

Friedrich Glasl

Overview: The article outlines, from three different perspectives, a typical complaint that was resolved to the satisfaction of all parties in a Swiss canton. The claimants, the authority and the ombudsman each recount how they perceived the situation and the approach of the involved parties; followed by a commentary from the point of view of mediation.

Keywords: Complaint, ombudsman process, Switzerland.

A complaint to the ombudsman - viewed from three different perspectives

Prologue

Each year, the ombudsman of the canton of Zurich, Dr. Thomas Faresi, presents an annual report to the council of the canton. The report anonymously describes selected examples of cases that his office investigated, in order to illustrate the type of complaints that the office receives. Furthermore, it puts up for discussion fundamental questions about the law state and the democracy of Switzerland. In addition, various experts discuss important topics as guest authors. On our request, the ombudsman advocated on our behalf that we were able to report about a successful case from the point of view of three different parties in "perspective mediation": 1. from the point of view of the complainant (animal shelter Z), 2. from the point of view of the government authority (Department for Spatial Development = ARE) whose conduct was the subject of the complaint, and 3. from the point of view of the ombudsman. The involved parties were guaranteed anonymity and the opportunity to authorise the report before printing. All involved parties have thus given their consent to this article.

The activity report of 2013 describes the case of the animal shelter Z¹ - a 'small case', but which is typical of the work of the ombudsman's office. It describes the initial situation and the process. In the following article, the original wording of the report (written by the ombudsman Dr. Thomas Faresi) is reproduced in normal script, while the statements of the three involved parties are reproduced in cursive script;

and my comments are written in normal script.

The ombudsman's report outlines the situation as follows:

"Canvas, closed hedge and dogs"

The animal shelter Z in the city of Y primarily keeps dogs. It has lawns for the dogs to run around, and it is surrounded by roads, footpaths and neighbouring properties. Z applied to the local council for the permission to install a 2 metre high tarpaulin as a privacy screen on two sides of its dog free-roaming area (tarpaulin attached to the existing wire mesh fence). When the cantonal planning authority reached the conclusion that the application could not be approved based on town planning rules and compliance with planning zones, Z approached the ombudsman.

Z argued that a sufficiently high privacy screen would have a calming effect on the dogs, and that pedestrians would be exposed to less barking. The planning authority held the view that the tarpaulin was visually too obtrusive and could therefore not be approved.

-

1) www.ombudsmann.zh.ch, p. 34 ff.

At this point, I asked the following question about the initial situation: "How did you rate the chances of reaching a mutually agreeable solution to the issue at the beginning of the process?" The responses of the parties were:

Animal shelter Z: *We felt positive about it.*

ARE (Department for Spatial Development): *Good.*

Ombudsman: *Neutral – moderately optimistic.*

My comments: From the beginning, all three parties were confident in regards to the chance of a successful outcome in this case. Therefore, the animal shelter Z and ARE were open to suggested changes. This is not a given in many situations, because disputing parties have often adopted a definite position in a prior approach, have become embittered by failed efforts, and have made a bogeyman out of the other party. Consequently, they usually don't recognise the other party's attempts at cooperating, as they can no longer envisage a conciliation. In this case, the initial situation had not escalated to this point.

The report further states: As Z did not reply to the notice of the planning authority, and the application was therefore considered as withdrawn and the case closed, the ombudsman recommended to the animal shelter Z to firstly ask the authority to review its request, and to discuss any problems that might arise with the ombudsman, or alternatively have the ombudsman discuss these problems with the authority.

Regarding this stage, I asked the following question: "Did the parties of the dispute try to enter into conversations to resolve the issue prior to the review by the ombudsman?"

Animal shelter Z: *Our manager contacted the head of the council and the competent authorities several times, but she didn't find the contact person responsive; she was told that there was no other solution.*

ARE: *In the building approval process, we offered to the builders to contact us with any questions and to nominate a contact person.*

Ombudsman: *The animal shelter and the planning authority had already communicated with each other. In addition, the local authorities had advocated the*

case of the animal shelter, however without achieving success.

My comments: Even though, officially, contact had been made previously, this doesn't mean that the communication was perceived as respectful, or that the citizens felt understood. This is usually determined not so much by the good intentions of the involved parties, but by the impact experienced by the conversation partners. When citizens decide to contact the ombudsman's office, this is usually because they feel that they haven't been taken seriously and that they haven't really been listened to. For this reason, a mediating intervention by the ombudsman that ensures an open communication without interference is the most important prerequisite for a joint effort to find a constructive solution to the matter. Therefore, it is important that the ombudsman encourages the parties to firstly try to find a solution on their own, and contact him, should the outcome not be satisfactory.

