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Sent also by fax: +33 (0) 3 88 41 27 30

Veenendaal October 4th 2013

Our reference: 100519 (Haak, N65)
Your reference: -
Direct Phone : 33 (0)3 88 41 20 18
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Ref. Comité N65OH, BVBH and te Velde,

Dear Madam/Sir,

Hereby I have the honor to introduce the attached application under Article 34 of the Convention on behalf of the following applicants:

1. Comité N65OH, Helvoirt in the municipality of Haaren
2. Belangenvereniging Bewoners Hudsonlaan (B.V.B.H.) in Eindhoven
3. F. te Velde in Helmond.

The application concerns violations of the Articles 2, 6 and 13 of the Convention and of Article 1 of it's First Protocol.

The present communication is sent by both fax and registered mail. The fax-message contains the application form, the authorities, a list of attachements (which attachments are to be sent only by registered mail) and copies of the final domestic decisions. A full case file including all relevant documents from the domestic procedures is being prepared and will follow shortly by surface mail.

Thank you for consideration of this application.

Yours sincerely,

Mr S. (Stephan) Haak

AUTHORITY

I, Frank te Velde

Eikendreef 21, Helmond
(name and address of applicant)

hereby authorize

name: Mr. S.C. (Stephan) Haak

physical address: Landjuweel 34a Netherlands
3905 PG Veenendaal

web address ..... www.amadvocaten.nl

Advocaat and Lawyer at AMV Advocaten, Landjuweel 34a, Veenendaal
(name, address and occupation of representative)

to represent me in the proceedings before the European Court of Human Rights, and in any subsequent proceedings under the European Convention on Human Rights, concerning my application introduced under Article 34 of the Convention against

the Kingdom of the Netherlands.....
(respondent State)

on September 3 2013
(date of letter of introduction)

Helmond August 17, 2013
(place and date)

F.F. te Velde.
(signature of applicant)

I hereby accept the above appointment

.....
(signature of representative)

2013/10/4

mr. S. Haak

AUTHORITY

I, representing the Stichting Comité N65 Ondergronds Helvoirt (Comité N65)

Torenstraat 47 5268 AS Helvoirt
(name and address of applicant)

hereby authorize

name: Mr. S. (Stephan) Haak, lawyer.....

physical address: Landjuweel 34a, 3905 PG Veenendaal Netherlands

web address: http://www.amnadvocaten.nl/.....

Advocaat and Lawyer at AMN Advocaten, Landjuweel 34a, 3905 PG Veenendaal Netherlands .....
(name, address and occupation of representative)

to represent me in the proceedings before the European Court of Human Rights, and in any subsequent proceedings under the European Convention on Human Rights, concerning my application introduced under Article 34 of the Convention against

the Kingdom of the Netherlands.....
(respondent State)

on September 3 2013.....
(date of letter of introduction)

Helvoirt August 28 2013..... .....
(place and date)

C.B.A. Spil.....
(signatures of applicant)

I hereby accept the above appointment

.....2013/10/4.....
(signature of representative)

mr. S. Haak

AUTHORITY

We, representing the Belangenvereniging Bewoners Hudsonlaan (B.V.B.H.)

Hudsonlaan 486,Eindhoven
(name and address of applicant)

hereby authorize

name: Mr. S. (Stephan) Haak, lawyer.....

physical address: Landjuweel 34a, 3905 PG Veenendaal Netherlands

web address: http://www.amnadvocaten.nl/.....

Advocaat and Lawyer at AMN Advocaten, Landjuweel 34a, 3905 PG Veenendaal Netherlands .....
(name, address and occupation of representative)

to represent me in the proceedings before the European Court of Human Rights, and in any subsequent proceedings under the European Convention on Human Rights, concerning my application introduced under Article 34 of the Convention against

the Kingdom of the Netherlands.....
(respondent State)

on September 3 2013.....
(date of letter of introduction)

Eindhoven August 28 2013.....
(place and date)

Ton Staals.....A. van Doornmalen. A. v. Doornmalen.....
(signatures of applicant)

I hereby accept the above appointment

.....
(signature of representative)

2013/08/14
mr. S. Haak

COUR EUROPÉENNE DES DROITS DE L'HOMME

EUROPEAN COURT OF HUMAN RIGHTS

Conseil de l'Europe - *Council of Europe*

Strasbourg, France

REQUÊTE
APPLICATION

présentée en application de l'article 34 de la Convention européenne des Droits de l'Homme, ainsi que des articles 45 et 47 du Règlement intérieur de la Cour

under Article 34 of the European Convention on Human Rights and Rules 45 and 47 of the Rules of Court

I LES PARTIES
THE PARTIES

A. LE REQUÉRANT
THE APPLICANT

Applicant 1:			***Comité N65OH***
1.1 Surname:	Comité N65OH	2.1 *First Name(s)*	Foundation under Dutch Law See www.n65.nl
Sex: male / female:	Foundation under Dutch Law		
3.1 Nationality	Dutch	4.1 *Occupation*	Foundation
5.1 *Date and place of birth:*	Foundation created on March 2 2011 in Helvoirt, Netherlands		
6.1 *Permanent address:*	Torenstraat 47 5268 AS Helvoirt Netherlands, near the N65		
7.1 *Tel no.*	00-31-411-641699		
8.1 *Present address:*	Same as Permanent address		

Applicant 2:			***BVBH***
1.2 Surname:		2.2 *First Name(s)*	Association under Dutch Law see www.hudsonnieuws.nl/
Sex: male / female:	Association under Dutch Law		
3.2 Nationality	Dutch	4.2 *Occupation*	Association
5.2 *Date and place of birth:*	Association created on July 17 1992 in Eindhoven, Netherlands		
6.2 *Permanent address:*	Hudsonlaan 428, 5623 NL Eindhoven, Netherlands, near the Kennedylaan		
7.2 *Tel no.*	00-31-40-2466659		
8.2 *Present address:*	Same as Permanent address		

Applicant 3:			***F. te Velde***
1.3 Surname:	Te Velde	2.3 *First Name(s):*	Frank F.
Sex: male / female:	*Male*		
3.3 Nationality:	Dutch	4.3 *Occupation:*	Engineer
5.3 *Date and place of birth:*	September 19 1940; Place of Birth: Zwolle, Netherlands		
6.3 *Permanent address:*	Eikendreef 21, 5707 BN Helmond, Netherlands, near the N270		
7.3 *Tel no.:*	00-31-492-477222		
8.3 *Present address:*	Same as Permanent address		

9. Nom et prénom du représentant
Name of representative

Mr. Stephan Haak

10. Profession du représentant
Occupation of the representative

Attorney-at-Law

11. Adresse du/de la représentant
Address of representative

Landjuweel 34a, 3905 PG Veenendaal
The Netherlands

12. Tel No.
00-31-318 830 202
Fax no.
00-31-318 830 203

B LA HAUTE PARTIE CONTRACTANTE
THE HIGH CONTRACTING PARTY

13. **The Kingdom of the Netherlands**

II EXPOSÉ DES FAITS
STATEMENT OF THE FACTS

14.

1. This application concerns the right to life, respect for private and family life, property and an effective remedy under the Convention of nearby residents of busy roads crossing urban areas in the province of Brabant, located in the south of the Netherlands.

2. First, the relevant facts and the applicable domestic legal framework will be set out, after which it will be shown how law and practice are in breach of fundamental rights enshrined in the Convention.

RELEVANT FACTS

3. It is a well known fact in the Netherlands that in maps[1] showing the incidence of background air pollution, the most vulnerable area's are located in the south of Netherlands where all applicants live near busy roads crossing urban areas.

4. It is further well known that traffic produces some specific pollutants notably: NO2, particulate matter (PM10 and PM2,5) and benzene. The increase is dependent on various factors such as traffic density, traffic composition, traffic lights and so on. Obstacles and other geometrical conditions influence the size of the contaminated surface in square meters.

5. A large collection of studies shows that living near a road with dense traffic affects the health of nearby residents resulting in fewer years of living. Estimates on shortened life expectancy vary. A statement of the EU Commissioner for the Environment e.g. cites in his executive summary on Air Quality in Europe 2012[2]: "*Air pollution is bad for our health. It reduces human life expectancy by more than eight months on average and by more than two years in the most polluted cities and regions.*" Based on primarily Dutch studies on life expectancy of residents up to 1000 m1 near a busy road, the applicants concluded to a shortened life expectancy of 1,45 year[3].

6. There are 2 official calculations of population densities available in the cities concerned. Supposing the average age of direct deadly traffic accidents to be 50% of average Dutch life expectancy, this 1,45 year shortened life expectancy of the affected population may be converted to a comparable number of deadly traffic accidents. The resulting outcome is 31-74[4] deadly victims of air pollution per year in the affected areas. There are arguments to maintain that effective numbers are much higher. For example by comparing relative death ratio's in two nearby villages of Haaren en Helvoirt[5] with comparable socio-economic populations.

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1 See for example http://geodata.rivm.nl/gcn/ (filter by year and pollution indicator)
2 See http://www.eea.europa.eu/publications/air-quality-in-europe-2012/at_download/file
3 See http://www.n65.nl/Studie-N65-Tables-mortality-traffic-Helvoirt.xls
4 See http://www.n65.nl/Regionale_Kerncijfers-Bevolkingsdichtheid-2010.xls
5 See http://www.n65.nl/Studie-Sterfterisico-Haaren-Helvoirt.xls

APPLICABLE DOMESTIC LEGAL FRAMEWORK

7. Directive 2008/50/EC on ambient air quality and cleaner air for Europe has been implemented and complied with in the Netherlands by the Wet Milieubeheer (Environmental Management Act) and the Regeling Beoordeling Luchtkwaliteit 2007 (Regulation Air Quality Control 2007). The Environmental Management Act will be referred to hereafter as Act EM in shorthand notation. The Regulation Air Quality Control 2007 will be referred to as RAQ 2007. The Wet inzake de luchtverontreiniging (Law regarding Air Pollution) is left aside here as irrelevant to this case. The Ministry of Infrastructure and the Environment (Ministerie van Infrastructuur en Milieu), responsible for legislation and system implementation, will be called the Ministry or I&M hereafter in shorthand notation.

8. Article 5.9 sub 1 of the Act EM reads translated[i]: "*Mayor and Aldermen adopt a plan in the cases set out in Annex 2, rule 13.1, where a plan threshold is exceeded. This plan will indicate how and by what measures limit values listed in the Annex will be met within the deadline for that value. They shall ensure the implementation of that plan.*" The annex 2 complies with the annexes of Directive 2008/50/EC. The other parts of Article 5.9 Act EM refer mainly to legal formalities in setting up such a plan, the collaboration required from other state institutions and reporting rules to these other state institutions.

9. Chapter 20 of the Act EM defines as Court of Appeal the Afdeling Bestuursrechtspraak van de Raad van State. (Administrative Jurisdiction Division of the Council of State). Some limited exceptions are irrelevant in the present case. This Court of Appeal will be referred to as Council of State in shorthand notation.

10. To implement chapter V of Directive 2008/50/EC on public information the Dutch government did set up a system called NSL (Nationaal Samenwerkingsprogramma Luchtkwaliteit) translated as National Collaboration Program on Air Quality. The Dutch shorthand notation as NSL will be maintained hereafter.

11. This implementation of NSL however does not comply with chapter V of Directive 2008/50/EC. Chapter V requires among others that the public is adequately informed. However verifiability of the input data used in NSL is almost impossible due to unclear responsibility sharing between municipalities and the Ministry (I&M) responsible for Infrastructure and Environment. For the purpose of this complaint more important is Annex III of Directive 2008/50/EC. It appears that NSL violates in this Annex III, the Section C. Microscale siting of sampling points. This Section C. requires for all pollutants that "*traffic-orientated sampling probes shall be at least 25 m from the edge of major junctions and no more than* **10 m** *from the kerbside.*" Section A article 1 of Annex III requires the same 10 m1 for locations where ambient air quality is assessed by indicative measurement or modelling. The Ministry has openly confessed that actually NSL uses much higher measurement locations than the prescribed maximum 10 meter from the kerbside with different criteria such as "*applicability and exposure*"[6] and "*sampling points should be located at least 10 meter from the kerbside*"[7]. The Minister made also clear that significant uncertainties exist well over the 15-25% allowed for in Annex I of Directive

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6 http://www.n65.nl/RvS-Helmond/Antwoord-Min-24-2-2012-Kamervragen-30-1-2012-p-i-m-0000001694-2.pdf

7 In a letter dated July 25 2013 the Ministry stated that "*sampling points should be located at least 10 meter from the kerbside*". See http://www.n65.nl/RvS-Haaren/Ministerie-van-Infrastructuur-dd-25-7-2013.pdf. This statement is a clear violation of Directive 2008/50/EC and RAQ 2007 that both prescribe less than 10 meter as shown in a letter to the Ministry: http://www.n65.nl/RvS-Haaren/Brief-aan-IenM-inzake-handhaving-Luchtverontreinigingsnormen-Helvoirt.pdf and a letter to the Minister http://www.n65.nl/RvS-Haaren/Brief-aan-Minister-IenM-tot-Aanpassing-Startbeslissing-N65-aan-eigen-regelgeving.pdf

2008/50/EC. These ministerial confessions have all been confirmed by various calculations made by applicants.

12. Both the Ministry responsible for Infrastructure and Environment as well as the Council of State recognize various calculation models as officially allowed besides the VLW model used in NSL. Because the calculation model CARII is also officially allowed and online available for free, applicants made use of CARII, that is also traditionally used by the municipalities of Eindhoven and Helmond. The calculation results on specific locations between CARII and NSL may differ for different reasons. Distance to the kerbside is an important factor. NSL shows generally not any limit value exceeded. Applicants showed with CARII that various limit values were exceeded on specific places near major busy roads.

13. Besides formal sampling requirements there is another much more important requirement in Annex III of Directive 2008/50/EC, stating under Section A article 1: "*Ambient air quality shall be assessed at all locations except those listed in paragraph 2*" where paragraph 2 means, simply stated, locations where members of the public do not have access. This requirement reduces the distance to the kerbside to effectively 0 meter.

14. Within traffic related air pollutants, NO2, PM10, PM2,5 and benzene are predominant. Their actual limit values in Annex XI of Directive 2008/50/EC and the exceptions granted to the Dutch government are stated in the table below:

Name	Actual Limit Values Directive 2008/50/EC	Max. Tolerance Directive 2008/50/EC	Dutch Exception
NO2 or nitrogen dioxide	- 200 µg/m3 an hour, not to be exceeded more than 18 times a calendar year - 40 µg/m3 year average	0% since 1-01-2010	60 µg/m3 year average until 1-1-2015
PM10 (large Particulate Matter)	- 40 µg/m3 year average - 50 µg/m3 on one day, not to be exceeded more than 35 times a calendar year	50 % since 1-01-2005	none
PM2,5(fine Particulate Matter	25 µg/m3 year average	0% starting 1-01-2015	none
Benzene	5 µg/m3	0% since 1-01-2010	none

15. It should be noted that these annual mean limit values for PM10 and PM2,5 in Directive 2008/50/EC double the WHO (World Health Organization) 2005 guidelines[8] that accepts not any tolerance for benzene. The recently published "*Review of evidence on health aspects of air pollution – REVIHAAP*"[9] revised the limit values of Directive 2008/50/EC even further downwards. As a result the European Commission announced proposals for new and lower limit values later this year.

8 PM10 - 20 µg/m3 annual mean and - 50 µg/m3 24-hour mean
PM2,5 - 10 µg/m3 annual mean and - 25 µg/m3 24-hour mean with benzene at 0 µg/m3

9 http://www.euro.who.int/__data/assets/pdf_file/0020/182432/e96762-final.pdf

16. These WHO Guidelines on air pollution have no direct legal force such as Directive 2008/50/EC which is a political compromise. Therefore, as far as threats to health and life are concerned, the WHO Guidelines might be the better judge.

17. On the level of applicable European case law two verdicts should be highlighted:
    - Case C-237/07, Dieter Janacek[10] where the Second Chamber of the European Court of Justice ruled as follows on 25 July 2008 under point 48:

      - "*Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution.*"

      - "*The Member States are obliged, subject to judicial review by the national courts, only to take such measures – in the context of an action plan and in the short term – as are capable of reducing to a minimum the risk that the limit values or alert thresholds may be exceeded and of ensuring a gradual return to a level below those values or thresholds, taking into account the factual circumstances and all opposing interests.*"

    - Case 48939/99, Öneryildiz v. Turkey where your Grand Chamber[11] ruled on 30 November 2004 under point 89 that: "*The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 (see paragraph 71 above) entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life*"

18. For the time being there are now two final verdicts for which effective local remedies are exhausted:

- Helvoirt/Haaren: On August 14 2013 a final verdict of the Council of State regarding applicant 1 in Helvoirt/Haaren was taken on internal appeal (verzet) against the basic decision in first instance on February 7 2013. That basic decision contained the following main argument[12] under point 3: "*As the Council of State has previously considered (judgement of 31 March 2010 in Case No. 200902395/1/M1;* www.raadvanstate.nl*), the obligation resting on the Major and Aldermen when crossing a plan threshold, to establish a plan under article 5.9, first paragraph, of the Environmental Management Act, occurs according to this article from the law itself. The letter of 6 February 2012 is therefore not aimed at legal consequence[13] and is not a decision within the meaning of Article 1:3, paragraph 1 AWB, against which an appeal could be used. In view of this, the objection raised by the Committee N65 has been rightly deemed inadmissible by the Council of State.*" In appeal applicant concluded among others, also referring to Janacek, that the decision not to establish such a plan, after proof of exceeded limit values, has clearly 'legal

10 http://curia.europa.eu/juris/liste.jsf?language=en&num=C-237/07

11 Application 48939/99, 30-11-2004: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67614

12 Helvoirt/Haaren, basic decision 7-2-2013, point 3: "*Zoals de Afdeling eerder heeft overwogen (uitspraak van 31 maart 2010 in zaak nr. 200902395/1/M1; www.raadvanstate.nl) treedt de verplichting om een plan vast te stellen die ingevolge artikel 5.9, eerste lid, van de Wet Milieubeheer bij overschrijding van een plandrempel op het college rust, ingevolge dit artikel van rechtswege in. De brief van 6 februari 2012 is derhalve niet gericht op rechtsgevolg en is geen besluit in de zin van artikel 1:3, eerste lid, AWB waartegen een rechtsmiddel kon worden aangewend. Gelet hierop heeft het College terecht het door de Stichting Comité N65 gemaakte bezwaar niet ontvankelijk verklaard.*"

13 This specific Dutch legal term "rechtsgevolg", translated as legal consequence, can only be understood knowing that in Dutch administrative law, this term marks the difference between administrative and civil proceedings. Legal consequence means that acting or not acting of a government body changes someone's legal position. The applicants have argued of course that by not acting on air quality, their legal positions change. Among others their life's are shortened, their health endangered, their house prices fall and their right to claim an air pollution plan as required by Directive 2008/50/EC and elucidated by the European Court of Justice in the comparable case of Dieter Janecek C-237/07 with point 48 , dismissed.

consequence' in Dutch law, results even logically from the judgement of 31 March 2010 in Case No. 200902395/1/M1 of Velzen and that requesting such a plan was of course meant to have that plan executed. They also pleaded that civil proceedings would impose a hurdle impossible to overcome due to excessive costs and proceedings long over the local limits set for the maximum length of proceedings. The Council of State however, concluded on August 14 2013 in appeal not to be authorized to pass judgement with the following main argument under point 4.1[14]: "*Having regard to the foregoing, the college has interpreted these letters correctly as request to establish a plan referred to in Article 5.9, first paragraph, of the Environmental Management Act and not as a request for an administrative order, or to act under punitive damages or with administrative coercion or as a request for a legal opinion. As the Council of State in the decision in appeal rightly considered, a response to a request to establish such a plan, is not a decision because such a response is not aimed at legal consequence. The obligation to establish a plan when exceeding a plan threshold, under Article 5.9 paragraph of the Environmental Management Act, occurs, as the Council of State rightly considered from the law itself.*"

- Helmond: On April 17 2013 a final verdict of the Council of State regarding applicant 3 in Helmond was taken on the internal appeal (verzet) against the basic decision in first instance on October 30 2012. That basic decision contained the following main argument under point 2.1[15]: "*As the Council of State has previously considered (judgement of 31 March 2010 in Case No. 200902395/1/M1; www.raadvanstate.nl), the obligation resting on the college when crossing a plan threshold, to establish a plan under article 5.9, first paragraph, of the Environmental Management Act, occurs according to this article from the law itself. Therefore the communication of the college that the drafting of a plan referred to in Article 5.9, first paragraph, of the Environmental Management Act is not currently at issue, is not aimed at legal consequence. In view of this, the letter of July 6, 2012 is not a decision within the meaning of Article 1:3, first paragraph, of the AWB against which under Art. 20.1, first paragraph, of the Environmental Management Act can be appealed with the Council of State. That te Velde, as he maintains, has requested the adoption of specific measures to improve air quality, does not alter the fact that the communication of the college does not aim at legal consequence and therefore does not lead to a different conclusion.*" In appeal applicant concluded among others, also referring to Janacek, that the decision not to establish such a plan, after proof of exceeded limit values, has clearly 'legal consequence' in Dutch law, results even logically from the judgement of 31 March 2010 in Case No. 200902395/1/M1 of Velzen and that requesting such a plan was of course meant to have that plan executed. Applicant also pleaded that civil proceedings would impose a hurdle impossible to overcome due to excessive costs and proceedings long over the local limits set for the maximum length of proceedings. Of course applicant specifically concurred with that part of the basic decision on October 30 2012 stating that the obligations in the Act EM article 5.9 first section, result from the law but concluded that in case of failure by the authorities to execute such a plan, immediate action is required when limit values are exceeded. The Council of State

14 Helvoirt/Haaren, Appeal 14-8-2013, second paragraph of point 4.1: "*Gelet op het voorgaande heeft het college de brieven terecht opgevat als een verzoek om vaststelling van een plan als bedoeld in artikel 5.9, eerste lid, van de Wet Milieubeheer opgevat en niet als een aanvraag om met een last onder dwangsom of onder bestuursdwang op te treden of om een zogenaamd bestuurlijk rechtsoordeel te geven. Zoals de Afdeling in de uitspraak waarvan verzet terecht heeft overwogen, is een reactie op het verzoek een dergelijk plan vast te stellen geen besluit omdat een dergelijke reactie niet op rechtsgevolg is gericht. De verplichting om een plan vast te stellen bij overschrijding van een plandrempel, treedt immers zoals de Afdeling terecht heeft overwogen ingevolge artikel 5.9 eerste lid van de Wet Milieubeheer van rechtswege in.*"

15 Helmond, basic decision 30-10-2012, point 2.1: "*Zoals de Afdeling eerder heeft overwogen (uitspraak van 31 maart 2010 in zaak nr. 200902395/1/M1; www.raadvanstate.nl) treedt de verplichting om een plan vast te stellen die ingevolge artikel 5.9, eerste lid, van de Wet Milieubeheer bij overschrijding van een plandrempel op het college rust, ingevolge dit artikel van rechtswege in. De mededeling van het college dat het opstellen van een plan als bedoeld in artikel 5.9, eerste lid, van de Wet Milieubeheer op dit moment niet aan de orde is, is dan ook niet op rechtsgevolg gericht. Gelet hierop is de brief van 6 juli 2012 geen besluit in de zin van artikel 1:3, eerste lid, van de AWB waartegen ingevolge art. 20.1, eerste lid, van de Wet Milieubeheer beroep bij de Afdeling kan worden ingesteld. Dat te Velde, zoals hij stelt, heeft verzocht om het nemen van specifieke maatregelen ter verbetering van de luchtkwaliteit, doet er niet aan af dat de mededeling van het college niet op rechtsgevolg is gericht en leidt derhalve niet tot een ander oordeel.*"

however, concluded on April 17 2013 in appeal not to be authorized to pass judgement with the following main argument in the last phrases of part of point 4[16]: "*Therefore the college has interpreted these letters correctly as request to establish a plan referred to in Article 5.9, first paragraph, of the Environmental Management Act and not as a request for an administrative order, or to act under punitive damages or with administrative coercion or as a request for a legal opinion. As the Council of State in the decision in appeal rightly considered, a response to a request to establish such a plan, is not a decision because such a response is not aimed at legal consequence, which te Velde as such does not dispute. The Council of State has, in view of this, rightly concluded that it is not competent to judge on appeal.*"

- Eindhoven: The basic decision in first instance of the Council of State regarding applicant 2 in Eindhoven is still pending since the original request on February 15 2012. In view of the ECHR-deadline in Helmond, the final verdict of the Council of State on Eindhoven has to be included in this application later on.

19. In the meantime new requests based on new and different CARII calculations showing different limit values exceeded, has been made in June 2013 by all applicants in Haaren/Helvoirt (N65), Eindhoven(Kennedylaan) and Helmond (N270). This time using the 'magic' words: "*application for an administrative order to act under punitive damages, administrative coercion and request for a legal opinion.*". All three municipalities refused again to take action and appeals are again under way again for the refusal to act. In the meantime every year 31-74 deadly victims of air pollution are lost in the affected areas as a result of shorter life expectancies.

16 *Helmond Appeal 17-4-2013: Last phrases of point 4: "Het College heeft de brieven dan ook terecht als een verzoek om vaststelling van een plan als bedoeld in artikel 5.9, eerste lid opgevat, en niet als een aanvraag om met een last onder dwangsom of onder bestuursdwang op te treden of om een bestuurlijk rechtsoordeel te geven. Zoals de Afdeling in de uitspraak waarvan verzet terecht heeft overwogen is een reactie op het verzoek om een dergelijk plan op te stellen geen besluit, hetgeen te Velde als zodanig ook niet betwist. De Afdeling heeft gelet hierop terecht geconcludeerd dat zij niet bevoegd is van het beroep kennis te nemen. "*

III EXPOSÉ DE LA OU DES VIOLATION(S) DE LA CONVENTION ET/OU DES PROTOCOLES ALLÉGUÉE(S), AINSI QUE DES ARGUMENTS À L'APPUI
STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION AND/OR PROTOCOLS AND OF RELEVANT ARGUMENTS

15.

Domestic Legal Framework as outlined

1. Article 5.9 sub 1 of the Act EM reads translated "*Mayor and Aldermen adopt a plan in the cases set out in Annex 2, rule 13.1, where a plan threshold is exceeded. This plan will indicate how and by what measures limit values listed in the Annex will be met within the deadline for that value. They shall ensure the implementation of that plan.*" This is not inconsistent with Directive 2008/50/EC. However it appears that Dutch municipalities as well of the Council of State do not want to realize the implications of the rulings of the European Court of Justice under point 48 in the comparable case of Dieter Janecek C-237/07. These rulings clarified what action a third party whose health is impaired is entitled to take and what may be expected from Member States to reduce to a minimum the risk that the limit values may be exceeded.

2. As to third party action, the European Court of Justice ruled unequivocally that "*persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution.*" As acquis communautaire it is understood that "*the domestic legal order will provide an effective remedy for violations of Convention rights.*" The previous judgements, in first instances and in appeal, make clear that the Council of State did not execute this obligation of Member States. The various written remarks of local authorities in Haaren/Helvoirt, Eindhoven and Helmond later on in this case, provide further evidence that when air pollution, traffic and health effects are at stake the domestic legal order does not provide an effective remedy for violations of Convention rights.

3. As to what may be expected from Member States the European Court of Justice ruled unequivocally that "*Member States are obliged, subject to judicial review by the national courts, only to take such measures – in the context of an action plan and in the short term – as are capable of reducing to a minimum the risk that the limit values or alert thresholds may be exceeded and of ensuring a gradual return to a level below those values or thresholds, taking into account the factual circumstances and all opposing interests.*" The various written remarks of local authorities in Haaren/Helvoirt, Eindhoven and Helmond later on in this case and the new WHO guide lines make clear that anyhow risk is involved. In Eindhoven and Helvoirt/Haaren there are no action plans in effect. An older action plan of 2006 in Helmond is not (longer) legally valid. As to the content of exceeding limit values, not any municipality disputed the merits of the CARII calculations in terms of risk, hiding after legal tricks and a wrongly footed NSL.

