

Addendum 2

Revised Policy for Encroachments on the Foreshore – proposed by the Minister for Infrastructure

Purpose:

The purpose of this document is to set out the revision to the “Policy: Encroachments on the Foreshore” (reference MD-PH-2017-0054). The necessary background for the need for a policy on foreshore encroachments is in MD-PH-2017-0054.

Definitions:

Certain terms are used in this policy document, which for convenience are defined as follows:

Consideration: A monetary sum paid for land/property in a transaction, including for granting rights.

Default boundary line: The proposed line at which a boundary with an adjoining private property will be ratified when a foreshore encroachment transaction is being agreed.

Encroachment: The unauthorised and unlawful entering upon the land, property, or the rights of another party including title encroachments.

Fair and proper price: The price paid for land/property in a transaction as determined by a valuation undertaken with reference to the publication: “RICS Valuation – Global Standards 2020” (the “Red Book Global Standards”) effective from 31 January 2020.

Flood defence: A structure intended to provide defence to land against sea water or coastal erosion. Commonly referred to as a seawall or sea defence. Provisions are made for the designation of flood defences in the “*Drainage (Jersey) Law 2005*”.

Foreshore: The land surrounding Jersey, owned by the Public, as customarily described as lying between the “High Water Mark of full Spring Tide” and the “Lowest Mark of Tide”.

GHE: The Growth, Housing and Environment Department of the Government of Jersey.

HWMoFST: High Water Mark of full Spring Tide.

Historic encroachments:	Encroachments which have existed for more than ten years.
Interfering encroachments:	Encroachments which: <ul style="list-style-type: none"> a. frustrate, obstruct or make harder the exercise of any of The Minister's/GHE's/JPH's duties, especially in respect of access for maintenance and repair of flood defences, and/or b. reduce any right of access or exercised right as a matter of longstanding habitual and recognised custom by the general Public, and/or c. have the potential to undermine or cause damage to a flood defence or pollute the foreshore d. affect the delivery of a service by the Government of Jersey.
JPH:	Jersey Property Holdings (part of GHE).
Licence agreement:	A conditional agreement giving permission to a third party to use, access or place something on an area of the foreshore.
LMoT:	Lowest Mark of Tide.
LOD	Law Officers' Department.
Minor encroachments:	Encroachments onto the foreshore which are of a trivial nature in scale, for example, an encroachment by a boundary fence or hedge of a few inches.
New/recent encroachments:	Encroachments which have existed for less than ten years.

Non-interfering encroachments:

Encroachments which do not:

- a. frustrate, obstruct or make harder the exercise of any of The Minister's/GHE's/JPH's duties, especially in respect of access for maintenance and repair of flood defences, and/or
- b. reduce the general Public's access to, or over, the foreshore or any right of access or exercised right as a matter of longstanding habitual and recognised custom by the general Public, and/or
- c. have the potential to undermine or cause damage to a flood defence or pollute the foreshore
- d. affect the delivery of a service by the Government of Jersey

Openings, gates, steps and stairs: Encroachments onto the foreshore comprising openings, gates, steps and/or stairs from a third-party property onto, or over an adjoining part of the foreshore.

Reclaimed foreshore: Areas of the foreshore which have been reclaimed, typically from the construction of a flood defence and the in-filling of the void behind the new wall to create a level area of land.

Surface water discharge pipes: Encroachments onto the foreshore comprising drainage pipes which discharge surface water from a third-party property either through or onto a flood defence or onto or over an adjoining part of the foreshore.

The Minister: The Minister for Infrastructure.

Title encroachments: An encroachment on the foreshore, including onto a seawall, which is claimed/recorded in a property's title contract, but where the Crown or the Public has not been party to the contract to agree the terms.

Categories of foreshore encroachment:

For the purposes of this policy document, foreshore encroachments are categorised as follows:

- A. New/recent encroachments.
- B. Historic encroachments.
- C. Minor encroachments.

Encroachment categories A. and B. may be sub-categorised as follows:

- I. Interfering encroachments

II. Non-interfering encroachments.

Encroachment sub-categories I. and II. may be sub-categorised as follows:

- Openings, gates, steps and stairs
- Surface water discharge pipes

Note: The above referenced categories, sub-categories and sub-sub-categories can all be classed as **technical encroachments** where applicable.

