AS TO THE ADMISSIBILITY OF

Application No. 19798/92
by AUGUSTIN S.A.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 30 November 1994, the following members being present:

MM. H. DANELIUS, Acting President
S. TRECHSEL
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 10 January 1992 by AUGUSTIN S.A. against Switzerland and registered on 6 April 1992 under file No. 19798/92;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the applicant company, may be summarised as follows.

The applicant company is registered in Switzerland. Its sole board member is Mr. O.M. Augustin, a Swiss citizen residing in Scuol in Switzerland. Before the Commission the applicant company is represented by Mr R. Viletta, a lawyer practising in Guarda.

A. Particular circumstances of the case

The applicant company is the proprietor of real property in the Sent municipality. In 1973/74 approximately 600 m2 of this real property was allocated to the building zone of the municipality. In 1988 the Sent municipality revised its building plan and again planned to attribute the area concerned to a building zone.

In 1990 the Government (Regierung) of the Canton of Graubünden approved the building zone in principle. However, it did not approve attribution to the building zone of the 600 m2 appertaining to the applicant company's real property. The Government considered in particular that the real property at issue amounted to a "spot or small building zone" (Punkt- oder Kleinbauzone) which had no connection to the remaining settlements (Siedlungsgefüge) of the municipality.

A "spot building zone" would only be possible where a municipality had remote farmhouses, but this was not the case in Sent.

The applicant company filed with the Federal Court (Bundesgericht) a public law appeal (staatsrechtliche Beschwerde) based on Section 84 para. 1 (b) of the Federal Judiciary Act (Organisationsgesetz; see below, Relevant domestic law). The appeal was directed against the failure of the Government of the Canton of Graubünden to approve attribution of its real property to the building zone.

In its public law appeal the applicant company maintained that the real property at issue complied with the requirements for a building zone, and that the opinion of the Government was arbitrary. Thus, the real property was already developed (erschlossen) and partly built over. It could not be said that the real property constituted a "spot building zone" as it was not at all isolated and distant from the centre of Sent. The fact that there was a forest zone between the real property and the village merely served the purpose of reducing the building zones.

On 26 March 1991 the Federal Court dismissed the public law appeal, the decision being served on 10 July 1991. The Court decided in so-called preliminary proceedings according to Section 92 para. 1 of the Federal Judiciary Act (see below, Relevant domestic law).

In its decision the Federal Court first recalled some principles of attributing real property in particular building zones. Thus, overly dimensioned building zones had to be avoided and an orderly settlement of the country had to be achieved. The separation of the building zone from the remaining area of the municipality aimed at limiting building activities to the building zone and avoiding dispersed settlements (Streubauweise). Small building zones, which promoted dispersed settlements, ran counter to the fundamental objective of separating the building zone from the non-building zone. The decision continues (excluding references to case-law):

<Translation>

> "The disputed part of the real property of the applicant company lies approximately 110 m to the West of the entrance to the Sent village, below the connecting road in the direction of Scuol. It is surrounded by real property which has been attributed to the remaining municipality area or the forest zone. There are no buildings in a surrounding circle of approximately 100 m and to the West of the real property of the applicant company in the direction of Scuol. The aerial photographs submitted by the applicant company also show a separation between the houses in the village zone and the real property which should be attributed to the building zone. Thus, the area is particularly peripheral, clearly separated from the village core of Sent, and surrounded by land which has not been built over. In respect of the zone for public buildings mentioned by the applicant company at the western village border above the road, which should serve to construct a car park, the Government expressly stated in its decision of approval of 7 May 1990 that only a subterranean construction would be possible. In the Report of the Cantonal Authority for Historical Monuments of the Canton of Graubünden of 9 September 1976, to which the applicant company refers, it is stated that the house to be built on the real property at issue would lie in a part which could not be seen below the road at the western village entrance. It further transpires from this report that the planned building should be constructed in its own rural area which would be separate from the village centre and would not further impair the impression of the village. Contrary to the opinion of the applicant company the real property at issue cannot be qualified as a mainly built

over-area, as it does not qualify for settlements ... This conclusion is also not altered by the applicant company's argument that its real property has been developed. According to the Federal Court's case-law, real property which has already been developed or contains buildings may or must, if necessary, be attributed to the non-building zone ... It cannot therefore be criticised as being unconstitutional if in these circumstances the Government considered that the real property at issue had no connection with the village zone for which reason it constituted an unlawful small building zone which could not be approved. For the Federal Court, which is not the highest planning authority ..., there is in the instant case no reason to interfere with the margin of appreciation which falls to the cantonal authorities when determining the limits of the various zones."

