

Report

Investigation into the failure of the Public Body of Bonaire to take enforcement action against containers parked for excessive periods

Judgement

On the basis of the investigation undertaken, the National Ombudsman upholds the complaint regarding the Public Body of Bonaire

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Bonaire's South Pier is made up of two plots of land, one of which is owned by the Public Body of Bonaire (*Openbaar Lichaam Bonaire*, OLB). The OLB has granted hereditary tenure of the adjacent plot to the complainant, an entrepreneur, to serve as the site for a shopping mall and other developments. The complainant has let some of the retail units in the new mall. The South Pier has for many years been used to land supplies on Bonaire. The South Pier is the only site on the island suitable for loading and unloading the container vessels operated by a shipping company. On and around the South Pier, the shipping company has parked trailers and containers unloaded from its vessels. The trailers and containers obscure the view from and of the shopping mall.

NATURE OF COMPLAINT

The complainant's grievance is that the OLB is failing to take enforcement action against containers parked for excessive periods in contravention of a parking ban covering the South Pier.

BACKGROUND TO COMPLAINT

In 2004, the complainant and the OLB entered into a contract for the development and operation by the complainant of a cruise terminal, including a shopping mall and other amenities, on the OLB's land. In 2007, the OLB granted the complainant hereditary tenure of the land in question, subject to the condition that the complainant was not to begin construction work until the OLB provided written authorisation, having consulted the harbour master.

During the building permit application procedure, the OLB wrote to the complainant on 19 May 2010 stating that any building permit that might be granted would be subject to the condition that construction work would not begin until an alternative unloading and docking site had been found for the supply vessels. Cruise liner passengers would not have appropriate access to the public road network until such a site had been found. Efforts to identify a suitable site for the supply vessels were still in progress.

On 23 February 2011, the OLB issued a building permit, subject to the condition that the complainant would not begin construction work until the Executive Board of the Public Body of Bonaire (hereinafter referred to as the "Executive Board") had provided written authorisation, having first consulted the harbour master. On 23 May 2011, the harbour master wrote to the relevant Executive Board member that construction of the cruise terminal would interfere with transport movements via the South Pier. The harbour master was therefore opposed to the proposed building permit being granted.

In October 2011, a summary court judgement was issued regarding the OLB's granting of authorisation for construction work to commence. In that judgement, the court ruled, amongst other things, that the shipping company had no right to expect the complainant and/or the OLB to accept the placement of containers on the plot.

In late 2011, the complainant began construction work and the complex was made available to lessees in July 2014. However, the shipping company continued to use the plot to park its containers and trailers. The complainant therefore asked the OLB's Supervision and Enforcement Directorate (*Directie Toezicht en Handhaving*, T&H) to intervene. T&H took no action to prevent the parking of containers and trailers, however. Consequently, the complainant filed a formal complaint with T&H on 22 October 2013.

On 4 April 2014, the complainant's attorney wrote informing the OLB that it was in breach of the development contract and the deed of hereditary tenure and summoning the OLB to fulfil the contract and the deed, otherwise summary court proceedings would be initiated.

On 14 April 2014, the Executive Board refused the request to take enforcement action. According to the OLB, the placement of containers on the pier was not contrary to the Road Traffic Regulations, the International Ship and Port Facility Security Code (ISPS) or the Bonaire Spatial Development Plan (*Ruimtelijk Ontwikkelingsplan Bonaire*, ROB). In support of that assertion, the OLB argued that the ROB permitted the placement of containers on the plot, while the Road Traffic Regulations were not applicable and the ISPS contained no applicable prohibition. The OLB therefore had no authority to forbid the shipping company to (temporarily) place its containers on the pier. The OLB was nevertheless in discussion with the shipping company, with a view to identifying an alternative site for placement of the containers and designating the area in question a customs zone. The OLB drew the attorney's attention to the fact that, when the development contract was concluded, when the hereditary tenure was granted and when the building permit was issued, the complainant had been made aware that the plot was used for container handling and would continue to be used for that purpose until a new container port was built and/or an alternative site identified. The complainant was therefore entirely liable for the inconvenience and nuisance experienced and the resulting loss of rental income, the OLB contended.

