IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SALAMIS HOLDINGS LIMITED,

Applicants,

and

THE MUNICIPALITY OF FAMAGUSTA,

Respondent.

(*Case No.* 501/73).

Administrative acts or decisions—Confirmatory acts—Executory acts—Distinction—Act merely confirmatory of an earlier executory decision cannot be made the subject of a recourse under Article 146 *of the Constitution—Only decision of an executory nature can be challenged by such recourse—And in certain circumstances a decision confirming an earlier executory decision may become itself a new executory decision liable as such to be attacked by the recourse—New inquiry—New material—See further immediately herebelow.*

Administrative acts or decisions—The sub judice *decision confirming a previous refusal of an application for renewal of a building permit under section* 5 *of the Streets and Buildings Regulation Law, Cap.* 96*—Is not of a merely confirmatory nature but of an executory character—Because the* sub judice *decision was reached after a new inquiry and after taking into consideration new material —It is, therefore, within the ambit of Article* 146.1 *of the Constitution and as such it could be made the subject of the instant recourse.*

Confirmatory act and executory act—Discretion—Test applicable—New inquiry—When does a new inquiry exist—See further supra.

New inquiry—When can it be said that a new inquiry does exist—See supra.

By this recourse under Article 146 of the Constitution the applicants seek the annulment of the decision dated October 19, 1973, whereby the respondent Municipality affirming its earlier decision (refusal) dated July 2, 1973, refused again to renew

the building permit No. 1622 issued to the applicants on February 15, 1972.

The sole issue at this stage of the proceedings is whether the *sub judice* decision (refusal) is a merely confirmatory act of the aforesaid earlier executory decision of the respondent (*supra*) as contended by their counsel; in which case the recourse is not maintainable upon the undisputed principle that such merely confirmatory acts are outside the ambit of Article 146.1 of the Constitution and cannot, therefore, be made the subject of a recourse under that Article. On the other hand, there can be no question at all that in so far as the aforesaid earlier decision of July 2, 1973, is concerned, the present recourse, filed on November 7, 1973, is obviously out of time *viz.* outside the period of 75 days prescribed under Article 146.3 of the Constitution. Be that as it may, the learned Judge found that the said decision (refusal) of October 19, 1973, is the product of a new inquiry and a consideration of new material facts; and, applying the well settled principles of administrative law, held that it is a new executory act within the ambit of Article 146.1 of the Constitution, liable to be challenged by the recourse thereunder and ruled that the case must proceed and be dealt with and determined on its merits.

The facts of the case are very briefly as follows:

On February 15, 1972, the respondent Municipality issued to the applicants the building permit No. 1622 valid for one year only under the law. An application made by the applicants for the renewal of the said permit under section 5 of the Streets and Buildings Regulation Law, Cap. 96 was refused by the respondent Municipality on July 2, 1973, on the ground that building permits cannot be renewed unless substantial works have been carried out during the one year period of their validity (*supra*) whereas in the present case " nothing has been done in accordance with the said building permit (No. 1622 *supra*). On August 9, 1973, counsel on behalf of the applicants wrote a letter to the respondent Municipality protesting against its said refusal and claiming that substantial works have been carried out on the site during the validity of the building permit in question. In support of his claim counsel attached to his letter a report prepared by the architect Mr. Economides acting for the applicants showing that works were actually carried out from March 20, 1972 until July 15 of the same year at a cost of £7,250.- On October 19, 1973, the respondent Municipality

informed in writing counsel for the applicants that after a local inquiry of the works and having re-examined their application in the light, *inter alia,* of such local inspection and taking also into consideration the relevant report of the architect Mr. Economides (*supra*) they (the Municipality) are not prepared to change their previous decision (refusal) of July 2, 1973, *supra.*

It was argued by counsel for the respondent Municipality that the present recourse fails because: (a) in so far as the earlier refusal of July 2, 1973, is concerned the recourse filed on November 7, 1973, is obviously out of time, *supra* (b) in so far as the reply of October 19, 1973, is concerned, this is not an executory decision—which alone can be made the subject of a recourse under Article 146 of the Constitution—but an act merely confirming the earlier one (of July 2, 1973) and as such it cannot be challenged by a recourse under the said Article 146. Counsel for the applicants argued that the decision of October 19, 1973, having been reached after a new inquiry (local inquiry etc.) and after a consideration of new material facts such as the architect's report should be held to be a new executory decision liable to be challenged by the recourse.

Agreeing in substance with counsel for the applicants, the learned Judge:-

Held, (1) It is clear that a merely confirmatory act is not of an executory nature, and, therefore, it cannot be made the subject of a recourse under Article 146 of the Constitution (see: *Kolokassides* v. *The Republic* (1965) 3 C.L.R. 549 and on appeal reported in (1965) 3 C.L.R. 542; see also *Varnava* v. *The Republic* (1968) 3 C.L.R. 566).

