1985 May 18

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

MARIA N. VASSILIADOU AND ANOTHER,

Applicants,

v.

THE DISTRICT ADMINISTRATION OF LARNACA,

Respondent.

(Case No. 56/81).

Act or decision in the sense of Article 146.1 of the Constitution—Which can be made the subject of a recourse—Regulation 6(3) of the Streets and Buildings Regulations—A regulatory legislative act, the constitutionality of which can be examined in a recourse against a decision based on the said regulation.

Streets and Buildings Regulations—Regulation 6(3)—Order declaring a road as a "trunk road" made thereunder—Not of a regulatory character—It has the same legal nature as a street-widening scheme made under section 12 of the Streets and Buildings Regulation Law, Cap. 96.

Administrative Law—Administrative acts or decisions—Informatory act—Letter informing applicants that their application for a building permit could not be proceeded with because it contravened regulation 6(3) of the Streets and Buildings Regulations—Amounted to an expression of the will of the administration and not merely to an expression of intention—An executory act which could be challenged by a recourse.

Streets and Buildings Regulations—"Trunk road"—Distance of Building from—Regulation 6(3).

Constitutional Law—Right to property—Article 23 of the Constitution—Restrictions or limitations imposed by regu-

lation 6(3) of the Streets and Buildings Regulations on the use of property for purposes of building development—Not unreasonable or arbitrary but absolutely necessary in the interest of town and country planning in the sense of Article 23.3—Said regulation not unconstitutional—Though applicants' property seriously affected by such restrictions they do not amount to a "deprivation" in the sense of Article 23(2) and (4) and their operation is not unconstitutional.

The applicants as owners of a piece of land abutting the Larnaca-Famagusta road which was declared* a "trunk-road" ("The trunk-road") under regulation 6(3)** of the Streets and Buildings Regulations, applied for the issue of a permit for building thereon of a two-storied building. The respondent informed the applicants that the application could not be proceeded with because the building was not at a distance of at least 50 feet from the boundary of the "high-way road", as provided by regulation 6(3) of the Streets and Buildings Regulations. Hence this recourse.

Counsel for the respondents raised the preliminary objection that the sub judice decision challenged by this recourse did not constitute an executory administrative act in the sense of Article 146 of the Constitution but only a confirmatory act and/or one of an informative character of a previous act, namely the declaration of the Larnaca-Famagusta road as a "trunk-road" and that the validity of such act could not be challenged even incidentally in connection with the refusal of the application of the applicants. It was, further, urged that the sub judice act merely informed the applicants of the opinion and view of the administration and as such could not be the subject of a recourse.

Counsel for the applicant mainly contended:

(a) That regulation 6(3) does not provide for a distance of 50 feet but for a distance of only 10 feet; and that a

* See Notification 122 published in Supplement No. 3 to the Official Gazette of the Republic of the 10th March, 1966.

** Regulation 6(3) is quoted at p. 1302 post.

greater distance may be sanctioned only in cases of industrial buildings;

(b) That regulation 6(3) is unconstitutional as offending Article 23 of the Constitution.

Held, (I) on the preliminary objection:

(1) That what is challenged by the recourse is not the Notification declaring the Larnaca-Famagusta road as a trunk-road; that this Notification is not of a regulatory character and what it achieves is to specify certain individual instances as subject to certain legal rules; and that it has the same legal nature as a street widening scheme made under section 12 of the Streets and Buildings Regulation Law, Cap. 96 as well as notices issued under section 14 of Cap. 96 as amended; that in this case what is challenged is a decision taken under regulation 6(3) which requires the construction of a building at a distance of not less than 50 ft. from a "trunk-road" so declared by the Notification; that this regulation is a regulatory legislative act, the constitutionality and legality of which can be examined in a recourse against a decision based on the said regulation.

(2) That the contents of the sub judice act amounts to an expression of the will of the administration and not merely to an expression of intention; and that, accordingly, it can be made the subject of a recourse.

Held, (II) on the merits of the recourse:

(1) That the argument advanced that this provision regarding the distance at which the building must stand from the boundary of the plot is confined to industrial buildings or stores only, cannot stand, as the provision requiring the building to be built at a distance of 50 ft. from the boundary of a "trunk-road" is independent of the provision regarding the building of industrial premises and stores on plots outside the zones, so declared by virtue of section 14 of the Law.