On 29 April 2014, the complainant's attorney wrote informing the Executive Board that the complainant objected to the unnecessary parking of containers and trailers on the relevant plot only because the OLB had in 2012 given the shipping company use of two large plots of land adjacent to the shipping company's offices and sheds, approximately five minutes' drive from the South Pier.

On 6 June 2014, the OLB wrote informing the complainant that the OLB shared the complainant's view that it was not essential for sealed or unloaded containers to be left on the pier. The OLB had therefore notified the shipping company that sealed and unloaded containers must be relocated within a week. If the shipping company did not comply with the request, the OLB would apply a traffic control measure, such as imposing a ban on the parking of containers on the South Pier. No such action followed, however. On 27 January 2015, the complainant's attorney therefore wrote summoning the OLB to

apply and, if necessary, enforce the promised traffic control measure within a short time frame.

On 5 March 2015, the complainant initiated summary court proceedings against the OLB, leading to a judgement on 31 March 2015. In its judgement, the court concluded, amongst other things, that the plot was a public road in the sense of the General Police Ordinance and the Road Traffic Regulations. The court ordered the OLB to write within fourteen days of the judgement, requiring the shipping company to relocate the containers by 1 May 2015. The court also ordered the OLB to take action to ensure the containers' relocation if the shipping company did not relocate them within the specified period. If the OLB failed to comply with the court order, the OLB would be liable to pay the complainant a penalty of USD 5,000 per parking infringement, up to a maximum of USD 350,000. The court additionally ordered that the OLB's order to the shipping company should apply only from 1 May 2015 until the date that parking regulation signs were erected on the public roads around the shopping mall and on the South Pier.

On 15 April 2015, the complainant wrote to the OLB asserting the latter's liability for damages suffered by the complainant as a result of the harbour master usually instructing cruise ships to moor at the North Pier instead of the South Pier. It was asserted that such arrangements were in contravention of the development contract, the deed of hereditary tenure and the building permit.

On 21 July 2015, the OLB wrote to the complainant stating that the policy was for the South Pier to be used both for docking supply vessels and for mooring cruise ships. The South Pier could not be designated the primary pier for various reasons, one being that there was (for the time being) no other suitable site for container vessels to dock. The docking of container vessels required sufficient space for manoeuvring trailers, which was available at the South Pier, but not elsewhere. Until a suitable alternative dock was available for supply vessels, the harbour master had no choice but to designate the South Pier as the primary dock for supply vessels and the North Pier as the primary dock for cruise ships. Through the provisions of the development contract and the deed of hereditary tenure, and by other means, the complainant had been made aware of the situation from the outset. Nothing in the development contract or the building permit could be interpreted as implying that the South Pier would be used exclusively for mooring cruise ships. Under the development contract, the Executive Board was obliged to cooperate in the development of the shopping mall. That obligation had been met, as evidenced by the fact that the complainant had been granted hereditary tenure and a building permit. The complainant had proceeded with construction of the shopping mall in full awareness of the fact that the South Pier would also be used as a dockyard. The complainant was therefore entirely liable for the consequences of that decision, the OLB argued. In response to the letter and a discussion, the complainant offered to let the OLB rent or buy the shopping mall or some part of it.

In line with the summary court judgement, the OLB ordered the shipping company to ensure that trailers and containers were not parked for more than five hours. The order

was effective from 1 May 2015, but was not to come into effect if, prior to that date, the OLB erected parking regulation signs.

On 29 April 2015, the Lieutenant Governor imposed a parking ban covering the dockyard and the South Pier. The ban was to take effect on 1 May 2015 and included an exemption permitting containers and trailers to be parked for up to six hours. The order imposing the ban also provided for the placement of parking regulation signs.

On 29 April 2015, the OLB wrote informing the shipping company of the ban. The point was made that, by permitting containers and trailers to be parked for up to six hours, the ban allowed the shipping company sufficient time to prepare for docking activities, while ensuring that containers and trailers did not remain parked for unnecessarily long periods. Six hours was deemed an appropriate period, given the duration of the crossing between Curaçao and Bonaire, the OLB wrote.

