JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

W.P. NO. 58 OF 2022

CAPITAL DEVELOPMENT AUTHORITY

VS

SHUJA SHARIF & ANOTHER

Petitioner by	**:**	**Mr. Kashif Ahmad Khan, Advocate.**
Respondents by	**:**	**M/s Abdullah Malik, Nauman Munir Paracha, and Arslan Khan Burki, Advocates for the Respondent No.1.**
Date of hearing	**:**	**10.09.2025**

MUHAMMAD AZAM KHAN, J.

1. Through the instant Writ Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the **"Constitution"**), the Petitioner has assailed the Order dated 03.06.2021 passed by the Deputy Commissioner I.C.T., exercising the powers of the Commissioner, C.D.A., whereby the review application against the order dated 23.09.2020, filed by the Respondent No. 1, has been accepted.

2. The brief facts of the case, as per the contents of the instant petition, are that House No. 01, Street No. 28, Sector F-6/1, Islamabad, was in a persistent non-conforming use in the shape of an Office, in violation of the Islamabad Residential Sectors Zoning (Building Control) Regulations, 2005. The Deputy Commissioner, CDA, vide order dated 08.04.2020, imposed a fine upon the Respondent No. 1 under clause 2.17.3 of the Islamabad Residential Sectors Zoning (Building Control) Regulations, 2005. The tenant of the Respondent No. 1 filed an appeal against the said order dated 08.04.2020 before the Court of the Commissioner, CDA, titled as "CCGC versus Deputy Commissioner CDA & others". The said appeal was dismissed by the Commissioner, CDA, vide order dated 23.09.2020. The Respondent No. 1 filed a review petition before the Commissioner, CDA, against orders dated 23.09.2020 (passed by the Commissioner, CDA) and 08.04.2020 (passed by the Deputy Commissioner, CDA). The Commissioner, CDA, accepted the review petition vide the Impugned

Order and set aside his previous order dated 23.09.2020 and the order passed by the Deputy Commissioner, CDA, dated 08.04.2020. Being aggrieved, the Petitioner has filed the instant petition.

3. The learned counsel for the Petitioner submitted that the Commissioner, CDA, acted beyond his jurisdiction by passing the Impugned Order dated 03.06.2021 without legal authority or adherence to the rules. The said order was passed ex-parte, without issuing notice or providing a hearing to the Petitioner Authority, in clear violation of the principle of natural justice, *audi alteram partem*. No summons was issued, nor was the Authority's counsel informed about the pending review. Under Section 36 of the CDA Ordinance, 1960, the Commissioner has no power to review his or his predecessor's orders, except for correcting clerical or patent errors, none of which were established by Respondent No. 1. Moreover, the review petition was unsigned, unsupported by affidavit, and based on false assertions, which were accepted without scrutiny. The Commissioner, CDA, also ignored the established fact of the property's non-conforming use and decided the matter on presumptions. The Impugned Order is arbitrary, illegal, and without lawful authority, and is thus liable to be set aside. The learned counsel prayed for restoration of the earlier order dated 08.04.2020 passed by the Deputy Commissioner, CDA.

4. On behalf of Respondent No. 1, it is submitted that the Commissioner, CDA, had the jurisdiction to entertain and decide the review petition, especially in view of the material irregularities and legal errors apparent on the face of the earlier order. The Impugned Order reflects a reasoned decision after due consideration of facts. It is submitted that the property in question was wrongly categorized, and the earlier order failed to consider relevant documents and factual aspects, justifying the review. There is no illegality or excess of jurisdiction in the Commissioner's exercise of power, and the Impugned Order was passed to rectify a manifest injustice. Therefore, the petition seeking to set aside the Impugned Order is misconceived and liable to be dismissed.

