

STATES OF JERSEY



ENCROACHMENTS ON THE FORESHORE: REVISED POLICY (P.111/2020) - SECOND AMENDMENT

Lodged au Greffe on 16th February 2021
by the Minister for Infrastructure
Earliest date for debate: 2nd March 2021

STATES GREFFE

ENCROACHMENTS ON THE FORESHORE: REVISED POLICY
(P.111/2020) - SECOND AMENDMENT

1 PAGE 2 –

After the words “this proposition”, insert the words “, except that, taking into account the findings and recommendations of the report ‘Foreshore Encroachment Policy Review’ (S.R.1/2021) –

(a) on page 8 of the Appendix, after paragraph 1.a., there should be inserted the following paragraphs –

“b. The Law Society of Jersey’s Standard Seller Questionnaire (Jan 2019), in particular questions 3 and 19, may also lead to approaches being made to JPH by the Public’s neighbours.

c. The age of an encroachment will be considered as one of the factors in its resolution.”;

(b) on page 8 of the Appendix, in paragraph 2.a., after the word “resolve” there should be inserted the words “or regularise”;

(c) on page 8 of the Appendix, in paragraph 2.e.i for the words “decided / approved” there should be substituted the word “approved”;

(d) on page 10 of the Appendix, after Section 4, there should be inserted the following new Section –

“5. General

In so far as it can be ascertained, the age of the encroachment prior to 2015 when the Crown transferred ownership of the foreshore to the Public of the Island) will be taken into account as a factor in how the encroachment will be considered and dealt with in relation to all types of encroachment. The longer that the encroachment has been in existence prior to 2015 the more favourably this will be taken into account towards the third party concerned.

Secondly, if the third party can provide evidence that the Crown in fact agreed to the encroachment this will be taken into account favourably in considering and dealing with the encroachment.”; and

(e) the text from Appendix 1 to the amendment to the proposition (P.111/2020 Amd.(2)), lodged by the Minister for Infrastructure, should be appended to the revised policy”.

MINISTER FOR INFRASTRUCTURE

Note: After this amendment, the proposition would read as follows –

THE STATES are asked to decide whether they are of opinion –

to approve a revised policy for encroachments on the foreshore, as set out in the Appendix to the report accompanying this proposition, except that, taking into account the findings and recommendations of the report ‘Foreshore Encroachment Policy Review’ (S.R.1/2021) –

(a) on page 8 of the Appendix, after paragraph 1.a., there should be inserted the following paragraphs –

“b. The Law Society of Jersey’s Standard Seller Questionnaire (Jan 2019), in particular questions 3 and 19, may also lead to approaches being made to JPH by the Public’s neighbours.

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(e) the text from Appendix 1 to the amendment to the proposition (P.111/2020 Amd.(2)), lodged by the Minister for Infrastructure, should be appended to the revised policy.

REPORT

I wish to thank the Environment, Housing and Infrastructure Scrutiny Panel (the Panel) for its review: “Foreshore Encroachment Policy Review” of 14 January 2021 (S.R.1/2021). The review of this complex and difficult matter is comprehensive and provides useful discussion of many of the strands to the policy principles. I also wish to thank the Deputy of Grouville for her amendment to my Proposition, the principle of a part of which I accept. I have also included an amendment to the Policy which I hope will address some of her concerns.

Scrutiny Panel’s Review

It is more convenient to deal with the Panel’s recommendations first but my responses to some of them are also relevant to the Deputy of Grouville’s amendment. In conjunction with Departmental Officers who are involved with foreshore encroachments, I have considered in detail the nine recommendations of the Panel’s review.

I have decided to support the majority of the recommendations (in whole or part) of the Panel - being recommendations 2, 3, 4, 5, 7 and 8. I am not presently able to accept recommendations 1,6 and 9 but, given more time to work with the Panel, it may be possible to agree on compromise positions in relation to those recommendations.

Recommendations 2, 3, 4, 5, 7 and 8

I set-out my thoughts on implementation of these recommendations as follows.

RECOMMENDATION 2: *In the interests of greater clarity and transparency, the Minister for Infrastructure should consider further how the boundary line of the foreshore and the basis of evidence for its determination can be made publicly accessible. This should be considered and the outcome reported back to the Panel before the end of Q2 2021.*

Recommendation 2 is agreed in principle. I have sought to address it by the addition of Appendix 1 to the policy, which Appendix deals with certain procedural matters connected to the application of the policy.

I am confident that in setting-out the procedure which will be followed in the initial contact by JPH with third-party owners, and subsequently making available the map or plan(s) in accordance with Data Protection (Jersey) Law 2018 principles, it will show that this recommendation has been addressed. I also confirm that I will report to the Panel on this point before the end of Q2 2021.

