

1985 November 7

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

- 1. ANREAS PELEKANOS
- 2. IOANNIS PELEKANOS
- 3. VASO PELEKANOU,

Applicants,

v.

IMPROVEMENT BOARD OF LATSIA C/O
THE DISTRICT OFFICER, NICOSIA,

Respondent.

(Case No. 348/82).

Time within which to file a recourse—Article 146.3 of the Constitution—Imposition of zones—Inclusion of applicants' property in zone Γ1—Decision not challenged within the prescribed period—Applicants never applied for reconsideration and no such reconsideration ever took place—Reference to such decision in a letter dated 15.6.82 of an informatory character—Recourse in so far as it is directed against such decision out of time. 5

Recourse for annulment—Practice—Technical defects in the application—Practice not to dismiss a case for such defects—Power discretionary. 10

The Streets and Buildings Regulation Law, Cap. 96 as amended by Laws 14/59 to 25/79 s. 14—Imposition of zones.

On the 17.7.1981 the Improvement Board of Latsia in its capacity as the appropriate authority under s. 14 of Cap. 96, as amended by Laws 14/59—25/79 decided to revoke a previous decision of the District Officer which had been issued at a time when the District Officer was the appropriate authority under s. 14 of Cap. 96 as amended by laws 14/59—28/74 and published in the 15 20

5 Official Gazette on 5.1.79 under Not. 4/79, and took a new decision which was approved by the Council of Ministers and was published in Supplement 3 of the Official Gazette dated 17.7.1981 under Not. 157/81, whereby the building zones within the area of the Improvement Board of Latsia were defined.

10 Applicants' property (Plot 9 Sh/Plan XXX/15.E.1 was classified as belonging to zone Γ1 within which the construction of buildings, other than storehouses or industrial buildings, or buildings for the breeding of animals or birds which were prohibited was restricted to buildings with a maximum building ratio of 0.10:1 and the maximum floors to two.

15 The applicants did not challenge the validity of the decision, whereby the said zones had been imposed. On the 3.12.1981 they submitted a letter to the Director-General of the Ministry of Interior protesting that their property was left outside the Water Supply area which was defined by Law 13/74 and applied for the inclusion of their property within the water supply area. This letter was submitted to the respondent Board which rejected the same. 20 By letter dated 15.6.82 the District Officer in his capacity as chairman of the Board informed the applicants that their application cannot be granted for the following reasons, namely "(a) Your property as well as the nearby plots, are not included in the residential zones because they form a long inlet within the Athalassa forest which is intended to be a park in the area. (b) Your said plot cannot be included in the water supply area of Latsia because it is situated outside the residential zones." 25 30

As a result applicants filed the present recourse complaining of the respondent's refusal to include their property within the residential zone and to include it within the water supply area of Latsia.

35 Counsel for the respondent raised the following preliminary objections, namely that (a) The recourse is directed against the wrong organ at it ought to have been directed against the "Improvement Board of Latsia in its capacity as the appropriate Authority under Cap. 96", (b) the sub

judice decision (i.e. the decision communicated by the letter of 15.6.82) is not an executory administrative act, (c) That such decision is confirmatory of the decision published under Not. 4/79 on 5.1.79 and (d) That the recourse is out of time.

Held, (1) The objection under (a) above is too sophisticated and technical. The practice of this Court is not to dismiss a case for merely technical defects. The power is discretionary. This is a proper case to exercise such power by rejecting the said objection.

(2) This recourse in so far as it is directed against the decision to include applicants' property in zone Γ1 is out of time. The decision to include applicants' property in zone Γ1 was taken in 1979 but was reconsidered in 1981 and new decision was taken on the matter and published on 17.7.81. Such decision was not challenged within the prescribed period of 75 days. The applicants had never applied for reconsideration of such decision and no such reconsideration had ever taken place. Any reference to such decision in the letter dated 15.6.1982 is of an in-formatory character.

(3) Though from the said letter of 15.6.1982 it emanates that when such letter was written applicants' property "had already been left outside the water supply area...", in the absence of further material it is unjust to treat such letter as proving the existence of a prior decision which cannot be challenged by reason of a time bar. Indeed in Notification 151/81 no mention is made as to which of the zones were included within the water supply area. Therefore, the recourse will proceed as far as it is directed against the decision not to include applicants' property within the Water Supply area.

Order accordingly.

