States Greffe

Connetable Michael Jackson,
Chairman,
Environment, Housing and Infrastructure Scrutiny Panel

1st December 2020

Dear Connetable,

Review of the Foreshore encroachment Policy

Thank you for your letter of 5th November 2020, inviting the States Complaints Board to comment on the Scrutiny Panel's terms of reference as set out in your letter.

You will appreciate that a Complaints Board is convened to consider a particular complaint against the decision of a Minister, and that Board of three members is drawn from the wider Complaints Panel. There is therefore no standing complaints body which may contribute to broad policy debate. Having said that, I am conscious that the whole question of the relationship between the Public ownership of the foreshore and the rights of third party private owners of land adjoining the foreshore came to prominence through the decisions and recommendations of two similar cases heard by a States Complaints Board, and I believe that experience may enable us to provide a constructive contribution to the discussion.

This submission is therefore made on behalf of the Board that determined the complaints of Messrs. Mallinson and Luce, as if the revised Policy now under your scrutiny had been submitted to the Board as a response by the Minister to the Board's findings and recommendations (R.71/2018).

There are two distinct elements to this whole matter: the first is the (presumably unquestioned) benefit to adjoining owners of land to have clear boundaries and clearly expressed rights and obligations vis a vis one another. The second is the obligation of the Public to protect the Island population and property generally and to be able to fulfill its statutory obligations in that respect.

As the owner of land (in this case the foreshore), it is in the interest of the Public to clarify its boundaries. The Board congratulates JPH, the Law Officers Dept. and all others involved in putting together what must have been a very substantial piece of work to create the Master Schedule. This, though, is where we find our first difficulty.

According to the Policy document, the Master Schedule cannot be publicly disclosed, as it is derived from privileged legal advice to the Minister, and also because it contains information which is effectively private to individual property owners. Taking that second point first, that information was presumably obtained by research of individual title deeds contained in the Public Registry, and which are by definition publicly available.

As far as the first point is concerned, it is the Minister's policy, not the Law Officer's advice which is being discussed. Whether the policy slavishly follows the advice is immaterial - it is the policy of the Minister and the Master Schedule is at its absolute heart.

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The Report (P.111/2020) acknowledges that the landside boundary of the foreshore requires clarification, not least because the High Water Mark has changed over time, or has been obscured by the construction of sea defences. However, the Report gives the impression that rather than being a starting point for discussions with neighbouring owners as to the establishment of a mutually acceptable boundary, the Master Schedule is a definitive statement of the position of the HWM (and thus the legal boundary) and that the "default boundary line positions" as set out in the Master Schedule are non-negotiable.

In his submissions to the Board at the time of the hearings, the Minister stated that the use of the term "Public de cette Ile" was an interchangeable expression meaning the government of the Island. The Board does not accept that position. The Board considers that the "Public" is wider than the government, and is more the trustee of the people of the Island as a whole, both present and future. As such, it may have a broader, more protective and benign responsibility than the government. That being the case, it can sacrifice some monetary value for a wider community benefit if the circumstances are appropriate. It is suggested that the benefit to the Public of having the boundaries of its property defined clearly, and likewise the wider property-owning public being able to identify the limits of its private property justify a benign approach (as had been adopted by the Crown before its transfer of the foreshore to the Island). It should be stressed at this point that we are referring here only to the mutual benefit to both landowners of clarifying their common boundary, and not to the added value of any building or other encroachments.)

Without seeing the Master Schedule, it is difficult - indeed, impossible - to say whether the proposed default boundary lines are reasonable or not. In its original report (8.11 of R.71/2018) the Board suggested that "the landside face of the seawall should be the starting point for the fixing of the boundary of the foreshore". In the absence of any sight of the Master Schedule, the Board has no reason to depart from that suggestion. We stress, though, the words "starting point". There may very well be reasons why the Public considers that it is imperative that it remains a greater area of land in certain places, but as the Report acknowledges, negotiations would take place on a case by case basis.

The Board acknowledged that the Public should retain additional landside land it considers essential for sea defence, but the Board took the view that any residual landside land should be transferred to the adjoining owner "for an appropriate consideration". Contrary to the implication contained at Page 6 section ii of the Policy report, the Board has never suggested that any land be gifted by the Public. The Board does however take the view that the price of the land should be at a modest rate, assuming that the Public will impose on any transfer tight restrictions on the use and exploitation of that land, and reflecting the mutual benefit of a defined boundary. This relates only to what may be regarded as "backfill" land behind the sea wall, and not to buildings or other encroachments, the legitimisation of which will significantly enhance the value of the neighbouring property.

The Board acknowledges that if there is a transfer of land landside of the sea wall, it may well be appropriate for the Public to retain access rights onto the land transferred for the purposes of essential defence work. The Board would hope that the Master Schedule would include standard clauses to be included in any conveyancing contracts in order that owners could understand the limitations on the land and the extent of the land restricted. By retaining such rights over the land transferred (including an actual or implied restriction against any building on the land) the land is largely valueless other than for landscaping purposes and this should be reflected in the price charged.

What the Board objected to (apart from the "take it or leave it" approach in "negotiations" with the complainants, was that whilst the complainants were charged significant amounts of money for alleged encroachments to be allowed to remain, the Public reserved the right to require the encroachments to be removed at the complainants' cost in the event that access was required in the future for defence works (Para 8.13 of R71/2018). The complainants got very little for their money. If the Public is going to demand large sums for permitting encroaching buildings to remain, then that right to remain should be clear and absolute. The whole point is that both the Public and the landowner should have certainty. That is not to say that it could not be agreed that a particular encroaching structure could remain but could not be replaced or enlarged, but that limitation should be reflected in the compensation paid.

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The subject of compensation then brings us to the question of the proposed "sliding scale". The Report on the Policy offers no indication of what that sliding scale might look like, or the difference between one end of the scale and the other. The Board maintains the view that a sliding scale based purely on the length of time a particular encroachment has been in existence is unfair, discriminatory and arbitrary. The Board considers that the appropriate compensation should be negotiated on a case by case basis, taking into account the value added to the landside property by virtue of such encroachment, but taking into account also any approval (whether by the planning authorities or by the Crown) explicit or otherwise of such encroachment.

The Board does not accept that a non-market approach to the assessment of the value of land transferred or compensation for encroachments risks creating a precedent against realising the proper value of Public land. Instead, it reflects the benefit to the Public in having boundaries and rights clearly defined, it recognises the wider public interest in some hundreds of families being able to clarify the extent of their properties and the restrictions to which they are subject, and also acknowledges the benefit to the public administration in not being faced with possibly lengthy delays in establishing boundaries etc at a critical time when urgent sea defence works are needed to be carried out.

It is however acknowledged that it may go "against the grain" for JPH to be asked to agree values that it regards as less than optimum. It may therefore be appropriate to establish an arbitration process with clear parameters in the event that JPH and the property owner are unable to agree terms.

Yours sincerely

G.C. Crill
Chairman, States of Jersey Complaints Panel

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