abdul Salam Qureshi and another vs. Judge, Special Court of Banking for Sind and another** PLD 1984 Karachi 462; **Atlas Autos Limited and 5 others vs. National Industrial Relations Commission, Islamabad and 16 others** PLD 1990 Karachi 362; **Abdus Sattar vs. The State** PLD 1997 Lahore 683; **Manzoor Hussain vs. The State** PLD 1998 Lahore 239;

“ ... I am of the opinion that there is great deal of force in this contention and since this is not a direct attack upon their right to continue as members, I am also of the opinion that their acts should not be invalidated merely because they could have been found in a proper proceeding under Article 98 (2) (b) to be disqualified from continuing as Members of the House. To do so collaterally in proceedings not taken to test the validity of their title directly would lead to serious inconvenience to the public and those individuals whose interest may have been affected by the legislative measures enacted in the meantime. This de facto doctrine is a doctrine of necessity to bring about regularity and prevent confusion in the conduct of Public business and promote security of private rights.”

There being no question of any challenge made in this suit directly to the jurisdictional authority of the Master Plan Department, SBCA, while it would seem that that actions of the Master Plan Department of the SBCA in approving the conversion from residential to commercial on 26 April 2014 were prime facie in excess of the jurisdiction of that authority on that date, as per the decisions of the Supreme Court of Pakistan, the same cannot be impugned collaterally in these proceedings and hence cannot be a basis to find a prima facie case for granting an injunction.

(vi) **Whether Flats Can be Constructed on Commercial Properties**

86. In an unreported petition bearing CP No. D-549 of 1997 entitled **Farookh Captain and others vs. Karachi Building Control Authority and others**, that was considered in terms of the Karachi Building and Town Planning Regulations, 1979, a question arose as to whether “multi-storied flats” could be constructed on “residential” properties or as to whether they were an altogether different category of construction. In that matter a Division Bench of this Court considered that:

“ ... 13. In the presence of the admitted fact that the two plots are located in a residential area, Mr. Naimur Rehman, however, has raised another rather interesting question. According to him only residential bungalows were allowed to be constructed in the area and permission to raise multi-storied flats amounts to change of land user which could only be effected after following a specific procedure under the Town Planning regulation and the KDA Order which included inviting public objections. Since admittedly such procedure was not followed to the approval of the plan by the KBCA, was not lawful and the construction raised even according to such plan, was liable to be demolished. In support of his contention, learned counsel referred to Section 26 of the Town Planning Regulation which inter alia provide that for the purpose of change of land use, the criteria laid down in schedule 'D' shall be followed. He also relied upon following observations of the Honourable Supreme Court in Abdul Razzaq vs. KBCA (PLD1994 S.C. 512). appearing at page 526:

*"In such cases it can be said that the Authority has no discretion in fact and law. The plot in dispute was intended to have residential bungalow and it was not earmarked as a flat site. It is a matter of common knowledge that in the various KDA Scheme the plots are categorized, as residential site, flat sites, commercial plots and industrial plots.*

14. Mr. Makhdoom Ali Khan, learned counsel for the builders, however, argued that no change of land use was involved for the purpose of attracting para 4, Schedule D' Part II of the Building

Regulations in as much as construction of multi-storied apartments for residential purposes does not amount to conversion of a residential plot for any other purposes unless the proposed construction also involved use for commercial purpose as had happened in Abdul Razzaq's case. Learned counsel further relied upon para 1, Schedule G' Part I of the Building Regulations, where the term residential usage has been comprehensively defined in the following words:-

"(1) Residential Uses - Residential uses.

Includes all land used for dwelling facilities, but does not include land used for lodging facilities on a commercial basis. These classes may be internally subdivided either by types of structures (e.g., pucca, semipucca, kutchra), or by types of housing programs (e.g., improvement, registration, open plot development, utility wall development, bungalows, town houses, flats). Special sub-classes may be needed to distinguish between urban and rural types (goths) of residential uses."

15. It may further be pertinent to mention that para 2 of the aforesaid Schedule 'G' Part 1, describes other residential usage and refers to various categories i.e. Health & Welfare Usage, Religious Usage, Commercial Usage, Parks and Play Grounds etc. Nevertheless to appreciate the merits of the respective contentions of learned counsel it may be appropriate to refer to the relevant part of para 3 and para 4 of Schedule 'D' Part II:-

"3. No change of land use or conversion of Amenity, Utility and other plots as defined in sub section 2(a) -----  
--- to an 2(1), 2(j) part 1 of Schedule 'G' ----- plans of any housing scheme prepared by any local body, housing society or by any private developer, shall be allowed except in accordance with the following procedure:-

(a) The local body, housing society or the private developer shall apply to Commissioner, Karachi for the change of land use or conversion from any other, purpose for the plots reserved for the purposes as mentioned above with full justification and details.

(b) -----  
(c) -----  
(d) -----  
(e) -----  
(f) -----

4. (a) No residential plot shall be converted into any other use except with the approval of MP & EC (Authority under Sind Building Control Ordinance 1979) after the recommendations of the Concerned Authority.