(2) That the restrictions or limitations imposed by regulation 6(3) on the use of such property for purposes of building development are not unreasonable or arbitrary but absolutely necessary in the interest of town and coun-

try planning in the sense of paragraph 3, of Article 23 of the Constitution and therefore the said regulation is not unconstitutional; that, as regards this individual case, though the property of the applicants is seriously affected yet they do not amount in effect to a deprivation in the sense of paragraphs 2 and 4 of Article 23 and therefore their operation or application cannot be treated to that extent as unconstitutional; accordingly the recourse must fail.

Per curiam:

Once the applicants consider and claim that they can substantiate that the value of their property is materially affected it is a case for compensation which has to be considered by the appropriate Court in the light of the overall circumstances pertaining to the assessment of compensation in the circumstances. No doubt the offer of the respondents to examine the possibility of relaxation may meet the claim for compensation wholly, or in part.

Application dismissed.

Cases referred to:

Nemitsas v. *The Municipal Corporation of Limassol and Another* (1967) 3 C.L.R. 134;

Lanitis Farm Ltd. v. *The Republic* (1982) 3 C.L.R. 124;

Manglis and Others v. *The Republic* (1984) 3 C.L.R. 351;

Charalambides v. *The Republic* (1984) 3 C.L.R. 1516;

Nicosia Race Club v. *Republic* (1984) 3 C.L.R. 791;

Kyriakides v. *Municipality of Nicosia* (1976) 3 C.L.R. 183;

Sofroniou and Others v. *The Municipality of Nicosia* (1976) 3 C.L.R. 124.

Recourse.

Recourse against the refusal of the respondents to issue a building permit to applicant for the erection of a two-storied building consisting of ten flats on his land situated at Pyla village.

A. Poetis, for the applicant.

A. Vassiliades, for the respondents.

Cur. adv. vult.

A. Loizou J. read the following judgment. The applicants are the owners by one half share each of two adjoining building-sites, under Registration Nos. 5756-5757, Sheet/plan 41/26, plot 132/1/4 and plot 132/1/5 at locality "Yiatros" of Pyla village. The extent of both sites is 12,000 sq. ft. They abut a "trunk-road" the "trunk-road" (υπερασστική οδός) of Larnaca-Famagusta, as same was so declared by Notification 122, published in Supplement No. 3 to the Official Gazette of the Republic of the 10th March, 1966, and which was issued by virtue of regulation 6(3) of the Streets and Buildings Regulations.

On the 6th June, 1980, they applied to the District Officer, Larnaca for the issue of a permit for the building on the said land of a two-storied building consisting of ten flats.

The application in question went through the usual channels including the Departments of Town Planning and Housing and Public Works for their views.

On the 20th November, 1980, the respondents wrote to the applicants (Appendix 1), informing them that it was not possible to proceed further with their application as upon examination of the plans submitted, the following were noticed:

"(a) Taking into consideration that the covered space had a clear height of more than 8 ft. and that it was not intended for the parking of cars, same was considered as a storey and consequently the building was a three-storied one contrary to Regulatory Order 196/76, published in the Official Gazette of the Republic dated 1st October, 1976.

(b) The total height of the building was 29'-1'' instead of not more than 27 ft. contrary to the aforesaid Regulatory Order 196/76.

(c) The building has a building factor 0.945:1, counting also the covered part as storey but even if this covered part was altered so that it will be offered as a covered parking space of a height of not more than 8 ft. the building factor will be 0.63:1, contrary to the said Regulatory Order.

(d) The building is intended to be erected at a distance of 11 ft. from the boundary of the 'high-way road' instead of at least 50 ft., as provided by the Streets and Buildings Regulations."

The applicants by their letter dated 10th December, 1980, (Appendix 2), replied to the above as follows:

"With reference to your letter dated 28th November, 1980, regarding our application for a building permit in Pyla village we enclose the set of plans which you returned to us as well as two sets of amended plans marked as 1A, 2A and 3A, by which we comply fully with your suggestions under (a), (b), and (c).

After this we believe that the permit applied for should be granted to us and we request you to take, for the purpose the necessary steps the soonest possible."

