

# STATES OF JERSEY



## FORESHORE: POLICY FOR ALLEGED ENCROACHMENT PAYMENTS (P.101/2020): AMENDMENT

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Lodged au Greffe on 15th September 2020  
by the Minister for Infrastructure

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STATES GREFFE

FORESHORE: POLICY FOR ALLEGED ENCROACHMENT COMPENSATION  
PAYMENTS (P.101/2020): AMENDMENT

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**1 PAGE 2, PARAGRAPH (a) –**

For paragraph (a) substitute the following paragraph –

“(a) that no further land transactions should take place between the Public and third parties in respect of strips or parcels of reclaimed foreshore until a revised foreshore encroachment policy has been debated;”.

**2 PAGE 2, PARAGRAPH (b) –**

Delete the words “and should confirm the date from which the deemed encroachments will be determined and be accompanied by a map clearly showing the boundaries used to establish land ownership”.

**3 PAGE 2, PARAGRAPH (c) –**

For paragraph (c) substitute the following paragraph –

“(c) that upon a revised policy being agreed by the Assembly, the Minister for Infrastructure should re-consider Finding 8.15 of the States of Jersey Complaints Board’s report (R.71/2018) in respect of refunding the difference (if any) between the considerations paid under the two respective land transactions and the considerations that would have been paid had the new policy been in place at the time;”.

**4 PAGE 2, PARAGRAPH (d) –**

For the word “2020” substitute the words “Quarter 1 of 2021”.

MINISTER FOR INFRASTRUCTURE

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

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

- (a) that no further land transactions should take place between the Public and third parties in respect of strips or parcels of reclaimed foreshore until a revised foreshore encroachment policy has been debated;
- (b) that such policy should be brought forward for debate by the Assembly by January 2021;
- (c) that upon a revised policy being agreed by the Assembly, the Minister for Infrastructure should re-consider Finding 8.15 of the States of Jersey Complaints Board’s report (R.71/2018) in respect of refunding

the difference (if any) between the considerations paid under the two respective land transactions and the considerations that would have been paid had the new policy been in place at the time; and

- (d) to request that the Department for Infrastructure publishes by the end of Quarter 1 of 2021, a map of all public accesses, footpaths and rights of way to the foreshore.

## REPORT

### Explanation of amendments

Proposition item (a).

The wording of this paragraph implies that foreshore encroachments cases, which have been subject to transactions to sell the land or rights over the land, are merely ‘alleged’, and without basis as to the claim of ownership by the Public. It also implies that the third parties were prevented from presenting cases as to their opinion of the ownership of the land. Both of these implied positions are without basis. Transactions which have been completed have been freely entered into between the parties of their own free volition, and the sales which took place have been for a fair and proper price. Item (a) of [P.101/2020](#) implies that encroachment transactions must cease where a value is being attached to the encroached land, but can continue to take place where no value is attached. This is an unsatisfactory position, and I would prefer that all foreshore encroachment transactions are put on hold until the revised 2017 policy is debated by the Assembly. There are several ongoing foreshore boundary cases being negotiated between JPH and third parties at this present time, and I consider it to be unacceptable to delay the completion of those transactions pending the approval of a revised policy by the Assembly. I therefore propose that following the debate of the revised policy, transactions will be allowed to resume.

Proposition item (b).

The inclusion of the wording: “the date from which the deemed encroachments will be determined” is, in my opinion, irrelevant and unworkable. Where a foreshore encroachment is claimed, that claim will have a basis. The third party can submit a counterclaim, and if the matter remains disputed, the two parties can follow established courses of action to seek a resolution. Encroachments of the foreshore vary from very recent to historic, and attempting to give a single date as proposed by Carolyn F. Labey, the Deputy of Grouville, will not assist in how foreshore encroachments are resolved.

Regarding the wording: “a map clearly showing the boundaries used to establish land ownership”, this is also, in my opinion, irrelevant and unworkable. A project has just been completed to research the upper, landside, limited of the foreshore. There is now comprehensive information on that line and the encroachments which exist. The revised policy is to engage with third parties to explain the claimed position, and to allow resolution to take place in the usual manner. Should a third party be able to produce new information to substantiate his/her claim to already owning the land, then that may resolve the case. To attempt to produce a map showing private encroachments in advance of the third parties having an opportunity to seek to resolve matters would be grossly unfair to those parties. There is also the matter that certain upper limits of the foreshore are substantiated with more than one source of information, leading to complex claims as to ownership. It would be misleading to attempt to mark a single line on a plan without the opportunity to communicate the supporting information.

Proposition item (c).

