

1986 September 26

[A. LOIZOU. J.]

IN THE MATTER OF ARTICLE 146  
OF THE CONSTITUTION

GEORGHIOS KYRIACOU MOUSKA.

*Applicant,*

v.

1. THE IMPROVEMENT BOARD OF  
PARALIMNI,
2. THE REPUBLIC OF CYPRUS, THROUGH
  - (a) THE MINISTER OF INTERIOR,
  - (b) THE DISTRICT OFFICER OF FAMAGUSTA,

*Respondents.*

(Case No. 229/81).

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- 5 *Streets and Buildings—Building permit—Foreshore protection zone—Application for relaxation by the Council of Ministers turned down by respondents 1—The Foreshore Protection Law, Cap. 59 as amended by Laws 22/61, 17/64, 8/72 and 52/75, Section 5A and the proviso to subsection (2) of section 5A—The two prerequisites that have to be satisfied by virtue of the proviso so that a case may be submitted by the appropriate authority to the Council of Ministers are that the case should be an exceptional one*
- 10 *and that public interest requires the issue of the authorisation by the Council of Ministers—Public interest, meaning of—The proviso introduces the exception, not the rule—Purpose of rule—The burden of proof that a case satisfies the two said prerequisites is on the applicant—*
- 15 *Absence of specific reference to the two prerequisites—In the circumstances not a ground of annulment, because the reasoning of the sub. judice decision makes it clear under which provision of the law the application was made and examined.*
- 20 *Constitutional; Law—Right to property—Constitution, Article*

23 and Article 23.3—Foreshore protection—Notification under the Foreshore Protection Law, Cap 59 as amended by Laws 22/61, 17/64, 8/72 and 52/75 affecting four and a half donums of applicant's plot of land, which is of a total extent of about 7 donums—Amounts to restriction or limitation within the ambit of Article 23.3 and not to deprivation of applicant's right of ownership 5

The applicant is the owner of a plot of land of an extent of about 7 donums at Paralimni; part of the said plot of an extent of about four and a half donums is within a foreshore protection zone 10

The applicant applied for a relaxation by the Council of Ministers in order that the appropriate Authority be enabled to issue to him a building permit for the construction of a hotel on the said plot, part of which would extend into the said zone. 15

Respondents 1 agreed with the views expressed by the Department of Town Planning and Housing, namely that the relaxation should not be granted as it is in respect of a sandy beach, which has suffered also erosion,\* and, consequently, turned down the application 20

Hence the present recourse. Counsel for the applicant argued, inter alia, that the sub-judice decision offends public interest in that by reason of the construction of a luxury hotel the foreshore will be beautified the flow of tourists will be increased, foreign exchange will be imported, public revenue will be increased and many unemployed will find employment 25

Held, dismissing the recourse: (1) It is obvious that the applicant asked for a relaxation by the Council of Ministers under the provision of section 5A\*\* of Cap 59, as amended by the aforesaid laws 30

(2) As it is clear from the wording of the proviso to subsection 2 of section 5A two prerequisites have to be satisfied for the appropriate Authority to submit to the 35

\* The relevant letter of the Department is quoted at pp 1891-1892 post

\*\* This section is quoted at pp 1892-1894 post

Council of Ministers a case so that the latter in its absolute discretion may authorise such authority to issue a building permit for the erection of any building within the foreshore protection zone. The first prerequisite is that the case should be an exceptional one. The second that it is in the public interest to give such authorisation.

(3) The absence of any specific reference to both or either of the said prerequisites in the minutes of the respondent's, in the letter of the Department of Town Planning and Housing and in applicant's application, does not mean that the application was submitted independently of the said proviso or that respondents examined it without bearing in mind the requirement of such proviso. The aggregate effect of the component parts of the reasoning of the sub judge decision makes it abundantly clear under which provision of the law the application was both made and examined.

(4) The burden of proof that the case satisfies the aforesaid two prerequisites is on the applicant.

(5) As regards the argument that "public interest" was offended by the sub judge decision one should not forget that the proviso introduces the exception for exceptional cases and not the rule. The purpose of the rule is to protect or conserve the character and amenities of any foreshore or the public use and enjoyment thereof or the access to the public thereto. It is only when overriding reasons exist that outweigh these considerations that an authority can be satisfied that it is a case coming within the proviso.

(6) The right of ownership safeguarded by Article 23 of the Constitution is not an unlimited one, but subject to restrictions or limitations as provided by paragraph 3 of Article 23. There can be no doubt that the Notification affecting applicant's property does not amount to deprivation, but only to a restriction and limitation within the ambit of Article 23.3.

