



# OMBUDSMAN

SINT MAARTEN



# KPSM Towing Policy

Investigation into the towing policy of the St. Maarten Police Force

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## 1. Introduction

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For at least twelve (12) years there have been complaints about the unregulated towing of vehicles in Philipsburg. A quick Google search on the World Wide Web and social media reveals numerous complaints from citizens and visitors to the island about their towing misfortunes on Sint Maarten. The situation or the ‘racket’, as it was referred to by a local newspaper back then, came to a head in March of 2012. The Minister of Justice at the time vowed that ‘years of traffic infractions particularly relating to parking and the towing of vehicles will come to an end’. The Minister of Justice further stated that the police would soon start fining persons and companies for illegally placing ‘no parking’ signs, blocking public parking spaces and illegally towing vehicles. Anno 2020, eight (8) years later, there has been some improvements, however regrettably the problem of towing in Philipsburg remains insufficiently regulated.

### 1.1 Objective and research questions

A recently concluded [report](#)<sup>1</sup> of the Ombudsman, in January 2020, based on a complaint submitted by a citizen, exposed the challenges that still exist as it relates to the towing of vehicles in Philipsburg. The Final Report concluded that the complaint was founded. The standards of active and adequate information provision, adequate organization of services, correct treatment and fair play were violated. As a result, the Ombudsman concluded that the ‘*Korps Politie Sint Maarten*’ (KPSM) acted improperly.

The limited cooperation received from KPSM during the aforementioned investigation<sup>2</sup> as well as their response to the Final Report prompted the Ombudsman to look further into the actual towing policy of the OM/KPSM and the execution of same in practice. Additionally, another facet that is inextricably linked to the towing policy is the lack of a parking policy in Philipsburg. The Minister of Justice alluded to this in 2012 when he explained that persons and companies were illegally placing no parking signs in public parking spaces or on public property and subsequently illegally towing vehicles. The absence of a parking policy plan will be addressed in this report as well.

### 1.2 Scope and approach

While there are challenges in other districts, such as Simpson bay, Maho and Beacon Hill, this report will mainly focus on the Philipsburg area, being the capital of Sint Maarten and where the problem of illegal towing is the most prevalent. We have questioned the KPSM and the Prosecutors office in our information gathering process. We also have had discussions with the Office of the Cadaster regarding property ownership as this relates to parking rights/permits and

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<sup>1</sup> See Ombudsman’s Final Report: “Towed in Philipsburg”, complaint nr. 2018 /00450.

<sup>2</sup> The investigation took over 12 months to complete due to the non-responses from KPSM.

representatives of the two towing companies. Finally, we engaged in a literature study to review and analyze the manner in which towing and parking policies are managed in other countries within the Kingdom of the Netherlands.

### **1.3 Chapter overview**

Chapter 1 gives a description of the objective and scope of the report as well as provides the chapter overview. In chapter 2 the legal basis of towing is analyzed and discussed, including KPSM's towing policy and how towing is actually executed in practice. The responsibility of KPSM is also handled in this chapter. In chapter 3 the parking permit procedures and ownership of parking areas/lots are discussed. In chapter 4 the bottlenecks are identified. In chapter 5 the conclusion is presented followed by the recommendations in chapter 6.

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## 2. Towing legal basis

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KPSM derives their authority to investigate, confiscate<sup>3</sup> and tow vehicles based on article 117 paragraphs 2 and 3 of the Road traffic ordinance (*‘Wegenverkeersverordening’*<sup>4</sup>):

*“Opsporingsambtenaren zijn bevoegd zich te vergewissen van de naleving van de bepalingen van deze verordening en zodanig een voertuig, ten aanzien waarvan zij een onderzoek wensen in te stellen, te betreden en naar een nabij gelegen plaats te vervoeren of te doen vervoeren voor rekening van de eigenaar of houder. De bestuurder is verplicht desgevorderd hen de tot het onderzoek en het vervoer noodzakelijke medewerking te verlenen en desverlangd de bedoelde personen in het voertuig te vervoeren.”*

Police officers are authorized to ensure compliance with the provisions of this regulation and to enter a vehicle in respect of which they wish to investigate, and to transport or have transported to a nearby place for the account of the owner or holder. If required, the driver is obliged to lend them the cooperation necessary for the investigation and transport and, if required, to transport the persons in question in the vehicle<sup>5</sup>.

Article 117 paragraph 3 determines further that:

*“Ingeval van toepassing van het tweede lid kan het motorrijtuig, voor zover geen andere bestuurder beschikbaar is, onder toezicht, of, voorzover degene die het proces-verbaal opmaakt, zulks nodig oordeelt, in bewaring worden gesteld. In het laatste geval wordt het motorrijtuig voor rekening en risico van de verdachte overgebracht naar een door de verbaliserende persoon geschikte geachte plaats en aldaar bewaard, totdat het door of vanwege de eigenaar of houder, zonodig tegen betaling der kosten wordt afgehaald.”*

In the event of application of the second paragraph, the motor vehicle may be placed under supervision, insofar as no other driver is available, or, insofar as the person who draws up the report considers it necessary, be confiscated. In the latter case, the motor vehicle is transferred at the expense and risk of the suspect to a place deemed suitable by the verbalizing person and stored there, until it is collected by or on behalf of the owner or holder, if necessary, against payment of the costs<sup>6</sup>.

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<sup>3</sup> During the course of this investigation, the Ombudsman received multiple complaints from persons regarding the confiscation of their legally owned vehicles that allegedly are part of criminal investigations. Seemingly vehicles are confiscated for months on end without persons being provided a documented reason for the confiscation, neither being given a reasonable timeframe when the vehicles will be returned to their possession, even though persons have been recognized as the rightful owners.

<sup>4</sup> AB 2013 GT no. 133.

<sup>5</sup> This is a free translation.

<sup>6</sup> This is a free translation.

