



Environment, Housing and Infrastructure Scrutiny Panel

Foreshore Encroachment Policy Review

Witness: The Deputy of Grouville and Sir Philip Bailhache

Tuesday, 8th December 2020

Panel:

Connétable M.K. Jackson of St. Brelade (Chair)

Connétable J.E. Le Maistre of Grouville

Connétable S.A. Le Sueur-Rennard of St. Saviour

Witnesses:

Sir Philip Bailhache

Deputy C.F. Labey of Grouville

[14:07]

Connétable M.K. Jackson of St. Brelade (Chair):

I welcome Sir Philip Bailhache and Deputy Carolyn Labey to the Environment, Housing and Infrastructure Scrutiny Panel's Foreshore Encroachment Review. I will introduce myself, Constable Mike Jackson and Connétable John Le Maistre of Grouville as panel members. If I may commence, Deputy, by asking if you will be able to summarise the concerns or issues regarding the foreshore and the policies that have been highlighted to you through your constituents.

Deputy C.F. Labey of Grouville:

Yes, well, as you know, I took a proposition to the States in September having been working with 2 constituents for 3 years and being fined - well, I call them fines for want of a better word - they had

been fined amounts and they felt these were unfair because at the time there was not a policy in place, the time the fines were issued, and I advised them to take their complaints to the Jersey Complaints Panel, which they did. They had to put their bundles together. It was a lot of work. They were seen by the panel and the panel issued a report, I think, in 2018. I think it was April 2018 the report was issued and that report felt that they had been treated in a unfair manner. That was predominantly our concerns in that there was no policy so people did not know where they stood and they would get a tap on their shoulder when they came to sell their property and they had to go through Property Holdings, who would determine how much they should or should not be fined for these alleged encroachments. So it was the unfairness, the inequity, the lack of transparency. The findings of the report came out very, very sympathetic to what had happened. The Minister, when he took over in May, said that he would then look at the issue and he has been looking at the issue, he has responded. There are lot of comments that were made by the Complaints Panel that received a “no comment” from the Minister in response and I have been asking for revised policies from that time. Nothing had been forthcoming and so I felt I was left with no other alternative other than to lodge proposition, which I did, which we debated in the autumn. Ironically 3 days before we were due to debate my proposition, lo and behold, a revised policy drops on States Members’ doorsteps for debate later on in the autumn, which is now, I understand it, going to be debated in January. I felt that was unfortunate timing because as we were going to have the debate anyway the least the Minister could have done was to listen to States Members’ concerns and possibly take on board the comments made throughout the debate so that he could then take that back and come forward finally with a revised policy. I think I made all my other comments about how I felt about this being Crown land and then not 62 days after it was gifted to the people of Jersey did Property Holdings go about in, what has got to said, a fairly heavy-handed, indiscriminate manner, fining people. Yes, so the proposition that I lodged asked for several things like maps and dates so that the public can be clear as to when they come to buy or sell a property along the foreshore what it is, what they own and they do not have to sit there in fear of selling their property because they do not know if the heavy hand of Property Holdings will come along and fine them.

The Connétable of St. Brelade:

Indeed. Obviously you are raising concerns about the fairness of the current policy and its application, we get the impression the revised policy proposes to provide a fairer approach. In your view do you believe the revised policy could deliver a fairer approach in contrast to what we have at present, do you think it would allay the concerns of your constituents and how might that be?

The Deputy of Grouville:

No, I do not. Like I say, I think it is very unfortunate that the Minister did not have the courtesy to wait for the States debate so he could consider all my concerns and my fellow States Members’ concerns about the policy. The new policy is very complex and difficult, I do not think it gives the

transparency required. It talks about things like a master schedule and feels that it would be in appropriate to openly publish that. How is that open and transparent? It then talks about default boundary but nobody knows where that is. It refuses to publish a map even a map that the applicants, who are about to sell their property, are going from to sell. I see the new policy as not the way forward.

[14:15]

It is very unclear and in actual fact the conclusion in the report that goes with it, and I quote: "The conclusion and recommendation of the review of this aspect is that the current position should stand." They are unrepentant about it, in which case why are they bringing forward a revised policy if the current position should stand, and what is that current position? Is that the current position that they were going from before a policy was laid down after we received the gift, that Property Holdings should extract the maximum amount ... I am not sure of the wording, is it: "The maximum amount of value from the public"?

