

7. Considerations

We determine whether you were justified in making the decision.

Preliminary relief

The objector also asked for preliminary relief from the court. At the court proceedings, the same arguments were presented as have been made in this objection. In a ruling dated August 16, 2022, the court in the preliminary relief proceedings rejected the request for relief. Among other things, the court's ruling states that you were justified in taking the position that the jacuzzi does not serve the purposes of a garden. This court goes on to state that it follows from this that the jacuzzi is in violation of the rules of the zoning plan and that you were authorized to take enforcement action. The court further concludes that you were also in a position to reasonably use your powers of enforcement by calling a halt to the construction work.

Applicable law

In principle, when making a decision on an objection, the law must be applied as it is in force at the time. However, enforcement proceedings constitute an exception in this regard. In such proceedings, the facts and circumstances at the time when the primary decision was made form the basis for assessment. Circumstances which subsequently occur may play a role in the reassessment, but only insofar as their inclusion is not precluded by the purpose and scope of the standard to be enforced or the fundamental legal principles which apply. Calling a halt to construction is a decision taken in relation to the situation at a particular time. Given the nature of such a decision, taking into account new rules, facts and circumstances which date from after the primary decision is therefore unlikely to be considered appropriate.

We will therefore disregard the new zoning plan (Museumkwartier – Valeriusbuurt 2022) which came into effect after construction was halted.

Construction without planning permission

The objector argues that the jacuzzi meets the requirements for construction without planning permission and that no halt to construction should therefore have been imposed. It is true that, under Article 3 of Appendix II to the Living Environment Law Decree (Besluit omgevingsrecht, 'Bor'), a swimming pool, hot tub or similar facility without a canopy does not require a permit under the Environment and Planning Act. If such a construction does not correspond to the zoning plan, however, a permit to deviate from the zoning plan is required. Unless a permit of this kind is granted, the pool or jacuzzi cannot be installed.

The contested decision states that the jacuzzi is in breach of the zoning plan. This was the position taken by the court in the preliminary relief proceedings. The objector disputes this position. To assess whether the jacuzzi may be installed without planning permission, we will assess whether or not it is in breach of the zoning plan.

Assessment in light of the zoning plan and the principle of legal certainty

At the location in question, the 2011 version of the Museumkwartier and Valeriusbuurt zoning plan was in effect at the time of the contested decision. The land was governed by a Housing zoning plan and, as such, was allowed to be used (as applicable) for housing, gardens and grounds, residential sections, footpaths, and bicycle lanes. However, undeveloped land was only allowed to be used as a garden.

We cannot therefore follow the objector's contention that this last rule is not applicable. The assertion that the land on which the jacuzzi was built was undeveloped prior to the construction of the jacuzzi is not disputed. Since that land was not developed, no buildings were allowed to be

constructed there, and constructions other than buildings were allowed only if they served the purposes of a garden. The objector argues that the land is not (or is no longer) undeveloped because she herself has developed it by building the construction under discussion. However, to take this circular reasoning to its logical conclusion, this would mean that no undeveloped land exists within this zoning plan. After all, this land can always be built on and once building has begun it can no longer be regarded as undeveloped. Not only is this position inconsistent with the literal interpretation, system, and intent of the zoning plan, but it would also render this planning item meaningless.

The term 'garden' is not defined in the zoning plan. In such cases, recourse should be made to the definition in common parlance. In this regard, case law in the Netherlands often operates on the basis of the definitions given in the Dutch-language dictionary *Groot woordenboek van de Nederlandse taal* published by Van Dale (hereinafter referred to as 'the Van Dale dictionary'). The court in the preliminary relief proceedings ruled on this point as follows:

11.1 The court in the preliminary relief proceedings holds that the respondent was correct in their assertion that the land on which the jacuzzi was planned was undeveloped. Insofar as applicable, pursuant to Article 19.4.4 of the planning regulations, 'garden' is the only permissible use for undeveloped land. This means that the jacuzzi must serve the purposes of a garden. The assertion that this planning item may form a hindrance to some forms of permitted use of land governed by a Housing zoning plan does not alter this situation.

11.2. No definition of the term 'garden' is included in the planning regulations. Nor do the explanatory notes provide any explanation as to how this term should be interpreted. The definition of the term 'garden' must therefore be determined according to common parlance, and in this regard the Van Dale Groot woordenboek van de Nederlandse taal (hereinafter: the Van Dale dictionary) has to serve as a guideline. According to the respondent, it follows from the Van Dale dictionary that 'garden' means 'a fenced or enclosed piece of land belonging to a house and adjoining or surrounding it, where flowers or vegetables etc. are grown'. The court in preliminary relief proceedings takes the view that the respondent could reasonably have been expected to accept this definition. The circumstance that, in practice, a garden may take a different form and that another definition may be given for the term 'garden' does not mean that the respondent was not in a position to accept the definition of the term 'garden' as given in the Van Dale dictionary. (...).

The objector provided no further substantiation as to why this ruling might not be correct. She merely repeated what she had also stated in the application for preliminary relief. We have no reason to doubt the position taken by the court in preliminary relief proceedings and therefore uphold its decision. In other words, we adhere to the view that the jacuzzi is in breach of the zoning plan and cannot therefore be built without planning permission.

The objector enlisted the services of consultancy firm Buro SRO to review the need for a permit prior to the construction work. The memo on this subject drawn up by Buro SRO mentions that the site is governed by a Housing zoning plan and that only construction that does not require planning permission is allowed beyond the structural area. It goes on to state that, in the opinion of Buro SRO, the jacuzzi does not have a canopy as referred to in Article 3 of Appendix II to the Living Environment Law Decree (Br) and (therefore) does not require planning permission. No mention is made of the fact that the zoning plan allows the land in question to be used only for the purpose of a garden. Nor does it consider whether a jacuzzi or swimming pool can be classified as "serving the purpose of garden". The review carried out by Buro SRO is therefore incomplete, in that it did not fully consider whether a jacuzzi or swimming pool is in line with the zoning plan.

If the objector wanted to know whether a jacuzzi could be built in the garden without planning permission, she would have been better off putting her question to the relevant department of the district authority, instead of enlisting the services of an external consultant. After all, the district authority is the body charged with the task of assessing these matters and, as such, is in a position to provide a definite answer about the grounds on which the relevant committee assesses a construction of this nature.