## 2.1 Towing Policy in theory

Upon the request of the Ombudsman, to the Public Prosecutors office ('Openbaar Ministerie' (OM)), for a copy of its towing policy, the OM indicated that an established towing policy does not exist. According to the OM, back in June 2010 one of the prosecutors at the time had a discussion with the KPSM<sup>7</sup> regarding towing.

Based on this discussion the following agreements were made with the police:

- Incorrectly parked vehicles would only be towed if they were a nuisance or danger to traffic. Therefore, if a vehicle is parked incorrectly, however the vehicle does not obstruct traffic (i.e. traffic can still pass), it should not be towed;
- A 'proces verbaal' (PV) or police report must always be made up;
- The police report must describe the degree of the nuisance and/or danger aspect.

As per KPSM's procedural policy towing companies cannot tow a vehicle without the permission of KPSM. Once it is established that a vehicle is illegally parked, the police (patrol) officer reports this to the Section Chief in charge, who assesses the situation via the telephone and gives consent whether to tow or not.

The PV, as mentioned above, is subsequently provided once the driver is on the scene.

### *Year: 2018*

*I parked my vehicle on Emmapplein across from Jump Up Casino and went to the Coffee Lounge with my then three-month-old baby and my mother who was visiting the island.*

*Upon my return to where my vehicle was parked, I realized it was not there. We walked to the police station to see if the police ordered the vehicle to be towed. The police did not know who towed my vehicle and why it was towed in the first place. The police called up the towing companies and managed to locate my vehicle. A tow truck came to the police station and took me to their compound, somewhere in Dutch Quarter, where I located my vehicle. I was instructed to leave my mother and baby at the police station which I did. The tow truck driver told me I had to pay him \$75.00, so I agreed to pay him with my ATM card. However, he demanded that I pay in cash, which I did not have on me. This led to the driver blocking me from leaving as he also refused to follow me to Philipsburg where I could have obtained the cash at an ATM machine and pay him. I did not want to go back to get the money and then return for my vehicle, considering that my baby and mother was still at the police station.*

*I was blocked in and began screaming for help. I begged the driver to go with me to Philipsburg where I would pay him, but he refused to let me go with my vehicle. He wanted me to go back with him in his tow truck directly to an ATM, which I refused to do. The tow truck driver even tried to scare and intimidate me with a Pitbull. I finally had to call the police who took my identification card and escorted me back to Philipsburg hours after I left.*

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<sup>7</sup> Since this was before October 10, 2010, the discussion was with the 'Korps Politie Nederlandse Antillen (KPNA)'.

Despite the abovementioned agreements it would appear that these were not being adhered to considering the comments of the Minister of Justice<sup>8</sup> as was reported in the media in March of 2012. The minister stated, at the time, that years of traffic infractions particularly relating to parking and the towing of vehicles will come to an end. The minister further stated that the police will start fining persons and companies soon for illegally placing “no parking” signs, blocking public parking spaces and illegally towing vehicles. The minister reiterated that according to the law, only the police have the right to remove vehicles or apply wheel clamps<sup>9</sup> and that no licenses had been given to towing companies to do such. The police are the only authority that can decide whether somebody is impeding traffic and that can apply traffic rules. On the scene a verbal or written command will be issued by the officer before the vehicle is removed or wheel clamps installed.

Notwithstanding the comments of the minister, his instructions as well as the agreements made in 2010, these were only announced within KPSM via a communique<sup>10</sup> on July 19, 2013 and subsequently adopted as ‘policy’. It can therefore be concluded that only after July 19, 2013 a towing ‘policy’ was in place and was being executed accordingly. In 2017 a change was made. The KPSM entered into a so-called service level agreement<sup>11</sup> (SLA) with two (2) towing companies; Leap Year and Hungry’s Towing. Contrary to the past, only these two (2) companies were allowed to provide services to the KPSM on an on-call basis.

**Year: 2013**

*I was parked on Back Street in an area that had no signage indicating that I could not. After doing my errands, I returned to the spot I thought I had parked my car and it was not there. Initially I was not aware that my car was towed as there was no indication of such. I asked around and a store merchant told me that it might have been stolen or towed and I should go to the Police Station. Upon arrival at the station I relayed what had transpired and was asked for my license plate. The officer then checked a logbook and said my car was towed and I should hold on. After a few minutes I was told to wait at the station as someone from the towing company would come and pick me up to go and retrieve my car. During the ride to the yard I was informed by the tow truck driver that the fee would be \$70 to get my car. At the yard I paid the fee, checked the contents of my car (shopping bags) and rushed out. No receipt was given to me. The experience was one of “ask no question, just pay the fee and get out of there”.*

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<sup>8</sup> Editorial – End of a ‘racket’? The Daily Herald, 29 February 2012 | SMN-news: ‘Police instructed not to use private tow trucks – towing of Vehicles is illegal, 29 February 2012 |The Daily Herald: ‘No tolerance for illegal vehicle towing, blocking parking spots, 1 March 2012.

<sup>9</sup> Contrary to the minister’s statement, the provision regarding the application of wheel clamps does not exist in the traffic ordinance.

<sup>10</sup> According to KPSM, the communique cannot be retrieved as the system (ACTPOL) where it was stored, is no longer available. All data stored in ACTPOL has been lost and cannot be recovered.

<sup>11</sup> Letter from KPSM to Hungry’s Towing and Leap Year dated 10 April 2017.

The primary responsibilities of the service providers (towing companies) were defined in the SLA as follows:

‘Both companies are expected to be vigilant, professional and maintain a full understanding of their regulatory compliance, such as:

- Fixed price<sup>12</sup> for towing and storage of the vehicles;
- Safe and proper storage location;
- Liability insurance for damages, theft and/or destruction incurred to vehicles;
- Issuance of a receipt’.

In a memo dated January 2019 from the OM, which referred to the communique of July 2013, additional conditions<sup>13</sup> were added to the towing policy.