Preamble:

The principles of the policies:

The policies as set-out on pages 8-10 of this document are supported by two main principles:

1. That the Public is the owner of the foreshore, including any reclaimed areas situated to the rear of the seawalls. The Crown's gift of the Foreshore to the Public of the Island in 2015 was to the Public and not to individual private landowners.
2. JPH is a body established by the States Assembly to manage land and buildings owned by the public of Jersey and ensure best value is realised (as per "Statement on Land Valuation" as approved under MD-PH-2006-0094).

Where Public land of any type is annexed to third party properties without authorisation, JPH has to act in the Public interest to reach the best resolution on behalf of the Public.

When land is encroached, there are only three options: recover the land, transact in the land or do nothing.

Based upon the above-mentioned primary principles the main objectives are:

1. Resolve and/or regularise all foreshore encroachments for a clear landside boundary line.
2. Prioritise resolving and/or regularising new/recent encroachments.
3. Where the outcome involves (i) the transfer of an area of the foreshore or (ii) the grant of rights, to ensure that the transaction accords to the "Statement on Land Valuation" as approved under MD-PH-2006-0094).

The Public's landside ownership of the foreshore:

The Public of the Island owns the foreshore and seabed of Jersey, having been ceded the land by the Crown in a series of contracts starting in 1895 and culminating in 2015.

The extent of the Foreshore is customarily described in Jersey as all that land lying between "*le plein de Mars*" (the High Water Mark of full Spring Tide or, more

correctly, the mark which the tide reaches during the highest tide in the month of March) and “*le niveau de basse mer*” (or the lowest mark of tide, often referred to as the *datum* level). The landside extent is highly relevant to this policy document as it is the line between the Public’s foreshore and adjoining private properties.

Where Public seawalls have been built on the foreshore, it is generally always the case that they were built forward of the “HWMoFST”, thus leaving strips of residual foreshore behind the masonry/concrete structures. In most, if not all cases, the voids behind seawalls have been backfilled/ infilled, thus creating strips of reclaimed foreshore.

Apart from in a very limited number of cases where the Crown has previously conveyed parcels of reclaimed land behind certain seawalls to adjoining private property owners, the Public ownership includes all strips of the foreshore situate to the rear of the seawalls.

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.

Prescription

Prescriptive possession was a customary law codified in the Code of 1771 – “*possession quadragenaire*” - being 40 years peaceable, uninterrupted and unchallenged possession of land will usually give good title of the land to that person.

However, as a matter of customary law, it is not possible to establish title by *possession quadragenaire* against the Crown because prescription does not run against the Crown’s immovable property.

Prescription does however run against the Public. So, whilst the position of the Crown could not be affected by encroachments by third parties, the same does not hold for the Public, and 40 years of peaceable, uninterrupted and unchallenged possession of a strip of foreshore from 2015 to 2055 could render good title to the third party.

Planning Permission

Cases exist where third party property owners have included strips of foreshore, sometimes including parts of seawalls, in development applications made to the Planning authority, which applications may have received ‘planning approval’ and the developments completed. Such approval/development does not change the ownership status of the encroached foreshore, or how it is to be resolved under this policy.

Jersey Property Holdings

JPH was established by the States Assembly in 2005 under the framework of a Proposition⁶ concerning the management of the Public property portfolio. The proposition set-out the aims of the organisation, which including realising the value

⁶ Policy and Resources Committee proposition lodged 03.05.05 “States of Jersey Property Holdings: Establishment

of Public land and property. JPH replaced “Property Services”⁷ which itself was established in 1991 – again with a remit including the principle of realising best value for Public land.

In 2006 JPH made a formal valuation policy “Statement on Land Valuation” as approved under MD-PH-2006-0094. That policy aimed to reinforce the intention to realise the proper value of all Public land and property.

In view of the established remit of JPH and its formal 2006 valuation policy, it is clear that one of its functions is to ensure that Public land, when disposed of, is done for a fair and proper price. Encroached strips of the foreshore typically enhance and add value to the costal properties which have annexed the land. It is JPH’s role to negotiate a settlement to reflect that position.

The Minister, through GHE and JPH, has certain responsibilities in respect of the foreshore including flood defences, control of encroachments and beach cleaning. In addition, other Ministers have a range of functions and duties relating to the foreshore such as development control, the policing of beaches and controlling deposits in the sea.

