

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ

Raja ZAHOOR AHMED and others---Petitioners

Versus

CAPITAL DEVELOPMENT AUTHORITY through Chairman and others---Respondents

Civil Petitions Nos.3347 to 3351, 4229 and 4263 of 2021, decided on 20th May, 2022.

(Against the consolidated judgment of Islamabad High Court, Islamabad dated 16.02.2021, passed in W.Ps. Nos.4126 of 2015 and connected cases)

(a) Capital Development Authority Ordinance (XXIII of 1960)---

---Ss. 11, 12 & 13---Status of properties changed from residential to commercial---Legality---Violation of the Master Plan---Capital Development Authority ("CDA") has no discretionary power to give effect to any scheme or accord any permission for change of status or use of property in breach of the Master Plan--Board of Directors ("Board") in which vests the management of the CDA is not competent to allow any change in the character of any property in violation of the Master Plan---Master Plan is protected under the Capital Development Authority Ordinance, 1960 ('the Ordinance') and the Ordinance obliges the CDA to regulate the use of land pursuant to the Master Plan---Prohibition contained against the use of land for a purpose other than the one specified in the Master Plan is absolute.

The Board of Directors ("Board") of the Capital Development Authority ("CDA") took the decision dated 13-02-1995 ('earlier decision') to commercialize the residential properties of the petitioners. The Board soon realized that the decision dated 13-02-1995 would be in violation of the Master Plan of the city. Taking note of the fact that the decision dated 13-02-1995 had not till then been implemented as conversion rate could not be finalized, the Board through a fresh decision dated 05-10-1995 rescinded its earlier decision. Subsequently, the CDA issued notices to the petitioners for non-conforming use of their properties.

The properties owned by the petitioners did not fall within a commercial area as set out in the Master Plan or the Scheme prepared thereunder. They sought a change in the status of their properties from residential to commercial. However, such a change was not permissible under the Capital Development Authority Ordinance, 1960 ('the Ordinance') without a change in the Master Plan which could only be done with the approval of the Federal Government. Any scheme prepared relating to land use, zoning and land reservation, among other things, was required to be in pursuance of the Master Plan. The CDA had no discretionary power to give effect to any scheme or accord any permission for change of status or use of property in breach of the Master Plan. The Master Plan was protected under the Ordinance and the Ordinance obliges the CDA to regulate the use of land pursuant to the Master Plan. The prohibition contained against the use of land for a purpose other than the one specified in the Master Plan was absolute. There was, therefore, no escape from the conclusion that the earlier decision of the Board was taken without lawful authority. The Board itself realized that its earlier decision would be in violation of the Master Plan and, thus, rightly rescinded it through a fresh decision.

No vested rights could be created in favour of the petitioners under the earlier decision. The Board in which vests the management of the CDA was not competent to allow any change in the character of the properties of the petitioners in violation of the Master Plan. The Master Plan could only be amended with the approval of the Federal Government. The earlier decision was in breach of provisions of the Ordinance and in conflict with the Master Plan. It was taken without lawful authority and was rightly undone by the Board. Moreover, the CDA did not implement its earlier decision. It did not approve any change in the status of the properties owned by the petitioners during the period this decision remained in the field. The petitioners could not, in the given circumstances, claim to have taken any decisive steps in pursuance of the earlier decision. The doctrine of locus poenitentiae was not, therefore, attracted to their case.

Supreme Court directed that the CDA shall ensure to factor in adaptation, climate resiliency and sustainability into their plans, policies and decisions in order to protect the constitutional rights to life,

dignity and property of the residents of the Capital City, in particular, and people of the country, in general. Petitions for leave to appeal were dismissed, and leave was refused.

(b) Environmental law---

---Urban planning and climate change---Adaptation, climate resiliency and sustainability---Urban development authorities---Factors to be considered by urban development authorities in Pakistan while making urban development plans stated.