Vehicles were only to be towed under the following conditions:

- If they are a nuisance and/or danger to traffic;
- If a vehicle is parked at a bus stop and/or taxi stand;
- If a motorcycle and/or vehicle is involved in an investigation and must be seized for the forensic investigation.

Additionally, vehicles were **not** to be towed should the following apply:

- If they are parked incorrectly and do not constitute an obstacle to other traffic;
- If the driver does not have a valid driver’s license and/or insurance certificate.

***Year: 2012***

*I parked my vehicle on Front Street in front of the Oranje School in the morning hours around 9 a.m. I usually park my vehicle in that general area. I worked nearby (the school) so I did not return to my vehicle until around 6:30 p.m.*

*When I returned to the location where my vehicle was parked, I noticed my vehicle was “missing”. I decided to call the police to convey that I parked my car (at the previously mentioned location) and that my vehicle was “missing”. The Police asked me for my plate number and put me on hold.*

*Once they returned to the call, I was told that my vehicle was towed to Hungry’s Towing yard in the Dump area. The police told me to go directly to Hungry’s and I would be further assisted.*

*I went to Hungry’s and the gentleman who was there confirmed that my vehicle was in his yard, and it would be released once I paid \$75, which he said was the towing fee. I paid the \$75, received a receipt and left the towing yard with my vehicle.*

<sup>12</sup> The towing fees are: daytime (\$75), nighttime (\$85-\$90) and \$15 per day, per vehicle, for storage fees.

<sup>13</sup> These conditions or “*afspraken omtrent wegslepen*” are available on the Public Prosecutors website ([www.OM-SXM.org](http://www.OM-SXM.org)).



## 2.2 Towing Policy in practice

Based on recent discussions with representatives of both towing companies it would appear that the towing policy nor the SLA are being lived up to in practice. PV's containing the fines for example are seldom made up. Vehicles are usually towed under the direct instruction and supervision of a (on the scene) police officer, without a PV. Furthermore, according to one of the towing companies, they were unable to secure a liability insurance and as a result are not allowed to tow vehicles based on incorrect parking, only on the basis of violation of article 80 of the road traffic ordinance<sup>14</sup> (lack of a license plate) or other services, upon the request of the police.

### *Year: 2016*

*After a hard day of work, I was happy to go home around 7:00 pm. As I started heading towards my car, I realized that my car was not where I parked it. I kept looking around and thought to myself 'Oh my God my car got towed or maybe someone stole my car'. I called my colleague as I was in shock and didn't know what to do. My colleague advised me to go to the police station. I walked to the police station. I explained to the police officer at the front desk about my car. He said that my car probably got towed and called the towing company who was responsible for towing in Philipsburg. The towing company confirmed that they were in possession of my vehicle. He told the person on the phone to pick me up in order for me to get my car. He told me that the towing company was on its way and that I had to pay them a fee of \$75. After explaining to him that I was parked at the entrance of an empty plot of land he said that they would still tow me as I was blocking an entrance. After a while the towing company came to pick me up in a big (high) tow truck with only space for two persons. I felt very uncomfortable as I climbed up in the truck heading out in the dark not knowing where I was going. When we arrived, I was told that the boss man was on his way and that I had to wait for him. I stood somewhere in the middle of a big area in the dark trying to see where my car was parked. After 10 minutes someone came and asked me for the money. I handed him \$80 as I had no exact change. He said he doesn't think he had any change for me. I told him that he could keep it and to please give me my vehicle. He showed me where it was and I did a quick scan with the light on my mobile phone to see if it was in good order as it was a brand-new vehicle. I saw a scratch at the back and on the side of the jeep. I told them about it and they began to curse me out using foul language and vehemently denied that they damaged my jeep. I felt unsafe and very intimidated so I rushed out of there as fast as I could. I realized that I was in Sucker Garden and found my way out. I was very upset about the scratches on my brand-new jeep and decided to inform the police right away. I spoke to the same officer who assisted me earlier and to my surprise he stated that it was no use to file a complaint of that nature as nothing would be done with it. Once the towing company denies and there is no proof that they damaged the vehicle there is no case. I left the police station very upset. I never received a fine for alleged bad parking nor any receipt of payment.*

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<sup>14</sup> This statement could not be verified. It is unclear how Hungry's Towing could be excluded from towing vehicles for parking violations on one hand by the police, but on the other, allowed by the same police department to provide other towing services, without having the required liability insurance.

Once vehicles are towed and transferred to the storage area, the person whose vehicle is towed should obtain a vehicle release form<sup>15</sup>, after identifying themselves, from the KPSM and supply that form to the towing company along with the towing fee in order for their vehicle to be released. The entire towing fee goes to the towing company, i.e. government receives nothing! If the driver is not present when a fine is being written (PV) usually no fine is given to the driver. Ultimately, the driver/owner of the vehicle (generally) only pays for the towing fee. Noteworthy is that KPSM does not (consistently) keep a record (log) of the vehicles that are towed.



Therefore, when a person reports to the police officer on duty that their vehicle has been (presumably) towed, the police officer usually calls the towing company to confirm that this is the case, even though it is the police force that gives the instruction to have the vehicle towed in the first place.

According to the towing companies it happens that release forms were/are provided to persons while the towing company was/is not in possession of their vehicle. The requirement of KPSM that the towing companies are expected to submit a detailed overview of the vehicles that were not collected by the owner at the end of each quarter, is also not being adhered to.

Many of the issues expressed by the towing companies have been confirmed by the Ombudsman in the 'Towed in Philipsburg' case. In the aforementioned case, it remained inconclusive if the parked vehicle that was towed was a nuisance and/or danger to traffic. Additionally, it is not clear what traffic rule was violated. Even if it is assumed that the vehicle was a nuisance to

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<sup>15</sup> It would appear that the vehicle release form is not consistently used. Some towing victims have indicated they were not provided with a release form by the police, neither have towing companies demanded this form prior to the releasing of vehicles.

traffic and was rightfully towed, KPSM still did not adhere to their own towing policy as no PV/fine or police report, describing the degree of the nuisance, was made up.

