



Environment, Housing and Infrastructure Scrutiny

Panel

Foreshore Encroachment Policy Review Public

Hearing

[extracted from transcript of Quarterly Hearing]

Witness: The Minister for Infrastructure

Tuesday, 27th October 2020

Panel:

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

Deputy I. Gardiner of St. Helier

Deputy K.F. Morel of St. Lawrence

Connétable J.E. Le Maistre of Grouville

Witnesses:

Deputy K.C. Lewis of St. Saviour - The Minister for Infrastructure

Mr. A. Scate - Acting Director General, Infrastructure, Housing and Environment

Mr. T. Daniels - Director of Property, Jersey Property Holdings

Mr. J. Littlewood - Head of Finance Business Partnering, Infrastructure, Housing and Environment

Mr. T. Dodd - Director, Transport

Mr. R. Fauvel – Head of Solid Waste and Recovery

Mr. H. Wilson - Principal Engineer

[11:32]

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

Good morning, everyone. We will kick off immediately by asking if you can outline how, in your view, the proposed foreshore encroachment revised policy provides a more fair and pragmatic approach when handling foreshore encroachment matters?

The Minister for Infrastructure:

Yes, thank you, Chair. As you know, P.111 has been submitted and yourself and your panel have requested you would like to have a look at it, which obviously we are more than happy to agree to. So this will be becoming before the States early in the New Year. Right, to kick off, Tim, would you like to take this?

Director of Property, Jersey Property Holdings:

Thank you, Minister. The policy itself is divided into 4 general sections, the first of which establishes the principle of a proactive approach and the historical approach of J.P.H. (Jersey Property Holdings) has always been - and will continue to be - to engage with the affected individuals and to make sure that other than a blanket settlement that the specific incidence and context of their particular case is considered, and that the challenges that are faced are resolved in light of the specifics of the individual cases. So the first part of the policy is a proactive and pragmatic engagement. The second part covers the identification early of new or recent encroachments and establishes the requirement to settle those and to make sure that the encroachment is again resolved. The third part of the policy looks to historic encroachments and I think it is obvious that these are the areas that are particularly challenging. But, again, there are a number of methodologies that could be sought from removal of the encroachment to a financial or legal regularisation of any encroachment to make sure that both the landowner and the public have the outcome that is desired. Then the final part of the policy looks at minor encroachments and, again, establishes that there will be a pragmatic approach to how these are solved. That may be wooden steps down over the breakwater or opening of a gate on to the public foreshore, and these will be considered in their own merits and a resolution agreed.

The Connétable of St. Brelade:

Tim, we all know what foreshore encroachment means but for those listening in, could you just clarify what it means because it does cover, shall we say, a multitude of sins, if you could describe them as such?

Director of Property, Jersey Property Holdings:

Yes, absolutely. Well, the foreshore is defined in law as the strip of land that is lying between the low water mark of the lowest tide of the year and the high water mark of the highest tide of the year, and the foreshore originally belonged to the Crown until it was gifted in its entirety to the public of the Island in 2015. The high water mark at the highest tide of the year represents the boundary

between the publicly owned foreshore and the private properties. There are a number of private properties, particularly in the south and south-east corner of the Island to which that applies. The sea wall, which was constructed, was generally constructed in front of the high water mark and so that means that there is a strip of land that is publicly owned, that is behind the sea wall and in some circumstances has been included in individual's properties, either through a commission or a lack of knowledge of the existence of that line. So there has historically been uncertainty about the precise location. It can be perhaps brought about by the shifting sands or lack of record of where the high water mark was and so a study was undertaken recently to determine exactly where that line was. That has been done by a reference to historical documents. The study had been undertaken by, in the main, the Law Officers' Department and has required an exhaustive research of historical documents. So an encroachment occurs, as I said, where either wittingly or unwittingly a landowner uses or occupies, or has access to, or has advantage of that bit of the public land behind the sea wall that was transferred from the Crown to the public of the Island in 2015.

The Connétable of St. Brelade:

Thank you. Regarding the current policy, concerns were raised about its fairness and its application. Perhaps, Minister, you could outline the main aspects within the revised policy that would ensure a fairer approach is achievable with consideration to aspects that perhaps are absent in the current policy? Essentially what is going to be done differently to allay concerns regarding the current policy and to achieve a more fair-minded approach when handling situations involving these encroachment incidents. I am sure you are keen to be as fair to the public as anyone.

