



NCN: [2023] UKFTT 423 (GRC)
Case Reference: NVZ/2021/0024

**First-tier Tribunal
(General Regulatory Chamber)
Nitrate Vulnerable Zones**

Considered without a hearing

Decision given on: 09 March 2023

Before

TRIBUNAL JUDGE NEVILLE

Between

D E HARRIS & PARTNERS

Appellant

and

THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Respondent

Decision:

- (1) The decision of 6 January 2022 consenting to the withdrawal of the appeal is set aside, pursuant to rule 41 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
- (2) The appeal is allowed.

REASONS

1. This appeal concerns land at Southwood Farm, Blackpool, in Dorset.
2. Regulation 4 of the Nitrate Pollution Prevention Regulations 2015 (“the regulations”) requires the Secretary of State to keep under review the eutrophic state of fresh surface waters, estuarial waters and coastal waters. ‘Eutrophic’, in relation to water and as defined at regulation 2(1), means enriched by nitrogen compounds causing an accelerated growth of algae and higher forms of plant life. In excess, this produces an undesirable disturbance to the water’s quality and balance of organisms.

3. The regulations provide that every four years the Secretary of State must, where necessary, revise or add to the designation of 'nitrate vulnerable zones' ("NVZs"). This is done by monitoring nitrate concentrates in order to identify water that is affected by pollution (or could be if the controls provided by the regulations are not applied), identifying land which drains into those waters and that contributes to its pollution, and taking into account changes and factors unforeseen at the time of any previous designation.
4. The regulations define "a relevant holding" as land and any associated buildings used for growing crops in soil, or rearing livestock for agricultural purposes, that fall wholly or partly in an NVZ. The occupier of a relevant holding must comply with rules concerning the use of nitrogen fertilisers and the storage of organic manure. Before the Secretary of State revises or adds to the designation of NVZs, regulation 5 requires her to publicise her proposals and send written notice to anyone appearing to be the owner or occupier of a relevant holding. Regulation 6 then affords such an owner or occupier a right of appeal to the Tribunal. So far as still applicable, the only permitted grounds of appeal are that the relevant holding (or any part of it):

(a) does not drain into water which the Secretary of State proposes to identify, or to continue to identify, as polluted or which has been similarly identified in Wales or Scotland, [or]

(b) drains into water which the Secretary of State should not identify, or should not continue to identify, as polluted.

5. Such a notice, dated 26 November 2021, was served on the appellant as the occupier or owner of the land at paragraph 1 above. It exercised its right of appeal to the Tribunal, citing ground (a) above. The accompanying narrative included the following:

... The correct NVZ field is on the other side of the road, which drains to Slapton Lea.

Our one field is separated by a Devon Bank Hedge which is 6 foot wide and a road. There are no drains in the hedge which would allow water to drain that way.

6. The appellant confirmed that it was content for the appeal to be decided without a hearing.
7. Following directions, the Environment Agency (on behalf of the Secretary of State) provided a Response to the appeal pursuant to rule 23 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. At paragraph 4 of the Response, the Environment Agency confirmed that the appeal was not opposed because:

...

All the land identified by the appellant does not drain to a polluted water. The local information on drainage patterns that has been provided by the appellant refines

and improves the understanding used in the technical note, in Annex 2, to identify the land draining to the polluted waters.

5. The Environment Agency considers that the designations made by the Secretary of States on 31 December 2020 (maps published on 1 June 2021) should be amended to remove the land identified by the appellant in this appeal from NVZ EL 124 and therefore does not wish to oppose this appeal.

8. The documents corresponding to that response were provided as annexes, and the Environment Agency confirmed that it was likewise content for the appeal to be decided without a hearing.
9. Ordinarily, the Tribunal's reaction to that concession would be to place the appeal before a judge to be decided. In this case, unfortunately, a member of staff instead sent an email to the appellant inviting it to withdraw its appeal. The appellant did so, stating in its email:

I understand from the correspondence received yesterday, that the Environment Agency will remove my land from the NVZ as it will not contest my appeal.

In that case I would like to withdraw the appeal.

10. On 6 January 2022, a Legal Officer acting under delegated judicial powers treated that email as notice of withdrawal under rule 17(1) and gave the Tribunal's consent under rule 17(2) to the notice of withdrawal taking effect. It does not appear from the file that the Legal Officer was provided with a copy of the Response. The Environment Agency was notified that withdrawal was effective, but not provided with the surrounding correspondence.
11. On 26 January 2023 the Environment Agency wrote to the Tribunal seeking clarification of the status of the appeal, its email including the following:

... We need our decision, as set out in the response letters for each appeal, to be allowed by the Judge in order to make the necessary, legally binding, NVZ boundary changes.

If the appellant subsequently withdraws the appeal then we have no legal basis to amend the physical NVZ boundaries.

12. In response, I issued a notice setting out my provisional view that the chronology disclosed a procedural irregularity. The rule 23 Response clearly anticipated that the appeal would be allowed by consent, as indeed had already taken place in numerous other appeals where the relevant appellant's evidence concerning drainage had been accepted. The Environment Agency was not notified of the subsequent invitation to the appellant to withdraw the appeal, nor the appellant's response. The appellant would have seen the Tribunal's invitation as intended to give effect to the concession in the Response. Nor, it seems, was the Legal Officer who gave consent provided with the Response.

13. The notice also set out my provisional view that the decision to give consent to withdrawal should be set aside in the interests of justice under rule 41. The appeal could then be allowed by consent, which would formally establish that the appellant's land should not be included within the NVZ. The parties were invited to make any objection to that proposed course of action within 14 days. Neither has done so.
14. I am therefore satisfied that the requirements of rule 41(1)(a) and 41(d) are met. While the Environment Agency ought to have appreciated that there was a problem sooner, this is outweighed by the importance of formally establishing the position under the statutory regime.
15. The appeal for the purposes of regulation 6(3), the Secretary of State (through the Environment Agency acting on her behalf) accepting that the ground at regulation 6(2)(a) is made out.

Signed

Judge Neville

Date:

17 February 2023