



The Law Society of Jersey

Connétable Michael Jackson
Environment, Housing and Infrastructure Scrutiny Panel
Scrutiny Office
Morier House
St Helier
Jersey
JE1 1DD

4 December 2020

Dear Connétable Jackson

REVIEW OF THE FORESHORE ENCROACHMENT POLICY

I refer to your letter dated 5 November 2020, addressed to Advocate Colley in her capacity as President of the Law Society of Jersey, seeking the views of the Law Society as part of your Panel's review of the Foreshore Encroachment Policy.

We are aware that you have also approached, potentially amongst others, Advocate Chris Philpott of Carey Olsen who, it will be recalled, together with myself, represented the Law Society at a meeting of the Scrutiny Panel on 28 May 2019, at which the views of the Law Society in relation to the issue of the foreshore encroachment were outlined and discussed in detail with the panel.

We are pleased to provide further comments to assist the Panel with their review of the revised policy. For the avoidance of doubt, these comments reflect the collective and considered views of property practitioners, including Advocate Philipott, from whom no separate response will be forthcoming.

It will perhaps not come as a surprise that we remain of the view that the position previously presented by the Law Society in relation to this matter remains what would be the most practical and fair approach and in the best interests of the Public. It is certainly a position which is preferable to either the original policy which was adapted or the proposed revised policy. We are still at a loss to understand how the Public actually benefits in real terms from the aggressive approach taken by the Minister for the Environment and the Law Officers' to date.

It is a big assumption that sea walls were always built (i) above the High Water Mark (HWM) and/or (ii) on Crown owned land. The Government of Jersey previously paid a large sum of money to Les Pas to avoid a finding that the harbour and reclaimed land was built on Les Pas' land including the foreshore. Time might not run against the Crown, but it would run against a private Seigneur. If a wall was built on a private Seigneur's land, and a private land owner continued to treat the land as his own and adjoined the wall, how can it be said to have encroached?

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The key issue is that the Crown was previously untroubled by alleged encroachments. It gave the foreshore (to the extent it owned it) to the States. The States have chosen to exploit a previously tacitly accepted position to make money. We understand their concern to avoid further encroachments, but not their rapacious demands over previous alleged encroachments established (effectively) on their watch.

The land as is used has been used without actual impediment to the Public, and so for the Minister / Jersey Property Holdings (JPH) to allege that there is value in the "normalising" of the boundary is arguable. A different argument could perhaps be made where the neighbour has profited (by use or financially) in full knowledge of their encroachment, but to say that the land has an innate value as a public asset, for which neighbouring landowners should pay, misses the point. If an unencumbered transfer of title to the land was being proposed by JPH there would be yet another argument, but that is not what they are suggesting. They are simply extracting cash payments for temporary (and defeasible) rights; the value of that right is not the value of the land.

The lack of publicity of the research / findings of the Law Officers' Department (LOD) and the Master Schedule is flawed in principle because: (a) the foundations of the research being found in the Public Registry (and thus not private) and (b) the policy itself comprising the approach to be taken by the Minister (which must be clear so as to stand up to scrutiny on administrative review) which necessarily includes the Master Schedule, which while prepared by LOD does not at that point represent legal advice, and thus cannot be said to be privileged).

It does not sit well that the Minister / JPH (allegedly on behalf of *Le Public de cette Ile*) is pronouncing the 'real truth' as to the extent of the foreshore. It was not so defined in the contract by which the Public acquired it from the Crown, and it is wrong that owners of land adjoining the foreshore are unable to review, agree with or reject the assertions being made by the Minister / JPH.

As noted above, the Public has not come into this unaware – it has for many years had *de facto* control of the foreshore under its arrangements (both formal and otherwise) with the Crown, and did not seek to enforce property rights in that instance, for the benefit of the Crown.

We do not accept the argument that gifting the foreshore weakens the Public's hand *vis a vis* other publicly owned land; the foreshore is unique in that it was gifted to the Public "as is" in recent times; thus any alleged encroachments in place at the time of the gift are arguably different / distinguishable from other property assets within the Public's portfolio (noting again that they would most likely have been established 'on the Public's watch').

On the draft policy itself, we make the following observations:

- ✓ Under historic encroachments (3.c.), it states that changes to historic encroachments will restart the clock. What is a change and how significant must it be to have this effect – replacing rusty / rotten steps? Rebuilding an old wall?

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- ✓ Sliding scale must be published – are they using 40 years as the benchmark? i.e. the value decreases by 1/40th for each year or part that the encroachment has been in situ? See above point re difficulty in assessing actual value.
- ✓ How is value for a licence determined – and how does this compare to a lease or sale of the land?
- ✓ When would a lease be used instead of a sale?

We hope that the Panel finds these comments helpful. They should, of course, be read in conjunction with the Minutes of the Law Society's meeting with the Panel in May 2019, during which the views of the profession were clearly expressed and are unchanged. For ease of reference, an extract from the minutes is attached to this letter at Appendix A.

Yours sincerely



Neville Benbow
Chief Executive Officer
The Law Society of Jersey

Cc Advocate Rose Colley, President, The Law Society of Jersey
Advocate Chris Philpott, Carey Olsen

Encl. Appendix A - Extract from Minutes of a Meeting of the Environment, Housing and Infrastructure Scrutiny Panel with the Law Society of Jersey held on 28 May 2019

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Extract from Minutes of a Meeting of the Environment, Housing and Infrastructure Scrutiny Panel with the Law Society of Jersey held on 28 May 2019

The Panel welcomed Mr Neville Benbow and Advocate Chris Philpott of the Law Society of Jersey to the meeting.

The Panel was advised that it was the general consensus of the legal profession that the issue of the foreshore encroachment had not been dealt with fairly by Jersey Property Holdings.

It was the opinion of the Law Society that it was not right or just to apply a new policy retrospectively to landowners, some of which may not have made the encroachment, as in some cases it may have been a previous landowner. It was also felt that it was not fair to apply the policy only to landowners in the process of selling their property and not to those who were not selling their property.

It was suggested that a full audit or inventory of the foreshore should have been undertaken, at the time of the transfer from the Crown in 2015, supported by photographic evidence, with any issues or perceived encroachments arising being highlighted to homeowners who would be advised that no action would be taken in relation to the issues identified other than to advise homeowners that a) unfettered access to their premises may be required to protect the sea wall etc. (at the homeowners' risk) and b) that any further proposed work would be subject to planning consent and, if approved, the payment of an appropriate fee in relation to the work if it was deemed to represent an encroachment.

It was felt that this exercise could be undertaken now to avoid any repetition of the position that had arisen with homeowners who were selling their 'foreshore' properties being forced to pay significant sums of money to facilitate the sale of their property.

The Panel were handed a copy of the contract from when the foreshore transferred from the Crown to the Public of Jersey. The Law Society noted that they felt the current Jersey Property Holding's policy on the foreshore encroachments was not in keeping with the spirit of this contract.

In particular, it was noted that, while not specifically referring to 'encroachments', clause 2 of the contract makes reference to past actions being unaffected by the transfer. It is our view that this clause should have been interpreted based on the 'spirit' of the gift from the Crown.

The clause states:

2. THAT any right of access or of exploitation exercised as a matter of longstanding habitual and recognised custom by the general public of the Island or by any member thereof shall be and remain unaffected by this contract of gift cession and transfer.

It was further highlighted that some of the encroachments – to the extent that they are encroachments – happened on the watch of the States of Jersey, when the Public were effectively the tenant of the Crown for all matters relating to the foreshore prior to the 2015 contract. Having not taken any action during this period of time, it was felt that it was not appropriate to penalise, and effectively take advantage of, homeowners in relation to changes that had, in some cases, taken place prior to the current ownership of the property.

The issue of discrepancies with the foreshore boundary was also discussed, it being noted that it was not straight forward to establish a boundary, as it was not clear cut as to where the boundary was. It was felt by the Law Society that issues with determining the boundary should have been addressed prior to the Department's approach of seeking compensation payments from landowners.

The Law Society also suggested that there should be more collaboration and joined up working between the Planning and Infrastructure arms of the Department and more interest should be taken by the Minister for Infrastructure for Planning Applications that involved a sea defence wall. Furthermore, that Planning Obligation Agreements, making landowners jointly responsible for the maintenance of the sea walls, could be utilised for ring-fencing funds for this purpose.

The Panel thanked Mr Benbow and Advocate Philpott for their time and attendance.

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