AS TO THE ADMISSIBILITY OF

Application No. 26794/95
by Gottfried SCHERTLER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 4 September 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, 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 23 December 1992 by Gottfried SCHERTLER against Austria and registered on 21 March 1995 under file No. 26794/95;

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 applicant is an Austrian national, residing in Schwarzach. In the proceedings before the Commission he is represented by Mr. W. Weh, a lawyer practising in Bregenz.

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

The applicant is the owner of two parcels of land in Dornbirn. These parcels have Nos. 11010 and 11013/2 in the Dornbirn land register and are designated as free space (Freifläche-Freihaltegebiet) in the area zoning plan (Flächenwidmungsplan).

On 19 June 1990 the applicant, represented by counsel, applied to the Dornbirn municipality for a partition of his land (Grundstücksteilung). He also requested that the designation of his land should be changed to building land (Bauland). He attached a map which had been prepared by a civil engineer, according to which a street was to be built to develop the land at issue. North of it three parcels to be used for commercial purposes were to be created, while south of it seven parcels for the construction of houses were to be established.

On 8 January 1991 the Dornbirn Town Council (Stadtrat) refused the applicant's request for a partition of his land on the ground that it was contrary to the area zoning plan, as it was aimed at creating

parcels for building purposes. However, land designated as free space had to be kept free of development.

On 6 March 1991 the Dornbirn Town Representation (Stadtvertretung) dismissed the applicant's appeal. It referred to S. 34 of the Vorarlberg Planning Act (Raumplanungsgesetz), according to which permission for the partition of land had to be refused, inter alia, if it was contrary to the relevant area zoning plan. It confirmed the Town Council's view that the applicant's proposal for the partition of parcels No. 11010 and 11013/2 aimed at developing them and was, therefore, contrary to the area zoning plan. The Town Representation found that the applicant's submissions mainly contained a proposal to change the designation of his land. In the present proceedings, however, the authorities had to apply the area zoning plan as it was currently in force.

On 10 May 1991 the Dornbirn District Administrative Authority (Bezirksverwaltungsbehörde) dismissed the applicant's further appeal.

On 27 June 1991 the applicant lodged an appeal with the Constitutional Court (Verfassungsgerichtshof). He claimed that his right to property and his right to a fair trial had been violated. He submitted in particular that the proceedings relating to his request for partition of his land concerned his civil rights and argued that S. 34 para. 2 (a) of the Vorarlberg Planning Act was unconstitutional because it referred to the existing area zoning plan. He complained that there was no right to a decision as regards his request to have the designation of his land changed. Moreover, the applicant claimed that the present designation of his land as provided for in the area zoning plan was unlawful. He claimed in particular that the area on either side of his land had been developed in the last years. There were also plans to construct a road on his land and, according to him, the true reason for delaying the introduction of proceedings to amend the area zoning plan was to keep the price down in case of a future expropriation.

On 25 November 1991 the Constitutional Court refused to deal with the applicant's complaint for lack of sufficient prospects of success. As regards the applicant's complaint about the alleged unlawfulness of the area zoning plan, the court referred to its constant case-law concerning the discretion of the planning authorities. It noted that the applicant's submissions were limited to arguments according to which another designation of his land would be more expedient. However, he had not pointed out any provision of the Vorarlberg Planning Act which would be violated by the present designation. Subsequently, upon the applicant's request, the Constitutional Court referred the case to the Administrative Court (Verwaltungsgerichtshof).

On 24 March 1992 the applicant supplemented his complaint to the Administrative Court. He maintained that the area zoning plan was unlawful. In this respect he referred to his submissions to the Constitutional Court and repeated that there was no objective reason for the present designation of his land. Moreover, he complained that the area zoning plan should not be regarded as a decree (Verordnung), i.e. a rule of general applicability, but as an individual decision (Bescheid). Thus, it would be possible to challenge it before the Administrative Court as being unlawful.

On 21 May 1992 the Administrative Court rejected the applicant's appeal on the ground that it was not competent to deal with it. It found that an area zoning plan was a rule of general applicability and that its competence was limited to reviewing the lawfulness of individual decisions.

The decision was served on the applicant on 29 June 1992.

COMPLAINTS

1. The applicant complains that his request for partition of his land was not determined by a tribunal within the meaning of Article 6 para. 1 of the Convention. He claims that the contested proceedings concerned his civil rights and that there was a dispute as regards the question whether his request was contrary to the area zoning plan.

