

“Ordinance Special Powers” AB 2021.5

Explanatory Memorandum: per Article

Article 2 Administrative Detention

Article 2 is based on Article 158 of the Act public entities of Bonaire, Statia, and Saba. This Article provides for the power of the Governor in the event of disturbance of the peace to detain groups of disorderly persons for no more than 12 hours in a place designated by the Governor. The transportation to the place of detention is included.

With regard to disturbance of the peace one has to think of situations such as high-risk events and high-risk assemblies on the island and demonstrations that get out of hand. The application of the administrative instrument of administrative detention requires a basis in an ordinance in which the Council gives the Governor the power of administrative detention in the event of failure of groups to comply with specific regulations. Article 2 provides for this.

The conditions under which administrative detention can be applied have been laid down in Article 158 of the Act public entities of Bonaire, Statia, and Saba. The phrase “pursuant to Article 158 of the law” consequently implies that all conditions have to be met before a decision for administrative detention can be made. These conditions have been described above.

In accordance with the law, the provision mentions “groups designated by him (the Governor)”. This requires the Governor to specify the group to which administrative detention will be applied. This can be done, for instance, with the wording “those who manifest themselves as participant in or the action against... by their clothing, equipment, or conduct”. Furthermore, the group can be specified by indicating the area where the group was located at the time the decision for detention was made, the actions performed by the members of the group at that time, the size of the group, or by mentioning the language, origin, or nationality of the members of the group.

Based on the law, by ordinance the details will be specified of what specific regulations are suitable for proceeding to administrative detention in the event of failure of groups to comply, which will depend on the local situation, for which earlier experiences with large-scale disturbance of the peace can serve as a guideline.

“Ordinance Special Powers” AB 2021.5

Article 3 Security Risk Areas

Pursuant to Article 155 of the Act public entities of Bonaire, Statia, and Saba, by ordinance the Council can give the Governor the power to designate areas in which the public prosecutor can exercise the power of control referred to in Articles 50, 51, and 52 of the Weapons and Ammunition Act. It concerns the power of control within the designated area:

- to examine vehicles;
- to examine everyone’s clothing; and
- to demand that packages that persons carry are opened.

The Governor can designate an area if facts or circumstances show that there is disturbance of the peace due to the presence of weapons or serious fear that this disturbance may arise. The designation as security risk area will be for a duration not longer and for an area not broader than strictly necessary to maintain public order. Before the Lieutenant Governor designates an area, he will consult on this with the public prosecutor and the chief of police in the local triumvirate. The following subjects will be discussed then:

- facts or circumstances that show that there is disturbance of the peace due to the presence of weapons or serious fear that this disturbance may arise;
- broader enforcement policy in the intended area to increase the quality of life and security;
- careful balancing of the objective and subjective security interest and the individual interest of the citizens (privacy); and
- subsidiarity and proportionality.

Case law

Court of Justice Amsterdam 09-23-2005, ECLI:NL:GHAMS:2005:AU3200.

The power laid down in Article 151b, first paragraph, of the Municipalities Act can only be exercised within strict boundaries based on a proper justification.

ABRvS 03-09-2005, ECLI:NL:RVS:2005:AS9248.

The appellant does not live or work in the designated security risk area, nor does she run a business there. She is not compelled to be there at certain times for a lengthy period either in any other way. Nor is she an owner of real estate in the area. The appellant consequently does not have a special individual interest in the designation order. That she has lived in the municipality for years and used to go out in the

“Ordinance Special Powers” AB 2021.5

designated area and to visit friends and family is insufficient for the opinion that she distinguishes herself from others sufficiently, also given the days and times on which the order was in effect.

ABRvS 11-09-2005, ECLI:NL:RVS:2005:AU5839.

Based on the circumstance that the other party’s house is in the designated security risk area, the other party is an interested party with regard to the designation order in the sense of Article 1:2, first paragraph, of the General Administrative Law Act (“Awb”). The Department states first and foremost that the mayor has a broad margin for discretion when issuing a designation order (necessity and proportionality test).

