

5. TAYLORS MISTAKE AND BOULDER BAY BACHES

General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8549
Officer responsible:	Legal Services Manager
Author:	Ian Thomson, Solicitor

PURPOSE OF REPORT

1. In September and December 2006 seminars were held for councillors to discuss with them the current situation with regard to the baches at Taylors Mistake and Boulder Bay and to explore options for reaching a long term solution of the bach issue. The Legal Services Unit was instructed to prepare a full report on those options for the purpose of enabling the Council to make a decision on the future of the baches.

EXECUTIVE SUMMARY

2. In 2003 the Environment Court considered proceedings brought by parties interested in how the City Plan provides for the future of the baches at Taylors Mistake and Boulder Bay. Many years spent trying to resolve the issues raised by continued existence of the baches culminated in the Court's decision.
3. In summary, the Court decided that 31 of the baches should remain and that 14 should be removed. The owners of the baches to be removed were to be offered the opportunity to build replacement structures on an area of land zoned for that purpose.
4. The Court's decision is reflected in the City Plan. However, the Council now has to decide whether or not it will enforce the removal of baches and/or grant licences in respect of those scheduled to remain.
5. For the reasons set out in this report, Council staff recommend that the Council:
 - (a) Require bach owners to take the appropriate steps to create the Taylors Mistake Bach zone ("TMB zone").
 - (b) Require the owners of baches stated in the City Plan to be removed to remove them and give them the opportunity to build new baches in the TMB zone.
 - (c) Agree to grant licences to the owners of baches scheduled in the City Plan to remain.

FINANCIAL IMPLICATIONS

6. There will be costs incurred by the Council in bringing the bach issues to a satisfactory conclusion. This will include staff time and fees paid to external advisers.
7. There will be further staff time required to complete the transfer of the land owned by the Taylors Mistake Association to the Council and the implementation of the TMB zone. External advice may be required from time to time in respect of these matters.
8. It will also be necessary for Council staff to monitor the removal of baches and the building of new ones in the TMB zone. This will include ensuring that appropriate consents are obtained.
9. So far as the licences to occupy are concerned, these will need to be completed and signed on behalf of the Council. The Legal Services Unit expects that there will be opposition to the Council's decision to issue licences and the possibility cannot be ruled out that there will be a legal challenge to this decision. The effect of that will be to delay the issue of licences and increased costs incurred by the Council.

Do the recommendations of this report align with 2006-16 LTCCP budgets?

10. Although no specific provision has been made in the budgets it is likely that this will be necessary if the Council becomes involved in High Court proceedings.

LEGAL CONSIDERATIONS

11. These have been covered in full in the background to this report.

Have you considered the legal implications of the issue under consideration?

12. Yes.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

13. The Council has an obligation to maintain the integrity of its City Plan. If a decision is made that is in accord with the recommendations of this report then steps will be taken to remove the baches scheduled to be removed.

Do the recommendations of this report support a level of service or project in the 2006-16 LTCCP?

14. Other than identifying the need to comply with the provisions of the City Plan, the answer to this is "no".

ALIGNMENT WITH STRATEGIES

15. The Council has already incorporated the conclusions reached by the Environment Court in 2003 in the Council's City Plan. To the extent that this creates an expectation that the Council will enforce the Plan's provisions, then the recommendations in the report are in line with strategies adopted by the Council.

Do the recommendations align with the Council's strategies?

16. Yes.

CONSULTATION FULFILMENT

17. Over many years there has been extensive consultation with parties interested in or affected by the Council's decision with regard to the future of the Taylors Mistake and Boulder Bay baches. This has included private and public meetings, deputations, the deliberations of various Council-initiated working parties and hearing panels, reports from Commissioners, an extensive Environment Court hearing in which all interested groups and individuals took part and a number of seminars some of which have been open to the public.

18. There have also been discussions with groups in favour of or opposing the retention of baches and proponents of the establishment of a penguin colony at Boulder Bay, a site visit and a seminar for elected members.

19. There were no appeals from the Environment Court's decision. The views expressed since then reflect the positions taken by various individuals and groups at the hearing. Briefly stated, these have been as follows:

(a) Taylors Mistake Association (Inc)

(i) In addition to supporting the ongoing presence of the baches the Environment Court found no legal impediment to the Council scheduling existing baches and creating a new bach zone for those that would be relocated.

(ii) Whilst it would prefer for all the baches to stay where they are, the Taylors Mistake Association is committed to supporting the Council's implementation of the Environment Court's decision.