(2) It is also quite clear that an act or decision confirming a previous executory decision becomes a new executory decision when it was reached after a new inquiry and a consideration of new material facts.

(3) The answer to the question: When does a new inquiry exist, is a question of fact in each particular case. In general, it is considered to be a new inquiry, the taking into consideration by the administration of new substantive legal or real material, and when the new material is meticulously considered; for he who has been out of time in attacking an executory act should not be allowed to circumvent such a time limit by the creation of a new act, which was issued nominally after a new

inquiry, but in substance on the basis of the same material (see: Stassinopoulos, The Law of Administrative Disputes 4th edn. (1964) pp. 175–176).

(4) (a) Furthermore, it can be said that especially there exists a new inquiry where, before the issue of the subsequent act, the administration takes into consideration new material or pre-existing but unknown, which are now taken into consideration *in addition*, but for the first time.

(b) Similarly it constitutes a new inquiry the carrying out of a local inspection or the collection of additional information regarding the matter under consideration. The same stand is taken by the Greek Council of State in the case No. 758/1938.

(5) For the above reasons I hold that the decision of the respondent Municipality of October 19, 1973, is not of a merely confirmatory nature but of an executory character reached after a new inquiry which they (the Municipality) themselves have ordered and after taking into consideration new material; and I would in due course fix a date for hearing to decide the rest of the issues raised in this recourse.

Order accordingly.

Per curiam: It goes without saying that at this stage I am not expected, and I am not deciding whether the works carried out by the applicants on the site do justify or are sufficient reasons for the granting of the renewal of the building permit in question always assuming that such renewal of the permit is not conflicting with any Regulations in force at the time of such renewal.

Cases referred to:

Kolokassides v. *The Republic* (1965) 3 C.L.R. 549; and on appeal reported in (1965) 3 C.L.R. 542;

Varnava v. *The Republic* (1968) 3 C.L.R. 566;

The Decision of the Greek Council of State: No. 758/1938.

Recourse.

Recourse against the refusal of the respondent to renew applicants' building permit.

R. Constantinides, for the applicants.

M. Papas, for the respondent.

Cur. adv. vult.

The following ruling was delivered by:-

HADJIANASTASSIOU, J.: In these proceedings under Article 146 of the Constitution, the applicants seek a declaration that the act and/or decision of the Municipality of Famagusta not to renew the permit No. 1622 issued to them on February 15, 1972, is *null* and *void* and of no effect whatsoever.

The facts in brief are these: On February 15, 1972, the Municipality of Famagusta, after an application made by the applicants, issued to them a building permit for the erection of a block of flats. The said permit *viz.*, No. 1622, was valid for one year only, and on March 15, 1973, the applicants, in accordance with s. 5 of the Streets and Buildings Regulation Law, Cap. 96 (as amended) addressed a letter to the same authority seeking a renewal of their building permit (*exhibit* 2). On July 2, 1973, Mr. Pouyouros, the Chairman of the Municipal Committee, in reply, said that he regretted that he could not renew the building permit because the application was made contrary to the Streets and Buildings Regulation Law, and as a result, he was unable to satisfy their request. Mr. Pouyouros further added that in accordance with the said provisions, building permits are renewed only if and when in compliance with the said provisions, substantial building works have been carried out. Furthermore, he pointed out that as it appeared from a report made by the appropriate service of the Municipality, nothing has been done in accordance with the said building permit (*exhibit* 1).

On August 9, 1973, counsel on behalf of the applicants wrote once again to Mr. Pouyouros repudiating the allegations put forward, *i.e.* that the renewal of the said building permit would violate the provisions of the Streets and Buildings Regulation Law, and claimed that, on the contrary, the granting of the renewal of the permit would have been in accordance with the provisions of the law and the regulations in force at the time. In support of his claim, counsel attached to his letter a report prepared by Mr. Economides, the architect of the applicants, showing that works were actually carried out from March 20, 1972, until July 15 of the same year at a cost of £7,250 (see

exhibits 3 and 3 (*a*)). Apparently, as there was no reply, the applicants wrote once again to Mr. Pouyouros requesting him to reply to their previous letter regarding the renewal of the building permit, and on October 19, Mr. Pouyouros, dealing once again with the same matter, informed counsel for the applicants that after a local inquiry of the works and having re-examined the application in the light of the contents of the letters dated August 9 and 30, 1973, and taking also into consideration the relevant report of the architect, Mr. Economides, the appropriate authority was not prepared to change their previous decision which had been communicated to the applicants on July 2, 1973 (*exhibit* 5).