On the 26th January 1981, the respondents informed the applicants by letter (Appendix 3) of that date, that their application could not be proceeded with because there was no compliance with paragraph (d) of their letter of the 28th November 1980, which referred to the construction of the building at a distance of at least 50 ft. from the boundary of the "high-way road".

In paragraph 6 of the opposition it is stated that the rejection of the application in question was based on the clear provision of regulation 6(3) of the Streets and Buildings Regulations and on the suggestion of the Public Works Department, within the competence of which the Larnaca-Famagusta high-way road comes, that it did not agree to any relaxation of the said regulation which had already been applied to nearby properties as for example to plot 128 as this would create a bad precedent with the

result not to have a satisfactory protection of the said road and the circulation thereon.

Before examining a preliminary objection raised on behalf of the respondents it will be useful to set out regulation 6(3) which reads as follows:

> "No part of the main building or alteration or addition to any existing main building and no open verandah higher than four feet from the ground level shall be less than ten feet from any boundary of the plot on which it stands, or less than 50 ft. from the boundary of a road declared by the Council of Ministers as a trunk road, by Notification published in the Official Gazette of the Republic, or from the boundaries of part of such road specified in the Notification or less than 20 ft. from any boundary of the plot on which it stands if the building is an industrial one or a store situated outside the zones declared by virtue of Section 14 of the Law only for stores or industrial buildings, or both."

The preliminary objection is that the sub judice decision challenged by this recourse does not constitute an executory administrative act in the sense of Article 146 of the Constitution but only a confirmatory act and/or one of an informative character of a previous act, namely the declaration of the Larnaca-Famagusta road as a "trunk-road" by virtue of the aforementioned Notification 122 and that the validity of such act could not be challenged even incidentally in connection with the refusal of the application of the applicants. It was further urged that the sub judice act merely informed the applicants of the opinion and view of the administration and as such could not be the subject of a recourse.

I am afraid, I cannot agree with either of these contentions. The first contention of counsel for the respondents could be a valid one and born out by the authorities only if what was challenged was the Notification by virtue of which the Larnaca-Famagusta road was declared as a "trunk-road".

Indeed the Notification declaring the Larnaca-Famagusta road as a "trunk-road" is not of a regulatory character.

What it achieves is to specify certain individual instances as subject to certain legal rules. It has the same legal nature as a street widening scheme made under section 12 of the Streets and Buildings Regulation Law, Cap. 96 as well as notices issued under section 14 of Cap. 96, as amended. (See *Nemitsas* v. *The Municipal Corporation of Limassol and Another* (1967) 3 C.L.R. 134; *Lanitis Farm Ltd.*, v. *The Republic* (1982) 3 C.L.R. 124; *Manglis and Others* v. *The Republic* (1984) 3 C.L.R. 351; and *Charalambides* v. *The Republic* (1984) 3 C.L.R. 1516).

In the present case what is challenged is a decision taken under regulation 6(3) which requires the construction of a building at a distance of not less than 50 ft. from a "trunk-road" so declared by the Notification. This regulation is a regulatory legislative act, the constitutionality and legality of which can be examined in a recourse against a decision based on the said regulation. In this respect see inter alia *The Nicosia Race Club* v. *The Republic* (1984) 3 C.L.R. 791, where a review of the authiroties is made.

As regards the argument advanced that the decision merely informed the applicants of the opinion and views of the administration and as such could not be the subject of a recourse, the brief answer is that this is not warranted by the material placed before me. The contents of the letter of the respondents of the 26th January, 1981, (Appendix 3), amounts to an expression of their will and not merely to an expression of intention. They made no other comment on the new amended plans submitted which were claimed by the applicants to comply with the previous comments of the respondents contained in their letter of the 20th November 1980 (Appendix 1), except that there was no compliance with paragraph (d), namely the distance of 50 ft. from the boundary of the "trunk-road."

The very fact that long after the filing of this recourse and in particular on the 27th April, 1983, (see exhibit 2) the possibility of a relaxation of regulation 6(3) is also intimated, though admittedly new observations are made on the amended plans submitted by the applicants and which observations tend to show that there still exists non-compliance with certain regulations, even by the amended plans,

does not change the situation. As regards this part of the preliminary objection reference may be made to the case of *Kyriakides* v. *The Municipality of Nicosia* (1976) 3 C.L.R. 183, in which Malachtos J., took the same stand and expounded the relevant principles of Law on the question of what constitutes an executory act.