This item exceeds the relevant finding of the Complaints Board’s report. The relevant finding is 8.15 of the report, which recommended that if a new policy is adopted, which results in foreshore encroachment cases being handled differently in the future, then that

position should be retrospectively applied to the two complainants, and any difference between what they paid for the encroached land and what they would have paid under the new adopted policy should be refunded. It did not recommend a full refund – unless of course the new policy is to gift all encroached foreshore to third parties. I therefore propose my amendment.

Proposition item (d).

The requirement for “a map of all public accesses, footpaths and rights of way to the foreshore” is, in my view, an unnecessary exercise. Virtually all public access to the foreshore is via land in Public/Parish ownership – slipways, promenades and public open land etc. Those accesses are very commonly known about. There are very limited other “public accesses, footpaths and rights of way to the foreshore”, but I am happy to arrange for a plan to be produced by the end of Q1 2021.

### **Brief background and examples of encroachments**

In mid-2015 the ownership of the foreshore transferred from the Crown to the Public of Jersey. Prior to that the Public held leasehold ownership the land for some 65 years and also acquired the freehold of certain sections of the foreshore as required.

Research of the Island’s protective seawalls indicates (highly logically) that they were built marginally below the point reached by the “High Water Mark of Full Spring Tide” (HWMoFST) – which is upper limit of the foreshore.

Accordingly, there were strips of residual foreshore left behind the seawalls, which were backfilled with sub-soil. Research has shown that in some cases these strips were narrow, i.e. less than 1’0”, but in other cases the distance was several feet and even in the order of 20 feet or more.

Researching the line of the HWMoFST is a complex matter and not as simple as checking more traditional boundary lines. However, based on the best information available, including observations of the structures, and land surveying techniques, it is possible to make sound cases as to the lines originally reached.

Research has also shown that in only a small number of cases, parcels of foreshore behind seawalls have been actually conveyed by the Crown to adjacent private property owners (most of these cases were in fact completed by the Public). But substantially, almost all residual foreshore behind the seawalls remained in Crown ownership, with the ownership transferring to the Public in mid-2015.

Unfortunately, over time, adjoining private property owners extended the use of their plots over the residual foreshore, and effectively annexed the land to theirs. In many cases private owners actually built directly on top of the Public’s seawalls and built steps and stairs over or through them for direct beach access.

For the avoidance of doubt, apart from the small number of cases where the Crown conveyed land to private parties – all garden extensions, patios, balconies, walls, fences, and buildings steps, stairs etc. built-on the residual foreshore behind the seawalls, onto the seawalls themselves and onto the beaches – are without proper authority and are deemed to be land encroachments.

Some of the encroachments have a long history and the private properties have transacted many times (at which times the usual legal boundary checks would have been conducted), but others are recent and with no change of ownership.

### **The effect of/loss from encroachments**

If no encroachments had taken place along the eastern and other coastlines, it appears that the land would have been available for Public amenities, such as sections of promenade or paths. Sections of seawall would be stronger for not having gaps for private steps, gates etc. The sea defence team would have easier access for maintenance of the seawalls. Boundaries and ownerships would be clear for the Public ('private' beach access can cause confusion). An eastern cycle path is now costing Government millions to establish elsewhere inland.

Therefore, the Public appears to have lost valuable pieces of land while those who have encroached and appropriated land to which they have no title, have increased the value of their property. This seems neither right, fair or legal.

Allowing encroachments to go unchallenged would set a perilous precedent with potentially serious ramifications. This should apply to historic encroachments just as well as recent ones. The principle should be upheld to ensure people do not think it is "worth the risk". There have been no fines levied on those who have encroached or any legal penalty. They have only paid for what they have taken.

Unfortunately, with the passage of time, the modified landscape of parts of the Island's coast has perhaps become passively accepted, as has the impact of some of the encroachments described above.

It is arguable that the landscape *should be* seawalls much in their original state, with private properties set back by the depth of the residual foreshore behind, and with the seawalls free of third-party walls, gates, steps, stairs, patios buildings etc.

As already mentioned, in certain cases, Public promenades probably could have been created behind seawalls. Some stretches of Public promenades have been lost to encroachments.

Some members of the Public express the view that certain stretches of beach now have the appearance of private beaches due to the number of steps and stairs dropping down, and dominant structures built up to and onto the seawalls.

### **The case against P.101/2020**

The fundamental question in the debate of this matter is: should encroachments on Public land be allowed without any action taken for redress?

The answer must surely be no.

It is therefore up to Government to find the most pragmatic approach to the situation.