The Minister for Infrastructure:

This is something obviously we have inherited but the land transactions, if you like, were going on when the property belonged to the Crown. So transactions were taking place in those days. But I would like to clear up some misinformation that is out there that obviously Property Holdings have been accused of pursuing people when, in fact, on the contrary, Property Holdings have been perceived ... this is normally when a house or property is being transacted and, as I have said before, any lawyer or solicitor worth their salt would know exactly where the boundaries are. Normally when a house is being transacted the new buyer will contact a lawyer and the lawyer will come along and look at the plans and look at the whole site. If they know what they are doing, which most of them do, they will say: "I think you need to clarify your boundary because this area over here does not look right." It is at that point that Property Holdings are contacted and that is when these problems come to light.

The Connétable of St. Brelade:

Is it the intention of the policy that each foreshore encroachment account would be considered on its own merit and, if so, what process is in place to ensure that it is in fact the case?

The Minister for Infrastructure:

If I may defer to Tim again.

Director of Property, Jersey Property Holdings:

It is absolutely the case each individual encroachment would be considered. There are a number of types of encroachment so we have got an interfering encroachment, a major encroachment that has a potentially material impact on the Department for Infrastructure's ability to maintain the sea wall or the ability of the public to access the foreshore. In those circumstances if the encroachment cannot be removed then a legal process will have to be determined to understand what the value of that encroachment might be and then for a settlement, acknowledging the value to be agreed on between the landowner and the public. There are, as I mentioned earlier, non-interfering encroachments which could be a sort of gate opening or stairs that are lying on but not interfering with the fabric of the sea wall. In those circumstances if there is no material gain then a legal regularisation could occur, again to the satisfaction of both the landowner and the public, which would allow the situation to be recorded in law and the ownership to be determined.

The Connétable of St. Brelade:

Regarding the complaints process, is there a complaints system in place that could be followed if a property owner disagreed with the outcome of an evaluation? If so, would this process be made easily accessible to the public?

Director of Property, Jersey Property Holdings:

Yes, I think that is one area that we need to make sure is identified more completely in the forthcoming policy and I think that there is a process in law. The value of said interfering encroachment was to be established by an Institute of Chartered Surveyors valuer and that would be the basis for the value to be determined. However, I think at the moment it is unclear as to what the actual recourse might be if somebody disagreed with that valuation. We look to the Law Officers to make sure that we get a more detailed and clear understanding of what the recourse might be.

The Connétable of St. Brelade:

The developers may take a commercial view, however regarding the public resolving issues related to land disputes resolution is generally not so simple and they are faced with a concern of risk and cost. Other than using the Complaints Board, are there any options that members of the public may have at the moment in relation to disputes of the nature you suggest?

Director of Property, Jersey Property Holdings:

The disputes would be through the Complaints Board and at the moment that is the only opportunity that we have. But, as I say, I think we need to make sure that there can be a more formal process that is not as dramatic, if you like, or of such a high level so that it will not be daunting to landowners if they feel that they have to enter into a full blown legal process to voice their concerns.

The Connétable of St. Brelade:

Yes, there is always the threat of the States or Government having a bottomless pit of money to defend any actions. I think it is an area, as you say, that does need further consideration. In your report to your amendment to P.101 you asserted that encroachments made predating the current ownership should remain subject to compensation claims due to the conveyancing process that takes place when a property is transacted. It suggests, and I quote: "It would be highly surprising if buyers had no knowledge of the position, for instance the encroachment."

[11:45]

Do you still stand by this view? Do you consider this is a fair assumption to make when dealing with these cases, given that some properties have been in the same family ownership for many, many years and will not have been transacted, shall we say, by the existing generations even? How would you respond to that, Tim?

Director of Property, Jersey Property Holdings:

Again, I think that the foreshore has always been a challenging area and I do think that Jersey lawyers, in particular, are well aware of it as an area that needs particularly close concern, as in any boundary transactions. But you are absolutely right there may well be historical cases where that has not been case. I do think that generally in the more recent epoch and certainly since the transfer of the foreshore from the Crown to the public, that it is clearly very common knowledge that it is an issue. The fact that transactions were undertaken by the Crown again shows the fact that this was in common knowledge prior to 2015, so I do think it is a fair assumption to make that generally the legal profession on the Island would have been aware of challenges and that perhaps it may have been down to individual landowners who took an element of risk perhaps and felt that they were prepared to accept the situation if they felt that they were going to be in possession of the property for a long time and that it would not be an issue if they wanted to sell.