RECOMMENDATION 3: *The Minister for Infrastructure should consider a separate Sea Defences Maintenance Policy, in addition to how Planning Obligation Agreements might satisfactorily be utilised going forward, to ensure adequate upkeep and maintenance of seawalls where encroachments are concerned. The Minister should investigate these possibilities and report back to the Panel before the end of Q3 2021.*

I agree with the principle of this recommendation. I consider that policy information on the maintenance of sea defences exists in the “Jersey Shoreline Management Plan (2020)”, which provides an assessment of coastal risks and specific advice for the

management of coastal defences to maintain a resilient coastline. It also sets out shoreline management policies and identifies methods to deliver them. This covers sea defence maintenance, adaptive management and ‘advance the line’ management, where appropriate.

However, I am also happy to work with the Panel to understand the specific points of policy for the maintenance of sea defences which have been analysed, to determine whether an additional policy, or an expanded policy, is necessary.

Regarding the use of Planning Obligation Agreements (POAs) for seawall infrastructure works arising from new coastal development applications, I consider that there may be scope to make such agreements to that effect, having due consideration to the guidance document ‘*Supplementary Planning Guidance: Advice Note - Planning Obligation Agreements – July 2017*’. I have therefore arranged for JPH Officers to collaborate with Planning Officers regarding the opportunities for the use of POAs on coastal applications for infrastructure works.

However, I do not believe that POAs can be connected to land encroachment situations *per se*, and used to form part of the resolution – the two matters are quite distinct. The advice which I have received to date is that a POA cannot be used as mechanism to offset the loss of land arising from an encroachment. Nevertheless, I will report back to the Panel on this recommendation before the end of Q3 2021.

RECOMMENDATION 4: *The Minister for Infrastructure should, in collaboration with the Minister for the Environment, seek to put in place a suitable, formal protocol for dealing with planning permission applications relating to properties along the foreshore. This should be put in place before the end of Q2 2021.*

I fully support this recommendation. It is indeed a matter which had already been previously raised with a former Minister for the Environment and with “Planning”. It is now being re-investigated, and whilst a form of protocol has not yet been established, discussions between Officers from the respective departments indicate that it is now possible for a formal process to be put in place.

Foreshore encroachments tend to be, in the main, on land behind, and up to, seawalls. They also tend to arise when properties are being developed, with owners seeking to benefit from having access up to, onto, or even over, a seawall.

I am firmly of the view that a preventative approach is sensible. Where an application for planning permission for development that falls within an area of responsibility or concern of me, or may affect the boundary of the foreshore, it should be referred to me for comment. Although this is a matter of detail for the protocol, for the purposes of Article 32 of the Drainage (Jersey) Law, 2005 and Articles 16 and 17 of the Planning and Building (Jersey) Law 2002 (as the sewerage undertaker and flood defence authority for Jersey and Minister with political responsibility for the Public’s landholdings), I am likely to ask to be consulted on all applications for planning permission where any part of the application site is on, by, or adjacent to the foreshore. Please note that for convenience I have attached the above-mentioned articles, plus other relevant ones, as Appendix B.

I will revert to the Panel once the details of the protocol have been finalised before the end of Q2 2021.

RECOMMENDATION 5: *The Minister for Infrastructure should seek to apply the policy in a fair and non-discriminatory manner, and not solely to those where a trigger event has occurred. Compensation sought or paid should be reflective of the encroachment and limitations agreed. This should be reflected in the revised policy prior to its adoption.*

I agree with the principle of this recommendation, although it does require an adequate level of resourcing to achieve it. The recommendation deals with three aspects: firstly, the approach, in respect of timing, as to how all foreshore encroachments are dealt with; secondly, the value which is attached to Public land when it is sold to the third-party as part of an encroachment transaction; and thirdly, the principle of being non-discriminatory to a particular owner or set of owners.

It should be noted that following the setting-up of the former Property Services Department in the early 1990s (which preceded JPH), many foreshore encroachments cases have been dealt with in conjunction with the Crown. Some of those cases arose where third parties were selling their coastal properties and approached the government, seeking the government's co-operation to resolve an encroachment to allow the property to be sold. Other cases arose where a new significant encroachment had been seen taking place.

Timing

The timing of how ***all*** foreshore encroachments are dealt with, is of course a difficult matter given the extent of the problem.

It will be virtually impossible to deal with every foreshore encroachment case simultaneously. Some property owners will prefer to defer dealing with a foreshore encroachment relating to their property until a trigger event such as a sale or transfer of the property. However, I do agree that if certain individual encroachments are being resolved, then there has to be a plan in place to address all encroachments over a reasonable time frame.

