IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTOS M. ZIVLAS,

Applicant,

and

THE MUNICIPALITY OF PAPHOS, THROUGH THE MUNICIPAL COMMITTEE OF PAPHOS,

Respondent.

(*Case No.* 9/73).

Time—Within which to file a recourse—Article 146.3 *of the Constitution—Recourse against decision refusing to revoke building permit and certificate of approval—"Knowledge" of the decision—Meaning—Recourse out of time—As filed after* 75 *days from date applicant had full knowledge of decision complained of.*

Administrative Law—Executory act—Confirmatory act—Refusal to revoke a previous executory act does not amount to an executory act but to a confirmatory act—It does amount to an executory act if refusal is expressed after a new inquiry and after taking into consideration new substantial factors.

Administrative Law—New inquiry—When does a new inquiry exist.

Constitutional Law—Time—Within which to file recourse—Article 146.3 *of the Constitution.*

The applicant complains against the refusal and/or omission of the respondent to revoke (a) the permit issued to the interested parties for the division of land into building sites and for the widening of a road and (b) the certificate of approval issued thereafter.

The following statement of facts is taken from the judgment:

The division permit in question was issued on the 15th December, 1969 and after the work was carried out a certificate of approval was issued on the 18th November, 1970.

The complaint of the applicant being that the condition of the said permit in respect of the road had to be so framed so

that in order to have the 30 ft. road constructed, he would not be required to cede more land than the one ceded by the interested parties, he wrote to the respondent on the 15th January, 1971, and, *inter alia,* reported interference with the public road.

Respondent replied by his letter dated 10th February, 1971 and after rejecting applicant's complaints stated that the decisions in question were made in accordance with the terms of the relevant permit.

On the 17th February, 1971 applicant filed a civil action for trespass against the interested parties and the respondent in this recourse which was settled and dismissed on the 26th October, 1972. (See pp. 354–357 of the judgment *post*).

On the 7th December, 1972 applicant's counsel addressed a letter to the respondent wherein after referring to the civil action and the record of the settlement thereof he stressed that part of the property of the applicant was taken unlawfully into consideration by the respondent, when issuing the division permit in question. Applicant's counsel went on to say that in view of such illegality and the misconception of fact which came to the knowledge of the respondent on the date of settlement of the civil action, he was instructed to ask the respondent to revoke the division permit and the certificate of approval so that it would be possible to adapt the submitted plans to the real state of facts.

Respondent replied by a letter dated 18th December, 1972 and rejected applicant's allegations.

This recourse was filed on the 4th January, 1973 and the main issue therein was whether it has been filed within the mandatory period of 75 days prescribed by Article 146.3 of the Constitution and what the Court had to determine in this respect, was: (a) When the decisions complained of came to the knowledge of the applicant; (b) whether the refusal of the administration to revoke or withdraw their previous administrative decisions or acts, namely, the building permit and the certificate of approval, was an act or decision of an executory nature which could be made the subject of a recourse and from the occurrence of which the time prescribed by Article 146.3 started running.

After finding that the applicant had full knowledge of the decisions complained of since the 10th February, 1971, when

respondent wrote to him that the division of the building sites was made in accordance with the terms of the relevant permit the Court,

Held, (1) The decision, embodied in the letter dated 18th December, 1972, was a confirmatory one constituting a repetition of the previous decision and based on the same factual and legal basis. It could not become the subject of a recourse under Article 146 of the Constitution, as acts and decisions stating the insistence of the administration and its refusal to revoke a previous executory act are confirmatory ones. (See *Varnava* v. *The Republic* (1968) 3 C.L.R. 566 at pp. 574–575).