4. As to the final remark in the second ruling on '*taking into account the factual circumstances and all opposing interests*' the following information is relevant. The Province of Brabant together with the Ministry responsible for Infrastructure and Environment, intend to build new roads in nature and countryside locations of Brabant, implying investments of approximately €1.336.000.000[17]. The applicants have brought forward that building car tunnels under busy roads in the affected areas will cost €1.495.000.000[18]. However development possibilities over and near tunnels will make up for the difference and probably more in the centre of these densely populated towns. In any case car tunnels will stop air pollution effectively in the affected areas whereas the provincial plans do

17 http://n65oh.wordpress.com/plan-rijkprovincie/

18 http://www.n65.nl/Brabants-Ondertunnelingsplan-drukke-wegen-in-bebouwde-kommen.pdf

not substantially reduce traffic in the affected areas. As a result benefit/cost calculations on tunnel investments are much more favourable than the provincial plans.

The Domestic Legal Framework at work

5. Some of the remarks below from the proceedings may clarify how public authorities disrespected human rights by sending applicants from pillar to post as shown by the following examples taken from the written proceedings:

Applicant 1 in Helvoirt/Haaren on the N65[19]:

- Mail from the responsible alderman on 4-2-2012 to his political friends in the city council endorsing their obvious doubts that "*real links exist between the N65 and mortality.*" Comment: All scientific literature proves real and direct links.
- Letter from the municipality on 6-2-2012 to applicant 1 as answer on the first request for an air quality plan on 29-12-2011 concluding: "*The Ministry for Infrastructure and Environment is responsible, the NSL will register air quality, health of our citizens is also our concern.*" Comment: Article 5.9 Act EM makes explicitly the municipality responsible.
- Letter from the municipality on 26-6-2012 containing the decision that the request has no '*legal consequence*', therefore not admissible with an advice to turn to civil proceedings. Comment: see this footnote[20].
- Letter from the municipality on 8-7-2013 to applicant as answer on the second request of applicant 1 for an air quality plan using the 'magic' words required by the Council of State. The answer was: "*The municipality of Haaren is not authorized, because the request concerns the national road network. For the national road network, the Minister for Infrastructure and Environment is the competent authority.*" Comment: A 'Startnotitie N65' (Notification of Intent N65) has been signed by the Ministry for Infrastructure and Environment on May 16 2003. Besides making available €100.000.000 including VAT, it further states that there are no air pollution problems or limit values exceeded as shown by the NSL and a tunnel does not fit in the budget. This statement on air pollution can easily be refuted by existing CARII calculations. The statement on costs is disputable. The outcome depends on development possibilities over and near tunnels and is also inconsistent with the priority given by the Ministry to benefit/cost analysis. New appeal is under way for lack of action.

Applicant 2 in Eindhoven on the Kennedylaan[21]:

- Letter from the municipality on 2-3-2012 to applicant 2 as answer on the first request for an air quality plan on 15-2-2012 concluding: "*There are no air pollution standards exceeded. The air quality and mobility program in 2006 provides a comprehensive and coherent package of measures. A car tunnel is not a viable and effective solution nor necessary.*" Comment: It was easy to prove that the Eindhoven air quality and mobility program in 2006 showed already pollution limits

19 See proof of details (Dutch only) on:
http://www.n65.nl/RvS-Haaren/Procedure-Overschrijding-Luchtverontreinigingsnormen-N65.htm

20 Civil proceedings do not give the right to request an air quality plan but may serve only to sue for unlawful government acts and thus might only result in effective punitive damages. Only administrative law can make binding government decisions such as drafting an effective air quality plan. Furthermore applicants have argued before the Council of State that civil proceedings in comparable cases took many years, far over the local limits set for the maximum length of proceedings, were all ended for lack of funds and risked to end in non-admissibility due to various reasoning's.

21 See proof of details (Dutch only) on:
http://www.n65.nl/Eindhoven/Procedure-Overschrijding-Luchtverontreinigingsnormen-Kennedylaan.htm

exceeded from 2006 until after 2015 and did not comply with existing rules for valid legal approval. It was also easy to prove that any objective analysis, based on benefit/cost comparison and price, results in a clear preference for car tunnels under busy roads in densely populated areas.

- A hearing with a municipal appeal commission on 11-9-2012 showed a document from the municipality were the responsible officials refused to verify the CARII calculations on limit values exceeded. The argument used was that NSL did not show them.
- The same hearing shows that the responsible officials doubted the application of European law and the relevance of Janacek in this case.
- The municipality decided on 14-12-2012 that the request has no *'legal consequence'* and was therefore not admissible. The appeal commission advised nevertheless the authorities explicitly to check the content of applicant's allegations that limit values are exceeded. Comment: This advice was never followed in spite of the fact that all CARII calculations provided by applicant can be checked with just some minutes work.
- Letter from the responsible alderman on 26-3-2013, together with some colleagues in other big cities, to the Ministry for Infrastructure and Environment expressing concern on the health effects of air pollution, requesting money and stating among others: "*Since some years, the national monitoring reports of the RIVM indicate that in 2015 in our cities - at unchanged policy – there will be bottlenecks in air quality NO2. The most recent national monitoring report confirms this for umpteenth time.*" Comment: In a hearing at the N65 case with the Council of State on 19-7-2013, the acting judge – a previous minister- indicated unofficially that the Ministry will try to extend the Dutch exception on NO2 and advised us therefore to focus on particulate matter. This judge also indicated that when using the 'magic' words in the next request, the Council of State would judge on the content of the request.
- On the moment of sending this application, a final decision in first instance has not been taken. It is expected to be identical with the final decisions in Helvoirt/Haaren and in Helmond. Therefore a second request of applicant 2 for an air quality plan using the 'magic' words required by the Council of State, has already been made to the municipality of Eindhoven.
- Letter from the municipality on 5-7-2013 to applicant as answer on the second request of applicant 3 for an air quality plan using the 'magic' words required by the Council of State. The answer was: "*Your request has been transferred to the Ministry for Infrastructure and Environment who is responsible*". Comment: Article 5.9 Act EM makes explicitly the municipality responsible. New appeal is under way for lack of action.

Applicant 3 in Helmond N270/Traverse[22]

- Letter from the municipality on 2-3-2012 to applicant 3 as answer on the first request for an air quality plan on 15-2-2012 concluding: "a. *According to the NSL it is expected that the legal limits on air quality will be met.* b. *It must be said that an alternative car tunnel plan does not fit into the road infrastructure in Helmond and will*

22 See proof of details (Dutch only) on:
http://www.n65.nl/RvS-Helmond/Procedure-Overschrijding-Luchtverontreinigingsnormen-N270-Traverse.htm
The North-East Corridor is one of the many names indicating an important part of the provincial plans around Eindhoven and Helmond. Other terms used are Brainport, NOC, Wilhelminakanaal etc.

therefore not be included in the North-East Corridor." Comment: It follows from the words 'expected' and 'will be met ' that actual limits are not met as confirmed in the older action plan of 2006 that is not (longer) legally valid.

- Letter from the municipality on 10-7-2012 containing the final decision with as legal argument: "*The NSL has gone through an AWB process that you have used. The above means that the plan has been prepared according to Article 5.9 Environmental Management Act.*" This letter remarked furthermore: "*We will, if it appears in 2015, that the legal standards are going to be exceeded again, be obliged to draft a plan with measures. At present, the need of preparation of a supplemental plan does not arise.*" Comment: It follows from the words 'going to be exceeded again' that actual limits are not met as confirmed in the older action plan of 2006 that is not (longer) legally valid.
- Letter from the municipality on 2-7-2013 to applicant as answer on the second request of applicant 3 for an air quality plan using the 'magic' words required by the Council of State. Referring to the NSL the answer was that no action was required because: "*On January 1, 2015 the limit value NO2 must be met*". Comment: On written requests to answer on the exceeded values of PM and benzene as shown, no answer has been received until the date of sending this application. This in spite of the fact that all CARII calculations provided by applicant can be checked with just some minutes work. New appeal is under way for lack of action.

6. The previous paragraph cites some polite written statements from municipalities about health being a serious concern. However this is political small-talk with just feel good external statements without consequence. They also cite internal mockery on this health concern. Fact is that municipalities and the Council of State hide after the NSL, the Ministry for Infrastructure and Environment, the existing provincial infrastructure plans, existing Dutch exceptions on NO2, the future in 2005 with possibly a more benign regulation on NO2, very formal Dutch legal reasoning's to escape action on air pollution such as '*no legal consequence*' or '*the obligation to draw up an air pollution plan occurs by operation of law*'. Not any municipality bothered to go into the facts presented on exceeded limit values. Not any municipality provided any proof of the validity of NSL on specific places or even considered the possible threat to life and health as risk. Not any municipality considered the risk that on some other locations limit values could also be exceeded. This in spite of the fact that the health risk is quite evident in view of the (new) WHO guidelines even when actual legal limit values are not exceeded. On top of all, some remarks and statements of municipalities make even clear that there is little doubt that some limits are exceeded or at least that risk was imminent. It is also very difficult to understand why the Ministry responsible for Infrastructure and the Environment deviated in the NSL from the maximum 10 meter from the kerbside prescribed by Directive 2008/50/EC. This results in much lower air pollution values in NSL.

7. It is remarkable that all municipalities and even the Council of State overlooked the ruling in C-237/07 with Dieter Janecek requiring that "*where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan.*" The Ministry of Justice[23] wrote even a guidance manual for municipalities on administrative appeals procedure requiring: "*In assessing a letter, the administrative authority should consider the intentions of the petitioner.*" As tip is even stated "*When unsure, it is advisable to ask applicant what procedure he refers to, for example by telephone.*" Not any municipality, let alone the Council of State

23 Boom, ISBN 90-5454-438-4

took notice of the intentions of applicants, continuing sending applicants from pillar to post in lengthy procedures. It is also remarkable that all municipalities continued sticking to the provincial plans for infrastructure, overlooking the request of a political minority of at least 4 parties to investigate the merits of such a plan. The Council of State did not even bother in this case, very similar to Janacek, to ask the opinion of the European Court of Justice if the unusual request for 'magic' words complies with the Janacek ruling. On August 7 2013 the Council of State stated even in writing that: "*Your alleged interest is not enough to justify minutes of the proceedings.*" The conclusion might even be drawn that systematically denying the clear intentions of applicants, evading checks on their calculations on limit values exceeded near their homes, evading their calculations on viable (tunnel) alternatives and deviating in NSL from the prescribed maximum 10 meter from the kerbside, could be intended policy.