The Connétable of St. Brelade:

Indeed. Sir Philip, in terms of your understanding of the history of the foreshore and its transfer of ownership from the Crown to the public of Jersey, do you consider the revised policy to be a fair approach in dealing with these encroachment matters?

Sir Philip Bailhache:

No, I do not, Constable. Perhaps I could just first of all express my gratitude to the Deputy of Grouville for allowing me to share her computer because my technology at home, I am afraid, is not up to it so that is why I am sitting next to her here in Grouville. I think the real problem with the revised policy is that it is not a revised policy. It is adopting the very same approach that the Jersey Property Holdings have adopted in the last 2 to 3 years. The reason for that is, I think to be fair to J.P.H. (Jersey Property Holdings), that they believe that they are operating under a political mandate which was given by the Minister for Infrastructure some time ago in 2016, which was that - and I quote again - "J.P.H. should extract the optimum benefit from property assets." When one looks at the face of those words one can well understand that J.P.H. might think that their duty is to extract from landowners who may or may not have encroached upon the foreshore the maximum amount of money that they can. I do not think that that is the proper approach. It is the approach which is to be found again in the revised policy. The revised policy, if I may again quote, states: "A main principle of it is that J.P.H. 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." That is why I expect that J.P.H. feels under a mandate to adopt what is really a commercial property developer's approach in its dealings with the public of Jersey. That does not seem to me to be right.

Connétable J.M. Le Maistre of Grouville:

I have a question and Sir Philip might well know more about this than me, have the Crown not always gone into agreements with people when it comes to disputes over the foreshore and where it ends and begins? In other words, maybe in a much less heavy-handed way, they have come to agreements and there has been considerations when a property has indeed encroached and that has been accepted, and that has been going on for some time so that Property Holdings ... they may well be doing it in a far more heavy-handed way, they are not really doing anything different to what has been happening prior to the States or the public owning the foreshore.

Sir Philip Bailhache:

I am not sure that I would accept that, Connétable, I think that there has been a difference of approach which is embodied in the 2006 approach to the management of land in general, which I quoted a few moments ago. I suppose I am not clear how far back you are intending to go but certainly when I was Receiver General of Her Majesty's Property, some 25 [sic]¹ years ago, the approach that the Crown adopted towards encroachment was a very gentle one. Certainly if there was a public interest in ensuring that an encroachment should be removed, and I remember one at Petite Portelet behind Gorey Castle, then the Crown would do something about it. But in other respects, if people wished to put down steps on to the beach, which cause no harm to anybody else, then the Crown generally tolerated that kind of encroachment.

The Connétable of Grouville:

When it came to larger intrusions on to Crown land, did the Crown in your time and subsequently sell bits of land because it accepted that somebody built on it and it was unpractical to move it and then you came to ... there was a consideration involved, it was not just a question of: "Well, you have been there a long time, you can stay there." Did you occasionally come across instances where you would sell pieces of land?

Sir Philip Bailhache:

I do not recall ever doing that, I must say, but it is possible that happened. I think in all respects it is important to consider what is in the public interest. That is really the key to it and if the public interest requires that an encroachment be removed then obviously the encroachment should be removed. If the encroachment does not really affect adversely anybody else then the approach, it seems to me, the proper approach is a generally tolerant one because we are a small community and that is the way we behave.

The Connétable of St. Brelade:

¹ Subsequent to the hearing the witness has advised this was 35 (not 25)

Sir Philip, we are aware, for example, of clause 2 in the deed of transfer when the foreshore was gifted from the Crown to the public, which states 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 any member thereof shall be and remain unaffected by this contract of gift cessation and transfer." What is your understanding and interpretation of this clause? That strikes me as being aligned with what you have just said.

Sir Philip Bailhache:

Yes, my interpretation of it, which may be different from the legal advice which the Minister has received on it, is that sleeping dogs should be left to lie. Assuming that there is no contrary public interest and that if some encroachment has taken place, which has been there for a long time, then the contract envisaged that that encroachment should remain, not that the landowner should be pursued remorselessly and made to pay up a large sum of money in order to allow whatever it was that encroached to remain.

