

STATES OF JERSEY



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

Lodged au Greffe on 31st December 2020
by the Deputy of Grouville

STATES GREFFE

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

- (a) After the words ‘this proposition’, insert the word “; and”; designate the existing paragraph as paragraph (a) and insert a new paragraph (b) as follows –

“(b) to request the Minister for Infrastructure to provide a map, setting out the public boundary, as part of the encroachment policy document”

- (b) On Page 2 of the Appendix to the report accompanying the proposition, in the section entitled ‘definitions’ -
- (i) delete the heading and associated definition of ‘Default boundary line’
 - (ii) delete the heading and associated definition of ‘Fair and Proper Price’;
 - (iii) within the definition of ‘Historic encroachments’ delete the words “for more than 10 years” and substitute “prior to 12th June 2015”;
 - (iv) delete the heading and associated definition of ‘New/recent encroachments’;
 - (v) delete the heading and associated definition of ‘Title encroachments’;
- (c) On Page 4 of the Appendix to the report accompanying the proposition delete entirely the paragraph entitled ‘Categories of foreshore encroachment’;
- (d) On Page 5 of the Appendix to the report accompanying the proposition delete entirely the paragraph entitled ‘Preamble: The principles of the policies’;
- (e) On Page 5 of the Appendix to the report accompanying the proposition delete entirely the paragraph entitled ‘The Public’s landside ownership of the foreshore’;
- (f) On Page 7 of the Appendix to the report accompanying the proposition delete entirely the paragraph entitled ‘Jersey Property Holdings’;
- (g) On Page 8 of the Appendix to the report accompanying the proposition, after the heading ‘Policies:’ delete the remaining text and substitute the following –
- “Encroachments occurring after the date upon which the States approved this policy document will be required to be removed and the foreshore restored to its prior state at the cost of the encroaching party.

Encroachments occurring prior to the date upon which the States approved this policy document, but after 12th June 2015, will be dealt with as follows –

- (1) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.
- (2) Interfering encroachments will be required to be removed and the foreshore restored to its prior state at the cost of the encroaching party.
- (3) Non-interfering encroachments, which are not minor encroachments, may at the discretion of the Minister be permitted to remain subject to such reasonable conditions as he may specify in a licence agreement, including the payment of reasonable compensation.

Encroachments which have occurred prior to 12th June 2015 (historic encroachments) will be dealt with as follows –

- (1) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.
- (2) Interfering encroachments may be required to be removed and the encroaching party may be required, depending on the particular circumstances of the case (including the length of time that the encroachment has existed), to contribute appropriately to the cost of such removal.
- (3) Non-interfering encroachments, which are not minor encroachments, will be permitted to remain subject to such reasonable conditions as the minister may specify in a licence agreement.

Notwithstanding the above policies, if an encroachment at any time affects any duty of the Minister to repair or improve flood defences pursuant to the Drainage (Jersey) Law 2005, he may deal with the matter as he thinks fit.”

DEPUTY OF GROUVILLE

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

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

- (a) to approve a revised policy for encroachments on the foreshore, as set out in the Appendix to the report accompanying this proposition; **and**
- (b) to request the Minister for Infrastructure to provide a map, setting out the public boundary, as part of the encroachment policy document.**

Note: After this amendment, the policy in the Appendix to the proposition would read as follows –

APPENDIX

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-PH2017-0054.

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.

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

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 **prior to 12th June 2015**.

Interfering encroachments: Encroachments which:

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.

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.

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.

Policies:

Encroachments occurring after the date upon which the States approved this policy document will be required to be removed and the foreshore restored to its prior state at the cost of the encroaching party.

Encroachments occurring prior to the date upon which the States approved this policy document, but after 12th June 2015, will be dealt with as follows –

- (1) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.
- (2) Interfering encroachments will be required to be removed and the foreshore restored to its prior state at the cost of the encroaching party.
- (3) Non-interfering encroachments, which are not minor encroachments, may at the discretion of the Minister be permitted to remain subject to such reasonable conditions as he may specify in a licence agreement, including the payment of reasonable compensation.