8. This application is not meant to overrule or ridicule the verdicts of the Council of State. Every year lost without effective actions means 31-74 deadly victims of air pollution in the affected areas as a result of shorter life expectancies. Therefore non-action where action is required in view of the risk that limit values are exceeded, implies serious infringements of the human rights below.

ALLEGED VIOLATION(S) OF THE CONVENTION AND/OR PROTOCOLS

a) Right to life

9. Article 2 sub a. of the Convention states that "*Everyone's right to life shall be protected by law.*" and Article 2 sub b. and your case law give almost no leeway for any margin of appreciation. As regards the right to life in relation to environmental issues a prominent position in case law is taken by the ruling of your Grand Chamber in 2004 under point 89 with Öneryildiz v. Turkey: "*The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 (see paragraph 71 above) entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life*". This ruling was followed by many others confirming that local authorities have little margin of appreciation left when it comes to article 2. Since Osman v. the United Kingdom, no. 14/1997/798/1001 on 28.10.1998, it has been made clear however that Article 2 should "*be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities*". Applicants took therefore care to provide a viable technical and financial alternative by proposing car tunnels. There is also no doubt that the ruling in Berü v. Turkey, no. 47304/07 on 11.01.2011 that authorities should be aware of "*immediate risk*" was applicable in this case and that authorities "*neglected to take operational measures to prevent that risk from materializing*" as Kemaloglu v. Turkey, no. 19986/06 on 10.04.2012 requires.

10. In contrast to the above case law, it appears that in the Netherlands there is no legislative and administrative framework designed to provide effective deterrence against threats to the right to life related to air pollution on busy roads. The existing framework disregards clear rules set by the European Court of Justice in Janacek. It seems set mainly to prevent effective deterrence for example by changing the prescribed maximum 10 meter from the kerbside into a minimum and completely disregarding the requirement that limit values should nowhere be exceeded, except on places where the public is not allowed. The authorities prevented even further evaluation of viable technical and financial alternatives that did took into account the health risks of air pollution near busy roads in populated areas. This attitude should be considered in the light of the fact that even when local legal limit values are not

exceeded, there is a threat to life as exposed by the new WHO Guidelines.

It follows from the above that article 2 has been infringed.

b) Respect for private and family life

11. Article 8 sub 1 of the Convention states that "*Everyone has the right to respect for his private and family life, his home and his correspondence.*" A long list exists of ECHR judgements where art. 8 has been violated regarding: neighbouring noise[24], industrial pollution[25], other adverse effects on the environment and so on.

    It is true that article 8 sub 2 of the Convention and case law enlarge the margin of appreciation compared to article 2 sub 2. However, notice should be paid to the introduction phrase of article 8 sub 2 "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law*". In the present case the law itself requires interference by public authorities for the protection of health. Such effective interference for the protection of health however was never given except by political small talk without consequence.

    At the contrary, just political agreement's between some political parties having a majority in the provincial parliament after previous local elections, prevented the request of a political minority in July 2011 to investigate the merits of an alternative plan with car tunnels under the busy roads concerned. In the parliamentary discussions as in the political agreement's, the political majority disregarded the health aspects of alternative plans on infrastructure. The later pillar to post play exposed in the lengthy legal procedures in this case, obvious violations in NSL of among others, the prescribed maximum 10 meter from the kerbside with no tolerance for exceeded limit values except on places where the public is not allowed on top of the violations of European (case) law exposed in this case, make obvious that public authorities refuse to pay respect for private, family life and home's. This all leads to the conclusion that the exceptions in article 8 sub 2 of the Convention are not applicable and that public authorities did not act in accordance with the law.

12. In the present case the exception on the economic well-being of the country even turns into a contrarian argument, thus supporting the proof that article 8 of the Convention has been infringed. Indeed, from the perspective of economic well-being, there is little doubt that the alternative plans with tunnels should be preferred on sound economic grounds. The existing plans give a benefit/cost ratio of respectively 0,74 (NOC) and 0,68 (N279) whereas the car tunnel alternative benefit/cost ratio exceeds 2 on top of fewer likely budget restraints.

13. In your Court's case law the margin of appreciation given to authorities was sometimes enlarged for the economic needs of public projects (airports e.g.) despite the fact that private, family life and homes were at stake. The argument that authorities have a larger margin of appreciation in case of economic needs of public projects fails here. All economic and traffic needs are even better met with the proposed car tunnel alternative, neglected by authorities. Nevertheless it could make sense here to show in detail that the arguments that your Grand Chamber used in for example Hatton v. the United

24 Moreno Gomez v. Spain (no. 4143/02 in 2004), Deés v. Hungary (no. 2345/06 in 2010), Mileva and Others v. Bulgaria (nos. 43449/02 and 21475/04 in 2010), Dubetska and Others v. Ukraine (no. 30499/03 in 2011),

25 Lopez Ostra v. Spain (no. 16798/90 in 1994)

Kingdom, no. 36022/97, on 08-07-2003, to justify an exception based on the economic needs of public projects do not apply in this case.
a. It is not a small percentage of the population that is at risk but every body living in a radius of 1.000 meter near busy roads.
b. It is also not true that those people living nearby knew the air pollution problem in advance. They knew of course about the noise problem of heavy traffic when moving in, mostly many years ago, but could not predict the increase in traffic let alone the health effects of living nearby heavy traffic. Even by now, many people, including local authorities, are not fully conscious of the health effects and local authorities have strong tendencies to treat lightly or even deny these health effects as this case shows.
c. It is certainly not true that house prices have not dropped as shown later on under protection of property rights.
d. It is also not true that those people living nearby can leave or sell their houses without financial damage.

It follows from the foregoing that article 8 has been infringed.

c) Protection of Property Rights

14. Article 1 sub 1 of the First Protocol states "*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.*" This Article 1 sub 2 gives ample room of course to a margin of appreciation to the authorities. However, violating clear laws on air pollution and thereby human rights under article 2 and 8 of the Convention does not fit into any margin of appreciation.

15. Therefore, as one of the defences against the Dutch legal habit that the distinction between civil and administrative proceedings is largely based on the idea of '*legal consequence*', applicants stated also that nearby busy roads affect the value of their homes negatively. This was regarded as so self evident, that proof was not submitted. Your case law on Article 1 of the First Protocol often requires proof. Proof may be easily provided by a Dutch tax system that relies for some taxes on home values. These values are calculated by all Dutch municipalities with 'WOZ-values'. These 'WOZ-values' are of course regularly disputed. Therefore easy proof can be found in two ways:
    - by case law research on July 28 2013 in tax law on all Dutch search terms together 'WOZ', 'drukke weg' 'drukke verkeersweg' (English: WOZ, 'busy road' 'busy traffic road'), applicants found 6 recent judgements declaring on principle that traffic has negative impact on 'WOZ-values[26]'. Limiting search terms to only 'WOZ' and 'drukke weg' gives already 57 hits. Checking all these 57 hits appears superfluous given the evident nature of the question.

    - by Google research on July 28 2013 with the same search terms, applicants found

26 6 judgements since 2006 accepted the relationship between traffic details and a lower 'WOZ-value'. Not any judgement doubted this relationship on principal and limited legal discussions to local details of proof.
Case 1. http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBBRE:2011:BV1614 on 07-12-2011
Case 2. http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARN:2007:BB5523 on 05-10-2007
Case 3. http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBBRE:2006:AX5808 on 09-05-2006
Case 4. http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHSGR:2010:BN2005 on 06-07-2010
Case 5. http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2011:BR1249 on 16-06-2011
Case 6. http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMID:2007:BH9171 on 28-12-2007

2.770 hits. We selected in this footnote[27] just some hits containing calculation models, appeal models, advice or legal support stating that near by traffic influences 'WOZ-values' negatively. Checking all these 2.770 hits appears superfluous given the evident nature of the question..

It follows from the foregoing that the first article of Protocol 1 on the Convention has been infringed.

d) Right to an effective remedy before a national authority

16. Article 13 of the Convention states that "*Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*" This article guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The health aspects of air pollution require immediate action as confirmed by the European Court of Justice in C-237/07, Dieter Janacek. This case demonstrates that immediate action and effective remedies are not available, not by the administrative proceedings as prescribed by the Act EM and not by civil proceedings, in the Netherlands necessarily based on unlawful government acts. In the domestic proceedings applicants argued before the Council of State that civil proceedings in comparable cases took many years, far over the local limits set for the maximum length of proceedings, were all ended for lack of funds and risked to end in non-admissibility due to various very local legal arguments.