16. It may be observed that while conversion of amenity, utility and all other kinds of plots are dealt with in para 3, a specific provision i.e. para 4, has been designed for conversion of residential plots. At the same time while the language of para 3 suggests that various categories of plots for residential usage cannot be converted for use for any other residential purposes, there seems to be no such restriction in para 4. Therefore, there seems to be substance in Mr. Makhdoom Ali Khan's contention to the effect that as long as the use for residential purposes is retained to the requirements of Schedule D' Part II will not apply. Mr. Naimur Rehman indeed argued that even in para 1 of Schedule 'G' Part I, utility wall development, bungalows, Town houses and flats, could be classified as separate categories of residential uses, but the simple answer is that if the law makers intended to treat use from one category to another category of residential use as conversion, they could have simply done so by designing para 4 of Schedule 'D' Part II, on the same patron as para 3.

17. With respect to the observations of the Honourable Supreme Court Mr. Makhdoom Ali Khan contended that they were merely in the nature of obiter dicta and the relevant provisions of the Building Regulations were not brought to their Lordships' notice. Indeed Mr. Naimur Rehmen argued and rightly so that even obiter observations of the Honourable Supreme Court are binding on this Court. However, we have noticed a fundamental difference between the facts of Abdul Razzaq's case and the present one. In the reported case commercial-cum-residential building was proposed to be raised on a plot earmarked for construction of a residential bungalow with shops on the ground floor and flats on the upper floor. This indeed amounted to conversion and their Lordship rightly held, if we may say so with respects that it could not be done. Moreover, their Lordship's relied upon the provisions of the KDA Schemes, which treated bungalows, and flats sites as altogether different kinds of use. Admittedly the plots in question do not fall within any of such scheme and observed by the Honourable Supreme Court in *Excel Builders vs. K.BCA* (1999 S.C.M.R. 2039) it is highly doubtful whether such distinction would also apply to plots leased by K.M.C. M. Naimur Rehman was not able to show any provisions from the K.M.C. Land Grant Conditions and Rules making a distinction between bungalows and flats. We are therefore, constrained to repel the objectors' contention on this ground. ..."

The Order of the Division Bench of this Court states that with regard to residential plots located in the jurisdiction of the Karachi Metropolitan Corporation, as opposed to the KDA, no distinction was made as between plots that were meant for residential purposes and plots that were meant for "Multi Storied Flats" and as such the construction of "Multi Storied Flats" being residential in nature, were not prohibited on plots that were designated for residential use in the area administered by the KMC.

87. The KB&TPR, 2002 repealed and replaced the Karachi Building and Town Planning Regulations, 1979. In the KB&TPR, 2002 a difference was made in Regulation 25 entitled "Zoning Regulations and Area Standards" as between "Residential" constructions and construction on "Flat Sites" and which originally read as hereinunder:

" ... 25-2 RESIDENTIAL

*All Residential houses/bungalows shall observe the following standards, except where any of these standards are in conflict with Clause 25-9, in which case Clause 25-9 shall prevail ...*

25-4 FLAT SITES CATEGORY

S No.	FOOT PRINT	F.A.R	MINIMUM COS FRONT	MINIMUM COS SIDES	MINIMUM COS REAR
1	40%	1:2.75	20ft. (6m)	20ft. (6m)	20ft. (6m)

..."

The KB&TPR, 2002 defines the expression "residential" in clause 19-2.1 and states that:

“ ... Residential Uses: Includes all land used dwelling facilities, but does not include land used for lodging facilities operated on a commercial basis.”

This definition is expanded on in Regulation 2-107 of the KB&TPR,2002 where the expression “Residential Building” is defined as hereinunder:

“ ... means building constructed for residential purposes e.g. bungalow, town house, flats and such other buildings.”

The definition of these expressions are also found in the Change of Land Use of City District Government Karachi Bye-Laws, 2003 and which read as hereinunder in terms that residential has been defined as:

” 2-6 اربائشی سے مراد وہ آراضی جو رہائشی تعمیر کے لئے مختص گئی ہو۔“

and which translated into English reads as hereinunder:

“ ... 6. Residential means such land that has been specified for residential purposes”

Flat Site has been defined as:

” 2-7 فلیٹ سائٹ سے مراد وہ رہائشی آراضی جو کہ فلیٹ بنانے کیے مختص کی گئی ہو“

and which translated into English reads as hereinunder:

“ ... 7. Flat Site means such residential land that has been specified for the construction of flats

and Commercial has been defined as:

” 2-8 کمرشل سے مراد وہ آراضی جو تجارتی مقاصد کے لیئے مختص گئی ہو۔“

and which translated into English reads as hereinunder:

“ ... 8. Commercial means such land that has been specified for commercial purposes.”

The KB&TPR, 2002 applied without distinction to all plots located in Karachi, irrelevant as to the ownership as between the Karachi Metropolitan Corporation, the KDA, the Province of Sindh or any other authority. Having been drafted so as to make a distinction as between the construction of “Residential Houses/Bungalows” in Regulation 25-2 of the KB&TPR, 2002 and “Flat Sites” in Regulation 25-4 of the KB&TPR, 2002 an argument was maintained before and considered by a Division Bench of this Court in the decision reported as Zaheer Ahmed Chaudhry vs.