At present, JPH and the Law Officers' Department are not sufficiently resourced to complete the task of contacting every owner and resolving every foreshore encroachment simultaneously. We therefore need to work with the relevant sections of the government to put in place the necessary resources to complete this piece of work in a timely manner, so that all affected third parties are contacted etc together. JPH considers that it requires two additional full-time Officers dedicated to the task, or equivalent consultancy resource. I understand that the Law Officers' Department will also need at least one full time conveyancer.

Value

Turning to the matter of the value which is attached to Public land when it is sold to the third party as part of a foreshore encroachment resolution, it would be wrong to depart from the valuation methodology developed by the Royal Institution of Chartered Surveyors. The amount which a third party should be asked to pay for land which is acquired as part of an encroachment resolution should be based on a market assessment to reflect the use to which the land is being put by the third-party and the benefit which the land is giving to the third-party property. Thus, an encroachment comprising a strip of garden is likely to be less valuable than, say, balconies on a block of apartments.

I cannot put forward an alternative method of valuation to the one developed by the RICS.

However, I would reiterate that despite the principle of ‘*possession quadragénaire*’ (i.e. 40 years of uninterrupted possession) not running against Crown land, historic encroachments have always been treated in a manner which acknowledges the period of existence. A sliding scale reduction has been applied, so those third-parties with historic encroachments generally have the opportunity to acquire the Public land at a significantly reduced value.

Non-discrimination

The policy will of course be applied in a fair and non-discriminatory manner.

RECOMMENDATION 7: The Minister for Infrastructure should further define and set out the criteria for a Sliding Scale into the revised policy so that it is clear and transparent. This should be incorporated into the revised policy prior to its adoption.

Members will recall that the original 2017 draft of the policy included an associated procedure document which contained the sliding scale to be used for historic encroachments. Members will also recall that the Complaints Board disagreed with the principle of reducing the value of encroachments to reflect their age, and it was in light of this, that the sliding scale was not included in the revised draft of the policy, what was included as a policy principle.

In view of the Panel’s recommendation 7, I have re-introduced the sliding scale to the procedural matters in Appendix 1 to the policy. Members will note that the sliding scale has also been revised since its original 2017 publication, with the % reductions now being more favourable for third parties.

RECOMMENDATION 8: The Minister for Infrastructure should be explicit in the revised policy as to how each case will be considered on an individual basis and what processes will be in place to ensure this happens. This should be incorporated into the policy before its adoption.

I believe what is sought is clarification on the approach and process for resolving encroachments through the policy. I have therefore arranged for this to be included in the procedural matters in Appendix 1 attached to the revised policy.

Recommendations 1, 6 and 9

Turning to the minority of the Panel’s recommendations which present me with more difficulty, I set-out below my reasoning in respect of numbers 1, 6 and 9, but would add that given more time in which to work with the Panel, it may be possible to agree on compromise positions in respect of those recommendations.

RECOMMENDATION 1: The Minister for Infrastructure should give further consideration to how encroachments are dealt with in relation to those that pre-date the gifting of the foreshore from the Crown in 2015. Specifically, this should consider whether the land in question was Crown-owned land to begin with and a date determined from when alleged encroachments should be considered. This should be considered prior to the adoption of the revised policy.

The Public's ownership of the foreshore was considered thoroughly prior to the adoption of the original policy. It is axiomatic that a policy in respect of the Public's land can only apply to land owned by the Public.

The Public of the Island owns all the foreshore and seabed of Jersey. The Crown in right of the Bailiwick of Jersey ceded the foreshore to the Public in a series of contracts starting in 1895 and culminating in the contract of gift from Her Majesty to the Public of the Island in 2015. Further, the Public has been in uninterrupted possession of the foreshore for over 70 years since 1950 by virtue of leases of the foreshore from the Crown in right of the Bailiwick of Jersey.

I would mention that the Land Transaction for the 2015 transfer of the foreshore and seabed from the Crown to the Public of the Island was reported to members in accordance with Standing Order 168(3) on 21 May 2015 [R.61/2015]. Subsequent to the presentation of R.61/2015, only one question was asked by a States Member, which was by Deputy R Labey of the then Chief Minister on 2 June 2015 during questions without notice [Hansard June 2015, 7.6 at Page 59 – attached below as Appendix A for convenience].

Also, during the recent States' debate of 'Foreshore: policy for alleged encroachment payments (P.101/2020): amendment (P.101/2020 Amd.)' the Attorney General provided responses and advice to us on number of questions concerning ownership and potential claims [Hansard 24 and 25 September 2020 = also attached as Appendix A].