The importance of regulating land use for orderly urban development cannot be understated. Planning and regulating building construction activity in urban environments is emphasized around the world in the interest of organized growth of cities. It is an exercise based on scientific research and experience which recommends in a comprehensive manner from social, economic, environmental, infrastructure capacity, aesthetic, and other relevant aspects, the best present and future uses of geographically specified land areas called zones. Zoning is a public welfare management tool employed in urban planning to serve the city's interests. Public welfare today would naturally encompass the pressing issues of the time i.e., climate change; environmental degradation; food and health safety; air pollution; water pollution; noise pollution; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety, natural resource conservation, environmental protection, social equity, social choice, etc. Any initiative to revise land use regulations must be based on the said considerations in order to ensure that urban development standards stay relevant to current issues of the community.

Jerold S. Kayden, 'National Land-Use Planning in America: Something Whose Time Has Never Come' (2000) 3 WASH. U. J. L. & POL'Y 445, 446-447; *Agins v. City of Tiburon* 447 U.S. 255, 262 (1980); Keith H. Hirokawa, 'Making Sense of a "Misunderstanding of the Planning Process"' (2012) 44 Urb. Law. 295 and *D. G. Khan Cement Company Limited v. Government of Punjab* 2021 SCMR 834 ref.

The necessity of planned urban development is accentuated in the vulnerable age of climate change. Climate change poses a series of interrelated challenges to the country's most densely populated places: its cities. Many cities depend on infrastructure, like water and sewage systems, roads, bridges, and power plants, that is aging and in need of repair or replacement. Rising sea levels, storm surges, heat waves, and extreme weather events will compound these issues, stressing or even overwhelming these essential services. Climate change and its impacts threaten the well-being of urban residents. Essential infrastructure systems such as water, energy supply, and transportation will increasingly be compromised by interrelated climate change impacts. The nation's economy, security, and culture all depend on the resilience of urban infrastructure systems. Direct and interacting effects of climate change will expose people who live in cities to multiple threats. Climate changes affect the built, natural, and social infrastructure of cities, from storm drains to urban waterways to the capacity of emergency responders. Climate change increases the risk, frequency, and intensity of certain extreme events like intense heat waves, heavy downpours, flooding from intense precipitation and coastal storm surges, and disease incidence related to temperature and precipitation changes. The vulnerability of urban dwellers multiplies when the effects of climate change interact with pre-existing urban stressors, such as deteriorating infrastructure, areas of intense poverty, and high population density.

<https://nca2014.globalchange.gov/report/sectors/urban> ref.

National response to climate change, inter alia, is to continuously evolve innovative and smart "adaptation" strategies. Adaptation climate change strategy requires that Pakistan and its public institutions make climate resilient policies and rest their decisions on sustainability. Infrastructures must be strong enough to withstand climate change e.g., heavy rains, floods, earthquakes and other extreme weather. Shutting eyes to the ominous signs of climate change will plunge the country into a world that may not be able to sustain fundamental human values. It could affect basic physical and larger social needs including harnessing and consuming energy, water and food as well as habitation, travelling and communication potentialities. It is doubtful that early town planners were driven by climate considerations. However, climate must, in the wake of climate change, form a basic determinant of urban planning and design. Climate-resilient development in cities of all sizes is crucial for improving the well-being of people and

increasing the life opportunities of future generations. Any change in the Master Plan to an urban scheme without taking account of the climate factor would be detrimental.

Shelby D. Green, 'Zoning Neighborhoods for Resilience: Drivers, Tools and Impacts' (2016) 28 Fordham Env'tl. Law Rev. 41 ref.

Urban development authorities need to ensure that their urban development plans consider and support adaptation, climate resiliency and sustainability. Before putting up a proposal for amendment or modification in the Master Plan or a scheme or before proposing a new development plan or scheme, the urban development authorities need to seriously consider the climate change angle. Any conversion of residential neighbourhoods to commercial zones is likely to lead to adverse environmental consequences on account of increased human and vehicular traffic and activity, and should not be permitted without proper investigation, forethought and remedial measures to control the soaring thermal environment. Urban planners should prioritize the climate factor in their development approaches to address the triple planetary crises of Climate Change, Air Pollution and Loss of Biodiversity.