» **Because dispute resolution by the ombudsman is not supposed to replace regular administrative processes.**

The report further states: Z informed the ombudsman - in reply to his question whether a reduction of the planned height of the screen was a possibility, or if the plantation of native vegetation could possibly solve the issue raised by the planning authority - that they would be happy with a lower tarpaulin screen. However, the case officer of the planning authority had clearly advised them that neither green tarpaulin nor plantation were acceptable. Z pointed out that the same case officer was also assessing another application by Z, and they voiced their concern that his attitude regarding the privacy screen might lead to a negative assessment of the other project. The ombudsman didn't see any indication for this in the current case, and informed Z accordingly.

Regarding this stage, I asked the following question: "Did you have an assumption of the intentions of the opposing party at the beginning of the process? And were there hostile concepts of the opposing party?"

Animal shelter Z: *We assumed that the authorities wanted to reject our application. We found the authority to be obstinate, but not really antagonistic.*

ARE: Yes, our assumption was based on the documents submitted in relation to the building application. The project had already been partially completed, without the required exemption permit. However, we didn't perceive the animal shelter Z as being antagonistic.

Ombudsman : From the beginning, I had the impression that the parties were willing to jointly find a solution, especially after the head of the department had been involved. At the level of the process, the application had to be assessed based on the regulations and on the principle of 'same rules apply'. This is an administrative principle. However, the head of a department should also accept responsibility for deviating from the rules if there is a good reason to do so. In my opinion, the parties did not hold hostile perceptions of each other. However, it was evident that the management of the animal shelter could not comprehend the rejection of their original application by the planning authority, even though it was lawful.

Comments: It is usually nearly always the case that the emotionally charged expectations of the parties of a dispute determine their perceptions, thinking and actions, and in most cases lead to negative assumptions and allegations. In such ways, positive gestures and offers of the alleged opponent are not noticed any more. At the beginning of the resolution process, there were factual disagreements, which had led to a certain inflexibility, but they had not resulted in a generally negative image of the other party. This made it easier for the parties to pick up positive signals from each other. The ombudsman's replied to the assumption of the animal shelter management that the planning authority was prejudiced in relation to another application of theirs, that he couldn't see any indication for this.

» **Because the ombudsman enjoyed their trust, the animal shelter was able to let go of their assumption and recognise positive signals of the opposing party.**

The report further states: The ombudsman lastly asked the case officer of the planning authority to present options of a privacy screen that could be approved. In its reply, the planning authority referred to its pertinent regulation that tarpaulins and closed hedges could principally not be approved outside of building zones because of their negative impact on the landscape, amongst other reasons.

They pointed out that the only exception to this rule was within a seven metre distance, as long as the identity of the surroundings was maintained. The question about approvable options was not answered in more detail.

Based on this reply, the ombudsman could not rule out that the authority generally decides on privacy measures outside of building zones based on the seven-metre criterion, while the Federal Supreme Court has clearly decided that the question of whether or not the identity of the surroundings is preserved [and therefore whether a project can be approved; note by the ombudsman] has to be decided based on an evaluation of all circumstances, including (judgment of the Federal Supreme Court dated 22 April 2013, 1C_330/2012; see esp. consideration 2):

1. whether the change is minor overall [and]
2. whether the essential nature of the building project is preserved with regard to its size, external appearance and assigned purpose [and]
3. whether it creates new, essential implications for the terms of use.

The ombudsman then contacted the head of the Department for Spatial Development (ARE) and asked him whether a plantation with native bushes or a green tarpaulin of 1.5 metre height, which would encompass the fence on one of the areas in question, may be approved, or if he could think of another way to meet Z's request. The ombudsman also suggested to inspect the site and discuss the situation on site.

The head of the department welcomed the suggestion of a meeting at the site, while pointing out that there was a public interest in the separation of building and residential areas as well as in the preservation of a mostly undisturbed overall appearance of the landscape.

I asked the following question in relation to the solution-finding process: "Was there a stage (or a time) during the process when you had doubts that the case would be resolved?"

Animal shelter Z: *Yes, we did. Because in our opinion, the authority had dug their heels in. It helped that the ombudsman was very persistent in his dealings with the authorities.*

ARE: We had doubts relating to the original subjective vision of the builders, because we are bound by the rules and regulations of the town planning law, doctrines and jurisdiction. The solution was possible because the original height of the proposed privacy screen was substantially reduced.

Ombudsman: I had no doubts in the resolvability.

My comments: These attitudes are actually typical for the initial stage of the process:

» **The complainant is focused on their own interests, the authority on their compliance with laws and legal practice – and as for the ombudsman, it is exactly this perceived incompatibility that prompts him to initiate the resolution process.**

An important intervention therefore always consists of trying to achieve a reciprocal understanding of the other party's position - whereby understanding does not mean agreeing. Only when there is empathy, the interests and needs of all sides can be acknowledged as the foundation of a mutually acceptable solution.