- (b) Brent Gilpin
 - (i) He would like Councillors to consider whether an improved outcome would be achieved by scheduling more of the existing baches to remain where they are.
- (c) White Flipped Penguin Trust
 - (i) A penguin colony can be established at Boulder Bay and function as an eco-tourism experience (with positive conservation advocacy, revenue for the scientific study of the species, tourism development and public access outcomes) with the removal of the central bach (number 6) only.
 - (ii) Furthermore, the Trust would hold no objection to the relocation of that bach elsewhere in the bay, but sufficiently at the edge of the bay that it caused minimal impact to public access and enjoyment.
- (d) Department of Conservation
 - (i) The White Flipped Penguin Trust has worthy conservation aims and has proposed a project on public conservation land which the Department supports.
- (e) Save the Bay Limited
 - (i) It is quite evident that the eight baches on the main beach north of the surf club, and which are unscheduled, interfere with the enjoyment of the beach by the public. The removal of these baches is a priority to mitigate against potential health hazards from pollution.
 - (ii) The Hobson Bay baches (scheduled to remain) discharge their sullage directly onto the foreshore.
 - (iii) Access along the base of the cliff at high tide becomes difficult in places and this is further restricted by the presence of some baches. The restriction caused by the baches and their general occupation is a public nuisance.
 - (iv) It is incumbent upon the Council to take immediate action towards the removal of baches 28 to 33 that the Court found incompatible with the use of the beach by the public.
 - (v) Some of the occupation of baches 35 to 46 (scheduled to remain) does at times cause a nuisance to the public.
 - (vi) The occupation of a number of the Boulder Bay baches can be considered a public nuisance.
- (f) O Snoep
 - (i) The right of passage over a road is one possessed by the public, not the Council.
 - (ii) The public enjoys a measure of priority when it comes in conflict with private interests such as the baches.
 - (iii) The reason why the road was vested in the Council by the Crown was for the purpose to enable the Council to facilitate passage for its citizens and the use of the road by them.

20. Other views expressed also supported the removal of bach number 6 at Boulder Bay to facilitate the establishment of a penguin colony, and the Council making a decision that reflects the conclusions reached by the Environment Court. Councillors who attended the seminar held in December 2006 may recall discussing the option of allowing all existing baches to remain and granting the owners licences to occupy. This is referred to later in the report.
21. The report endeavours to collate the information obtained through the consultation process and to present the practicable options open to the Council.

STAFF RECOMMENDATION

It is recommended that the Council resolve to:

- (a) Give notice to the Taylors Mistake Association that it must take immediate steps to provide a concept plan for the Taylors Mistake Bach zone and complete the transfer of land to the Council as referred to in the Environment Court decision in 2003.
- (b) Require the owners of baches stated in the City Plan to be removed to remove them and give those owners the opportunity to build new baches in the Taylors Mistake Bach zone.
- (c) Grant licences to occupy in respect of the baches scheduled in the City Plan to remain.
- (d) Authorise Council staff to negotiate and to enter into licences to occupy with the owners of the baches scheduled to remain, substantially on the terms and conditions set out in the draft form of licence attached to the staff report and note that if agreement cannot be reached with bach owners on suitable terms and conditions then the matter is to be brought back to the Council for a further decision.
- (e) Note that the Council's decision to grant licences in respect of baches at Taylors Mistake and Boulder Bay is not an indication that such licences will automatically be granted in other situations where unauthorised structures have been built on land vested in the Council as legal road.

BACKGROUND (THE ISSUES)

Background Information

22. Attached to this report as Annexure A is background information on the status of the land on which the baches are situated and a chronology of events. This has been taken from the Environment Court's 2003 decision. Although this information has been provided before, distributing it again may assist Councillors with putting the bach issue into context when considering the recommendations of this report.

Environment Court Decision

23. The recommendations set out in this report are based on the decision of the Environment Court in 2003. The conclusions reached by the Court are briefly stated in this section.
24. The Court considered proceedings brought by Save the Bay Limited, O Snoep and Royal Forest and Bird Protection Society of NZ Inc that sought to amend provisions in the then proposed City Plan. Taylors Mistake Association Inc and Canterbury Regional Council were also joined as interested parties.
25. The plaintiffs sought removal of provisions in the Plan that allowed some of the baches at Taylors Mistake to be removed and replaced elsewhere and others to remain as a permitted activity. The Court also addressed issues such as the historic and heritage value of the baches, the requirement to enhance public access to the coastal marine area and the visual amenity and quality of the environment. It concluded that the existence of a penguin colony and parade and the scheduling of the baches at Boulder Bay were not necessarily incompatible, having regard to the Council's ability to control both the use and the conditions of use of the buildings.
26. The Environment Court found that the natural character of the area was higher with the baches than it would be if they were removed and the land merely retained as pastoral. At Taylors Mistake, the Court decided that 31 of the baches should remain on a scheduled basis in the City Plan. "Scheduled" means that the location and use of the baches are permitted and defined in a schedule to the Plan. The baches to be removed were those most visually prominent occupying the most seaward portion of the Bay. The Court's decision did not include the removal of any of the baches at Boulder Bay.
27. The reasoning behind the Court's decision was that the scheduling of the baches would allow the Council to control the future use of the buildings, reconstruction, the exterior and other similar matters through the standards that the City Plan imposed. It also recognised the heritage values of the baches and for the enhancement that they bring to the quality of the environment.
28. The Environment Court upheld the proposed provision for the bach relocation area, the TMB zone, in the City Plan. Overall, it found that the correct balance had been achieved between the significant number of issues that had to be addressed in evaluating both the scheduling of the baches and the creation of the TMB zone.
29. The parties to the proceedings agreed on planning maps reflecting the conclusions reached by the Court and these were included in the City Plan, along with the description and purpose of the TMB zone. The creation of the TMB zone has been deferred pending the transfer of land owned by the Taylors Mistake Association to the Council and preparation of a concept landscaping plan.
30. There were no appeals lodged following the Court's decision. The subdivision required to create the TMB zone can proceed on a non-notified basis and does not require the written consent of any interested parties, provided that the subdivision complies with the requirements of the TMB zone. The only matters outstanding before the TMB zone can be established are the transfer of land to the Council and preparation of the concept landscaping plan. Both of these matters are within the power of the Taylors Mistake Association to progress.