The Connétable of St. Brelade:

So you agree it is at odds with the approach being taken or that has been taken over the past year or 2 to apply this, you suggested, rapacious approach retrospectively?

Sir Philip Bailhache:

Yes, I can understand that a lawyer might very well take the view that that clause only applies to legal rights and almost by definition an encroachment does not give you a legal right. I do not think that is why the clause was put in the contract. The clause was put in the contract, as I say, to encourage the principle that sleeping dogs should be left to lie.

The Deputy of Grouville:

How far do you take back these alleged encroachments? While the Crown gifted it to the people of Jersey on 12th June 2015, if we are going to take encroachments back before then, as Property Holdings are indicating that is what they are going to do or may do, how far back do we go? That is another reason why I asked for a date and a map in my proposition, P.6 and the subsequent one. I put a lot of photographs at the back of my proposition originally just to demonstrate where is this boundary. How are we deeming or where are we deeming these encroachments to be from? I think the Constable of Grouville asked the question, where is the hightide mark? With rising sea levels that is going to be different in time, is it not?

The Connétable of Grouville:

I was just looking at Sir Philip's submission to us which we have only just received. I was looking at encroachments that have happened before the ... this is a suggested policy, encroachments prior to the

approval of the policy but after January 10th [sic]² should be dealt with as follows. Then interfering encroachments will be required to be removed and the foreshore restored to its prior state at the expense of the encroaching party. Some of those are substantial parts of buildings, balconies and things like that. Should they be removed or would it be reasonable for the department to come to some kind of consideration with those people?

Sir Philip Bailhache:

There are a number of considerations to bear in mind. Firstly, how long has that encroachment been in position? Did the landowner apply to the Planning Department for permission to do that particular piece of building? Was the Crown or the Receiver General asked for permission or told about what was proposed to take place? All these things are relevant, it seems to me, to the approach that one ought to take to an encroachment of that kind. Then one comes to the present. Is the encroachment ... I do not know whether there are any such encroachments, Constable, but you may be right, if part of a balcony does extend over the foreshore in such a position one would have to ask whether there was any public interest that required that to be removed. If there was, if it was detrimental to sea defences, for example, then, yes, perhaps it should be removed. But I think it is quite difficult to lay down any hard and fast rules about these things because there are so many different circumstances that apply to different types of encroachment.

The Connétable of Grouville:

The example I gave was one that was given to us by officers at the department when we had a similar meeting. There are other examples. Another example is people have got a patio leading right up to the sea wall. Well, nobody really minds that they have got a patio there but it is not their property and some kind of agreement would need to be agreed and it may be that selling that bit of the patio would be desirable for both parties.

Sir Philip Bailhache:

It may be. What I think is the position is that there ought to be a reasonable and moderate approach to all these questions. What I did [sic]³ think should happen is that there should be an aggressive approach by Jersey Property Holdings which requires every single landowner who may or may not have encroached upon the foreshore to justify themselves and pay up a relatively large sum of money if it is found that there was an encroachment that had taken place.

The Deputy of Grouville:

But to be fair to everyone concerned in some of the photographs I have attached in the appendix it has the high tide level coming up to just in front of the Royal Yacht. So all of the encroachments that the States of Jersey themselves have made, for example on the waterfront, should the States of Jersey or

² Subsequent to the hearing the witness has corrected this to January 2010 (not 10th)

³ Subsequent to the hearing the witness has corrected this to “do not” (not did)

should Property Holdings be looking to Ports of Jersey to compensate us for those encroachments? Should the eastern railway line ... should Property Holdings being looking to get some recompense for that? Where does it start and where does it finish? Again, that is the reason I asked for a map and a date. How far back are we meant to go?

[14:30]

The Connétable of St. Brelade:

Sir Philip, what is your understanding and views on the difficulty of being able to determine where the foreshore boundary line would be?

