

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 30009/05
by Gabriele ÜBLEIS
against Austria

The European Court of Human Rights (First Section), sitting on 11 October 2011 as a Chamber composed of:

Nina Vajić, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 3 August 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Gabriele Übleis, is an Austrian national who lives in Prambachkirchen. She was represented before the Court by Mr F.X. Berndorfer, a lawyer practising in Linz. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

A. The circumstances of the case

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

The applicant is the owner of two plots of land of about six-thousand square metres in the Wilhering municipality. The property, plot nos. 23 and 24 on the Wilhering land register, had been designated as building land since the early 1950s. By contract of 27 November 1995 the applicant's parents transferred the property to her. At the same time they transferred other plots of building land to her sister. The applicant and her sister considered that the plots of land each of them had received were of approximately equal value and therefore made written statements waiving their right to a compulsory portion of their parents' estate.

1. Proceedings concerning the review of the area zoning plan

Meanwhile, on 1 January 1994 the new Upper Austrian Land Planning Act (*Raumordnungsgestz* – hereinafter, "the Land Planning Act") had entered into force. Its section 39(3) had obliged all municipalities to review existing area zoning plans (*Flächenwidmungspläne)* within five years.

On 16 February 1995 the Wilhering Municipality, pending the review of the area zoning plan, issued a temporary building prohibition (*Bausperre*) for parts of the municipal area. Pursuant to the Upper Austrian Building Act the temporary building prohibition is a decree (*Verordnung*) which has to be made public. Based on the recommendations of land planning expert E., the review of the area zoning plan concerned forty-seven plots of land, including the two plots of land at issue, which were at that time still owned by the applicant's parents. The temporary building prohibition was extended twice.

On 23 November 1998 the mayor of the Wilhering municipality informed the applicant that a change in the area zoning plan was envisaged which would lead to the designation of her two plots of land as green land (*Grünland*). He gave her the opportunity to submit written comments, which she did on 19 January 1999. She opposed the change, giving arguments for maintaining the designation of her plots of land as building land.

By a decision of 4 February 1999 the Wilhering municipal council (*Gemeinderat*) amended the area zoning plan. As a result the applicant's property was designated as green land. In its considerations the municipal council set out on a general level that the reserve of building land by far exceeded the projected need. In respect of the applicant's plots of land, it noted in particular:

> "The objection of Ms Gabriele Übleis, owner of plot nos. 23 and 24 [...] should be rejected, since in accordance with Section 21 of the Upper Austrian Land Planning Act only areas that are suitable for construction based on their natural and

infrastructural conditions may be classified as building land. Such land is required in order to meet the demand of the municipality for building land which has been projected by the municipality for a planning period of 5 years. Areas that are unsuitable for appropriate construction on account of their natural conditions may not be designated as building land. This applies also to areas whose development would entail unreasonable costs.

In the opinion of the local planning expert and author of the plan, the plots of land at issue lack suitability as building land (just like the rest of the areas re-designated as green land in accordance with the area zoning plan amendment) for the following reasons: building development would entail unreasonable costs owing to the steep gradient of the slope; the suitability of the property as a housing area is limited on account of the emission load of the Eferdinger Federal Road; because of its position on a northern slope with adjacent woodland, only reduced insulation is possible; in general, construction on the steep Kürnberg hills descending to the river Danube would violate section 2(1) (protection of the environment) and paragraph 10 (preservation of the typical settlement structure and landscape) of the Upper Austrian Land Planning Act."

Of the forty-seven plots of land concerned by the review of the area zoning plan, a total of thirty-seven were re-designated as green land.

The area zoning plan amendment was approved on 30 March 1999 by the Upper Austrian Regional Government (*Landesregierung*), acting as the supervisory authority for the municipality, and entered into force on 10 April 1999.

2. Proceedings concerning the application for a building-site permit

Under Austrian law a land owner cannot challenge an area zoning plan directly before the Constitutional Court, but has to raise the question of its lawfulness in the context of administrative proceedings, for instance in proceedings on a request for a building permit (*Baugenehmigung*) or a building-site permit (*Bauplatzbewilligung*) (see relevant domestic law below).

On 10 April 2002 the applicant applied to the Wilhering municipality for a permit for a building site for the two plots of land at issue. She claimed in essence that the change of designation of her property had been unlawful. In support of this argument she submitted an opinion by a land planning expert, N., dated 14 February 2002. The conclusion of the latter was that the two plots of land were suitable for construction.

The mayor refused the application by a decision of 24 May 2002 noting that the granting of a building-site permit would be contrary to the property's designation as green land.

The applicant appealed on 12 June 2002. She referred to the written comments she had made in the proceedings concerning the amendment of the area zoning plan and complained that the authority had failed to examine her arguments. Furthermore, she alleged that the change of designation was unlawful for the following reasons: Firstly, the re-designation of her property as green land was not an appropriate means of achieving the

declared aim of reducing the despoliation of the landscape, given the position of her property close to the centre of the municipality. Secondly, changes in the area zoning plan were subject to restrictions. Only very significant public-interest reasons could prevail over the individual interest of preserving acquired rights. The main aim pursued by the change to the area zoning plan, namely to reduce the excess of building land, did not have such preponderant weight. Thirdly, there were no new facts which would justify the change of designation, since the excess of building land had existed for decades and had been aggravated by the municipality itself newly designating numerous plots of land in the past. Fourthly, the authority had failed to take the applicant's interests into account. Her property had suffered a very considerable loss of value for which she had not been compensated under Section 38 of the Upper Austrian Land Planning Act. Finally, no uniform criteria had been applied as regards the re-designation of building land as green land, since other plots of land in a comparable position and with comparable topography, including two plots of land adjacent to hers, had not been re-designated.

By a decision of 7 November 2002 the Municipal Council dismissed the applicant's appeal. It noted that the applicant's arguments concerned the underlying decision to amend the area zoning plan and could not be taken into account in the proceedings at issue.

The applicant filed an objection (*Vorstellung*) against this decision in which she repeated the arguments she had submitted in her appeal.

On 17 February 2003 the Upper Austrian Regional Government dismissed the applicant's objection. It noted that the area zoning plan was a decree, that is, a binding act of subordinate legislation. While the applicant was entitled to submit arguments as regards its lawfulness, it was not for the administrative authorities but for the Constitutional Court (*Verfassungsgerichthof*) to examine those arguments.

3. Proceedings before the Constitutional Court

The applicant lodged a complaint with the Constitutional Court against the refusal of the building-site permit, challenging the lawfulness of the underlying area zoning plan. She claimed that the building authorities' decisions violated her right to property and the principle of non-discrimination in that the refusal of a building-site permit had been based on an unlawful area zoning plan. In that regard, she repeated all the arguments she had already submitted in the course of the proceedings.

On 9 December 2004 the Constitutional Court dismissed the applicant's complaint. It noted that the municipality had based the re-designation of the applicant's property on the undisputed excess of building land and on its lack of suitability for construction. It had adduced specific reasons for finding that the applicant's plots of land were unsuitable for construction, such as their position on a steep slope, the unreasonable costs of

development because of that position, the interests of environmental protection in preserving the woods on the slope, the emission load of the nearby Federal Road and the limited possibilities for insulation. The expert opinion of N. submitted by the applicant had supported her position only in part. In particular, it had not contested the unreasonable costs of developing the property because of its position on a steep slope. Nor had it contradicted the municipality's argument in respect of emissions from the nearby Federal Road.

In sum, the municipality had rightly come to the conclusion that the previous designation of the applicant's property as building land was contrary to the principles laid down in section 2(1) and (10) of the Land Planning Act. In such a case Section 39(3) of the Land Planning Act obliged the municipality to change the designation of the plots of land at issue without a further weighing of interests as this task had already been carried out by the legislator. The question whether or not it was lawful to maintain the designation of two neighbouring plots of land as building land did not fall to be examined in the present proceedings.

The Constitutional Court's decision was served on the applicant's counsel on 3 February 2005.

