

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Syed Hassan Azhar Rizvi
Mr. Justice Zulfiqar Ahmad Khan

C.P. No.D-751 of 2020

[Moosa Khan v/s. Pakistan Defence Officers Housing Authority & others]

Petitioner : M/s. Amir Mansoob Qureshi and Iftikhar Shah, Advocates

Respondent No.1 : Malik Naeem Iqbal and Mr. Khurram Memon, Advocates

Respondent No.2 : Mr. Ashraf Ali Butt and Mrs. Rehmat-un-Nisa, Advocates

Respondent No.3 : *Nemo*

Date of Hearing : 26-02-2020

JUDGMENT

Zulfiqar Ahmad Khan, J. Petitioner having co-proprietary interests in a building constructed on the intersection of two major arteries of a posh locality has challenged creation of a new commercial plot by the respondent No.1 (Pakistan Defence Officers Housing Authority) by (a) converting neighboring open space, and (b) amalgamating it with the quadrant obtained from reducing the immediate roundabout into a four-legged intersection, which act, per petitioner has destroyed his property's corner-plot status (resultantly decreasing plot's market-value) and restricting his view. He further claims that such master-plan change did not follow the principle of natural justice and violated the dictum laid down by the Superior Courts.

1. Precise facts of the case are that as per the commercial lease granted to the plot of land bearing No.40-C, Bukhari Commercial, Lane No.9, Phase VI, situated in Defence Officers Housing Authority, Karachi ("Plot 40-C"), a G+4 commercial building was constructed thereon, wherein the petitioner purchased two shops and basement (immediately beneath thereunder) totaling an area of 1,020 sq.ft., and was running a

business thereon since 2011. Plot 40-C as described in the lease document dated 17.02.2009 was bounded as under:-

North by	40' wide Bokhari Commercial Lane
South by	20' wide Lane
East by	Plot No.42-C
West by	60' wide Khayaban-e-Muslim

2. Learned counsel for the petitioner relying upon Google-Earth images of the subject Khayaban-e-Muslim by Bokhari Commercial Lane No. 9 intersection for the past couple of years showed that the roundabout over the said intersection had been converted into a four-legged intersection and the open area adjacent to his plot has been used in creating a new commercial plot (No. 38-C) where speedy construction had commenced recently. Since the Respondent Nos. 1 and 2 (PDOHA and Cantonment Board Clifton, respectively) have admitted to the fact of converting the roundabout into a four-legged intersection by submitting a lease in respect of the subsequently carved out Plot No. 38-C and has also admitted that the said change was carried out in pursuance of the Executive Board's Meeting No. 01/2011 dated 28.06.2011, where through Agenda Item No. 31 it was resolved that PDOHA to take over charge of all vacant lands in Bukhari Commercial Area as per the sketch "C". While a copy of the said sketch has not been shown to the Court, but it was affirmed that the said sketch inter alia pertained to conversation of the subject roundabout into a four-legged intersection, and the newly carved out plots on all four sides of the intersection were given in the control of PDOHA, leaving this Court with the legal controversy as to the respondent's competency of making changes of the like nature in the alleged master-plan.

3. Both the learned counsel as well as counsel for the respondent No.3 assisted the Court well in this regards. Learned counsel for the Petitioner in support of his arguments relied upon the judgment of the Hon'ble Supreme Court rendered in the case of Mst. Yawar Azhar

Waheed v/s. Khalid Hussain and others (2018 SCMR 76) where in the similar circumstances, the apex Court while discussing that *under the provision of section 179 of the Cantonment Board Act, 1924 and the Cantonment Land Administration Rules, 1937 and more particularly the master plan* held that *“Once the master plan is notified and it is accepted by the purchaser of the plot and the Board accepts the offer of purchaser and allots the plot, thereafter, the Cantonment Board is left with no authority to bring changes in the master plan, designed for the housing scheme unilaterally because a binding contract came into existence in such eventuality”*. Learned counsel also relied upon the judgment of this Court rendered in the case of Irfan Merchant v/s. Federation of Pakistan (2013 CLC 853) where upon conversion of PDOHA’s Khayaban-e-Mujahid and Khayaban-e-Shamsheer into single carriage road, the aggrieved petitioners approached to the court, which after lengthy discussion held that *any changes in the master plan are required for the public interest, the same may be done in accordance with law after following the procedure and taking all concerned authorities on board referred above and last but not the least giving public hearing to all those who are likely to be affected by such change/conversion*. Learned counsel also cited the case of Mrs. Farkhanda Farouq & others v/s. Defence Housing Authority & others (2019 CLC 695) where learned single Judge of Lahore High Court after giving reference to a number of cases pertaining to property rights and public spaces reached to conclusion that *“To deprive a citizen from the purpose of property, for which it was purchased on representation through sanctioned plan, would amount to partial deprivation of the property. Safeguard to the purpose of property is inclusive in Article 24, to ensure which, laws like The Easements Act, 1882 and condition, under town planning laws, to obtain NOC from the neighbouring owners before allowing commercialization of a residential plot*.

4. Learned counsel for PDOHA took this Court to Article 9(3) of Pakistan Defence Officers Housing Authority Order, 1980 to press his

point that Executive Board of the Authority was fully competent to prepare and amend master-plans in respect of lands under its control and in the case at hand, the subject roundabout was converted into a right-angled intersection by the Executive Board in its meeting dated 28.06.2011 upon the proposal of Director Town Planning and Building Control where changes in the planning of Bukhari Commercial Area was approved, which inter alia included conversion of the subject road intersection. Copy of the Agenda Item No. 31 was provided at page 17 of the counter-affidavit, but not that of the Sketch-C, however it was admitted that the said sketch inter alia pertained to the conversion of the subject intersection. The learned counsel also referred to the relevant provisions of the Cantonment Act, 1924 to show that no requirement of placing such conversion for public objections was prescribed by the said Act, hence the Authority was not obligated to call for public objections, once the said change was effected. In support of his contentions the learned counsel place reliance on the case of Mian Fazal Din v/s. Lahore Improvement Trust & another (PLD 1969 SC 223) where the appellant who was owner of a house in Gulberg-III Scheme of the Lahore Improvement Trust claimed that the Plot No. 94-E/I of the said Scheme (in front of his house) which was earmarked for the construction of a market for the convenience of the residents of the locality and being the main consideration which induced him to purchase his plot and built a house thereon, but the Trust (the lessor) later altered the landuse and sanctioned a substantial part of that plot for the construction of a mosque. The appellant and some 275 other residents of the Scheme upon coming to know of this alteration approached the Trust and the Provincial Government objecting to the illegal alteration of the Scheme. As no action was allegedly taken on these representations, the appellant ultimately invoked the Constitutional jurisdiction of the High Court under Article 98 of the Constitution of Pakistan, 1962, which Court came to the conclusion that if the Scheme was still in the execution stage, then it was open to the Trust to alter the Scheme under section 43 of the Punjab

Town Improvement Act 1922, even after the Scheme had been sanctioned by the Government. It was thus held that the Trust did not act in excess of its lawful authority in changing the use to which a particular plot of land was first to be put. The petition was dismissed, which resulted the applicants approaching Hon'ble Supreme Court. The Hon'ble Supreme Court upon having examined the provisions of the Town Improvement Act, 1922 in a threadbare manner observed that the former being a complete statute in itself and whenever re-publication was considered necessary, statute itself had made specific provisions for the same (such as in subsection (2) of section 41 and section 43(b)), and as prayed that whenever a Scheme was to be modified, even to an insignificant extent, it must be republished, then the above provisions would become wholly unnecessary. Relying on clause (b) of subsection (2) of section 41 of the said Act, the Apex Court observed that as it should be left to discretion of the Government to determine whether a modification is or isn't of such importance as to require re-publication. Court having observed that if it was the intention of the framers of the Act to insist upon re-publication of unimportant or minor modifications, the law should have made provisions of that. The application was thus dismissed with the following conclusion *"In this view of the matter, it seems to me that the Trust was not wrong in taking the view that it could make the alteration or modification impugned, namely; the change of the user of part of the site without the previous sanction of the Government. The modification was neither of a radical nature nor fell within the mischief of section 43 of the Town Improvement Act"*. Learned counsel for the Respondent No. 2 (Cantonment Board Clifton) adopted arguments of the former counsel. None appeared for the Respondent No.3 and counsels agree that the petition alongwith its accompanying application(s) be decided at the Katcha Pashi stage. The learned counsel also challenged *locus standi* of the petitioner as he was only a fractional shareholder of the building built on Plot C-40.

5. Heard the learned counsel for the parties and reviewed the material on record. Since it is admitted that the petitioner has co-proprietary interests in the building constructed on Plot No. 40-C and that he has been running a business thereon since 201, further that plot C-38 has been created on the open space next to his plot, this petition was held to be maintained as it questioned one's right to property under Article 24 of the Constitution and issuance of the writ of mandamus against the respondents, if the circumstances permitted.

6. Learned counsel for the petitioner relying upon Google Earth images of the subject Khayaban-e-Muslim by Bokhari Commercial Lane No. 9 intersection for various years showed that the roundabout over the said intersection has been converted into a four-legged intersection and the open area adjacent to his plot has been used for creating a new commercial plot (No. 38-C). Since the Respondent Nos. 1 and 2 have admitted to the conversion of the roundabout into an intersection, and to the creation of a new plot by submitting a lease in respect of the said plot being numbered as Plot No. 38-C, hence this court is only posed with the legal controversy as to the competency of PDOHA to effect changes in master-plans of its schemes, projects or works in general and whether the subject roundabout's change could be said to a change in master-plan?

7. With regards conversion of the roundabout into a four-legged intersection, Google-Earth images as introduced by the learned counsel for the Petitioner for the respective years are worth reproducing in the following:

Year 2004



Year 2010

Petitioner's Building

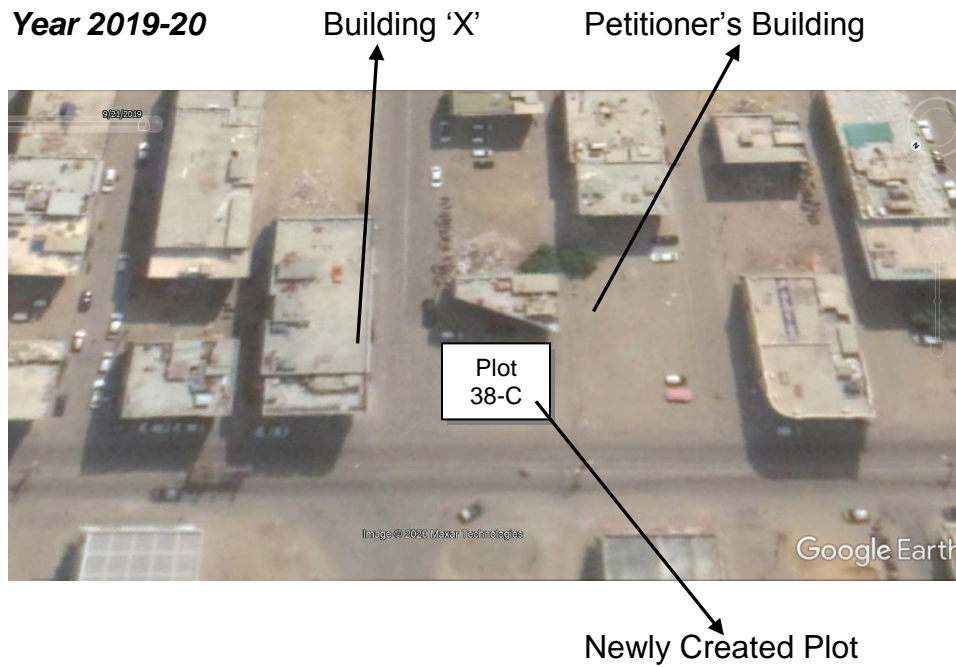


Year 2016

Building 'X'

