1981 June 27

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS A. GEORGHIOU AND OTHERS,
Applicants,

v.

THE STROVOLOS IMPROVEMENT BOARD,
THROUGH THE DISTRICT OFFICER,
NICOSIA,
Respondent.

(*Case No.* 176/79).

Building—Building permit—Application for—Refused because applicant was required to modify his plans in respect of position of proposed building so that part of the building site could be used for construction of a road—No valid scheme in force, in accordance with the law, affecting the land in question—Respondent not entitled and wrongly acted in refusing the permit.

The applicants as registered co-owners of a piece of land at Strovolos applied to the respondents for a building permit to erect a building thereon. The respondents rejected* the application on the 28th March, 1979 because the proposed building "would be erected on a point of the said plot that would render impossible the construction of a road of paramount importance"; and acting under section 8(c) of the Streets and Buildings Regulation Law, Cap. 96 required of the applicants to so alter their plans "that the proposed building is erected elsewhere on the same plot in such a way as to lie at least 10′ from the boundary of the proposed road artery that is shown in green on the aforesaid survey plan, 10′ from the boundary of the sterilising strip shown green on the same plan, and 10′ from the remaining boundaries of the plot". Hence this recourse.

* The relevant decision is quoted at pp. 350–51 *post.*

When the above decision was taken there was no valid scheme in existence affecting the area in question, in accordance with the Town and Country Planning Law, 1972 (Law 90/72) or any other law in force. In 1981, however, the respondents acquired compulsorily part of applicants' property and some other property in order to put into effect the plans envisaged in the *sub judice* decision.

Held, that once there was no valid scheme at the time affecting the area in question the respondents were not entitled and wrongly acted in refusing the permit to the applicants; accordingly the *sub judice* refusal is contrary to the provisions of the law and/or of the constitution and was made in excess and/or in abuse of the powers vested in the respondents and must be annulled.

Sub judice decision annulled.

Cases referred to:

Holy See of Kitium v. *Municipal Committee of Limassol*, 1 R.S.C.C. 15;

Theodosiou & Co. Ltd. v. *Municipality of Limassol* (1975) 3 C.L.R. 195;

Aspri v. *Republic*, 4 R.S.C.C. 57;

Orphanides and Another v. *Improvement Board Ay. Dhometios* (1979) 3 C.L.R. 466.

Recourse.

Recourse against the refusal of the respondent to issue a building permit to the applicants.

A. I. Dikigoropoulos, for the applicants.

C. Adamides, for the respondent.

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment. In these proceedings under Article 146 of the Constitution the applicants seek a declaration that the acts and/or decisions of the respondent in refusing to issue a building permit to them is null and void and of no effect whatsoever.

1. *Article* 146:

Time and again it is said that the Supreme Court has exclusive jurisdiction to adjudicate finally on a recourse made to it on

a complaint that a decision or an omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

2. *The facts*:

The facts are not in dispute and shortly are these: The applicants Georghios A. Georghiou, Androula A. Frangou and Anna M. Christophi, are the registered co-owners of immovable property situated at Strovolos and is described in the relevant certificate of Registration as Plot No. 1400 of L.R.O. Sheet Plan XXI/62.E.2. On 29th December, 1977, they applied to the respondents, the Strovolos Improvement Board through the District Officer of Nicosia for a permit to erect a building on part of the aforesaid property. This application was made in accordance with the provisions of the law and regulations made thereunder. All plans, drawings and other documents required under the law and/or the regulations made thereunder were submitted with such application. On 8th June, 1978, counsel appearing for the applicants addressed a letter to the respondents seeking a reply and the respondents by a letter dated 26th July, 1978, assured them that their letter was being examined. The applicants feeling aggrieved because of the long delay of the administration repeated their oral complaints and the respondents finally on 28th March, 1979, in reply had this to say:-