B. Relevant domestic law and practice

In Upper Austria land planning is governed by the 1994 Upper Austrian Land Planning Act. Area zoning plans are issued by the municipalities. Under Austrian law area zoning plans and any amendments thereto are regarded as decrees, that is, binding acts of subordinate legislation. The lawfulness of decrees can only be reviewed by the Constitutional Court (Article 139 of the Federal Constitution).

Proceedings in which area zoning plans are issued or amended are not ordinary administrative proceedings and the land owners affected by them, while having the right to submit comments, are not parties to the proceedings. They are not entitled to challenge the area zoning plan directly before the Constitutional Court if it is possible to institute administrative proceedings, for instance building proceedings.

If an area zoning plan is the basis for refusing a building permit or a building-site permit, which is a preliminary decision on the suitability of land for construction purposes, the persons concerned are expected to assert their rights in the building proceedings, in which they can ultimately challenge the lawfulness of the area zoning plan before the Constitutional Court.

The relevant provisions of the 1994 Upper Austrian Land Planning Act (*Raumordnungsgesetz*) state as follows:

Section 2
Objectives and principles of land planning

"(1) The objectives of the Land Planning Act are, in particular:

1. protecting the environment against adverse impact as well as safeguarding or restoring a natural balance;

...

10. preserving and shaping settlement structures, including the development of settlements, and preserving typical settlement structures and landscapes ..."

Article 18
Area zoning plan and local development concept

"(1) In implementing its tasks of local land planning, each municipality shall issue the area zoning plan and the local development concept by a decree, and manage and review them at regular intervals. The local development concept shall be prepared for a planning period of ten years, the area zoning plan for a planning period of five years."

Section 21
Building land

"(1) Only such areas may be designated as building land as are suited for construction based on their natural and infrastructural conditions. They have to meet the demand for building land of the municipality projected by the municipality for a planning period of five years. Areas lacking suitability for adequate construction owing to natural conditions (e.g. ground-water level, flood hazard, rock fall, soil characteristics, risk of avalanche) may not be designated as building land. This applies also to areas whose development would entail unreasonable costs ..."

Section 30
Green land

"(1) All areas not designated as building land or transport areas shall be designated as green land."

Section 39
Transitional provisions

"(3) After the entry into force of this Regional Act, each municipality shall review the area zoning plan and adopt an area zoning plan together with the local development concept no later than five years after the entry into force of the Regional Act. Furthermore, the area zoning plan shall be reviewed to ascertain whether the building land areas designated in the area zoning plan but not yet used for the designated purpose still conform to the principles of this Regional Act. Building land areas whose designation contravenes the aforementioned principles shall be designated as building land or as green land, as appropriate, by changing the area zoning plan."

Under section 38(1) and (2) of the Land Planning Act, compensation for a change of designation is only available in specific circumstances, essentially when the owner of land relying on the designation of the property as building land has already incurred costs in view of intended

construction which is then made impossible by the amendment of the area zoning plan, or when a plot of land which is suited for construction within the meaning of section 21(1) and is entirely or mostly surrounded by building land is not designated as building land and suffers a loss of value as a result.

COMPLAINTS

1. The applicant complained under Article 1 of Protocol No.1 of the Convention about the change of designation of her plots of land from building land to green land. She submitted, in particular, that the authorities had failed to advance sufficient reasons for the change of designation and that the interference with her possessions was disproportionate since she had not received any compensation.

2. The applicant complained under Article 6 that she did not have access to a tribunal. The Mayor, the Municipal Council and the Regional Government were administrative authorities and the Constitutional Court's scope of review was limited, since it was bound by the establishment of facts carried out by the lower authorities. Finally, the applicant also complained that the proceedings had been unfair in that the authorities had failed to take her arguments into account. Moreover, they had failed to give sufficient reasons for their decision. The main aim pursued by the change of designation of her property had been to reduce the amount of building land. However, she alleged that the authorities had failed to set out the criteria they applied when making the choice of which plots of land were to be changed to green land and which were to be maintained as building land.

