AS TO THE ADMISSIBILITY OF

Application No. 28569/95
by U. D.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 10 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 7 September 1995 by U. D. against Austria and registered on 18 September 1995 under file No. 28569/95;

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, born in 1941, is an Austrian national residing in Gloggnitz. In the proceedings before the Commission she is represented by Mr. B. Binder, a lawyer practising in Linz.

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 of about 3,300 square meters, which are situated in a residential area in the centre of Linz. According to the 1958 development plan (Teilregulierungsplan) these parcels were designated as building land.

On 24 September 1987 the Linz Municipal Council (Gemeinderat) issued a zoning plan (Flächenwidmungsplan) under the 1972 Upper Austrian Regional Planning Act (Raumplanungsgesetz - "the 1972 Planning Act") which designated the applicant's property as a green area (Grünland). In accordance with the relevant procedural rules, the zoning plan was published on the notice board of the Linz municipality. It entered into force on 10 May 1988.

The applicant only learned later about the change of designation of her land. Thereupon, she introduced two sets of proceedings, one in which she requested compensation and one in which she requested a permit for a building site (Bauplatzbewilligung). In these proceedings the applicant was represented by counsel.

The compensation proceedings

On 23 March 1993 the applicant requested compensation for the loss of value of her property. She relied on S. 25 para. 2 of the 1972 Planning Act, which provides that the municipality has to compensate the land owner for the loss of value caused by the issuing or changing of a zoning plan, if his or her parcel is not designated as building land although it is suited for building purposes and is surrounded by building land. The applicant stated that the one-year time-limit for asserting the compensation claim provided for by the above Act was too short and that she intended to have its constitutionality reviewed.

On 17 August 1993 the Linz District Administrative Authority (Bezirksverwaltungsbehörde) dismissed the applicant's request. It referred to S. 25 para. 3 of the 1972 Planning Act according to which a compensation claim becomes extinct unless it is asserted within one year after the entry into force of the relevant zoning plan.

On 3 June 1994 the Upper Austrian Regional Government (Landesregierung) rejected the applicant's appeal on the ground that, following the entry into force of the 1994 Upper Austrian Regional Planning Act on 1 January 1994, it was no longer competent to decide. Appeals against decisions of the District Administrative Authority concerning compensation claims had to be lodged with the District Court (Bezirksgericht).

On 29 November 1994 the Constitutional Court (Verfassungs-gerichtshof) refused to deal with the applicant's complaint.

On 28 March 1995 the Administrative Court (Verwaltungs-gerichtshof) dismissed the applicant's complaint. The decision was served on 19 April 1995.

The proceedings under the Upper Austrian Building Act (Bauordnung)

On 25 March 1993 the applicant requested a permit for a building site, which is a precondition for a building permit. She submitted that she intended to construct a house.

On 21 June 1993 the Linz Building Office (Baurechtsamt) dismissed the applicant's request on the ground that it was contrary to the zoning plan, which had designated the two parcels of land as a green area. The Building Office further noted that a permit for a building site was not required as regards buildings which were in conformity with the designation as green area, in particular buildings serving agricultural purposes.

On 28 October 1993 the Linz City Executive (Stadtsenat) dismissed the applicant's appeal, confirming the reasons given by the first instance authority. As regards the applicant's submissions that the zoning plan was not in conformity with the aims of the 1972 Planning Act and was therefore unlawful, the City Executive noted that the zoning plan was a decree (Verordnung) which had been duly published, and by which it was therefore bound.

On 2 February 1994 the Upper Austrian Regional Government dismissed the applicant's further appeal.

On 26 September 1994 the Constitutional Court refused to deal

with the applicant's complaint for lack of sufficient prospects of success.

On 21 February 1995 the Administrative Court dismissed the applicant's complaint. It noted the applicant's argument, which she had already advanced before the Constitutional Court, that the zoning plan was contrary to S. 23 para. 2 of the 1972 Planning Act, as the change in the designation of her two parcels of land did not serve public interest. It also noted her request that the Administrative Court refer the question whether the zoning plan was lawful to the Constitutional Court.

The Administrative Court acknowledged that the designation of the applicant's land as green area, though not amounting to an expropriation, placed far-reaching restrictions on her property and thus had to be justified by public interest. However, there was no doubt that there was a public interest in creating or preserving green zones in dwelling areas. According to a report of the Linz Planning Office there had not been a particular need for building parcels at the time when the zoning plan was issued. Thus, this interest had been outweighed by those interests of town planning which aimed at preserving existing green areas. The fact that the applicant's parcels were the only ones of those designated as green area which were owned by a private individual did not disclose any appearance of discrimination. In conclusion, the Administrative Court found that there was no indication that the zoning plan was not in accordance with the provisions of the 1972 Planning Act.

The decision was served on 30 March 1995.

COMPLAINTS

1. The applicant complains that the change of designation of her two parcels of land from building area to green area amounted to an expropriation, as she could neither use her property for building purposes nor, given its location in town, for agricultural purposes. Moreover, she claims that the change of designation was not justified by public interest. Further, she complains that she was de facto denied compensation as the zoning plan was not served on her and the one-year time-limit for asserting a compensation claim was inadequately short. She also submits that the change of designation of her land discriminated against her on account of her status as a property owner. She alone had to bear the disadvantage of this decision while the general public benefited from it. She invokes Article 1 of Protocol No. 1 alone and in combination with Article 14 of the Convention.

2. The applicant complains that she did not have access to a court or any effective remedy against the zoning plan which changed the designation of her property. She invokes Articles 6 and 13 of the Convention.