5. I have heard the learned counsel for the parties and perused the record with their able assistance.

6. Perusal of the record shows that vide order dated 08.04.2020, a fine of Rs.500,000/- was imposed by the Deputy Commissioner, CDA, by invoking Section 49-C of the CDA Ordinance, 1960, read together with Clause 2.17.3 of the Islamabad Residential Sectors Zoning (Building Control) Regulations, 2005,

for non-conforming use of the property. The Petitioner sought reliance upon a report purportedly prepared in the year 2015, on the basis of which the Deputy Commissioner, CDA, is stated to have imposed a penalty of Rs. 500,000/- upon Respondent No. 1. However, it is significant to note that the said report has neither been produced on record nor is there any reference to it in the order dated 08.04.2020 passed by the Deputy Commissioner, CDA. Likewise, the subsequent orders of the Commissioner, CDA, including the Impugned Review Order, are conspicuously silent regarding the contents of the alleged report. Consequently, the very basis which purportedly prompted the imposition of penalty by the Deputy Commissioner, CDA, is *ex facie* absent from the record as well as from the reasoning reflected in the Impugned and earlier orders of the concerned authorities.

7. There is no cavil to the proposition that Section 36(3) of the CDA Ordinance, 1960, empowers the Commissioner or Deputy Commissioner to review their own orders. However, the scope of such jurisdiction is narrowly circumscribed. The proviso makes it abundantly clear that a review may only be exercised to correct an arithmetical, clerical, or patent error apparent on the face of the record. It does not permit re-opening concluded matters for a fresh determination on merits. For ready reference, Section 36 is reproduced hereunder:-

> *"**Section 36. Appeal and review: -***
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> *(1). The Authority or any person aggrieved by an award or final order of the Deputy Commissioner may, within fifteen days of such award or order, appeal to the Commissioner.*
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> *(2) The Commissioner may, after giving the Authority and the person affected by the award or order appealed against an opportunity of submitting an objection to the appeal and of being heard, pass such orders thereon as he may think fit.*
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> ***(3) The Deputy Commissioner or the Commissioner, either of his own motion or on application made in this behalf, at any time within five years from the date of an award or order made or passed by himself or by any of his predecessor in office, including an award or order made or passed before he commencement of the Capital Development Authority (Amendment) Act 1960 may after giving the parties concerned a notice and an opportunity of being heard, review the award or order and pass such order thereon as he may deem fit.***

> ***Provided that an order under this sub-section shall not, except in so far it corrects an arithmetical, clerical or patent error or mistake in the award or and under review, enhance, the amount of compensation awarded.***
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> *(4) Any amount paid to any person which is found, for any reason including fraud or misrepresentation, not to be due or in excess of the amount is entitled to under the award or order as review under sub-section (3) shall be recoverable by the Authority and the Deputy Commissioner shall call upon such person to refund it.*
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> *(5) Subject to the provision of sub section (3), the order of the Commissioner passed on any appeal shall be final and shall not be called question in any court}." (Emphasis added)*

8. In the instant case, the Commissioner, by invoking review powers on 03.06.2021, effectively sat in appeal over the decision of his predecessor and substituted his own findings on the basis of an undated lease agreement executed between Respondent No. 1 and his tenant, i.e., CGGC Mohmand Dam Hydropower Project Management. It is pertinent to observe that the contents of the undated lease agreement *prima facie* indicate that it was executed in the year 2023. The relevant clause unequivocally records that *"Whereas the said Lessor agrees to give on lease and the Lessee agrees to take on lease the Premises for residential use only with all the appertaining rights and privileges thereto for a term of one (1) year commencing from 1st June 2023, and ending on 31st May 2024...."* This recital itself reveals that the document could not have been in existence at the relevant time when the penalty proceedings were initiated in 2019. The undated lease agreement, therefore, appears to be a subsequent creation and an afterthought on the part of Respondent No. 1, ostensibly brought forth to shield himself from the legal consequences flowing from the imposition of penalty.