It follows from the above that article 13 of the Convention has been infringed.

e) Exhaustion of Local Remedies

17. Given the effects of air pollution on health and shorter lifetimes brought forward in domestic proceedings, little doubt exists whether a "*significant disadvantage*" is at stake as defined Article 35 § 3 (b) of the Convention. The resulting loss of 31-74 deadly victims of air pollution a year in the affected areas due to shortened life expectancies, is not a minor thing. Furthermore, the (not-binding) Admissibility Guide of your Court states as additional safe guard clauses applicable in this case:

1. "*An application will not be declared inadmissible if respect for human rights as defined in the Convention or the Protocols thereto requires an examination on the merits.*" and "*The Convention organs have consistently interpreted those provisions as compelling them to continue the examination of a case, not withstanding its settlement by the parties or the existence of any other ground for striking the case out of its list. A further examination of a case was thus found to be necessary when it raised questions of a general character affecting the observance of the Convention*"

2. "*It will not be possible for the Court to reject an application on account of its trivial nature if the case has not been duly considered by a domestic tribunal.* "

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27 See example(s) for:
- calculation model: http://www.krachtvanutrecht-initiatief.nl/gastvrij/index.html?WOZ/index.html
- appeal model: a. http://www.nuenensbelang.nl/Tips%20en%20voorbeeld%20bezwaarschrift%20OZB.htm
  b. http://www.z24.nl/ondernemen/zo-loont-bezwaar-maken-tegen-woz-waarde
-advice bureau: a. https://www.wozspecialisten.nl/quote.php?id=20
  b. http://www.futd.nl/blog/2567/waardedrukkende-factoren-voor-de-woz/
  c. http://www.jurofoon.nl/nieuws/weblog.asp?id=6743

These main admissibility criteria are all met. Respect to the estimated annual 31-74 deadly victims requires an examination on the merits. The lack of respect as shown in domestic proceeding raises serious questions of a general character affecting the observance of the Convention in the Netherlands, beside other European (case) laws. Furthermore this case is not trivial and has not been duly considered by the Council of State.

18. The Dutch government may point out however that local remedies have not been exhausted and lodge a non-exhaustion plea stating for example that: a. applicants did not bring their case forward to the appropriate civil court, b. therefore the Council of State could only declare the case not admissible, implying also that c. it was legally impossible to have it judged in substance. To these and other arguments the following objections may be raised:

- Chapter 20 of the Act EM defines as Court of Appeal the Council of State (Afdeling Bestuursrechtspraak van de Raad van State=Administrative Jurisdiction Division of the Council of State). This is one of the three highest Courts in Dutch administrative law. So further domestic appeal is impossible. A non-exhaustion plea would also not hold in view of the following case law:
  a. The (not-binding) Admissibility Guide of your Court states: "*If more than one potentially effective remedy is available, the applicant is only required to have used one of them*". There were also various other reasons why the applicants deemed a civil court would not be able to provide a remedy capable of redress in respect of the applicant's complaints and of offering reasonable prospects of success. One of them was that only the Council of State disposes of the foundation STAB (Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening) as an impartial expert.
  b. The Council of State is also reputed to deliver quick judgements in highest domestic appeal, normally within a year, where two similar civil proceedings took well over 4 year respectively 20 month in the first instance's where one applicant gave up for lack of money. The other applicant's appeal ended after about 6,5 year in second instance while applicant was unable to pay an interim decision forcing him to pay several thousands Euro's for 3 expert advisor's. So, even if the burden of proof on this point should lie with applicants, the (not-binding) Admissibility Guide of your Court cites the following exceptions: "*the remedy was for some reason inadequate and ineffective in the particular circumstances of the case (Selmouni v. France [GC], § 76 – for example, in the case of excessive delays in the conduct of an inquiry –Radio France and Others v. France(dec.), § 34; or a remedy which is normally available, such as an appeal on points of law, but which, in the light of the approach taken in similar cases, was ineffective in the circumstances of the case: Scordino v. Italy (dec.); Pressos Compania Naviera S.A. and Others v. Belgium , §§ 26 and 27), even if the decisions in question were recent (Gas and Dubois v. France(dec.)).*" So, in the light of the approach taken in Dutch civil courts in two similar cases, civil proceedings may be regarded as ineffective in the circumstances of this case.
  c. Dutch civil law proceedings generally end with one of the parties being condemned, depending on the outcome of the proceedings, to pay various (substantial) costs. These costs act effectively as fines in practice while the (not-binding) Admissibility Guide of your Court states that "*Imposing a fine based on the outcome of an a appeal when no abuse of process is alleged excludes the remedy from those that have to be exhausted*". So, due to these fines, civil proceedings are excluded from the remedies that have to be exhausted.
  d. The (not-binding) Admissibility Guide of your Court states on "*inadequate and ineffective remedies*" that: "*The remedy must be capable of providing redress in respect of the applicant's complaints and of offering reasonable prospects of success*". The rule on exhaustion of

local remedies is also "*inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (Aksoy v.Turkey, § 52)*". So, given the circumstances of this case and regardless of actual legal pollution values exceeded or not, it may be duly concluded that the repeated disregard of health risks of polluted air near busy roads, is incompatible with the Convention, shows official tolerance and most likely bad faith of such a nature as to make both civil and administrative proceedings futile or ineffective.

- All applicants brought their cases forward in ample substance to the Council of State. The (not-binding) Admissibility Guide of your Court states on this point: "*It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance*". So, the case being raised in ample substance and the most likely court refusing to judge on the merits, this non-exhaustion argument of the Dutch state is not supported by your case law.

- The local case law on "*legal consequence*" as the division barrier between civil and administrative law can be interpreted at will and is ambiguous as shown in this case. Therefore this artificial legal distinction violates your case law stating that "*The remedy's basis in domestic law must therefore be clear (Scavuzzo-Hager and Others v. Switzerland * (dec.); Norbert Sikorski v. Poland *, § 117; Sürmeli v. Germany [GC], §§ 110-12).*" However, the next points show that Dutch law is not clear at all on air pollution plan proceedings:
  a. "Legal consequence" means that acting or not acting of a government body changes someone's legal position. The applicants have argued that by not acting on air quality, their legal positions change. Among others their life's are shortened, their health endangered, their house prices fall and their right to claim an air pollution plan as required by Directive 2008/50/EC and elucidated by the European Court of Justice in the comparable case of Dieter Janecek C-237/07 with point 48 , dismissed.
  b. Requiring 'magic words' to be used and disregarding obvious intentions in view of applicants "significant disadvantages" at stake, is excessively formal and not accepted standard procedure in Dutch law. Certainly not when European case law clearly prescribes immediate action where there is a risk that limit values may be exceeded and it has been shown that the NSL does not comply with Directive 2008/50/EC.
  c. Both applicants and the Council of State have brought forward in domestic proceedings a previous ruling[28] from the Council of State (judgement of 31 March 2010 in Case No. 200902395/1/M1on 31-03-2010). This case discussed a recent air pollution action plan established in the municipality Velzen. Quite correctly and in accordance with Janacek, the Council of State noticed in Velzen that the content of such a plan should be judged according to the administrative law procedures in Chapter 3.4 of the General Administrative Law(AWB). It also remarked in Velzen quite correctly and in full accordance with Janacek that this is not the case if the applicant should have made a specific request for an air pollution action plan. However, in the present case all applicants made such a specific request and nevertheless the Council of State systematically denies access to an air pollution action plan. So case law is not clear at all and the question arises why the Council of State judged according to Janacek in the Velzen case and not in this case.
  d. In this context your case law of Kleyn and Others v. the Netherlands (applications nos. 39343/98, 39651/98, 43147/98 and 46664/99) on May 6 2003 is relevant. For lack of proof, applicants in this case did never complain of a violation of Article 6 § 1 of the

28 http://www.rechtspraak.nl/ljn.asp?ljn=BL9651

Convention. Nevertheless in view of the foregoing points a, b and c, doubts may be raised whether in the present case by also advising on the Law EM, the Council of State lacked the necessary independency and impartiality prescribed by Article 6 § 1 of the Convention. To avoid all suspicion of dependency and partiality, the acting government has recently decided to merge in the future the judicial section of the Council of State with the other two highest Courts in Dutch administrative law, thus setting the advising section apart.

e. The previous arguments, taken together, lead to the conclusion that your requirements on 'quality of law' as elucidated recently on 07/10/2011 in Serkov v. Ukraine (Application no. 39766/05) has been disrespected. There is a clear lack of the required foreseeability and clarity in the domestic law on air pollution. As your Court rightly concluded in Serkov v. Ukraine, this risk should be borne by the authorities.

It follows from the foregoing that applicants exhausted local remedies.

IV EXPOSÉ RELATIF AUX PRÉSCRIPTIONS DE L'ARTICLE 35 PAR. 1 DE LA CONVENTION
STATEMENT RELATIVE TO ARTICLE 35 PAR. 1 OF THE CONVENTION

16. Décision interne définitive (date et nature de la décision, organe - judiciaire ou autre - l'ayant rendue)
Final decision (date, court or authority and nature of decision)

- Applicant 1 in Haaren/Helvoirt: February 7 2012 on the merits and on August 14 2013 in internal appeal on inadmissibility, both declaring the request not admissible.
- Applicant 2 in Helmond: October 30 2012 on the merits and on April 17 2013 in internal appeal on inadmissibility, both declaring the request not admissible.

17. Autres décisions (énumérées dans l'ordre chronologique en indiquant, pour chaque décision, sa date, sa nature et l'organe - judiciaire ou autre - l'ayant rendue)
Other decisions (list in order, giving date, court or authority and nature of the decision for each one)

None

18. Le requérant disposait-il d'un recours qu'il n'a pas exercé? Si oui, lequel et pour quel motif n'a-t-il pas été exercé?
Is any other appeal or remedy available which you have not used? If so, explain why you have not used it.

No.

V EXPOSÉ DE L'OBJET DE LA REQUÊTE ET PRETENTIONS PROVISOIRES POUR UNE SATSIFACTION EQUITABLE
STATEMENT OF THE OBJECT OF THE APPLICATION AND PROVISIONAL CLAIMS FOR JUST SATISFICATION

19. The applicants request the Court to find that Articles 2, 8 and 13 of the Convention and/or Article 1 of the First Protocol have been violated, and to award just satisfaction in accordance with the applicants' claim thereto, to be filed at a later stage.