Also, in this case, no receipt for the cash only payment was provided to complainant, despite the specific request made for such. Consequently, the Ombudsman identified an overall lack of execution of the policy in practice and the absence of procedures.

### **2.3 Legal instruments**

Towing companies have legal instruments at their disposal to facilitate the execution of their tasks. These will be discussed in this chapter.

#### ***‘Retentie recht’ (right of retention)***

An important tool that comes into play with respect to the towing of vehicles is the right of retention (*‘retentie recht’*). The right of retention is regulated in article 3:290 BW (civil code):

*“Retentierecht is de bevoegdheid die in de bij de wetboek of een andere landsverordening aangegeven gevallen aan een schuldeiser toekomt, om de nakoming van een verplichting tot afgifte van een zaak aan zijn schuldenaar op te schorten totdat de vordering wordt voldaan”.*

Right of retention gives the creditor the right to delay their obligation to release a good (product) to the debtor until the debt has been paid/fulfilled. A known example is a mechanic who has repaired a car. As long as the invoice for the repair is not paid, the mechanic does not have to return the car. Exercising the right of retention prevents the person who performed the work from being in arrears.

The right of retention is often used in towing when a person is illegally parked. The towing company may refuse to return the vehicle to the owner (holder) as long as the towing fee has not been paid. This right of retention is also applicable on Sint Maarten and is regulated in article 117, paragraph 3 of the road traffic ordinance: *“... the motor vehicle is transferred at the expense and risk of the suspect to a place deemed suitable by the verbalizing person and stored there, until it is collected by or on behalf of the owner or holder, if necessary, against payment of the costs”.*

#### ***‘Parate executie’ (summary execution)***

Another important instrument with respect to the towing of vehicles is the right of *‘parate executie’*. This is the right to sell the property of a debtor without prior judicial judgment in public according to local practice. In other words, should a person whose vehicle has been towed not claim the vehicle within a specific period of time, usually one to three months, the debtor (towing company or government for example) can sell or destroy the vehicle.

*‘Parate executie’* is widely used in the Netherlands<sup>16</sup>. The Curaçao Road traffic<sup>17</sup> ordinance uses the *‘dwangbevel’* (writ of execution). A writ of execution is a written order issued on behalf of

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<sup>16</sup> See article 5:30 Algemene wet bestuursrecht (Awb).

<sup>17</sup> *‘Wegenverkeersverordening’* Curaçao (A.B. 1997 no.62).

the government, which is served by the bailiff. This order gives the governmental body the option of forcibly collecting a sum of money from an individual. In absence of payment within the provided timeframe, the bailiff may execute the writ of execution. The bailiff may therefore seize personal belongings (the vehicle for example) without having to go to court, and subsequently sell said belongings in order to collect the monies.

As far as we have been able to ascertain, the Sint Maarten Road traffic ordinance does not contain similar provisions. Nevertheless, we have been informed, by at least one of the towing companies, that the practice of selling unclaimed vehicles or parts of vehicles ('scrapping'), after a period of time, is tolerated - allegedly - with the approval of KPSM.

## **2.4 Responsibility of KPSM**

According to KPSM<sup>18</sup> they cannot be held responsible for the manner in which the towing companies execute their task. They argue that complaints of this nature must be directed to the towing company. Government does not have a towing company, neither a location to store vehicles, they contend. As a result of these factors, an external partner must be utilized. Based on the traffic ordinance only the police have the authority to tow /remove vehicles. The law however provides the possibility that this can be done by a third party upon the instruction or request of the police. As the KPSM indicated, the government does not own a towing company. Therefore, to execute this authority which has been explicitly provided by law the police has (duly) outsourced/ contracted a third party to provide towing services<sup>19</sup>. Based on the letter / SLA dated 10 April, 2017 addressed to Leap Year and Hungry's Towing and subsequently signed by both parties as well as the Chief Police Commissioner, it can be concluded that the towing of vehicles was outsourced on the basis of said document.

The succinct document clearly gives mentioned towing company's permission to provide the service to the police force. The letter also specifically outlines the conditions, when providing said service, that the companies are required to adhere to: *'Both companies are expected to be vigilant, professional and maintain a full understanding of their regulatory compliance requirements, such as fixed price for towing and storage of vehicles, safe and proper storage location, liability insurance for damages, theft and/or destruction incurred to our clients vehicles. Issuance of a receipt of payment to our clients when returning their vehicle to their care is also a new requirement from the Corps. At the end of each quarter the towing companies are expected to submit a detailed overview of the vehicles that were not collected by the owner.'*

Is the KPSM correct in their assertion that they cannot be held responsible for the manner in which the towing companies execute their task, on behalf of the KPSM?

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<sup>18</sup> Letter from KPSM to the Ombudsman dated 12 February 2020.

<sup>19</sup> The Ombudsman was unable to determine if official towing permits were issued to the companies in question.

Before answering that question, let us first establish that towing companies can by law be prosecuted for theft if they tow a vehicle and are unable to provide a statement from the police showing their authority to do such. This was also confirmed by the Minister of Justice in 2012<sup>20</sup>.

Regarding the question if KPSM can be held responsible, the following. In the *Stichtse Vest*<sup>21</sup> *arrest* the Supreme Court of the Netherlands determined that municipal tasks (such as road maintenance) can be outsourced to third parties. The Court further established that if a third party can perform the task without a public-law decision (“*publiekrechtelijk besluit*”) to that effect, then that task cannot be considered an exclusive administrative task (“*exclusieve bestuurszaak*”<sup>22</sup>). If the third party is negligent in performing a task that can be outsourced without the need for a public-law decision, the municipality does not enjoy immunity and can be prosecuted.