Article 4 Camera Surveillance in Public Areas

Pursuant to Article 156 of the Act public entities of Bonaire, Statia, and Saba, by ordinance the Council can give the Governor the power to conduct camera surveillance in public areas in the interest of maintaining public order. The Council may determine in this connection to what public areas the power extends and for what maximum duration the use of cameras can take place. According to the legislator, this provides the granting of the power to use cameras with democratic safeguards.

The decision of the Governor to install cameras in a public area is a general decision to which objection and appeal are possible. It may happen that images are recorded of persons entering or leaving a building. The owners of these buildings can be qualified as interested parties in the sense of the Awb, just like for instance those who work or live in this building (tenants) or other regular visitors of this building.

Not only is surveillance with fixed cameras possible, but also with mobile cameras. The reason is in particular that in practice fixed cameras have often appeared inadequate to fight crime, nuisance, and vandalism that quickly and easily moves to other areas. The government indicates in the Explanatory Memorandum to the amendment to the Municipalities Act which has made this possible (Parliamentary Documents II 2012/13, 33 582, No. 3) that talks with representatives from the administrative, judicial and police practice, including municipalities, have shown that surveillance with fixed cameras sometimes falls short: “For constant nuisance that moves to other areas one may think of nuisance caused by loitering youths, drug users and drug dealers, muggers and pickpockets, and persons who destroy property in the public area. (...) Several recently published municipal evaluation reports on camera surveillance in public areas recognize the tendency that nuisance moves around and that fixed camera surveillance as supervision instrument falls short in case of displacement effects”.

“Ordinance Special Powers” AB 2021.5

The government also emphasizes that cameras can only be used to maintain public order, but this does not mean that there already has to be disturbance of the peace or a concrete threat hereof in advance: “After all, the mayor maintaining public order also includes the general administrative prevention of criminal offenses that affect order and peace in the municipal community”.

Purpose of camera surveillance

Municipal camera surveillance based on Article 156 of the Act public entities of Bonaire, Statia, and Saba can exclusively take place to maintain public order. This term also includes the general administrative prevention of criminal offenses that affect order and peace in the municipal community. This main purpose does not alter the fact that this form of camera surveillance can also serve sub-goals. For instance, this Article also provides the option to use the images recorded to investigate and prosecute criminal offenses. In addition, cameras can be used to deploy the police and other emergency services more efficiently and effectively. Moreover, the preventive effect of camera surveillance increases their safety.

Recognizability

It has been laid down in Article 156 of the Act public entities of Bonaire, Statia, and Saba that the use of cameras has to be apparent. Citizens in any event have to be notified of the possibility that they can appear in images as soon as they enter the area within reach of the cameras. Not only does the requirement of recognizability have to be met when images are recorded, but also if there is monitoring and consequently no recordings are made. By installing signs that are properly visible, stating that the relevant area has camera surveillance, the public can be alerted to this possibility. Incidentally, the requirement of recognizability does not imply that cameras always have to be visible or that the citizens have to be notified of the exact recording times. Non-apparent use of camera surveillance in areas accessible to the public has been penalized.

Based on Article 156 of the Act public entities of Bonaire, Statia, and Saba the Council has the power to also designate other areas that are publicly accessible without any restrictions as public area, and to thus bring them under the scope of the law. It concerns areas such as parking lots, which, because presence there is related to a specific purpose, do not fall under the definition of public area of the Public Assemblies Act. The legislator has intended with this that municipalities can quickly respond to local

“Ordinance Special Powers” AB 2021.5

needs that have become apparent. The starting point remains at all times that camera surveillance has to be necessary with a view to maintaining public order.

Article 5 Area Ban

If there is (serious fear of) disturbance of the peace or conduct causing a nuisance, a Governor can impose an area ban. The Governor can derive the power from the General Local Ordinance (“APV”). This provision is meant for that purpose. There are four kinds of bases on which a Governor can impose an area ban. The best-known is a provision in a local ordinance such as this one, which will be discussed hereinafter.

