

1985 June 22

[TRIANTAFYLIDES. P.]

IN THE MATTER OF ARTICLE 146  
OF THE CONSTITUTION

ASBESTAS ESTATES LIMITED,

*Applicants,*

v.

THE MUNICIPAL COMMITTEE OF NICOSIA,

*Responden's.*

*(Case No. 62/81).*

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5 *Executory act—Preparatory act—Application for a building permit in respect of a building 67 feet high—Respondents informed applicants that height of building should not exceed 47 feet—Decision amounts to final refusal of a permit for a building 67 feet high—Decision is of an executory nature.*

10 *Recourse for annulment—Abatement—Applicants' conduct subsequent to the filing of recourse—As applicants expressly reserved their rights it cannot be said that the recourse has been abated.*

15 The applicants applied for a building permit in respect of a building to be constructed by them of a height of 67 feet. By letter dated 4.12.80 the respondents informed the applicants that the building should not exceed the height of 47 feet. As a result the applicants submitted modified plans for a building of a height of 47 feet, but made it clear that such plans were submitted without prejudice to their rights.

20 By means of this recourse the applicants challenge the decision communicated to them by the letter of 4.12.80. Counsel for the respondents raised two preliminary objections, namely that the sub judice decision is of a pre-

paratory nature and that the recourse has been abated by reason of the applicants' subsequent to its filing conduct.

*Held*, dismissing the preliminary objection: (1) The contents of the letter dated 4.12.80 amount to a final decision refusing a building permit for a building 67 feet high. It follows that the sub judice decision is of an executory nature. 5

(2) Since the applicants expressly reserved their rights before accepting a permit issued in accordance with the modified plans, it cannot be said that the recourse has been abated by reason of their conduct subsequent to its filing. 10

*Preliminary objections dismissed.*

**Cases referred to:**

*The Republic v. Demetriou* (1972) 3 C.L.R. 219; 15

*Fellas v. The Republic* (1972) 3 C.L.R. 310;

*Kyriakides v. The Municipality of Nicosia* (1976) 3 C.L.R. 183;

*Orphanides v. The Improvement Board of Ay. Dhometios* (1979) 3 C.L.R. 466; 20

*Simonis v. The Improvement Board of Latsia*, (1984) 3 C.L.R. 109;

*Polyviou v. The Improvement Board of Ayia Napa* (1985) 3 C.L.R. 1058;

*Ionides v. The Republic* (1979) 3 C.L.R. 679; 25

*Tomboli v. The Cyprus Telecommunications Authority* (1982) 3 C.L.R. 149;

*Zambakides v. The Republic* (1982) 3 C.L.R. 1017;

*Andronikou v. The Republic* (1983) 3 C.L.R. 1280.

**Preliminary Objections. 30**

Preliminary objections by respondents to the effect that their letter dated 4.12.1980 in respect of which the re-

course has been filed is an act of a preparatory and not of executory nature and that it could not be made the subject of a recourse under Article 146 of the Constitution

5 *Ch Ierides* with *Chr Clerides*, for the applicants

*K Michaelides*, for the respondents

*Cur. adv. vult.*

10 TRIANTAFYLLIDES P. read the following decision. Counsel for the respondents has, at the present stage of these proceedings, raised two preliminary issues, namely that the letter of the respondents, dated the 4th December 1980, in respect of which this recourse has been made, is an act of preparatory, and not of executory, nature and that, consequently, it could not be made the subject-matter of  
15 this recourse under Article 146 of the Constitution, and that, in any event, such recourse has been abated by the subsequent to its filing conduct of the applicants

20 In relation to these preliminary issues there was adduced by the parties evidence by means of affidavits but, eventually, it did not prove necessary to go into disputed matters of fact in the course of pronouncing on such issues

25 By means of the aforementioned letter of the respondents, dated the 4th December 1980, the applicants were informed, inter alia, that the building in respect of which they had applied for a permit should not exceed the height of 47 feet.

30 On the 9th May 1981 the architect who was acting on behalf of the applicants submitted modified plans in compliance with the requirement for a height of 47 feet, instead of a height of 67 feet which was the height envisaged by the plans initially submitted by the applicants, but it was made clear by the said architect that the modified plans were submitted without prejudice to the rights of  
35 the applicants; and the respondents were, also, informed that the present recourse had, in the meantime, been filed on the 11th February 1981.

On the 26th June 1981 a building permit was issued to the applicants on the basis of the modified plans.

In relation to the first preliminary issue, namely whether or not the letter of the respondents dated the 4th December 1980, is only of preparatory, and not of executory, nature, it is useful to refer to, inter alia, the following case-law of our Supreme Court: *The Republic v. Demetriou*, (1972) 3 C.L.R. 219, 223, *Fellas v. The Republic*, (1972) 3 C.L.R. 310, 316, 317, *Kyriakides v. The Municipality of Nicosia*, (1976) 3 C.L.R. 183, 189, *Orphanides v. The Improvement Board of Ayios Dhometios*, (1979) 3 C.L.R. 466, 475, *Simonis v. The Improvement Board of Latsia*, (1984) 3 C.L.R. 109, 113, and *Polyviou v. The Improvement Board of Ayia Napa* (case 347/80 in which judgment was delivered on the 31st May 1985 and has not been reported yet).\*

In my view the contents of the said letter of the 4th December 1980, even if they could be found to be of a preparatory nature in certain other respects, they amount to a decision finally refusing a building permit for a building 67 feet high, as had been applied for by the applicants; and, therefore, such decision is of an executory nature and it can be challenged by means of the present recourse.

As regards the second preliminary issue, namely whether or not this recourse has been abated by subsequent to its filing conduct of the applicants, I am of the view that, since the applicants have expressly reserved their rights before accepting a building permit issued in accordance with their modified plans, it cannot be said that their recourse has been abated by their conduct subsequent to its filing; especially as by virtue of the refusal of the respondents to issue to the applicants a permit for a building 67 feet high they have been deprived ever since of the opportunity to erect such a building. Useful reference may be made, in this connection, to case-law such as *Ionides v. The Republic*, (1979) 3 C.L.R. 679, *Tomboli v. The Cyprus Telecommunications Authority*, (1982) 3 C.L.R. 149, *Zambakides v. The Republic*, (1982) 3 C.L.R.

\* Reported in (1985) 3 C.L.R. 1058.

3 C.L.R. *Asbestos Estates Ltd. v. M'ty of Nicosia Triantafyllides P.*  
1017 and *Andronikou v. The Republic*, (1983) 3 C.L.R.  
1280.

5 In the light of all the foregoing I find that the preliminary issues raised by counsel for the respondents are not well founded and, therefore, this recourse has to be heard on its merits.

*Order accordingly.*