In this case the Court therefore determined that pursuant to the Road Act (“*Wegenwet*”), the municipality has a duty of care (“*zorgplicht*”) with regard to road maintenance, but this does not alter the fact that the actual maintenance of roads - and therefore also the failure to carry out this maintenance – can also be carried out by third parties. Consequently, according to the Court, the municipality has no criminal immunity with regard to the maintenance of roads, i.e. the municipality is responsible/liable.

This case can be applied to the local situation regarding towing. The towing of vehicles cannot be classified as an exclusive administrative task, towing can be carried out by third parties. Nevertheless, the police have a supervision obligation based on the law (article 117 paragraph 3 of the road traffic ordinance). As a result, if the towing companies are negligible in performing their task and this is attributable (“*toerekenbaar*”) to the failure of KPSM in the execution of their supervision obligation, the KPSM (government), in theory, does not enjoy immunity from prosecution.

In the ‘Towed in Philipsburg’ case, the Ombudsman established that there is no proper data on “*proces verbalen/mutaties*” regarding parking violations and the towing of pertinent vehicles. Additionally, there is no written published policy regarding the process of towing of vehicles, neither are these known or available to the public. The Complainant in the case was subjected to inhumane and unprofessional behavior by the towing company handling on behalf of KPSM as a result of her vehicle being towed. Complainant was not afforded the dignity of a reaction when KPSM was approached to address the matter. Furthermore, Complainant was not provided with a written statement (“*proces verbaal*”) nor a receipt in order to ascertain her options in objecting to her vehicle being towed nor to contest the payment made in order to retrieve her vehicle.

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<sup>20</sup> The Daily Herald, March 1, 2012, “No tolerance for illegal towing, blocking parking spots”.

<sup>21</sup> NJB 2018/505 | NJ 2018/134

<sup>22</sup> Acts that by their nature and in view of the legal system can only be performed by the government in the context of the administrative task assigned to it. This concerns situations in which third parties do not participate in civil society on an equal basis with the government.

Considering the foregoing, it can be concluded that KPSM was negligent in the execution of their supervision obligation towards the towing companies.

As a result of the foregoing, it is - in principle - also possible that the government can be held responsible for damages based on the civil code, ‘*onrechtmatigde daad*’ (unlawful (government) act), article 6:162 BW. KPSM is therefore inaccurate in their assertion that they cannot be held responsible for the manner in which the towing companies carry out their duties, on their behalf.

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### 3. Parking permit procedures

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Parking permits<sup>23</sup> are issued by or on behalf of the Minister of Justice based on article 2 paragraph 13 sub j of the Road traffic ordinance. Parking permits are issued to persons and/or businesses allowing them to park on public property<sup>24</sup>.

Requests for parking permits must be submitted to the KPSM. After approval by the Minister of Justice, based on an inter-ministerial advice from KPSM<sup>25</sup> and Ministry of VROMI<sup>26</sup>, the relevant traffic (parking) sign<sup>27</sup> is placed by the Ministry of VROMI. Without a decree from the Minister of Justice, the erecting of a parking sign is in violation of the law.

Consequently, such a (parking) sign has no legal force against which action can be taken in the event of an alleged parking violation.

*In October 2018, Complainant submitted a request to KPSM and the Ministry of VROMI for 2 parking spaces on the E.C. Richardson street, in order to facilitate his business during the delivery of merchandise as well as to accommodate customers. At the time, police would cooperate and temporarily vacate the parking space(s) in the event of deliveries. In December 2018, 2 months later and through the intervention of the Ombudsman, the request was denied by both the Minister of VROMI as well as KPSM in two separate correspondences. The grounds for denial was that the KPSM had obtained sole authorization for the all parking spaces on E. C. Richardson Street nr. 29, directly in front of the Philipsburg Police headquarters. Subsequent to his complaint he was promised by KPSM that he would (still) be allocated 2 parking spaces as he had initially requested, however this never materialized.*

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<sup>23</sup> This pertains only to roads or paths open to public traffic or other traffic (article 1 sub 1, road traffic ordinance), and not private property. Parking permits are also usually limited to weekdays, Monday thru Friday, between the hours of 7:00 AM to 6:00 PM.

<sup>24</sup> Conversely, if a property is privately owned that means a parking permit is not necessary. This also means that proprietors of the business and/or persons can request towing companies, without the permission of the KPSM, that parking violators are towed.

<sup>25</sup> KPSM analyzes the effect on the road safety and the free flow of the traffic.

<sup>26</sup> The Ministry of VROMI advises with regard to the public road infrastructure.

<sup>27</sup> Although VROMI is required to provide the required traffic signage, these are usually unavailable. Signs are therefore usually paid for by the business or individual requesting the parking permit and manufactured by local signage companies.

The Ministry of Justice<sup>28</sup> has indicated that a total of 13 decrees have been granted for parking permits during the period 2016-2019. No information was provided for the preceding years. It is therefore unclear how many parking permits are presently in use. Based on information received from Cadaster we were able to determine that the majority of the parking facilities adjacent to businesses in the Philipsburg area are not privately owned.

For example, the majority of parking spaces next to businesses on the Walther A. Nisbeth road (Pondfill), Ch. E. Voges Street and Emmaplein are public property.

This means that businesses (or an individual) will require a parking permit to ensure that the parking location remains exclusive for the business or individual.

Devoid of that parking permit, all persons, whether patronizing the services of the business or not, are by law allowed to park at that location, and towing would be in violation of the law. This also means that erecting parking barriers at these locations, effectively blocking off the public parking spaces, without a parking permit, is also in contravention of the law.



<sup>28</sup> Letter from the Minister of Justice dated 24 September 2020.



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#### *4. Bottlenecks and Challenges*

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Several bottlenecks and challenges have been identified, these include: the lack of a parking policy plan, unclear parking permit procedures, and the non-execution of the existing towing policy. These bottlenecks as well as others will be further explained in this chapter.