The preliminary objection therefore fails and I shall proceed now to deal with the merits of the recourse.

The first ground relied upon by the applicants turns on the meaning and effect of regulation 6(3) and I find no better way of presenting the arguments advanced on their behalf by counsel than quote here in full from the written address filed in the case. It reads:

"a. It is abundantly clear that regulation 6(3) does not provide for a distance of 50 feet but for a distance of only 10 feet. The exception, according to which a greater distance may be sactioned by the appropriate authority applies only in cases of industrial buildings. (See, as well, the relevant amendments published in Supplement 3 of the Gazette, 11.7.69, p. 545, not. 567, 21.1.65, p. 80, not. 74, 21.12.79, p. 845, not. 295, 23.10.64, p. 529, not. 448, 25.5.67, p. 429 not. 404.)

This is due to the fact that an industrial building may cause fumes, noise, disturbance or risk. However, in the present case, the plans which were submitted and the application were not for an industrial building. The amendment of reg. 6 regarding the distance from the boundary is that effected by not. 448, p. 529, 23.10.64, which provides as follows:

'Η παράγραφος (3) του Κανονισμού 6 των βασικών Κανονισμών τροποποιείται δια της διαγραφής των λέξεων, αίτινες έπονται της λέξεως 'ίσταται' εν τη τετάρτη γραμμή και της αντικαταστάσεως αυτών δια των ακολούθων λέξεων: ολιγώτερον των είκοσι ποδών από των ορίων οδού εγκεκριμένης παρά του Υπουργικού Συμβουλίου ως Τοπικής Κυρίας Οδού, ή ολιγώτερον των εκατόν ποδών από των ορίων οδού εγκεκριμένης παρά του Υπουργικού Συμβουλίου ως Κεντρικής Οδού, ή ολιγώτερον των εβδομή-

κοντα πέντε ποδών εξ οιωνδήποτε ορίων, εάν η οικοδομή είναι βιομηχανική τοιαύτη ή αποθήκη κειμένη εντός των ζωνών των εγκεκριμένων δυνάμει του άρθρου 14 του Νόμου μόνον δι' αποθήκας ή βιομηχανικάς οικοδομάς ή αμφοτέρας'.

However, this applies again to industrial buildings or store. The inevitable conclusion is, therefore, that either the respondent was under the impression that the application was for an industrial building, in which case the sub judice decision was taken under a misconception of fact, whereby it has been vitiated (see, among others inter alia, *Piperi and another* v. *Republic* (1968) 3 C.L.R. 365, *Andronicou and Co.* v. *CY.T.A.* (1969) 3 C.L.R. 1, *Kyriacou* v. *Republic* (1966) 3 C.L.R. 876, *Christodoulou* v. *Republic* (1966) 3 C.L.R. 887, *Miliotis* v. *Republic* (1968) 3 C.L.R. 477), or because it was under the impression that this applies to non-industrial buildings as well, or it acted under misconception of law and or in excess of power, in which case, again the sub judice decision should be annulled (see, among others *Paschali* v. *Republic* (1966) 3 C.L.R. 593, *Ioannou* v. *Republic* (1978) 3 C.L.R. 276, *Leonida* v. A.-G. (1978) 3 C.L.R. 247, *Christodoulou* v. *Republic* (1967) 3 C.L.R. 50, *Christodoulidou* v. *Republic* (1968) 3 C.L.R. 57, *Iacovides* v. *Republic*, (1966) 3 C.L.R. 191, *Cyprus Palestine Plantations* v. *Republic* (1965) 3 C.L.R. 271, *Demades* v. *Republic* 1964 C.L.R. 167, *Demetriou and Sons* v. *Republic*, (1968) 3 C.L.R. 444).

b. It should be noted that what reg. 6(3) provides is that the distance provided for is 'from any boundary of the plot on which the building stands' and not as required by the sub judice decision, from the boundary of the high-way road. However, since the high-way road and the building sites in question have common boundaries, the said mistake of the respondent has no bearing on this recourse."