(2) As stated in the Conclusions of the Greek Council of State, p. 203 "there is no obligation on the part of the administration to revoke its legal acts or examine applications for revocation of such acts and in consequence it is not considered as executory act the express or silent refusal of the administration to revoke an unlawful act. If, however, the refusal was expressed after a new inquiry of the case and after taking into consideration new substantial factors, such refusal has an executory character". This is not, however, the case in the present instance, where all relevant material was known to both the applicant and the respondent and there was no question of a new inquiry being carried out. (As to when a new inquiry exists see *Police Association and Others* v. *Republic* (1972) 3 C.L.R. 1 at pp. 29–30).

(3) The present recourse has been filed out of time and it is, therefore, *dismissed.*

Application dismissed.

Cases referred to:

Moran and *The Republic*, 1 R.S.C.C. 10 at p. 13;

Varnava v. *The Republic* (1968) 3 C.L.R. 566 at pp. 574–575;

Police Association and Others v. *Republic* (1972) 3 C.L.R. 1, at pp. 29–30;

Cariolou v. *The Municipality of Kyrenia and Others* (1971) 3 C.L.R. 455, at p. 462.

Recourse.

Recourse for a declaration that the refusal and/or omission of the respondent to revoke the permit issued to the owners

of plot 22, sheet plan L131.VII, Reg. No. 24044 for a division of the said property into building sites and/or the widening of the road lying to the east of the said plot and the certificate of approval issued thereafter in respect of the said division and/or widening are *null* and *void.*

K. Talarides, for the applicant.

J. P. Potamitis, for the respondent.

A. Skarparis, for the interested parties.

Cur. adv. vult.

The following judgment was delivered by:-

A. LOIZOU, J.: By the present recourse the applicant claims that the refusal and/or omission of the Municipality of Paphos to revoke the permit issued to the owners of plot 22, sheet plan L131.VII, Reg. No. 24044 dated 28.3.1969 for division of the said property into building sites and/or for the widening of the road lying to the east of the said plot and the certificate of approval issued thereafter in respect of the said division and/or widening, be declared *null* and *void* and that whatever has been omitted should have been performed.

A division permit No. 3888 was issued on the 15th December, 1969 to interested parties Danai M. Iacovidou and Maria Lazarou, for the purpose of dividing the aforesaid property into 19 building sites in accordance with the plans submitted and on the terms attached thereto. The work was carried out and on the 18th November, 1970 a certificate of approval was issued under section 10 of the Streets and Buildings Regulation Law, Cap. 96.

The subject property was separated from that of the applicant along its whole length, by a public path—referred to in some of the documents as "earth track"—of a width of 4 feet. This path would have to be incorporated in a road to be constructed on that side of the property by the interested parties which, no doubt, as things are, would have to be 30 ft. wide.

The complaint of the applicant is that the condition in the building permit in respect of this road had to be so framed so that eventually in order to have the 30 ft. road constructed, the applicant would not be required to cede more land than the one ceded by the interested parties. As ascertained ulti-

mately at a local inquiry carried out by the Lands Office, the strip of land ceded by the interested parties and joined by the path and made into a proper asphalted road, varied from 8 ft. to 12½ ft. The Appropriate Authority by its certificate of approval, approved same as having been constructed in accordance with the building permit in question. In fact, the contractors who carried out the division of the land into building sites and constructed the roads, went beyond the boundary of the path on the side of the applicant's property and trespassed therein, by asphalting small strips of land or levelling other strips, as shown in the plan attached to *exhibit* 4.

Soon after the certificate of approval was issued and in particular, on the 15th January, 1971, the applicant, through his then lawyer, addressed a letter (*exhibit* 8) to the District Officer and the respondent Municipality in their capacity as the Appropriate Authority under the Streets and Buildings Regulation Law, Cap. 96, by which he was reporting interference with the public road and was saying:–