9. The act of the Commissioner, CDA, under review jurisdiction is clearly *ultra vires* to Section 36(3) of the CDA Ordinance, 1960. The Islamabad High Court in "*Awais Aslam Ali through Representative Versus Capital Development Authority and another*" **(2024 YLR 1422)** emphatically held that the Commissioner, while exercising review jurisdiction, cannot reassess facts or sit in appeal over a predecessor's order. The High Court declared that such conduct is without jurisdiction and unsustainable by observing the following:-

> *"6.* ***It is apparent from the impugned order dated 16.09.2021 that it has not been passed to correct any error floating on the surface of the record. While passing the impugned order Commissioner,***

> ***CDA essentially sat in appeal over the decision rendered by his predecessor and took into account additional factual aspects of the matter, which were never presented before Deputy Commissioner, CDA when he passed the initial order imposing of fine.*** *In view of the arguments of the learned counsel for CDA who presented to Commissioner, CDA the screen shot of a webpage reflecting that the petitioner was Chairman of Pakistan Press International (Pvt.) Ltd. and the address of the petitioner's house was reflected as the address for Pakistan Press International Pvt. Ltd., the Commissioner while exercising review powers concluded that the fine had been correctly imposed.* ***This was neither the basis of CDA seeking the review nor could have been a valid ground for passing an order in review jurisdiction. If at all the facts suggested that the petitioner was liable for non-confirming use of his property, fresh proceedings could have been initiated for such non-confirming use****. However such fact as determined by the Commissioner based on the arguments made by the counsel for CDA in the year 2021 could not form a basis to either review the order of Commissioner, CDA dated 31.07.2017 or conclude that the initial fine imposing order passed by Deputy Commissioner, CDA on 10.11.2015 was correct.(Emphasis added)*
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> *7.* ***As aforementioned the scope of a review is very limited. What the CDA sought to do was not to seek the correction of an error floating on the surface of the record, but was to seek the order of the Commissioner to be set aside through a fresh appreciation of facts. And by engaging in such exercise Commissioner, CDA acted beyond his review jurisdiction and sought to decide the matter afresh essentially in exercise of appellate jurisdiction. The impugned order therefore is not sustainable in the eyes of law and is without jurisdiction.*** *The petition is therefore allowed and the impugned order dated 16.09.2021 is set aside. (Emphasis added)*

10. Applying the same principle herein, the Commissioner, CDA, under the guise of review proceedings, had no authority to disturb the appellate order dated 23.09.2020. The reasoning advanced by the Commissioner, CDA, in the exercise of review jurisdiction, is manifestly misconceived and legally untenable. The finding that the premises was rented out merely for the residential purpose of certain Chinese families and, therefore, did not constitute a non-conforming use, is not borne out from the record. The characterization of such use as purely residential is not supported by any credible material on file. More critically, the observation that “no proper colonies are established in Islamabad to accommodate such foreigner families” does not constitute a legal justification for condoning a

non-conforming use. The CDA Ordinance, 1960, read with the applicable Regulations, does not permit deviation from prescribed land use merely on grounds of administrative convenience or absence of alternative housing arrangements. To accept such reasoning would be to sanction a parallel regime outside the statutory framework, which the law does not permit.

11. Furthermore, the scope of review under Section 36(3) of the CDA Ordinance, 1960, is narrowly circumscribed and is limited to correcting clerical, arithmetical, or patent errors. The Commissioner, CDA, by re-examining factual controversies already adjudicated upon, and by substituting his own findings for those of the Deputy Commissioner, transgressed the jurisdictional limits of review. The Impugned reasoning, therefore, suffers from jurisdictional infirmity and amounts to an illegal exercise of authority. Accordingly, the Impugned Order dated 03.06.2021 passed by the Commissioner, CDA, in review, cannot be sustained in the eyes of law, being contrary both to the statutory scheme and to settled judicial principles regulating the scope of review. The Impugned review order dated 03.06.2021, therefore, suffers from inherent lack of jurisdiction and is liable to be set aside.

