

MEDIUM TERM FINANCIAL PLAN ADDITION 2017-2019: ELEVENTH AMENDMENT AMENDMENT COMMENTS (P.68/2016):

By the Council of Ministers

Deputy K.C. Lewis of St Saviour proposes that:

The States should continue to pay recurring water rates or the cost of supplying drinking water to all properties previously affected by pollution from the Airport Fire Training Ground until such time as water from all boreholes and wells have been declared (on an individual basis) safe for drinking purposes in respect of such pollution. This to exclude those where a legally-binding agreement is entered into with the States or the Ports of Jersey. Estimated cost is identified as between £75,000 and £100,000 per annum.

The proposal is that these costs be met, by increasing the net revenue expenditure budget of the Department for Infrastructure initially through a reduction in Contingency but thereafter by seeking to increase the dividend received from Ports of Jersey to compensate.

The Amendment links the proposed ongoing payments to a point when water is declared safe on an individual basis by the Minister for Health and Social Services. It also appears to change the current basis for determining such safety standard. These are issues that will require the view of that Minister, in terms of appropriateness and deliverability.

The Council of Ministers strongly opposes this Amendment and urges States members to reject the Proposition.

Summary of Council of Ministers Comments

- The Amendment undermines the positive steps being taken by Ports of Jersey to bring an appropriate and equitable solution to this long running and unresolved issue.
- The interim arrangement of paying full water rates, was intended to facilitate and show goodwill whilst long term settlement agreements were negotiated and put in place. The draft Settlement Agreement never intended to compensate the cost of full water rates, only that element that related to “Prohibited” uses such as for drinking. Perversely, this interim arrangement may have inadvertently worked against the achievement of the aim of finalising long term settlement agreements, as property owners are being over-compensated by the interim arrangement. By seeking to continue and extend this interim arrangement, the Amendment, could if adopted, compound this problem.
- The Amendment seeks to change the previously proposed period of payment of water rates from 25 years (through the draft Settlement Agreement) or until such

time as contamination levels fall below the deemed threshold to a potentially open ended period. It also seeks to change the standard by which drinking water is declared safe introducing an USA standard in addition to the British Standard. The implications of this are not identified and would need to be considered in more detail by Environmental Health.

- The Amendment does not appear to recognise that, given the sensitivity of the pollution issue, the States had initially taken a very conservative view and put in place a wide regime of interim measures, covering any property that could possibly be affected whether it has actually been affected or not. As time has moved on and the impact is better understood, it is clear that, for example, water rates are being paid in respect of properties that have never been and are never likely to be affected.
- In developing an agreed way forward Ports of Jersey have recognised that any settlement with property owners must be balanced against public interest considerations, which require that Ports of Jersey does not overcompensate those affected or compensate those who have not been affected. This Amendment goes against those public interest considerations.
- Ports of Jersey is now seeking to reach equitable settlement with those affected owners in the plume area. It should be allowed to continue with that process.
- The proposed method of ongoing funding i.e. through seeking increased dividend payments from Ports of Jersey, cannot be guaranteed as a regular and ongoing source of funding. As such it creates budgetary uncertainty for the Department taking on responsibility for these payments.

Detailed Comments

Deputy Lewis's Amendment effectively undermines the positive steps being taken by Ports of Jersey to resolve this long standing issue. It also seems to blur issues around responsibility for the pollution with interim measures put in place to facilitate proper legal agreements and appropriate settlements with affected owners being finalised.

To be clear, there is no dispute that Settlement Agreements and appropriate payments, for affected owners in the plume area, should be agreed, signed and paid. No agreements are being reneged upon. It is however a fact that, as the Amendment makes clear, many attempts have been made over a long period of time to reach a conclusion. This has failed to produce a satisfactory outcome.

The conservative interim arrangements put in place, to include any property that could be affected, and to pay full water rates for all of those properties, domestic or commercial, were considered appropriate at the time. The payment of full water rates as an interim measure was intended as a positive measure whilst long-term Settlement Agreements were negotiated. It was never intended under the draft Settlement Agreement, or as part of any settlement package, that the full cost of water rates would be paid in perpetuity. Payments would only be that element of water consumption that related to, among other things, drinking and cooking. Others uses such as watering gardens and flushing of toilets, were not prohibited and would not be compensated.

It could be argued that there is reduced incentive for property owners to reach a settlement which compensates in the future for part water rates when current arrangements compensate for full water rates. If adopted this Amendment would compound this problem.

Ports of Jersey have set a clear target of bringing this issue to a conclusion which is to be welcomed.

In developing an agreed way forward it has been recognised that any settlement with property owners must be balanced against public interest considerations, which require that Ports of Jersey does not overcompensate those affected or compensate those who have not been affected.

In most cases of affected domestic properties this means the cost of connecting the property to the water mains and paying the water rates for a period of up to 25 years (which is likely to be offered as a lump sum payment).

