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SINT MAARTEN

FINAL REPORT

(Article 21 sub 1 National Ordinance Ombudsman)

Complainant: Complainant

Date complaint filed: 31 October 2014

Complaint no.: 2014/00184

Ministry of Tourism, Economic Affairs, Traffic and Telecommunication

Department: Economic Licenses & Public Transportation / Economic Inspection

Department Head: Valya Lake-Pantophlet / Lucien Wilson

Summary of Complaint:

On 20 September 2013 Complainant sent a letter addressed to the Minister of Tourism, Economic Affairs, Traffic & Telecommunication (TEZVT) about the decreasing amount of (commercial beach) space she was allowed to occupy on the Great Bay Beach. In the aforementioned letter, Complainant asked that she be contacted to further explain the situation and its implications.

To date of filing the complaint with the Ombudsman on 31 October 2014, no response was given to the above-mentioned letter.

Findings:

Complainant claims that she has been working on Great Bay Beach renting chairs, umbrellas and floating devices since 2001.

In a Decree dated 9 July 2004, the Executive Council of the Island Territory of Sint Maarten granted Complainant a vending license allowing her to rent out 50 beach chairs, 50 umbrella's and 20 floating mats to the public on Great Bay Beach.

By Decree (no. 4135/2009) dated 31 August 2009 Complainant received a new vending license allowing her to rent out 36 beach chairs, 18 umbrellas and floating swimming accessories on a space of 572 m² (26 meters in length and 22 meters in width) on Great Bay Beach.

By email of 6 August 2013 addressed to Ms. Wendy Jack, Complainant requested a meeting (with unknown persons) to discuss a number of points following an informative meeting held on 2 August 2013.



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In response, Ms. Jack requested that Complainant address her concerns to the Economic Department and/or the new Minister of TEZVT via an official letter, booked in at General Affairs (DIV).

By email of 6 August 2013 to Mr. Martin Wilson, Complainant asked why she had been instructed to address her concerns to the Department of Economic Inspection and/or the new Minister of TEZVT. In the email Complainant mentioned that during the informative meeting (on 2 August 2013) the attendees had been informed that they would be allowed to discuss their concerns with those present at the meeting.

By letter dated 20 September 2013 addressed to the Minister of TEZVT, Complainant explained the situation she faced as she was only allowed to place a maximum 36 chairs to be rented out.

On 30 May 2014 a meeting was held with all parties operating on the Great Bay Beach to discuss the Great Bay Beach Policy. The agenda points for the meeting were:

- Setting up of beach chairs and umbrellas;
- Working conditions on the beach;
- Storing of equipment;
- Control aspects of inspectors and other entities involved with the day-to-day operations of the board walk;
- General rules and regulations of Great Bay Beach.

On 5 December 2014 a Notification of Complaint (NOC) was sent to the Minister of TEZVT. The Minister was requested to respond to the NOC within 4 weeks from the date of the letter, however no later than 2 January 2015.

The following questions were included in the NOC:

- When can Complainant expect a motivated answer to her letter dated 20 September 2013?
- What is the equitable division per lot on Great Bay Beach?
- Indicate the provision under which the terms of a vending permit may be changed.
- Please provide us with a copy of the permit (no. 2786/2001) referred to in the vending permit issued in 2009 (no. 4135/2009) and all relevant documents pertaining to the issuance of the permits.

By letter dated 16 January 2015 Mr. Lucien Wilson, Department Head of Economic Inspection at the Ministry of TEZVT (further: Department Head) responded to the NOC. The response included the following:



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- *“On May 7, 2001 Complainant, requested to operate a stand on the beach at Philipsburg to rent beach chairs, umbrellas and “floating mats” to the public. The request was granted and the permit issued July 19, 2004 under number 2786/2001. The location of the stand was at the top of Loodsteeg, in Philipsburg.*

Of key importance here is permit condition (a) which grants the permit holder permission to rent 50 beach chairs, 50 umbrellas and 20 “floating mats” to the public.