**City District Government Karachi and others**<sup>146</sup> as to whether after the notification of the KB&TPR, 2002, the decision in the unreported petition bearing CP No. D-549 of 1997 entitled **Farookh Captain and others vs. Karachi Building Control Authority and others** would still apply and as to whether Multi-Storied Flats could or could not be raised on Residential Plots and in which it was held that:

“ ... *Mr. Abid Zuberi contended that in fact main issue for considering is whether flats can be constructed on residential plot and this issue already stands decided by the Honourable Supreme Court in various judgments which are binding on this Court and therefore no elaborate discussion is required. We find substance in the contention and agree with the proposition that the Honourable Supreme Court has already decided the issue that flats can be constructed on a residential plot and it is held accordingly.*”

While the contentions of Mr. Abid S. Zuberi, as recorded in the judgement reported as **Zaheer Ahmed Chaudhry vs. City District Government Karachi and others**<sup>147</sup> refer to the order of the Division Bench of this Court in CP No. D-549 of 1997 entitled **Farookh Captain and others vs. Karachi Building Control Authority and others** as having decided this issue and as there was no judgement of the Supreme Court of Pakistan on that point, it may be that the Division Bench while placing reliance on the order in CP No. D-549 of 1997 entitled **Farookh Captain and others vs. Karachi Building Control Authority and others**, inadvertently referred that it was decided by the Supreme Court of Pakistan.

88. Amendments thereafter followed to the provisions of the KB&TPR, 2002 and in which Regulation 25-2 was amended<sup>148</sup> as hereinunder:

“ ... *All Residential houses/bungalows/buildings shall observe the following standards, except where any of these standards are in conflict with Clause 25-9, in which case Clause 25-9 shall prevail...*”

By inserting the word “building” into Regulation 25-2 of the KB&TPR, 2002 and which expression is defined in Clause (107) of Regulation 2 of the KB&TPR, 2002 to include “flats”, the amendment pressed that flats could therefore be approved for construction by the SBCA under Regulation 25-2 of the KB&TPR, 2002 when the plot was designated in its lease as being for “residential” use and also under Regulation 25-4 of the KB&TPR, 2002 when the plot was designated in its lease as being marked for a “Flat Site.” The amendment was considered in a decision of a Division Bench of this Court reported as **Standard Chartered Bank Limited through**

<sup>146</sup> 2006 YLR 2537

<sup>147</sup> 2006 YLR 2537

<sup>148</sup> See the **Sindh Government Gazette**, Extra., Pt. IA, Pg No. 18, dated 26 November 2010

**Constituted Attorney vs. Karachi Municipal Corporation through Administrator and 9 others**<sup>149</sup> and in which it was held that:

“ ... 16. We turn to consider the second ground, which requires a consideration of Farrokh Captain and the 2002 Regulations. Paragraph 4 of Schedule D to Part II of the 1979 Regulations, which was considered in Farrokh Captain, and Regulation 18-4.2 of the 2002 Regulations have been reproduced above (see paras 2 and 3). Reference has also been made to the procedure laid down in Regulation 18-4.2 for conversion of a residential plot to any other use. The corresponding provision in the 1979 Regulations was also considered in Farrokh Captain. This was paragraph 3 of Schedule D to Part II. The learned Division Bench accepted the submission by counsel that "as long as the use for residential purposes is retained", the requirements of paragraphs 3 and 4 would not be engaged. It was sought to be argued that bungalows, town houses and flats were separately categorized for residential use in the 1979 Regulations, and therefore the use of a residential plot for apartments or flats would require paragraphs 3 and 4 to be applied. As to this, the learned Division Bench observed that "if the law makers intended to treat use from one category to another category of residential use as conversion, they could have simply done so by designing para 4 of Schedule 'D' Part II, on the same [pattern] as para 3". When the submissions made by learned counsel for the petitioner in the present case are compared with what was argued in Farrokh Captain, the arguments are (subject to what is stated below) remarkably similar. We have already noted the close similarity between the provisions of the 2002 Regulations and the 1979 Regulations. With respect, we have been unable to detect any substantive difference as would permit us to take a view different from that which has already found favor with this Court in Farrokh Captain. This is especially so because it is not disputed before us that the construction underway at the subject property is of a purely residential nature, i.e., comprises of 16 flats for such use and accommodation.

17. The difference sought to be made out on the basis of Regulations 25-2 and 25-4 is, with respect, not relevant for present purposes. Chapter 25 is concerned with zoning regulations and area standards and it is therefore not surprising that it has divided the plots into various categories such as commercial, industrial, residential and flats. But that does not address the question that is before us. We may note that it was not contended by learned counsel for the petitioner that there were flat sites specifically demarcated in or for the area where the subject property is located. In our view, the present matter stands covered by Farrokh Captain and the issue at hand ought to be answered in the same manner in relation to the 2002 Regulations as was held in respect of the 1979 Regulations. We hold accordingly.

89. The issue that arises in this Application is that if “flats” have been classified as “residential” whether such usage can be permitted on plots which are converted from “residential” to “commercial” and which are thereafter classified solely as “commercial.” Necessarily, the first question to consider is as to whether the KB&TPR, 2002 or the Change of Land Use of City District Government Karachi Bye-Laws, 2003 are to be considered the basis for making such a determination. However, having considered each, I find that there is little difference that is to be made by using either as a basis for answering such a question.