Sir Philip Bailhache:

I think it is sometimes difficult because, as we know and as the Deputy of Grouville has just said, the boundary line has moved over the years as a result of land reclamation and, in certain circumstances, tide levels rising. The end of the foreshore is quite difficult sometimes to determine. That, I think, is one of the concerns about the revised policy which says that Jersey Property Holdings has drawn up a putative boundary line which it wants to impose upon every landowner who asks them to sort out the boundary. These things ought to be subject to negotiation but the revised policy makes it clear that the States is not going to negotiate, the States is going to say: "This is our boundary line, you must agree to that and if you do not we are not going to give you a contract to ratify the boundary."

The Connétable of St. Brelade:

Deputy, can you help us to understand the extent of encroachment issues that may exist in your parish? I know you have several. What impact does that have within the parish and for your constituents? You have obviously heard from those who have been affected but are the concerns shared by others round and about?

The Deputy of Grouville:

The 2 people that approached me were in St. Clement. I have not really had any particular feedback from people within encroachments in my parish, however I have had people contact me because they are concerned and they are worried about selling their home. A couple were thinking about downsizing, for example, and they were very nervous about putting their house on the market because they did not know whether they were going to be approached by Property Holdings and asked for a sum of money and it has made them very nervous. I think it has, or it could have, an impact on the collection of stamp duties in this regard because people ... if they do not know, if policies are not open, transparent and understandable then I think people will just choose to stay put.

The Connétable of St. Brelade:

Given we understand there are some 400 properties affected around the Island, in your view and experiences relating to your constituents or adjacent ones who may have been affected by the policy, do

you believe that people generally have a clear understanding of what foreshore encroachment is and the reasons for it.

The Deputy of Grouville:

I do not think they have a clue but possibly those people who do own property on the coastline, I think it is a reasonable assumption that they will have an idea. In one of the constituent's cases he did not know that his property had encroached until such time as he came to sell it. He put it on the market and then was approached by Property Holdings because apparently they are tipped off about these sort of things from estate agents. So then they get contacted, which does not seem to me to be a very open and fair way. Certainly the revised the policy will not make things, in my opinion, any clearer or open or transparent to members of the public who are trying to understand what it means and where they stand.

The Connétable of St. Brelade:

Given it is the intention of the revised policy that each foreshore encroachment occurrence would be considered, as they suggest to us, on its own merits, are you aware of any of your constituents having been contacted by Property Holdings, either directly or via estate agents, to discuss their individual circumstances and concerns. If so, have you any experience of that?

The Deputy of Grouville:

No, I do not. I have knowledge that a certain property has been seeking planning permission and the planners have told them: "We cannot make any decision until this issue has been resolved."

The Connétable of Grouville:

If you come to sell a house that may or may not be affected by this and your conveyancer says: "We are not sure of the boundary" at that stage you surely have to establish a boundary with the Crown and it may be that you want more of the land than perhaps ... or you may need more of the land than is yours. Under that circumstances there is no reason why a commercial consideration would not be given if the now public ... generally speaking, if you are coming to sell a house, you do need to establish a boundary in any case. It did not happen in the past, people just accepted you were on the foreshore but I think in present times things have got a lot tighter when it comes to conveyancing.

The Deputy of Grouville:

I do not believe that just because you have a property on the beachfront that gives you the right to expand and encroach on the foreshore. I do not think that at all. I believe that we need an open, fair and transparent way. You were talking about boundaries there. Who is determining these boundaries, because the way things lie at the moment and with this proposed new policy, the only people that can determine the boundary are Property Holdings, and that cannot be right either.

The Connétable of St. Brelade:

Can I just pick up on that? One wonders whether there should be, perhaps, an advisory board. An appeals process is difficult because by the time you get to appeal it is almost too late. But if there were to be an advisory board so that the poor individual was not immediately pitched into court and with the associated costs, I wonder whether something of that nature as a filtering mechanism would help? Do you have a view on that?

The Deputy of Grouville:

I thought - and Sir Philip would be able to advise better than this - there was a public registry of land, obviously by dint of the name, open to the public, which is why I was pushing for a map so that you do not have to go seeking out information from Property Holdings when you come to sell your property. It should be open but in their revised policy they talk about this master schedule and as I read at the beginning it was not going to be put in the public domain. Why not?