"'Αναφορικῶς πρὸς τὴν αἴτησίν σας δι' ἧς ζητεῖτε ὅπως σᾶς παραχωρηθῆ ἄδεια οἰκοδομῆς ἐπὶ τοῦ τεμαχίου 1400 Φ/Σχ. 21/62 Ε2 κειμένου εἰς Στρόβολον, πληροφορεῖσθε ὅτι αὕτη ἐξητάσθη ὑπὸ τοῦ Συμβουλίου, πλὴν ὅμως ἀπερρίφθη, καθ' ὅτι ἡ προτεινομένη οἰκοδομὴ θὰ ἀνεγερθῆ εἰς σημεῖον τὸ ὁποῖον θὰ καταστήση ἀδύνατον τὴν κατασκευὴν ὁδοῦ πρωταρχικῆς σημασίας, ὡς δεικνύεται ἐπὶ τοῦ συνημμένου χωρομετρικοῦ σχεδίου, μὲ ἀποτέλεσμα νὰ ἐπηρεασθῆ λίαν σοβαρῶς τόσον ἡ μελλοντικὴ ὁδικὴ ἀνάπτυξις τῆς περιοχῆς ὅσον καὶ τῆς πόλεως γενικώτερον.

2. 'Ως ἐκ τούτου, καλεῖσθε ὅπως δυνάμει τοῦ ἄρθρου 8(γ) τοῦ περὶ Ρυθμίσεως 'Οδῶν καὶ Οἰκοδομῶν Νόμου Κεφ. 96 τροποποιήσετε τὰ σχέδια σας οὕτως ὥστε ἡ οἰκοδομὴ νὰ ἀνεγερθῆ εἰς ἄλλην θέσιν ἐντὸς τοῦ ἰδίου τεμαχίου κατὰ

τοιοῦτον τρόπον ὥστε νὰ ἀπέχῃ 10' τουλάχιστον ἐκ τοῦ ὁρίου τῆς προτεινομένης ὁδικῆς ἀρτηρίας τοῦ δεικνυομένου δι' ἐρυθρᾶς γραμμῆς ἐπὶ τοῦ ὡς ἄνω ἀναφερομένου χωρομετρικοῦ σχεδίου, 10'–0'' ἐκ τοῦ ὁρίου τῆς προστατευτικῆς λωρίδος τῆς δεικνυομένης διὰ πρασίνου χρώματος ἐπὶ τοῦ ἰδίου σχεδίου καὶ 10'–0'' ἐκ τῶν ὑπολοίπων ὁρίων τοῦ τεμαχίου".

And in English it reads:–

"With reference to your application for a permit to erect a building on Plot 1400, of L.R.O. Sheet/plan 21/62 E2, situate at Strovolos, you are informed that such application was examined by the Board, but was rejected, as the proposed building would be erected on a point of the said plot that would render impossible the construction of a road of paramount importance, as is shown on the attached survey plan, thus seriously affecting the future development of the area as well as of the town generally.

2. Consequently, you are required under Section 8(c) of the Streets and Buildings Regulation Law, Cap. 96 to so alter your plans that the proposed building is erected elsewhere on the same Plot in such a way as to lie at least 10' from the boundary of the proposed road artery that is shown in green on the aforesaid survey plan, 10'–0'' from the boundary of the sterilising strip shown green on the same plan, and 10'–0'' from the remaining boundaries of the plot".

3. *Grounds of Law*:

Counsel for the applicants in support of the application put forward the following grounds of law: (1) That the act or decision complained of is contrary to the provisions of the Streets and Buildings Regulation Law, Cap. 96; (2) The decision complained of was made and was taken under a misconception of facts and/or in a manner inconsistent with all notion of proper administration; and that respondents misconceived the interpretation of section 8(c) and attempted to set into motion the provisions of section 12 of Cap. 96 relating to the widening and straightening of streets, without complying with the special provisions set out in the latter section of the aforesaid law; (3) The refusal of the respondent to grant the building permit