I am advised artificial reclamation did not divest the Crown of its ownership of the foreshore. Where a seawall has been built on the foreshore, any section of foreshore behind the sea wall remained in the ownership of the Crown. The 2015 contract of cession has the express intention of ceding to the Public sections of foreshore that are behind the sea walls.

There is a misconception, and a degree of hyperbole, that addressing encroachments on the foreshore is somehow something new which has only occurred since completion of the 2015 Contract. This is incorrect.

The Public dealt with encroachments when it was the Crown's tenant and would enter deeds of arrangement as appropriate which would often involve a consideration payable by the encroaching property owner. As part of my answer to written Question W.Q. 16/2020 I explained and confirmed this was not a new process. Payments in respect of encroachments on the foreshore were made prior to the gift of the foreshore to the Public of the Island by Her Majesty. A schedule of past transactions is attached as Appendix C.

Ownership of the foreshore and the seabed brings with it all the rights and all the responsibilities of ownership. That responsibility includes how best to protect the public's interest in the foreshore as a valuable amenity for the benefit and enjoyment of all. now be provided for the public benefit. No individual member of the public has any form of personal ownership interest in the land which is owned by the Public

RECOMMENDATION 6: *The Minister for Infrastructure should seek to differentiate between a deliberate or unintentional encroachment in the revised policy and this should be incorporated into the revised policy prior to its adoption.*

Recommendation 6 presents significant difficulties and I believe is unworkable in practice. Encroachments do not happen or appear by accident. Each encroachment needs to be considered on its own merits. Whilst the Minister would not wish to be unduly unsympathetic in respect of an owner who has been poorly advised, or has made a genuine error of judgment, to try to draft or create a policy by way of exception will make it unworkable.

RECOMMENDATION 9: *The Minister for Infrastructure should seek to incorporate a suitable and workable process for dealing with complaints relating to foreshore encroachment compensation payments and in addition a clear appeals and arbitration process for dealing with any such complaints. This should be incorporated into the policy before its adoption.*

Recommendation 9 is not acceptable as drawn. I have included matters of procedure in Appendix 1 of the revised Policy including the option of referring a dispute to an expert third party, but arbitration is a more expensive form of process than Court proceedings. There are also some practical issues, such as how an appeal would be funded or paid for. This is an area that may benefit from discussion with Scrutiny.

Conclusion

I reiterate that I am grateful to the Environment, Housing and Infrastructure Scrutiny Panel for its review and the work undertaken on this complex and difficult matter in respect of the policy principles.

I am pleased that it has been possible, in conjunction with departmental officers who are involved with foreshore encroachments, to offer my support to many of the recommendations of the Panel's review.

Deputy of Grouville's Amendment

I also thank the Deputy of Grouville for her amendment. As regards paragraph (a) of her amendment and, as set out above in relation to Recommendation 2 of the Scrutiny Panel, I am able to agree in principle to a plan or map. I have included this in the procedural matters in Appendix 1 to the revised policy and agree to report back on this by the end of Q2 2021.

However, as regards her suggested revised version of the Policy I regret that I am unable to accept it as drafted, as it is likely to result in significant encroachments (both in number and degree) on the foreshore being allowed to remain, such that areas of the promenade (including in Grouville) will be permanently transferred from Public to private ownership. I also respectfully consider that her suggested amendments to the Policy will result in more vagueness and uncertainty as to how the Policy will operate.

Nevertheless, to meet the Deputy of Grouville part way I have included [two] further amendments to the Policy: firstly, a general confirmation that the age of the encroachment, in so far as it can be ascertained, will be taken into account in how they

are dealt with; [and, secondly, a confirmation that if the third party can provide evidence that the particular encroachment was in fact agreed to by the Crown then that will also be taken into account in favour of the third party when dealing with the encroachment].

Financial and manpower implications

As explained above, the Panel's recommendation that cases should not be dealt with arising from 'trigger events' - means that for an "across the board approach" to be implemented - JPH considers that it requires two additional full-time Officers dedicated to the task, or equivalent consultancy resource. At least one further full-time conveyancer will be needed by the Law Officers' Department. The total cost of such additional staff is estimated to be approximately [£250,000] per annum.

As regards consideration payments from property owners which are dealt with by way of a payment, the Policy is not a revenue raising exercise. It is expected that the majority of encroachments will not be dealt with by way of a payment but by agreeing a boundary or license or by allowing the encroachment to remain. Any payments that might be received pursuant to the policy are too uncertain to predict and it is not anticipated that they would be sufficient to fund the annual cost of the additional staff.

Appendix 1

“APPENDIX 1

PROCEDURES IN CONNECTION WITH THE POLICY

1. Upper limit of the foreshore/default boundary lines

As contained in the policy:

“In 2019 JPH and the LOD commenced a project to research the upper limit of the foreshore in all areas not previously investigated, in order to gather as complete information as possible on the landside extent. The project has provided extensive information on the nature and scale of foreshore encroachments around the island. From this work a ‘default boundary line’ has been formulated to work from.”

Procedurally, it is intended that JPH will contact every property owner whose property has been included in the research, in order to explain the findings.

That is considered to be the fairest approach to such owners, in order to give them time to consider the information, and to submit any counter-information which they may wish to submit.

Work is currently in hand to convert the research information onto a plan or map format.

Following JPH making contact with all owners, it is intended that arrangements will be made for the plan(s) or map to be made accessible in accordance with Data Protection (Jersey) Law 2018 principles.

2. Sliding Scale

In cases of **Historic Encroachments**, the value of land, where subject to a transaction, should be reduced to reflect the period of existence of the encroachment:

Age of Encroachment	2017 – Reduction in consideration payable	2021 – Reduction in consideration payable
Up to 5 years	No reduction	No reduction
Over 5 years to up to 10 years	10% reduction	No reduction
Over 10 years to up to 15 years	15% reduction	20% reduction
Over 15 years to up to 20 years	20% reduction	25% reduction
Over 20 years to up to 25 years	25% reduction	30% reduction
Over 25 years to up to 30 years	30% reduction	35% reduction
Over 30 years to up to 35 years	35% reduction	40% reduction
Over 35 years to up to 40 years	40% reduction	50% reduction
Over 40 years	50% reduction	60% reduction

3. Procedure for foreshore encroachments

- I. JPH will contact in writing every property owner whose property borders the foreshore and has been included in the LOD research, in order to explain the findings.
- II. This will include:

- a. The opinion of the line reached by the upper limit of the foreshore at that property, and thus the Public's claim to ownership of the foreshore.
 - b. The basis of the claim.
 - c. The default boundary line at that location.
 - d. A description of what encroachment, if any, exists on the Public land at that property.
 - e. The option for resolution of the encroachment, or options if there are more than one.
- III. JPH will invite every owner to consider the content of the communication, and to seek their own advice as required.
- IV. JPH will request that every owner responds in writing to the communication within two months, but will also arrange Officer meetings beforehand if requested, for discussion purposes.
- V. Depending on which resolution option is favoured and agreed between JPH and the adjoining owner, the following steps will be taken:
- a. **Agreed boundary where there is [neither] the sale [nor material loss] of public land.**
 - i. In cases where no encroachment is claimed, but there is a lack of a contractually defined boundary between the foreshore and the third-party property, it will be recommended that a boundary ratification contract is passed by the parties before Royal Court.
 - ii. Unless otherwise agreed, this will be based upon the default boundary line
 - b. **Dispute.**
 - i. If the adjoining owner disputes the Public's claim to ownership of the land, then then the two parties will seek to agree a route to resolution. Ultimately this may lead to the dispute being referred to an independent expert third-party for an opinion.
 - c. **Removal of the encroachment.**
 - i. A timetable will be agreed with the adjoining owner for the removal of the encroachment, and the role which JPH will take in that.
 - d. **Sale of the encroached land.**
 - i. JPH will commission an independent valuation of the land.
 - ii. The adjoining owner will be at liberty to commission their own valuation.
 - iii. JPH and the adjoining owner will seek to agree a figure for the value of the land.
 - iv. Failure to agree a figure may lead to the dispute being referred to an independent expert third-party for an opinion.
 - v. When a value for the land is agreed, or settled by an agreed or an accepted form of dispute resolution, JPH will arrange for Ministerial approval to be sought, to allow for a land transaction to complete before Royal Court.

e. Licence for continued use of the land.

- i. This applies to encroachment cases where the adjoining owner may not have the means or desire to acquire the Public land which has been encroached upon, and JPH may agree that it is not essential for the land to be restored.
- ii. In such cases, the option of a licence for continued use of the land may be exercised.
- iii. The licence will be personal to the party involved, and the expectation is that at the point of future sale of the property, the ownership of the encroached land would be contractually resolved, or the land restored to public amenity.”

Appendix 2

Hansard Extracts

[Hansard June 2015, 7.6 at Page 59]

“7.6 Deputy R. Labey:

When the Chief Minister and his team were preparing their suggestion to Her Majesty the Queen that she might like to give the foreshore to the Island, was the spectre of seigneurial rights rearing its ugly head foreseen and, if so, what consideration was given to avoiding another £10 million capitulation?

Senator I.J. Gorst:

I hope the Deputy will not be surprised to know that it absolutely was and the comments in the J.E.P. (Jersey Evening Post) which ... sadly I was out of the Island last week, so I did not have the pleasure of reading that august organ, but I understand that comments have been made in that publication about the Le Pas deal and potential challenges along the same lines. I do not accept that premise for a number of reasons, not least of which that that was settled in 2003. It had been ongoing since 1989 and, of course, as we know, in 1989 the States had not enjoyed the 40 years of possession of the foreshore which gives rise to title, but we have now enjoyed in the region of 65 years of possession and thus the Le Pas situation I do not accept can be repeated.”

H.M Attorney General when Foreshore: policy for alleged encroachment payments (P.101/2020): amendment (P.101/2020 Amd.) was debated answered a number of questions concerning ownership and potential claims:

[Hansard, 24 September 2020 at Page 73]:

“Deputy M.R. Higgins:

The question I have is why did the States concede and pay Les Pas Holdings regarding the foreshore of the reclaimed land and are there any issues regarding this case that have implications for this debate, as both are regarding the right to the foreshore? As I say, we paid our £10 million to Les Pas Holdings who are claiming a fief over the foreshore. The States did not take it to court, conceded it after a long period of time, and are there any other fiefs or anything else that can impact our debate today? I would certainly like to know if there are any issues that affect us in this debate.”

“The Attorney General:

In relation to the payment to Les Pas Holdings, I am not sure it is a legal question to me. Insofar as it is, I think it is simply a commercial bargain that was struck between the States at the time and the claimant, Les Pas Holdings, and Advocate Falle. So the reasons for that, I am sure, will be recorded somewhere and the Deputy should refer to them. It was simply a bargain that was struck and that frequently happens with civil litigation, as this claim was. The parties decide for practical reasons that they do not want to incur the costs, expense and risk, of court proceedings and they arrive at a mutually acceptable bargain struck. As regards to the Deputy’s wider question in relation to the foreshore, I think perhaps he is referring to the risk of further claims. There has only been one and that was the one that was brought by Les Pas Holdings and Advocate Falle. One can never predict whether someone will bring another claim in the same way as Les Pas Holdings. But, if they were to do so, my view is that claim would fail. I am not sure it is necessary for me to go into all the legal reasons for why that is my view, but the important ones are the arguments that were put forward on

behalf of the States as regards the nature of the Crown's ownership will still all be available in any future such claim. But, in addition, there are further arguments that now have much more force, which concern the de facto control by the public in those series of contracts from 1895 onwards. Importantly, also, the lease of the foreshore in 1950 such that basically any Seigneur whose property adjoins the foreshore will now face far greater obstacles in showing that they had in fact ownership of the foreshore than they did in relation to the Les Pas Holdings claim back in the late-1990s. It may be that, for instance, Les Pas Holdings brought their claim shortly before the expiry of the 40year period from the date of the public's lease of the entirety of the foreshore back in 1950. So, in my view, while I can never predict or rule out further claims in relation to the foreshore by Seigneurs, in my view those claims would fail."

and [Hansard, 25 September 2020 at Page 9]:

“Deputy M.R. Higgins of St. Helier:

Yesterday I asked the A.G. (Attorney General) a question regarding whether the Les Pas Holdings case had any relevance to the debate on this issue. He thought not. This morning I had a chance to look up the Les Pas issue and came across the following statement from Advocate Richard Falle, made just after the Queen's decision to give the Island's foreshore and seabed to Jersey. He said: "that the Island and the Crown could be sued under feudal law following the Queen's decision last week to give the foreshore and seabed to Jersey. He believes that under centuries-old law private rights to many areas of the foreshore do not belong to the Queen but instead to Seigneurs, or feudal lords, who were granted fiefs – hereditary property rights – by past monarchs." Advocate Falle said: "The legal view in my opinion is that you cannot give away something that you do not have." Now, in a J.E.P. (Jersey Evening Post) report on his statements it said: "If he is right, the Island could see several reruns of the 14-year legal battle he fought over the area of land on which the reclaimed waterfront now sits. In 2003, the States effectively paid off Mr. Falle and others in a £10 million out of court settlement after he argued that the land belonged to an ancient fief, the Fief de la Fosse, which he owned. The advocate ..."

The Greffier of the States (in the Chair):

"Sorry, Deputy, this is a question for the Attorney General, can you ..."