THE LAW

1. The applicant complains that the change of designation of her two parcels of land from building area to green area amounted to an expropriation, which was not justified by public interest and for which she was not compensated. She also claims that she was discriminated against on account of her status as a property owner. She invokes Article 1 of Protocol No. 1 (P1-1) alone and in combination with Article 14 (P1-1+14) of the Convention.

a. The Commission will first examine the applicant's complaints under Article 1 of Protocol No. 1 (P1-1), which reads as follows:

"Every natural or legal person is entitled to the peaceful

enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Commission finds that the change of designation of the applicant's property constitutes an interference with her peaceful enjoyment of her possessions. However, contrary to the applicant's allegations, the planning decision at issue did not concern a deprivation of property within the meaning of paragraph 1 of Article 1 (Art. 1-1). Firstly, there was no formal expropriation. Secondly, the applicant's submissions do not suffice to show that the land is without any meaningful alternative use. In particular it appears from the decision of 21 June 1993 by the Linz Building Office that the designation as green area does not amount to an absolute building prohibition. Nor has it been shown that the property has been rendered worthless. Thus, the interference must be considered as a control of the applicant's use of her property falling within the scope of the second paragraph of this Article (see Eur. Court HR, Fredin v. Sweden judgment of 18 February 1991, Series A no. 192, pp. 14-15, paras. 42-47).

The Commission recalls that this paragraph requires that the interference is lawful and serves a legitimate aim. Moreover, the interference must be proportionate, achieving a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. There must be a reasonable relationship between the means employed and the aim pursued, whereby the State enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see Fredin v. Sweden judgment loc. cit., p. 16 et seq., paras. 48-51).

As regards the lawfulness of the interference, the Commission notes that the Administrative Court in its decision of 21 February 1995 dismissed the applicant's complaint that the zoning plan which had changed the designation of her two plots of land was contrary to the 1972 Planning Act.

The Commission further considers that the interference pursued a legitimate aim, namely the preservation of green areas within an urban dwelling area.

As regards the proportionality of the interference, the applicant claims that the change of designation of her property was not justified by public interest. She also complains that she was de facto denied compensation as the zoning plan was not served on her and the one-year time-limit for asserting a compensation claim was inadequately short.

The Commission notes that the Administrative Court in its decision of 21 February 1995, having examined the applicant's arguments in detail, found that the change of designation was justified by public interest. Moreover, the relevant provisions of the 1972 Planning Act provided for compensation. Although a one-year time-limit for asserting the compensation claim may appear short, given that it starts with the entry into force of the zoning plan following its publication on the notice board of the municipality, it still falls within the wide margin of appreciation left to the State in such matters. In the circumstances of the case, the change of designation of the applicant's land does not

appear to be disproportionate.

In conclusion, the Commission finds that there is no appearance of a violation of the applicant's right to the peaceful enjoyment of her possessions as guaranteed by Article 1 of Protocol No. 1 (P1-1).

b. As regards Article 14 of the Convention in combination with Article 1 of Protocol No. 1 (Art. 14+P1-1), the Commission recalls that a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised (Eur. Court HR, Darby v. Sweden judgment of 23 October 1990, Series A no. 187, p. 12, para. 31). Having regard to the above considerations, the Commissions finds no indication of discrimination in the present case.

Therefore, the Commission finds that there is no appearance of a violation of Article 14 of the Convention in combination with Article 1 of Protocol No. 1 (Art. 14+P1-1).

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

2. Further, the applicant complains that she did not have access to a court or any effective remedy against the zoning plan which changed the designation of her property. She invokes Articles 6 and 13 (Art. 6, 13) of the Convention.

Article 6 (Art. 6) of the Convention, so far as relevant, reads as follows:

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

The Commission notes in the first place that the Municipal Council which issued the zoning plan cannot be regarded as a tribunal within the meaning of Article 6 para. 1 (Art. 6-1). Further, it appears that the applicant could not have a review of the zoning plan in abstracto by the Constitutional Court, but could only raise the question of its lawfulness in the context of administrative proceedings. However, the Commission has, in a similar case, found that this limitation of access to the Constitutional and the Administrative Court does not impair the "right to a court" as guaranteed by Article 6 (Art. 6) of the Convention (Nos. 21022/92 and 21023/92, Berger and Hüttaler v. Austria, Dec. 7.4.94, unpublished).

The applicant, in the proceedings relating to her request for a permit for a building site, could appeal to the Constitutional Court and to the Administrative Court and put the question before them whether the designation of her land was in accordance with the provisions of the 1972 Planning Act. The Commission recalls that the proceedings for the consideration of such appeals will be consistent with Article 6 para. 1 (Art. 6-1) only if conducted before "judicial bodies which have full jurisdiction" (Eur. Court HR, Zumtobel v. Austria judgment of 21 September 1993, Series A no. 268-A, p. 13, para. 29).

In the present case, the Constitutional Court declined to deal with the applicant's complaint. However, the Administrative Court considered the applicant's arguments relating to the alleged unlawfulness of the zoning plan on their merits, point by point, without having to decline jurisdiction in replying to them or in ascertaining various facts (Zumtobel v. Austria judgment, loc. cit, p. 14, para. 32). In conclusion, the Commission finds that the Administrative Court, in the circumstances of the case, fulfilled the requirements of Article 6 para. 1 (Art. 6-1) of the Convention.

Finally, as the Commission has examined the proceedings under Article 6 para. 1 (Art. 6-1), there is no need for the matter to be considered in the context of Article 13 (Art. 13), which has less stringent requirements (cf. No. 24142/92, Dec. 6.4.95, D.R. 81, p. 108).

It follows that this part 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.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber