1965
June 11,
Oct. 4,
Nov. 30,
Dec. 13,
1966
Jan. 17

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS KALOGEROPOULLOS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY OF THE INTERIOR,

Respondent.

(Case No. 109/64).

Town and Country Planning—Building-sites—Division of land into building sites—Permit required—Refusal by the Appropriate Authority to grant such permit—The Streets and Buildings Regulation Law, Cap. 96, sections 3(1)(c), (2)(b), 4, 8, and 9, and Regulation 4 of the Streets and Buildings Regulations—Recourse against that refusal—In the instant case it was open to the Improvement Board of Messa Yitonia (the Appropriate Authority under section 3(2)(b) supra) to take the decision it did—Decision properly taken in the exercise of the powers vested in the Board by Cap. 96 (supra) and in particular by sections 3,4,8 and 9 thereof and by regulation 4 (supra) —The Board is entitled to accept and act upon the advice and recommendations of the Planning and Housing Department.

Administrative Law—See also under Town and Country Planning above—Collective organ—The decision complained of conveyed to the applicant by a letter written by the District Officer Limassol in his capacity as Chairman of the aforesaid Board is presumed to be the decision of the Board itself, unless there is evidence to the contrary—Onus in this respect lies on the applicant.

Constitutional Law—Article 23, paragraphs 2 and 3 of the Constitution—The Streets and Buildings Regulation Law, Cap. 96—The relevant said provisions of Cap. 96 (supra) impose "restrictions or limitations" in the sense of paragraphs 2 and 3 of Article 23 of the Constitution—Rights of the citizen under paragraph 3 of Article 23 fully expounded in the cases Holy See of Kitium and The Municipal Council of Limassol, 1 R.S.C.C. 15, at p. 17; Nicos Kirzis and

Others and The Republic (1965) 3 C.L.R. 46 at p. 55.

On the 18th January, 1964, the applicant applied to the Board of Messa Yitonia (the Appropriate Authority under section 3(2)(b) of Cap. 96, *supra*) for a permit to divide a plot of land into separate building sites as proposed in a plan attached to his application. Such permit is required under section 3(1)(c) of the said statute. By a letter dated 6th July, 1964, written by the District Officer Limassol in his capacity as Chairman of the aforementioned Board, the applicant was informed that the division permit applied for would not be granted unless the applicant's plan for the division (now Exhibit 2) was revised to conform with a new plan (now Exhibit 3), which was recommended to the Board by the Planning and Housing Department. It is against this refusal that this recourse under Article 146 of the Constitution has been brought.

The relevant parts of sections 3, 4 and 8 of the Streets and Buildings Regulation Law, Cap. 96, as well as regulation 4 of the Streets and Buildings Regulations are set out in the judgment of the Court.

Counsel for applicant, before dealing with the actual merits of the case, has submitted that the decision challenged by this recourse was taken in excess or abuse of powers on the following preliminary grounds, viz. (1) That it was not in fact the Board, as such, which had taken the decision in question but the District Officer of Limassol alone without holding a properly constituted meeting, (2) that the decision in question was taken on the erroneous belief that the views of the Planning and Housing Department were binding either on the Board or on its Chairman. With regard to the merits of the case counsel for the applicant has submitted that the applicant was refused the permit to divide his plot (Plot No. 205) in the manner proposed by the plan submitted by him (i.e. Exhibit 2, *supra)* owing largely due to the manner in which the adjoining plot No. 204 was divided in 1960 into building sites, particularly due to the fact that it was not divided in accordance with the relevant permit to divide issued at the time.

The learned Justice in dismissing the recourse:-

Held, I. As to the two aforesaid preliminary points:-

(1) The onus is on the applicant to show that the de-

cision in question is the decision of the District Officer and not that of the Board itself; and the applicant has not discharged this onus. On the contrary it is apparent on the face of the letter of the 6th July, 1964, *(supra)*, whereby the said decision was conveyed to the applicant, that it was written by the District Officer Limassol in his capacity as "Chairman of the Improvement Board of Messa Yitonia". This clearly indicates that the decision conveyed therein was the decision of the Board, and, in the absence of any evidence to the contrary I am not prepared to assume that the District Officer would take upon himself to convey such decision as Chairman of the Board, unless such decision had in fact been taken by the Board under the provisions of Cap. 96 *(supra)*.

(2) Regarding the second preliminary point, here again I do not think there is any substance in it. True, the letter of the 6th July, 1964, is to the effect that the permit applied for would not be granted unless the plan is varied to conform with the recommendations of the Planning and Housing Department as shown in the plan Exhibit 3. In the absence of any evidence to the contrary, I do not think it can be assumed simply from the wording of the said letter that the Board or its Chairman considered that the Board was bound by the views of the Planning and Housing Department. No doubt the Board was entitled to accept and act upon the advice of that Department.

Held, II. As to the merits of the case:

(1) Whatever may have been the circumstances in which the adjoining plot 204 came to be divided, pursuant to a permit issued in 1960, in the manner in which it was in fact divided, (the construction of one of the streets did not fully conform with the aforesaid relevant permit to divide of 1960),-the fact remains that the Board in 1964 in considering the applicant's application to divide plot 205, had to do so in the light of the circumstances and in accordance with the position as the Board found them to exist at the time at which it had to consider such application.

(2) I am satisfied on all the evidence before me that it was a proper exercise of the powers vested in the Board as the Appropriate Authority under section 3(2)(b) of Cap. 96 *(supra)* to require the alterations of the plan submitted by the applicant (Exhibit 2) in the manner proposed in

the plan Exhibit 3. There is no doubt, in my opinion, that the alterations suggested by the Board were necessary for the purposes, *inter alia*, of "safety, communication, amenity and convenience" within the meaning of paragraph (c) of section 8 of Cap. 96 *(supra)*.

(3) In view of the provisions of section 4 of Cap. 96 *(supra)* the Board had a duty to take into account the provisions of regulation 4 of the Streets and Buildings Regulations. Regulation 4 expressly provides, *inter alia*, that every plot resulting from the division shall have a frontage not "less than seventy feet". But an examination of the plan submitted by the applicant with his application (Exhibit 2) will indicate that three of the proposed site-plots have a frontage of less than seventy feet. And I am not prepared to say, having regard to all the circumstances, that there was any obligation on the Board to dispense with these requirements under the proviso to the aforesaid regulation 4, on the ground that it "would be equitable so to do".

(4) In the result, I have come to the conclusion that it was open to the Board to take the decision it did, that the said decision which was communicated to the applicant by the said letter of the 6th July, 1964, was properly taken in the exercise of the powers vested in the Board by the Streets and Buildings Regulation Law, Cap. 96, and in particular by sections 3,4, 8 and 9 thereof and that such decision was not taken in excess or in abuse of the powers vested in the Board.

Recourse dismissed.
No order as to costs.

Cases referred to:

Holy See of Kitium and the Municipal Council of Limassol, 1 R.S.C.C. 15, at p. 27;

Nicos Kirzis and others and The Republic, (1965) 3 C.L.R. 46, at p. 55.

Per curiam: The constitutionality of the relevant provisions of Cap. 96 *(supra)* have not been challenged and rightly so. The issue has now been well established in decided cases that the provisions of Cap. 96 *(supra)* must be read, since the establishment of the Republic on the 16th August, 1960, subject to the

provisions of the Constitution and, in particular, to Article 23 thereof, and to be applied with necessary modifications. (Vide in particular *Holy See of Kitium and the Municipal Council of Limassol,* 1 R.S.C.C. 15, at p. 27 and *Nicos Kirzis and Others and The Republic,* (1965) 3 C.L.R. 46, at p. 55). The effect of "restrictions or limitations", in the sense of paragraphs 2 and 3 of Article 23 of the Constitution, imposed under the provisions of Cap. 96, *(supra)*, and the rights of the citizen under paragraph 3 of Article 23 have been fully expounded in the aforesaid decided cases and need not be repeated again in this judgment.

Recourse.

Recourse against the decision of the respondent whereby the applicant was refused a permit to divide immovable property registered in his name, under plot No. 205 of sheet plan LIV.50.2.IV, in accordance with the plan submitted by him.

L. Clerides for the Applicant.

L. Loucaides, Counsel of the Republic for the Respondent.

Cur. adv. vult.

The following judgment was delivered by:—

MUNIR, J.: By this recourse under Article 146 of the Constitution the Applicant seeks to annul a decision of the Improvement Board of Messa Yitonia (hereinafter referred to as "the Board") which was communicated to Applicant by a letter dated the 6th July, 1964, whereby the Applicant was refused a permit to divide immovable property registered in his name under plot No. 205 of sheet-plan LIV.50.2.IV (hereinafter referred to as "plot 205") in accordance with the plan submitted by the Applicant. Plot 205 is situated within the Improvement Area of Messa Yitonia in the District of Limassol.

Under the provisions of paragraph (*b*) of sub-section (2) of section 3 of the Streets and Buildings Regulation Law, Cap. 96, the Board is, for the purposes of the said Law, the

appropriate authority of the improvement area in which plot 205 is situated and the District Officer of Limassol is the Chairman of the Board.

On the 18th January, 1964, the Applicant applied to the Board under section 3(1) (*c*) of Cap. 96, for a permit to divide plot 205 into separate building sites as proposed in the plan *(Exhibit 2)* which was submitted with his application. This plan provides for nine building sites.

The Applicant was informed, by a letter dated 6th July, 1964, by the District Officer of Limassol, written in his capacity as the Chairman of the Board, *(Exhibit 1)*, that his application for a permit to divide plot 205 into building sites in the manner proposed by him, *i.e.* in accordance with the plan *(Exhibit 2)* attached to his application, had been refused. It is against this decision which this recourse has now been brought.

It is common ground that on the 19th May, 1960, the owners of plot 204 of the same sheet-plan (hereinafter referred to as "plot 204"), which adjoins plot 205 on two sides, had applied under Cap. 96 for a permit to divide plot 204 into building sites. This application was approved on the 12th August, 1960, before the establishment of the Republic, and the requisite permit to divide was issued to the owners of plot 204 on the 19th August, 1960. The official file (No.D343/60), relating to the granting of this permit to divide plot 204, is *Exhibit 6*.

It is also not in dispute that when, pursuant to the permit granted under Cap. 96, plot 204 was actually divided into building-sites and the streets connected with such division were constructed, there was a difference of some 24 feet between the actual alignment of one of the streets running in an approximately East to West direction through the middle of plot 204 and on either side of plot 205 as was in fact constructed on the ground and its alignment as shown on the plan *(in Exhibit 6)* which was approved by the appropriate authority in granting the permit to divide plot 204.

The form of division of plot 205 into building-sites, which was recommended by the Limassol Divisional Office of the Planning and Housing Department and in accordance with which the Board was prepared to grant the Applicant a permit to divide, is as shown on the plan *Exhibit 3*. This

plan provides for eight building-sites.

Counsel for Applicant, before dealing with the actual merits of the Case, has submitted that the decision in question, which was communicated to the Applicant by the letter *Exhibit 1*, was taken in excess or abuse of powers on the following two preliminary or procedural grounds, which may be summarized as follows:—

(1) That it was not in fact the Board, as such, which had taken the decision in question, but that such decision was in fact taken by the District Officer of Limassol himself without holding a properly constituted meeting at which the members of the Board could be consulted.

(2) That the District Officer of Limassol, in taking the decision in question, wrongly believed that he was bound by the views of the Planning and Housing Department (whereas in fact the decision was one for the Board and not for the said Department) and that, therefore, the decision in question was not properly taken.

With regard to the first of the above two grounds, I agree with counsel for Respondent that the onus is on the Applicant to show that the decision in question, as conveyed to the Applicant by the letter *Exhibit 1*, was not properly taken by the Board in accordance with the statutory requirements and that the Applicant has not discharged this onus. On the contrary, it is apparent on the face of the letter *(Exhibit 1)* itself that it is not written by the District Officer of Limassol simply in his capacity as District Officer but that the writer of the letter in question *(Exhibit 1)*, actually designates himself as "District Officer, *Chairman of the Improvement Board of Messa Yitonia*". This clearly indicates, in my view, that it was in his capacity as Chairman of the Board that the District Officer was writing *Exhibit 1* and that the decision conveyed therein was the decision of the Board, and, in the absence of any evidence to the contrary, I am not prepared to assume that the District Officer would take it upon himself to convey such a decision, in his capacity as Chairman of the Board, unless such decision had in fact been taken by the Board under the provisions of Cap. 96.

With regard to the second preliminary issue raised by counsel for Applicant, here again I do not think that there is any substance in this point. It is true that the letter *Exhibit 1*

is to the effect that the division permit applied for would not be granted «ἐκτὸς ἐὰν τοῦτο τροποποιηθῆ συμφώνως τῶν ὑποδείξεων τοῦ τμήματος Πολεοδομίας» ("unless it is varied according to the views of the Town Planning Department"), but, in the absence of any evidence to the contrary, I do not think that it can be assumed simply from the wording of *Exhibit 1* itself that the Board or its Chairman considered that the Board was bound by the views or recommendations of the Planning and Housing Department. The Planning and Housing Department, through its Divisional Officer in Limassol, was no doubt acting as the technical adviser of the Board for this purpose and evidently accepted, and acted upon, the technical advice given to the Board in this instance in reaching the decision which it did. In my view the reference to the Planning and Housing Department in *Exhibit 1* was made rather with the object of describing the plan with which it was desired that the Applicant should comply than as a statement, as suggested by counsel for Applicant, that the Board was bound by the views of the Planning and Housing Department. I am not satisfied, on the evidence before me, that it has been established that the Board or its Chairman considered that the Board was necessarily bound to accept the views or recommendations in question of the Planning and Housing Department.

Coming now to the actual merits of this matter, counsel for Applicant has submitted in this connection that it was largely due to the manner in which plot 204 was divided into building-sites, and particularly due to the fact that it was not divided in accordance with the relevant permit to divide, that the Applicant was refused a permit to divide in the manner proposed by the plan submitted by him *(Exhibit 2)*.

Whatever may have been the circumstances in which plot 204 came to be divided, pursuant to a permit issued in 1960, in the manner in which it was in fact divided—and I am not prepared to say from the evidence before me that there was necessarily any bad faith on the part of the owners of plot 204, as counsel for Applicant has invited the Court to infer from the fact that the construction of one of the streets did not fully conform with the relevant permit to divide—the fact remains that the Board in 1964, in considering the Applicant's application to divide plot 205, had to do so in the light of the circumstances and in accordance with the

position as the Board found them to exist at the time at which it had to consider such application.

When all is said and done, the basic issue in this recourse ultimately comes down to the question whether the plan *(Exhibit 2)* submitted by the Applicant to the Board should have been accepted by the Board as the basis for the division of plot 205 into building sites or whether the Board had properly exercised its statutory discretion in refusing to grant to the Applicant a permit to divide plot 205 unless the Applicant's plan for the division *(Exhibit 2)* was revised to conform with the plan *Exhibit 3*, which was recommended to the Board by the Planning and Housing Department.

On this issue the Applicant has called Mr. Yiangos Mavroudes, who has had considerable experience as a Land Valuer for over 30 years, and who has, at the same time, quite frankly admitted that he has "no qualifications regarding town planning". Mr. Mavroudes has expressed the opinion that the overall loss which the Applicant would suffer, in terms of money, if plot 205 were to be divided in accordance with the plan *Exhibit 3,* and not in accordance with the plan *(Exhibit 2)*, would be about £500. In answer to questions put to him by counsel for Respondent, Mr. Mavroudes has agreed "that in the plan proposed by Respondent *(Exhibit 3)* the visibility would be better along the proposed street which runs from East to West through plot 205". He goes on to say "I do agree that from the point of view of the traffic also the street proposed on the plan of the Respondent *(Exhibit 3)* is better than the street proposed on the plan of the Applicant *(Exhibit 2)*". On the subject of the street, of the width of 30 feet, running from North to South, the construction of which is proposed in *Exhibit 3*, Mr. Mavroudes stated that although he considered this street to be redundant he nevertheless agreed that such a street may be more convenient later from the point of view of its users but went on to point out that, from the point of view of the maintenance of such a street, it would be a burden on the tax-payers.

Mr. George Phaedonos, who is an Architect and a Town Planner and a member of A.R.I.B.A., and who also has a degree in Town Planning from Manchester University, was called to give evidence by counsel for Respondent. His present post is that of a Divisional Officer of the Depart-

ment of Planning and Housing in Nicosia but at the material time he was the Divisional Officer of that Department in charge of the Limassol and Paphos Districts.

Mr. Phaedonos explained at some length, in his evidence, the reasons why it was considered necessary from the town planning aspect of the matter that plot 205 should be divided in the manner proposed in the plan *Exhibit 3*. He considered that the division proposed by the Applicant in the plan *Exhibit 2*, provides for a road which would create a bad road junction with the existing road. He further pointed out that three of the building sites proposed by the Applicant on *Exhibit 2*, are of "sub-standard frontage", that is to say, they have a frontage of less than 70 feet, which is the minimum frontage specified in the Streets and Buildings Regulations. Mr. Phaedonos also explained why it was considered necessary, again from the town planning point of view, also to have a street running from North to South through plot 204, of a width of 30 feet, as proposed on the plan *Exhibit 3*, namely, because to the west of plot 205 and plot 204 there exists an open space with a road to the East of it, running from North to South, and it was eventually proposed to create that open space into a public garden primarily for the use of children and elderly people. It was, therefore, considered advisable, Mr. Phaedonos stated, to relieve the burden of traffic from the street running along the East side of the open space by the construction of another road parallel to it through plot 205.