Deputy M.R. Higgins:

"It is quite specific, but he needs to hear the background to do it. I will be there in a second. It said: "The advocate issued his warning after it was announced that the Crown would be transferring ownership of the Island's beaches and seabed to the public, which will give Jersey more control over those areas, including its territorial waters. Ministers have said the move would allow Islanders to profit from leasing out the seabed for wind farms or tidal turbines. But Advocate Falle says that if any future projects are undertaken in areas where fiefs exist, seigneurial rights to the land must not be breached or the Crown and the public of Jersey could both face legal action from the Seigneurs. Because the States settled out of court, his claims to the land under feudal law were never tested." So my question to the Attorney General is: could the Attorney General give his opinion on Advocate Falle's legal opinion and clarify if at the time of the transfer of the foreshore to the Island this matter had been legally addressed and settled."

Mr. M.H. Temple Q.C., H.M. Attorney General:

“Yes, I am aware of Advocate Falle’s assertions and arguments and I stand by the answers that I gave to the Assembly yesterday. In terms of legal rights, feudal rights, that is one thing, but ownership of the foreshore is another. There are many arguments that can be made against Advocate Falle’s assertions that could have been made back in 1990 when he brought his claim, having bought the Fief de la Fosse seigneurship. All those arguments remain to the public now, but in addition there are even more powerful arguments in my view based on lapse of time since the Les Pas Holdings case. The Crown has always owned the foreshore but, uncontrovertibly in 1950 the Crown and the public entered into a lease of the entirety of the foreshore. That is a clear demonstration of ownership and in order for a party to overcome that sort of demonstration of ownership they would have to have contest it. The fact is that only Les Pas Holdings brought a claim just before the expiry of the 40-year period, the possession quadragénaire right, which I alluded to yesterday which is a right in the 1771 Code. So since 1950 it is only Les Pas Holdings and Advocate Falle that have done that, and we now have a further 31 years that have passed since the Les Pas Holdings claim. So it is incontrovertible that the Crown and the public now have ownership of the foreshore. All these arguments around feudal rights I can assure Deputy Higgins were thought about, were the subject of advice, that they were carefully considered both here and in London when it came to the transaction whereby in 2015 the Crown conveyed its interest in the foreshore to the public of the Island. All that was thought about, carefully considered and addressed. I hope that reassures the Deputy.”

Deputy M.R. Higgins:

“I cannot say that I am reassured in one sense because all the legal opinion before the Les Pas Holdings case was they had no chance whatsoever, but the Island Government in the end capitulated and paid £10 million. Can the Attorney General confirm that because it never went to court and was never settled in court there are still outstanding issues that could pose problems going forward?”

The Attorney General:

“I am not sure I can add much to the advice that I gave the Assembly yesterday. I cannot guarantee that no Seigneur will make a claim. That is up to them; I cannot control that and nor can the Assembly. But what I can say is that any such Seigneur I think would be foolish to do so, or ill-advised to do so, because in terms of the legal merits my view is that sort of claim will fail. So I am not sure that I can add too much to what I have already said to the Deputy. I gave the answers yesterday as to why the Les Pas Holdings claim was compromised in the way that it was. Yes, we did not get a judgment which dealt with ownership of the foreshore, but that was for the reasons that I gave yesterday. It is common in civil litigation to resolve matters consensually without all the cost and stress and risk of going to court; 99 out of 100 civil claims do that. They do not usually go to trial. Since that date we have had the further passage of time in the way that I have outlined in both my previous answers, so I do not think I can add any further to what I have just said to the Deputy.”

Deputy M.R. Higgins:

“Could I just seek clarification of one point then? Advocate Falle was arguing the Crown did not have the right to transfer all the foreshore, but that part has not been tested. If the States are going to try and extract money from people because the States now has the foreshore, and if someone sued and said: “No, the Crown did not have the right transfer the part of the foreshore that I am concerned with” what is the legal position on that?”

The Attorney General:

“I have already answered those questions. The fact is that the Crown was party to transactions where it did extract money from private individuals in relation to transactions concerning the foreshore. It has been doing that for a very long period of time, as has the public of the Island. The specific point that has just been raised by the Deputy is covered by my previous answers that I have just given.”

Appendix 3

Planning and Building (Jersey) Law 2002

14 Development of concern to highway authority

- (1) This Article applies in respect of an application for planning permission –
 - (a) where the proposed development involves the creation of a new means of access or the enlargement of an existing means of access to a road; or
 - (b) where it appears that if the development were to be undertaken it might create a problem specified in paragraph (2).
- (2) Those problems are that the development of the land might –
 - (a) be a source or cause of danger to people using or entering a road bordering the land;
 - (b) have a significant effect on the volume or type of traffic using the roads leading to and from or in the vicinity of the development;
 - (c) involve an increase in the cost of undertaking any improvement of a road bordering the land; or
 - (d) hinder the improvement of a road bordering the land which the highway authority intends to improve.]
- (3) Where this Article applies, the application shall not be determined until the highway authority (if any) in respect of the road has been consulted, and any comment by the authority shall be taken into account in the determination of the application.[\[55\]](#)
- (4) [\[56\]](#)