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<sup>149</sup> 2015 YLR 1303

90. The definition of the expression “residential” in Regulation 19-2.1 of the Karachi Building and Town Planning Regulations, 2002 states that the expression “residential” should be considered to mean land which is used for “dwelling” facilities. The expression “dwelling” however has not been defined in the KB&TPR, 2002. Recourse having had to be made to the grammatical meaning of the word, the Oxford English Dictionary defines the expression to mean:<sup>150</sup>

“ ... 1. *The action of Dwell.*  
2. *A place of residence or habitation , a house.*”

This definition is expanded on in Regulation 2-107 of the KB&TPR, 2002 and which clarifies the various types of constructions that can be classified as residential and which is expressed to mean a “*bungalow, town house, flats and such other buildings.*” It is therefore clear that “flats,” such as are being proposed to being constructed on the Suit Property, under the provisions of the KB&TPR, 2002 have been classified as “residential” and not “commercial.” This is further reinforced by the definition of the expression “Commercial Uses” as defined in Regulation 2-34 of the KB&TPR, 2002 which states that:

“ ... *“Commercial Use” means commercial (trade) uses such as shops, shopping centers, markets and other uses as defined in Sub-clause 19-2.2.6”*

Similarly, Regulation 22-33 of the KB&TPR, 2002 defines what a commercial building is as:

“ ... *Commercial Building” means a building constructed for commercial use as defined in sub-clause 19-2.2.6.”*

Regulation 19-2.2.6 of the KB&TPR, 2002 thereafter clarifies what usage would be classified as commercial and states that:

“ ... 19-2.2.6. *Commercial (trade) uses :*  
  
*normally includes only the land used for the activity in question, though this may be increased by additional open or green space, if the operation of the facility concerned requires it. Commercial (trade) uses includes :*  
  
*(a) whole sale trade: subzi mándi, fruit mandi, whole sale markets.*  
  
*(b) retail shopping: including shops, shopping centres, department stores, bazaars, markets and hawkers areas juma bazar etc.;*  
  
*(c) personal services: including barbers, hair-dressers, baths, tailoring, shoe-making, laundries and dry cleaners;*

<sup>150</sup> Brown, L (1993) *Shorter Oxford English Dictionary*, Oxford University Press, Oxford

*(d) catering: including restaurants, banquet halls, marriage hall/lawn, refreshment stalls, buffets,*

*(e) lodging: including hotels, motels, guest houses and clubs providing lodging;*

*(f) business offices including banks;*

*(g) petrol stations, CNG station.*

*(h) Cyber Cafe etc.*

*(i) Non-obnoxious warehouse."*

A comparison as between each of these definitions would show that the expression "residential" refers to land which is a place of an abode of a person while "commercial" refers to land from which a person carries out trade i.e., selling a good or providing a service. A distinction having thereafter been made in these regulations as between a "flat" being residential i.e., a place of an abode of a person and a premise that can be used for commercial use, I am of the opinion under the provisions of the KB&TPR, 2002 a flat cannot be classified as "commercial" i.e., a place for trade.

91. The Change of Land Use of City District Government Karachi Bye-Laws, 2003 in Bye-Laws 2-6 to 2-8 purports to define each of the expressions residential, flat sites and commercial by correlating the definition of these words to the usage assigned to a plot. This would mean that it would be necessary to see the terms on which a plot was allotted, leased or converted to e.g., residential, commercial or flat site and then classify the usage permitted on a plot on such a basis. The definitions however avoid to define what kind of activities would constitute "residential," "commercial" or "flats" and in respect of which once against the dictionary definition of the word would have to be considered as clarified hereinabove and which would lead to the same conclusion that flats being used for a person's abode would be residential in nature.

92. After considering both the provisions of the KB&TPR, 2002 and the Change of Land Use of City District Government Karachi Bye-Laws, 2003, to my mind, the very fact that a distinction has been made in both the KB&TPR, 2002 and Change of Land Use of City District Government Karachi Bye-Laws, 2003, either in terms of usage or in terms of allotment, as between plots on which construction can be raised for commercial use and plots on which construction can be raised for residential use or for flats means that the construction that is raised on commercial plots would automatically exclude such plots from having construction thereon of either a residential nature or for flats. Such a finding would be in

consonance with the decisions of all three Division Benches of this Court in the unreported petition bearing CP No. D-549 of 1997 entitled **Farookh Captain and others vs. Karachi Building Control Authority and others** and the decisions reported as **Zaheer Ahmed Chaudhry vs. City District Government Karachi and others**<sup>151</sup> and **Standard Chartered Bank Limited through Constituted Attorney vs. Karachi Municipal Corporation through Administrator and 9 others**<sup>152</sup> each of which have held the “flats” are “residential” and not “commercial” in nature. It would therefore follow that where a plot is converted from residential to commercial, while construction that would be classified as commercial could be raised thereon, construction of the nature of flats, as has been approved by the SBCA on the Suit Property, being residential in nature prima facie could not have been approved.