JPH, and its predecessor department Property Services have dealt with encroachments on the Foreshore since the early 1990s, with evidence of encroachments dating back considerably further than that. All cases dealt with by JPH and Property Services have had regard to the proper value of the land taken.

When decisions are made in respect of the management or disposal of the Public’s land, the Public interest must be, and is, considered.

Policies:

1. Landside boundary of the foreshore

- a. A proactive approach will be taken by JPH to use the information held on the upper limit of the foreshore towards private properties and the recommended ‘default boundary lines’, to resolve foreshore encroachments and to ratify boundaries with adjoining properties. This is to include JPH communicating with such private owners the information held on the upper limit of the foreshore, and the recommended ‘default boundary lines’.
- 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.

2. New/recent encroachments

- a. A proactive approach will be taken by JPH to identify **new/recent encroachments** and to take action to resolve or regularise them with the respective third parties.
- b. New encroachments occurring after the date of this Policy document

⁷ Established as the Property Management Office under P.43/1991

will be required to be removed and the foreshore restored to its prior state at the cost of the third party. This position applies irrespective of the sub-category **interfering encroachments** or **non-interfering encroachments** or the sub-sub-category **openings, gates, steps and stairs**.

- c. There is a presumption that **new/recent encroachments** in the sub-category **interfering encroachments** will be required to be removed and the foreshore restored to its prior state at the cost of the third party. This also applies to the sub-sub-categories **openings, gates, steps and stairs**, and **surface water discharge pipes**.
- d. However, in certain cases, the Minister may decide to allow **new/recent encroachments** to remain – primarily those in the sub-category **non-interfering encroachments**.
- e. Policy 2.d. is subject to:
 - i. a sale or lease of the encroached land taking place from the Public to the third party – as approved by the Minister;
 - ii. the sale or lease of the encroached land being for a fair and proper price, and the Public's costs also being met by the third party;
 - iii. the sale or lease of the encroached land being subject to the 'default boundary line' being ratified; and
 - iv. where applicable, the sale or lease of the encroached land being subject to reasonable provisions for the Public to retain necessary access onto the sold/let land for future essential maintenance of a sea defence or for future essential improvement of a sea defence, including heightening.
- f. Policy 2.d. may also be subject to, in the case of the sub-sub-categories **openings, gates, steps and stairs** and **surface water discharge pipes**:
 - i. a licence agreement covering the use of the openings, gates, steps and/or stairs and surface water discharge pipes between the Public and the third party, subject to terms to be decided by the Minister;
 - ii. however, where any part of an opening, gate, step or stair or discharge pipe is deemed to comprise an interfering encroachment and having an impact on the current or future function or integrity of a sea defence, then any necessary modifications to restore the sea defence will be required.

Policy 2 also applies to **title encroachments** and to encroachments which may have been granted 'planning permission' to a third party.

3. **Historic encroachments.**

- a. A proactive approach will also be taken by JPH to identify, record and monitor changes to **historic encroachments**.
- b. A proactive approach will be taken by JPH to notify third party owners with **historic encroachments** of the upper limit of the foreshore and the default boundary line.
- c. Changes to **historic encroachments** made after the date of this Policy document will be deemed to recategorize them as **new/recent encroachments**, with the relevant policies for that category then being applicable.
- d. A proactive approach will be taken by JPH to engage with third party owners with **historic encroachments** to resolve their encroachments, either by:
 - i. restoring the foreshore to its prior state on terms to be agreed between the parties.
 - ii. a sale or lease of the encroached land taking place from the Public to the third party, subject to a fair and proper price being paid for the land, but subject to a reduction in the price to reflect the period for which the **historic encroachment** has existed.

Policy 3. applies to both **interfering encroachments and non-interfering encroachments**, and to **title encroachments** and encroachments which may have been granted 'planning permission' to a third party. However, in the case of the sub-sub-categories **openings, gates, steps and stairs** and **surface water discharge pipes**, the presumption is that such encroachments will be regularised by a licence agreement as set-out under Policy 2.f.i.

4. **Minor encroachments.**

- a. A proactive approach will be taken by JPH to identify, record and monitor change.
- b. JPH may decide to bring such encroachments to the attention of respective third parties, which parties may wish to seek to regularise the encroachments.

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.

End of policy document

APPENDIX

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