1979 July 31

[STAVRINIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS ORPHANIDES,
AS ADMINISTRATOR OF THE ESTATE OF THE
LATE PAVLOS HADJIANGELI AND ANOTHER,
Applicants,

and

THE IMPROVEMENT BOARD OF AYIOS DHOMETIOS,
Respondent.

(*Case No.* 317/69).

Administrative Law—Administrative acts and decisions—Due reasoning —Application for building permit—Administration requiring modification of plans without specifying clearly the reason for the requirement—Reason not supplied by any document in the relevant file—Requirement being, in substance, an unfavourable decision reason therefor should have been stated specifically.

Constitutional Law—Right of property—Article 23 of the Constitution —Application for a building permit—Requirement by administration to modify plans in respect of position of proposed house—Does not amount to a "deprivation" within Article 23 but only to a "restriction" or "limitation" within such Article—Offer of compensation not necessary.

Building—Building permit—Land not affected by a street-widening scheme under section 12(c) of the Streets and Buildings Regulation Law, Cap. 96—Appropriate authority has no right to require a person, who applies for a permit, anything that is not required by

a scheme having actual legal force, as distinct from a scheme existing only on paper.

Administrative Law—Executory act or decision—Application for building permit—Administration requiring modification of plans—Applicants refusing to comply with requirement and requesting to be informed whether the permit would be granted—No reply by administration—Its silence a tacit rejection of the application, thus amounting to an executory act.

In May, 1969, the applicants applied to the respondent Board as "the appropriate authority" within the meaning of the Streets and Buildings Regulation Law, Cap. 96, for a permit to erect a house on a piece of land of theirs at Ayios Dhometios. On the following July 24 the Board wrote to the applicants as follows (*exhibit* 2).

> "With reference to your application of May 15, 1969, whereby you are asking for a permit to build on plot 1745.... situate at Ayios Dhometios, you are informed that to enable me to examine your case you should, in accordance with s.8(c) of the Law, Cap. 96 (maintenance of proper conditions of communication etc.), modify your plans so that the proposed dwelling-house is erected at a distance of at least ten feet south-west of the green line shown on the attached survey plan.
>
> It is understood, of course, that it is not required that you should cede any part of your plot to the public road".

Applicants replied to the above letter through their counsel on September 15, 1969 and stated that they did not intend to modify their plans and, also, requested to be informed whether the Board intended to grant the permit in question. The Board kept silent and hence this recourse for a declaration that "the decision of the respondent not to grant the building permit applied for by the applicants is null and void".

Counsel for the applicant relied on the following grounds:

(1) That the requirement made by *exhibit* 2 was not duly reasoned;

(2) that the said requirement was contrary to Article 23 paragraphs 1-3 of the Constitution in that no offer of compensation was made therein;

(3) that the said requirement was contrary to section 8(c)* of the Streets and Buildings Regulation Law, Cap. 96 and it was made in abuse of powers.

In this connection counsel referred to the fact that the applicants' land was not affected by a street-widening scheme, under s. 12(c) of Cap. 96, in force in respect of the area, and argued that the demand made by the appropriate authority regarding the position of the proposed house had no legal basis and therefore was arbitrary, because "there was no lay-out to the execution of which some competent authority was committed".

On the other hand counsel for the respondent argued that the said letter *exhibit* 2 was not an executory act or decision but simply a preparatory act.

Held, (1) that since the requirement that the applicants should modify their plans was, in effect, a refusal of the permit application as it stood, the administration should have specified clearly the reason for the requirement; that section 8(c) of Cap. 96 contains several alternatives and therefore the administration did not fulfil that obligation by a simple reference to one of them followed by "etc."; that, in this case, the reason could not be supplied by any document in the relevant file of the administration, for the requirement being, in substance, an unfavourable decision, the reason for it should have been stated, and stated specifically, in the said letter *exhibit* 2 itself; and that, accordingly, the applicants succeed on ground (1) above.

(2) That there was no "deprivation" within paragraph 3 of Article 23 of the Constitution; that the requirement in *exhibit* 2

* Quoted at p. 474 *post*.

involved only a "restriction" or "limitation" within the meaning of the said paragraph 3; that, therefore, no offer of compensation was necessary; and that, accordingly, ground 2 must fail (see, also, *Thymopoulos and Others* v. *Municipal Committee Nicosia* (1967) 3 C.L.R. 588).

(3) 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 the street-widening scheme to do, in connection with that land, anything that is not required by a scheme having actual legal force, as distinct from a scheme existing only on paper; that since the applicants' property was not so affected, the requirement made in the said letter *exhibit* 2 was one that the authority had no power to make; that the letter in question was not in itself an executory act or decision; that the applicants' counsel's reply to it made it incumbent on the respondent to decide on the application for a permit as it stood, and the silence of the respondent can only be construed as a tacit rejection of it; and that since the Board had no right to require alteration of the applicants' permit application in respect of the position of the proposed house, the applicants are entitled to succeed on ground 3 as well.

Sub judice decision annulled.

Cases referred to:

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

Recourse.

Recourse against the decision of the respondent not to grant applicants' application for a building permit.