Cases referred to:

Demetriou v. The Republic, 1 R.S.C.C. 99;

The Attorney-General and Kouppi and Others, 1 R.S.C.C. 115;

President of the Republic v. The House of Representatives (1985) 3 C.L.R. 872.

Recourse.

Recourse against the refusal of the respondent to include applicants' property situated at Latsia within the residential zone and within the water supply area of Latsia.

5 K. Michaelides, for the applicants.

E. Odysseos, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. Applicants by their present recourse challenge the decision of the respondent Board contained in a letter dated the 15th June, 1982, not to include applicants' property under Plot No. 9 of Sheet Plan XXX/15.E.1 within the residential zone (οικιστική ζώνη) and not to include the said plot within the water supply area of Latsia.

15 The facts of the case are briefly as follows:

The applicants are the co-owners of the above plot of property which is situated at Latsia village. Prior to the establishment of the respondent Board the District Officer of Nicosia in his capacity as the appropriate authority for the village of Latsia, by a decision under the provisions of section 14 of the Streets and Buildings Regulation Law, Cap. 96 as amended by Laws 14/59 - 28/74 with the approval of the Council of Ministers defined the village building zones for the area of Latsia village. Such decision was published in Supplement No. 3, Part 1 of the official Gazette of the Republic, No. 1493 dated 5.1.1979 under Notification 4/79. The object of such order was, as stated therein, the preservation of the environment, the health of the inhabitants, the regulation and future development of industry, the regulation of the type of buildings to be erected and the future development of the immovable property which was affected thereby.

On or about the 17th July, 1981, the Improvement Board of Latsia, which in the meantime became the appropriate authority under the law, decided to revoke the previous decision of 5.1.1979 and in its capacity as the appropriate Authority under section 14 of Cap. 96, as amended by

Laws 14/59 - 25/79 took a new decision, which was approved by the Council of Ministers and was published in Supplement No. 3, Part 1 of the official Gazette of the Republic No. 1704 dated 17.7.1981, under Notification 157/81, whereby the building zones within the improvement area of Latsia were defined and a number of restrictions on the erection of buildings was imposed in the various zones as defined therein. Under such notification applicants' property was classified as belonging to zone Γ 1 within which the construction of buildings, other than storehouses or industrial buildings, or buildings for the breeding of animals or birds which were prohibited, was restricted to buildings with a maximum building ratio of 0.10:1 and the maximum number of floors to two. 5 10

The applicants never challenged the validity of such decision regulating the building zones of Latsia village. On the 3rd December, 1981 the applicants submitted the following letter to the Director-General of the Ministry of Interior with copy to the District Officer, the Director of the Water Development Department and the Director of the Town Planning and Housing Department: 15 20

"We the undersigned Andreas, Ioannis and Vasso Pelekanou of Nicosia, owners of plot. 9, sheet plan XXX/15. E1, Block B of the village of Latsia, hereby wish to protest for the following: 25

1. Our said property was left out of the water supply area which was defined by Law 13/74.

2. Our said property is adjacent to the defined boundary and it is the only private property which remained out of it. We agree that the rest of the area is Government property (forest area). 30

3. In view of the zones which have already been fixed as we are informed, our property lies within zone Γ 1 which provides for a low building ratio.

4. Our property was bought by us before any zones had been defined and with the object of building houses for our children. 35

It cannot be disputed that this is a case of injustice

and you are requested to take care so that our property be included within the water supply area of Latsia which, for a number of reasons has been extended in the meantime by the addition of new areas.

5 Hoping that our application will be favourably considered, we remain,

Such application was submitted by the District Officer to the respondent Board which rejected same. By letter dated the 15th June, 1982, signed by the District Officer in his
10 capacity as chairman of the Improvement Board of Latsia, applicants were informed as follows:

“I wish to refer to your letter dated 3.12.1982 which you have addressed to the Director-General of the Ministry of Interior whereby you apply that your said
15 property under Plot No. 9 of Sheet Plan XXX/15. E. 1 be included within a residential zone and the water supply area of Latsia and regret to inform you that your application cannot be granted for the following reasons:

20 (a) Your property as well as the nearby plots, are not included in the residential zones because they form a long inlet within the Athalassa forest which is intended to be a park in the area.

25 (b) Your said plot cannot be included in the water supply area of Latsia because it is situated outside the residential zones”.

As a result, applicants filed the present recourse praying for a declaration that such decision is null and void and of no effect whatsoever.