The Connétable of St. Brelade:

We shall have to ask the question. It seems that there are so many variations with regard to the sea wall in terms of its structure and construction, which has an effect once again on the space which may be required to repair it. Sir Philip, I would be interested to hear your views on landowners being granted planning permission that might have resulted in an encroachment. Going back to the Minister or department's view, it seemed to be that the landowner has a right or duty to declare their landownership and therefore the onus is on them to declare they own the land before they seek planning permission. Do you consider that is a fair stance to take or, as the Deputy alluded to earlier on, should it be batted back to a policy as such? Should planning be involved at this stage?

Sir Philip Bailhache:

Obviously it is correct to say that it is up to landowner to establish what his boundary is and to find that out before he makes an application for planning permission. But what has quite often happened, I think, is that a landowner knows that there either was an encroachment or there might be an encroachment upon Crown land and before approaching the Planning Department for planning permission has approached the Crown to say: "This is what I am proposing to do, is it okay with you?" The Crown has, mostly it seems, acquiesced and then the landowner has gone on to make his application. I think what is unfair is to leave all that out of account when one is in dispute about where the boundary may lie. What has been happening, as we saw with the complaints to the Complaints Board, is that a view has been taken by Jersey Property Holdings as to where the boundary line was. It may or may not have been the right view but a view was taken and the landowner was told: "If you want us to be party to a contract in order to ratify the boundary then you must agree what we say the boundary is and you must also pay compensation." That, I think, goes too far. It is taking advantage of a powerful position to exploit the weakness of landowners bordering the foreshore.

The Connétable of St. Brelade:

Indeed, we are also aware of at least once instance - you may be too - where planning permission was granted for works and permission given by Her Majesty's Receiver General, who is obviously a joint signatory on the planning application form, prior to the transfer of the foreshore from the Crown to the public of Jersey. However, subsequent to this and following the deed of transfer of the foreshore the landowner was then charged compensation for what was deemed an encroachment. What would your views be on this approach that was taken?

Sir Philip Bailhache:

I do not know whether you are referring to one of the complaints that went to the Complaints Board but I personally thought that the treatment meted out to those 2 individuals was extremely unfair.

The Connétable of St. Brelade:

Indeed. Deputy, what is your view regarding one of the primary aspects for a review of this policy to ensure essential maintenance was possible and not inhibited by any encroachments? For example, as I alluded to earlier on, the maintenance of the sea wall or particularly the back of it.

The Deputy of Grouville:

I believe there are policies in place. There is the sea defences policy which gives the Minister the right to maintain the sea walls and gain access in order to maintain them. I do not see that this ... obviously if there are encroachments that impinge on that and his ability to do that then he must take issue.

The Connétable of St. Brelade:

Yes. There are some encroachments that are patently on the sea wall and probably quite longstanding. Would you imagine that those encroachments may have to be removed? Given that some of those sea walls are pretty well established and have not moved in probably 100 years, is there justification for having them removed because they are on the sea wall? What would be your views on that?

The Deputy of Grouville:

I think it would depend on the public interest and how the public would gain from its removal. If the public gains from its removal - and I do not mean financially, I mean so that the maintenance team can access a sea wall - then that is obviously a consideration.

The Connétable of St. Brelade:

It has been suggested that the public have lost out in some areas by loss of use of, shall we say, the coastal footpaths. Has that come to light in your area, in Grouville?

The Deputy of Grouville:

I think would it not be lovely if we had a promenade like we have in Grouville that goes up to the Martello Tower and around it where the public can walk all the way around the Island.

[14:45]

That is a lovely notion and we have it for the best part of Grouville here but then we get into St. Clement and it is not necessarily the case. However, up to Pontac there is an area, La Rocque to Pontac, that owned by the owners of the properties. The Crown gifted it to those properties, those individual property owners at the time. That area does not fall under the Property Holdings remit.

The Connétable of St. Brelade:

Are you aware of any transactions that have needed to be halted or any transaction issues or disruptions caused resultant of the revised policy development process at this stage? Are there any on hold that you are aware of?

The Deputy of Grouville:

Yes.

The Connétable of St. Brelade:

Yes, so an early resolution will be to everyone's interest. I would just like to ask, clearly you have been focused on issues in your parish but I wonder if you have any experience of encroachment issues on other parts of the Island? I know in P.101 you alluded to others throughout the Island. Have any been brought to your attention as a result of P.101 being lodged?