S. Nikitas, for the applicants.

K. Michaelides, for the respondent.

Cur. adv. vult.

STAVRINIDES J. read the following judgment. The first applicant is administrator of the estate of Pavlos Hadjiangeli, deceased, in whose name a 3/4 share in a field situate within the area of Ayios Dhometios, near Nicosia, is registered, and the

second applicant the registered owner of a 1/4 share in that property. Some time in May, 1969 (the date is variously put, in the indorsement of the application, at May 15, 1969, and in the indorsement on the opposition at May 20 of that year), they applied to the respondent as "the appropriate authority" within the meaning of the Streets and Buildings Regulation Law, Cap. 96, for a permit to erect a house thereon (*exhibit* 1, hereafter "the permit application"). The Board on the following July 24 wrote to the applicants as follows (*exh.* 2):

> " With reference to your application of May 15, 1969, whereby you are asking for a permit to build on plot 1745... situate at Ayios Dhometios, you are informed that to enable me to examine your case you should, in accordance with s. 8(c) of the Law, Cap. 96 (maintenance of proper conditions of communication etc.), modify your plans so that the proposed dwelling-house is erected at a distance of at least ten feet south-west of the green line shown on the attached survey plan.
>
> It is understood, of course, that it is not required that you should cede any part of your plot to the public road".

(The survey plan referred to in para. 1 of *exh.* 2 has been produced, *exh.* 4.) To that letter on the following September 15, 1969, an advocate replied on behalf of the applicants as follows (*exh.* 3):

> " In reply to your letter of the 24th July last ... in connection with an application for a building permit, you are informed that my above clients allege that the architectural plans submitted comply fully with the Law and existing regulations and further that they do not intend to modify them as mentioned in your letter.
>
> Therefore I would request you to inform me as soon as possible whether you intend granting the requested permit".

In accordance with established practice the Board referred the permit application to the Town Planning and Housing Depart-

ment of the Government (hereafter "the Department") for its comments. On December 21, 1969, the Department wrote to the Board as follows (*exh.* 13):

"This application concerns the grant of a permit for a single-storied main building (dwelling) and an enclosure on the basis of plans Nos. 1 to 6.

2. It should be mentioned that the applicants applied in 1965 for a permit to subdivide the above plot into building sites ... At that time I recommended the subdivision of the plot in question on the basis of my plan No. N/D/296(s), which the applicants did not accept and in order to make its implementation impossible they submitted applications and obtained building permits for two dwelling-houses... Of the dwelling-houses in question the southern one has partly been erected.

3. As a result of the erection of the proposed third dwelling-house in the north-eastern corner of the plot as shown on the survey plan, the making of a roundabout at the point where the existing Avenue will be crossed in future by the main arterial road whose construction on the former railway line is being considered will in future be rendered impossible.

4. On the survey plan p. 1 is shown by a green line the section of the applicants' plot which it is foreseen will be needed for making the traffic island in question and on which surely the construction of buildings is not indicated of which in future the compulsory acquisition and demolition will be required at considerable cost to the public, without this being of any benefit to the applicants, who will only suffer inconvenience.

5. It is therefore recommended that the applicants be called upon under s. 8(c) of the Law, Cap. 96 (maintenance of proper conditions of communication etc.) to modify their plans so that the proposed dwelling-house is erected at a distance of at least ten feet south-west of the green line shown on the survey plan p. 1 and thereafter

the file be returned to me for final recommendations. *The applicants should be informed that it is not required of them to cede any part of their plot to the public road.*" [The underlining is the writer's.]

By the instant application the applicants are asking—

"A. For a declaration that the omission of the respondent to examine or consider the application for a permit applied for by the applicants for the erection of building on plot No. 1745, P/S XXXI/45.W.I, Block 'B', ought not to have been made and further that whatever has been omitted should have been performed.

B. For a declaration that the decision of the respondent not to examine or grant the application for a building permit applied for by the applicants unless the plans submitted by the applicants were modified is null and void and of no effect whatsoever as being contrary to law and/or in abuse of (sic. for 'or') excess of power.

C. For a declaration that the decision of the respondent not to grant the building permit applied for by the applicants is null and void and of no effect whatsoever."

At the hearing counsel for the applicants expressly stated that what they were complaining of was the letter *exh.* 2, thus by implication abandoning para. A of their prayer.

In his address learned counsel for the applicants relied on the following grounds: (a) the requirement made by *exh.* 2 is not duly reasoned; (b) it is contrary to s. 8(c) of Cap. 96; (c) it is contrary to Art. 23, paras. 1–3, of the Constitution; (d) it is based on a misconception of fact; and (e) it was taken in abuse of power. These grounds were argued in this order, viz. (a), (c), (d) and, lastly, (b) and (e) together. I propose considering them in that order.

Ground (a). Since the requirement that the applicants should modify their plans was, in effect, a refusal of the permit application as it stood, the administration should have specified clearly the reason for the requirement. As pointed out by

counsel for the applicants, s. 8(c) of Cap. 96 contains several alternatives, and therefore the administration did not fulfil that obligation by a simple reference to one of them followed by "etc." Nor, in this case, could the reason be supplied by any document in the relevant file of the administration, for the requirement being, in substance, an unfavourable decision, the reason for it should have been stated, and stated specifically, in the letter *exh.* 2 itself. Thereupon on this ground the applicants succeed.