VI AUTRES INSTANCES INTERNATIONALES TRAITANT OU AYANT TRAITÉ L'AFFAIRE
STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

20. Avez-vous soumis à une autre instance internationale d'enquête ou de règlement les griefs énoncés dans la présente requête? Si oui, fournir des indications détaillées à ce sujet.
Have you submitted the above complaints to any other procedure of international investigation of settlement? If so, give full details.

No.

VII PIÈCES ANNEXÉES
LIST OF DOCUMENTS

21. See list of attached documents.

VIII DÉCLARATION ET SIGNATURE
DECLARATION AND SIGNATURE

Je déclare en toute conscience et loyauté que les renseignements qui figurent sur la présente formule de requête sont exacts.
I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

Lieu / *Place* Veenendaal, Netherlands

Date / *Date* [-] 2013/10/4

Signature du représentant / *Signature of representative*

mr. S. Heuh

[i]**Artikel 5.9 Wet Milieubeheer**

1. Burgemeester en wethouders stellen in de in bijlage 2, voorschrift 13.1, aangegeven gevallen waarin een plandrempel wordt overschreden een plan vast, waarin wordt aangegeven op welke wijze en door middel van welke maatregelen voldaan zal worden aan de desbetreffende in de bijlage genoemde grenswaarde, binnen de voor die waarde gestelde termijn. Zij dragen zorg voor de uitvoering van het plan.

2. Op de voorbereiding van een plan als bedoeld in het eerste lid, is afdeling 3.4 van de Algemene wet bestuursrecht van toepassing. Zienswijzen kunnen naar voren worden gebracht door een ieder.

3. Gedeputeerde staten, Onze Minister, Onze Ministers van Landbouw, Natuur en Voedselkwaliteit en van Verkeer en Waterstaat en andere bestuursorganen die maatregelen kunnen treffen leveren op verzoek van burgemeester en wethouders een bijdrage aan het opstellen en uitvoeren van een plan als bedoeld in het eerste lid. Daarbij geven de desbetreffende bestuursorganen in het plan gemotiveerd rekenschap van het al dan niet treffen van maatregelen. Omtrent het opstellen en uitvoeren van het plan bevorderen burgemeester en wethouders overleg met die bestuursorganen.

4. Voor 1 mei van het jaar volgend op het jaar waarin de overschrijding van de desbetreffende plandrempel, met inachtneming van de krachtens artikel 5.20 gestelde regels, is vastgesteld en gerapporteerd, stellen burgemeester en wethouders gedeputeerde staten in kennis van een vastgesteld plan als bedoeld in het eerste lid. Voor 1 juli van dat jaar stellen gedeputeerde staten Onze Minister in kennis van alle door hen ontvangen plannen.

5. Burgemeester en wethouders rapporteren eenmaal in de drie jaar, voor 1 mei van het op die periode volgende jaar, aan gedeputeerde staten omtrent de voortgang van de uitvoering van een plan of plannen als bedoeld in het eerste lid. Voor 1 juli van dat jaar stellen gedeputeerde staten Onze Minister in kennis van alle door hen ontvangen voortgangsrapportages.

6. Burgemeester en wethouders dragen er zorg voor dat het plan, bedoeld in het eerste lid, in overeenstemming is met een programma als bedoeld in artikel 5.12, eerste lid, of 5.13, eerste lid.

LIST of ATTACHMENTS to Introduction Letter of 3 September 2013 on the complaint of:

1. **Comité N65OH, Helvoirt in the municipality of Haaren**
2. **Belangenvereniging Bewoners Hudsonlaan (B.V.B.H.) in Eindhoven**
3. **F. te Velde in Helmond**

versus the Kingdom of the Netherlands

Attachments of Applicant 1 Comité N65, Helvoirt in the municipality of Haaren

1. December 29, 2011: Applicant requested the municipality (B & W) to make an air quality plan in view of limit values exceeded near the N65 in the village of Helvoirt.
2. December 29, 2011: Attachment to the previous request showing limit values exceeded.
3. February 6, 2012: B & W announced that Rijkswaterstaat (RWS) is the competent authority
4. February 15, 2012: Applicant showed respect for the need for serious investigation and requested a renewed decision within eight weeks, starting from 16/01/2012.
5. February 27, 2012: B & W repeated that RWS is the competent authority.
6. March 19, 2012: After a discussion with RWS on technicalities and out of fear to exceed the statutory period, applicant objected to the absence of a decision as requested on 29-12-2012.
7. March 22, 2012: B & W responded on 22-3-2012 communicating that a ruling on the objection would follow within 12 weeks.
8. June 18, 2012: Applicant put the municipality of Haaren in default in writing.
9. June 26, 2012: B & W declared the request for an air quality plan inadmissible.
10. August 12, 2012: Applicant filed a notice of appeal with the Council of State.
11. October 15, 2012: B & W filed a statement of defense with the Council of State.
12. February 7, 2013: The Council of State found the appeal unfounded and therefore not admissible.
13. March 16, 2013: Applicant submitted an internal appeal with the Council of State.
14. May 30, 2013: Applicant filed a second request to B & W using the 'magic' words advised by the Council of State and based on new calculations.
15. July 8, 2013: B & W maintained on the second request that the Ministry of Infrastructure and the Environment is responsible for the N65.
16. July 19, 2013: Applicant submitted pleading notes in a hearing.
17. August 5, 2013: Applicant objected to the negative decision on the second request referring to the art. 5.9 of the Environmental Management Act and Janacek.
18. August 14, 2013: The Council of State found the first request without 'legal consequence' and therefore not admissible.

Attachments of Applicant 2 BVBH, Eindhoven

A full list of attachments will be submitted after receipt of the final decision of the Council of State

Attachments of Applicant 3 F. te Velde , Helmond

1. May 7, 2012: Applicant requested the municipality (B & W) to make an air quality plan in view of limit values exceeded near the N270 in the town of Helmond.
2. May 7, 2012: Attachment to the previous request showing limit values exceeded.
3. June 22, 2012: B & W answered in response to the previous request that according to the NSL no limit values are exceeded. Furthermore a car tunnel does not fit within the Helmond road structure.
4. June 25, 2012: Applicant objected to the absence of a decision and declared B & W in default.
5. July 10, 2012: B&W declares that the NSL was approved in an AWB procedure, as such a supplementary plan is not at issue and in in the Structural Vision for Brabant a tunnel alternative is not selected.
6. August 18, 2012: Applicant filed a notice of appeal with the Council of State.
7. October 2, 2012: B & W filed a statement of defense with the Council of State.
8. October 30, 2012: The Council of State found the appeal unfounded and therefore not admissible.
9. December 3, 2012: Applicant submitted an internal appeal with the Council of State.
10. March 15, 2013: Applicant submitted pleading notes in a hearing.
11. April 17, 2013: The Council of State found the first request without 'legal consequence' and therefore not admissible.
12. June 4, 2013: Applicant filed a second request to B & W using the 'magic' words advised by the Council of State and based on new calculations.
13. July 2, 2013: B & W stated that an action plan was unnecessary because the limit value for NO2 is applicable only after January 1, 2015.
14. August 4, 2013: Applicant objected to the negative decision on the second request referring to the fact that limit values for PM10 and benzene are also exceeded and sufficient threat has been proven so that -according to Janacek- an action plan is required.

Raad van State

201207926/3/A4.
Datum uitspraak: 14 augustus 2013

AFDELING
BESTUURSRECHTSPRAAK

Uitspraak op het verzet (artikel 8:55 van de Algemene wet bestuursrecht; hierna: Awb) van:

de stichting Stichting Comité N65 Ondergronds Helvoirt, gevestigd te Helvoirt, gemeente Haaren,
opposante,

tegen de uitspraak van de Afdeling van 7 februari 2013 in zaak nr. 201207926/2/A4.

Procesverloop

Bij uitspraak van 7 februari 2013, in zaak nr. 201207926/2/A4, heeft de Afdeling na vereenvoudigde behandeling het beroep van Stichting Actiecomité N65 ongegrond verklaard. De uitspraak is aangehecht.

Tegen deze uitspraak heeft Stichting Comité N65 verzet gedaan.

De Afdeling heeft het verzet ter zitting behandeld op 19 juli 2013, waar de Stichting, vertegenwoordigd door mr. C.B.A. Spil en C. Jansen-van Valderen, zijn verschenen.

Overwegingen

1. In verzet staat alleen ter beoordeling of de uitspraak waarvan verzet terecht vereenvoudigd is behandeld.

2. Bij brief van 6 februari 2012 heeft het college van burgemeester en wethouders van Haaren Stichting Actiecomité N65 te kennen gegeven dat het geen aanleiding ziet om een plan als bedoeld in artikel 5.9, eerste lid, van de Wet milieubeheer vast te stellen. Het bezwaar van Stichting Actiecomité N65 hiertegen heeft het college bij besluit van 26 juni 2012 niet-ontvankelijk verklaard, omdat de vaststelling van een plan als bedoeld in artikel 5.9, eerste lid, van de Wet milieubeheer niet is aan te merken als een besluit in de zin van artikel 1:3 van de Awb en hierdoor geen bezwaarmogelijkheid open staat.