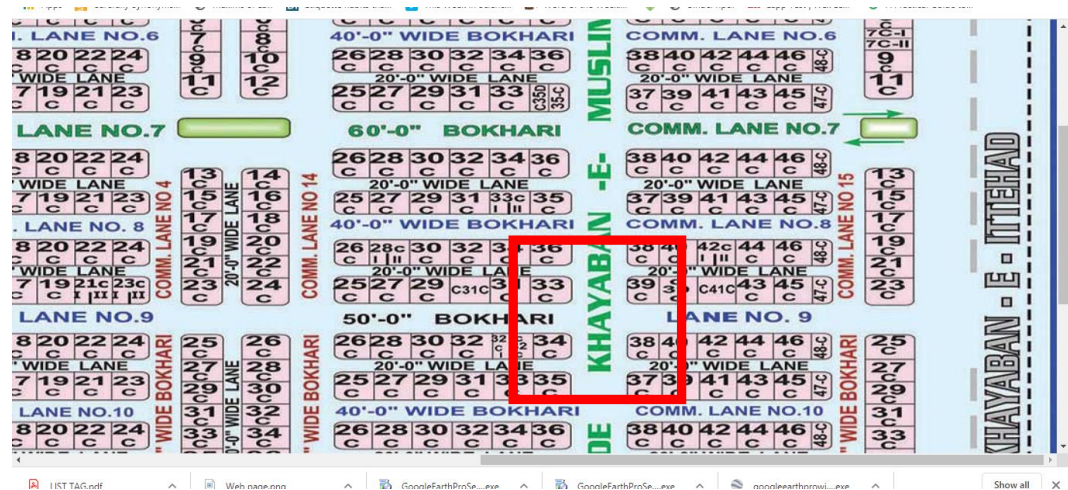
Petitioner's Building





8. As evident from the above images, while the Petitioner's building appears for the first time in the year 2010, however from the year 2016 image, it could be seen that in the same year Building 'X' has appeared on Bukhari Commercial Lane No.9 just opposite to the Petitioner's building. Any prudent individual would have noted from the size of the Building 'X' that the said building has used neighboring quadrant of the roundabout, hence the possibility of constructing a roundabout on that intersection diminished upon the erection of Building 'X'. However, the petitioner claiming to be in business in his premises since 2011 chose to stay quiet and it was only early this year, when construction of a structure commenced on the quadrant adjacent to his plot, the petitioner chose to come to this court. Hence we are not inclined to treat the instant matter as a matter of public interest, as agitated by the Petitioner and reduce the issue to one solely related to co-proprietary rights of the petitioner, and when we do so, we immediately observe that the instant petition is seriously hit by aforementioned latches. Looking at the Images from the Google-Earth, we fear that the two remaining quadrants facing Khayaban-e-Muslim by this time would also had been converted into plots and any order in the instant matter would affect those (unrepresented) parties' rights. Lo and behold, a simple search over the Internet showed that the said intersection has long been changed and all the four quadrants have

resulted in creation of four new plots. A map freely available on the Internet shows those four plots being 33-C, 39-C, 34-C and 38-C. Hence the petitioner’s claim that he was unaware of the creation of neighboring Plot 38-C is not tenable, and if he has been sleeping over his rights (if any), no relief could be granted to him under the established legal principle of *Vigilantibus Et Non Dormientibus Jura Subveniunt* meaning that *the law assists those that are vigilant with their rights, and not those that sleep thereupon*. A map of the intersection (seemingly in existence since long) taken from the Internet is reproduced in the following from where it is evident that the roundabout has long been changed into an intersection creating four plots:



https://www.pakrealestate.com/maps/large17-bukhari_com_area_VI_542475304.jpg

9. Now coming to the procedure with regards changes in the master-plans of the areas falling within the jurisdiction of PDOHA, the applicable regulations are titled Building Control & Town Planning Regulations 2011 which were framed under the powers vested in the Executive Board under Article 23 of the Presidential Order 1980. Clause (ww) of Regulation No. 3 defines master plan as “*a development plan for an area providing short term and long term policy guidelines for a systematic and controlled growth, liable to amendments as per future requirements after due approval of the Executive Board*”. At numerous places in the said Regulations, requirement for seeking public objections have been spelt out. For example Regulation 43(j) concerning Petrol/CNG Pumps provides

that “*Petrol or CNG Station can be allowed on commercial plots after conversion into specific designated petrol pump or CNG use provided all other requirements noted above are met and after calling of public objections through press and with the approval of PDOHA on payment of prescribed fees*”. With regards changes in the landuse, Regulation 101 pertains to such change from Residential to Commercial landuse, clause (c) and (d) respectively require that “PDOHA shall also issue a public notice for the change of land use of the plots in accordance with the provisions of these Regulations and the expenses shall be borne by the applicant” and “*PDOHA shall give due consideration to the objections from the public before the final decision.*” Regulation 105 relates to dangerous buildings and its clause (a) provides that “*If for any reason it shall appear to the evaluation committee that any building or part thereof intended or used for human habitation or human occupation for any purpose whatsoever is unfit for such uses, it shall signify its intention to prohibit the further use of such building or part of a building and call upon the owner or occupiers or tenants to state in writing their objections (if any), to such prohibition within fifteen days after the receipt of such notice. If no objection is raised by such owner or occupier within the prescribed period or if any objection which is raised, appears to the evaluation committee to be invalid or insufficient, the evaluation committee may prohibit by an order in writing, the further use of such building or part thereof. The owner or occupier of the building shall be given an opportunity of appearing before the president of evaluation committee in person or by an agent in support of his objection, if he/she so desires. A public notice to this effect will be published by PDOHA in leading Urdu and English daily newspapers.*” [underlinings are ours]. Applying the ratio of Mian Fazal Din v/s. Lahore Improvement Trust & another (supra) where in similar circumstances (change of landuse), the Apex Court after detailing provisions of Punjab Town Improvement Act 1922 reached to the conclusion that the former being a complete statute in itself and whenever