It is apparent that the aforesaid arguments were built by reference to the wording of regulation 6(3) as it stood before the amendment effected to it by the amending regula-

tions of the 11th February 1965, and its proper text has been set out earlier in this judgment. The argument advanced that this provision regarding the distance at which the building must stand from the boundary of the plot is confined to industrial buildings or stores only, cannot stand, as the provision requiring the building to be built at a distance of 50 ft. from the boundary of a "trunk-road" is independent of the provision regarding the building of industrial premises and stores on plots outside the zones, so declared by virtue of section 14 of the Law.

As regards the second part of this ground the answer again is to be found in the wording of the regulation itself which relates to the 50 ft. distance from the boundary of a "trunk-road" so declared as above stated.

The second ground relied upon by the applicants is that this regulation prescribing that buildings should be erected at a distance of not less than 50 ft. from the boundary of a "trunk-road" is unconstitutional as offending Article 23 of the Constitution.

The factual basis for this contention is to be found in the affidavit of Nicos Pierides, a valuer from Larnaca, which was filed on behalf of the applicants. In it an account is given of the extent of the restriction, resulting from the requirement of the 50 ft. so prescribed by the said regulation, which will be suffered by the applicants. It is stated that out of 669 square meters which could be covered by buildings, what can be built as a result of this 50 feet restriction is 102 square meters. This results in the market value of the two building-sites, which is given to be in the region of £90,00 being reduced to £14,40.

In answer to this contention the respondents have in effect confined themselves to a reference to the fact that the building-sites are in Zone C. 1 published under Notification 196 in Supplement No. 3 to the Official Gazette of the 1st October, 1976, with a building factor 0.60:1 and maximum height 27 ft. and that as regards the valuation of the affiant, of the applicants, the alleged damage which is claimed that it will be suffered by them is the result of the refusal of the appropriate Authority to allow a relaxation of regulation 6(3) and they conclude: "As the appropriate

Authority by its letter 27th April, 1983, exhibit 2, does not refuse the possibility of a relaxation of regulation 6(3) the applicants have not suffered until to-day any damage."

The legal principles governing the issues like the one before me are to be found in a series of cases which were reviewed by the Full Bench of this Court in inter alia, *Sofroniou and Others* v. *The Municipality of Nicosia* (1976) 3 C.L.R. 124, and more recently in *Manglis and Others* v. *The Republic* (1984) 3 C.L.R. 351, an authority relied upon by applicant's counsel. In so far as relevant to the issues before me the relevant passage is to be found in pp. 360-361:

"(d) The sanctity of the right of property, to the extent to which such right is constitutionally protected by means of Article 23 of the Constitution, is not violated by the said Notices because:-

(i) In any individual case in which the restrictions or limitations imposed by them materially decrease the economic value of the affected property the owner of such property is entitled to compensation under Article 23.3.

(ii) In any individual case in which the said restrictions or limitations entail such drastic consequences that they amount in effect to 'deprivation,' in the sense of paragraphs (2) and (4) of Article 23, then the operation, to that extent, of the sub judice Notices 116 and 117 has to be treated as being unconstitutional (see inter alia, in this connection the case of *The Holy See of Kitium* v. *The Municipal Council of Limassol*, 1 R.S.C.C. 15, 28)."

Having considered the facts and circumstances of the case in their totality, I have come to conclusion that the restrictions or limitations imposed by regulation 6(3) on the use of such property for purposes of building development are not unreasonable or arbitrary but absolutely necessary in the interest of town and country planning in the sense of paragraph 3, of Article 23 of the Constitution and therefore the said regulation is not unconstitutional.

As regards this, individual case, though the property of the applicants is seriously affected yet, to my mind they do not amount in effect to a deprivation in the sense of paragraphs 2 and 4 of Article 23 and therefore I cannot treat their operation or application to that extend as unconstitutional.

It is to my mind, once the applicants consider and claim that they can substantiate that the value of their property is materially affected, a case for compensation which has to be considered by the appropriate Court in the light of the overall circumstances pertaining to the assessment of compensation in the circumstances. No doubt the offer of the respondents to examine the possibility of relaxation may meet the claim for compensation wholly, or in part, but I do not intend to dwell any further on this issue as not all relevant facts are before me, nor is it within the ambit of this case to do so.

For all the above reasons the recourse is dismissed but in the circumstances there will be no order as to costs.

Recourse dismissed with no order as to costs.