93. To my mind, the approval accorded by the SBCA for construction on the Suit Property is not purely for commercial use and having both commercial and residential elements would be classified as an approval for “residential cum commercial” construction. Reference is made to such a classification in Regulation 19-1.2 of the KB&TPR, 2002 as hereinunder:

“ ... 19-1.2. Where land includes mixed uses, the designations of the various uses classes may be combined as appropriate (e.g. “commercial-cum-residential”)”

Chapter 19 of the KB&TPR, 2002 is entitled as “General Standards: Land Use Classifications” and as such Regulation 19-1.2 of the KB&TPR, 2002 clarifies that, wherever in Chapter 19, usage of land is described in one category e.g., residential or commercial **and the land has been designated to be used for a mixed purpose e.g., residential cum commercial**, to determine what could be constructed on such plot recourse could be made to the definition of both residential and commercial and each of the usages specified therein could be sanctioned on the basis of an approval for construction issued by the SBCA. **This is however not the case here as admittedly, when converted, the Suit Property was not converted for a “residential cum commercial” purpose but rather was converted solely for “commercial” usage.**

94. Mr. Mushtaq A. Memon placed reliance on the definition of the expression “commercial” as contained in Sub-Section (e) of Section 2 of the Sindh Disposal of Urban Land Ordinance, 2002 and in which the definition of that expression has been expanded to include “commercial

<sup>151</sup> 2006 YLR 2537

<sup>152</sup> 2015 YLR 1303

cum residential” usage and pressed for such a definition to be applied by the SBCA to the provisions of the KB&TPR, 2002 when sanctioning an approval to a construction. Respectfully, I am not convinced by this argument. While interpreting the provisions of the KB&TPR, 2002 I cannot “borrow” definitions which have been enacted by the Provincial Assembly in a completely different statute as to do so would in effect rewrite the definition of that expression as has been prescribed in the KB&TPR, 2002. As a rule of interpretation, I must only give effect to the definitions as prescribed in those regulations as those were the basis on which the approval for construction was granted by the SBCA and not on the definition contained in an extraneous statute. SBCA and not on the definition contained in an extraneous statute.

95. The question that arises is as to why such an action has been undertaken by the Respondents No. 9 to 13 and which has been approved by the SBCA. The development of a plots for any use are regulated by Regulation 25 of the KB&TPR, 2002 which clarify the various heads under which a construction can be approved and identify 13 different zones and area standards:

S No.	Zoning and Area Standard	Regulation
1.	<i>Residential</i>	25-2
2.	<i>Commercial</i>	25-3
3.	<i>Flat Site</i>	25-4
4.	<i>Amenity Plots</i>	25-5
5.	<i>Industrial Area</i>	25-6
6.	<i>Cottage Industries, Work Shops, Godowns, Non obnoxious Warehouses</i>	25-7
7.	<i>Dairy Plots,</i>	25-8
8.	<i>Old City area</i>	25-9
9.	<i>Cinema Houses</i>	25-10
10.	<i>Petrol Stations</i>	25-11
11.	<i>CNG Stations</i>	25-12
12.	<i>Religious Buildings, and</i>	25-13
13.	<i>High Density Zone</i>	25-14

These regulations, through the Floor Area Ratio, Footprint and COS, inter alia control the amount of construction that can be raised on a plot. By way of an example, hypothetically, if a plot admeasures 1000 square yards and a Floor Area Ratio of 1:2 is prescribed, then a calculation is first to be made to convert the square yardage to square feet by multiplying the figure representing the area of the plot by a factor of 9 i.e.,

$$1000 \text{ square yards} \times 9 = 9000 \text{ square feet}$$

This figure representing the square footage is thereafter to be multiplied by the factor indicated in the Floor Area Ratio and the product of which would identify the permissible area, in square feet, that would be available for construction on a plot, and which in the above example would be:

9000 square feet x 2= 18,000 square feet

The owner of a plot is thereafter able to construct such square footage on a plot, subject to no construction being raised on the area excluded by the foot print and on the Compu as mentioned in the KB&TPR, 2002.

96. When one is to peruse each of the above-mentioned regulations one will find that save for Regulation 25-9, which relates to the Old City Area,<sup>153</sup> no other prescription is made in any of the other regulations for a “residential cum commercial” category of plot. The Suit Property is not located in an Old City Area and therefore is not amenable to the prescriptions under that Regulation.

97. The Suit Property admeasures 2000 square yards and having been converted into a commercial property would, as per the table indicated in Regulation 25-3 of the KB&TPR, 2002, on the date of the first sanction have been able to avail a Floor Area Ratio of 1:5.5. A corresponding sized plot under the heading of residential would have been able to avail a Floor Area Ratio of 1:1 and if classified as a Flat Site would have been able to avail to a Floor Area Ratio of 1:2.75. The variation and the advantage given by the SBCA to the Respondents No. 9 to 11 becomes more apparent from the perspective of the available square footage for construction and which is as hereinunder:

<i>Commercial FAR - 1:5.5</i>	<i>Residential FAR - 1:1</i>	<i>Flat Site FAR -1:2.75</i>
<i>99,000 Square Feet</i>	<i>18,000 Square Feet</i>	<i>49,500 Square Feet</i>

The variation as between Commercial and Residential of constructable area being 81,000 square feet, it seems that the SBCA had prima facie illegally sanctioned construction being “residential cum commercial” in nature on a plot that was not designated as being for “residential cum commercial” use as the Suit Property was, after its conversion, solely designated for “commercial” use. This was prima facie done so as to allow for the Defendant No. 9 to 11 to avail the financial benefit of the