Ground (*c*). The argument here is based on the fact that no offer of compensation was made in *exh.* 2 There is no authority for the proposition implicit in this argument. On the other hand in the *Thymopoulos* case, (1967) 3 C.L.R. 588, the following propositions among others were formulated: Not every interference with the right of property as defined in para. 1 of Art. 23 of the Constitution is a "deprivation" within para. 3 thereof; such interference may amount only to a "restriction" or "limitation" within the meaning of para. 3 of that Article, and whether it is so or not is a question of degree. A street-widening scheme may affect a property "to such an extent as to render it totally unsuitable for the ordinary, in the circumstances, use" of it. In such a case a question of constitutionality may arise. Reverting now to the instant case, here there is no such deprivation; the requirement in *exh.* 2 involved only a "restriction" or "limitation" in the above sense. Accordingly no offer of compensation was necessary.

I have not considered whether the requirement was well-founded in law, as no such question has been raised.

It is clear from what I have said that this ground fails.

Ground (*d*). The misconception is supposed to be that in para. 6 of the indorsement on the opposition it is stated that the proposed house "is contrary to the plans of the appropriate authority for the area and if permitted it should [meaning "would"] defeat respondent's plan for the area". It appears from a letter from the District Officer to the applicants dated January 25, 1966 (*exh.* 9), that on November 29, 1965, the applicants had applied to the Board for a permit to divide plot 1745. This letter reads:

" With reference to your application of November 29, 1965, for a permit to lay-out plot No. 1745 into building plots... I inform you that it will be examined further in accordance with the new lay-out on the attached plan No.N/D/296(s).

2. If the above lay-out is approved by you you are requested to produce to me three official survey plans on which the said lay-out is marked in accordance with the Streets and Buildings Regulations [this last word should be in the singular and folllowed by "Law,"] Cap. 96.

. . . . . "

In the light of that letter it is apparent that "plans" in para. 6 of the indorsement on the opposition means simply the lay-out of the applicants' property as shown in the plan No. N/D/196(s), *exh.* 8. Accordingly there is no such misconception as alleged.

I now go on to grounds (b) and (c). Counsel for the applicants explained that what he meant by these grounds was that the demand made by the appropriate authority regarding the position of the proposed house had no legal basis and therefore was arbitrary, because "there was no lay-out to the execution of which some competent authority was committed". As I understand this argument, it refers to the fact that the applicants' land was not affected by a street-widening scheme under s. 12(c) of Cap. 96 in force in respect of the area. The premiss of this ground is in accordance with fact. Did then the Department have power to impose the requirement in question?

Section 8(c) of Cap. 96, which is invoked by the letter *exh.* 2, reads:

"Before granting a permit under s. 3 of this Law, the appropriate authority may require the production of such plans, drawings and calculations or may require to be given such description of the intended work as it may seem necessary and desirable and may require the alteration of such plans, drawings and calculations so produced, particularly—

. . . . . .

(c) with the general object of securing proper conditions of health, sanitation, safety, communication, amenity and convenience in the area in which the intended work is to be carried out";

and s. 13(1) reads:

" Where a permit is granted by an appropriate authority and such permit entails a new alignment for any street, in accordance with any plan which has become binding under s. 12 of this Law, any space between such alignment and the old alignment, which is left over when a permit is granted, shall become part of such street without the payment by the appropriate authority of any compensation whatsoever:

Provided that, if it is established that hardship would be caused if no compensation were paid, the appropriate authority shall pay such compensation as may be reasonable having regard to all the circumstances of the case".

In my judgment the appropriate authority has no right to require a person who applies for a permit to erect a building on land not affected by the street-widening scheme to do, in connection with that land, anything that is not required by a scheme having actual legal force, as distinct from a scheme existing only on paper; and since here the applicants' property was not so affected, the requirement made in the letter *exh.* 2 was one that the authority had no power to make. But counsel for the respondent argued that that letter was not an executory act or decision but simply a preparatory one. In Stasinopoulos's Law of Administrative Disputes, at p. 178, last paragraph, I find this:

" Other acts, described as preparatory, i.e. as tending to the preparation of the future executory administrative act. Such acts are those fulfilling procedural forms, settled by law, such as:

.....

(b) the preliminary invitation for the supply of information and the related preliminary communication to the interested parties.

....."

In my view the letter in question was not in itself an executory act or decision. But the applicants' counsel's reply to it, viz. *exh.* 3, made it incumbent on the respondent to decide on the application *exh.* 1 as it stood, and his silence can only be construed as a tacit rejection of it. The question then is whether

that rejection is to be upheld or not, and since, as I have already indicated, in my view the Board had no right to require alteration of the applicants' permit application in respect of the position of the proposed house, in my judgment the applicants are entitled to succeed on this ground as well.

Declaration in the terms of para. C of the applicants' prayer. The respondent to pay the applicants £30 costs.

Sub judice decision annulled.
Order for costs as above.