Contrary to what has been portrayed in the media, JPH has not been proactively pursuing the perpetrators, it does not have the resources to do so. It has worked on a case by case basis when these have become known to the Department. Following the findings of the

Complaints Board and the experience of recent cases, it was clear that it would be more pragmatic to establish the full extent of the encroachments, rather than approaching each case individually. This work is nearly complete (it has taken longer than hoped due to unavoidable resource issues) along with a review of current policy.

A consequence of P.101, is that the approval of the Proposition – and by implication the accompanying report – would weaken the Public’s future position in dealing with land encroachments on any of its estate. JPH can foresee encroachment cases happening in the future, where the party in question quotes P.101 and Public land on the foreshore being given away.

A further consequence of P.101 is that the two complainants may well interpret the refund of their considerations as declarations of wrongful cases on the part of the Public, and go on to pursue legal claims for damages and loss. Also, that every party who has completed an encroachment type transaction for a strip of foreshore, no matter how long ago, will seek application for the consideration paid to be returned to them.

Also, very important is the known position that tidal levels are forecast to continue rising, necessitating heightening and other modifications to many seawalls, including closing-up unauthorised openings. The States should deliberate very carefully in reaching a decision to ‘open the floodgates’ by implying that all foreshore encroachments as at mid-2015 can remain and the land gifted for free. The Government must retain control of its sea defences and the land immediately behind, for the sake of flood defence of the Island.

The Deputy of Grouville does not specify what would be the principal points of a revised foreshore encroachment policy in P.101, but the strong assertion from the report is that all existing encroachments as at the date of transfer of the foreshore to the Public in 2015 should be allowed to remain. In cases where private owners wish to formalise a robust boundary agreement with the Public towards the foreshore, any encroached residual foreshore should be gifted to them for free, and with rights for steps and stairs to remain etc.

The unease about such a policy is that selective private owners would be receiving valuable land annexed to their properties for free, which land was held by lease by the Public for 65 years, and is now owned by the Public. It is difficult to think of another case of an asset owned by the Public of the Island, which would be freely given to individuals for their *personal* enjoyment and financial gain.

A further consequence of P.101 is that every party who has completed an encroachment type transaction for a strip of foreshore, no matter how long ago, will seek application for the consideration paid to be returned to them.

A further consequence is that certain owners who have refrained from encroaching but have seen their neighbours encroach and seemingly ‘get-away’ with it, may well feel highly aggrieved and take further action.

Item (c) of the P.101 Proposition asks the States to agree to return to the complainants the money which they paid to the Public in acquiring the encroached land and/or rights over it. However, that proposal is beyond the findings of the Complaints Board’s report. JPH’s interpretation of the report is that it said that if the policy is revised so that future cases are dealt with differently, then that revised position should be retrospectively

applied to the complainants. That is to say, if the encroached land would be valued lower under a revised policy, then the difference from what the complainants actually paid should be refunded to them. Accordingly, JPH is somewhat at a loss to understand why the Proposition is calling for the full sums to be refunded now.

### **The complaints hearing**

Before the hearing, the Complaints Board stated that it did not intend to voice an opinion on the ownership of the foreshore. Despite this, the issue of ownership was raised repeatedly at the hearing. This perhaps blurred the clarity as to what the Panel gave an opinion on, especially when reported on at a later stage.

The Board said it was “entirely appropriate that the Public should formulate a policy relating to its ownership of the foreshore and, by extension, how it approached the matter of encroachments towards it”.

The Board also acknowledged that it is the Minister for Infrastructure who is the flood defence authority for Jersey and has power to “provide, maintain, improve and extend facilities and measures to protect Jersey from flooding” ([Article 2\(3\)\(c\) of the Drainage \(Jersey\) Law 2005](#)).

Furthermore, the Board said: “It is, of course, the sale of a property that most commonly prompts the clarification of a boundary, or the ratification of an encroachment and, in such a case, it can be said that the property seller who seeks clarification comes to the negotiations at something of a disadvantage. Nevertheless, the Board is in absolutely no doubt that when it is approached by neighbouring owner seeking such clarification or ratification, the Public has a clear duty to act fairly, promptly and transparently in its dealings with the owner.”

In response to the Board’s findings, I asserted that both transactions involved the Public acting as a landowner and were carried out in accordance with the 2006 Valuation Statement and [Standing Order 168](#).

I agreed to review the Policy, which work is almost complete.

It should be noted that the Board did not make any allowance for the fact that the Public was trying to recover what was owed rather than entering into negotiations for sale of land which the Public wanted to dispose of. There is surely a different onus of responsibility.

In my view, certain descriptions and claims made in the complainant’s submissions have been reported upon in the media and seemingly presented as fact, but without rise to investigation of the facts.