However, the complainant asserts that the parking ban was not enforced, as evidenced by a statement of the shipping company's violations made by the bailiff at the request of the complainant. The bailiff stated that containers had been parked for longer than permitted on five occasions in the period from 18 August up to and including 12 November 2015. The complainant and his attorney contacted the OLB stating that penalties were payable and asking for their payment in the event of repetition.

On 5 October 2015, the complainant e-mailed the Lieutenant Governor asking for the matter to be addressed and for a meeting to be arranged to discuss possible ways of resolving the problems.

On 7 October 2015, the OLB wrote informing the complainant that the OLB had, within the fourteen-day period specified by the court, written to the shipping company ordering it to desist from parking containers and trailers for longer than five hours, with effect from 1 May 2015. The OLB pointed out to the complainant that the court had explicitly stated that the order would not be effective if the OLB erected parking regulation signs before 1 May 2015. The OLB had erected appropriate signs before that date, so, in the OLB's view, the court order was not effective.

On 1 December 2015, the OLB wrote pointing out to the complainant that the summary court judgement was based exclusively on civil law. The summary court process could not be used to pursue a case under administrative law to remedy an alleged refusal to take enforcement action. Such a case would have to be brought before an administrative court. Similarly, the summary court process could not be used to pursue a case concerning the alleged refusal to place parking regulation signs. The provisions of the court order applied only until parking regulation signs were erected along the public road(s) around the shopping mall and on the South Pier. The court had indicated that the placement of a traffic sign and the associated enforcement action were matters of administrative law. If the complainant had a grievance regarding either of those matters, the case would therefore need to be pursued through the administrative courts. The

complainant could not use the civil courts to seek the enforcement of traffic regulations, the OLB argued. The enforcement of traffic regulations was the responsibility of the police, not of the OLB, the OLB wrote to the complainant.

On 22 December 2015, the complainant had sought to obtain payment of the penalties referred to above by serving a third-party debt order on the OLB. On 29 December 2015, the OLB sought to have the order lifted by bringing summary court proceedings against the complainant. On 27 January 2016, the court ruled that the OLB had complied with the previous court order by writing to the shipping company and subsequently erecting parking regulation signs, and was not therefore liable to pay any penalty.

COURSE OF THE INVESTIGATION

I took the matter up with the Executive Board of the OLB. The Executive Board responded by stating its case, and the complainant's attorney subsequently responded to the Executive Board's statement. My report is based upon the information thus provided to me.

VIEW OF THE OLB

The court has ruled that the case is a matter of administrative law, which therefore needs to be considered by an administrative court. The OLB has no authority to enforce parking regulations. In this case, only the police are entitled to impose fines in the event of violations. The OLB had therefore repeatedly referred the complainant to the police. The OLB also wondered what fine would be appropriate for the violation of a parking regulation, and whether the imposition of such a fine would serve any worthwhile purpose, given the likely difficulty of collection. With regard to a possible referral obligation, the OLB pointed out that the National Office for the Caribbean Netherlands (*Rijksdienst Caribisch Nederland*, RCN) had been kept fully informed about the matter through the Kingdom Representative. The court had ruled that the OLB had acted correctly and was beyond reproach. The OLB could not therefore have failed in its duty of referral. The summary court order of 26 January 2016 had confirmed that the OLB had obeyed the earlier court order and complied with its requirements, the OLB asserted.

RESPONSE OF COMPLAINANT OR COMPLAINANT'S ATTORNEY

The Lieutenant Governor is competent in the matter under the Kingdom Act concerning the Police of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba (*Rijkswet Politie van Curaçao, van Sint Maarten en van Bonaire, Sint Eustatius en Saba*). Section 17, subsection 1, of that Act clearly states: "When acting to enforce public order, the police on Bonaire, Sint Eustatius or Saba shall be subject to the authority of the Lieutenant Governor." Moreover, the explanatory memorandum accompanying the Act on the Public Entities of Bonaire, Sint Eustatius and Saba (*Wet openbare lichamen Bonaire Sint Eustatius en Saba*, WolBES) states: "As stated, the Lieutenant Governor is the best

party to take responsibility for the enforcement of public order and security, because the Lieutenant Governor has sole authority. The enforcement of public order and security is such an important element of the Lieutenant Governor's duties, that it is non-transferrable. The Kingdom Act provides for the Lieutenant Governor to be supported in the enforcement of public order and security by the police force under his/her control."