THE LAW

1. The applicant complained that the change of designation of her plots of land violated Article 1 of Protocol No. 1, which provides 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 Government contended, firstly, that it was open to doubt whether there had been an interference with the applicant's rights under Article 1 of

Protocol No. 1. They explained that the designation of a plot of land was not in itself decisive for the question whether it could be used for building purposes. Before issuing a building-site permit, the authorities had to ascertain whether the plot of land was actually suitable for appropriate and orderly construction. In the circumstances of the applicant's case, given the topography and other conditions of the plots of land at issue, it was by no means sure that the applciant would have obtained a building-site permit, even if the designation had not been amended.

In the alternative, assuming that there had been an interference with the applicant's right to peaceful enjoyment of her possessions, the Government argued that it had been compatible with the requirements of Article 1 of Protocol No. 1. It had had a legal basis in section 39(3) of the Land Planning Act and served typical public interests in the area of land planning, namely the protection of the environment and the protection of the settlement structure and landscape. The interference had also been proportionate: a prerequisite for an amenmdent of the area zoning plan under section 39(3) of the Land Planning Act was that the plot of land at issue had not been used according to its designation. In the present case the plots of land had not been used for building purposes for more than forty years and the re-designation had been based, among other things, on their lack of suitability for construction. Moreover, when the applicant's parents had transferred the plots of land to her in November 1995, a temporary building prohibition with a view to reviewing their designation had already taken effect. Finally, the applicant had not been the only person affected by the re-designation. A total of forty-seven plots of land had been subject to a review of their designation and thirty-seven had in fact been re-designated as green land.

The applicant did not submit further observations apart from maintaining her submissions. In essence she asserted that when she had received the property at issue from her parents, she had assumed that the plots were building land of approximately equal value to the plots of land transferred to her sister at the same time. She claimed that the re-designation of her property amounted to a *de facto* deprivation of property. The measure had been disproportionate as the two plots of land could no longer be used for construction purposes and had therefore suffered a huge loss of value.

In the Court's view the change of designation of the applicant's plots of land does not amount to a deprivation of property within the meaning of paragraph 1 of Article 1 of Protocol No. 1 but constitutes an interference with her right to the peaceful enjoyment of her possessions, which falls to be considered under the second paragraph of that Article (see *Haider v. Austria* (dec.), no 63413/00, 29 January 2004, with further references).

The Court reiterates that the second paragraph of Article 1 of Protocol No. 1 allows Contracting States to control the use of property in accordance with the public interest, by enforcing such laws as they deem necessary for

the purpose, which means that there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 64, Series A no. 52, and *Allan Jacobsson v. Sweden (no. 1),* 25 October 1989, § 54, Series A no. 163). As regards the choice of the detailed legal rules implementing a measure for the control of the use of property, the domestic legislature must have a wide margin of appreciation.

In the present case, the Court notes that the amendment of the area zoning plan was based on the relevant provisions of the Land Planning Act, namely on section 39(3) of that Act, which obliged municipalities to carry out a review of the former area zoning plan within five years, and on section 2 of the Land Planning Act, which set out the relevant planning aims.

Furthermore, the change of designation of the applicant's plot of land pursued public interests, namely the protection of the environment and preservation of the typical settlement structure and landscape.

Turning to the proportionality of the measure, the Court notes in particular the following circumstances: It is undisputed – and this was indeed a pre-condition for the amendment of the area zoning plan – that the plots of land at issue, which had been designated as building land in the 1950s, had not been used for construction. More importantly, when the plots of land at issue were transferred to the applicant by her parents in November 1995 the building prohibition which had been issued in February 1995 was already in force. The applicant's main argument is that she was not aware of the pending review of the area zoning plan and assumed that her plots of land were of equal value to the property transferred to her sister at the same time. However, the Court notes that a building prohibition is a decree which has to be made public. The applicant could and should therefore have known that the plots of land at issue might undergo a change of designation. She could therefore not rely on their designation remaining unchanged, nor could she, pursuant to section 38 of the Land Planning Act, expect to receive compensation in case of a change of designation. Furthermore, contrary to the applicant's assertion, there is no indication of arbitrariness: The municipality gave detailed reasons for the change of designation of the applicant's property. Nor can it be said that the applicant was singled out for such a measure: out of the forty-seven plots of land concerned by the review of the area zoning plan, thirty-seven were re-designated as green land. In these circumstances, the Court finds that the amendment of the area zoning plan, which resulted in a re-designation of the applicant's land, did not impose an excessive burden on her (see, *mutatis mutandis*, *Haider* (dec.) cited above, and *Berger and Hüttaler v. Austria* (dec.), nos. 21022/92 and 21023/92, Commission decision of 7 April 1994, which concerned the re-designation of building land as undeveloped land and green belt, respectively).

Having regard also to the authorities' wide margin of appreciation when implementing their land-planning policy, the Court finds no appearance of a violation of Article 1 of Protocol No. 1.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. The applicant raised a number of complaints under Article 6 § 1 of the Convention, which, as far as material in the present case is concerned, provides as follows:

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

a. The applicant complained, firstly, that she did not have access to a tribunal as regards the refusal of a building site permit and the underlying change of designation of her property as the lower instances deciding on her request for a building-site permit were administrative authorities, while the Constitutional Court's scope of review was limited.

The Government submitted that the applicant had based her complaint against the refusal of a building-site permit to the Constitutional Court exclusively on the alleged unlawfulness of the area zoning plan. With regard to that complaint, the Constitutional Court had full adjudicative power. The Constitutional Court could assess the lawfulness of a decree, such as the area zoning plan, from various perspectives, including an assessment of all relevant facts. In the present case, the Constitutional Court evaluated the two local planning options carefully, assessing the conditions of the applicant's plots of land and their suitability for construction. In proceedings of that type the Constitutional Court's review was not limited.

The applicant did not submit further observations apart from maintaining her position.

The Government have not disputed that Article 6 applied to the proceedings concerning the applicant's request for a building-site permit. The Court notes that these proceedings were the only way for the applicant to challenge the re-designation of her property as green land. Her right to a building-site permit depended on the lawfulness of the amendment of the area zoning plan. The Court has already held in a similar case that such proceedings involve the determination of a civil right (see *Haider* (dec.), cited above). The Court therefore accepts that Article 6 applies to the building-site proceedings which included the review of the lawfulness of the area zoning plan.

Having regard to the specific nature of the applicant's complaint concerning the lawfulness of the area zoning plan, the Constitutional Court was the only body which could have determined this aspect of the dispute between the applicant and the administrative authorities. In this regard, the Court reiterates that the Constitutional Court, for questions which fall within its specific range of jurisdiction, qualifies as a tribunal (see, on the general

principle, *Pauger v. Austria*, 28 May 1997, § 59, *Reports of Judgments and Decisions* 1997-III, and, in the context of the review of the lawfulness of an area zoning plan, *Haider* (dec.), cited above, and *Kugler v. Austria*, no. 65631/01, § 50, 14 October 2010). The Court observes that the Constitutional Court examined all aspects of the case when reaching the conclusion that the amendment of the area zoning plan was lawful. Consequently, it finds that the scope of review of the Constitutional Court satisfied the requirements of Article 6 § 1 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

b. Secondly, the applicant complained under Article 6 § 1 that the proceedings had been unfair in that the authorities had failed to give sufficient reasons for their decision. The main aim pursued by the change of designation of her property had been to reduce the amount of building land. However, the authorities had failed to set out the criteria they applied when deciding which plots of land were to be changed to green land and which were to be maintained as building land.

The Court has already found that the Constitutional Court carried out a full review of the lawfulness of the area zoning plan. The latter held that the re-designation of the applicant's property was based on the undisputed excess of building land in the municipality and on the land's lack of suitability for construction. It confirmed the administrative authorities' finding that the applicant's plots of land were unsuitable for construction, for which they had given detailed reasons. The Court therefore finds that the domestic authorities gave sufficient reasons, which also explained why the applicant's property had been chosen for re-designation as green land. Finally, the Court has already noted above that the applicant's property was not singled out for re-designation. Thus, there is no indication of a violation of Article 6 § 1.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren Nielsen
Registrar

Nina Vajić
President