For example – that parties have been ‘fined’, ‘gone after’, ‘held to ransom’, targeted within weeks of the foreshore transferring and numerous other claims – are all simply untrue and without basis in my view.

The Board’s report went to some length to suggest how encroached land should be transferred to parties in the future on favourable terms, but nothing to acknowledge the loss to the general public of the encroached land, or the huge inconvenience caused to the Government in dealing with encroachment cases.



### **Did the Government implicitly approve encroachments?**

P.101 report alludes to a position that the Government has failed over time in its duty to stop the encroachments described above, and that private owners who have annexed Public land to their properties have interpreted that as passive acceptance on the part of the Government.

I do not support that position. Coastal estate tends to be at the high-end of the property market, with buyers generally being astute and mindful of taking comprehensive professional advice. I would be highly surprised if buyers' conveyancing checks at the time had not given rise to warnings of uncertain boundaries towards the foreshore, the seawalls being in Public ownership, no '40-year rule' for Crown land, and options for resolving matters.

The other matter under this heading is that owners have applied for Planning permission to develop their land, but may have shown their boundary as being the back-face of the seawall, or even the seawall itself, and that such cases may not have been contested by the Government, giving rise to passive consent of ownership. My response to this is that there is no case for land to be conveyed through a party making a planning application on it.

### **Length of encroachments and different owners**

Another position alluded to in the P.101 report is that some owners, including one of the complainants, acquired their properties with the encroachments in place, and therefore should be gifted the land for free, and that perhaps some owners have no knowledge of the encroachments.

Property transactions in Jersey are overseen by the legal/conveyancing profession, which I believe provides a high standard of service, with private practitioners being very well versed in all aspects of Jersey property law. I reiterate that it would be highly surprising if buyers had no knowledge of the position.

Indeed, the conveyances (mentioned briefly under '1.' above) completed by the Crown and certain private parties prior to 2015 very much set/created a series of contractual statements in the Public Registry, as to the claim to the ownership of the foreshore.

### **Present owners – the position**

The P.101 report also alludes to a position that present owners 'do not know where they stand' and are distressed at the prospect of settling encroachments for a fair and proper price. Also, that JPH should publish plans of claimed encroachments for all to see.

JPH and the Law Officers' Department (LOD) spent considerable time in 2019, and continuing to date, to research the nature and extent of foreshore encroachments. Once the work is complete, the department will openly meet any owner on an individual basis to discuss the boundary at their property.

## **The legal position**

Whilst much of JPH's work involves matters of property law and legal contracts, it issues instructions to, and takes advice from the LOD.

The P.101 report has references to legal positions and even includes in an appendix information from a private advocate.

I, or JPH, are not in a position to comment on the legal points in the P.101 report.

## **Conclusion**

The arguments put forward in P.101 are not balanced and there is a lot of conjecture. The facts are: Public land has been appropriated without consent, to the benefit of neighbouring landholders and to the detriment of the Public. This cannot be encouraged or condoned. Whether the encroachment took place by the current owner, or a previous one, is irrelevant as it is the responsibility of the landholder to ensure they have title to the land they occupy. This is why land searches are undertaken when properties change hands.

JPH has operated on a case by case basis because each is unique, and has taken a pragmatic approach. 'Fines' have not been levied as reported, people have not been asked to demolish buildings that have encroached. The consideration for the encroachment charged have been in accordance with current policy.

## **Financial and manpower implications**

In my opinion the financial implications of the amendments are that future proceeds from sales of encroached strips of foreshore will not be waived and the Public will continue to receive a fair and proper price for its land. There are no manpower implications arising from the amendments; however it must be recognised that the proper management of a land area, on the scale of the foreshore, requires an allocated Officer resource – which is presently difficult to achieve under current circumstances.

Please refer to the footnotes below as further references<sup>1</sup>.

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<sup>1</sup>Finding 8.15: *“By the same token, the Board expresses the hope that, notwithstanding that the contracts with the Complainants have been passed through Court, once a clear policy regarding the fixing of the boundary of the foreshore and the payment of compensation in relation to any encroachments has been adopted, the Minister will review the terms concluded with the Complainants and refund them any difference between the compensation each of them paid and the amount of compensation (if any) that would be payable had the new policy been in place at the time. In any event, the Board expresses the hope that the Minister will refund to Mr. Mallinson the difference between the compensation that he paid and the lesser amount assessed by BNP as being the appropriate amount of compensation.”*

States of Jersey complaints Board 11.04.2018 “Complaints by Mr A Luce and Mr J Mallinson against the Minister for Infrastructure and JPH regarding the handling of foreshore encroachment cases”