In addition, merely for disturbance of the peace that this provision does not refer to, an area ban can be imposed pursuant to Article 172, third paragraph, of the Municipalities Act (the “light power to issue an order”). If the provision of the local ordinance as well as Article 172, third paragraph, of the Municipalities Act can apply to an area ban, the AVP takes precedence. However, if Article 172, third paragraph, of the Municipalities Act is used because there is no APV provision, the court may indicate that there was sufficient opportunity to draw up such a regulation. If there are structural problems, the Council has to include a regulation in the APV.

The power of Article 172, third paragraph, of the Municipalities Act is “light” compared to the power of the mayor to issue an emergency order (Article 175, first paragraph, of the Municipalities Act). A light order has to be in conformity with applicable regulations, including local ordinances. An emergency order on the other hand may deviate from applicable regulations, except the Constitution and higher regulations than the Constitution. The legislator has created the light power to issue an order for situations in which applicable regulations, including local ordinances, do not contain a provision for a concrete public order problem. Finally, there is a possibility to impose an area ban pursuant to Article 172a of the Municipalities Act (inserted in 2012 through the Combating Football Hooliganism and Serious Public Nuisance (Measures) Act). The power of Article 172, third paragraph, of the Municipalities Act is also light compared to this Article. This concerns repeated nuisance (at least twice and a pattern), so that a thorough file has to be compiled, as well as serious fear of continuation of this nuisance. These area bans can apply for three months with no more than three extensions, each by that period, up to a maximum of one year, and be imposed in combination with one of the other instruments (group ban, requirement to report to the police) of that Article.

“Ordinance Special Powers” AB 2021.5

With the area ban in the APV, the mayor can take action against persons causing a nuisance in a public area. The area ban was first meant to be used for nuisance caused by drug dealing and drug use. But the instrument can also be applied in the event of other forms of nuisance, depending on how the provision is “interpreted”. For instance when the nuisance is caused by assembly, annoying alcohol use, violence, etc. Many municipalities apply this instrument to reduce feelings of insecurity and nuisance.

The area ban is imposed on persons who commit criminal offenses or acts disturbing the peace and usually have already received an administrative warning once. Some conditions must have been met to apply a public order measure, such as an area ban. The situation requirement must have been met, meaning that there should be circumstances that may require intervention to maintain public order. In addition, the criterion of purpose must have been met: the measure should be aimed at ending or preventing (further) disturbance of the peace or nuisance or at reducing its consequences. The power can only be applied in the event of (imminent) disturbance of the peace. The duration of this concrete measure must be directly linked to the situation that there is a threat to public order is imminent. Therefore, the duration of the measure cannot be disproportionately long. Usually there is consequently a step-by-step buildup.

When the measure is applied, the statutory regulations may not be deviated from. Finally, the measure has to meet the requirements of subsidiarity (there is no means available that is less serious) and proportionality (the order has to be in proportion to the problem to be fought or the goal to be achieved).

The interpretation of the first paragraph requires a choice of the municipality. For instance, in the provision itself it can be determined for the violation of which provisions the area ban can be used, one may think of various provisions of the AVP, but also of provisions of the Criminal Code, the Opium Act, the Weapons and Ammunition Act, the Road Traffic Ordinance, etc. Important is that the administrative system of judicial discretion also applies to an administrative order. So the violation must be adequately plausible and not – as in criminal law – legally and convincingly proven. The advantage is that a certain foreseeability is provided and that there is democratic legitimacy. Disadvantage is that every amendment has to go through the Council and consequently takes time. Therefore, it is also possible to lay down in a policy rule (or a warning that is necessary then) for which violations the area ban can be used. In this rule it has to be laid down in any event what is meant by “acts disturbing the peace”. Advantage is that some flexibility has been provided for (for amending a policy rule is much “easier” than amending the APV); disadvantage is that the Council has less control over the details.