12. Furthermore, Section 49-C of the CDA Ordinance, 1960, is the substantive provision which empowers the Authority to act against non-conforming use. The same is reproduced hereunder for ready reference:-

> ***"49C. Removal of building, etc. erected or used in contravention of this Ordinance:-*** *(1) If any building, structure, work or land in erected, constructed or used in contravention of the provisions of this Ordinance or of any rule, regulation or order made hereunder, the Deputy Commissioner, or any person empowered in this behalf by the Authority, may, by order in writing, require the owner, occupier, user or person control of such building, structure, work or land to remove demolish or so alter the building structure or work, or to desist from using or to so use the land, as to be in accordance with the said provisions.*
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> *(2) If an order under sub-section (1) in respect of any building, structure, work or and is not complied with within such time as may be specified therein, the Deputy Commissioner, or any person empowered in this behalf by the Authority, may after giving the person affected by the order an opportunity of being heard, remove, demolish or alter the building, structure or work, or stop the use of the land and, in so doing may use such force including police force as may be necessary and may also recover the cost therefore from the person responsible for the erection, construction or use of the building,*

structure, work or land in contravention of the provisions as aforesaid."

- The Islamabad Residential Sector Zoning (Building Control) Regulations, 2005, state the following qua non-conforming usage of residential property: -*Regulation 1.2.121: 'Residential Building' means a building authorized for residential occupancy by one or more families but does not include hotels or lodging houses.*
- *Regulation 2.17.1: No land or building [or part of the building] shall be put to a non-conforming use.*
- *Regulation 2.17.2: Any building [or part of the building] or structure designed or intended for a use, not authorized or permitted under these Regulations or conditions of allotment, shall either be removed or converted into a building or structure designed or intended for a use authorized or permitted under these Regulations or conditions of allotment.*
- *Regulation 2.17.3: A non-conforming use of a residential building may render the owner and the occupant of the building liable, on first conviction to pay a fine of [Rs.0.5 million] and in the case of failure to discontinue the non-conforming use within 15 days of the conviction, to an additional fine which may extend to [five thousand rupees (Rs.5000)] for every day during which he has persisted in the failure. After a persistent non-conforming use for a period for three months, the owner or as the case may be the occupant shall be liable to be evicted from the building summarily and the allotment/conveyance deed of the plot may also be cancelled.*
- *2.17.4 The penalty mentioned above in this regard, shall be imposed by the Deputy Commissioner only.*

13. A review of the above-referred provisions, read with Section 49-C of the CDA Ordinance, 1960, reveals that it is permissible to lease out a residential premises/house for residential use in exchange for monthly rent; however, the same cannot be leased out as a guest house, which is a commercial activity. Hence, the principal use of the said building/house is for a residential purpose and occupancy of a family or families. The factual record demonstrates that the subject house was being utilized by more than twenty-five persons. Such an arrangement falls well outside the purview of "residential use by a family" as envisaged by the Regulations. Instead, it is reflective of a guest house, hostel, or dormitory-style use, all of which constitute commercial activities under Clause 1.2.32 of the Regulations defining "Commercial Building." The Commissioner's finding, in review, that the presence of foreign families negated the charge of non-conforming use is fundamentally flawed because the principal use of the building

remains determinative. If the building was occupied by transitory groups or organized in a manner resembling guest house accommodation, especially when there was no lease agreement on record between the Respondent No. 1 and the tenant in 2019, this would constitute a commercial activity prohibited by the statutory scheme.

14. Thus, when the provisions of the 2005 Regulations are applied to the instant case, it becomes abundantly clear that (i) the subject property was authorized exclusively for residential use; (ii) the alleged use of the premises for office or guest house purposes constitutes a violation amounting to non-conforming use; and (iii) the Commissioner's attempt to justify such use in review jurisdiction, based on considerations extraneous to the Regulations, is illegal, without jurisdiction, and liable to be set aside. The penalty imposed vide order dated 08.04.2020 rests on a purported report of 2015, which neither forms part of the record nor finds mention in the reasoning of the Deputy Commissioner, CDA, or in any of the subsequent orders passed by the Commissioner, CDA; such omission renders the very foundation of the impugned action unsustainable in law, and when coupled with the absence of a meaningful opportunity of hearing, vitiates the proceedings altogether, thereby necessitating that the order dated 08.04.2020, and the orders dated 28.09.2020 and 03.06.2021 be set aside with direction that fresh proceedings, if any, be undertaken strictly in accordance with law and upon due notice to all concerned parties. The fresh proceedings must be conducted in accordance with directions mentioned in the judgment titled as "*Mrs. Shamshad Butt Versus Deputy Commissioner C.D.A., Islamabad and 3 others*" **(2023 C L C 304)**, wherein the Islamabad High Court laid down the following guidelines:-