<sup>153</sup> The areas comprised in the Old City Area are Lyari Quarters, Lea Quarters, Kemari Quarters, KPT Area, Queens Quarters, Jamshed Quarters (J.M.), Muslimabad, Hyderabad Colony Fatima Jinnah Colony, Garden East Garden West, Bath Island Quarters, Civil Lines Quarters, Frere Town Quarters, Portion of Cantonment Quarters, Serai Quarters, Railway Quarters, Saddar Bazar Quarters, Preedy Quarters, Artillery Maidan Quarters, Ghulam Hussain Kassim Quarters, Old Town Quarters, Bunder Quarters, Market Quarters, Napier Quarters, Tahil Ram Quarters, Wadohmal Oddahram Quarters, Ranchore Lines Quarters, Ramaswami Quarters, Lawrence Quarters, Harchand Rai Vishandas Quarters, Soldier Bazar Quarters, Arambagh Quarters and Jacob Lines(KDA Scheme No. 35).

excess Floor Area Ratio to construct a greater square footage of flats and which being residential in nature prima facie could not have been approved by the SBCA under the Land Area Conditions specified in Regulation 25-3 of the KB&TPR, 2002 and which therefore is prima facie a misapplication of the regulations by the SBCA.

**(vii) Whether SBCA can increase the Floor Area Ratio without an Urban Renewal**

98. It seems that after the approval first been sanctioned on 9 September 2022, a further approval was granted on revisions made to that plan on 19 June 2023. It would seem that this was on account of Regulation 25-3 of the KB&TPR, 2002 having been amended so as to increase the FAR for plots of the size of the Suit Property from 1:5.5 to 1:7. The difference on account of the increase in FAR amounts to an **additional 27,000 square feet** that would be permissible for the Defendants No. 9 to 11 to avail for commercial use. The question that therefore has to be asked is as to whether the authority under Section 4 of the SBCO, 1979 has the requisite power under that statute to alter the permissible quantum of construction on a plot by simply altering the figure, representing the Floor Area Ratio, or for that matter the Footprint or the F in relation to a property, in the KB&TPR, 2002.

99. I have already considered the provisions of the Sections 7B, 7C and 7D of the SBCO, 1979<sup>154</sup> and have opined that the SBCA could only exercise powers under the KB&TPR, 2002, when the Master Plan for the entire District of Karachi is notified in terms of Section 7B of the SBCO, 1979. Clearly, since this has not been done, prima facie any amendments made by the authority constituted under Section 4 of the SBCO, 1979 to the KB&TPR, 2002 would to my mind prima facie not be legal and cannot be sustained.

100. **In addition**, the Supreme Court of Pakistan in the decision reported as **Abdul Razzak vs. Karachi Building Control Authority and others**<sup>155</sup> had dilated on this issue and has clarified that:

“ ... 21. It may be mentioned that framing of a housing scheme does not mean simpliciter levelling of land and carving out of plots, but it also involves working out approximate requirements of water, electricity, gas, sewerage lines, streets and roads etc. If a housing scheme is framed on the assumption that it will have residential units 1 + 1, but factually the allottees of the plots are allowed to raise multi-storeyed buildings having flats, the above public utility services will fall short of

<sup>154</sup> See paragraph 65 of this order

<sup>155</sup> PLD 1994 Supreme Court 512

*requirements, with the result that everyone living in the aforesaid scheme will suffer."*

It is only logical that if the SBCA has provided a Floor Area Ratio of 1:5.5 for commercial plots of a certain size, the same must have been developed by the authority on some rational basis taking into account the utilities and infrastructure that would be required to serve such a construction. To unilaterally change such a figure without making a proportionate change in the infrastructure and the utilities available within the town planning scheme will cause havoc to town planning scheme of the area and render the area as unlivable. To my mind such an amendment made to the KB&TPR, 2002 by the authority constituted under Section 4 of the SBCO, 1979 would be so irrational that it would be classified as being "Wednesbury Unreasonable"<sup>156</sup> and therefore could prima facie not be sustained. The science of town planning is not premised on trying to accommodate as many people on a piece and parcel of land as possible but rather is to accommodate as many people as that piece and parcel of land has been developed to hold. If such a balance is altered by changing the figure representing the Floor Area Ratio, the Footprint or the Compulsory Open Space then a corresponding change would have to be made in the infrastructure and utilities of the area to allow for the persons living in the area to live in some semblance of order and to do otherwise would be to take a decision regarding town planning purely for the financial benefit of the authority and the developer without performing the authorities core function of town planning and which would be so irrational that it would, to my mind be absurd. To surmise, it cannot be that the regulating authority, when entrusted with a function of town planning for the benefit of residents of an area, puts its consideration for town planning to the side and works purely for its and the developers financial benefit and abdicates its obligation to town plan for the benefit of all of the residents of that area. This would also to my mind prima facie be illegal.