Separately, it has to be determined how long the short-term area ban will apply. Short-term means a period of 48 hours. A period of 24 hours is often used. It is also possible to include a special regulation

“Ordinance Special Powers” AB 2021.5

beside this general regulation. For instance by determining that the Governor orders someone who displays certain conduct that causes a nuisance to bars and restaurants in the entertainment area between Thursday 6 p.m. and Sunday 12 a.m. to stay away from that area for the rest of that period. The same is possible for funfairs, football matches, or other events.

It has to be determined how long the long(er)-term area ban can continue at most. A period of no more than twelve weeks has been considered acceptable in case law. Nevertheless, most ordinances use a maximum of usually eight weeks. Four weeks is also a frequent maximum. If desired, this may also be tiered in a policy rule – particularly in case of a longer period – which improves flexibility.

Depending on the interpretation and wording of the first paragraph, the text of the second paragraph has to be adjusted to the first paragraph.

The number of months expiring between the violations is important for the permitted period of an area ban and has to be determined. Frequently it is a period of six months, although twelve months also occurs.

In light of proportionality and subsidiarity it is also pointed out that, as a rule, before proceeding to impose an area ban a warning is given first. It is also advisable against this background to only impose a long-term area ban as referred to in the second paragraph if the act it is imposed for takes place within a certain period after the earlier area ban has been imposed.

The fourth paragraph gives the Governor the power to limit the order when he considers it necessary in connection with the personal circumstances. He will then take into account the need or inevitability of being in the designated area in public transportation, working or living there, a (different) demonstrable, reasonable interest in being there, political and religious freedom, and family life. The Governor may grant temporary exemption from an order on request.

Case law

Supreme Court 12-10-2013, ECLI:NL:HR:2013:1742.

Article 184 of the Criminal Code, “by statutory regulation”. Articles 172 and 177 of the Municipalities Act, Articles 2.8 and 2.9.1 of the APV Amsterdam 2008, Mandating Decision orders to disperse mayor Amsterdam of October 31, 2008. The Court of Justice has correctly established that Article 2.9 of the APV does not explicitly imply that the mayor has the right to issue an order as in this case. Pursuant to Article 172, third paragraph, of the Municipalities Act, the mayor has the power, however, to give

“Ordinance Special Powers” AB 2021.5

persons orders necessary to maintain public order. This order can be qualified as a statutory regulation of a general nature. The mayor can involve police officers in the implementation of this power to issue an order, provided that he indicates with adequate accuracy in what circumstances the police officers have to perform the acts and make the decisions described by him. By issuing the Mandating Decision orders to disperse, the mayor has apparently exercised the power, granted to him in Article 172, third paragraph, of the Municipalities Act, to issue an order, and considering the content of that order has determined that his order has been given for the cases accurately described in Article 2.9 of the APV. The above entails that an order to disperse, given in conformity with the Mandating Decision to disperse, by a police officer on behalf of the mayor can be qualified as an order given by statutory regulation as referred to in Article 184 of the Criminal Code. The different opinion of the Court of Justice is consequently incorrect.

Conclusion Advocate General Spronken 07-07-2015, ECLI:NL:PHR:2015:2409 belonging to Supreme Court 11-17-2015, ECLI:NL:HR:2015:3325.

“Article 2:78 Model APV contains an explicit provision that the mayor has the right to impose area bans so that non-compliance with such an order meets the requirements the Supreme Court sets for them in the context of Article 184 Criminal Code in aforementioned case law. The violation of area bans issued by the mayor pursuant to Article 172, paragraph 3, and 172a Municipalities Act also falls under the scope of Article 184 Criminal Code. However, a prohibition on delegation applies to the exercise of powers granted in the Municipalities Act pursuant to Article 177, paragraph 2, Municipalities Act, and problems occur on this intersection of the granting of powers in APVs and the Municipalities Act.”