The report continues as follows: After the inspection of the property, and after Z had explained the issues, the parties reached the following agreement: On one section of the land, a privacy screen would be implemented by planting suitable vegetation. On the other section of the land, the inside of the fence would be covered by a discrete green tarpaulin of one and a half metres height, and the outside would have vegetation planted. The parties also agreed that the privacy screen must be maintained at all times.

Regarding this stage, I presented the following question to the management of the animal shelter and to ARE: "Did the involvement of the ombudsman enable to you see options for a course of action that you didn't see previously?"

Animal shelter Z: No, not at all.

ARE: Yes.

I asked the ombudsman the question: "How important was your role in the achievement of a final solution by pointing out additional options?"

Ombudsman: Decisive!

My comments: This difference in the perceived importance of the part of the ombudsman in reaching an acceptable solution is surprising. After all, it was the ombudsman who suggested the on-site meeting and suggested variations to the privacy screen, which later led to a different decision of the department, and still accommodated the wishes of the animal shelter. It was probably the ombudsman's "Socratic" way of asking questions - instead of authoritatively giving directive recommendations - that reinforced the complainant's impression that they themselves had come up with new options. This effect would indeed correspond to the intention of a mediative approach, because the involved parties are not meant to be authoritatively directed to a solution, but to find their own solution by making suggestions to each other.

However, mediators have differing opinions about whether they are allowed to suggest solutions when the parties of the dispute evidently do not have ideas of their own. In my opinion, this intervention depends on the degree of escalation of the conflict, i.e. possibly a locked position of the parties.

» **Because the further the conflict has escalated, the harder it is for the opposing parties to conceive of a creative solution because of their restricted, "blinkered" view; and the suggestions of a third party can re-extend their field of vision.**

The same also applies to situations where people have hardly gained experience outside of their daily field of work. Yet it is crucial for the process whether mediators suggest a single solution or several options, so that the third party doesn't come across as an arbitrator because of its authority.

The report concludes with the following recount: A short time later, the department informed the ombudsman that it had issued a positive report about the amended course of action to the relevant office of the planning authority; the planning authority consequently had approved the project.

This pleasing outcome of this case brought before the ombudsman would hardly have been possible without the active and constructive cooperation of ARE. It could not reasonably be claimed that the privacy screen that was put in place was opposed to town planning concerns.

Statements of the involved parties to the solution reached: *Both the animal shelter and the authority thoroughly agreed to the solution, and the ombudsman acknowledged this. During the entire process, neither party ever doubted the neutral and unbiased position of the ombudsman. The authority described the approach of the ombudsman as correct, solution-oriented, uncomplicated and within assessable time-frames. The ombudsman was certain that his approach was perceived as fair and correct by the parties.*

My comments: The on-site meeting led to a mutual understanding of the parties, through the inspection of the site, the moderated discussion, and the search for possible solutions. This facilitated a decision within the law that both met the specific requirements of the animal shelter and satisfied the interests of the non-involved stakeholders, as there would be less barking for pedestrians and neighbours thanks to the privacy screen jointly agreed on. An extension of the evaluation to include entitled people or groups, i.e. beyond the needs and concerns of the immediately affect parties, allowed for the positions to be harmonised.

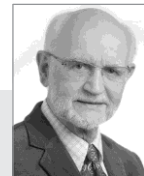
Epilogue

This successful example demonstrates that the ombudsman process cannot be described as a complete mediation in all cases, but that the use of mediative means and a mediative attitude of the ombudsman can help to ensure that a comprehensive evaluation of the legal interests is achieved on a factual level.

>> The ombudsman does not just act as a neutral, unbiased authority, but also thinks and acts above and beyond the parties.

The former parties of the dispute assured me that they did not have a hostile perception of the other party after the conclusion of the ombudsman's case, so that they will be able to deal with each other in the future in an unprejudiced way. This outcome at the level of their interaction is also an important goal of the ombudsman. The management of the animal shelter told me at the end that they would have doubted Switzerland's rule of law if no solution had been reached that was both within the law and took into account the interests of the citizens. For this reason, the management of the animal shelter thanked the ombudsman for his help; equally, the authority has applauded the ombudsman for his fair and correct approach. This process can prevent a possible disenchantment with the government by finding a fact-based solution and a satisfactory way of dealing with each other. It is worth the effort.

The editors thank all involved parties for their honest disclosure of their points of view before knowing the answers of the other parties; moreover we thank everybody for their trust and willingness to participate in this publication.



Contact

Friedrich Glasl, Prof. Dr. Dr.h.c., conflict researcher, mediator BM, mediation trainer BM, and organisation consultant, co-founder of the Trigon development consultancy, Graz.
friedrich.glasl@trigon.at
www.trigon.at