Transfer of Land

31. Some years ago a number of bach owners formed Taylors Mistake Association Land Company Ltd and purchased 73 hectares of farmland immediately behind Taylors Mistake beach. This includes the area to be set aside for the TMB zone.
32. In 1999 the company entered into a trust deed that provided for the bulk of the land to be held for the benefit of the citizens of Christchurch. The company agreed to transfer to the Council that part of the land not required for the relocation of baches. This comprises about 70 hectares.
33. Adjacent to this land is a Council-owned property that is currently used for grazing. The bach owners' land is fenced and could easily be grazed as part of the Council property until such time as future decisions are made in respect of both properties.
34. The Environment Court came to the view that the transfer of the bach owners' land is clearly necessary and is a pre-condition for the subdivision and creation of the area that will comprise the TMB zone.

Effect of not implementing City Plan Provisions

35. The decision of the Environment Court has been incorporated in the City Plan and those provisions are operative. This means that they are beyond appeal and that the procedural requirements of Schedule 1, Clause 20 of the Resource Management Act, have been met. If the transfer of land to the Council and the concept landscaping plan are completed, then the TMB zone will immediately come into effect without the need for a plan change.
36. The City Plan does not determine that the baches must stay, although it also provides no impediment to the Council granting licences to occupy in respect of the baches scheduled to remain, if that is what the Council decides to do. The Environment Court noted that even if the baches are scheduled that merely makes provision for them in terms of the City Plan rather than being a determination as to their status or continued occupancy of the foreshore.
37. Buddle Findlay has provided advice with regard to the obligations imposed on the Council so far as implementing the provisions of its City Plan is concerned. It advises that:
 - (a) In determining whether or not to grant licences, different considerations apply to the scheduled baches as compared with those that are not scheduled.
 - (b) The scheduled baches are clearly permitted by the Plan and whilst the Environment Court's decision made it clear that the Council was free to determine whether it would allow their continued occupation, it would seem reasonable in light of the Court's finding as to the baches' historic heritage value to proceed to grant licences so long as they were on terms that addressed any other concerns that the Council may have as landowner.
 - (c) In respect of the unscheduled baches, real difficulties would arise if the Council granted them a licence to occupy. The operative plan provisions make their presence in the Conservation 1A zone a prohibited activity and the licence would therefore be to undertake an activity that was unlawful under the Resource Management Act.
 - (d) It is open to any person to apply to the Environment Court for an enforcement order under the Resource Management Act requiring the removal of the baches on the grounds that their presence breaches rules in the City Plan. Potentially, the Council itself could be served with an enforcement order in its capacity as the landowner permitting the continued presence of the baches on its land. The Council could be required to cease permitting the occupation in order to ensure compliance with the rules in the Plan.
38. If the Council decided to allow all existing baches to remain and to grant licences to occupy, then it would again be acting contrary to the provisions of the City Plan.