Under Boardwalk Phase 2 which commenced in 2005 vendors were allotted a pre-define lot and/or locations with specified dimensions on Great Bay Beach where the demarcation lines are the boundary lines of the various properties along The Boardwalk. Based on her request of April 21, 2009, Complainant requested an extension of her vending permit no.2786/2001. This was granted under vending permit 4135/2009 issued October 2, 2009.

As can be read, this permit contained more specific conditions and restrictions as it was necessary to demand a more organized structure, guarantee safety, security of beach operations and of all the beach vendors when dealing with the public. Under Boardwalk Phase 2 the number of chairs determined by the allotted space that is provided to the vendor. The chairs were to be placed in pairs with one umbrella for each pair of chairs. A space of $1m^2$ was required between each row of chairs. The ratio of chairs to umbrellas is 2:1 per $4m^2$.

There are some key differences in the permit issued in 2004 versus 2009 which have been highlighted below.”



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<u>Year</u>	<u>2004</u>	<u>2009</u>
Standplaatsvergunning #	2786/2001	4135/2009
Number of beach chairs	50	36
Number of umbrellas	50	18
Number of swimming accessories	20	No limit mentioned in permit
Physical location/size	Top of Loodsteeg, Philipsburg/Size not mentioned	Location see meet brief/Size: 26m x 22m
Meet brief no.	Not applicable	17/2006
Layout of chairs	No requirements	2 rows of beach chairs within allotted space

In an inspection report dated 14 January 2015 signed by Mr. Martin Wilson it was stated that during an inspection on the above mentioned date, Complainant had set-up 58 beach chairs in four rows. In the report, Mr. Wilson further commented that Complainant was not adhering to the stipulated amount of 36 chairs in her (vending) license.

By letter dated 12 February 2015 the Department Head was requested to provide an answer to questions 4 to 6 posed in the NOC dated 5 December 2014. In addition, the Department Head was requested to provide the following documents/information:

- A copy of the legislation or regulations applied in this case;
- An explanation of how the pertinent legislation and/or regulation are implemented in practice, and to provide documentation of the actual procedure followed, if any.

By email of 17 February 2015 the Department Head responded as follows:

- When can the Complainant expect a motivated answer to her letter dated September 30, 2014?

“I have contacted the Department of Economic Licenses which is responsible for issuing all economic licenses (copied on this email). The Department Head, Ms. Valya Lake has indicated that she will prepare a response to Ms. ...’s letter of September 2013 as the permit was issued by them.”

- What is the equitable division per lot on Great Bay Beach?



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“According to the St. Maarten Beach & Vending Policy – Jan.2012 pg.38 point 16 “The number of chairs is determined by the allotted space that is provided to the vendor. The chairs must be placed in pairs with one umbrella for each pair of chairs”. Point 16 goes on to state, “The ratio of chairs is 2 chairs with one umbrella per 4m2.” On page 36 under the title Beach Allotment: Vending points 1 and 2 provide for elucidation of the demarcation points of the “beach lots” assigned to vendors. The boundaries of the private property were used to determine and confine beach activity. The methodology to determine individual beach lot sizes is the same however, all vendors are not assigned an equitable sized lot.”

- Indicate the provision under which the terms of a vending permit may be changed. *As with all permits a request can be submitted to the Ministry to change the terms or conditions of a permit issued by the Ministry however the existing policy determines lot size and consequently the number of beach chairs and umbrellas assigned to a vendor using fixed demarcation points e.g. the boundaries of private property. Therefore the possibility to increase the number of chairs or umbrellas assigned to a vendor currently does not exist.*

Additional questions

- a. Please submit a copy of the legislation or regulations applied in this case.
“A link to the Beach and Vending Policy January 2012 is included <http://www.sintmaartengov.org/Policy%20and%20Reports/Beach%20and%20Vending%20Policy%20Jan2012.pdf>.”
- b. Explain how the pertinent legislation and/or regulation is implemented in practice; provide documentation of the actual procedure followed, if any.
“Please see documents attached on calculation of chairs and umbrellas assigned to Ms.”

