

22. 4. 2010

**REPORT BY THE CHAIRPERSON OF THE
HAGLEY/FERRYMEAD COMMUNITY BOARD**

PART A - MATTERS REQUIRING A COUNCIL DECISION

1. TAYLORS MISTAKE AND BOULDER BAY BACHES

General Manager responsible:	General Manager, Regulation and Democracy Services, DDI 941 8462
Officer responsible:	Legal Services Unit Manager
Author:	Ian Thomson, Solicitor

PURPOSE OF REPORT

1. The purpose of this report is to present a recommendation from the Hagley/Ferrymead Community Board to the Council in respect of the baches at Taylors Mistake and Boulder Bay.

EXECUTIVE SUMMARY

2. The current position is that the City Plan has scheduled 31 baches that are to remain at Taylors Mistake and Boulder Bay, with 14 unscheduled baches to be removed.
3. The Plan also provides for land owned by the bach owners to be subdivided to create a new bach site for owners of unscheduled baches (TMB zone). The balance of the land is to be transferred to the Council.
4. These provisions were publicly notified in 1999 and eventually were referred by interested parties to the Environment Court. The changes proposed by the Council were confirmed and the parties agreed upon the wording of provisions to be included in the City Plan.
5. The Council has yet to make a decision about how, as land owner, it will give effect to those provisions.

STAFF RECOMMENDATION

That the Council resolve to:

- (a) request the Taylors Mistake Association to:
 - (i) prepare a planting concept plan for the TMB zone to the satisfaction of the Council.
 - (ii) issue the fee simple and leasehold titles in the TMB zone in accordance with the provisions in the City Plan.
 - (iii) transfer the land contained in CT35B/158 and that land contained in CT35B/160 to the east and south of the TMB zone up to and in line with the edge of the western boundary of the TMB zone to the Council for no further consideration, to be vested in the Council as recreation reserve under the Reserves Act 1977.
 - (iv) confirm the Association's undertaking on behalf of affected bach owners that immediately upon fulfilment of the conditions in (a)(i) – (iii) above, all unscheduled baches will be removed.

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- (b) authorise the General Manager Corporate Services to negotiate and to enter into licences to occupy with the owners of the baches scheduled to remain at Taylors Mistake and Boulder Bay, substantially on the terms and conditions set out in the draft form of licence, marked 2, prepared for the Council and circulated with the staff report (refer **Attachment 3** circulated under separate cover). 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.
- (c) 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.

BOARD CONSIDERATION

A deputation on this matter was heard from Jim Turpin and Brent Gilpin representing the Taylors Mistake Association Inc and a written submission and pictorial brochure were presented, clause 2.1 of the minutes from this meeting refer. Correspondence from Save the Bay Limited and Otto Snoep were received on this matter, clauses 5.1 and 5.2 of the minutes from this meeting refer. (**Attachment 4**)

BOARD RECOMMENDATION

It was decided on the motion of David Cox, seconded by Tim Carter that the Board recommend that the Council resolve to:

- (a) request the Taylors Mistake Association to:
 - (i) prepare a planting concept plan for the TMB zone to the satisfaction of the Council.
 - (ii) issue the fee simple and leasehold titles in the TMB zone in accordance with the provisions in the City Plan.
 - (iii) transfer the land contained in CT35B/158 and that land contained in CT35B/160 to the east and south of the TMB zone up to and in line with the edge of the western boundary of the TMB zone to the Council for no further consideration, to be vested in the Council as recreation reserve under the Reserves Act 1977.
 - (iv) confirm the Association's undertaking on behalf of affected bach owners that immediately upon fulfilment of the conditions in (a)(i) – (iii) above, all unscheduled baches will be removed.
 - (b) authorise the General Manager Corporate Services to negotiate and to enter into licences to occupy with the owners of the baches scheduled to remain at Taylors Mistake and Boulder Bay, recognising the Council's responsibility to consult with Ngai Tahu. If agreement cannot be reached with bach owners on suitable terms and conditions then the matter is to be reported back to the Community Board and the Council for a further decision.
 - (c) 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.
- (Note:** John Freeman requested his vote against (a), (b) and (c) of the foregoing resolution be recorded.
Yani Johanson requested that his vote against (b) of the foregoing resolution be recorded.)

