

1981 May 30

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANDREAS CH. STRONGILIOTIS,

Applicant,

v.

THE IMPROVEMENT BOARD OF AYIA NAPA,

Respondent.

(Case No. 401/81).

*Administrative Law—Executory act—Hierarchical recourse—
Or administrative review—Recourse against decision of
respondent refusing to revise a condition in a building
permit—Preceded by hierarchical recourse to Minister
5 under s.18 of the Streets and Buildings Regulation Law,
Cap. 96 (as set out in section 3 of Law 13/74)—Once ap-
plicant sought resort to the procedure under s.18 deci-
sion challenged by the recourse lost its executory character
and could not be directly challenged by a recourse on
10 its own—Had a recourse been filed against the decision of
the Minister, which was the final act in the administrative
process, then the validity of the sub judice decision would
be in issue in such recourse.*

*Practice—Recourse for annulment—Question of time-limit with-
15 in which to file a recourse—And question whether sub
judice act an executory one—Not raised or argued—Court
bound to consider them ex proprio motu.*

On the 21st March, 1980 the respondents issued a
20 building permit to the applicant for the construction of a
house on a plot of land of his at Ayia Napa village, under
certain conditions one such condition being to the effect
that a bridge should be constructed for the purpose of
joining the two parts of the plot. Following the comple-
tion of the construction of the house the respondents refused

to issue a certificate of approval because applicant failed to comply with the above condition. By letter dated 22nd April, 1981, the applicant requested the respondents to revise the said condition but the latter by letter dated the 4th June, 1981 turned down the request. On the 19th June, 1981 the applicant filed a hierarchical recourse to the Minister of Interior, under the provisions of section 18 of the Streets and Buildings Regulation Law, Cap. 96 (as set out in section 3 of Law 13/1974); and the Minister on the 8th October, 1981 informed the applicant that he was not prepared to intervene in the matter.

On the 30th October, 1981, the applicant filed the present recourse challenging the decision of the respondent Improvement Board refusing to revise the above condition, contained in the letter of the 4th June, 1981.

Although neither the question of time limit nor that of the nature of the decision challenged i.e. whether it was an executory act that could be challenged by a recourse, were raised or argued by either side the Court was bound to consider these issues *ex proprio motu*.

Held, that the decision rejecting applicant's application for the revision of the said condition, which is challenged by this recourse, was taken almost five months prior to the filing of the recourse; that, so, even on the assumption that the decision challenged could be said to amount to an executory act, the recourse would be out of time in view of the imperative provisions of Article 146.3 of the Constitution; that once the applicant chose to resort to the procedure of a recourse to the Minister, provided for by s. 18 of the Law, the decision of the Improvement Board challenged by the recourse has lost its executory character and could not be directly challenged on its own by a recourse to this Court; that if, however, a recourse had been filed against the validity of the decision of the Minister, which was the final act in the administrative process, then the validity of the sub judice decision of the Improvement Board would be in issue in such recourse. (See, in this respect, *Ioannou v. E.A.C.* (1981) 3 C.L.R. 280 and *Mytidou v. C.Y.T.A. and Another* (1982) 3 C.L.R. 555); that in the light of the above both the

above grounds are equally fatal to the outcome of this recourse and it must, therefore, be dismissed.

Application dismissed.

Cases referred to:

5 *Ioannou v. E.A.C.* (1981) 3 C.L.R. 280;

Mytidou v. C.Y.T.A. and Another (1982) 3 C.L.R. 555.

Recourse.

Recourse against the decision of the respondent to impose certain conditions on the building permit issued to applicant for the construction of a house.

C. A. Emilianides, for the applicant.

Y. Panayi, for the respondent.

Cur. adv. vult.

15 L. LOIZOU J. read the following judgment. The applicant is the owner or co-owner of a piece of land under plot No. 83 of sheet/plan 42/14 E2 at Ayia Napa village.

20 On the 21st November, 1979, together with a certain Loukia Spyrou, he applied to the respondent Improvement Board for a building permit for the construction of a house on the above plot, enclosing architectural plans and all other necessary documents (exhibits 1 and 2 attached to the written address of counsel for applicant).

25 On the 21st March, 1980, the respondents issued a building permit to the applicant and to the other person under No. 000037 (exhibit 1 attached to the written address of counsel for the applicant) under certain conditions referred to therein (see exhibit 4 also attached to counsel for applicant's written address). Such conditions were purportedly issued under the provisions of s.9 of The Streets and Buildings Regulation Law, Cap. 96, as amended by

30 Laws 13 of 1974 and 24 of 1978.

One of the conditions contained in exhibit 4, which in fact is the subject-matter of this recourse, is condition (E) which is to the effect that a bridge should be constructed

for the purpose of joining the two parts of the plot.