On 26 March 2015 Complainant informed the Ombudsman that she had not been contacted by, nor had she received any response from the Department of Economic Licenses.

By letter dated 4 June 2015 the Preliminary Findings Report (PFR) was sent to the parties in the case. In the PFR, the Ombudsman issued the following recommendations:

- Provide Complainant with a motivated answer to her letter dated 20 September 2013;
- Provide Complainant with an explanation as to why she is only allowed to place 36 chairs and 18 umbrellas.



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The Minister was requested to respond to the findings outlined in the PFR no later than 18 June 2015.

On 8 June 2015 Complainant disputed the following points stated in the NOC response from the Department Head of Economic Inspection, reported in the above-mentioned PFR. Complainant stated that the location indicated in said response was incorrect as Complainant is located at the centre of Loodsteeg. Complainant also indicated that the condition of the permit issued in 2004 of 50 chairs and 50 umbrellas is illogical because the set-up of chairs to umbrellas is 2:1. Therefore the permit should have stated 100 chairs and 50 umbrellas.

Since no formal response was received from the department to the PFR dated 4 June 2015, the Secretary General of the Ombudsman sent a reminder to the Secretary General of TEZVT in a letter dated **18 June 2015**, in which an additional two (2) weeks were granted (until 2 July 2015) to respond to the PFR.

By letter dated 23 June 2015 the Ministry of TEZVT responded to Complainant's letter of 20 September 2013 as follows:

"In accordance with the Public Vending Ordinance, article 4, sub 3, the Minister of Tourism, Economic Affairs, Traffic & Telecommunication (or the Executive Council of Territory of Sint Maarten, prior to October 10, 2010) can apply certain conditions to a license. One of such conditions is stipulated in sub 6 of your extended vending license dated October 2, 2009, allowing you to rent 36 beach chairs and 18 umbrellas as well as floating swimming accessories.

The decision to grant 36 beach and 18 umbrellas is based on policy, namely the Great Bay Beach policy and subsequently the St. Maarten Beach & Vending Policy. Page 38 point 16 of the St. Maarten Beach & Vending Policy states that "the number of chairs granted to a vendor is determined by the allotted space that is provided to that vendor. The chairs must be placed in pairs with one umbrella for each pair of chairs". Point 16 of the policy goes on to state, "The ratio of chairs is 2 chairs with one umbrella per 4m2." On page 36 under the title Beach Allotment: Vending points 1 and 2 provide for elucidation of the demarcation point of the "beach lots" assigned to vendors. The boundaries of the private property were used to determine and confine beach activity. The methodology to determine individual beach lot sizes is the same. However, all vendors are not assigned an equitable lot.

Based on the lot size you were allotted, according to the aforementioned policy, the number of beach chairs and umbrellas permitted in that space had to be reduced."



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By email of 10 July 2015 the Department Head of Economic Licenses, responded to the PFR stating her agreement with the findings and the recommendations in the report.

Legal Basis:

Pursuant to article 19 section 1 of the National Ordinance Ombudsman, the Ombudsman is authorized to request from government bodies, civil servants, the complainant, civil servants as experts or witnesses, all information and or documents pertaining to the investigation. The persons mentioned in the aforementioned article are obliged to respond to the request within the time indicated by the Ombudsman, except in cases where the persons can appeal to legal grounds (“*verschoningsrecht*” - see article 19 section 4).

Sint Maarten Vending and Beach Policy

Designation & allocation of vending locations (pg. 13)

Point 1: Every stationary permit/license will be designated and confined to a specific location; the dimensions will be specified in the vending permit.