The Connétable of St. Brelade:

Going forward, you can clarify - and this is for the record - that the revised policy will handle these sort of situations in a more robust or formal manner than was the case in the past and that the conveyancing officers within law firms in the Island will be fully aware of what the department are doing?

Director of Property, Jersey Property Holdings:

I believe that law firms are fully aware of the issues and certainly the conveyancing profession as a whole are aware of the challenges.

The Connétable of St. Brelade:

Thank you. The panel is aware that on occasion property owners have received planning consent for alleged encroachments, how will the revised policy deal with situations like this and what work has been undertaken to prevent planning permission from being granted in such situations?

Director of Property, Jersey Property Holdings:

Yes, you are absolutely right. I think that the planners have considered, if you like, the bare bones of the case in the past but certainly we will make sure the Planning Department are now aware that anything in the area of the foreshore must be referred in the first instance to Jersey Property Holdings and, indeed, the Law Officers' Department to make sure that the ownership of areas that are being applied for planning are clearly identified and are as assertions are made.

The Connétable of St. Brelade:

So you would agree that your Minister and Jersey Property Holdings should collaborate with the planning team within the Department for Infrastructure to ensure that we are joined up in this and everybody knows what is going on? Would you agree that needs to be done?

Director of Property, Jersey Property Holdings:

We are definitely joined up and certainly, you are right, we need to make sure that the situation you outlined does not occur in the future.

The Connétable of St. Brelade:

Could I suggest that Property Holdings be a requisite consultee, shall we say, of any planning application that is made for properties with foreshore issues, as are people like drainage and the roads departments? John Le Maistre has a question.

Connétable J.E. Le Maistre of Grouville:

Do you think Andrew Scate might want to just comment on what has been said so far because mine is on the same subject but coming from a slightly different area?

Acting Director General, Infrastructure, Housing and Environment:

I was just going to make the point that it is a legal duty on anyone applying for a planning application to declare the land ownership. So either they are the total owner and they have to sign accordingly

or they get the landowner's permission to make that application. So that is a requirement in our Jersey Planning Law that all our owners have to sign. The starting point is for the person making the application to be very clear around their ownership and then accordingly if they do understand that there is public ownership of part of the site then Property Holdings would need to sign as well.

The Connétable of St. Brelade:

John, anything further on that?

The Connétable of Grouville:

Not on that matter but I would like to ask a question about rights of way that lead - there are certainly quite a few in Grouville, I am assuming there are some in other Parishes - what is their status? They vary, some of them, at the ends of housing estates which are relatively new. Some are longstanding rights of way, some rights of way I understand are rights of way to certain other properties in the area, although they may be owned by one property. What is their status? They all lead out on to the beach so presumably they lead out on to public property or the foreshore that belongs to the public and is there a way that as you go through this process of negotiating agreements with property owners that these rights of way can be established, or not necessarily established but made sure that they are for the use of the public in the future? Deputy Carolyn Labey was asking these questions and certainly some research needs to be done. Maybe this is an opportunity whereby you can agree with property owners that that right of way is kept clear.

Director of Property, Jersey Property Holdings:

Absolutely. I would say generally though the rights of way on to the beach tend to be slips and those common easily defined areas. There are, in certain circumstances, footpaths and lanes that are deemed to be a common right of way but are in private ownership and there is a habitual access that has been achieved in the past that continues to be used but it is not necessarily a public right of way. However, there is a ... one of the requirements from Deputy Labey was to have a map produced to show the public access, public rights of way, on to the beach. We would be very happy to publish that.

The Connétable of St. Brelade:

Picking up on that, Tim, during the States debate on 24th September, it was commented that Jersey did not have a land register and that boundaries are based on histories of past transactions and contracts. In fact it was highlighted that although there are boundary stones on land sometimes these get moved, ultimately identifying boundaries is inevitably a complex system. Could you explain how ownership of land would be determined in establishing default boundary lines and what evidence would be used to determine that?

Director of Property, Jersey Property Holdings:

I will give it a go, Chair, but I am not sure I will do the explanation justice. The Law Officers' Department have spent a lot of time and effort researching this and there is a huge volume of historical data that they consulted to determine these default lines. So it is a legal question and it is one that would deserve a legal response.

The Connétable of St. Brelade:

Thank you. Regarding deliberate versus unintentional encroachments, the panel would imagine this could be an area of concern as ultimately a difference exists between these 2 groups. Would you foresee any complication regarding this and, if so, what measures would be taken to resolve them?