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BACKGROUND (THE ISSUES)

6. In 2001 a number of matters were referred to the Environment Court arising from decisions of the Council with regard to provisions in its proposed City Plan. These related to baches at Hobsons Bay, between "the Giants Nose" to the north of Taylors Mistake beach and Taylors Mistake itself, Taylors Mistake beach, including the baches known as "Rotten Row" (collectively referred to as the Taylors Mistake Baches), and the coastal bay in Godley Head Farm Park known as Boulder Bay.
7. Attached is a copy of the plan (refer **Attachment 1**) contained in the City Plan, showing the scheduled and non-scheduled baches.
8. The case concerned whether or not:
 - (a) provision should be made in the City Plan for any of the existing baches as scheduled activities in the Conservation 1A (Coastal Margins) zone;
 - (b) there should be a new TMB zone created immediately behind "Rotten Row"; and
 - (c) any access should be provided to the TMB zone if created.
9. The matters referred to the Court came about as a result of conclusions reached by a Commissioner appointed by the Council to hear submissions in response to the Council's draft City Plan. The Commissioner's recommendations had been adopted by the Council and publicly notified in May 1999.
10. The Court noted that the Commissioner's findings were supported by both the bach owners and the Council on the basis that they represented an appropriate balancing of the various interests under the Resource Management Act. Opposing that view was Save the Bay Ltd, consisting largely of residents living at Taylors Mistake in an area behind the beach. It accepted the non-scheduling of a number of the baches as appropriate but not the scheduling of the remainder. Save the Bay Ltd also argued that the TMB zone was entirely inappropriate in the coastal environment.
11. The Court also noted that it was not its role to advise the Council as to how the Council should deal with the occupation of its land. Any decision in terms of the matters referred to the Court did not determine whether or not the baches should stay or go. The role of the Court was merely to assess the matters referred to it under the Resource Management Act and in terms of the City Plan.
12. The position of the Council and the bach owners was that the performance standards contained in the City Plan should be extended to include in respect of the scheduled baches control of alterations and additions, external appearance, temporary occupation, heritage character, limiting vehicle access and parking and preventing reconstruction if destroyed.
13. This matter has now come before the Council as owner of the land on which the baches currently sit with staff making a recommendation that accords with the Environment Court decision.

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14. The Environment Court concluded that access across the headland between Taylors Mistake beach and the Hobsons Bay beach is critical if the plan is to enhance access for members of the public. Without baches on the headland visitors could access Hobsons Bay even at high tide. The Court decided that:
 - (a) any step that will lead to an increase in access to the headland by members of the public meets the objectives and policies of the City Plan;
 - (b) the occupation of the headland by the non-scheduled baches does interfere with public access to the area;
 - (c) it was not satisfied that the removal of the baches within Hobsons Bay itself would significantly increase public access through Hobsons Bay provided attempts to fence and mark out curtilage around the baches are removed;
 - (d) private occupation of public road can be authorised by the Council and frequently is.
15. Over all it was the view of the Court that any provision that would lead to the removal of the baches from the headland to Hobsons Bay, and therefore enhance public access to the area pursuant to section 6(d) of the Resource Management Act, is of benefit. Also that baches form part of the existing environment and none of the scheduled baches at Hobsons Bay will significantly inhibit public access through the bay.
16. At Boulder Bay there is a walkway along its length, although at several points it either crosses the building platform of a bach or in the case of bach 6 the walkway goes beneath its balcony. Scheduling of the baches would not impede such public access. The Court found that other steps which could (and should) be taken by the Council such as signage and the removal of fencing would have a far more significant effect on public access to Boulder Bay than the scheduling or non-scheduling of the baches.
17. In the area containing Rotten Row and the main beach at Taylors Mistake, only 13 of the existing 27 baches, including those on the headland of Hobsons Bay, are scheduled. Many of the current views of Taylors Mistake beach are affected by the non-scheduled baches which occupy the most seaward portion of the bay and it is these that are to be removed.
18. It was the view of the Court that the key area of public access is that part of the water/land interface currently occupied by a number of baches (28, 30, 31, 32 and 33). None of these baches are scheduled and several of them, in the Court's view, do impede public access to the foreshore.
19. In the TMB zone the Court accepted the assurance given by bach owners that they would provide an access behind Rotten Row and in front of the new baches proposed for the zone. It was also proposed that parking would not be allowed alongside any of the baches, including Rotten Row.

VISUAL AMENITY

20. The Environment Court concluded that the Hobsons Bay baches did not derogate from an appreciation of the bay's recreational attributes. This is not the case so far as the baches on the headland are concerned.
21. At Boulder Bay the Court found that the visual amenity is high and will remain that way.

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22. At Rotten Row and the main Taylors Mistake beach the Court found that the baches give the area visual appeal and immediately mark it out as a beach/bach area. It was noted that there are significant areas where people are able to experience walking on the Godley Head track with no buildings, both further up Taylors Mistake valley or around Godley Head. Rotten Row has higher visual interest than the car park area which is at the centre of the valley and in fact is close, if not closer, to the beach.