15 Development of concern to the Minister for Economic Development, Tourism, Sport and Culture

- (1) This Article applies in respect of an application for planning permission to develop land within an area shown on a map provided by the Minister for Economic Development, Tourism, Sport and Culture for the purpose of this Article.
- (2) Where this Article applies, the application shall be referred to the Minister for Economic Development, Tourism, Sport and Culture for comment, and any comment made by that Minister in respect of the possible effect of the proposed development on the operation of a harbour or of the airport shall be taken into account in the determination of the application.

16 Development of concern to the Minister for Infrastructure[\[61\]](#)

- (1) This Article applies in respect of an application for planning permission for development that falls within an area of responsibility or concern of the Minister for Infrastructure.
- (2) Where this Article applies, the application shall be referred to the Minister for Infrastructure for comment, and any comment made by that Minister in respect of any of the matters specified in paragraph (4) shall be taken into account in the determination of the application.[\[63\]](#)
- (3)
- (4) Those matters are –
 - (a) the sufficiency of any sewerage or drainage system, flood defence work or water course that may be affected by the development, the prevention of damage to it, and any hindrance to its repair or maintenance;

- (b) the limitation of damage by surface water that could be caused by the development;
- (c) the effect of the development on water quality (including sea water quality).

17 Development of concern to any Minister, etc.

- (1) This Article applies in respect of an application for planning permission for development –
 - (a) that falls within the area of responsibility or concern of any Minister (other than a Minister referred to in Article 15(1) and 16(1)) or a body or person created by statute; or
 - (b) that is development of a type or class, or within an area of the Island, in respect of which a body or person created by statute has informed the Minister that it has an interest or concern.
- (2) Where this Article applies, the application shall be referred to the relevant Minister, body or person and any comment made by the Minister, body or person shall be taken into account in the determination of the application.

Drainage (Jersey) Law 2005

32 Control of development

- (1) When considering an application under Article 6 of the Island Planning (Jersey) Law 1964 for permission to develop land, the Minister for the Environment shall with a view to –
 - (a) the prevention of damage to any facilities specified in paragraph (2);
 - (b) the prevention of the obstruction of those facilities; and
 - (c) the limitation of flooding of any kind,
take into account the effect of the development on those facilities.[\[12\]](#)
- (2) The facilities to which this paragraph refers are –
 - (a) public sewers;
 - (b) public sewage disposal works;
 - (c) public outfalls;
 - (d) watercourses; and
 - (e) flood defence works.

Appendix 4

TRANSACTIONS COMPLETED OR NEGOTIATED PRIOR TO 12 JUNE 2015

(Date of Gift of Foreshore to the Public)

(List of known transactions since the 1990's including a relevant Crown transaction from 1978)

1. Property A – sale by the Crown to owner of Property A of a Strip of land measuring 845 square feet forming area of reclaimed Foreshore situate to rear of sea wall constructed on the beach.
2. Property B – Grant of rights by the Crown to owner of Property B permitting the owner of that property to keep the existing pipes which discharge rainwater on to the Foreshore.
3. Property C – Sale of 585 square feet of land on which part of an extension to the property had been built, adjoining the seawall.
4. Property D – Deed of Arrangement completed with the Crown to agree confirmed boundary points.
5. Property E – The owners of property E constructed a new house on the site of a previous property with various encroachments upon the sea defence. A contract was passed so that these encroachments were permitted to remain.
6. Property F – a contract passed in respect of balcony encroachments onto the seawall.
7. Property G – Sale of reclaimed foreshore to North of the seawall which had been encroached upon by owners of Property G.
8. Property H – Sale of reclaimed foreshore to North of the seawall which had been encroached upon by owners of Property H.
9. Property I – an agreed consideration re grant of rights plus costs.
10. Property J – Sale, cession and transfer by the Crown of a right of way and the right to create a vehicular opening through the sea wall in order to provide Property J with vehicular access to a Slip.
11. Property K – contract to allow openings less than the prescribed distance from the boundary with the foreshore – towards a promenade.

(Resolved/Non-completed Transactions)

12. Property X – an encroachment onto land behind a Seawall had taken place in conjunction with the redevelopment of the site. The matter was brought to JPH's attention by Deputy of Grouville. JPH caused the developer to remove the encroachment.

13. Property Y – an encroachment onto land behind the Seawall had taken place in conjunction with the redevelopment of the site (plus numerous other encroachments). JPH caused the developer to remove the encroachment.