> " This can be easily ascertained by a mere visit to the spot, when, without needing specialized knowledge, it becomes obvious, and also from the existing fixed points, that immediately after the Municipal Old People's Home which was included and by fence occupied by the School Committee of Ktima to the extent it adjoins plot 26/1/2/2 and beyond that it has been occupied by the adjoining owners of building sites who also constructed private road and/or further joined the road to their own property, and so the passing generally through the public road is obstructed.
>
> My aforesaid client is the owner by virtue of title deed of property covered by plot 26/1/2/1 sheet plan 51/3.I.YII.X, town of Ktima, which was in the past adjacent to the said public road, and apart from being affected himself as a citizen together with other citizens in the use of this public road, his lawful rights in the ownership of the said property which is intended to be divided into building sites will be substantially and to a great extent, affected, and by the present, intends to protect also his said lawful rights and interests.
>
> Be that as it may, and in the light of the aforesaid circumstances, my client inquires if all the aforesaid unlawful

acts which have been committed in complete and evident violation of the provisions of the Streets and Buildings Regulation Law, the relevant Regulations and without any decision of the Council of Ministers, were made with your permit, consent and forebearance, and he asks you, being so entitled under the Constitution, to be given a written reply, through me or direct to him, informing us about any decision of yours on the matter for the reinstatement of the state of affairs or of any views you have on the matter, as he intends, in case of failure on your part, to have recourse to the appropriate forum for the protection of his lawful rights as citizen and owner of affected property".

By letter dated the 10th February, 1971 (*exhibit* 5) the Chairman of the respondent Municipality replied to the applicant, informing him thereby that after a local inquiry it was ascertained that the road referred to in paragraph 1 of his letter, not only it did not cease to exist, but on the contrary, the Municipality widened the path marked on the plans and constructed a road of a width of 30 ft. with central water supply and had it also asphalted. No part of the existing passage was incorporated in any property, nor any part of his property was included in constructed roads, which were not private as he alleged, but public roads, having been created by the division of building sites in the area. Furthermore, the said divisions were made in accordance with the terms of the relevant permit of the Appropriate Authority.

So, the applicant was clearly informed by the aforesaid letter that the construction of roads in the area, including the road subject matter of the present recourse, was made in consequence of and in accordance with the terms of a permit issued by the Appropriate Authority.

On the 17th February, 1971 in furtherance of his indication (*exhibit* 8) that if he was dissatisfied with their reply he would take proper action and defend his lawful rights and interests, he filed, in the District Court of Paphos, Civil Action No. 222/72. Copies of the summons and the pleadings have been filed as *exhibit* 4. The defendants in that action are—(1) Lara Co. Ltd., of Ktima, (2) Danai Iacovidou, (3) Maroulla Lazarou and (4) the respondents in the present recourse. It was an action for trespass. As it was alleged in paragraph 4 of the statement of claim, the trespass was committed by defendant (1) wth the

assistance and approval of defendants (4) and in violation of the relevant permit issued by the latter in their capacity as the Appropriate Authority, by unlawfully taking and occupying the aforesaid earth track, by the destruction of a soil conservation bank protecting the plaintiff's property (applicant in this case) and further by occupying a strip of land along plots 26/1/2/1 and 23/1/1 belonging to applicant, of a width of upto 4 ft.

It was further contended that defendants 4 by approving the situation created by the aforesaid illegalities at the expense of and on part of the property of the applicant, they were in effect claiming same and demanding it as belonging to them, and by the said trespass the property of the plaintiff worth more than £500 was affected.

So, again, we have in the very words of the plaintiff himself reference to the building permit and the approval by the respondent Municipality in its capacity as the Appropriate Authority under the Streets and Buildings Regulation Law, approving what the applicant was contending to be an illegality and interference with his proprietary interests.

It is relevant to refer also to the defences filed by the four defendants. In paragraph 4 of the defence of defendant 1, it was alleged that in the execution of the said work which included the road complained of, they complied fully with the relevant division permit plans and certificate of approval etc. issued lawfully and competently by defendants 4 to the contents of which they reserved the right to refer at the trial.

Defendants 2 and 3 in paragraph 3 of their defence alleged that the work was carried out lawfully and rightfully and in accordance with a relevant division permit, plans, certificate of approval, etc. issued lawfully and competently by defendants 4 to the contents of which they also reserved the right to refer at the trial for their true meaning and effect and after instructions of the authorized for the purpose representative of defendants 4.

In paragraph 3 (c) of the defence of defendants 4 and in reply to paragraph 4 of the statement of claim they alleged—

"(a) that in their capacity as the Appropriate Authority under the Streets and Buildings Regulation Law, Cap. 96 and the relevant Regulations they issued a permit to defendants 2 and 3 for the division into building

sites of their property, plot 22, sheet plan 51/3/1 under the terms: That they ceded a strip of land from their property under plot 22 along the whole length of the said earth track for widening it without trespassing onto the property of the plaintiff, so that the said existing track would be widened in proportion and direction in accordance with the plan and also asphalt the said strip of land.

(b) Defendants 2 and 3 complied with the terms of the said permit and after that defendants 4 issued a certificate of approval by virtue of the provisions of the aforesaid law.

(c) By the said certificate defendants 4 approved merely all that was lawfully executed on the basis of the building sites division permit issued by them and nothing more and that anything done by defendants 2 and 3 would have to be done on their own property and not on the property of anybody else".

This latter defence appears to have been filed on the 16th March, 1971.

It is apparent from the aforesaid statements that the claim of the applicant against defendants 4 was in respect of the building permit and certificate of approval issued by them to the two interested parties, defendants 2 and 3 and furthermore, it was made clear by the defence of all defendants that they were claiming to have acted under the building permit and certificate of approval and plans etc. issued for the purpose.

After a local inquiry was carried out, the case came up for hearing before the District Court of Paphos on the 26th October, 1972. In the presence of the litigants and their advocates and by consent a plan to scale was put in, copy of which is attached to *exhibit* 4. It indicated the width of the road constructed and the part of the applicant's property trespassed upon on the other side of the path. The record of the Court on that date, as far as relevant, reads as follows:–

" *Sivitanides*: This action has been settled. Defendants 2 and 3 declare that plaintiff is the registered owner of plots 23/I/I, 23/2/7 and 26/I/2/I of Sheet/plan LI/3.I.VII the western boundary of which extends up to black dotted line marked A–B on *exhibit I*, and that the portions of

land coloured green and yellow on *exhibit 1* are part of plaintiff's property. Defendants 2 and 3 submit also to judgment for £45.- costs.

Michaelides:- The defendant No. 4 repeats the declaration made by Mr. Sivitanides for defendants 2 & 3.

Korakides:- Plaintiff is content with the aforesaid declaration and withdraws the action against all the defendants and accepts £45.- costs from defendants 2 & 3.

Court:- Action settled and is by consent dismissed, against all the defendants without costs as regards defendants 1 & 4 and with an order for £45.- costs against defendants 2 & 3 jointly and severally in plaintiff's favour".

It may be mentioned here that in the defence of defendants 1 it was alleged that if in the course of the construction through oversight or accidentally and unintentionally any trespass was made into the property of the plaintiff, which is not admitted, defendants 1 say that -

(a) This does not constitute trespass in accordance with the law, nor a cause of action;

(b) they are willing to reinstate matters in their previous position, and

(c) no damage was caused to the plaintiff.

On the 7th December, 1972 the applicant, through his present counsel, addressed a letter (*exhibit* 6) to the respondent Municipality. Reference was made therein to Civil Action No. 222/71 and the record of the Court hereinabove set out, and it was stressed that part of the property of the applicant was taken unlawfully into consideration by the Municipality when issuing the division permit in question, and went on to say that—"in view of the aforesaid illegality and the misconception of fact which came to the knowledge of the Municipality of Paphos on the 26th October", he had instructions on behalf of his said client to ask them to revoke the division permit and the certificate of approval issued to the interested parties, so that it would be possible to adapt the submitted plans to the real state of facts, as it was accepted before the District Court of Paphos.

To this, the respondent Municipality replied by their letter (*exhibit* 7) of the 18th December, 1972, which reads as follows:-

" ..... The Municipality of Paphos denies the allegations of your client and allege:

That it did not trespass on the property of your client and that the Municipality of Paphos issued a permit to Mrs. Danai M. Iacovidou and Maroulla Lazarou for the widening of existing road exclusively and only from their own space, namely, plot 22. If at the construction of the road the owners of the building sites of plot 22 trespassed on the strip of land coloured green and yellow, as per *exhibit* 1 in the said action, namely, the strips in respect of which the said Danai Iacovidou and Maroulla Lazarou recognize that they constitute part of the property of your client, this was made on the property of your client without the consent or instructions of the Municipality, and by the settlement reached in Action No. 222/71 (after which the action was dismissed) they recognized that plots 23/1/1, 23/2/7 and 26/1/2/1 of Sheet/plan LI/3.I.BII are covered by registration in the name of your client.

The term of their permit was not to enter into the property of your client, but to construct a road on plot 22 which belonged to them and not on other plots. Consequently, the illegality is due to the owners of the building sites of plot 22 and not to the Municipality of Paphos.

The Municipality of Paphos does not claim the part of the road which lies on plots 23/1/1, 23/2/7 and 26/1/2/1, Sheet/plan LI/3.I.BII and your client may use that part as his own in any way he wishes. He can also remove the aspalt which the said owners of building sites placed on part of the said strips of land.

The permit, as well as the certificate of approval refer only to plot 22 which belongs to the owners of building sites and do not refer to the plots which belong to your client".

On the 4th January, 1973, the present recourse was filed. The first point, therefore, that poses for determination, as it is always the case in respect of recourses filed under Article 146 of the Constitution, is whether such a recourse has been filed within the mandatory period prescribed by paragraph 3 of the said Article which reads as follows:-

" Such a recourse shall be made within seventy-five days of the date when the decision or act was published or if not published and in the case of an omission when it came to the knowledge of the person making the recourse".

The issue, therefore, in the first place, is when the decisions complained of, namely, the building permit and the certificate of approval, came to the knowledge of the applicant.

It has been the case for the applicant that the trespass on his property was a disputed one, hence, the filing of the civil action against the owners of plot 22 and the respondents for ascertainment of the said trespass. He went on to say that by the settlement of the said action there was an admission by all defendants of the trespass on the land of the applicant. That formal admission upset the factual basis on which the division and/or the street widening permit was issued, as well as the certificate of approval and rendered *ab initio* illegal the said permit and certificate. It was contended that it was after the judgment in the civil case that the facts were established judicially for the first time and the Municipal Council came to know that either the permit or the certificate of approval were wrongly issued. In other words, that either the interested parties complied with the permit and therefore the permit was wrongly issued, or they did not comply with the permit and therefore the certificate of approval was wrongly issued and once they came to know about this fact it was their duty to revoke it in pursuance of the application which was made to them on the 7th December by the applicant. It was in view of their refusal by *exhibit* 7 that the applicant had to come to this Court for redress.

It has been said in the case of *John Moran* v. *The Republic* 1 R.S.C.C., p. 10 at p. 13 that –

" In the opinion of the Court 'knowledge' means knowledge of the decision, act or omission giving rise to the right of recourse under Article 146 of the Constitution and not knowledge of evidential matters necessary to substantiate before this Court an allegation of unconstitutionality, illegality or an excess or abuse of power".

And at page 14 it is stated:–

" The period of seventy-five days as from the date knowledge was acquired could not be prevented from running merely because the applicant wanted to acquire further

knowledge not regarding the actual happening of the acts complained of but regarding the strength of his eventual evidence".

In the present case the applicant had full knowledge of the decisions complained of, to say the least, since the 10th February, 1971 when the respondent Municipality by their letter (*exhibit* 5) informed him that the constructed road was not a private but a public one created by the division of the land of the interested parties into building sites made in accordance with the terms of the relevant permit of the Appropriate Authority. Even if we were to ignore this date, we still have the Civil Action No. 222/71 filed on the 17th February, 1971, by which the applicant was alleging and claiming that the respondent Municipality had approved the illegalities, the subject matter of those proceedings and if anything further is required, we have the defences filed in those proceedings, again putting forward the defence of having been constructed by virtue of a division permit and a certificate of approval issued thereafter which show that more than 75 days elapsed from the latest date at which the applicant had knowledge of the acts or decisions complained of.

What remains, however, to consider, is whether the refusal of the administration to revoke or withdraw their previous administrative decisions or acts, namely, the building permit and the certificate of approval, is an act or decision of an executory nature which may be the subject of a recourse and as from its occurrence the time prescribed by Article 146.3 of the Constitution starts running.

In my view, that decision was a confirmatory one constituting a repetition of the previous decision and based on the same factual and legal basis. It could not become the subject of a recourse under Article 146 of the Constitution, as acts and decisions stating the insistence of the administration and its refusal to revoke a previous executory act is a confirmatory one. There was no reversal of the factual basis upon which the permit and the certificate of approval were issued, nor was there any scope for a new inquiry to be carried out by the administration in the matter, as the ascertainment of facts in the civil action and in particular the admission that there was a trespass by defendants 1, 2 and 3 beyond the boundary of the path was entirely unconnected with the conditions of the permit regarding the road to be constructed which is the subject of the complaint of the applicant. (In this respect, see *Varnava* v.

The Republic (1968) 3 C.L.R. 566 at pp. 574 and 575 and the authorities therein cited). As also stated in the Conclusions of the Greek Council of State, p. 203, "There is no obligation on the part of the administration to revoke its legal acts or examine applications for revocation of such acts and in consequence it is not considered as executory act the express or silent refusal of the administration to revoke an unlawful act. If, however, the refusal was expressed after a new inquiry of the case and after taking into consideration new substantial factors, such refusal has an executory character". This is not, however, the case in the present instance.

When a new inquiry exists, was extensively dealt with by Hadjianastassiou, J. in the case of *Police Association & Others* v. *The Republic* (1972) 3 C.L.R. 1 at pp. 29 and 30, where he adopts with approval a passage from the textbook of Stasinopoulos on the Law of Administrative Disputes, (1964) 4th ed., at p. 176 which is to the effect that when a new inquiry exists or not, is a question of fact and it is considered to be a new inquiry—the taking into consideration of new substantive legal or real material and a new material is judged severely because he who has lost the time limit for the purpose of attacking an executory act, should not be permitted to circumvent such a time limit by the creation of a new act which has been issued nominally after a new inquiry, but in substance on the basis of the same material.

In my opinion all relevant material was known to both the applicant and the respondent Municipality and there was no question of a new inquiry being carried out. There was no examination of facts newly established or pre-existing but until then unknown, which were taken additionally into consideration for the first time. There was complete knowledge of the act from the time that the applicant became aware of those elements generally indispensable and specific on the point capable of being used to base thereon an application for annulment (see *Cariolou* v. *The Municipality of Kyrenia & Others* (1971) 3 C.L.R. 455, at p. 462, following and adopting the corresponding passage from The Recourse for Annulment to the Council of State by Professor Tsatsos, 2nd ed., p. 54).

The ascertainment of the extent of the trespass on the plaintiff's property was not a newly established factor as the applicant was already complaining of same. What it did happen, was the accurate extent of it which is only evidential matter in

any event not the subject of this recourse, nor constituting a misconception of fact. Furthermore, from the known elements of the decision the applicant could ascertain, and in fact did ascertain, the existence of grounds of annulment, and as it was said, even one ground of annulment sets the time for the filing of a recourse for an annulment in operation.

For all the above reasons, I have come to the conclusion that the present recourse has been filed out of time and I, therefore, dismiss same, but in the light of the circumstances of this case, I make no order as to costs.

Application dismissed.
No order as to costs.