LEGAL UPDATE

Refusal of all-in-one permit for physical aspects and impending SDE+ deadline

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On 31 October 2018, the preliminary relief court of the Limburg District Court ordered a provisional remedy in the case of a potential solar farm developer versus the municipality of Leudal. The municipal executive had refused to grant the necessary all-in-one permit for physical aspects, whereas the applicant needed it by 8 November 2018 at the latest in order to participate in the autumn application round for the sustainable energy production subsidy scheme (SDE+ scheme).

The preliminary relief court is of the opinion that the applicant had an urgent interest justifying a provisional remedy because it needed the permit on 8 November before 5.00 p.m. in order to submit an application for an SDE+ subsidy. The preliminary relief court has taken into account that the subsidies will be much lower in 2019, meaning that it will then no longer be possible for the applicant to realise the requested solar farm. In the future, this may increasingly play a role as the amounts of the SDE+ subsidies will be reduced in the coming years.

What was this case about? The plot was subject to a zoning plan entitled 'Reparation and sweeping plan for Leudal outlying area 2016'. The designated use of the plot was 'Sports - Golf Course'. The applicant, the owner of the plot, initially intended to build a golf course there. As this proved not to be economically feasible, the applicant applied for an all-in-one permit for physical aspects to create a temporary solar farm covering 40 hectares, for a period of 25 years. The zoning plan provided for the possibility of a deviation from the zoning plan to enable the realisation of large-scale solar energy systems, provided that these systems do not disproportionately harm the ecological and visual landscape values of the area.

In its initial decision, the municipal executive took the view that the ecological and visual landscape values of the area would be disproportionately harmed by the envisaged solar farm, based on which the municipal executive was not allowed to use its authority to deviate from the zoning plan. In its objection, the applicant called in a professional firm, which concluded that the condition for using the authority to deviate from the zoning plan had actually been met. The Leudal Spatial Quality Committee also concluded that the all-in-one permit for physical aspects should be granted. However, the municipal executive stuck to its view and argued that the applicant had not sufficiently demonstrated that the applicant's plan was spatially acceptable and that it had not been sufficiently demonstrated that the ecological and visual landscape values of the area would not be harmed.

The preliminary relief court held that the municipal executive did not provide sufficient reasons in its refusal. After all, the applicant had supported its objection with a landscape integration plan drawn up by a professional firm, which also concluded that, after taking a number of measures, the envisaged solar farm can be integrated into the landscape and ecology of the area. In addition, the Leudal Spatial Quality Committee, which included a landscape expert, was also of the opinion that the permit should be granted. The reasons for the refusal should therefore have been explained in more detail, which had not been done.

As the autumn application round for the SDE+ scheme was closing on 8 November 2018 at 5.00 p.m., the preliminary relief court ordered the municipality to make a new decision on the objection by 6 November 2018 at the latest. The preliminary relief court stated that in this decision-making, it was not permitted to take into account the

question as to whether the location in question is suitable for a solar farm, as this had already been considered when the zoning plan was adopted.

In its decision of 6 November 2018, the municipal executive once again refused the all-in-one permit for physical aspects. The municipal executive considered that it follows from the notes to the 'Reparation and sweeping plan for Leudal outlying area 2016' that the legislator did not have in mind such a large solar farm at this location. Moreover, the municipal executive considered that the solar farm disproportionately harms the ecological and visual landscape values of the area concerned and the surrounding area. This time, the municipal executive had supported its position with a report by an external expert.

The initiators again requested the preliminary relief court to order a provisional remedy whereby the preliminary relief court would grant the requested all-in-one permit for physical aspects and rule that its judgment would replace the amended initial decision. However, in its judgment of 7 November 2018 the preliminary relief court considered that this would go beyond the limits of its jurisdiction. After all, ordering a provisional remedy is an intervention of a preliminary nature. Furthermore, ordering such a provisional remedy is precluded by the fact that, also in proceedings on the merits of a case, the administrative court, after annulling a refusal of an application for an all-in-one permit for physical aspects, can only in exceptional cases grant the requested permit itself or rule that the administrative authority concerned must grant this permit in cases where the administrative authority has discretion in its decision-making on the matter. The preliminary relief court stated that only if there are exceptional circumstances can there be a ground in such a case to render a judgment as envisaged by the applicant. However, the court held that there were no such exceptional circumstances. As there was also no conceivable less far-reaching measure which, in view of the fact that the deadline for a subsidy application was expiring on 7 November 2018, would have helped the applicant, the preliminary relief court held that no other judgment was possible than the refusal of the application for a provisional remedy.

For the project initiators, the judgment of 31 October 2018 was therefore a Pyrrhic victory. They still do not have the all-in-one permit for physical aspects they wanted.

The preliminary relief court also appeared to be somewhat dissatisfied with its judgment and considered that if the unlawfulness of the decision-making process is subsequently established, the damage arising from this must obviously be compensated by the municipality.

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