The applicants, feeling aggrieved because of the refusal of the Municipal Authority to renew their building permit, filed the present recourse on November 7, 1973, and their application was based on five grounds of law. On December 13, 1973, the respondent filed their opposition and the main grounds of law put forward were (1) that the subject matter of the recourse was not a decision in the sense of Article 146 of the Constitution, and, therefore, it could not be made the subject of a recourse; (2) that the recourse was out of time, in that the decision challenged by this recourse, contained in the letter dated October 19, 1973, was merely confirmatory of the earlier decision and was not of an executory nature; and (3) that the decision not to renew the building permit is *intra vires* their powers and/or constitutional and in accordance with the Streets and Buildings Regulation Law, Cap. 96.

On May 29, 1974, having heard both counsel on the preliminary points raised by the respondent, I have come to the conclusion that the decision turned mainly on whether the recourse was filed after the lapse of 75 days provided in paragraph 3 of Article 146 of the Constitution, which in effect reads as follows:- "Such a recourse shall be made within 75 days of the date when the decision or request was published, or if not published, and in the case of an omission, when it came to the knowledge of the person making the recourse".

There is no doubt that the effect of this paragraph, as it has been said in a number of cases, is mandatory and has to be given effect to in the public interest.

Counsel for the respondent contended that the recourse was filed out of time because the reply given to the applicants on

October 19, 1973, was not a decision or an act but was only of a confirmatory nature of their previous decision dated July 2, 1973.

On the contrary, counsel for the applicants argued that the decision contained in the letter of October 19, 1973, was of an executory nature, and, therefore, it was filed within the proper time because the Municipality had embarked into a local inquiry and a fresh decision was taken.

Having considered the matter very carefully, I think I must proceed to examine the question *viz.*, whether the letter of October 19, 1973, is a mere repetition or confirmation of the previous letter of Mr. Pouyouros. This question is covered by authority and it is a well-settled principle of administrative law that a confirmatory act is one which repeats the contents of a previous executory act and signifies the adherence of the administration to a course already adopted; but when the administration confirms a previous executory act after a new inquiry, then the resulting fresh act or decision is in itself executory also. On this point one finds useful guidance from the well-known textbook by Stassinopoulos on the Law of Administrative Disputes, 4th edn., (1964) at p. 175; also regarding the question of what is a confirmatory act or decision one finds from the Conclusions of the Jurisprudence of the Greek Council of State 1929-1959 at p. 240, a valuable exposition regarding the principle concerned.

From the trend of the authorities it is clear that a confirmatory act is not of an executory nature, and, therefore, it cannot be the subject of an administrative recourse both in Greece and in Cyprus. On this issue I find further support in our Case Law, and it has been laid down in *Kolokassides* v. *The Republic* (1965) 3 C.L.R. 549 and on appeal reported in (1965) 3 C.L.R. 542, that confirmatory acts or decisions are not of an executory nature and cannot become the subject of an administrative recourse in Cyprus. See also *Christakis L. Varnava* v. *The Republic* (*District Officer Nicosia and Another*) (1968) 3 C.L.R. 566, a case relied upon by both counsel in support of their argument.

Having dealt with the authorities I shall now proceed to examine whether the administration embarked on a new inquiry into the case of the applicant. There is no doubt that even counsel for the respondent after replying to the argument

put forward by counsel for the applicants, in fairness, in my view, conceded that he had traced a note in the handwriting of Mr. Pouyouros in the file of the Municipality dealing with the case of the applicants, ordering a new local inquiry. Regarding this point, once again I find valuable assistance in answering the question: when does a new inquiry exist, from Stassinopoulos from the textbook which I have referred to earlier, at p. 176. In effect, it appears that it is a question of fact in each case when a new inquiry exists. In general, it is considered to be a new inquiry, the taking into consideration by the administration of new substantive legal or real material, and when the new material is meticulously considered, for he who has been out of time in attacking an executory act should not circumvent such a time limit by the creation of a new act, which was issued nominally after a new inquiry, but in substance on the basis of the same material.

Furthermore, it was said that especially there exists a new inquiry where, before the issue of the subsequent act, the administration takes into consideration new material or pre-existing but unknown, which are now taken into consideration in addition, but for the first time. Similarly, it constitutes a new inquiry the carrying out of a local inspection or the collection of additional information regarding the matter under consideration. The same stand is taken by the Greek Council of State in the case No. 758/1938.

For the reasons I have tried to explain, I would reiterate that the decision of Mr. Pourouros is not of a confirmatory nature but of an executory character, made after a new inquiry, which he himself ordered, and after taking into consideration new material. It goes without saying, of course, that at this stage I am not expected, and I am not deciding, whether the works carried out by the applicants do justify or are sufficient reasons for the granting of the renewal of their building permit by the appropriate authority, always assuming that such renewal of the permit is not conflicting with any Regulations in force at the time of such renewal.

I would, therefore, dismiss the contention of counsel for the respondent, because the recourse has not been filed after the lapse of 75 days, and I would in due course, on the application of either party, fix a date for hearing to decide the rest of the issues raised in this recourse.

Order accordingly.