on the ground set out in *exhibit* 1 is not a valid reason, because after 16th August, 1960, the relevant legislation and the provisions of Cap. 96 have to be read subject to the Constitution and specifically Article 23 thereof. In addition counsel claimed that the refusal to issue a building permit, tantamounts to an interference and/or disturbance of the rights of the applicants over their property safeguarded under Article 23, and could not have been legally made even if the part of their property was arbitrarily converted into a public street with a sterilising zone which has been compulsorily acquired unless payment for such part of the land taken was paid to the applicants in advance. Counsel relies on the case of *Kitium* v. *Municipal Committee of Limassol*, 1 R.S.C.C. p. 15, and *Theodosiou and Co. Ltd.* v. *The Municipality of Limassol* (1975) 3 C.L.R. 195; (4) Without prejudice to the aforesaid and/or in the alternative the decision complained of was not reached on the basis of objective criteria, respondents having failed to carry out the necessary inquiry to ascertain all relevant facts such as the needs of vehicular traffic affected by the act and/or the decision complained of.

On the contrary counsel for the respondent put forward that the decision reached by the respondent was taken lawfully and was not in contradiction to the relevant provisions of the law or the Constitution and it does not amount to abuse or excess of power. In addition counsel argued that the decision reached was not contrary to the provisions of Cap. 96, and that the said decision was reached or taken after making a full inquiry into the relevant facts of the application and/or of the law and is not contrary to the correct principles of proper administration. Counsel further argued that the respondent rightly interpreted the provisions of section 8(c) of our law, and that no decision was taken in violation of the said law from the refusal of the administration to issue a building permit.

4. *The Law*:

I find it convenient, before dealing with the arguments of counsel, to state that our law requires, before granting a permit etc., to produce before the appropriate authority plans etc. Section 8 of Cap. 96 says that:-

> "Before granting a permit under section 3 of this Law, 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—

(a) with the object of securing proper conditions of health and safety in connection with the building to which such plans, drawings and calculations relate;

(b) with a view to preserving the uniform or proper character and style of buildings erected or to be erected in the area in which the plot is situated;

(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; and

(d) as later on amended reads:

ἐπὶ τῷ σκοπῷ διασφαλίσεως τῆς περαιτέρω βελτιώσεως τοῦ ὁδικοῦ δικτύου τῆς περιοχῆς."

This law deals also with the special provisions relating to widening and straightening of the streets and section 12 is in these terms:

"(1) Notwithstanding anything contained in this Law, an appropriate authority may, with the object of widening or straightening any street, prepare or cause to be prepared plans showing the width of such street and the direction that it shall take.

(2) When any plans have been prepared under subsection (1), the appropriate authority shall deposit such plans in its office and shall also cause a notice to be published in the Gazette and in one or more local newspapers to the effect that such plans have been prepared and deposited in its office and are open to inspection by the public and such plans shall be open to the public for inspection at all reasonable times, for a period of three months from the date of the publication of the notice in the Gazette.

(3) At the expiration of the period set out in subsection (2), the plans shall, subject to any decision by the Governor

in Council on appeal as in section 18 of this Law provided, become binding on the appropriate authority and on all persons affected thereby and no permit shall be issued by the appropriate authority save in accordance with such plans".

The first complaint of counsel was that there was no valid reason for the administration to refuse the building permit and that such refusal was taken on the misconceived or misinterpreted provisions of section 8(c) of Cap. 96, once the property in question abuts on an already existing street and because the plans and the drawings prepared were all in accordance with the relevant provisions of the law and regulations.

5. *The Case Law*:

With regard to the refusal of a building permit by the administration, time and again it was said that a refusal to grant a building permit, constitutes a disturbance of the possession of the owner of the property who, until the payment of the compensation, continues to exercise, subject to certain limitations, and have, as owner, intact the rights prescribed by law regarding possession, disposal and enjoyment. And no building permit may be refused until the payment of the compensation for the property under acquisition. (See Saripolos The System of Constitutional Law of Greece, 4th ed. Vol. 3 p. 215).

The first case which came before the Supreme Constitutional Court of Cyprus regarding the refusal of the administration to grant a building permit, is *Holy See of Kitium and Municipal Council, Limassol*, 1 R.S.C.C., 15 and at p. 27 it is stated:-

"The Court turns now to the question of the validity of the refusal of the Respondent on the 9th August, 1960, to grant the building permit applied for. It has already been decided that such refusal was bona fide. As the said decision was made before the 16th August, 1960, the date on which the Constitution came into force, its validity has to be determined in the light of the law then prevailing and of the manner in which such law was then being administered and interpreted. The Court, viewing such refusal in that setting is not satisfied that the decision of the respondent at the time was either illegal or made in excess or in abuse of power. Some support for this

conclusion may be found in the judgment of the former Supreme Court of the Colony of Cyprus given on the 26th January, 1959, in Case Stated No. 128 (*Georghios Lordos and others* v. *Government of Cyprus*).

No useful purpose would be served by analysing in extenso the grounds on which the above conclusion is based for the simple reason that such course would be of no assistance to the parties in this case or to any other future litigants, because from the 16th August, 1960, onwards the relevant legislation, and in particular CAP. 96, has to be read subject to the Constitution and specifically Article 23 thereof, and to be applied with necessary modifications".

In *Evrydiki Aspri and The Republic* (*Council of Ministers*), 4 R.S.C.C. 57, Forsthoff, P., dealing with the question as to whether the simultaneous publication of the order of requisition and the notice of acquisition was in order, had this to say at pp. 60–61:-

"The Court is of the opinion that the notion of requisition in paragraph 8 of Article 23, and Law 21/62 made thereunder, should be construed in a manner consistent with the whole context of Article 23. By comparing the provisions of paragraphs 4 and 8 of such Article it will be seen that they follow the same pattern and are destined to achieve similar objects except that under paragraph 8 no acquisition of property takes place, as under paragraph 4. This is the reason why the compensation under paragraph 4 is payable in advance whereas under paragraph 8 it is payable promptly only.

It is correct that by sub-paragraph (c) of paragraph 8, and section 4 of Law 21/62, it is laid down that the period of requisition cannot exceed three years, but such a provision does not also warrant the converse conclusion that the purpose of public benefit, to be achieved by means of the requisition, should also be of a limited duration. There is nothing to prevent the continued subsequent achievement of the same purpose of public benefit by means of a supervening compulsory acquisition and the procedure for such compulsory acquisition may be set in motion at any time during the period of requisition.

The Court, further, cannot accept that the making of the order of requisition would frustrate whatever rights may have been safeguarded for Applicant under sub-paragraph (c) of paragraph 4, concerning the payment in cash and in advance of compensation in respect of the compulsory acquisition. The sole purpose, in the opinion of the Court, of such sub-paragraph (c), when viewed in the context of Article 23, is to ensure that a person shall not be permanently deprived of the ownership of property, or of any right over or interest in property, prior to the payment of compensation in cash and in advance, and this is also the effect of section 13 of Law 15/62. The mere fact that the purpose for which a compulsory acquisition has been decided upon is being pursued pro tempore by means of requisition, upon payment of compensation, cannot reasonably be said to frustrate the said rights of Applicant under sub-paragraph (c) of paragraph 4 because the ownership continues to vest in the Applicant in the meantime".

In *Orphanides and Another* v. *Improvement Board Ay. Dhometios*, (1979) 3 C.L.R. 466, Mr. Justice Stavrinides, dealing with the refusal of the administration to grant to the applicant a building permit, had this to say at pp. 468–469:-

"...since the requirement that the applicants should modify their plans was, in effect, a refusal of the permit application as it stood, the administration should have specified clearly the reason for the requirement; that section 8(c) of Cap. 96 contains several alternatives and therefore the administration did not fulfil that obligation by a simple reference to one of them followed by 'etc.', that, in this case, the reason could not be supplied by any document in the relevant file of the administration, for the requirement being, in substance, an unfavourable decision, the reason for it should have been stated, and stated specifically, in the said letter *exhibit* 2 itself; and that, accordingly, the applicants succeed on ground (1) above.