101. In this context I have considered as to whether it is possible for this court to issue an injunction where executive action, in the form of regulations made under the provisions of a statute, are prima facie found to be illegal in the context of the decisions passed by the Supreme Court of Pakistan in **Federation of Pakistan vs. Aitzaz Ahsan and another**<sup>157</sup>

<sup>156</sup> See **Dr Akhar Hassan Khan and others vs. Federation of Pakistan** 2012 SCMR 455; **Haji Organizers Association of Pakistan through Authorized officer and others vs. Federation of Pakistan through Secretary Ministry of Religious Affairs and Interfaith Harmony, Islamabad** PLD 2020 Sindh 42, **Messrs 3N-Lifemed Pharmaceuticals vs. Government of Punjab through Secretary Primary and Secondary Healthcare Department and Other** 2023 CLC 948; **Muhammad Tariq Sahi vs. Government of Punjab** 2024 YLR 1306

<sup>157</sup> PLD 1989 Supreme Court 61;

and **Aijaz Ali Khan Jatoi v. Liaquat Ali Khan Jatoi**<sup>158</sup> Each of those decisions stated that a **statute** passed by the Majlis e Shoora or by a Provincial Assembly will, as a rule of constitutional interpretation, continue to be valid until they are declared to be ultra vires and consequentially no interim injunction could be issued by a court to prevent the operation of that law. I am clear that while such a rule extends to statutes, it does not extend to delegated legislation which being in the form of an executive action, like all other executive actions, can be enjoined by a court as an interim measure and which does not carry attract the same rule as a statute. Craig in his treatise on Administrative Law has stated that:<sup>159</sup>

“ ... Challenge to subordinate legislation is subject to different consideration and a declaration and injunction can be granted to a plaintiff.”

The erstwhile House of Lords in the decision reported as **R v. Secretary of State for Transport, ex parte Factortame Ltd and Others**<sup>160</sup> has also opined on this issue and also as to the standard which a Court should enforce when granting such an injunction inter alia holding that in certain circumstances it would be permissible to enjoin the operation of a statute. However, the Judgement of the House of Lords, in terms of the right to grant an injunction to suspend the operation of a statute, is in conflict with the decision of the Supreme Court of Pakistan in **Federation of Pakistan vs. Aitzaz Ahsan and another**<sup>161</sup> and **Aijaz Ali Khan Jatoi vs. Liaquat Ali Khan Jatoi**<sup>162</sup> and to that extent cannot be considered by this Court. That being said, as neither of the two decisions of the Supreme Court of Pakistan touch on the secondary issue as to whether a court can grant an injunction to restrain an executive action, I am prima facie of the opinion that there is no restraint that has been imposed in either decision of the Supreme Court of Pakistan in this regard from issuing an injunction in respect of what is prima facie an illegal act. The actions taken by the SBCA to alter the Floor Area Ratio in the KB&TPR, 2002 would, for the reasons stated hereinabove, clearly be outside the scope of the SBCO, 1979 and hence prima facie be illegal and in addition would on account of the decision of the Supreme Court of Pakistan reported as **Abdul Razzak vs. Karachi Building Control Authority and others**<sup>163</sup> also be “Wednesbury Unreasonable”.

<sup>158</sup> 1993 SCMR 2350

<sup>159</sup> Craig, P.P. (2021) **Administrative Law**, London, Thomson Reuters at pg. 829

<sup>160</sup> 1991 1 A.C. 603

<sup>161</sup> PLD 1989 Supreme Court 61;

<sup>162</sup> 1993 SCMR 2350

<sup>163</sup> PLD 1994 Supreme Court 512

**(viii) The Amalgamation of Plot No. D-10, Block A, North Nazimabad, Scheme No. 2, Karachi and Plot No. D-25 Block A, North Nazimabad, Scheme No. 2, Karachi in the context of Regulation 18-4.5 of the KB&TPR,2002.**

102. The permission granted for the change of land use of the Suit Property by the Master Plan Department of the SBCA on 22 August 2017 was conditional and included a restriction, imposed in Regulation 18-4.5 of the Karachi Building & Town Planning Regulations, 2002 and which is reproduced as under:

“ ... *the residential plots facing declared commercial road and amalgamated with rear plot and if the rear plot adjoins residential plots on side on rear plot only parking floors shall be allowed provided that access shall be from front plot. The total allowable FAR shall be the FAR applicable on Front Plot plus the total covered area of parking floors at rear plots”*

It seems that by this regulation where the conversion of usage of a that abutted a road where conversion was permitted from residential to commercial was amalgamated with a property which did not abut such road and “adjoined” residential properties, while the amalgamation could be permitted the approval for construction would be restricted inasmuch as:

- (i) the rear plot would only have parking floors constructed on it, and
- (ii) the access to the plot would be from the front plot.

Regulation 18-4.5 of the KB&TPR, 2002 was amended on 21 June 2018 and which amendment read as hereinunder:

“ ... *Any residential plot located on declared commercial road and amalgamated with rear plot falling in residential area shall not be allowed conversion except after withdrawal of amalgamation with rear plot.”*

It seems that by this amendment from 21 June 2018, the concession given to only construct parking floors on the rear side of the amalgamated plot after conversion of use was withdrawn and it was stated that the conversion of such plots would not be permitted until after the amalgamation with the rear plot was withdrawn and which regulation remained consistent at the time when the final approval of construction was issued on 19 June 2023 and which remains unchanged to date.