(c) Constitution of Pakistan---

---Arts. 9, 14, 18 & 23---Environmental law---Climate change---Effect of climate change on Fundamental rights of people explained.

Effect of climate change on cities, affects its residents and their core fundamental rights to life, dignity and property guaranteed under Articles 9, 14, 18 and 23 of the Constitution. In an urban living, climate change can impair the quality of life of a person, offend his dignity and deprive him of his property or the right to fully enjoy his property. Incorporating adaptation, climate resilience and sustainability, in the policy decisions by the urban development authorities, are essential to actualize the fundamental rights of the people and therefore form an integral part of the fundamental human rights of the people of the country. In the face of the grave existential threat of climate change, adaptation, climate resilience and sustainability assume the role of a constitutional necessity and of an overarching constitutional obligation.

Mansoor Ahmed, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Petitioners (in C.Ps. Nos. 3347-3351 of 2021).

Syed Asghar Hussain Sabzwari, Senior Advocate Supreme Court and Mahmood A. Sh., Advocate-on-Record for Petitioners (in C.Ps. Nos. 4229 and 4263 of 2021).

Nemo for Respondents.

Hasan Riaz, Research Officer, SCRC for Research Assistance.

Date of hearing: 20th May, 2022.

ORDER

SYED MANSOOR ALI SHAH, J.---The case stems from a decision of the Board of Directors ("Board") of the Capital Development Authority ("CDA") dated 13.02.1995 to commercialize the residential properties of the petitioners situated in front of the Industrial and Trading Centre, Sector G-9/4, Islamabad. The Board soon realized that the decision dated 13.02.1995 would be in violation of the Master Plan of Islamabad. Taking note of the fact that the decision dated 13.02.1995 had not till then been implemented as conversion rate could not be finalized, the Board through a fresh decision dated 05.10.1995 rescinded its earlier decision dated 13.02.1995. Subsequently, the CDA issued notices to the petitioners for non-conforming use of their properties. These notices were challenged by them, claiming in their writ petitions that their residential properties stood commercialized on the basis of the decision dated 13.02.1995. They also asserted that they could not be asked to pay conversion fee in lieu of such commercialization. Additionally, other petitioners filed civil suits seeking declaration that their properties had acquired commercial character. The applications under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure filed along with the suits were dismissed by the Trial Court; appeals also met the same fate; and, then, civil revisions were preferred before the High Court. The High Court through the impugned consolidated judgment dismissed the writ petitions and civil revisions filed by the petitioners. The petitioners now seek leave to appeal against said judgment of the High Court.

2. We consider in this case whether the decision of the Board dated 13.02.1995 was taken in the exercise of lawful authority and/or whether such decision had created any rights in favour of the petitioners. Also, the facts and circumstances of the case merit attention to the relationship between urban development and climate change, and the role of urban planning and development agencies.

3. The Capital Development Authority Ordinance 1960 ("Ordinance") was enacted to establish the CDA for the purpose of making all arrangements for the planning and development of Islamabad. The CDA was required to prepare a master plan and a phased master programme for the development of the 'Capital Site' and a similar plan and programme for the rest of the 'Specified Areas'.¹ All such plans and programmes were required to be submitted to the Federal Government for approval.² A Master Plan was prepared at the time of the inception of the city and subsequently different sectors were set up under different schemes. The Master Plan aimed at a rationalized reproduction of the attributes of the city by establishing the same sized and carefully organized spatial structures of the central facilities and public spaces as a coherent urban design scheme as evident in the detailed designs of different sectors.³