*Recourse dismissed.  
No order as to costs.*

**Recourse.**

Recourse against the refusal of the respondents to give applicant a relaxation in order that the Appropriate Authority be enabled to issue a building permit to applicant for the construction of a hotel on his property at Paralimni. 5

*M. Montanios*, for the applicant.

*N. Economou*, for respondent 1.

*A. Vassiliades*, for respondents 2.

*Cur. adv. vult.* 10

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks a declaration of the Court that the decision of the respondents refusing his application to be given relaxation by the Council of Ministers in order that the Appropriate Authority be enabled to issue to him a building permit for the construction of a hotel on plot 644/2/1 sheet/plan 43/8/E31 at Paralimni, part of which would extend into the foreshore protection zone and which decision is contained in the letter of the District Officer of Famagusta dated 11th April 1981, is null and void and of no effect whatsoever. 15 20

The facts of the case are briefly these. The applicant is the registered owner of the aforementioned property which is of an extent of about seven donums out of which approximately four and a half donums are within the said zone. By letter dated the 10th November 1980, the applicant asked that relaxation be granted to him by the Council of Ministers so that the respondents 1, in their capacity as the appropriate Authority issue to him a building permit for a hotel to be constructed on the said property in such a way that part of it would be allowed to be built within the foreshore protection zone. 25 30

In a letter of the architect of the applicant dated the 26th November 1980 (exhibit 1, blues 14-15) it was contended that the imposed foreshore protection line rendered the land in question unsuitable for any develop- 35

ment in spite of its gross land area amounting to seven donums, four and a half of which were within the said zone and he asked that the protection line be reconsidered as indicated on the attached thereto L.R.O. plans.

5 By letter dated the 16th April, 1981 (exhibit 1, blue 18), the District Officer Famagusta informed the applicant that his application was examined by the appropriate Authority and was refused on the ground that it did not serve  
10 erosion and any construction within the foreshore protection zone would have damaging consequences to the natural environment. He further advised him to submit amended plans for building outside the foreshore protection zone.

15 The minutes of the meeting of respondents 1, dated 7th April 1981 (exhibit 1, blue 17) at which the sub judice decision was taken read as follows:

20 "4. Case of Georghios Kyriakou Mouska, File No. B. 640/80. The case for the relaxation of the provisions of Administrative Order 98/73 and construction of part of the building within the foreshore protection zone was discussed, and it was stressed that the Council agrees with the views of the Department of Town Planning and Housing, that is that the  
25 relaxation should not be granted as it is in respect of a sandy beach which has suffered also erosion. Moreover it was decided to invite the applicant to amend his plan."

30 The relevant views of the Department referred to are contained in their letter of the 13th February 1981, which reads as follows.

"This Department does not agree with the granting of the relaxation applied for, for the following reasons:

35 (a) The distance of the line of the foreshore protection from the sea as marked on the Survey plans is about 250 feet as approximately it is also in the neighbouring plots. In reality the distance is smaller because the foreshore has been eroded.

- (b) The foreshore in the area is sandy and it is the only locality in the free area of Famagusta which has many common characteristics with the beach of the town of Famagusta and because of that any construction on the foreshore protection zone will have damaging consequences to the environment (erosion, buildings very near the sea etc). 5
- (c) In the adjacent plot 644 there is built the "Sunrise" hotel for which no relaxation was recommended by this Department." 10

The applicant was obviously asking for a relaxation by the Council of Ministers under the provision of section 5A of the Foreshore Protection Law, Cap. 59 as amended by Laws 22/61, 17/64, 8/72 and 52/75 (hereinafter to be referred to as the Law), so that part of the hotel intended to be built on his aforementioned property, would transgress into the foreshore protection zone. 15

Before proceeding therefore further I find opportune to set out in full section 5A of the Law which reads: 20

«5Α.- (1) Το Υπουργικόν Συμβούλιον δύναται, τη αιτήσει αρμοδίας αρχής ή άλλως, επί τω τέλει προστασίας ή διατηρήσεως του χαρακτήρος και ανέσεων οιασδήποτε παραλίας, ή της δημοσίας χρήσεως και απολαύσεως ταύτης ή της υπό του κοινού προσεγγίσεως της, δια Γνωστοποιήσεως, δημοσιευομένης εν τη επισήμω εφημερίδι της Δημοκρατίας, να καθορίζη οιαδήποτε περιοχόν της παραλίας ή εφαιτομένην της παραλίας, εντός της οποίας ουδεμία οικοδομή οιασδήποτε είδους θα ανεγείρεται. 25 30