Encroachments which have occurred prior to 12th June 2015 (historic encroachments) will be dealt with as follows –

- (1) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.
- (2) Interfering encroachments may be required to be removed and the encroaching party may be required, depending on the particular circumstances of the case (including the length of time that the encroachment has existed), to contribute appropriately to the cost of such removal.
- (3) Non-interfering encroachments, which are not minor encroachments, will be permitted to remain subject to such reasonable conditions as the minister may specify in a licence agreement.

Notwithstanding the above policies, if an encroachment at any time affects any duty of the Minister to repair or improve flood defences pursuant to the Drainage (Jersey) Law 2005, he may deal with the matter as he thinks fit.

End of policy document

REPORT

Encroachments upon the foreshore may be distinguished from other encroachment upon public land in two ways. First, the Crown, as the owner of the foreshore until 2015, adopted a very tolerant attitude towards minor encroachments. When the foreshore was gifted by the Crown to the Public, it was not envisaged that that policy would be reversed. Secondly, the Public itself, as the contract lessee of the foreshore for more than 50 years prior to 2015, acquiesced in that tolerant attitude and did nothing, or very little, to change it.

It was hoped that a revised policy would bring much needed clarity and transparency of the approach now being followed by the Minister's department when dealing with the publicly owned Foreshore. Unfortunately, the Minister's policy tabled in his proposition does not advance the situation one bit and remains ambiguous, confusing, open to interpretation and will give no comfort whatsoever to the public.

The long-awaited Revised Policy was published just days before the debate on my proposition on the Alleged Encroachments to the Foreshore (P.101/2020). Therefore, even after a 3-year wait, the Minister failed to give any credence to the views or concerns that might have been expressed by States Members because he lodged this policy 3 days before my September debate.

There is also a blatant disregard of the views and findings of the Jersey Complaints Panel. The Minister states no less than 3 times in his Report that:- *"the conclusion and recommendation of the review of this aspect is that the current position should stand"*.

The Minister's proposed revised policy is unnecessarily complex, lacks transparency and fails to supply a Map required in Q1 2021, setting out the boundaries of the publicly owned land. It willfully sets up a position where the public are invited to contact the department "to discuss" and have to actively seek clarification from the department in order to establish a defined position over the publicly owned boundary. This defined position relies on whatever is interpreted by the Minister, the Law Officers and the Officers.

The Revised Policy talks about "Default Boundaries" but fails to identify what that is, other than stating in the report that the "default boundary line positions" are set out in the "Master Schedule", but then states that the 'Master Schedule' is exempt from Public disclosure and which 'would be inappropriate to openly publish that'. I ask; why is it inappropriate to publish a definition and a map setting out the location of the boundary position of publicly owned land? Would it not, if agreed with the landowner, be recorded in the Public Registry?

The Appendix and Revised Policy defines Encroachment as "the unauthorised and unlawful entering upon the land, property, or the rights of another party including title encroachments" but fails to identify, or even attempt to identify, where that boundary line will be other than stating "that the default boundary line positions are the markers at which JPH will recommend that boundaries are ratified with adjoining property owners,...." Therefore, JPH hold members of the public and people wishing to transact on a property 'over a barrel'. They are required to either agree to the Officers recommendation and pay up or they don't transact.

The Appendix and Revised Policy talks about Historic, New/Recent Encroachments being more or less than 10 years but fails to put a date from which the 10-year mark is to be determined.

In the Preamble in the Minister's Appendix, the principles behind the policy are restated as 'ensuring best value is realised'. This is inappropriate in certain circumstances, as was demonstrated in the Jersey Complaints Panel's findings. This stance in some cases is contrary to the approach taken by the Crown, where JPH oversaw transactions, while Planning gave permissions.

It should be noted from the outset that the Minister has all the powers necessary to require the sea defences to be accessed, maintained and kept free of obstructions in the *Drainage (Jersey) Law 2005*.

It is accepted that the transfer of the foreshore to the Public changed the situation, and that the Public is entitled to establish a different policy towards encroachments. That policy should, however, be clear and transparent; it should also reflect the generosity of the Crown and the fact that the transfer of the foreshore and seabed was made with a different objective, namely renewable energy projects, in mind.

I recommend my amendments and amended policy to the Assembly.

Financial and manpower implications

As suggested by the Minister in his proposition, it is planned that the revised policy will be implemented from existing budget and manpower resources, although it is proposed that the progress of implementing the policy will be regularly reviewed to determine whether additional resource is required.