(2) That there was no 'deprivation' within paragraph 3 of Article 23 of the Constitution; that the requirement in *exhibit* 2 involved only a 'restriction' or 'limitation' within the meaning of the said paragraph 3; that, therefore,

no offer of compensation was necessary; and that, accordingly, ground 2 must fail (see also, *Thymopoulos and Others* v. *Municipal Committee Nicosia* (1967) 3 C.L.R. 588).

(3) That the appropriate authority has no right to require a person who applies for a permit to erect a building on land not affected by the street widening scheme to do, in connection with that land, anything that is not required by a scheme having actual legal force, as distinct from a scheme existing only on paper; that since the applicants' property was not so affected, the requirement made in the said letter *exhibit* 2 was one that the authority had no power to make; that the letter in question was not in itself an executory act or decision; that the applicants' counsel's reply to it made it incumbent on the respondent to decide on the application for a permit as it stood, and the silence of the respondent can only be construed as a tacit rejection of it; and that since the Board had no right to require alteration of the applicant's permit application in respect of the position of the proposed house, the applicants are entitled to succeed on ground 3 as well".

When judgment was reserved, finally it was brought to my notice that section 8(d) was introduced into our law in 1978 by reason of the provisions of section 5 of Law 24/78 which purports to authorise the Improvement Board of Strovolos to impose conditions in safeguarding the further improvement of the streets of the area concerned.

When the case was re-opened counsel for the applicants further argued that when the decision complained of was made by the respondent no valid scheme was in existence affecting the area in question in accordance with the Town and Country Planning Law, 90/72, or any other law in force at that time authorising the appropriate authority to take such steps. Since that date however the acquiring authority has now published an Administrative Act No. 310 in the Third Supplement of the Official Gazette dated 17th April, 1981, whereby the property in question and some other property is compulsorily acquired. Finally counsel invited this Court to accept that the respondent's decision whould not be upheld because section 8(d) of Cap. 96 is not applicable in the determination of the present proceedings

for the reasons he has given earlier. Counsel relied on Maxwell on Interpretation of Statutes 12th Edn. and at pp. 253–254 we read:

> "A similarly restrictive construction is placed on statutes which interfere with rights of property.
>
> A local Harbour Act, which imposed a penalty on 'any person' who placed articles 'on any quay, wharf, or landing-place, within ten feet of the quay-head, or on any space of ground immediately adjoining to the said haven, and within the space of ten feet from high-water mark' so as to obstruct the free passage over it was held to apply only to ground over which there was already a public right of way, but not to private property not subject to any such right and in the occupation of the person who placed the obstruction on it. Notwithstanding the comprehensive nature of the general words used, it was not to be inferred that the legislature contemplated such an interference with rights of property as would have resulted from construing the words so as to create in effect a right of way."[1]

On the contrary counsel for the respondent although he had conceded that at the time there was no particular act or decision authorising them to take such steps later on, he added, on 17th April, 1981, the administration relied on section 8(d) as it was amended by Law 24/78 and that law might be utilized by the administration to refuse issuing the relevant permit.

Having considered very carefully the arguments of counsel and in the light of the weighty authorities quoted earlier I have reached the conclusion that the respondent, once there was no valid scheme at the time they were not entitled and wrongly acted in refusing the permit to the applicants. It is true that later on section 8(d) was enacted but that section cannot be applied and therefore the administration, I repeat, wrongly refused such a permit. Indeed as I understand from counsel concerned the administration has now compulsorily acquired not only land from the owners, the applicants, but also other property in order to put in effect the new plans.

1. *Harrod* v. *Worship* (1861) 30 L.J.M.C. 165.

For all these reasons I have reached the conclusion that the appropriate authority wrongly denied to issue the permit required and illegally interfered with the rights of the applicants. In the result the decision of the respondent is contrary to the provisions of the law and/or of our Constitution and was made in excess and/or in abuse of powers vested in such organ. Recourse succeeds and the amount of £50 for costs is allowed to the applicants.

Sub judice decision annulled. Order for costs as above.