30 The grounds of law set out in the recourse are:

1. Respondent as the Appropriate Authority for the village of Latsia is empowered under section 14(1) of the Streets and Buildings Regulation Law, Cap. 96 to define zones for the purposes enumerated therein.

35 2. Such zoning amounts to the imposition of restrictions on immovable property and consequently same must be

absolutely necessary for any one of the reasons set out in Article 23.3 of the Constitution.

3. The inclusion of applicants' aforesaid plot into zone Γ 1 within which the maximum building ratio was 0:10:1, was unreasonable, arbitrary, not justified by any of the reasons set out in Article 23.3 of the Constitution and amounted to a discriminatory treatment against applicants.

4. In view of the aforesaid respondent, in refusing to amend accordingly the relevant notice so as to include applicants' said plot within the residential zone of Latsia, acted in excess or abuse of powers.

5. Further respondent's refusal is based on a misconception of facts as it was not examined in the context of all relevant circumstances and existing facts but on the basis of non existing and uncertain facts.

6. In view of the fact that the relevant notice was subsequently amended and neighbouring plots were included in the residential zone of Latsia, respondent's refusal to include applicants' said plot in the said zone amounts to an unequal or discriminatory treatment.

The application was opposed and the following preliminary objections were raised which, on the application of both parties, were set down for hearing as preliminary points of law in these proceedings:

(1) The sub judge decision (which is contained in the letter of the Acting District Officer of Nicosia dated the 15th June, 1982 in his capacity as Chairman of the Improvement Board of Latsia, addressed to the applicants), is not an executory administrative act or decision within the ambit of Article 146 of the Constitution and, therefore, is not subject to a recourse for annulment.

(2) Further and/or in the alternative, the said letter of the Improvement Board of Latsia to the applicants is merely confirmatory of the decision of the respondent Board to declare the village's building zones by virtue of Notification 4/79 of 5.1.1979 (Supplement No. 3 of the official Gazette of the Republic No. 1493). In the alternative such letter is of an informatory character and is in

the nature of an opinion and, therefore, it cannot be challenged by a recourse under Article 146 of the Constitution.

5 (3) Further and/or in the alternative the action of the applicants (their letter dated 3.12.1981 referred to in this recourse) was an out of time effort to dispute the validity of decisions published under Notifications 4/79 and 157/81, which the applicants silently accepted and/or they failed to challenge in time or at all. Therefore, their letter and the reply thereto of the appropriate authority cannot
10 revive the right of the applicants, which had been lost, to dispute the said administrative acts.

By his written address counsel for the respondent Board expounded on his preliminary objection and also advanced
15 an additional ground that the recourse was directed against a wrong organ.

In elaborating on this new ground of law, counsel contended that under the provisions of the Streets and Buildings Regulation Law, Cap. 96, (as amended) the power of defining building zones vested in the "appropriate authority" as defined by such Law. Such authority in the case of Latsia village was the Improvement Board of Latsia which
20 had been appointed as the appropriate authority. The recourse, therefore, should have been directed against the Improvement Board of Latsia "in its capacity as the appropriate Authority under Cap. 96" and not against the
25 Improvement Board of Latsia as such.

At this stage I wish to state that I find such objection as too sophisticated and technical. It has been the constant
30 practice of this Court in the exercise of its jurisdiction as a Supreme Constitutional Court that it will not dismiss a case for merely technical defects and it will try as far as possible to do justice in the case on the substance thereof, avoiding the duplicity of, and delay in, proceedings (*Demetriou v. The Republic*, 1 R.S.C.C. 99, *The Attorney-General and Kouppi and others*, 1 R.S.C.C. 115, and the recent decision of the Full Bench in *The President of the Republic and The House of Representatives* Ref. 1/84 (1985) 3
35 C.L.R. 872). This power is a discretionary power of the Court and in the circumstances I find that this is a proper
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case for exercising my discretion by rejecting the objection raised, in this respect, by counsel for respondent.

In elaborating on the remaining preliminary objections counsel for respondent contended that the letter of the District Officer dated 15th June, 1982 does not amount to an executory administrative act within the ambit of Article 146 of the Constitution but is merely of an informatory character informing the applicants of the situation and about building zones as created by the decision published under Notification 4/79 which was subsequently reconsidered and published under Notification 157/81 as a new decision. By both such decisions applicants' property was included within zone Γ1. Counsel further added that the applicants did not challenge such decisions in time but five months later they submitted an application to the Director-General of the Ministry of Interior which was communicated to the District Officer as chairman of the Improvement Board and to which the latter replied by his letter dated 15.6.1982 after a decision was taken on the matter informing the applicants of the reason why their request could not be acceded to.

Counsel for respondent finally contended that the letter of the District Officer did not in any way affect the legal position or the legal rights of the applicants as created or caused by the publication of the said notifications and the letter of the District Officer does not amount to a new act or decision of an executory character.

Counsel for applicants in reply to the above arguments contended that the act and/or decision complained of is not confirmatory of a previous decision or informatory but is an executory administrative act on its own and as such could be challenged by a recourse filed in time as it happened in the present case.

In the written address of counsel for applicants the following is stated:

"Applicants by their recourse seek a declaration that respondent's aforesaid decision not to include their said plot within the water supply area of Latsia is null and void."

A perusal, however, of the prayer and the grounds of law on which the recourse is based show clearly that the applicants do not challenge only the refusal of the respondent to include their property within the water supply area of Latsia but also the exercise by the respondent of its power under section 14(1) of Cap. 96 to define the zones in question and include applicants' property into zone Γ 1, within which the maximum building ratio was 0.10:1 which is contended to be unreasonable, arbitrary, not justified by any of the reasons set out in Article 23.3 of the Constitution and amounted to a discriminatory treatment against the applicants.

As there has not been a clear statement that the applicant abandons the grounds of law directed against the inclusion of applicants' property within zone Γ 1, I shall deal briefly with the preliminary objection that the recourse is out of time in this respect.

From the material before me it is abundantly clear that the decision to include applicants' property within zone Γ 1 was taken in 1979 but was reconsidered by the Improvement Board of Latsia in 1981 and a new decision was taken on the matter and published in the official Gazette of the Republic on 17.7.1981 by Notification 157/81.

The applicants did not challenge such decision within the period of 75 days fixed by the Constitution. Therefore, any complaint concerning such decision cannot be made outside the said period. From the material before me it does not emanate that applicants had ever applied for reconsideration of the decision fixing the building zones and the exclusion of their property from zone Γ 1 and no such reconsideration and new decision on the matter has, since the publication, taken place. Any reference in the letter of the respondent to the inclusion of applicants' property within zone Γ 1 can only be considered of *informa-* tory character. Therefore, any legal grounds directed against the fixing of zones and the inclusion of applicants' property within zone Γ 1 cannot be raised by this recourse, as the period of 75 days has lapsed from the publication of such decision.

The applicants by their letter dated 3rd December, 1981 are not asking for the exclusion of their property from zone Γ 1 but for "the inclusion of their property within the water supply area of Latsia". By his letter the chairman of the respondent stated the reasons why such request could not be granted. A perusal of the contents of Notification 157/81 makes it abundantly clear that the respondent fixed the zones as defined in such notification. No mention is made anywhere as to which of the zones were included within the water supply area. Therefore, I cannot treat the decision for the fixing of zones as embodying a decision restricting the water supply to those of the properties which fell within certain zones and not others. There was no absolute prohibition of construction of houses in zones classified as Γ 1, other than the restrictions already mentioned concerning the building ratio and the number of floors to be built thereon. In the result, the decision for fixing zones as per Notification 157/81 by itself cannot be treated as a decision regulating water supply and restricting the supply of water to applicants' property. No decision for restriction of the water supply to properties falling within zone Γ 1 has been put before me. From what emanates from the letter of the applicants of the 3rd December, 1981 at the time when such letter was written applicants' property "had already been left outside the water-supply area which had been fixed under Law 13/74". This presupposes a decision imposing a restriction on their property concerning water supply. In the absence, however, of any other material before me in this respect, I consider that it will be unjust to treat such letter as proving the existence of a decision prior to such letter the result of which might have imposed a time bar to the filing of the recourse, in respect of this prayer as well, without hearing evidence on the matter.

Therefore, I have decided to leave this issue for determination after hearing the case on the merits as well.

In the result, applicants' prayer challenging the inclusion of their property within building zone Γ 1, is hereby dismissed as being out of time. The recourse will proceed on

the merits with regard to the refusal of the respondent to include applicants' property within the water supply area of Latsia.

5 The question of costs of this preliminary hearing is left to be determined at the end.

Order accordingly.