

LEGAL UPDATE

Zeewolde wind farm scoop: wind turbines installed on the basis of an obligation to tolerate

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On 18 December 2019 the Administrative Law Division of the Council of State ('the Division') issued an interesting [ruling](#) in the appeal proceedings against the decision to impose an obligation to tolerate eight wind turbines of Wind Farm Zeewolde under the Public Works (Removal of Impediments in Private Law) Act.

The Division dismissed the appeals against the obligation to tolerate as unfounded. This confirms for the first time that wind turbines – in terms of foundation, access roads and encroachment – can be built on the basis of an obligation to tolerate on the part of third parties. This is a first for Wind Farm Zeewolde.

Key conclusions to be drawn from the ruling

1. Application of Section 9g of the 1998 Electricity Act – which provides that a wind farm with a capacity of at least 5 MW is to be regarded as a public utility project for the purposes of the Public Works (Removal of Impediments in Private Law) Act – does not conflict with Article 1 of the First Protocol to the Right to Peaceful Enjoyment of Possessions).
2. It is also permissible to impose an obligation to tolerate prior to the planning decision for which the obligation to tolerate has been imposed has become legally inviolable.
3. In assessing whether a serious and reasonable attempt has been made to reach an amicable agreement, circumstances that have arisen up to the time when the decision to impose the obligation to tolerate was taken are also relevant.

We will briefly explain the above conclusions.

(1) No conflict with Article 1 of the First Protocol to the Right to Peaceful Enjoyment of Possessions

According to the Division, there is no reason not to apply Section 9g of the Electricity Act 1998 in connection with Article 1 of the First Protocol to the Right to Peaceful Enjoyment of Possessions, which provides that every natural or legal person is entitled to peaceful enjoyment of their possessions.

Any measure affecting the peaceful enjoyment of possessions must be accompanied by procedural guarantees giving the party involved a reasonable opportunity to effectively challenge the lawfulness of that measure. This means that it must be possible to effectively challenge that the measure in question meets the requirements imposed by national law.

In the opinion of the Division, the application of Section 9g of the Electricity Act 1998 does not constitute an impediment to effectively challenging compliance with the statutory requirements for imposing the obligation to tolerate (and the other requirements imposed by the Public Works (Removal of Impediments in Private Law) Act. Finally, according to the Division, there is no reason to conclude that the 'fair balance' required by Article 1 of the First Protocol to the Right to Peaceful Enjoyment of Possessions has not been achieved.

(2) Imposition of obligation to tolerate also permitted before a planning decision is inviolable

The Division first of all refers to a ruling of 30 May 2012, [ECLI:NL:RVS:2012:BW6968](#), which argues that no legal rule precludes the amicable consultation on tolerating the work and – if no agreement has been reached through this consultation – the preparation of the

the decision to impose the obligation to tolerate is made before the planning decision for which the obligation to tolerate has been imposed has become legally inviolable.

Subsequently, the Division finds that there is also no legal rule that prevents an obligation to tolerate from being imposed before the planning decision for the implementation of which the obligation to tolerate is imposed has become legally inviolable. Accordingly, the fact that the proceedings concerning the government-imposed zoning plan amendment were still pending before the Division at the time the decision to impose the obligation to tolerate was taken does not give the Division any reason to annul the decision to impose the obligation to tolerate.

Lawful petitioner

According to the Division, the fact that, in the appeal proceedings against the government-imposed zoning plan amendment, the question of whether the construction of a wind farm is a scarce right and whether that right was said to be duly granted to Wind Farm Zeewolde does not mean that Wind Farm Zeewolde cannot be regarded as a lawful petitioner within the meaning of Section 2 of the Public Works (Removal of Impediments in Private Law) Act. In the light of this, the Minister only had to ascertain who was responsible for the practical performance of the work. Now that Wind Farm Zeewolde has taken the initiative to build the wind farm and, at the time of the decision to impose the obligation to tolerate, also had an environmental permit to set up this wind farm, the Minister has rightly designated Wind Farm Zeewolde as the party responsible for the practical development of the wind farm and therefore as the party responsible for the work.

(3) Attempt at amicable agreement

According to the Division, the Minister could reasonably take the view that a serious and reasonable attempt has been made to reach an amicable agreement.

The Division confirms that circumstances that have arisen up to the time when the decision to impose the obligation to tolerate was taken may also be relevant in assessing whether a serious and reasonable attempt has been made to reach an amicable agreement. According to the Division, the hearing, which under Section 2(4) of the Public Works (Removal of Impediments in Private Law) Act is to be held after the request for imposing the obligation to tolerate, is an ideal opportunity to consider whether the petitioner and the entitled parties can still reach an amicable agreement.

Our former partner and colleague, Frank Mulder, assisted Wind Farm Zeewolde in these proceedings.

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