(2) Ανεξαρτήτως παντός εν τω περί Ρυθμίσεως Οδών και Οικοδομών Νόμω διαλαμβανουμένου, από της δημοσιεύσεως Γνωστοποιήσεως δυνάμει του εδαφίου (1) του παρόντος άρθρου, και μετά ταύτην ουδεμία άδεια δια την ανέγερσιν οιασδήποτε οικοδομής εντός της περιοχής της καθορισθείσης εν τη Γνωστοποιήσει, δυνάμει του ρηθέντος Νόμου, θα εκδίδηται υπό της αρμοδίας αρχής: 35

Νοείται ότι εάν εις οιαδήποτε εξαιρετικήν περι-  
 πτωσιν η αρμοδία αρχή ικανοποιηθή ότι το δημόσιον  
 συμφέρον απαιτεί την έκδοσιν αδείας δι' ανέγερσιν  
 5 οικοδομής, δύναται να υποβάλη την τοιαύτην περιπτω-  
 σιν εις το Υπουργικόν Συμβούλιον, το οποίον, κατό-  
 πιν μελέτης αυτής δύναται, κατά την απόλυτον κρίσιν  
 του, να εξουσιοδοτήσει την αρμοδιαν αρχήν όπως  
 ανεξαρτήτως της ως ειρηται δημοσιευθείσης Γνωστο-  
 10 ποιήσεως, εκδώση τοιαύτην άδειαν και υπό τοιούτους  
 όρους ως το Υπουργικόν Συμβούλιον θα θεωρήση  
 σκόπιμον.

(3) Εάν καθ' οιονδήποτε τρόπον ήθελε προκύψει  
 ουσιώδης ζημία εις θάρος ιδιοκτησίας τινός συνεπεία  
 της εφαρμογής των προνοιών του παρόντος άρθρου,  
 15 η αρμοδία αρχή δέον να καταβάλλη δικαίαν αποζημι-  
 ώσεις λαμβανομένων υπ' όψιν όλων των περιστατικών  
 της περιπτώσεως.»

And in English it reads:-

“5A - (1) The Council of Ministers may, on the  
 20 application of an appropriate authority or otherwise,  
 for the purpose of protecting or conserving the cha-  
 racter and amenities of any foreshore, or the public  
 use and enjoyment thereof, or the access of the public  
 thereto, by Notification published in the official Ga-  
 25 zette of the Republic, declare any area within which  
 no building of any kind shall be erected.

(2) Notwithstanding anything contained in the  
 Streets and Buildings Regulation Law, as from the  
 30 publication of Notification under sub-section (1) of  
 this section and thereafter, no permit for the erection  
 of any building within the area specified in the  
 Notification under the said Law, shall be issued by  
 the appropriate authority:

Provided that where in any exceptional case the  
 35 appropriate authority shall be satisfied that it is in  
 the public interest to issue a permit for the erection  
 of a building, it may submit such case to the Council  
 of Ministers which may, after considering same, in

its absolute discretion, authorise the appropriate authority, notwithstanding the prior publication of the aforesaid Notification, to issue such permit, on such terms and conditions as the Council of Ministers may deem fit.

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(3) If any substantial damage should be occasioned in any manner to any property in consequence of the application of the provisions of this section, the appropriate authority shall pay just compensation, having regard to all the circumstances of the case."

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The Notification referred to in subsection 1, hereof affecting the subject property was published under No. 98 in Supplement No. III(I) in the official Gazette of the Republic No. 1010 of the 11 May, 1973, but there is no need to refer to its contents here.

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It is clear from the wording of the proviso to subsection 2 of section 5 that essentially two prerequisites have to be satisfied for the appropriate Authority to submit to the Council of Ministers a case so that the latter in its absolute discretion may authorise such authority to issue a building permit for the erection of any building within the area specified in a Notification and notwithstanding the existence of same. The first prerequisite is that the case has to be an exceptional one. The second that it is in the public interest to give such authorisation. Consequently these two questions have to be examined in the light of the factual background of the case and whilst doing so I find it convenient to deal with the several arguments advanced by counsel.

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It has been argued on behalf of the applicant that nowhere in the minutes of respondent 1 and the letter of the Department of Town Planning and Housing of the 16th April, 1981, reference is made to, and no authority appears to have examined the application of the applicant from the point of view of public interest which respondent 1, in any event did not, as it is claimed, have in mind when considering the application in question, but same was brought up as an afterthought when the letter of the 16th April was written.