2. The applicant complains under Article 1 of Protocol No. 1 that the refusal of his request for a partition of his land violated his right to property. He submits in particular that the designation of his land as free space is arbitrary and only serves to keep the compensation low in case of a future expropriation for the purpose of constructing a road.

THE LAW

1. The applicant complains that his request for partition of his land was not determined by a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, which so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

In determining whether the applicant's rights under Article 6 para. 1 (Art. 6-1) of the Convention have been violated in the proceedings complained of, the Commission must first consider whether these proceedings involved a determination of the applicant's civil rights within the meaning of this provision.

The applicability of Article 6 (Art. 6) depends on whether there was a dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, and, if so, whether this "right" was of a "civil" character within the meaning of Article 6 para. 1 (Art. 6-1). In particular, the dispute must be genuine and serious, it may relate not only to the actual existence of a right but also to its scope and manner of its exercise and, finally, the results of the proceedings concerning the dispute at issue must be directly decisive for such a right (see Eur. Court H.R., Allan Jacobsson judgment of 25 October 1989, Series A no. 163, p. 19, paras. 66-67).

The Commission recalls that a dispute about an owner's use of land for purposes other than those listed in the relevant rules does not determine the owner's civil rights, but concerns the application of public law regulations to the permitted use of land (cf. No. 10471/83, Dec. 9.12.85, D.R. 45 p. 113; No. 26085/95, Dec. 28.2.96 unpublished). The Commission has also held that a decision rejecting a request for amendment of an existing building plan does not involve a determination of civil rights (cf. No. 11844/85, Dec. 29.2.88, D.R. 55 p. 205).

From the above case-law it follows that civil rights within the meaning of Article 6 (Art. 6) of the Convention were involved where the applicants had had, or could arguably be said to have had, rights recognised under domestic law which were revoked or denied by the decisions of the administrative authorities (cf. No. 26085/95, Dec. 28.2.96 unpublished).

In the present case the authorities refused the applicant's request for a partition of his land on the ground that it was aimed at creating parcels for building purposes and was, therefore, contrary to the applicable area zoning plan, according to which it was designated as free-space. The Commission notes that the applicant did not contest these findings. In fact he himself had joined a request to change the designation of his land to building land to his request for partitioning it. In the proceedings before the Constitutional Court he

only claimed that the regional planning law was unconstitutional in that it referred to the existing area zoning plan. Moreover, he complained that there was no right to a decision to have a change of an existing area zoning plan. The Constitutional Court noted that he had not advanced any argument to support his allegation of unconstitutionality and that his submissions were limited to complaining that another designation of his land would be more expedient.

In these circumstances, the Commission finds that there was no genuine and serious dispute over a right of the applicant. He had no right to have his land partitioned contrary to the existing area zoning plan nor did he have a right to have the area zoning plan amended to change the designation of his land.

The Commission, therefore, considers that the proceedings at issue did not involve a determination of the applicant's civil rights within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 1 of Protocol No. 1 (P1-1) that the refusal of his request for a partition of his land violated his right to property. He submits in particular that the designation of his land as free space is arbitrary and only serves to keep the compensation low in case of a future expropriation for the purpose of constructing a road.

Before stating an opinion as to whether this part of the application reveals any appearance of a violation of the applicant's right to property, the Commission must determine whether it is barred by the ground of inadmissibility set forth in Article 27 para. 1 (b) (Art. 27-1-b) of the Convention, which provides as follows:

> "1. The Commission shall not deal with any petition submitted under Article 25 (Art. 25) which:
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> ...
>
> b. is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information."

The Commission notes that the applicant has already brought an application relating to the same two parcels of land, namely Nos. 11010 and 11013/2 in the Dornbirn land register. It was registered under No. 26575/95 and has been declared inadmissible on 26 June 1996. In that application the applicant also complained, albeit with regard to the refusal of a building permit, that his right to property had been violated. He submitted the same argument concerning the alleged arbitrariness of the designation of his land as free-space as in the present application.

The Commission, therefore, considers the applicant's complaint is substantially the same as the complaint the Commission has already examined in Application No. 26575/95.

It follows that this part of the application falls within the scope of Article 27 para. 1 (b) (Art. 27-1-b) of the Convention and must accordingly be rejected pursuant to this provision.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber