

ECLI: NL: RBGEL: 2020: 6699

Authority	District Court of Gelderland
Date of judgment	18-12-2020
Date of publication	21-12-2020
Case number	AWB - 19 _ 2184
Jurisdictions	Administrative law
Special characteristics	Preliminary injunction

Content indication Environmental permit for an antenna mast. In the opinion of the court, considering all arguments and with reference to the scientific literature, it cannot be ruled out that even at a field strength lower than 1 V/m, and therefore also in the case of the plaintiff, there may be increased health risks. The court therefore classifies the plaintiff as an interested party. The appeal is well-founded.

Locations Rechtspraak.nl
Environmental permit in practice 2021/8421

Judgement

COURT GELDERLAND

Seat in Arnhem

Administrative law

case number: AWB 19/2184

Judgement of the single-judge chamber of

in the case between

[plaintiff], at [place of residence], plaintiff

(Agent: Mr BN Kloostra),

and

the Municipal Executive of the Municipality of Berkelland , defendant.

The following took part in the proceedings as a third party: [third party] BV, in [place of residence].

(authorized representative: C. van Stralendorff)

Proceedings of the hearing

By a decision of 17 July 2018 (the primary decision), the defendant granted the third party an environmental permit for the construction of an antenna mast.

By a decision of 15 March 2019 (the contested decision), the defendant declared the plaintiff's objection inadmissible.

Plaintiff has appealed against the contested decision.

Defendant has lodged a statement of defence.

The third party has submitted a response.

The investigation at the hearing took place on October 20, 2020. The case was heard simultaneously with the appeals with case numbers 19/2143 and 19/2213.

Plaintiff's representative appeared. Plaintiff participated in the hearing via a video link. Defendant is represented by Mr. I. Nikkels and R. Tjallingii. C. van Stralendorff appeared on behalf of the third party.

Considerations

Preamble

1. On the 13th of March 2018 the third party submitted an application for the erection of a mast/antenna with a height of almost 40 metres on a site about 500 metres south of the [plaintiff's] place of residence. The objective of this mast was to improve the mobile network there.
2. The mast placement contravenes the zoning plan. The defendant has therefore in addition to the environmental permit for the mast,¹ granted a special permit for use in situations at variance with the zoning plan.² A separate permit has been granted for the felling of one oak and one birch tree with the obligation on the third party to plant two linden trees in their place.³

Who is permitted to lodge an objection and an appeal?

3.1 The General Administrative Law Act (Awb) stipulates that only an interested party can object to a decision and subsequently lodge an appeal with the court.⁴

In Article 1. 2, paragraph 1, of the law (Awb), "interested party" is understood to mean: "a person whose interests are directly affected by a decision".

3.2. Regarding the question of who can be regarded as an “interested party”, it is necessary to consult established case law of the Division of Administrative Jurisdiction of the Council of State.⁵ This Division defines an interested party as someone directly affected by a given activity that is permitted by a particular decision - such as a zoning plan or an (environmental) permit who is therefore in principle an interested party regarding this decision.

The criterion 'consequences of any significance' serves as a correction to this principle. Consequences of any significance are missing if the consequences can be determined, but the effects of the activity on the residential, living or business situation of the person concerned are so minimal that there is no personal interest in the decision. This takes into account factors such as the distance from, the view of, the planning appearance and environmental consequences (e.g. odour, noise, light, vibration, emission, risk) of the activity permitted by the decision, where necessary considering these factors in conjunction with one another. The nature, intensity and frequency of the effects may also be important.

3.3 When making decisions regarding activities that fall under the environmental law, it is the task of the administrative body to determine the range of stakeholders on the basis of (research into) the actual consequences of the decision. Ultimately, it is up to the administrative court to decide who has a legal interest in a particular decision. Therefore, it is not for the litigants concerned to prove that they are interested parties to a decision. Only in the case that the question arises during the process concerning whether 'consequences of any significance' are missing and therefore whether there is a need to correct the situation may the persons concerned be asked to explain the actual consequences of the activity they have experienced or fear that they will experience.

Can the plaintiff therefore be regarded as an interested party?

4.1 The claimant's home is situated at some 650 metres from the mast. It is not disputed that the plaintiff has no view of the mast from her home. The question is whether the plaintiff experiences any significant effects in the form of heightened health risks as a result of the EMFs emitted by the mast.⁶

4.2. The defendant insists along with the third party that this is not in fact the case. Given the distance of the plaintiff's home from the mast, one must conclude that the level of the EMF emissions at about 328 metres from the mast must be lower than 1 V/m.⁷ This level is significantly below the so-called exposure limit that has been established by ICNIRP (the International Commission on Non-Ionizing Radiation Protection), an independent organisation that studies exposure from radio waves and to which the Netherlands is affiliated. The norms established by ICNIRP have been taken over, with only minor modifications, by the Dutch Health Council. The government thus uses the ICNIRP guidelines. These norms have a safety margin of a factor of 50. This means that when the guidelines were established the maximum acceptable values were set at 50 times higher than the actual permitted level.

For the mast in question the frequencies emitted are within the range of 800 MHz to 2600 MHz. Therefore, the exposure limits applicable to this bandwidth will apply. These limits will therefore range from 39 V/m to 61 V/m.⁸ The defendant along with the third party derives the point that there are no increased health risks as long as the field strength lies below the exposure limits, and certainly if it is below 1 V/m from the 'Report on Electrosensitivity' of the Knowledge Platform concerning Electromagnetic Fields, of April 2012. A summary of p. 11 of that report states that, based on the understanding that EMFs cause adverse effects in the human body, it cannot be ruled out that some (small) groups of persons do experience real harms from EMF. The report also states that, based on the declaration that health problems can have a psychological cause, scientific research provides some indications that in some of those who suffer from electro-hypersensitivity,

health complaints can be attributed to the presumed exposure. It also states that, scientific research confirms that similar complaints may also be caused by other environmental factors and certain diseases.

Furthermore, the defendant referred to the Division's judgement of 14th January 2009.⁹ In that case, the Division instructed the Advisory Administrative Law Foundation (StAB) to investigate the health effects of EMF. With reference to that expert report, the Division is of the opinion that:

"The expert report states that global studies on the effects of radiofrequency electromagnetic fields applicable to this situation include those used for digital TV and radio and that they demonstrate that radiofrequency electromagnetic fields can have an adverse health effect. These studies distinguish between thermal effects, namely heating, and the effects of induced current, namely the stimulation of muscles and nerves by electric currents. Exposure limits have been set for these effects. As regards the short-term effects, these studies conclude that these levels are virtually never present in the residential and living environment. As regards the long term, the studies conclude that there is no evidence that radiofrequency electromagnetic fields cause cancer or other long-term adverse effects".

However, according to this report, there are scientific ambiguities regarding the possible impact of the changed exposure pattern due to the greatly increased use of mobile telephony in particular and the associated GSM and UMTS base stations and regarding the significance of reports of, at times quite serious, health complaints. The expert report states that these ambiguities have led the central government to launch a research programme and that the Health Council has recommended further research and the establishment of a knowledge and research centre. However, according to this report, the government has not yet seen any reason even on the basis of the precautionary principle to lower the official limits for radiofrequency electromagnetic fields.

All this leads the defendant to the conclusion that the plaintiff, measured by objective standards, will not experience any significant effects from the mast. The defendant therefore maintains that the plaintiff is not an interested party within the meaning of article 1: 2, paragraph 1, of the act (Awb).

The defendant has therefore declared the plaintiff's objection inadmissible.

- 4.3. The plaintiff has argued in considerable detail that she does suffer increased health risks from the mast, even from an emissions level lower than 1 V/m. Since this is crucial for the assessment of whether she is in effect an interested party, the court will discuss below the documents that she has submitted in substantiation of her claim.

The plaintiff argues that the conclusions of ICNIRP, the StAB, etc. concerning the health effects are based on incorrect information and therefore should not be used as a basis for decision-making. According to her, even when exposed to a field strength of less than 1 V/m, dangerous biological and clinical effects have been found. She insists that the conclusions in the StAB expert report are based on out-dated information, given the many scientific papers that have appeared since the writing of that expert report. Among other effects, these publications point to the possibility that EMFs may be carcinogenic. The plaintiff also identified publications that demonstrate that EMFs can cause adverse health effects even at very low exposure levels. In addition, the guideline of (in this case) 61 V/m is, according to the plaintiff, based on short-term thermal effects, while exposure to radiation from cell towers involves long-term exposure. She also questions the measurement by the Telecoms Agency of the field strength of the EMFs as given above. For further substantiation, the Plaintiff referred at the hearing to the conclusions in the main advice on 5G and health of the Health Council of 2nd September 2020. The relevant section states that:

"There are two reasons why the committee is as yet unable to answer the question of whether exposure to 5G frequencies actually poses health risks. First, to make such a

judgement we need to know the exposure levels that can cause adverse health effects in humans. This requires a more extensive analysis of the scientific data than the Committee has been able to carry out. The World Health Organization (WHO) is currently conducting such an analysis, which is expected to be completed in 2022. Secondly, it is necessary to know what the actual exposure to radio frequency electromagnetic fields will be after the introduction of 5G. This is not yet known because 5G is not yet fully in operation. The Committee has therefore explored the issue of whether there are indications that electromagnetic fields with the frequencies to be used by 5G have the potential to produce adverse health effects. To this end they have looked to see if there is a known relationship between exposure to radiofrequency electromagnetic fields on the one hand and the occurrence of diseases and disorders on the other. According to the Committee, it cannot be ruled out that the occurrence of cancer, reduced male fertility, poorer pregnancy outcomes and birth defects may be related to exposure to radiofrequency electromagnetic fields.

However, the Committee does not consider the relationship between exposure and the disease or condition to be proven or even likely for any of these and the other diseases and conditions studied. The Committee also looked at the possible relationship between radiofrequency electromagnetic fields and changes in biological processes. Changes in electrical activity in the brain are likely to be associated with exposure; it is unknown whether this is beneficial or unfavourable for health. For most of the other biological processes it has not been demonstrated and is also unlikely that changes in these are related to exposure to radiofrequency electromagnetic fields, although this cannot be completely ruled out. The only elements that were viewed as certain was that EMFs do not affect the immune system or hormone levels. However, research into the effects of exposure to frequencies around 26 GHz [that may be used by 5G] is almost entirely lacking. (...)

Finally, the Committee recommends using the latest guidelines of the International Commission on Non-ionizing Radiation Protection (ICNIRP) in the Netherlands as a basis for exposure policy. Because it cannot be ruled out that exposure under the latest ICNIRP guidelines also has the potential to harm health, the Committee recommends precaution and keeping exposure levels as low as reasonably possible.”

The conclusion of the plaintiff from all this was that the increased health risks did indeed warrant her being considered an interested party.

- 4.4. The administrative court is not the appropriate body to determine whether and, if so, at what field strength, which health effects may occur. However, the administrative judge must assess whether the stated health effects at the given field strength are so serious that this results in interest within the meaning of the act (Awb).

In the opinion of the court, considering all arguments and the scientific literature, it cannot be ruled out that increased health risks may well occur even at a field strength lower than 1 V/m, and therefore also in the case of the Plaintiff. In relation to this conclusion, the court also considers it important to note that recent scientific insight into the health effects of EMFs means that it is no longer possible to rely on the findings of the StAB expert report that was central to the judgment of the Division on the 14th of January 2009. It is furthermore important that a body such as the Health Council, whose advice plays an important role in forming a judgement in matters such as these, essentially confirms in its latest report that it is not yet clear what health effects will be caused by 5G and that, however unlikely it may seem it is perfectly possible that links will be found between EMFs and certain diseases. The Health Council also points to the relationship between exposure to EMFs and certain biological processes.

Therefore, in the opinion of the court, the plaintiff must be regarded as an interested party.

Whether the health risk is so high that the defendant could not have granted the environmental permit contested by the plaintiff is a substantive issue that is not addressed in the context of answering the question of interest.¹⁰

Conclusion and legal costs

5. The appeal is well-founded and the court sets aside the contested decision.

The defendant must make a new decision regarding the objection taking into consideration the court’s pronouncement. The court sets a period of 12 weeks for this from the date of the sending of this decision.

6. The court orders the defendant to pay the legal costs incurred by the plaintiff.

On the basis of the Administrative Costs Decree, the court sets these costs for legal aid provided by a third party at € 1,050 (1 point for submitting the notice of appeal and a second point for appearing in court, with a value per point of € 525 and a weighting factor of 1).

The court also ruled that the defendant must reimburse the court fee of € 174 paid by the plaintiff.

Decision

The court:

- declares the appeal well-founded.
- annuls the contested decision;
- instructs the defendant to make a new decision regarding the objection, taking the court’s pronouncement into consideration, within 12 weeks from the date of sending of this decision;
- orders the defendant to pay the plaintiff's costs of the proceedings up to an amount of € 1,050;
- orders the defendant to reimburse the plaintiff the court fee paid of € 174.

This judgment was made by Mr. JH van Breda, judge, in the presence of Mr. E. Mengerink, registrar.

The decision was issued in public on:

registrar

judge

Copy sent to parties on:

Legal Remedy

An appeal against this pronouncement can be lodged with the Administrative Jurisdiction Division of the Council of State within six weeks of the date on which it was sent. If an appeal is lodged, a request may be made to the high court of appeal for an interim measure or for the lifting or amendment of an interim measure from this pronouncement.

-
- 1 Article 2.1, paragraph 1, opening words and under a, Wabo (the general provisions of the environmental law).
 - 2 Article 2.1, paragraph 1, opening words and under c, of the Wabo in conjunction with Article 2.12, paragraph 1, under a, and under no. 2, of the Wabo and Article 4, part 5, of Annex II to the Environmental Law Decree
 - 3 Article 2.2, first paragraph, under g, of the Wabo
 - 4 This is stated in Articles 7: 1 and 8: 1 of the Awb.

- 5 See, e.g. the ruling of 23 August 2017, ECLI: NL: RVS: 2017: 2271 and later rulings of the Division referring to this ruling.
 - 6 See the ruling of the Division of 6 March 2019, ECLI: NL: RVS: 2019: 718.
 - 7 See the report 'Report field strength measurement, municipality of Losser' of the Ministry of Economic Affairs, Agency Telecom, of 20 June 2018. Annex 1 to the letter from [third party] of 7 November 2018 to questions from the appeals committee (in the file).
 - 8 See the letter from [third party] of 7 November 2018, in response to questions from the Objections Committee, in the file.
 - 9 ECLI: NL: RVS: 2009: BG9796. The Division refers to this ruling in, e.g. its rulings of 21 September 2016 (ECLI: NL: RVS: 2016: 2522), 5 December 2018 (ECLI: NL: RVS: 2018: 3979) and 16 October 2019 (ECLI: NL: Stainless steel: 2019: 3511).
 - 10 Compare the ruling of the Division of 6 March 2019, ECLI: NL: RVS: 2019: 718, under 2.3.
-