Director of Property, Jersey Property Holdings:

Again, I think that as I outlined at the beginning, our policy, when it is presented, will show that there is a specific requirement for a pragmatic and logical approach to resolving these issues. I think that it will be clear if there is a property that has not changed hands over a couple of generations or that could claim to have a lack of knowledge of an encroachment, in certain circumstances those claims can be quite easily refuted. There is photographic evidence for the majority of ... certainly in the southern and south-eastern corner of the Island. I think that where there is a legitimate claim to lack of understanding and knowledge of encroachment then, of course, that will be dealt with. We have, in the past, applied a sliding scale where there has been a long held encroachment but which settlement has been sought then a reduction of the monetary value or the increase of monetary value of the property has been levied. So, again, in the past we have had that pragmatic and problem solving approach. That is the approach that we will continue to have in the future.

The Connétable of St. Brelade:

The primary aspects for the review of the current policy was to ensure essential maintenance of the sea wall was possible and not inhibited by any encroachment. To date, Minister, are you aware of any foreshore encroachments that have caused issues in relation to the maintenance procedures or the upkeep of Jersey's sea defences?

The Minister for Infrastructure:

Sorry, Chair, we lost you there, could you repeat that, please?

The Connétable of St. Brelade:

It is a long way to St. Brelade. The primary aspect of the review of the current policy was to ensure that essential maintenance was possible not inhibited by any encroachment - this is the maintenance of the sea walls, to date are you aware of any foreshore encroachments that have caused issues in relation to the maintenance procedures or the upkeep of Jersey's coastal defences?

The Minister for Infrastructure:

I am not aware of any serious incidents but obviously there is a 2-fold problem here inasmuch as ... it is very much like the Forth Bridge where the team are constantly maintaining the sea wall. As you are aware from your Parish, Chair, we are increasing the height of some sea walls due to global warming and rising tides. So we may need to raise the wall further around the coast but we will take that under advice. There is also a question of liability should somebody have cut an opening in the sea wall and there is some flooding, and likewise if someone has steps going down to the beach which are not well maintained and was put there without permission and somebody should take a tumble, there would be a question of liability there. But, as Tim said, we are trying to take a pragmatic approach but the sea wall itself is not just sloping out to sea underground but slopes back the other way as well in a bracing motion, if you like, and there may be times when we are having to dig down that side to make some repairs, which is very difficult if someone has built over it.

The Connétable of St. Brelade:

It appears that there have not been any foreshore encroachments causing you difficulties in the maintenance of the sea walls to date. Has anything changed within the revised policy as a result of this, shall we say, non-incident? What provision has been made in the policy that is different from what we already have to ensure that maintenance can take place?

The Minister for Infrastructure:

We did have a major incident a few years ago in St. Clement. The Le Bourg area of the sea wall, there was an area several hundred feet long and it was a relatively new sea wall, I think built in the 1970s or 1980s, huge blocks of concrete were thrown around as if they were children's toys. There was some damage to the end of people's gardens who had, shall we say, claimed that area of land. So I think that had cost the best part of £500,000 to repair and took several months to implement. But would we then approach the people behind the sea wall and say: "Well, if you think you own sea wall then maybe you should pay for it?" which would be unreasonable and completely unfair. So we know what our responsibilities are and ...

[12.00]

The Connétable of St. Brelade:

Would you agree that the incident at Le Bourg has informed the new policy?

The Minister for Infrastructure:

I would say it has fed into, yes. We know that mother nature wins every time and we must prepare for changes in tides and, indeed, climate.

The Connétable of St. Brelade:

Have you been aware, Minister, of any property or land transactions that have needed to be halted or of any transaction issues or disruptions caused as a result of the revised policy development process? Have any transactions stopped because of it, do you feel?

The Minister for Infrastructure:

If I could defer to Tim on that.

Director of Property, Jersey Property Holdings:

Yes, there are 2 that are currently on the books awaiting for the hearings to be had. The revision that we put to the proposition asked that the transactions would be halted until the policy was debated. So there are 2 that are currently on hold. There may be others that people are not bringing forward but there are certainly 2 that we are aware of.

The Connétable of St. Brelade:

Thank you. With regards to resourcing for the work that would need to be undertaken to monitor and resolve existing and future encroachment as per your advice policy, will additional resourcing be required and, if so, how will this aspect be managed and funded? Maybe this is one for John as a finance man.