HERITAGE VALUES

23. Neil Carrie, a Senior Planner (Urban Design and Heritage) for the Council advised the Court that in his view the baches at Hobsons Bay do have historical and social significance. It is the grouping of the baches that give them their significance rather than their individual characteristics. The Court accepted his evidence and concluded that collectively each group of baches have both tangible and intangible heritage values.
24. Turning to Boulder Bay, the Court noted that it could add nothing further to the discussion that had already taken place on this issue with regard to Hobsons Bay. It acknowledged however that it appeared that a particular culture has grown up around the baches in Boulder Bay having regard to their relative isolation and the continued interest in the bay by several families through ensuing generations.
25. So far as all of the baches in Rotten Row are concerned, the Court recorded that all of them have registration under the Historic Places Act 1993 as a heritage area.

SEWAGE AND HYGIENE

26. Having heard all of the evidence the Environment Court was satisfied that the baches in Hobsons Bay can be connected to a sewer line by an appropriate method. In the Court's view it was satisfied that the potential for contamination of the foreshore by sewage or sullage can be avoided by such connections. The Court saw no potential impact by bach owners continuing to discharge their storm water into the sea.
27. At Boulder Bay the Court accepted the proposal that the existing electric toilets are sufficient to deal with human waste. Wash water and the like are proposed to be disposed of to the bay as has occurred to date. A report from Environment Canterbury showed no sign of contamination in the bay, which had very high water quality.
28. At Rotten Row and the main Taylors Mistake beach the Court concluded that all properties can be connected to the sewer and it was suggested that this be a performance standard of scheduling. It is also intended that baches in the TMB zone be connected as well.

OTHER MATTERS CONSIDERED BY THE ENVIRONMENT COURT

29. It was noted that the Council-appointed Commissioner concluded that there should be a Living Taylors Mistake Bach zone within an identified area. That is now part of the City Plan. The bach owners indicated a willingness that there be standards inserted into any TMB zone provisions ensuring that a new bach could only be constructed after the removal of an unscheduled bach from the beach. This has been done.
30. The bach owners also indicated during the course of the hearing that they would provide walking and bicycle access within the TMB zone behind Rotten Row.
31. The bach owners proposed that in the event that the Commissioner's decision was upheld and performance conditions imposed, the bach owners would transfer to the Council approximately 70 hectares of land immediately behind Taylors Mistake beach. This proposal has been incorporated into the City Plan, with the agreement of the bach owners.

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32. The Council's position as presented to the Environment Court was that the City Plan must balance the historical or heritage values of the buildings, access to members of the public, the interests of the group of existing bach owners and the enhancement and protection of amenity and heritage values of the area. All of these matters, and other relevant issues, were dealt with by the Court in the course of reaching the conclusion that it agreed with the Commissioner's recommendations.
33. The Court referred to the concern raised with regard to the potential use of Boulder Bay as a site for a penguin colony and an associated eco-tourism enterprise. The Court concluded that the existence of a penguin colony, and indeed a penguin parade, and the baches are not necessary incompatible although the issue was not a matter to be dealt with at the hearing. The Court noted however that control over the operation and ownership of the baches is a matter for the Council.
34. The majority view of the Court was that up to 18 baches situated in the TMB zone would not be visually intrusive provided that there were performance conditions requiring planting and that those conditions were relatively stringent as to:
 - (a) requiring planting to be undertaken in accordance with an approved concept and landscape plan;
 - (b) planting occurring prior to the baches being built in the TMB zone; and
 - (c) planting being maintained;
35. The major advantage of the creation of the TMB zone put forward by the bach owners was that all buildings located in this zone would have to meet current building standards. It was accepted by them that there would be no provision for garaging or parking in association with any of these units directly and that specific performance standards proposed would see the size limited to approximately no more than 50 m² and single story. The Court noted that it was accepted by the bach owners and the Council that there may be some merit in controlling external form, design, paint colours and the like. Performance standards were subsequently negotiated by the Council and bach owners and included in the City Plan.
36. The Environment Court concluded that Volume 2 section 6 of the City Plan is consistent with the range of approaches that were before the Court and that it balances the various elements identified. The Court agreed that the values encompassed in the objectives and policies of the City Plan are not compromised in any significant manner by including the provisions for Taylors Mistake and Boulder Bay. It appeared to the Court that the Plan prefers an approach of provision and control over non-recognition.
37. The rules applying to the Conservation 1A zone are specifically designed around Taylors Mistake and this constitutes a more controlled regime for new buildings than in other conservation zones.
38. The Court came to the conclusion that scheduling is an appropriate method to adopt in the case of the Taylors Mistake and Boulder Bay baches. In respect of baches 28 and 31 - 33 and those on the headland between Hobsons Bay and Taylors Mistake and on the beach front of Taylors Mistake itself, the Court had no hesitation in concluding that provision for those baches by way of scheduling would be inappropriate in terms of the plans, methods, rules, objectives and policies in the City Plan.
39. The bach owners, through a company incorporated by the Taylors Mistake Association owns approximately 73 hectares at Taylors Mistake which includes the TMB zone land. The land to be transferred to the Council would include all of the land excepting Lot 3. If not all of Lot 3 was rezoned as the TMB zone the Court understood that the bach owners would be prepared to transfer the balance to the Council also.