re-publication was considered necessary, statute itself had made specific provisions for the same and as prayed that whenever a scheme was modified, even to an insignificant extent, it must be republished, such was not the intention of the legislature. The Apex Court having observed that if it was the intention of the framers of the law to insist upon re-publication of unimportant or minor modifications, the law should have made provisions for that. In the case at hand the applicable Regulations has made provisions for seeking public objections at various instances (as detailed in the foregoing) however with regard present schematic changes of converting a roundabout into four-legged intersections (which changes may would have been necessitated purely on account of the requirements of Traffic Engineering) the Regulations have given authority to the Executive Board under clause (ww) of Regulation 3 to effect such a change. The Petitioner has not challenged vires of the Regulations or the competency of the Executive Board to amend such schemes. With regards Power of the Executive Board, it would be not out of place to refer to Article 5(3) of the Presidential Order 1980 which empowers the Executive Board with all acts and things which may be exercised or done by the Authority. Article 12 of the said Order provides that all schemes, projects and works undertaken by or on behalf of the Authority under the said Order shall be deemed to be schemes, projects and works for public purposes. The latter expression has challenged court's ingenuity to deal with the true meaning of such purposes for more than a century, however this is not the case where we would wish to divulge ourselves deep in this concept or to refer to leading court decisions on the subject, however, would only refer to Black's Law Dictionary (5th Edition) which defines 'public purpose' to be an act which has in its objective the promotion of public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division. Since the first time, the concept of public purpose seeped in our legislation through Act I of 1894 (the Land Acquisition Act 1894) this

expression is generally understood to give meaning to acts done in good faith substantially benefiting the concerned public and courts have usually kept themselves at length from such acts unless colorable exercise of power was patently visible (Suo Motu Case No.13 of 2007 reported as 2009 PLD 2017 SC), which situation we do not see in the case at hand.

10. With regards the contention of the learned counsel for the petitioner and his reliance on the caselaw concerning master-plans having being carved in stone, we are of the humble opinion that mere change of a roundabout into four-legged intersection does not amount to the change of master-plan though it may be a change in the scheme. Research points out master-plans to be a dynamic long-term planning document providing a conceptual layout to guide future growth and development. Master-planning is said to be about making the connection between buildings, social settings, and their surrounding environments. A typical master-plan includes analysis, recommendations, and proposals on population, economy, housing, transportation, community facilities, and land use and it is based on public input, surveys, planning initiatives, existing development, physical characteristics, and social and economic conditions. Its that's why not surprising that the mega city of Karachi only saw two Master Plans since 1947. First being the Karachi Greater Plan 1952 and the Karachi Master-Plan 1986-2000, which could be found at <http://www.urckarachi.org/downloads/Karachi%20Development%20Plan%202000.pdf>. According to leading UK newspaper Guardian dated 25.01.2016, the city of London since its fire of 1666 has seen no more than six Master Plans. Thus the court decisions with regards requisites of changes in Master-Plans do not apply to the case at hand. In other parts of the city of Karachi and in many other cities across the country, road crossings continue to change from time to time depending on the nature and speed of traffic plying on the roads. From Traffic Engineering point of view, usually a signaled intersection takes precedence over a roundabout, which only suits slow moving traffic. Also another aspect is that on one road,

combination of signaled intersections and roundabouts is not to be permitted, probably that may be the reason that in the entire Bukhari Commercial Area, one does not find any other roundabout other than the instant one, which has now been converted to a four-legged intersection too, may be for pure traffic engineering purposes.

11. It is for these reasons we reach to the irresistible conclusion that neither the respondent PDOHA acted in excess of its lawful authority while changing the subject roundabout into four-legged intersection on legal as well as on technical grounds, nor the Regulations required that such a change be put to public scrutiny. The petition being devoid of any Constitutional merits and infested with laches and apparent malafide is hereby dismissed along with all pending applications.

Judge

Karachi: 28 April, 2020

Judge