Head of Finance Business Partnering, Infrastructure, Housing and Environment:

I am not entirely sure to be honest with you, Constable. A lot of the effort is within the Law Officers' Department at the moment I believe in terms of the actual investigations and I do not know, Tim, if there are plans in that area for a specific resource to deal with this?

Director of Property, Jersey Property Holdings:

Absolutely, we are currently under-resourced and are waiting for the new organisational model as a result of a couple of reviews that are ongoing. That will reshape the department ...

Head of Finance Business Partnering, Infrastructure, Housing and Environment:

There are no specific bids for additional resource, though, is there, that has been put forward? It will be within your target operating model?

Director of Property, Jersey Property Holdings:

Exactly.

Head of Finance Business Partnering, Infrastructure, Housing and Environment:

Yes.

The Connétable of St. Brelade:

It seems that - and maybe this is one for the Minister - J.P.H. just is not adequately resourced to deal with these encroachment matters and having seen the numbers involved it seems unlikely that you could achieve much within a reasonable time. To take a pragmatic view, Minister, what is your thought on that in terms of resourcing? Can you get more resource?

The Minister for Infrastructure:

We may need some more resourcing that is true but, as I say, we have a very good team dealing with things at the moment and as I mentioned at the outset most of these incidents are brought to J.P.H. by prospective buyers who wish to, shall we say, clarify boundaries that are pretty undetermined. So most people come to the department, as it were. But it is something that is ongoing and it is something the department is very aware of. We are keen to get it resourced properly, yes.

The Connétable of St. Brelade:

Will you be bidding in the Government Plan for additional resource?

The Minister for Infrastructure:

I do not believe that is ... Andy, can you help with that?

Acting Director General, Infrastructure, Housing and Environment:

There is no new additional resourcing in this current Government Plan refresh for that. As Tim has outlined, we are going through a process of property review at the moment and we will need to just assess what that target operating model looks like once that work is completed in the early part of 2021, quarter 1, going into the summer and so it may well form future iterations. I am not saying at this point we would not want to look at resources but I think we need to do the review work first to understand what the answer would be.

The Connétable of St. Brelade:

Thank you. Minister, we wrote to you recently requesting to see documentation and research relating to the landside boundary review. We note that this is not in the public domain and you have requested our confirmation that information forwarded to the panel will be kept confidential. It has always been part of our code of engagement with Government that confidential information provided to Scrutiny will be treated as such. Please could I ask that you forward this information without delay in order for us to consider this in our information gathering?

The Minister for Infrastructure:

Absolutely, I will ask that any information is forwarded to you that is obviously not commercially confidential or that breaks any confidentiality agreements. But obviously there are certain things we did not want to enter the public domain, for instance anyone who may be encroaching. The team will obviously speak to these people and arrangements will be made. We did not think it was fair to name people and properties so the team will be approaching people on an individual basis.

The Connétable of St. Brelade:

Thank you. I will just remind you of the code of engagement between Scrutiny and the Executive for reference in due course.

The Minister for Infrastructure:

Absolutely.

The Connétable of St. Brelade:

Minister, when will the work to define all default boundary lines be complete? I know you are working on it.

Director of Property, Jersey Property Holdings:

If I could just step in. We have the information on where the actual encroachments we believe are for individual properties. The default is a little bit more challenging and requires sort of a wider view and for that we do need to refer back to the Law Officers' Department to make sure that the line we are coming up with is defensible and logical. We are hoping that by Christmas time we will be in a position to have that default line squared away and so it will be ready for the debate of the proposition in the New Year.

The Connétable of St. Brelade:

So will this be a map or some such like? Do you anticipate a map?

Director of Property, Jersey Property Holdings:

Yes, it will be a line on the map.

The Connétable of St. Brelade:

Right, thank you. You mentioned in your letter to the panel on 22nd October that you are in the process of compiling a master schedule to capture all key data on the opined boundary line around the coast, the extent of the encroachments and possible resolutions. When will this schedule be provided in confidence to the panel?

Director of Property, Jersey Property Holdings:

That schedule we are intending to send through to you as it is now. The areas that are outstanding are bits of the north coast, which is the last piece of the actual review of the foreshore and so do not have a huge amount of bearing on some of the more common topics of conversation. So we will send the document through to you. The officer is on leave this week so as soon as he is back next week we will get it through to you. It covers the current ... the areas considered to contentious.

[Questioning on foreshore encroachment policy ends]