The Deputy of Grouville:

No. No, not of 101. Not of my proposition.

The Connétable of St. Brelade:

I think what led me to mentioning that was closer to home for me we have old properties on the foreshore at St. Aubin, historically probably going back 400, 500 years, and the property owners there are concerned as the status of their boundaries, once again, and almost the absence of sea wall. They have the stakes in the beach which were affording protection to their boundary walls, which had fallen into disrepair so I had planned to work on Property Holdings in that respect as well. I do not know if any other panel members have any further questions. John, anything from you?

The Connétable of Grouville:

Just a question about if a new policy is introduced - well, it will be - and if it is less severe, what happens to the people who have been dealt with in the last 7 or 8 years, up to 10 years? Obviously 2 people have complained, what redress do they get? I suspect, although I do not know for certain, there will be other people who have come to agreements happily or have been quite happy with the way they have been treated but there may be others who have not complained who perhaps had reason to complain. How would you expect them to be treated if a new revised policy came through that was a little bit kinder, shall I say?

Sir Philip Bailhache:

Again, I think it depends upon the circumstances but if somebody has been dealt with very harshly and it is thought that the treatment of that person would not have taken place under a new and more moderate policy then it seems to me that there are pretty good grounds for the making of an ex gratia payment to put matters right and to restore part or perhaps the whole of any compensation that had been paid. It is difficult to lay down any hard and fast rules but if the policy has changed and people were forced to pay compensation under a policy that has been rejected, then it seems to me that the States has a moral obligation to do something about it.

The Deputy of Grouville:

John, I should say as well that in my proposition I brought forward I was asking that the people that had taken their complaint through the Jersey Complaints Board, and depending on their findings, because that is their recourse supposedly, if the Jersey Complaints Board found their treatment unreasonable then it would not be unreasonable to assume that they could ... well, whatever the findings are. If the Jersey Complaints Board decided that they should be recompensed or not had to undergo the fines of Property Holdings then that be put right. Because that is the only form of appeal at the moment.

The Connétable of Grouville:

My understanding of the Complaint Board's findings is they found that Property Holdings acted badly but within the law. I do not like the idea that they have behaved badly but if they have behaved within the law technically there is nothing to pay back.

Sir Philip Bailhache:

I think that must be right, particularly if a property owner has made an agreement with the Jersey Property Holdings and gone to court to settle the boundary on the payment of a certain sum of money. Then, legally, that certainly binds all the parties. But what the Deputy and I are saying is that if there has been an unfairness then it is open to Jersey Property Holdings or to the Minister to contemplate an ex-gratia payment.

The Connétable of Grouville:

It may appear from my questioning I do not share your view, but I do think the Government should always behave well and properly. If they behave badly then maybe they should look at some kind of repayment to people they have treated badly.

The Connétable of St. Brelade:

Sadie, have you got any comments to make?

Connétable S.A. Le Sueur-Rennard of St. Saviour:

No, thank you very much, but a very interesting take on this because this is very difficult to grasp, to be honest with you. Thank you both very much.

The Connétable of St. Brelade:

Sir Philip, the final part of your submission where you suggested in Jersey we have a more pragmatic way of approaching these problems, respecting our customs and traditions as the Crown has done over centuries is very pertinent. I do not know if you or the Deputy have anything further to add?

Sir Philip Bailhache:

Not from me, Constable, thank you very much. It has been most interesting to have a discussion with you. I am sorry it could not be face to face but there we are.

The Deputy of Grouville:

I am probably going to seek to make an amendment to what the Minister has lodged and his proposed revised policy, as you know, which Sir Philip has been helping me with because I do not feel that what the Minister for Infrastructure is proposing as a revised policy gets us any further forward. What he has tabled is incredibly complex and continues to be secretive with master schedules, default boundaries and not specifying what they are. I will lodge an amendment beforehand and seek to revise his policy.

The Connétable of St. Brelade:

Thank you very much for speaking to us, we appreciate it. We will no doubt be speaking further on the matter. Thanks very much and I will close the meeting.

[14:51]