Licences to Occupy

39. The Environment Court dealt with the bach issue in the context of the Resource Management Act only. It did not determine whether or not the Council had the legal right to or should issue licences to occupy in respect of structures on land vested in the Council as legal road. All of the baches at Taylors Mistake and Boulder Bay are situated on legal road.
40. Buddle Findlay has provided advice to the Council on the matter. That advice has been shared with Duncan Cotterill, the solicitors for Save the Bay Ltd, which has argued that the Council does not have the right to issue licences. A copy of Buddle Findlay's letter to Duncan Cotterill is attached as Annexure D.
41. In the letter, Buddle Findlay states that in its view the Council has the power to grant licences to the owners of the baches situated on an unformed road. This power arises from several sources:
 - (a) Section 12 of the Local Government Act 2002. This grants to the Council a power of general competence, on top of the unrepealed roading provisions of the 1974 Act. Previously, the lack of a power of general competence meant that it was more difficult to rely on implicit powers flowing from the Council's ownership of roads.
 - (b) Irrespective of Section 12, there is good case law authority for the argument that the Council has the power to grant licences for the occupation of roads because of its status as owner. The passing of Section 12 in the 2002 Act only strengthens this view.
 - (c) The Council's powers under Section 12 must be exercised only for the purposes of performing its role, one of those purposes being "to promote the social, economic, environmental and cultural wellbeing of communities, in the present and for the future" (Section 10(b)). If it can be fairly said that taking all matters into account granting licences to bach owners is for that purpose, then the Council may exercise its powers under Section 12.
 - (d) The baches scheduled to remain have been found by the Environment Court to have the following attributes:
 - (i) Tangible and intangible heritage values.
 - (ii) None of the scheduled baches at Hobsons Bay will significantly inhibit public access through the bay.
 - (iii) The Hobsons Bay baches contribute to an appreciation of the bay.
 - (iv) There is no evidence of degradation of the quality of the environment.
 - (v) The potential for contamination of the foreshore by sewage or sullage can be avoided at Hobsons Bay by connections to a sewer line.
 - (vi) The danger to the public of rockfall is present whether the baches are in Hobsons Bay or not.
 - (vii) The risk to buildings in Hobsons Bay is not such a significant hazard as to mean that the baches could not be allowed for in terms of the Plan.
 - (viii) A particular culture has grown up around the baches in Boulder Bay.
 - (ix) Scheduling of the Boulder Bay baches would not itself impede public access. Other steps such as signage and removal of fencing would have a far more significant effect.
 - (x) No risk of derogation of the quality of the environment at Boulder Bay due to the disposal of sullage to the sea.

- (xi) The existence of a penguin colony, and a penguin parade, and the baches at Boulder Bay are not necessarily incompatible.
 - (xii) All of the baches in Rotten Row have registration under the Historic Places Act 1993 as a heritage area.
 - (xiii) The Row clearly demonstrates aspects of cultural and historic interest.
 - (xiv) The Row and the other baches give the area visual appeal.
 - (xv) The Row can be connected to water and sewage reticulation.
 - (xvi) There is minimal risk to safety of occupants of the baches from wave or inundation.
 - (xvii) The maximum number of baches in the TMB zone would not be visually intrusive provided there were performance conditions requiring planting.
- (e) These attributes reflect issues affecting the social, environmental and cultural wellbeing of the community. If the Council were to make a decision granting licences in respect of the scheduled baches, one of the reasons for doing so would be for the purpose of addressing those issues. In such circumstances, it is fair to conclude that the Council is properly exercising its power under Section 12.
 - (f) Another source of the Council's power to grant licences allowing the occupation of roads can be found in a number of older New Zealand cases. In its letter of 16 August 2005 Buddle Findlay states that the cases that recognise the ability of a Council to allow such occupation because of its fee simple ownership of the road continue to have authority. The firm has found no decision that has held that these cases no longer apply or that the Council's fee simple ownership does not extend to the ability to grant licences. This is limited, however, by the rights of the public.
 - (g) Specific statutory provisions. These include Sections 357(1)(a) and 684(13) of the Local Government Act 1974, which have not been repealed, and Section 45(1) of the Public Works Act 1981. Buddle Findlay's advice with regard to these provisions is that the Council does have the power to grant licences allowing a road to be occupied. This is based primarily on the accumulation of powers flowing from Section 12 of the Local Government Act 2002 and fee simple ownership under Section 316 of the 1974 Act. This conclusion is buttressed by the implication that Sections 357 and 684 of the 1974 Act recognise the ability of a Council to authorise encroachments on roads and to allow construction on a road.
 - (h) It could be argued that if the Council had the power to allow the occupation of roads by granting licences, then it would have been set out in the legislation. The counter to this is that there was no need to provide specifically for this power because it was the natural consequence of fee simple ownership set out in Section 316.
 - (i) The Council's rights cannot interfere with the rights of members of the public to pass and repass along roads.
 - (j) Buddle Findlay notes in its letter that cases on the issue of whether or not the rights of the public would be interfered with if licences to occupy legal road were granted, appear to accept that a degree of obstruction is permissible. Also, that the particular circumstances of each case should be taken into account.
 - (k) Later cases. Comments in some of these suggest that the nature of a particular road is relevant when determining whether public rights of passage have been interfered with. In the case of the Taylors Mistake and Boulder Bay baches that might mean that because the road is unformed, is not used for vehicles and does not lead to other roads, and if the public can pass along the road on foot, their rights are not interfered with.