4. We see that the properties owned by the petitioners do not fall within the commercial area of Sector G-9 as set out in the Master Plan or the Scheme prepared thereunder. They seek a change in the status of their properties from residential to commercial. However, such a change is not permissible under the Ordinance without a change in the Master Plan which can only be done with the approval of the Federal Government. Any scheme prepared relating to land use, zoning and land reservation, among other things, is required to be in pursuance of the Master Plan.⁴ We agree with the impugned judgment of the High Court that the CDA has no discretionary power to give effect to any scheme or accord any permission for change of status or use of property in breach of the Master Plan. The Master Plan is protected under the Ordinance and the Ordinance obliges the CDA to regulate the use of land pursuant to the Master Plan. The prohibition contained against the use of land for a purpose other than the one specified in the Master Plan is absolute. There is, therefore, no escape from the conclusion that the decision of the Board dated 13.02.1995 was taken without lawful authority. The Board itself realized that the decision dated 13.02.1995 would be in violation of the Master Plan of Islamabad and, thus, rightly rescinded it through the decision dated 05.10.1995.

5. We also agree with the High Court that no vested rights could be created under the decision dated 13.02.1995. The Board in which vests the management of the CDA was not competent to allow any change in the character of the properties of the petitioners in violation of the Master Plan. The Master Plan could only be amended with the approval of the Federal Government. The decision dated 13.02.1995 was in breach of provisions of the Ordinance and in conflict with the Master Plan. It was taken without lawful authority and was rightly undone by the Board. Moreover, the CDA did not implement the decision dated 13.02.1995. It did not approve any change in the status of the properties owned by the petitioners during the period this decision remained in the field. The petitioners cannot, in the given circumstances, claim to have taken any decisive steps in pursuance of the decision dated 13.02.1995. The doctrine of locus poenitentiae is not, therefore, attracted to their case.

Urban Planning, Climate Change and the role of the CDA and other Urban Development Authorities

6. The importance of regulating land use for orderly urban development cannot be understated. Planning and regulating building construction activity in urban environments is emphasized around the world in the interest of organized growth of cities. It is an exercise based on scientific research and experience which recommends in a comprehensive manner from social, economic, environmental, infrastructure capacity, aesthetic, and other relevant aspects, the best present and future uses of geographically specified land areas called zones.⁵ Zoning is a public welfare management tool employed in urban planning to serve the city's interests.⁶ Public welfare today would naturally encompass the pressing issues of the time i.e., climate change; environmental degradation; food and health safety; air pollution; water pollution; noise pollution; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety, natural resource conservation, environmental protection, social equity, social choice,

etc.⁷ Any initiative to revise land use regulations must be based on the aforesaid considerations in order to ensure that urban development standards stay relevant to current issues of the community.

7. The necessity of planned urban development is accentuated in the vulnerable age of climate change. Climate change poses a series of interrelated challenges to the country's most densely populated places: its cities. Many cities depend on infrastructure, like water and sewage systems, roads, bridges, and power plants, that is aging and in need of repair or replacement. Rising sea levels, storm surges, heat waves, and extreme weather events will compound these issues, stressing or even overwhelming these essential services. Climate change and its impacts threaten the well-being of urban residents. Essential infrastructure systems such as water, energy supply, and transportation will increasingly be compromised by interrelated climate change impacts. The nation's economy, security, and culture all depend on the resilience of urban infrastructure systems. Direct and interacting effects of climate change will expose people who live in cities to multiple threats. Climate changes affect the built, natural, and social infrastructure of cities, from storm drains to urban waterways to the capacity of emergency responders. Climate change increases the risk, frequency, and intensity of certain extreme events like intense heat waves, heavy downpours, flooding from intense precipitation and coastal storm surges, and disease incidence related to temperature and precipitation changes. The vulnerability of urban dwellers multiplies when the effects of climate change interact with pre-existing urban stressors, such as deteriorating infrastructure, areas of intense poverty, and high population density.⁸