The Director of Supervision & Enforcement (*Toezicht & Handhaving*, T&H), to whom the harbour master is answerable, is authorised to instruct the harbour master to close the dockyard and the South Pier on days and at times that no vessels are moored there. Furthermore, under the ISPS Code, the Lieutenant Governor has both a duty and the authority to assure safety on the dockyard and the South Pier and is empowered by the Code to take various measures in order to achieve that aim.

The complainant was not obliged to seek a remedy from an administrative court in the first instance. After being informed of and having observed the violations of public order, the Lieutenant Governor should have exercised his enforcement powers, either by deploying T&H personnel, or by instructing the police, or both. Under the Kingdom Act, the Lieutenant Governor is the appointed local police commander and, as such, authorised to instruct the police to undertake enforcement activities.

Although the OLB points out that the Kingdom Representative is familiar with the matter in question, the OLB fails to understand that the Lieutenant Governor is the competent authority in this case, with the power to instruct the police to undertake enforcement activities. The summary court order of 26 January 2016 stated merely that as of 1 May 2015 the OLB had applied the traffic measures referred to in the order of 31 March 2015, and that the complainant was not entitled to claim the penalty payments due in the event of failure to apply such measures. However, the current case did not relate to enforcement after erection of the parking regulation signs. In that respect, the OLB had not been found to be in the right.

When interviewed on Bonaire by members of the National Ombudsman's staff on 11 April 2016, the proprietor of the complainant stated that the police took no enforcement action because it was not clear whether the site was public property or not.

WHAT IS THE NATIONAL OMBUDSMAN'S JUDGEMENT?

The complainant's grievance is that the OLB is failing to take enforcement action against containers parked for excessive periods in contravention of a parking ban covering the South Pier. The complainant's aim is to bring an end to the nuisance caused to the complainant by trailers and containers parked for excessive periods of time.

Both the complainant and the OLB have contributed to development of the current situation. The complainant wished to develop a cruise terminal and shopping mall on the South Pier, despite knowing that the shipping company had for many years been loading

and unloading vessels there. The OLB entered into a development contract for the mall and granted the complainant hereditary tenure, despite being similarly aware of the South Pier's use by the shipping company. Moreover, the OLB issued a building permit for the shopping mall despite the fact that the harbour master was opposed to the building permit on the grounds that construction of the cruise terminal would interfere with transport movements via the South Pier. Those circumstances led to prolonged correspondence and legal proceedings regarding the predictable nuisance caused by (parked) trailers and containers. The outcome was that the OLB erected parking regulation signs. However, the OLB does not yet appear to have taken any action to enforce the parking ban.

The summary court ruling indicated that the OLB had a responsibility under civil law to take action to end the parking-related nuisance. The OLB also has the authority under administrative law to take enforcement action in the form of the imposition of penalty payment orders, as provided for in Section 140 of the Act on the Public Entities of Bonaire, Sint Eustatius and Saba in combination with Article 2 of the Road Traffic Regulations. However, proceedings under civil law have not yet yielded a workable solution and it seems unlikely that proceedings under administrative law would be more successful.

The National Ombudsman notes that the OLB has opted for a formal legal approach. That much is apparent from the various legal proceedings and from the response to the findings of the National Ombudsman's investigation. However, when the Ombudsman's staff spoke to OLB representatives in April 2016, it was apparent that the OLB genuinely wished to find a reasonable solution to this increasingly complex matter. What is the most appropriate course of action for the OLB to take?

One of the criteria for good governance is that the government seeks to avoid or limit escalation in its interactions with the public. To that end, communication skills and a solution-focused attitude are essential.

In my capacity as National Ombudsman, I note that all parties in this case have an interest in resolving the dispute, because all parties are currently disadvantaged by the dispute on a daily basis. I am also of the opinion that legal proceedings cannot lead to a sustainable solution to the problem. On the contrary, such proceedings are liable to further sour relationships and lead to the dispute continuing for years to come. Such a scenario serves no one's interest.