The basic issue for determination in this Case, as I have already stated earlier, is whether the decision in question of the Board was properly taken in the exercise of the powers vested in it.

Section 4 of Cap. 96 expressly provides that no permit shall be granted under section 3 of Cap. 96 "unless the appropriate authority is satisfied that the contemplated work or other matter in respect of which the permit is sought is in accordance with the provisions of" Cap. 96 and the Regulations made thereunder and in force for the time being.

Section 8 of Cap. 96 provides that before granting a permit under section 3 thereof "the appropriate authority may require the production of such plans, drawings and calculations or may require to be given such description of the intended work as to it may seem *necessary and desirable*

and may require the alteration of such plans, drawings and calculations so produced, particularly—

. . . . . .

(c) with the general object of securing proper conditions of health, sanitation, safety, communication, amenity and convenience in the area in which the intended work is to be carried out".

The constitutionality of the relevant provisions of Cap. 96 have not been challenged in this recourse and counsel for Applicant was in my view quite correct in not doing so as this issue has now been well established in decided cases before the Court, that is to say, that the provisions of Cap. 96 must be read, since the establishment of the Republic on the 16th August, 1960, subject to the provisions of the Constitution and, in particular, to Article 23 thereof, and to be applied with necessary modifications (*vide* in particular *Holy See of Kitium and the Municipal Council of Limassol*, 1 R.S.C.C. p.15 at p. 27 and *Nicos Kirzis and Others and The Republic* (1965) 3 C.L.R. p. 46 at p.55). The effect of "restrictions or limitations", in the sense of paragraphs 2 and 3 of Article 23 of the Constitution, imposed under the provisions of Cap. 96, and the rights of the citizen under paragraph 3 of Article 23 have been fully expounded in the aforesaid decided cases and need not be repeated again in this judgment.

I am satisfied on all the evidence before me that it was a proper exercise of the powers vested in the Board, as the appropriate authority under Cap. 96, to require the alteration of the plan submitted by the Applicant *(Exhibit 2)* in the manner proposed in the plan *Exhibit 3*. There is no doubt, in my opinion, not only from the evidence of Mr. Phaedonos but also from the evidence of Mr. Mavroudes, that the proposed alterations of the plan submitted by the Applicant were necessary for the purposes, *inter alia*, of "safety, communication, amenity, and convenience" within the meaning of paragraph *(c)* of section 8 of Cap. 96.

Moreover, in deciding to exercise its powers under Cap. 96 in the manner in which it did in this Case, not only was it proper for the Board, in my opinion, to take into account the provisions of regulation 4 of the Streets and Buildings Regulations (Subsidiary Legislation, Volume 1 pp. 307-325), but in view of the provisions of section 4 of Cap. 96, the

Board had a duty to do so. The said regulation 4 reads as follows:—

"4. In considering an application for the division of any land, the appropriate authority may require the alteration of the boundaries of any adjoining plot or plots belonging to the same owner and may also require that plots resulting from the division shall be of such size and shape and with such frontage as the appropriate authority may in each case consider necessary or appropriate. Every such plot shall not be less than 5,600 square feet nor with a frontage less than seventy feet:

Provided that the appropriate authority may, in any case in which it considers that it is equitable so to do, dispense with the above requirements as to the size and frontage of plots".

It will be observed that regulation 4 expressly provides, *inter alia*, that every plot resulting from the division shall have a frontage of not "less than seventy feet". An examination of the plan submitted by the Applicant with his application *(Exhibit 2)* will indicate that three of the plots (i.e. Nos. 1, 2 and 3 thereof) have a frontage of less than seventy feet. I am not prepared to say, having regard to all the circumstances, that there was any obligation on the Board to dispense with these requirements under the proviso to the said regulation 4, on the ground that it would be "equitable so to do".

I have given careful consideration to the submissions made by both counsel and to all the evidence before me in this Case, and in particular to the expert evidence given by Mr. Mavroudes and Mr. Phaedonos, and I have come to the conclusion that it was open to the Board to take the decision which it did and I am of the opinion that the said decision which was communicated to the Applicant by the letter dated 6th July, 1964 *(Exhibit 1)* was properly taken in the exercise of the powers vested in the Board by the Streets and Buildings Regulation Law, Cap. 96 and in particular by sections 3, 4, 8 and 9 thereof and that such decision was not taken in excess or in abuse of the powers vested in the Board.

For all the reasons given above this Application cannot succeed and it is hereby dismissed accordingly. Having regard to all the circumstances of the Case I am of the opinion that there should be no order as to costs in this Case.

Application dismissed. No order as to costs.