Beach Activities (pg. 22)

Paragraph 2, lines 4-8: ... The size of the lot for vending of chairs and umbrellas will determine the amount of chairs that can be placed on the lot. This is based on 6m², which is the dimension of two chairs and an umbrella. The 6m² also includes an additional meter, which serves as a separation between each set of two adjoining chairs.

General Rules (pg. 37)

Point 7: Vendors will be allotted a pre-defined lot and/or location with specified dimensions.

Point 18: The boundaries and dimensions of each vending location will be equitably divided according to the length and width of the beach, the number and type of activities will be determined by the beach.

Standard(s) of Proper Conduct:

The Ombudsman investigates whether the behavior of public bodies towards citizens is proper. The applicable standard of proper conduct in this case is *Promptness*.



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Promptness

A public body is expected to be dynamic and as such be decisive and swift in its decision-making. Hence, providing a response or decision within the legal timeframe or at least within a reasonable time is required.

Promptness requires a decision to be taken in less than the legal timeframe in matters of urgency.

Conclusion:

Complainant claims that she has been working on Great Bay Beach renting chairs, umbrellas and floating accessories since 2001 and complains that the amount of commercial beach space she has been allowed to occupy on the Great Bay Beach has been decreased.

On 20 September 2013 Complainant sent a letter addressed to the Minister of Tourism, Economic Affairs, Traffic & Telecommunication (TEZVT) about the above-mentioned situation. Complainant asked that she be contacted so she could further explain the situation and its implications.

To date of filing the complaint with the Ombudsman on 31 October 2014, Complainant had not received a response to said letter.

According to the information under the heading *Beach Activities* paragraph 2, lines 4-8 of the *Sint Maarten Vending and Beach Policy*, the number of chairs and umbrellas allowed to be rented is determined by the size of the allotted space. This is in turn based on 6m², which is the dimension of 2 beach chairs and 1 umbrella.

Page 38, point 16 of the *Sint Maarten Vending and Beach Policy* further states that, “*The number of chairs is determined by the allotted space that is provided to the vendor. The chairs must be placed in pairs with one umbrella for each pair of chairs. ...The ratio of chairs is 2 chairs with 1 umbrella per 4m².*”

The above stated suggests that there are inconsistencies in the *Sint Maarten Vending and Beach Policy*, as it applies to the dimensions/size (m²) necessary for the placement of 2 beach chairs and 1 umbrella.

It is also unclear if Complainant, or other vendors are allowed to use all the available space for the rental of beach chairs and umbrellas. Government is expected to provide clarity on how the allotted space can be used.



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The manner in which the Sint Maarten Vending and Beach Policy is being applied is unclear and conflicting; it does not provide the necessary clarity to vendors with regard to how allotted beach space can be used. Considering the importance of clarity for vendors, moreso as they depend on the department for their livelihood, a prompt response to the Complainant on this matter should have been provided.

It took the Ministry of TEZVT a year and a half, and the intervention of the Ombudsman to respond to Complainant's letter of 20 September 2013 (erroneously stated in the letter from the Ministry of TEZVT as 30 September 2013), the standard of *Promptness* has not been observed.

The standard of proper conduct *Promptness* requires that administrative bodies provide a response or decision within the legal time frame or at least within a reasonable period.

Judgment:

The complaint filed by Complainant regarding the non-response of the Ministry of TEZVT to her request for a meeting is deemed founded.

Recommendation(s):

Considering the above stated findings, the Ombudsman recommends as follows:

- To revisit the Vending and Beach policy on inconsistencies, and provide clarity to vendors with regard to how allotted beach space can be used.
- o I agree with the recommendation(s)
- o I do not agree with the recommendations (please explain by submitting a written reaction no later than 21 August 2015).

The Ombudsman requests a status report on the recommendation(s) within three (3) months from the date of this letter.

Philipsburg, 7 August 2015

Dr. R. (Nilda) J.A. Arduin
Ombudsman