- (l) The conclusion is that there is room elsewhere on the unformed road reserve at Taylors Mistake and Boulder Bay for public passage of the type currently used (by foot and/or by bicycle). It is most likely that the baches do not materially interfere with the rights of the public. The road has been sufficiently surveyed to allow this conclusion to be reasonably drawn.
 - (m) The advice to Councillors is that if they wish to grant licences in respect of the baches, they can do so under existing legislation and case law.
42. Licence fees have been required from bach owners from time to time, most recently from 1976 when licences to occupy were issued for a term of 10 years expiring on 31 March 1986. The licences contained a condition that the baches were to be removed upon expiry of the term, but this was never enforced by the Council.

Building Consent Issues

43. It appears that most of the baches do not have building consent either for the original structure or for any alterations. In the deeds of licence entered into between 1976 and 1986, bach owners were not able to carry out any repairs or replace their baches, except for minor repairs approved by the Council.
44. In the form of licence attached to this report as Annexure C, bach owners are not able to build any structure, plant trees or shrubs, or make any alterations to their baches without the Council's prior approval.
45. The Building Act 2004 requires a building consent to be obtained when any "building work" is carried out, unless it is covered by the exceptions in Schedule 1 of the Act. Work that is for, or is in connection with, the construction, alteration, demolition or removal of a building is included in the definition of "building work".
46. The exceptions in Schedule 1 include repairs and maintenance to a building using comparable materials and building work that a territorial authority considers is unlikely to be carried out otherwise than in accordance with the building code or if it is, it is unlikely to endanger people or any other building.
47. The Building Act can (and should) be enforced in respect of the Taylors Mistake and Boulder Bay baches when any modification work is carried out. Any demolition of the baches will require a consent.
48. Buddle Findlay has advised the Council that building consents could be issued in respect of work carried out, or to be carried out, on the Taylors Mistake and Boulder Bay baches, notwithstanding that the land is owned by the Council, not the bach owners. There is no requirement for each bach to be on its own separate Certificate of Title. However, notices to fix relating to building work being carried out should not be issued to baches stated in the City Plan to be removed because that would be inconsistent with the provisions of the Plan.
49. It should also be noted that the City Plan provides that no scheduled bach shall be added to or altered in any way, other than for maintenance, which would diminish the historic character of the bach.

Supply of Services

50. None of the baches are connected to sewage or stormwater disposal systems. Toilets are either chemical, composting or "porta potties". All baches appear to have been connected to a power supply by way of overhead lines.
51. Water is supplied mainly by way of roof tanks, although the baches in Rotten Row get water from a tank that has been installed on the hillside above them. This is on land owned by Taylors Mistake Association Land Company Ltd.

52. If the Council decides to grant licences to the baches scheduled to remain, there are a number of issues with regard to services that will need to be addressed. Firstly, the draft form of licence requires that all services that are permitted, and that a licensee may wish to install, must be underground, unless otherwise agreed to in writing by the Council.
53. Secondly, the Council will not be able to approve any proposal for installing services to baches that are to be removed. If Councillors adopt the recommendations of this report, then immediate steps should be taken so that the removal and relocation of these baches occurs as soon as possible.
54. Finally, bach owners and Council staff will need to determine the most appropriate method of installing services. Baches in the proposed TMB zone will be able to connect to a sewage reticulation system adjacent to the Taylors Mistake beach car park, provided that a pump is installed. Those baches that are too far away from the system, or at Boulder Bay, will have to make other, approved, arrangements.
55. Whilst none of these issues are insurmountable, complying with Council requirements may be expensive. Such costs, however, will be the responsibility of the bach owners.

Management Plans

56. The draft form of licence refers to landscaping and/or management plans for beautifying and retaining heritage and cultural values developed or approved by the Council.
57. Whilst there has been no work carried out on such plans as yet, if the Council decides to grant licences then the concept of beautifying and managing the Taylors Mistake area could be considered. This might involve local residents, bach owners and other interested groups.

Rangitoto Island Baches

58. Elsewhere in this report is reference to a conservation trust set up by the Department of Conservation, landowners and hut holders at Lake Alexandrina, South Canterbury. The objectives of the trust include promoting awareness and preservation of the environment in the area.
59. The Rangitoto Island Historic Conservation Trust was established to deal with baches built in similar circumstances to those at Taylors Mistake and Boulder Bay. Originally there were about 140 baches built on public reserve land on the island. Today, 34 of them remain, essentially in the same condition as they were in when they were built in the 1920s and 1930s.
60. During the 1970s and 1980s, the majority of baches were demolished as lessees died, until 1990 when the Department of Conservation, at the request of the New Zealand Historic Places Trust, recognised the social and historical significance of the bach communities and placed a moratorium on bach demolition. The trust was formed in 1997 with the purpose of recording the history of these communities and restoring the baches.
61. Leases have been renewed for the remaining baches. It has been recorded that because other bach communities, which were prevalent throughout New Zealand, have virtually disappeared the Rangitoto Island bach settlements are irreplaceable artefacts of New Zealand's architectural and social history and therefore important beyond their locality.
62. If the Council decided to grant licences to the owners of baches scheduled in the City Plan to remain, there exists the opportunity to work with the owners to preserve the baches as a part of the history of Taylors Mistake.

