

1988 July 23

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CONSTANTINOS G. YIALLOUROΣ,

Applicant,

v.

- 1. THE DISTRICT OFFICER OF NICOSIA,
- AS CHAIRMAN OF THE IMPROVEMENT BOARD OF YERI,
- 2. IMPROVEMENT BOARD OF YERI,

Respondents.

(Case No. 579/86).

Streets and Buildings—Building permit—Street Widening Scheme not having been deposited or published under section 12 of the Streets and Buildings Regulation Law, Cap. 96 or under The Town and Country Planning Law, 1972 (Law 90/72)—In improving conditions as regards the permit, such a scheme cannot be relied upon—Section 9(1) (b) (xiii) of Cap. 96, as amended by Law 24/78—Does not substitute the provisions of sections 12 and 13 of Cap. 96 relating to Street Widening Schemes.

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Constitutional Law—Right to property—Constitution, Art. 23—Cession of part of immovable property (so as to become part of the street) made a condition for granting a building permit—Whether it constitutes a "deprivation" or merely a "restriction" or "limitation" of the right of property—A question of degree depending on the circumstances of each case.

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The facts of this case need not be summarized. The legal principles expounded by the Court in annulling the sub judice decision, that is the imposition of certain conditions in a building permit, are sufficiently indicated in the hereinabove headnote. It must be noted that the ground of annulment was that the conditions were imposed in virtue of a street widening scheme, which was neither deposited nor published in accordance with section 12 of Cap. 96. The Court did not accept that such conditions were imposed in violation of Art. 23 of the Constitution.

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*Sub judice decision annulled.
No order as to costs.*

Cases referred to:

Orphanides and Another v. The Improvement Board of Ayios Dhometios
(1979) 3 C.L.R. 466;

Paphos Plantations v. The Republic (1985) 3 C.L.R. 2745;

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Sarkis v. The Improvement Board Paralimni (1986) 3 C.L.R. 2457;

The Holy See of Kitium v. The Municipal Council of Limassol, 1
R.S.C.C.15;

Kirzis and Others v. The Republic (1965) 3 C.L.R. 46;

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Thymopoulos and Others v. The Municipal Committee of Nicosia (1967) 3
C.L.R. 588;

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

Simonis and Another v. The Improvement Board of Latsia (1984) 3 C.L.R.
109.

15 **Recourse.**

Recourse against the imposition of conditions in the building permit granted to applicant for the erection of a two-storey dwelling house at Yeri village.

G. Yiallouros, for the applicant.

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M. Christofides, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant is the registered owner of land situate at Yeri village, shown on D.L.O. Maps as Plot 881, Sheet/Plan XXX/16.E.2, Block C, 12

donums in extent. It is within building Zone H2 (see Notification 3/79 under section 14(1) of the Streets and Buildings Regulation Law, Cap. 96, as amended (hereinafter referred "the Law"), published in Supplement III (I) of the Official Gazette No. 1493, of 5th January, 1979).

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On 19th April, 1984, the applicant applied to the appropriate authority for a building permit, under section 3(1) (b) of the Law, for the erection of a two-storey dwelling-house. The application was accompanied by all documents prescribed by the relevant Regulation. (See Exhibit 1 - B617/84.)

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After due consideration and on payment of the prescribed fees, building permit No. 018714 was issued on 23rd January, 1986. The appropriate authority, however, imposed conditions, some of which were strongly objected to by the applicant. By a long petition of his advocates, dated 19th February, 1986, he requested the revision and revocation of the conditions imposed and especially conditions 2 and 4 (i), (ii) and (iii).

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Conditions 2 and 4 were as follows:-

"2. The proposed fence to be erected on the street-widening alignment (στη γραμμή της ρυμοτομίας)."

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"4. The parts of the plot affected by the widening scheme (τη ρυμοτομία) to be ceded for the widening (για τη διεύρυνση) of the public streets, in accordance with the provisions of section 9 (1) (b) (xiii) of Law, Cap. 96 and the following constructions to be made:-

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(i) on the part of the proposed road with future width 42 feet to place prefabricated concrete kerbstones and pavement 9 feet wide with prefabricated concrete slabs 0.40 X 0.40 metres and the remaining part to be asphalted with premix, in accordance with the technical instructions- category "A" - attached hereto.

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(ii) On the part of the proposed road with future width 60 feet to place prefabricated concrete stones and to construct a pavement 8 feet wide with prefabricated slabs 0.40 X 0.40 metres and the remaining part thereof to be asphalted with premix.

(iii) The arc of the curve of the building sites at the road junctions to be of radius 30 feet and the arcs of the bend of the kerbs to be analogous and of 30 feet radius at least."

The Respondents reconsidered the case and on the advice of the Town Planning and Housing Department ("the Department") reached a new decision which was communicated to the applicant on 8th July, 1986. It reads:-

"The Improvement Board of Yeri decided to replace conditions 4 and 5 of the building permit with the following condition:-

New condition 4: The part of the plot along the north - eastern side, which is affected by the street - widening (τη ρυμοτομία), which is shown with continuous green line on the attached survey plan, to be ceded for the widening of the public road (section 9 (1) (b) (xiii) of the Law, Cap. 96) and the following to be constructed:-

(a) On the part shown in yellow colour pavement 8 feet wide along the frontage of the street with future width 60 feet and pavement 6 feet along the side-road with kerbs and concrete slabs 0.40 X 0.40 and the remaining part to be asphalted in premix, according to the technical instructions Category "A" attached. Along the curve the two pavements to be joined smoothly.

(b) On the part of the plot shown in red colour to be constructed with concrete Kerbstones earthen pavement 8 feet wide."

Condition 5, which was not objected to, was not altered, but

was re-numbered for no good reason 4 (γ).

Condition 2 was left unaffected.

Attached to the letter of 8th July, 1986, there was a site plan on which a line was drawn all along the north-eastern boundary of the land of the applicant - 325 feet long- which is marked with the Greek word "δρυμοτομία" ("street alignment"). The street alignment does not ran only along the boundary with the public road, but turns to the west in plaintiff 's land along the south boundary with the adjoining plot 420. 5

The applicant being aggrieved filed this recourse whereby he prays for:- 10

"A declaration of the Court that the decision of the Respondents contained in their letter, 8th July, 1986, is null and void and of no legal effect whatsoever."

In his address learned counsel for the applicant relied on the following grounds:- 15

(a) The condition was imposed contrary to section 12 of the Law.

(b) It was taken in abuse or excess of power.

(c) It is contrary to Article 23 of the Constitution, as it amounts to deprivation of property and no offer of compensation was made. 20

(d) It is based on a misconception of fact.

It is common ground that no plans relating to widening or straightening of streets were deposited or published under section 12 of the Law, or pursuant to the provisions of the Town and Country Planning Law, 1972 (Law No. 90/72). 25

Condition 2, original condition 4, as well as the new condition 4, are identically worded with the comments/advice of the Department - (see Conditions blue 26, blue 35, Minutes 2 and 18 in Exhibit B617/84). In the comments of that Department of 20th June, 1984, we read:-

"2. Το τεμάχιο αυτό επηρεάζεται από σχέδιο ρυμοτομίας και στα δύο οδικά σύνορα όπως δείχνεται με πράσινο μελάνι πάνω στα τοπογραφικά σχέδια στη σελίδα 1 του φακέλλου."

("2. This plot is affected by a street alignment scheme on both its boundaries with the streets as it is shown, with green ink on the site plans.")

Condition 1 is identical with paragraph 4.(a).

Condition 2 is identical with paragraph 4.(b); and

Condition 4 is identical with paragraph 4 (e) (i), (ii), (iii) of the said comments/advice:

In the comments on the objection of applicant's counsel on 19th February, 1986, this Department wrote, inter alia:-

"2. By their letter the advocates of the applicant raised objection to conditions 2 and 4 of building permit No. E. 018714, dated 23rd January, 1986, which refer to the ceding of parts of their plot for the widening and continuation of the network of the area and the erection of the fence on the street-widening alignment (γραμμή ρυμοτομίας) and their proper formation."

"4. After careful re-examination of the case I have reached the conclusion that the condition referred to in the objection:-

(i) should be imposed as conditions for implementation on the development of the whole plot 881 by building or conversion into building sites. This file refers to the building development of only a small part at the north corner. Consequently, now conditions may be imposed which relate to works on the part of the plot to which the present application refers and the remaining works which should be done may be imposed as conditions gradually in the process of the development of the remaining part of the plot.

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(ii) The construction works provided by the conditions imposed are indeed disproportionately very high compared with the costs of the erection of the building."

The above was followed by the suggested new condition 4, which was adopted in toto by circulation of paper by the members of the Respondent Improvement Board.

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It is plain that the condition was imposed to satisfy the requirements of a street-widening scheme existing only at the office of the Department, which is not binding and has no legal force.

The controlling paragraph to both documents of this Department is paragraph 2 of the Comments, which reads:-

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"This plot is affected by a street - widening scheme (σχέδιο ρυμοτομίας)."

All the suggestions of the Department and the consequential decisions of the Respondents were intended to put into effect that scheme.

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The proposed building will be erected at the north-eastern corner.

The Respondents by the sub judge decision imposed a condition for widening (60 feet) and construction of a street 325 feet

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long and even further to make a side-road in plot 881 of the applicant along its boundary with plot 420 and to cede all the extent to the public streets.

5 It is well settled 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 a street - widening scheme to do, with connection with that land, anything that is not required by scheme having actual legal force, as distinct from a scheme existing only on paper.

10 (*Orphanides and Another v. The Improvement Board of Ayios Dhometios* (1979) 3 C.L.R. 466; *Paphos Plantations v. Republic* (1985) 3 C.L.R. 2745; *Sarkis v. Improvement Board Paralimni* (1986) 3 C.L.R. 2457.)

15 The Respondents contended that they exercised their power under section 9 (1) (b) (xiii) of the Law as amended by Law 24/78. It reads:-

20 "9(1) In granting a permit under the provisions of section 3 of this Law, the appropriate authority shall have power, subject to any Regulations in force for the time being, to impose conditions as hereinafter, to be set out in the permit, that is to say -

(a)

(b) with regard to the erection of any new building or addition, alteration or repair to any existing building, conditions as to -

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(xiii) A widening, continuation and construction of the street net work in appropriate cases."

A. Loizou, J. , as he then was, in *Paphos Plantations v. Republic* (supra) referring to section 9 (1) (b) (xiii) said the follow-

ing at p. 2755:-

"..... to my mind its provision empowering the appropriate Authority to impose conditions regarding the widening, continuation and construction of the street net - work in appropriate cases have to be applied in the light of Article 23 of the Constitution and cannot substitute the provisions contained in sections 12 and 13 of the Law relating to the widening or straightening of streets."

I am in full agreement with the above passage, which I adopt.

It is not necessary for this case to examine the extent of the powers of the appropriate authority under this statutory provision. The magnitude of the adjustment to the road and the creation of the side-road, in the circumstances, are not justified under the provisions of section 9 (1) (b) (xiii).

In the circumstances of this particular case, as explained earlier in this Judgment, I have come to the conclusion that the appropriate authority exceeded its power, in the purported exercise of a power under section 9 (1) (b) (xiii) they flagrantly acted in derogation and or contrary to the provisions of section 12 and 13 and their act or decision is the product of abuse of power. The Respondents did not exercise correctly their discretion under paragraph (xiii) and the sub judice decision was not reasonably open to them.

A further question that follows for consideration is whether the cession of the part of the applicant 's plot, as per condition 4, to the public street without compensation amounts to an act of "deprivation" under the provisions of Article 23, or to a "restriction or limitation" under paragraph 3 of this Article.

Not every interference with the right of property as defined in paragraph 1 of Article 23 of the Constitution is a "deprivation" within paragraph 2 thereof; such interference may amount only to a "restriction" or "limitation" within the meaning of paragraph 3

of that Article, and whether it is so or not is a question of degree. Relevant to this respect are *The Holy See of Kitium and The Municipal Council of Limassol*, 1 R.S.C.C. 15; *Nicos Kirzis and 2 Others and The Republic of Cyprus* (1965) 3 C.L.R. 46; *Demetrios Thymopoulos and Others v. The Municipal Committee of Nicosia* (1967) 3 C.L.R. 588; *Neophytos Sofroniou and Others v. Municipality of Nicosia and Others* (1976) 3 C.L.R. 124. *Orphanides and Another v. The Improvement Board of Ayios Dhometios* (supra) and *Simonis and Another v. Improvement Board of Latsia* (1984) 3 C.L.R. 109.

In the light of the above authorities and bearing in mind the extent of applicant's plot and the extent of the part that he would have to cede to the public, under condition 4 of the permit, I am of the view that it is not a deprivation but a restriction or limitation as envisaged by Article 24.3.

The requirement of applying for a building permit under section 3 of Cap. 96 is connected with the right of property safeguarded by paragraph 1 of Article 23, which includes the right to possess and enjoy property.

Paragraph 2 of Article 23 provides that no deprivation or restriction or limitation of any such right shall be made except as provided in the said Article and paragraph 3 thereof provides:

"Restrictions or limitations which are absolutely necessary in the interest of the public safety or the public health or the public morals or the 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 may be imposed by law on the exercise of such right."

It is noteworthy and significant that whereas "deprivation" is specifically mentioned in paragraph 2 in addition to "restriction or limitation" paragraph 3 provides only for "restrictions or limitations".

In each case where a building permit is applied for it is a question of fact and of degree, depending upon the circumstances of the particular case whether the decision of the appropriate authority thereon amounts to a "deprivation" (within the meaning of the above provisions) and which can only be achieved under paragraph 4 of Article 23, or whether it amounts to "restriction or limitation" (within the meaning of the above provisions) which can only be imposed under paragraph 3 of the said Article - (*The Holy See of Kitium and The Municipal Council of Limassol* (supra) at pp. 27 and 28).

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For the above reasons this recourse succeeds. The sub judice decision is declared null and void and of no effect.

Let there be no order as to costs.

*Sub judice decision annulled.
No order as to costs.*

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