

Dear Connétable,

I refer further to your letter of 28 October 2020 seeking views on P.111/2020 Encroachments on the Foreshore: Revised Policy lodged by the Minister for Infrastructure.

My primary comment is that what purports to be a revised policy is in reality no such thing. The complaint about the previous policy was in essence that a government department or entity should not conduct itself as might a rapacious property developer in the private sector, but should engage with the public in a sympathetic and fair-minded way befitting a government elected to serve the people. That is not to suggest that encroachers over the foreshore should be allowed to ride roughshod over public rights or interfere in any way with sea defences. However, Jersey Property Holdings (JPH) should have regard to the special circumstances affecting the foreshore, namely its history and the general approach over many centuries of the Crown, the previous owner.

The essential problem has been that JPH saw its duty as being to recover for the Public the maximum commercial benefit which could be obtained from any person who had, or might, have encroached upon the foreshore. They took literally a mandate from the previous Minister whose statement to the States on 9 November 2006 indicated that JPH "should **extract the optimum benefit** from property assets", which did not of course at that time include the foreshore. The Minister's report shows that nothing in that respect is to change. He states (at para (ii)) that "if an owner is selling his seafront property and the buyer is unwilling to accept the uncertainty of a foreshore encroachment, leading to the Public being requested to resolve the matter, then it seems fair to JPH that the value of the land should be realised". I observe, *en passant*, that it is the Minister's view which counts, but I assume that he shares the view of JPH. The revised Policy states that a main principle is that "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...**" The value of the land is to be realised by the calculations of professional valuers as if an area of sand on the foreshore were a piece of terrain in St Helier to be built over for some commercial purpose.

The Minister graciously concedes that the length of time that an encroachment has existed is a relevant factor. The professional valuation will remain the starting point, but in the case of historic encroachments it will be "subject to a reduction in the price to reflect the period for which the historic encroachment has existed". What that reduction might be is not made clear. If there is a sliding scale, it has not been published. The facts that an owner may have obtained the consent of the Crown, and obtained planning permission for steps on to the beach, are irrelevant. The "fair and proper price" is still to be exacted for the privilege of allowing the steps to remain.

In my view this is an unacceptable way for a government department to treat members of the public.

It is axiomatic that as a general policy the Public should not tolerate encroachments on public land. Encroachments upon the foreshore are, however, different. They should be distinguished from other encroachments on public land for three reasons. First, The Crown, as owner of the foreshore for centuries until 2015, adopted a very tolerant attitude to most encroachments. When the foreshore was gifted to the Public, it was not envisaged that that policy would be reversed. The contract of gift contained the following clause -

"That any right of access or of exploitation exercised as a matter of longstanding habitual and recognised custom by the general public of the Island or by any member thereof shall be and remain unaffected by this contract of gift cession and transfer."

Of course an astute lawyer might argue that encroachments do not give rise to any legal rights. But if the clause was only intended to refer to strictly legal rights, it was otiose and unnecessary. Such rights could be enforced in any event. The spirit of the clause is clear. People who have done things as a matter of "longstanding ... custom" should be "unaffected by this contract of gift". Owners who have had steps down to the beach for decades should not have a "fair and proper price" extracted from them.

Secondly, the Public itself, as the contract lessee of the foreshore for more than 50 years, acquiesced in the tolerant attitude of the Crown, and did little, if anything, to change it until the Public acquired the foreshore in 2015.

Thirdly, the Public was the beneficiary of a considerable act of generosity by the Crown. It seems churlish in the extreme to take advantage of that generosity by extracting compensation for encroachments approved or tolerated by the Crown when the purpose of the gift was actually to make possible renewable energy projects on the seabed.

I have thought deeply about how the "revised" Policy attached to the Minister's report might be amended to reflect fairness between the Public and individual members of the public. It is difficult. The Policy is too long and complicated, and not easy to understand. It is the expression of a determination not to change direction. It is clear that the "default boundary line" which the Minister has drawn up (but which for reasons that do not stand up in law he will not share with members of the States or unfortunate owners of foreshore properties), is to be forced upon such owners whether they like it or not. They will only be able to reach agreement on the boundary if they pay "the fair and proper price" and agree to ratify the "default boundary line". Landowners will be held over a barrel, as happened to the two complainants to the Complaints Board, and only the very rich are likely to have the time and the will to challenge the Minister in court. Again *en passant*, I hope that aggrieved landowners will know that they can apply to the court in an application for judicial review for a "protective costs order" which would protect them against at least some legal costs.

If I were drafting a policy for the Minister, it would, using the definitions employed in the document, contain the following principles.

- (1) Encroachments occurring after approval of the Policy by the States should be required to be removed and the foreshore restored to its prior state at the expense of the encroaching party.
- (2) Encroachments occurring prior to approval of the Policy but after 1st January 2010, should be dealt with as follows -
  - (a) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.
  - (b) Interfering encroachments will be required to be removed and the foreshore restored to its prior state at the expense of the encroaching party.
  - (c) 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.
- (3) Encroachments which have occurred prior to 1st January 2010 (historic encroachments) should be dealt with as follows -
  - (a) Minor encroachments will be permitted to remain subject to such reasonable conditions as the Minister may specify in a licence agreement.
  - (b) 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.

(c) 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.

(4) 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.

A revised policy on those lines would, in my opinion, be fair and reasonable and could be easily drafted. No public property would be "given away" to individual landowners. The policy could be short, comprehensible and flexible, taking account of the many different circumstances in which encroachments have occurred. There is no need for an expensive crusade against landowners whose properties border the foreshore. Boundary problems can be negotiated and resolved as they arise. The Minister's proposed revised policy is shameful. It pits the unbridled power of the state against individual members of the public. The Minister's way may be how things would be done in England. In Jersey we have a more pragmatic way of approaching these problems, respecting our customs and traditions, as the Crown has done over the centuries.

I am sorry that it has not been possible to get this submission to you sooner. I have no objection to its being placed in the public domain.

Kind regards,

Philip Bailhache

SIR PHILIP BAILHACHE