Precedent Effect of Decision

63. The Council has been faced with other situations in which it has had to deal with the issue of structures built on land vested in the Council as legal road. It has a policy that covers structures such as ramps, retaining walls, garages and parking platforms. Decisions on implementing the policy have been delegated to Council staff.

64. The Council does not have a policy that covers other structures on legal road. There has been some discussion about whether or not such a policy should be implemented, particularly with the Banks Peninsula district becoming part of Christchurch City. There are many structures, such as boat sheds and slipways, on land previously vested in the Banks Peninsula District Council. It may be an advantage to prepare and adopt a policy that will deal consistently with these.
65. In the meantime, it should be made clear that any decision to grant licences to the owners of baches at Taylors Mistake and Boulder Bay is in respect of those residential units only. It is not to be regarded as a precedent for other situations in which unauthorised structures have been built, or permission is sought for new structures, on legal road.

Possible Legal Challenges Faced by the Council

66. In its letter of 12 September 2007 (a copy is attached as Annexure E), Buddle Findlay advises that if the Council granted licences to the owners of baches scheduled to remain, this could be challenged either by the commencement of judicial review proceedings or possibly by way of a claim that the existence of the baches amounts to a public nuisance. Judicial review proceedings are considered to be more likely.
67. These proceedings would most likely rely on two grounds:
 - (a) The Council cannot grant a licence for the occupation of the road at all; and
 - (b) It cannot grant licences in this case because to do so would lead to interference with the rights of the public to pass and repass along the road.
68. Buddle Findlay concludes that it is most likely that the baches do not materially interfere with the rights of the public. The position of the unformed road has been established with some certainty. If the public can pass along the road on foot, their rights are not interfered with.
69. Save the Bay Ltd, a group strongly opposed to licences being granted to the owners of baches scheduled to remain has argued that the Council does not have the ability to grant a licence for the continued private occupation of unformed legal road for residential purposes. The group has referred to the fact that the City Plan includes an intention to stop the road. If steps are taken to do this, the land comprising the road becomes esplanade reserve and therefore administered under the provisions of the Reserves Act 1977. This means that licences to occupy could not be granted without the consent of the Minister of Conservation.
70. Advice provided by Buddle Findlay in response to that view is that the Council has indicated an intention only to stop the unformed road. It appears to have arisen as part of a plan change proposed in 1989. Although the change was not proceeded with, the intention was nevertheless included in the City Plan and not subsequently removed.
71. Further, in order to stop a road, formed or unformed, the Council is required to adopt a procedure set out in the Local Government Act 1974. It has not done so. The effect of this is that the restrictions imposed on licensing by the Reserves Act are not relevant to the Council's decision in respect of the Taylors Mistake and Boulder Bay baches.
72. Save the Bay Ltd has also suggested that only the Minister of Conservation has the statutory authority to grant licences for the occupation of land that would otherwise not be permitted, such as on esplanade reserves and unformed legal road adjoining the foreshore. It is argued that such statutory authority appears to specifically provide for historical encroachments on public land where it is not otherwise authorised.
73. Advice given to the Council is that this argument can be distinguished from the situation in respect of Taylors Mistake and Boulder Bay. There is a difference between land comprising legal road vested in the owner (the Council) and public reserve land so far as licences to occupy that land are concerned.

74. The Council has been urged to seek a declaratory judgement from the High Court to determine whether or not the Council has the ability to grant licences to occupy legal road. Buddle Findlay's advice is that it would be difficult to frame an application to the Court that would be specific enough to address the issues raised in respect of Taylors Mistake and Boulder Bay. It may be better for a group opposed to the granting of licences to take that step once the Council has made its decision.
75. In summary therefore, if the Council decides to grant licences to occupy to the bach owners at Taylors Mistake and Boulder Bay, there is a strongly arguable case to support that decision. However, the issue is not capable of a categorical answer because there are many and complex legal and factual issues that arise which have not previously been considered by the courts. As indicated earlier, a legal challenge is always possible.