#### **Lack of a Philipsburg parking policy plan**

A parking policy plan does not exist for Philipsburg. The issues surrounding parking have been repeatedly highlighted in various development plans and reports<sup>29</sup>. These reports concluded that parking, particularly in Philipsburg, is one of the main challenges facing Sint Maarten. A parking policy plan is a crucial component of the overall vision and development of the capital of the country. Fortunately, the parking problem has been identified, however this has not led to concrete plans for implementation of solutions or the development of a comprehensible parking policy plan and subsequently a sustainable parking policy.

#### **Insufficient and inadequate traffic (parking) signage**

There are presently insufficient (non) parking signs erected in the Philipsburg area. Without enough traffic signs citizens and visitors are unaware where can and more importantly where cannot be parked. Additionally, where signs are placed, based on a parking permit, these (signs) are not in accordance with the official models that are required by the Road traffic ordinance. Although VROMI is required to provide the required traffic signage, these are usually

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<sup>29</sup> Greater Great Bay Area, Development Perspective 'Friendly Island' Dutch Sint Maarten (NA), Teun Koolhaas Associates (TKA) / Architecture & Urban Design, 2003 | Starting Points Greater Philipsburg Development Plan, Royal Haskoning DHV, November 2013.



unavailable. Signs are therefore usually paid for by the business or the individual requesting the parking permit and manufactured by local signage companies, not necessarily keeping with the requirements (models) established by law, which also results in the signage not being uniform.

### **Lack of a formal parking permit policy; existing procedures are unclear and not consistently applied**

Based on the Road traffic ordinance, parking permits are issued by or on behalf of the Minister of Justice. Requests for parking permits must be submitted to the KPSM. After approval by the Minister of Justice, the relevant traffic (parking) sign is placed by the Ministry of VROMI. The Ombudsman has observed however that the present procedure is vague and adhoc. The Minister of Justice has also confirmed that a formal policy that governs the issuance of parking permits does not exist. In some cases, requests are submitted to the Ministry of VROMI and in others to the KPSM. Denials are also issued by the Ministry of VROMI as well as KPSM, even for the same case. The procedure regarding the application process and subsequent approval or denial of the request is therefore unclear. Citizens must be aware where a request for a parking permit should be submitted and who is responsible for the approval or denial. Presently it appears that both ministries are (equally) responsible. This can be confusing to the public. It should be noted that the Minister of Justice has recently acknowledged the policy shortfalls and has ensured that improvements will take place moving forward.

### **Inconsistent enforcement of the traffic ordinance and towing policy**

The towing of vehicles is not consistently executed. Even in cases where there is a clear violation of the Road traffic ordinance and the towing policy, illegal parking is tolerated. Consequently, citizens recognize that insufficient action is being undertaken by the police to curb the practice with the consequence that the problem proliferates further. The police then adopt a zero-tolerance approach to tackle the situation that has gotten out of hand. Case in point is the present illegal parking on Front Street, Back Street and the Boardwalk Boulevard<sup>30</sup>. If the police would act more consistently, the problem would not develop or worsen and the need to resort to zero tolerance would not be necessary.

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<sup>30</sup> The Daily Herald August 13, 2020: 'Police to step up action against illegal parking'.



### **Towing policy not being properly executed by KPSM**

KPSM is not enforcing its own policy, which specifically states that PV's or police reports must always be made up and must describe the degree of the nuisance, as well as incorrect parked vehicles would only be towed if they were a nuisance or danger to traffic. As we established, PV's are seldom made up. As a consequence, citizens are oblivious to what rule was violated, which frustrates and limits the possibility to successfully object to their vehicle being towed. This practice is in violation of the standard of Fair Play, which requires that administrative bodies provide the citizen the opportunity to properly utilize procedural opportunities provided for by law and otherwise. Also, in the event of damages to vehicles that are scratched or dented in the process of towing, often times these claims are disputed by the towing companies which results in citizens having to cover these expenses themselves.

### **Towing not properly outsourced**

It is unclear how the two towing companies were selected. Was this done for example in accordance with the "*comptabiliteitsverordening*<sup>31</sup>"? Were towing permits granted to the selected towing companies?

Based on letter dated 10 April, 2017 from the KPSM to Leap Year and Hungry's Towing, they were charged, on a rotating basis, with the towing of vehicles. The Ombudsman was unable to establish if official towing permits were granted. While the single page letter, signed by all parties, is referred to as an SLA by KPSM, it is actually a misnomer to designate that distinction to the document in question as it does not meet the minimum standards required for such. A SLA should include not only a description of the services to be provided and their expected service levels, but also metrics by which the services are measured, the duties and responsibilities of

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<sup>31</sup> This question will not be further researched as it exceeds the purview of this investigation.

each party, the remedies or penalties for breach, and a protocol for adding and removing metrics. Most of these mechanisms are absent in the document.

Furthermore, shortly after receiving the document one of the towing companies was unable to obtain a liability insurance and therefore was allegedly (partially) disqualified from participating. Hence, only one company has been executing towing services as it relates to parking violations until present.

### **Towing policy, fees are not published and fines are inconsistently issued and collected**

The public at large is unaware of the policy. The fees for towing are also not officially published. Citizens are therefore unaware what the applicable fees are.

When confronted with the fact that their vehicle has been towed away, many are dependent on the company informing them what the fees are. This creates the possibility for abuse.

Additionally, payments can only be made in cash, which is also unsafe.

With regard to the fines for violations (“*overtredingen*”) that, based on the road traffic ordinance (article 119<sup>32</sup>), can be issued, statistics from the OM’s 2019 annual report show that a total of 2001<sup>33</sup> traffic fines were issued, totaling an amount of ANG. 320.950. However, from the aforementioned amount only ANG. 180.766 was actually collected, just over 50%. The statistics also show a downward trend in the number of fines issued when compared to 2017 and 2018.