8. Pakistan falls amongst the most vulnerable countries and is seriously hit by climate change, even though it has negligible contribution towards greenhouse gases (GHGs). The National Climate Change Policy 2012 underlined the seriousness of this existential threat. Climate resilient development and adaptation⁹ was the focus of this policy document though as a responsible member of the global community due importance was also accorded to mitigation¹⁰ efforts. However, after Paris Climate Accord 2015, Pakistan has updated its climate policy and the focus of the National Climate Change Policy 2021 is equally placed on adaptation and mitigation with the major emphasis on nature-based solutions. Such solutions include vegetal cover expansion, coastal resource management, and mangrove and natural reef ecosystem protection. Infrastructure-based solutions comprise climate-proofing infrastructure, including storm drainage systems, water supply and treatment plants, as well as the protection or relocation of energy or solid waste management facilities. Some coastal cities may also need to plan for infrastructure development, protection and/or relocation related to a rise in sea level.¹¹

9. Our national response to climate change, inter alia, is to continuously evolve innovative and smart "adaptation" strategies. Our adaptation climate change strategy requires that Pakistan and its public institutions make climate resilient policies and rest its decisions on sustainability. Our infrastructures must be strong enough to withstand climate change e.g., heavy rains, floods, earthquakes and other extreme weather. Shutting eyes to the ominous signs of climate change will plunge us into a world that may not be able to sustain fundamental human values. It could affect our basic physical and larger social needs including harnessing and consuming energy, water and food as well as habitation, travelling and communication potentialities. It is doubtful that our early town planners were driven by climate considerations. However, climate must, in the wake of climate change, form a basic determinant of urban planning and design.¹² Climate-resilient development in cities of all sizes is crucial for improving the well-being of people and increasing the life opportunities of future generations. Any change in the Master Plan to an urban scheme without taking account of the climate factor would be detrimental.

10. The concept of "the Right to the City"¹³ has become a common framework for articulating alternative visions of the city and making a host of demands on issues related to urban equity and social justice. It has also been used for making urban governance, planning, and budgeting more participative and inclusive. The Right to the City is interdependent to all recognized international human rights; and its conception is based on an integral view, which includes civil, political, economic, social, cultural and environmental rights enshrined in the International Human Rights Treaties.¹⁴

11. Effect of climate change on cities, affects its residents and their core fundamental rights to life, dignity and property guaranteed under Articles 9, 14, 18 and 23 of the Constitution of the Islamic Republic of Pakistan, 1973. In an urban living, climate change can impair the quality of life of a person, offend his dignity and deprive him of his property or the right to fully enjoy his property. Incorporating adaptation, climate resilience¹⁵ and sustainability, in the policy decisions by the urban development authorities, are essential to actualize the fundamental rights of the people and therefore form an integral part of the fundamental human rights of the people of Pakistan. In the face of the grave existential threat of climate change, adaptation, climate resilience and sustainability assume the role of a constitutional necessity and of an overarching constitutional obligation.

12. Our urban development authorities need to ensure that their urban development plans consider and support adaptation, climate resiliency and sustainability. Before putting up a proposal for amendment or modification in the Master Plan or a scheme or before proposing a new development plan or scheme, the urban development authorities need to seriously consider the climate change angle. Any conversion of residential neighbourhoods to commercial zones is likely to lead to adverse environmental consequences on account of increased human and vehicular traffic and activity, and should not be permitted without proper investigation, forethought and remedial measures to control the soaring thermal environment. It is high time that our urban planners prioritize the climate factor in their development approaches to address the triple planetary crises of Climate Change, Air Pollution and Loss of Biodiversity. The CDA shall ensure to factor in adaptation, climate resiliency and sustainability into their plans, policies and decisions in order to protect the constitutional rights to life, dignity and property of the residents of Islamabad, in particular, and people of Pakistan, in general.

13. In view of the above, we do not take any exception to the judgment of the High Court. Consequently, leave is refused and the petitions are dismissed. Copy of this Order shall be dispatched to the Chairman, CDA for information, guidance and compliance.

MWA/Z-9/SC Petitions dismissed.