<Original>

"Der umstrittene Teil des Grundstücks der Beschwerdeführerin liegt ca. 110 m westlich des Dorfeingangs von Sent, unterhalb der Verbindungsstrasse Richtung Scuol. Er ist von Land umgeben, das dem übrigen Gemeindegebiet oder der Forstzone zugewiesen ist. In einem Umkreis von ca. 100 m and westlich des beschwerdeführerischen Grundstücks Richtung Scuol befinden sich keine Bauten. Die von der Beschwerdeführerin aufgelegte fotografische Luftaufnahme zeigt zudem eine klare Zäsur zwischen den Häusern in der Dorfzone and dem zur Einzonung beantragten Grundstücksteil. Es handelt sich demnach um ein ausgesprochen peripheres, vom Dorfkern von Sent deutlich abgesetztes Areal, das von unüberbautem Gelände umgeben ist. Im Zusammenhang mit der von der Beschwerdeführerin erwähnten Zone für öffentliche Bauten am westlichen Dorfrand oberhalb der Strasse, welche der Errichtung einer Autoeinstellhalle dienen soll, hat die Regierung in ihrem Genehmigungsentscheid vom 7. Mai 1990 ausdrücklich darauf hingewiesen, dass lediglich eine unterirdische Anlage in Frage komme. Im Bericht der kantonalen Denkmalpflege Graubünden vom 9. September 1976, auf den sich die Beschwerdeführerin beruft, wird festgestellt, dass sich das damals auf dem fraglichen Parzellenteil geplante Wohnhaus an einer wenig einsichtigen Stelle unterhalb der Strasse beim westlichen Dorfeingang befinde. Dem Bericht kann weiter entnommen werden, dass die geplante Baute in einer eigenen Landschaftskammer erstellt werden soll, die vom Dorfkern abgeschieden sei and das Ortsbild nicht weiter beeinträchtige. Entgegen der Meinung der Beschwerdeführerin kann daher der fragliche Grundstücksteil nicht zum weitgehend überbauten Gebiet gezählt werden, da er keine Siedlungsqualität besitzt ... Daran kann auch der Hinweis der Beschwerdeführerin, ihr Grundstück sei erschlossen, nichts ändern. Nach der bundesgerichtlichen Rechtsprechung dürfen oder müssen auch Grundstücke mit Erschliessungsanlagen oder Gebäuden allenfalls einer Nichtbauzone zugeteilt werden ... Wenn die Regierung unter diesen Umständen davon ausgegangen ist, das umstrittene Areal stehe mit der Dorfzone nicht mehr in Zusammenhang, weshalb es als gesetzwidrige Kleinbauzone nicht genehmigt werden könne, so ist dies verfassungsrechtlich nicht zu beanstanden. Für das Bundesgericht, das nicht oberste Planungsbehörde ist ... , besteht jedenfalls im vorliegenden Fall kein Anlass, in den Ermessenspielraum, der den kantonalen Behörden bei der Festsetzung der Zonengrenzen zusteht, einzugreifen."

B. Relevant domestic law

Section 84 para. 1 (a) of the Federal Judiciary Act (Organisationsgesetz) states:

<Translation>

"Against cantonal decrees and orders (decisions) an appeal may be lodged with the Federal Court:

a. against the violation of constitutional rights of the citizen."

<German>

"Gegen kantonale Erlasse oder Verfügungen (Entscheide) kann beim Bundesgericht Beschwerde geführt werden:

a. wegen Verletzung verfassungsmässiger Rechte der Bürger."

Section 91 of the Act states:

<Translation>

"1. As a rule, the public law decisions of the Federal Court are taken on the basis of written proceedings conducted by the Court President or an instructing judge.

2. Upon a party's request, and in case of special reasons, the Federal Court may exceptionally conduct an oral hearing."

<German>

"1. Die staatsrechtlichen Entscheidungen des Bundesgerichtes erfolgen in der Regel auf Grundlage eines durch den Präsidenten oder einen Instruktionsrichter zu leitenden schriftlichen Verfahrens.

2. Ausnahmsweise kann das Bundesgericht, wenn eine Partei es verlangt und besondere Gründe dafür vorliegen, eine mündliche Schlussverhandlung anordnen."

Section 92 of the Act states:

<Translation>

"1. A committee of three judges of the public and administrative law division may in non-public deliberations unanimously decide to reject manifestly inadmissible appeals or appeals which are indubitably unfounded.

2. The decision must be summarily reasoned."

<German>

"1. Ein Ausschuss von drei Mitgliedern der staats- and verwaltungsrechtlichen Abteilung kann ohne öffentliche Beratung bei Einstimmigkeit auf offensichtlich unzulässige Beschwerden Nichteintreten beschliessen oder Beschwerden, die er ohne irgendwelche Zweifel als unbegründet erachtet, abweisen.