In 2017 a total of 3093 fines were issued and in 2018, a total of 2379. There is a drop off of 35% when comparing the 2017 and 2019 figures<sup>34</sup>. With reference to the number of fines collected based on the fines issued, figures for 2017 are unavailable, in 2018 ANG. 187.700 was collected (the total amount of fines issued was unavailable). The disparity between fines issued and collected is obvious. In 2016 for example, the written-out fines totaled ANG. 1.112.300, on the other hand fines that were actually collected/paid were ANG. 334.120, just 30%.

In 2015 ANG. 187.095 was collected (the total amount of fines issued was also unavailable).

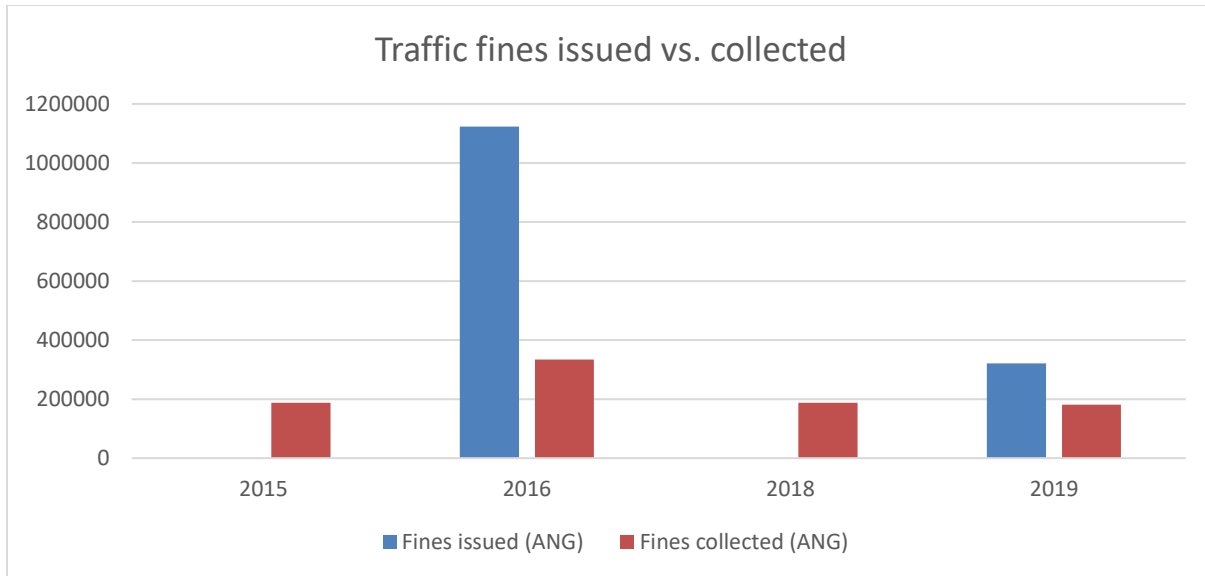
In addition, the process in which the fines are issued and processed is archaic. In this day and age, the process is still executed manually.

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<sup>32</sup> A distinction is made between “*misdrifven*” (crimes) and “*overtredingen*” (violations). The maximum fines for crimes are ANG. 5000.00, and a maximum of ANG. 300.00 for violations.

<sup>33</sup> These are fines issued by the KPSM, Coastguard and the Ministry of TEATT (Tourism, Economic Affairs, Transport and Telecommunication).

<sup>34</sup> According to the OM’s 2016- and 2017-year reports, the significant increase in the total of fines issued in 2016 (and to a lesser extent 2017) is the result of retroactive posting and processing of the fines issued in the preceding years, 2013 through 2017.



### **The illegal practice of selling unclaimed vehicles allegedly tolerated with the approval of KPSM**

There is no basis in the Road traffic ordinance for the practice of selling unclaimed vehicles. Towing companies are therefore handling in contravention of the law - allegedly - with the endorsement of the police. KPSM in collaboration with various stakeholders instituted an official bill of sale<sup>35</sup> document in May of 2016<sup>36</sup>. The objective was to structure the procedure of transferring ownership of vehicles via a standardized bill of sale whereby the selling of stolen vehicles could be effectively tackled. In the past anyone selling a vehicle, could easily make their own bill of sale, sometimes even handwritten ones and the vehicle would be transferred between the seller and the buyer without any possible control or real time information of the vehicle, the buyer or seller. By regulating the document, it removes the uncertainties as it relates to ownership of the vehicle and protects the buyer from possibly purchasing a stolen vehicle and losing their money in the process. It would appear that KPSM is undermining their own program with their alleged actions.

### **Government is exposing itself to liability**

KPSM has outsourced an activity that they, by law, are responsible for to a third party. They have entered into an SLA with these parties to execute this task, on their behalf. The SLA is being inadequately enforced and supervised. Consequently, based on jurisprudence and the law it can be established that if (the) towing companies are negligible in performing their

<sup>35</sup> The Daily Herald March 22, 2016: 'Police work towards regulating bill of sale'.

<sup>36</sup> It is unclear if this target date was met or if the program was ever implemented. The bill of sale was to be only available on-line, however at present (September 2020) this feature on governments website ([www.sintmaartengov.org](http://www.sintmaartengov.org)) is non-responsive (inactive).

task and this is attributable to the failure of the KPSM in the execution of their supervision obligation, the KPSM (government) can be held responsible for damages based on the civil code.