Options other than Granting Licences

76. Buddle Findlay has investigated, but discounted, the granting of leases over legal road. Its view is that this is not possible, given that a lease provides the lessee with an exclusive right of use.
77. Buddle Findlay has also reviewed the possibility of the Council stopping the unformed legal road that follows the coastline at Taylors Mistake and Boulder Bay. Buddle Findlay notes that under section 345(3) of the Local Government Act 1974, the first 20 metres of land above the mean high water springs mark vests as esplanade reserve.
78. Vesting land as a reserve does not resolve the problem of the baches because of section 44(1) of the Reserves Act which expressly prohibits the use of reserve land for residential purposes without the consent of the Ministry of Conservation. The Council has the ability under section 345(4) of the Local Government Act 1974 and section 77 of the Resource Management Act to include in its City Plan a rule that provides for esplanade reserves to be either greater or less than 20 metres. Any variation to the Plan to incorporate this provision would, however, have its difficulties.
79. In any event, even if some of the baches scheduled to remain are outside the 20 metre strip, the process of road stopping would require public notification and consultation. Buddle Findlay notes that given the intense scrutiny that such a process would generate, it is doubtful that it would provide the Council with an alternative solution to the problem.

The Possible Penguin Colony at Boulder Bay

80. This report has so far centred mainly on issues that are common to baches at both Taylors Mistake and Boulder Bay. The matter of a possible penguin colony conflicting with the existence of baches scheduled in the City Plan to remain affects Boulder Bay baches only. A detailed statement and concept plan for a penguin colony prepared by the White Flipped Penguin Trust have previously been distributed to elected members.
81. The Trust's position appears to be that although bach number 6 at Boulder Bay is scheduled in the City Plan to remain where it is, in fact if the penguin colony is to be established and function as an eco-tourism experience then bach number 6 would need to be removed. Alternatively, the Trust would not object to the bach being relocated elsewhere at Boulder Bay where minimal impact to public access and enjoyment would be caused.
82. The owners of bach number 6 may agree to such a proposal but issues would then arise with regard to the alternative site (the TMB zone at Taylors Mistake could be an option) and the cost of removal and rebuilding. These are matters that will need to be considered and be reported on to the Council at some point in the future, should relocation of bach number 6 become a viable proposition.
83. The Department of Conservation has actively supported the Trust. A letter setting out conservation issues and suitable habitat for the white-flipped penguin was sent to Councillors with other materials ahead of the December 2006 seminar.

84. In 2004 the Department purchased a bach at Boulder Bay that was situated on public conservation land adjacent to the legal road on which the other baches have been built. The building was originally a World War II military structure on Godley Head and will eventually be removed to its original site.
85. Councillors may be interested to know that the Department has been involved in setting up a conservation group comprising landowners and hut holders at Lake Alexandrina in South Canterbury. The aims of this group, which has now formed a charitable trust, include promoting awareness of environmental issues and undertaking a programme of restoration in the area. Whilst these are more simple tasks than establishing a penguin colony, nevertheless an opportunity may exist for bach owners, the Department of Conservation, the Council and the White-Flipped Penguin Trust, as well as other groups with an interest in the colony to form a similar organisation. The idea behind the Lake Alexandrina Conservation Trust was to get all those involved working together for the common good of the area as a whole.
86. If the Council decides to grant licences to bach owners, the suggested form of licence attached to this report contains a provision (clause 18.2(d)) for cancellation in the event that the continued existence or occupation of a bach is inconsistent with the proposed penguin colony at Boulder Bay.

THE OBJECTIVES

87. The first objective for the Council is to implement the provisions in its City Plan in respect of the baches at Taylors Mistake and Boulder Bay. This will require the removal of the 14 unscheduled baches because at present they are a prohibited activity in the Conservation 1A zone in which they are currently situated.
88. The second objective is to require the transfer of the Taylors Mistake Association land to the Council and in the course of doing so, create the TMB zone. This is so that the land comprising the TMB zone becomes available to bach owners for the purpose of rebuilding their baches. At the same time, the bach owners should be preparing the necessary concept landscaping plan as a matter of some urgency.
89. The third objective is the granting of licences to occupy to the owners of baches scheduled in the City Plan to remain, should the Council decide to do this.

THE OPTIONS

Option One

90. The Council could decide to do nothing. Members of the Taylors Mistake Association might be happy with this, but it is likely that those people and organisations opposing the continued existence of any or all of the baches at Taylors Mistake and Boulder Bay would take a different view. By doing nothing the Council would be seen to be permitting an activity that is unlawful under the Resource Management Act and exposed to the risk that an application to the Environment Court is made requiring the removal of the unscheduled baches. Whilst any action of this type may be directed at the owners of these baches, potentially the Council itself could be served with an enforcement order requiring it to cease permitting the unscheduled baches to remain.
91. By doing nothing, the Council faces the likely cost of having to defend its decision in the Environment Court.