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It is correct that there is no specific reference to the term "public interest" in either of the two documents hereinabove set out but there is neither reference to it in the application of the applicant of the 10th November 1980, (exhibit A), or in the letter of his architect of the 26th November 1980, (exhibit B). Nor is there any reference therein to the other prerequisites of the proviso, namely that their case was an exceptional one.

This absence of any reference to both or either of the two prerequisites of the Proviso does not mean that either the application was submitted independently of the proviso and the Notification, or that respondents 1, examined same without bearing in mind the requirements of the relevant provision of the Law and in particular of the Proviso to subsection 2 of section 5A. The absence of any explicit reference to the terms "exceptional case" and "public interest", however, does not vitiate the sub judice decision on the ground that the matter was not, as alleged, examined properly, as the aggregate effect of the component parts of the reasoning of the sub judice decision, which is to be found both in its body and in the rest of the material in the file and in particular the letter of the Department of Town Planning and Housing, make it abundantly clear under which provision of the Law the application was both made and examined and that the refusal of respondent 1, to submit the case to the Council of Ministers respondents 2, for relaxation was decided because the prerequisites of the said Proviso were not satisfied. This ground therefore fails and with it the ground of lack of due reasoning which in my view is to be found in the body of the decision and in the rest of the material in the file which duly supplements same.

Whilst on this question on public interest I would like to say that the burden of proof that the case comes within the proviso by being an exceptional case and that it was in the public interest to issue a permit as applied is on an applicant who seeks such relaxation.

In the present case the applicant has invited me to find that the public interest is offended by the refusal to grant his application on the following grounds:

- (a) The construction of a luxury hotel beautifies the foreshore.
- (b) The flow of tourists to the area and generally to Cyprus will be increased.
- (c) Foreign exchange will be imported by the construction of a hotel and so the public financial interest will be served. 5
- (d) The importation of foreign exchange by the financing of the hotel.
- (e) The offering of employment of many unemployed. 10
- (f) The increase of public revenue.

However true as they may appear to be, one should not lose sight of the fact that no hotel, however luxurious it is can, ipso facto, attract tourists unless linked with sandy beaches and a well preserved environment. But these are not the only considerations that have to be weighed by the appropriate Authority in deciding whether the case is an exceptional one and deserves to be submitted to the Council of Ministers for relaxation, as by themselves they predominantly serve the financial interest of the hotel proprietor. An important consideration is also that the access to the beaches is free for everybody and they are not rendered exclusively for the use of few privileged ones. One should not forget that the proviso introduces the exception for exceptional cases and not the rule. The rule being that provided by subsection 1 of section 5A namely the purpose of protecting or conserving the character and amenities of any foreshore or the public use and enjoyment thereof or the access of the public thereto and it is for that purpose that the Council of Ministers may on the application of an appropriate Authority, or otherwise by Notification published in the official Gazette of the Republic, may declare an area within which no building of any kind shall be erected. 15  
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It is only in my view when overriding reasons exist that outweigh these considerations that an authority can be satisfied that it is a case coming within the proviso.

5 The next argument advanced is that no due inquiry was carried out by respondent 1, before taking the sub judice decision and that they merely agreed with the views of the said Department without a study of their own and an inquiry on all the relevant facts and circumstances of the case nor did the said Department carry a full inquiry including the extent of the erosion of the beach or whether and to what extent the distance of the foreshore protection zone from the sea mark is in actual fact shorter than that appearing in the plans, nor was it examined if this was an exceptional case. Connected with this ground is that of  
10 the lack of due reasoning.  
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What is a proper inquiry and due reasoning are matters closely connected with the facts of each case and in the circumstances of the present one, I am satisfied that respondents 1, made a proper inquiry into the matter and their decision as already said duly reasoned.  
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Then there has been an argument that the application of the Law offends Article 23 of the Constitution, as it interferes with the right of ownership of the applicant. This right, however, is not an unlimited one, but subject to restrictions and limitations as provided by paragraph 3, of the said Article which are absolutely necessary in the interest of, inter alia, town and country planning or the development and utilization of any property to the promotion of the public benefit or for the protection of the rights of others if imposed by law on the exercise of such right.  
25 No doubt the Notification affecting the area in question, and at that the subject property, does not constitute a deprivation but a restriction and limitation of its use and enjoyment clearly permitted by the aforesaid paragraph.  
30 If it is found that this causes a material decrease of the economic value of such property, the applicant will be entitled to just compensation. Paragraph 3, of section 5A of the Law, already set out in full hereinabove, makes provision for just compensation obviously inserted in the  
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law in view of the Constitutional requirement of paragraph 3, of Article 23.

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

*Recourse dismissed.*

*No order as to costs.*

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