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### 5. Conclusion

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Parking in Philipsburg is not adequately organized. There is no comprehensive parking policy plan. A proper towing policy does not exist, and the one that is currently in place is not being followed. As a result, towing is chaotic and insufficiently regulated. The broader and more overarching issue is that there is no established Development Vision or Plan for Philipsburg. This however does not absolve government from its responsibility to adequately organize its services. Government is required to organize its administration and operation in a manner which guarantees proper service to the public. Proper service refers to the principle of meticulousness in the administration. Proper service also includes organizing the administration in a manner that is lawful, effective, transparent, accessible, equipped to provide prompt service and information. The administration of KPSM is inadequately organized. A proper record keeping of vehicles towed and the subsequent payments made thereafter are non-existent. There is no proper data on “*proces verbalen/mutaties*” regarding parking violations and the towing of pertinent vehicles. There is no written published policy regarding the process of towing of vehicles. While the ambition of KPSM to reach the standards of ‘integrity’ and ‘transparency’, as envisaged in the SLA, is applaudable, these positive attributes do not translate in comparable and discernable actions in the execution of the towing policy. Although improvements have been made over the past years, towing in Philipsburg remains insufficiently regulated and supervised.

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## 6.Recommendations

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Based on the findings in the report, the Ombudsman proposes the following recommendations:

### **Creation of a Philipsburg parking policy plan**

Government should revisit the numerous Philipsburg Development Plans and draft a comprehensive parking policy plan for the city. In the eventual implementation of the parking policy government should ensure that the proper infrastructure is in place, such as signs, parking machines, a parking reference system or perhaps one or more parking garages<sup>37</sup> with which the desired direction to the policy can be given. Government will also need to, directly or indirectly, have an organization that can implement the parking policy, including providing the necessary information to the public. It should also be noted that parking when properly regulated, can generate much needed revenue<sup>38</sup> for the country.

### **Draft and implement a comprehensive towing policy with proper checks and balances**

KPSM must establish a comprehensive towing policy. One that encompasses all of the phases: outsourcing, execution, control and supervision. In terms of the execution, matters that need to be addressed are: proper data base for '*proces verbalen/mutaties*', official (uniform) parking signage, payment possibilities other than cash and ensuring that in the event of damages to vehicles towing companies cannot absolve themselves from their responsibility without verifiable evidence, such as providing photos of the vehicle prior to and after towing.

### **Establish parking permit policy**

The procedure that is required to obtain a parking permit should be documented and properly regulated via a policy so that it is clear to the general public, including the possible grounds for denial and objections.

### **Amend and update Road traffic ordinance**

The Road traffic ordinance should be amended to facilitate the introduction of modern enforcement tools such as wheel clamps etc. The procedure for the seizure and selling of unclaimed vehicles must be included in the ordinance as well.

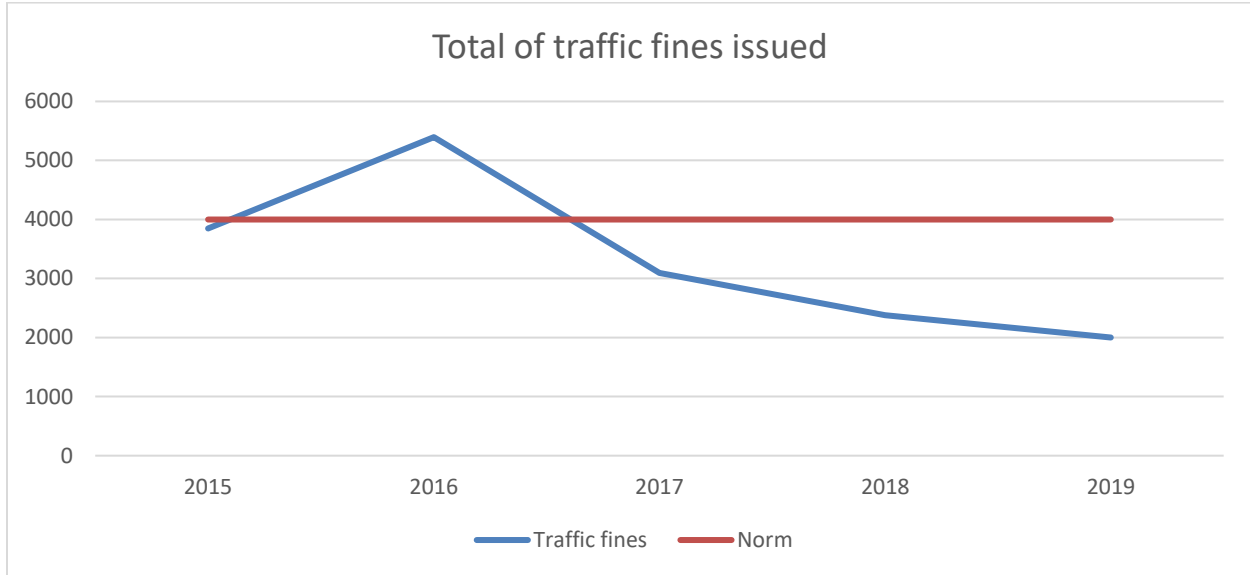
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<sup>37</sup> The Daily Herald April 20, 2016: 'APS to build 400-space multi-storey parking lot'. According to the article, the project was slated to start in 2016. However, has not started to date.

<sup>38</sup> The parking facility on the Clem Labega Square, managed by government, generated ANG. 100.247 in 2018 ('*Ontwerpbegroting 2020 land Sint Maarten*').

**More consistency in the execution of (targeted) traffic checks and the issuing of fines as well as modernizing the process**

Traffic checks must be carried out with more consistency. According to the OM, there are no fixed agreements with the KPSM about the regularity or dates of traffic checks. The norm for traffic checks, according to the OM Carib guidelines<sup>39</sup>, is 4000 per annum. That norm has not been realized for some time. The system /process of issuing fines must also be updated as this is (still) being done manually. Automating the process would increase efficiency and effectiveness.



**More action must be undertaken to collect the issued fines**

The collection of fines falls under the responsibility of the OM. Just over 50% of the issued traffic fines were actually paid in 2019. Figures for 2018 indicate the same percentage (50%). Figures for 2017 are unavailable and in 2016, just 30% was collected<sup>40</sup>. Increased collection can also contribute to an overall improved adherence to the traffic rules.

<sup>39</sup> OM Year Report 2019.

<sup>40</sup> OM year reports 2016 – 2019.