Option Two

92. The second option is for the Council to issue licences to occupy in respect of all scheduled and non-scheduled baches at Taylors Mistake and Boulder Bay. As indicated earlier, significant difficulties would arise if the Council decided to licence the unscheduled baches. This is because the provisions in the City Plan make the presence of the baches a prohibited activity in the Conservation 1A zone and the issue of a licence to occupy would allow an activity that is unlawful under the Resource Management Act. Again, any decision by the Council to do this would be open to attack in the Environment Court with the associated costs that such proceedings would incur.

Option Three

93. The third option is for the Council to decide to implement the provisions of its City Plan so far as the unscheduled baches are concerned but also not to issue licences to occupy in respect of the baches that are scheduled to remain. This decision could result in the Council being faced with complex resource management issues given that although the scheduling of the baches is a permitted activity in the City Plan their status in terms of occupation of land owned by the Council would remain in doubt. The Council may end up re-litigating issues that have already been addressed comprehensively in the 2003 Environment Court decision. Also, the Council would be faced with endeavouring to provide for building controls and services to the baches without having the terms and conditions of a licence to rely on.
94. On the other hand, by not issuing licences to occupy in respect of scheduled baches the Council is retaining the option as fee simple land owner to require action to be taken from time to time under threat of a notice for removal of the baches. It is difficult to see, however, much advantage to the Council in taking this option.

Option Four

95. The fourth option is for the Council to decide that all baches are to be removed, whether scheduled or not. The Environment Court noted that scheduling baches merely makes provision for them in terms of the City Plan, rather than determining their status or continued occupation of legal road. Bach owners have already agreed on an earlier occasion to vacate their baches, when they entered into licences that expired in 1986.
96. Notwithstanding this, the Council would have to demonstrate that it is reasonable for the Council not to follow the conclusions reached by the Environment Court and for acting contrary to its own Plan. The Council may face an application for a Judicial Review of its decision.

Option Five

97. The final option is for the Council to decide to implement the provisions of the City Plan relating to the baches. This would involve giving notice to the owners of unscheduled baches that those baches are to be removed. This will have the effect of requiring the Taylors Mistake Association to take immediate steps to transfer land to the Council and complete the concept landscaping plan.
98. Subdivision of the TMB zone land will require bach owners to address matters such as the services to be provided to baches built on that land, including disposal of sewage possibly by way of a connection to existing Council owned facilities at Taylors Mistake.
99. At the same time, the Council could agree upon the terms and conditions of the licences to be issued to the owners of scheduled baches with a view to these being completed as soon as possible. A suggested form of licence has been prepared with the assistance of Buddle Findlay and this is attached to this report. It is suggested that a term of five years be imposed so that the Council retains the opportunity to require removal of the baches at some point in the future if it wishes to allow full, unrestricted access along the unformed legal road. A licence to occupy in respect of bach number 6 at Boulder Bay may be granted subject to the owners and the Council agreeing on future steps to be taken should that bach be required to be removed and relocated to facilitate the possible establishment of a penguin colony.

100. Licences to occupy will require the owners of all scheduled baches to make provision for services to be installed to the satisfaction of the Council.
101. The risk to the Council as a result of it adopting this option is that those people and organisations that oppose baches remaining at Taylors Mistake and Boulder Bay will apply to the High Court for a judgement declaring that the Council has no legal authority to grant licences in respect of structures on legal road. The Council's external advisers have pointed out that whilst there is little that can be done to avoid such a challenge being made, it is strongly arguable that the Council has the power to grant licences to the owners of baches scheduled to remain. If the outcome of such proceedings is that the Council does not have the ability to grant licences, the result would be that the scheduled baches would become unlawful structures and subject to a requirement that they be removed from Council property.

THE PREFERRED OPTION

102. It is clear that none of the practicable options provide complete protection to the Council from attack by persons and organisations with an interest in or affected by the Council's decision, nor from the possibly significant costs that the Council would be required to incur. However, it is also clear that the Council's best approach is to implement the provisions of its City Plan in respect of the Taylors Mistake and Boulder Bay baches and issue licences to those baches scheduled to remain, by adopting option five.

FURTHER INFORMATION

103. Attached to this report are copies of the following documents:
 - Background information and chronology of events.
 - Location map.
 - Draft form of licence.
 - Buddle Findlay letter dated 16 August 2005.
 - Buddle Findlay letter dated 12 September 2007.
104. Councillors are also referred to the information contained in a grey folder distributed before the December 2006 seminar. This included:
 - Environment Court decision.
 - Maps and plans.
 - "Position Statement/Compromise Potential" from White Flipped Penguin Trust.
 - "Boulder Bay Concept Plan" from the Trust.
 - "A Guide to the Baches in Taylors Mistake" from Save the Bay Limited.
 - Letter from the Taylors Mistake Association (Inc).
 - Letter from the Department of Conservation (emailed separately).
105. A bound volume containing further copies of these documents has been separately circulated to Councillors with this report.