> "20. In view of the above discussion, this Court comes to an irresistible conclusion that the CDA authorities including the Deputy Commissioner and Officers of Building Control Section are to follow certain important guidelines for future purpose while dealing with the cases of non-conforming use in Islamabad Capital Territory, which are as under:
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> i. The Building Control Inspector who visits the building / office / house, which was under non-conforming use has to submit a written report clearly stating therein the name, date, time when the building was visited as well as the reasons on the basis of which he reaches to the conclusion that building is under non-conforming use.

ii. The report must contain the timeline of non-conforming use tentatively to assess the quantum of fine by the Deputy Commissioner, CDA till the removal of non-conforming use.

iii. Any visiting card, sign board, pictures, video evidences, letter head correspondence, which could be made basis of opinion of non-conforming use of the building may also be made part of the report including but not limited to the statement of individual who are occupant in the building, if any.

iv. The Deputy Commissioner CDA on the basis of such report may initiate the proceedings in terms of Section 49-C of CDA Ordinance,1960 read with the relevant clauses of Islamabad Residential Sector Zoning (Building Control) Regulations-2005, shall issue notice to the occupant/allottee/owner accordingly.

v. The Deputy Commissioner after issuing notice to the occupant at the first instance, if comes to conclusion that building is continuously under non-conforming use and he has given due opportunity of hearing to the occupant, who whether joins the proceedings or otherwise, may pass an-interim order of sealing of the premises by all means without the final verdict.

vi. In case, the occupant undertakes to remove subject non-conforming use within reasonable time, the Deputy Commissioner may on the undertaking give such opportunity for removal of the non-conforming use for a limited period, which could be verified after the specified time line. In case, the occupant has not removed the property from non-conforming use, Deputy Commissioner may pass a final order of imposing penalty and sealing of the premises.

vii. The Deputy Commissioner shall issue notice to the allottee along with the report of Building Control Inspector conveying him non-conforming use of the property.

viii. The Deputy Commissioner shall ensure the proper service of notice to the occupant by way of Registered Post and also by Special Messenger and may even affix the notice upon the subject premises before taking the action.

ix. The Deputy Commissioner shall take the report of Building Control Section, CDA and may put the same or confront to the occupant or the allottee for his input or rebuttal by way of affidavit and may also extend an opportunity to the occupant/landlord/allottee to rebut the same.

x. The Estate Management Section of the CDA can only cancel the allotment or conveyance deed of such premises under non conforming use, if the Deputy Commissioner reaches to the conclusion that the owner is guilty/liable for non-conforming

use under the law and even persistently using the building in a similar manner, despite passing of the order.

xi. The Estate Management Section, CDA shall independently issue a notice to the allottee before cancellation of allotment on the basis of order of the Deputy Commissioner if no plausible explanation has been rendered by the allottee within prescribed time referred in the notice.

xii. In terms of clause 2.17.5 of Islamabad Sector Zoning Building Regulation 2005, the building under non-conforming use may be sealed after expiry of 15 days of first notice issued by Building Control Directorate by Director Enforcement, CDA or any person empowered by the Authority in presence of Magistrate of CDA upon issuance of order for sealing of said premises by Director Building Control CDA.

xiii. The Deputy Commissioner, CDA while imposing fine upon the occupant shall pass speaking order justifying his penal action against the occupant/allottee.

15. For what has been discussed above, the instant Petition is **allowed**, orders dated 08.04.2020, 23.09.2020, and 03.06.2021 are hereby **set aside**. The proceedings before the Deputy Commissioner, CDA, are deemed to be pending, whereby the Respondent No. 1 shall join the proceedings and may submit his detailed version in writing with an affidavit as well as with any other documentary evidence to justify his stance. It is expected from the Deputy Commissioner, CDA, to decide the matter within a period of three (03) months from the date of receipt of copy of this judgment, strictly in accordance with the law.

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the open court on _____.

JUDGE

Approved for reporting
Blue slip added

//*Sajid*//