103. A perusal of the approval that has sanctioned by the SBCA on 19 June 2023 shows that it has been issued in violation of the permission granted for the change of land use of the Suit Property by the Master Plan Department of the SBCA on 22 August 2017 as access to parking is not from the front plot but rather is from the side road and from the area comprising the old Plot No. D-45, Block A, North Nazimabad, Scheme No. 2, Karachi. This has apparently been done to allow for shops to be constructed on the front and the side of the Suit Property so as to allow the Defendants No. 9 to 100 to gain additional financial benefit from the sale of those shops. On this score as well, it would seem that the approval for construction sanctioned by the SBCA has been accorded prima facie in violation of the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979.

***(ix) Failure to obtain approvals from the Sindh Environmental Protection Agency under the provisions of the Sindh Environmental Protection Act, 2014 read with Sindh Environmental Protection Agency (Environmental Assessment) Regulations, 2021.***

104. The Sindh Environmental Protection Agency has filed a statement in this Suit stating compliance has not been made by the Defendants No. 9 to 11 of Section 17 of the Sindh Environmental Protection Act, 2014 read with the provisions of the Sindh Environmental Protection Agency (Environmental Assessment) Regulations, 2021. It would seem to me if that were the case then the Defendant No. 8 would be at liberty to take appropriate action under the provisions of its constituting statute, rules and regulations and in the event that either the Plaintiff and/or the Defendants No. 9 to 11 are aggrieved by any such action they could avail their remedy before the Sindh Environmental Protection Tribunal.

***(x) The Injunction Ordered by the Court.***

105. For the foregoing reasons, I am prima facie of the opinion that:

- (i) when the conversion of the Suit Property was done by the Master Plan Department of the SBCA on 22 August 2017,

prima facie the Master Plan Department of the SBCA did not have the requisite jurisdiction to convert the Suit Property, however at this stage such an action should be considered to have been done within the de facto jurisdiction of the Master Plan Department of the SBCA;

- (ii) while sanctioning the approval for construction on the Suit Property, the treatment of the expression “flat” as “commercial” usage by the SBCA, is contrary to the definition of that expression as contained in the provisions of the KB&TPR, 2002 and the provisions of the Change of Land Use City District Government Karachi Bye-Laws, 2003 and which usage is rather within the definition of the expression “residential” as defined therein as has been held by this Court in an unreported petition bearing CP No. D-549 of 1997 entitled **Farookh Captain and others vs. Karachi Building Control Authority and others** and in the decision reported as **Standard Chartered Bank Limited through Constituted Attorney vs. Karachi Municipal Corporation through Administrator and 9 others**;<sup>164</sup> consequentially, a prima facie case has been made out that the approval sanctioned by the SBCA has been sanctioned in violation of the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 read with the provisions of the KB&TPR, 2002;
- (iii) that the unilateral increase in the FAR by an amendment made to Regulation 25-3 of the Karachi Building & Town Planning Regulations, 2002 increasing the permissible Floor Area Ratio from 1:5.5 to 1:7 is prima facie illegal as the amendment made is prima facie an act in excess of the jurisdiction conferred on the SBCA under the provisions of Section 7 B, 7C and 7D of the SBCO, 1979 and is prima facie also “Wednesbury Unreasonable”; and
- (iv) that the approval that has been accorded by the SBCA on 19 June 2023 for construction on the Suit Property has prima facie been issued in violation of the condition 7 of the permission granted by the Master Plan Department of the SBCA issued on **22 August 2017** and additionally of Regulation 18-4.5 of the KB&TPR, 2002.

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<sup>164</sup> 2015 YLR 1303

As there are prima facie illegalities in respect of the approval that has been sanctioned by the SBCA under the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979, therefore permitting any construction to continue on the Suit Property, even on undertakings given by the Defendant No. 9 to 11 would amount to, in the words of a Division Bench of this Court in the decision reported as **Suleman Mala vs. Karachi Building control Authority**,<sup>165</sup> a “premium on illegality” and which cannot be sustained. The balance of convenience is clearly in favour of the Plaintiff who will suffer if an illegal construction is permitted to being raised on the Suit Property and quite clearly the Defendant No. 9 to 11 cannot premise a balance of convenience or irreparable loss on being permitted to continue to perpetuate an illegality.

106. While, I do think a prima facie case has been made out by the Plaintiff for the grant of an injunction but which has to be balanced as against the rights of the Defendants No. 9 to 13 as this court cannot permanently injunct them from constructing on the Suit Property as their title to the Suit Property is not in dispute. In the facts and circumstances, keeping in mind the above and being cognizant that a complete bar cannot be imposed on the Defendants No. 9 to 11 right to construct on the Suit Property, CMA No. 10156 of 2024 is allowed in terms that the Defendants No. 9 to 11 are restrained from raising any further construction on the Suit Property until they submit and get approved a revised sanction from the SBCA:

- (i) which shall be approved at a Floor Area Ratio of not more than 1:5.5; and
- (iii) all the units therein must be of a commercial nature as defined in Regulation 19-2.2.6 of the KB&TPR, 2002.

and on account I had by a short order dated 11 February 2025 allowed this Application in the above terms and these are the reasons for that order.

JUDGE

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<sup>165</sup> 1990 CLC 448

4 August 2025