Issues do arise however in terms of public interest considerations where interim measures, such as payment of water rates and supply of drinking water, have been provided in respect of properties:-

- which have not been affected and probably never will be affected.
- which are in new ownership since the date of connection to the water mains.

Legal advice received by Ports of Jersey is that in these instances, the interim arrangements should cease. It is also clearly not in the public interest to provide financial compensation for a loss that has not been suffered.

The approach with commercial property owners is the same, but the issues are more complex. Ports of Jersey will continue to offer to connect any unconnected commercial property to the mains at its cost. It will however work individually with commercial property owners and consider the claims advanced by owners. Depending on the merits of the claim and the sum that would be required to reach a settlement, Ports of Jersey may agree to make a lump sum settlement.

With commercial properties water usage and the sums involved are greater. The interim arrangement of paying full water rates is therefore more attractive for commercial properties.

A number of commercial properties in the affected area have potentially benefited more from being connected to the water mains, than adversely affected by the PFOS contamination, in terms of their ability to expand and develop. If solely reliant on borehole supply they would have been challenged with contamination from e coli, hydrocarbons and nitrates (to name but a few) which would affect its use for certain purposes, and which are not attributable to the PFOS contamination.

Similarly, as with domestic property, there are commercial properties that have never been affected by PFOS contamination and where present owners have acquired the premises/businesses after connection to the water mains and in the full knowledge of

restrictions on borehole use. Furthermore in some cases premises are not owner occupied and therefore the beneficiary of payments is a tenant. These commercial businesses can also continue to use their Borehole supplies for their non-prohibited uses.

Conclusion

In conclusion, the Council of Ministers are satisfied that the positive steps being taken by the Ports of Jersey and their legal advisers is the right way forward. It recognises that previous attempts to bring the issue to a conclusion with all parties in a “one size” fits all arrangement did not work. By recognising different types of property, owners (including successors in title), tenants and degree of impact of the contamination, Ports aim to tailor settlements to each group on its own merits. This is set within the framework of ensuring that the public interest considerations are fully addressed by:-

- Not overcompensating those affected
- Not compensating those who are not affected

The Amendment does nothing to help bring this long running issue to a fair and equitable solution. Indeed, it compounds the problems of the interim solution by paying full water rates to a wide range of individuals whether they be property owners, tenants, entitled or unaffected, which makes it harder to reach fair and equitable long-term Settlement Agreements. As such it does not meet the public interest considerations set out above - it runs counter to them.

Further by trying to change the periods that water rates are to be paid for and the criteria that this will be assessed on, makes achieving any settlement much more difficult for Ports of Jersey.

The Deputy has referred to a change of approach. This is not the case. There has never been any intention to reach a settlement with those that are not affected, nor those that have acquired property after the incidence/connection to mains water, nor with tenants of the relevant property owner. In the balance of public interest payments should be commensurate with any loss suffered. To date, for the reasons previously outlined, a very conservative approach has been taken but the time has come to address the circumstances relating to each property. The Deputy has also referred to one resident feeling “bullied” into signing an agreement. This is clearly not something that the States or Ports of Jersey would wish affected residents to feel and is certainly not the case. It is accepted that where occupiers have been in receipt of a free utility for an extended period and are now being engaged to consider whether the particular circumstances of their case justify the continuation of provision, then that this is likely to raise concerns. These are clearly exacerbated when it is evident that there is no justification for such payments to continue. Every effort is being made to treat each owner as sensitively as possible whilst recognising the need to address the underlying issues. It is hoped that Members will see this as sufficient safeguard for property owners.

Financial implications

Ports of Jersey advise that a sum of £76,425 was spent in 2015 which included both direct provision of bottled water, water rates and ongoing water testing. The water testing regime proposed in the Amendment could significantly increase this cost possibly over the £100,000 indicated.

The proposed long term funding solution by the Deputy is to seek to increase the dividend payments from Ports of Jersey by an amount sufficient to cover the payments in relation to water supply.

It is relevant to consider the following:-

- A key element of the States agreeing to incorporate the Ports was to address the financial challenges that the business faced, in the longer term, of being able to fund the cost of maintaining and renewing the essential infrastructure at both the airports and harbours. Ongoing financial sustainability was the target set. Expectations as to whether a regular, consistent or substantive dividend payment would be achievable were secondary and are not known, in what is the first year of the new company's life.
- Dividends are also determined by the financial circumstances of the company in any particular year and have to be recommended by the Directors of the company who have legal responsibility to the Company. To seek to commit the Directors and company to paying the costs of this Amendment on an ongoing basis for an open ended period is not appropriate and certainly could not be guaranteed as a source of funding to meet the costs proposed.

Any Department taking on the responsibility for making any payments as a result of this Amendment would therefore have no guarantee of receiving the funding to meet that cost, on a regular and ongoing basis.