In view of the foregoing, I consider that the government has a responsibility to facilitate a resolution of this dispute. Discussion amongst the various parties involved with a view to exploring the options and devising a mutually acceptable solution is the only strategy that promises to yield a solution to the current impasse.

In view of the OLB's contribution to development of the situation and the OLB's responsibilities under civil and administrative law, I believe that it is up to the OLB to work with the police, the shipping company and the complainant to find a way of rectifying the

complainant's grievance. There has to date been no evidence of such cooperation. To that extent, I deem the investigated conduct to be inappropriate.

I have accordingly made a recommendation.

CONCLUSION

The complaint regarding the investigated conduct of the OLB is upheld, on the grounds that the OLB failed to de-escalate the situation as required.

RECOMMENDATION

The National Ombudsman recommends that the OLB takes the lead in securing the participation of the police, the complainant and the shipping company in discussions aimed at devising a solution to the current parking-related nuisance. Consideration should be given to discussion of the following points:

- The precise nature of the nuisance experienced by the complainant
- The defining characteristics of a situation acceptable to the complainant
- The possibility of trailers and containers being parked on the shipping company's own premises
- The possibility of overnight loading and unloading by the shipping company
- Financial compensation by the shipping company
- Acquisition/rental of the mall by the OLB
- Enforcement agreements between the OLB and the police

The National Ombudsman,

Reinier van Zutphen

RELEVANT LEGISLATION AND REGULATIONS

Act on the Public Entities of Bonaire, Sint Eustatius and Saba

Section 140

1. The island government shall have the authority to impose penalty payment orders.
(...)
3. The authority to impose penalty payment orders shall be exercised by the Lieutenant Governor, if the order relates to the enforcement of regulations that the Lieutenant Governor applies.
4. Section 1:1, subsection 4, Section 4:116, Sections 5:1 up to and including 5:10, and Title 5.3 of the General Administrative Law Act shall apply (...).
(...)

Kingdom Act concerning the Police of Curaçao, of Sint Maarten and of Bonaire, Sint Eustatius and Saba

Section 17

1. When acting to enforce public order or assist the public, the police on Curaçao and Sint Maarten shall be subject to the authority of, respectively, Our Minister of Justice for Curaçao and Our Minister of Justice for Sint Maarten, and the police on Bonaire, Sint Eustatius and Saba shall be subject to the authority of the Lieutenant Governor.
2. Our Minister, as referred to in subsection 1, or the Lieutenant Governor may give police officers general and specific instructions regarding the fulfilment of the duties referred to in subsection 1.

General Police Ordinance of Bonaire

Article 86, clause 2

In the context of this Ordinance, 'public road' shall be understood to mean any street, road, alley, passageway, path, square, quay, bridge, sidewalk, pier or other land or place that is open or intended for public use and, insofar as the activities referred to in the corresponding articles may take place there, any water body (whether intended for public use or not) that is in practice accessible to all.

Road Traffic Regulations of Bonaire

Article 1i

In the context of these Regulations, 'road', 'carriageway' and 'lane' shall be understood to mean any road or path that is open to the public for motorised or other forms of transport, including any bridges and underpasses incorporated into any such road or path and any paths, verges or edging strips belonging to any such road.

Article 2

In the interest of the free movement of traffic or of road safety, the Lieutenant Governor may implement or arrange for implementation of the following measures, which shall be indicated by the associated road signs and markings and, where appropriate, announced in one or more local newspapers:

13. Waiting prohibition:

- a. General
- d. At specific times

Article 19a

Waiting in or parking of any vehicle other than a bicycle in contravention of a prohibition imposed in accordance with Chapter II shall be prohibited.

Article 119

1. Acting in contravention of the provisions of Article 4, 6, 7, 8, 9, 10 or 103 shall be punishable by imprisonment for up to two months or a fine of up to five thousand guilders.
2. Acting in contravention of any other provision of these Regulations shall be punishable by imprisonment for up to thirty days or a fine of up to three hundred guilders.
3. The punishable contraventions referred to in clause 1 shall be deemed crimes, while those referred to in clause 2 shall be deemed misdemeanours.