3. In de uitspraak waarvan verzet, heeft de Afdeling overwogen dat de verplichting om een plan vast te stellen, die ingevolge artikel 5.9, eerste lid, van de Wet milieubeheer bij overschrijding van een plandrempel op het college rust, ingevolge dit artikel van rechtswege intreedt. De brief van 6 februari 2012 is derhalve niet gericht op rechtsgevolg en geen besluit in de zin van artikel 1:3, eerste lid, van de Awb waartegen een rechtsmiddel kan worden aangewend, aldus de Afdeling. De Afdeling komt gelet hierop tot de conclusie dat het college terecht het door Stichting Comité N65 gemaakte bezwaar niet-ontvankelijk heeft verklaard.

4. Stichting Actiecomité N65 voert in verzet aan dat haar verzoek van 29 december 2011 tot vaststelling van een plan als bedoeld in artikel 5.9, eerste lid, van de Wet milieubeheer mede moet worden beschouwd als een aanvraag om toepassing van bestuurlijke handhavingsmiddelen of om een zogenoemd bestuurlijk rechtsoordeel te geven.

4.1. In de brief van 29 december 2011 schrijft Stichting Actiecomité N65 dat uit een onderzoek blijkt dat rond rijksweg N65 bij Helvoirt verschillende grenswaarden worden overschreden. Zij wijst het college erop dat artikel 5.9, eerste lid, van de Wet milieubeheer in dat geval voorschrijft dat een plan moet worden opgesteld. Stichting Actiecomité N65 vervolgt de brief met het weergeven van het derde en vierde lid van dat artikel. Aan het einde van de brief vermeldt Stichting Actiecomité N65 dat zij graag in overleg treedt met het college over het plan om aan de grenswaarden, die zij

in haar brief nader noemt, te voldoen. In de brief van 18 juni 2012, waarbij zij het college in gebreke stelt wegens het niet tijdig nemen van een besluit, wijst zij het college er wederom op dat het ingevolge artikel 5.9, eerste lid, van de Wet milieubeheer een plan dient op te stellen.

Gelet op het voorgaande heeft het college de brieven terecht als een verzoek om vaststelling van een plan als bedoeld in artikel 5.9, eerste lid, van de Wet milieubeheer opgevat, en niet als een aanvraag om met een last onder dwangsom of onder bestuursdwang op te treden of om een zogenoemd bestuurlijk rechtsoordeel te geven. Zoals de Afdeling in de uitspraak waarvan verzet terecht heeft overwogen is een reactie op het verzoek om een dergelijk plan vast te stellen geen besluit, omdat een dergelijke reactie niet op rechtsgevolg is gericht. De verplichting om bij overschrijding van een plandrempel een plan vast te stellen treedt immers, zoals de Afdeling terecht heeft overwogen, ingevolge artikel 5.9, eerste lid, van de Wet milieubeheer van rechtswege in. De Afdeling heeft het beroep van Stichting Actiecomité N65 derhalve terecht na vereenvoudigde behandeling ongegrond verklaard.

Het betoog van Stichting Actiecomité N65, onder verwijzing naar het arrest van het Hof van Justitie van de Europese Gemeenschappen van 25 juli 2008, C-237/07, Janacek (www.curia.europa.eu), dat de Afdeling op grond van het Europese recht rechtsbescherming dient te bieden, leidt niet tot een ander oordeel. Daartoe overweegt de Afdeling onder verwijzing naar haar uitspraak van 31 maart 2010 in zaak nr. 200902395/1/M1 (www.raadvanstate.nl) dat uit dat arrest niet volgt dat het toezicht op de naleving van de uit artikel 5.9, eerste lid, van de Wet milieubeheer voortvloeiende verplichtingen moet worden uitgeoefend door de bestuursrechter. Nu de brief van 6 februari 2012 geen besluit is in de zin van artikel 1:3, eerste lid, van de Awb, kan Stichting Actiecomité N65 uitsluitend een vordering bij de burgerlijke rechter instellen. Ingevolge artikel 8:71 van de Awb is de burgerlijke rechter aan de in de vorige zin vervatte beslissing van de Afdeling gebonden, zodat effectieve rechtsbescherming is gewaarborgd.

5. Het verzet is ongegrond.

6. Voor een proceskostenveroordeling bestaat geen aanleiding.

Beslissing

De Afdeling bestuursrechtspraak van de Raad van State:

verklaart het verzet ongegrond.

Aldus vastgesteld door mr. W. Sorgdrager, lid van de enkelvoudige kamer, in tegenwoordigheid van mr. J.A.A. van Roessel, ambtenaar van staat.

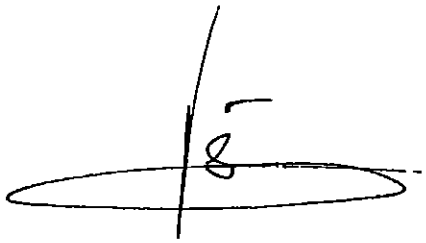
w.g. Sorgdrager
lid van de enkelvoudige kamer

w.g. Van Roessel
ambtenaar van staat

Uitgesproken in het openbaar op 14 augustus 2013

457-784.
Verzonden: 14 augustus 2013

Voor eensluidend afschrift,
de secretaris van de Raad van State,



mr. H.H.C. Visser

Raad van State

201208129/3/A4.
Datum uitspraak: 17 april 2013

AFDELING
BESTUURSRECHTSPRAAK

Uitspraak op het verzet (artikel 8:55 van de Algemene wet bestuursrecht) van:

H.F. te Velde, wonend te Helmond,
opposant,

tegen de uitspraak van de Afdeling van 30 oktober 2012 in zaak nr. 201208129/2/A4.

Procesverloop

Bij uitspraak van 30 oktober 2012, in zaak nr. 201208129/2/A4, heeft de Afdeling zich na vereenvoudigde behandeling onbevoegd verklaard om van het beroep kennis te nemen. De uitspraak is aangehecht.

Tegen deze uitspraak heeft Te Velde verzet gedaan.

De Afdeling heeft het verzet ter zitting behandeld op 15 maart 2013, waar Te Velde, vertegenwoordigd door mr. C.B.A. Spil en drs. W.M. Grientschnig, is verschenen.

Overwegingen

1. In verzet staat alleen ter beoordeling of de uitspraak waarvan verzet terecht vereenvoudigd is behandeld.

2. Te Velde heeft bij brieven van 7 mei 2012 en 25 juni 2012 verzoeken gericht aan het college van burgemeester en wethouders van Helmond. Het college heeft bij brief van 6 juli 2012 op die verzoeken gereageerd.

In de uitspraak waarvan verzet, is geoordeeld dat Te Velde met de brieven heeft verzocht om het opstellen van een plan als bedoeld in artikel 5.9, eerste lid, van de Wet milieubeheer en dat een reactie op een dergelijk verzoek niet op rechtsgevolg is gericht. De Afdeling oordeelde dat gelet daarop de brief van 6 juli 2012 geen besluit is, zodat zij onbevoegd is om van het beroep kennis te nemen.

3. Te Velde voert in verzet aan dat de brieven van 7 mei 2012 en 25 juni 2012 mede moeten worden beschouwd als een aanvraag om toepassing van bestuurlijke handhavingsmiddelen of om een zogenoemd bestuurlijk rechtsoordeel te geven.

4. Dit betoog faalt. Uit met name de brief van 25 juni 2012 blijkt duidelijk dat Te Velde verzoekt om vaststelling van een plan als bedoeld in artikel 5.9, eerste lid, van de Wet milieubeheer. Aan het begin van deze brief wordt immers verwezen naar de brief van 7 mei 2012 "met een verzoek om een plan op te stellen" op grond van de Wet milieubeheer, terwijl in de brief van 7 mei 2012 expliciet artikel 5.9, eerste, derde en vierde lid, van de Wet milieubeheer wordt weergegeven. Verder wordt aan het einde van de brief van 25 juni 2012 duidelijk vermeld dat het college "niet het gefundeerde besluit [heeft] genomen dat de Wet Milieubeheer art. 5.9 voorschrijft". Het college heeft de brieven dan ook terecht als een verzoek om vaststelling van een plan als bedoeld in artikel 5.9, eerste lid, van de Wet milieubeheer opgevat, en niet als een aanvraag om met een last onder dwangsom of onder bestuursdwang op te treden of om een zogenoemd bestuurlijk rechtsoordeel te geven. Zoals de Afdeling in de uitspraak waarvan verzet terecht heeft overwogen is een reactie op het verzoek om een dergelijk plan vast te stellen geen besluit, hetgeen Te Velde als zodanig ook niet betwist. De Afdeling heeft gelet hierop terecht geconcludeerd dat zij niet bevoegd is van het beroep kennis te nemen.

5. Het verzet is ongegrond.

6. Voor een proceskostenveroordeling bestaat geen aanleiding.

Beslissing

De Afdeling bestuursrechtspraak van de Raad van State

Recht doende in naam der Koningin:

verklaart het verzet ongegrond.

Aldus vastgesteld door mr. Y.E.M.A. Timmerman-Buck, lid van de enkelvoudige kamer, in tegenwoordigheid van mr. M.J. van der Zijpp, ambtenaar van staat.

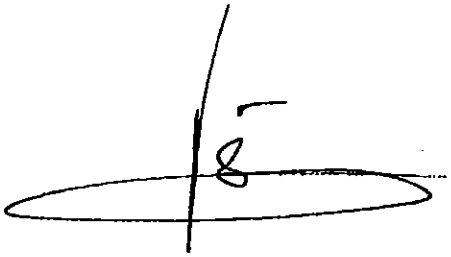
w.g. Timmerman-Buck
lid van de enkelvoudige kamer

w.g. Van der Zijpp
ambtenaar van staat

Uitgesproken in het openbaar op 17 april 2013

262-778.
Verzonden: 17 april 2013

Voor eensluidend afschrift,
de secretaris van de Raad van State,



mr. H.H.C. Visser