It appears from the material before the Court as well as from the evidence of a witness called by the applicant that the plot in question is separated in two by a rivulet and that the part of the plot where applicant's house was eventually built has no access to the public road in view of the fact that between that part of the plot and the public road there is another plot which is hali-land. It would appear, however, that the other part of the plot lying on the other side of the rivulet, which is in fact a cavity of uneven surface through which the rivulet or stream which divides the plot in two passes, has access to the public road and thus it was found necessary to join the two parts of the plot. However that may be, I do not think it necessary for the determination of this case to enter into the technicalities advanced on behalf of the parties how best this could have been achieved so that, at the same time, the rivulet or stream would be kept free for the flow of rain water during the winter months so as to avoid flooding.

It is the allegation on behalf of the applicant in the written address filed by his counsel that he repeatedly complained orally to the respondents about the imposition of the sub judice condition. This is denied by the respondents in their written address. In this respect it is significant to note that the Civil Engineer who prepared the plans and supervised the construction of the building and who gave evidence for the applicant, has stated on oath that he was not even aware of the existence of the condition in question because, as he said, the building permit was kept by the applicant and that he only became aware of such condition when they applied for a certificate of approval. I must, therefore, hold that the applicant has failed to substantiate his allegation. But I must say that I find it difficult to understand how they applied for a certificate of approval since, admittedly, neither the bridge to which the condition objected to by them related was constructed nor was the alternative proposed by the applicant in the plans.

But, be that as it may, according to the evidence, the construction of applicant's house took about eight months and it was completed in the spring of 1981. The respondents refused to issue a certificate of approval and informed the

applicant by letter dated 3rd April, 1981, (Appendix "A" attached to the Opposition) that for a certificate of approval to be issued to him he would have to comply with condition (E) of the building permit and requesting him to
5 so comply within a month otherwise legal proceedings would be instituted against him for using the building without a certificate of approval having been issued in respect thereof.

In reply, on the 22nd April, 1981, a letter was addressed on behalf of the applicant by his Civil Engineer to
10 the District Officer of Famagusta, as President of the Improvement Board of Ayia Napa, at Larnaca, complaining about the cost that the construction of the bridge would involve and requesting that the said condition be revised.

The District Officer of Famagusta by his letter dated
15 4th June, 1981 (Appendix "C" attached to the Opposition) addressed to the applicant, with copy to the respondents, replied that his application had been considered by the respondent Improvement Board and had been dismissed and
20 further, repeated the warning that if he failed to comply with the terms of his permit within one month, legal proceedings would be instituted against him for using the building without a certificate of approval having been issued in respect thereof.

25 Pausing here for a moment it must be pointed out that it is the decision contained in this last mentioned letter which is being challenged by the present recourse.

But following the decision contained in the above letter the applicant filed, on the 19th June, 1981, under the
30 provisions of s. 18 of Cap. 96 (as set out in s. 3 of Law 13 of 1974) a hierarchical recourse to the Minister of the Interior setting out the history of the case and his complaints and requesting that the decision of the Improvement Board be set aside. (Appendix "D" attached to the
35 Opposition).

The Minister, on the 8th October, 1981, informed the applicant, through the Director-General of Ministry, that he was not prepared to intervene in the matter (Appendix "E").

On the 30th October, 1981, the present recourse was filed challenging the decision of the respondent Improvement Board contained in the letter of the 4th June, 1981.

Although neither the question of time limit nor that of the nature of the decision challenged i.e. whether it was an executory act that could be challenged by a recourse, were raised or argued by either side I am bound to consider these issues *ex proprio motu*.

It will be seen from the above that the applicant does not challenge the decision of the Minister in refusing to delete the condition upon his hierarchical recourse to him but that of the respondent Improvement Board in rejecting his application to revise such condition which was taken and communicated to him almost five months prior to the filing of the recourse and which was, in fact, first imposed when the building permit was issued to him well over a year before that.

So, even on the assumption that the decision challenged could be said to amount to an executory act, the recourse would be out of time in view of the imperative provisions of Article 146. 3 of the Constitution. But, quite clearly, this is not the case; because once the applicant chose to resort to the procedure of a recourse to the Minister, provided for by s. 18 of the Law, the decision of the Improvement Board challenged by the recourse has lost its executory character and could not be directly challenged on its own by a recourse to this Court. If, however, a recourse had been filed against the validity of the decision of the Minister, which was the final act in the administrative process, then the validity of the sub judice decision of the Improvement Board would be in issue in such recourse.

(See, in this respect, *Ioannou v. E.A.C.* (1981) 3 C.L.R. 280 and *Mytidou v. C.Y.T.A. and Another* (1982) 3 C.L.R. 555. Useful reference may also be made to Conclusions from the Case Law of the Greek Council of State 1929-1959, pp. 241-242).

In the light of the above I am driven to the conclusion that both the above grounds are equally fatal to the outcome of this recourse and it must, therefore, be dismissed. In all the circumstances I make no order as to costs.

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*Recourse dismissed.**No order as to costs.*