2. Die Enscheidung ist summarisch zu begründen."

COMPLAINTS

1. The applicant company complains under Article 6 para. 1 of the Convention of a breach of its right of access to court. Thus, the Federal Court only examined the complaint of arbitrariness and had no full powers to review the facts and the law. It could not annul the contested decision, and it reached its decision only in summary proceedings. The applicant company also appears to complain of errors in the Federal Court's decision.

2. Under Article 6 para. 1 of the Convention the applicant company

also complains that no oral hearing was held by the Federal Court.

THE LAW

1. The applicant company complains under Article 6 para. 1 (Art. 6-1) of the Convention of the proceedings before the Federal Court and their outcome.

a) Insofar as the applicant company appears to complain of errors in the Federal Court's decision the Commission recalls that under Article 19 (Art. 19) of the Convention its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers on this point to its established case-law (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 p. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 p. 31, 45).

b) It is true that the applicants invoke Article 6 para. 1 (Art. 6-1) of the Convention which states, insofar as relevant, that "in the determination of his civil rights and obligations ... everyone is entitled to a ... hearing by (a) tribunal ...".

The Commission recalls the Convention organs' case-law according to which disputes over building plans amount to "the determination of ... civil rights" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (see Eur. Court H.R., Mats Jacobsson judgment of 28 June 1990, Series A no. 180-A, p. 12 et seq., paras. 30 et seq.). Article 6 para. 1 (Art. 6-1) of the Convention thus applies to the proceedings at issue.

c) The applicant company complains under Article 6 para. 1 (Art. 6-1) of the Convention of a breach of its right of access to court in that the Federal Court had no full powers to review the facts and the law.

The Commission recalls the case-law of the Convention organs according to which the Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 (Art. 6-1), or they do not so comply, but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 (see Eur. Court H.R., Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 16, para. 29).

In the present case after the Government of the Canton of Graubünden gave its decision, the applicant company seised the Federal Court by means of a public law appeal, and the latter dismissed the appeal.

In examining whether the Federal Court constituted a "tribunal" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, the Commission must consider the circumstances of the case before it (see Eur. Court H.R., Zumtobel judgment of 21 September 1993, Series A no. 268-A, para. 32).

In the present case, the applicant company complains that the Federal Court did not have full powers of review and only examined the complaint of arbitrariness.

However, the applicant company has not indicated any particular complaint which the Federal Court was not competent to examine in view of its limited jurisdiction. The Commission has therefore generally considered the complaints raised by the applicant company before the

Federal Court. It notes that in essence the applicant company in its public law appeal requested that the real property should be attributed to the building zone of the Sent municipality to which it effectively belonged.

In examining the Federal Court's reply to this complaint, the Commission notes, on the one hand, that the Court, in its decision of 26 March 1991, apart from leaving a certain margin of appreciation to the planning authorities, did not refrain from examining any issue on the ground that it declined jurisdiction (see Eur. Court H.R., Zumtobel judgment, loc. cit.).

On the other hand, the Federal Court explained, with reference to its previous case-law, why it considered that the real property did not appertain to the Sent building zone. Thus, the area at issue was surrounded by a forest zone and was clearly separated from the village. Relying inter alia on aerial photographs, the Federal Court concluded that the area could not be qualified as mainly built over. The fact that the area was developed or contained buildings could not alter this conclusion.

Thus, the Federal Court in fact gave a detailed and substantive reply to the applicant company's complaint. It cannot be said that the Court did not effectively consider and reply to the applicant company's complaints.

There is therefore no indication that the applicant did not have access to a court within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and this part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. Under Article 6 para. 1 (Art. 6-1) of the Convention the applicant company also complains that no oral hearing was held by the Federal Court.

However, according to the Convention organs' case-law, Article 6 para. 1 (Art. 6-1) of the Convention does not prevent a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public, although any such waiver must be made in an unequivocal manner and must not run counter to any important public interest (see Eur. Court H.R., Schuler-Zgraggen judgment of 24 June 1993, Series A no. 263, p. 19, para. 58).

In the present case, the Commission notes that according to Section 91 of the Federal Judiciary Act, in public law appeal proceedings the Federal Court will as a rule decide on the basis of written proceedings, and only exceptionally conduct an oral hearing.

In such circumstances, the applicant company could be expected to apply for an oral hearing if it attached importance to it. As no such request was raised, it can reasonably be considered that the applicant company unequivocally waived its right to a public hearing before the Federal Court (cf. Eur. Court H.R., Schuler-Zgraggen judgment, loc. cit., p. 20). There is also no indication that the dispute raised issues of public importance such as to make a hearing necessary.

It follows that the remainder of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Acting President of the

Second Chamber	Second Chamber
(K. ROGGE)	(H. DANELIUS)