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40. The bach owners submitted to the Court that balanced against any effects from the creation of the new TMB zone was the benefit of the removal of the 14 baches from the headland between the main bay and Hobsons Bay and those within the main bay itself. The Taylors Mistake Association produced copies of undertakings from all 14 bach owners indicating that in the event that they were able to locate to the TMB zone they would remove their baches from the foreshore area. Looking at the removal of the baches as a whole, the Court found that any provision that would enable this to occur would have significant benefits to members of the public because these baches occupy what the Court regarded as the critical areas of the bay along with the surf lifesaving club and the ablution block.
41. The Court concluded that it could not assume that baches not scheduled will be removed. It was not the Court's role to assess the existing use rights that may attach to the baches. If it was assumed that non-scheduled baches were to be removed then that would have occurred prior to the hearing as the matters referred to the Court had been outstanding for several years. The Court found that the difference now was the certainty of the undertaking provided.
42. Having considered the evidence, the Court was satisfied with the proposition put by Environment Canterbury (Ecan) that the provisions of the City Plan as they relate to the Taylor Mistake area are not inconsistent with either Ecan's Regional Coastal Environment Plan or the Regional Policy Statement.

THE FINAL CONCLUSIONS OF THE COURT

43. The Court was unable to find that there is any countervailing impact upon either the public generally or any individuals which would justify not scheduling the baches within the City Plan.
44. The Court was particularly minded that the provision within the Plan for the baches as permitted activities also sets out a series of performance standards which ensures that the values that are recognised relating to scheduled baches are maintained. For its part and with the agreement of the bach owners the Court understood that those standards would be reviewed and strengthened, particularly in relation to the extent of the maintenance which may be undertaken and the changes which may occur to a bach.
45. The Court considered that the scheduled baches do not interfere with public access to any notable degree and they do not detract at all from the visual amenity. It concluded that the scheduling does provide for the heritage values of the baches and for the enhancement that the baches bring to the quality of the environment. The Court concluded that the scheduling as proposed in the City Plan should continue with the potential amendments which were suggested by Save the Bay Ltd and the review of the performance standards envisaged by several of the witnesses and the Court.
46. The Court concluded that the TMB zone is appropriate. It was agreed that up to 18 baches could be located in the zone with a concept plan and planting and maintenance plan approved by the Court and included in the Plan. No bach could be constructed in the TMB zone unless and until the owners bach had been removed from the appropriate foreshore position.
47. With the suggested controls over the scale of buildings, the Court recognised a balance between the area of foreshore which is then available to the public and the additional visual impact created by a building being placed in the bach zone. That effect is one that the Court was prepared to accept to achieve an increase in accessibility by members of the public to the beach as a whole.
48. The intention of the Court was that Lot 3 would be dealt with as follows:
 - (a) the land above the tank track would be transferred to the Council;
 - (b) the balance of Lot 3 would be retained in one title with part zoned TMB and the remainder as Rural Hills;

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- (c) that part of Lot 3 remaining as Rural Hills zone would be limited as to its uses. No parking or buildings would be permitted without consent. The land could be transferred to the Council at the bach owners option along with the balance of the 70 hectares;
49. On that basis, the Court concluded that it was not necessary for it to determine what particular weight should be given to the transfer of the 70 hectares from the bach owners to the Council. It stated that the transfer is quite clearly a requirement and the Court assumes it will occur. It is a pre-condition of construction within the TMB zone and could be covered in terms of a performance standard to that effect.
50. In short the Environment Court agreed with the Council appointed Commissioner and his detailed assessment of the matter. Although the Court's reasoning was slightly different to the Commissioner's it concluded that the correct balance has been achieved between the significant number of issues that need to be addressed in both evaluating the scheduling of the baches and the creation of the TMB zone. The Court directed the Council to forward a memorandum setting out its proposals for the provisions to be inserted in the City Plan, including the performance standards for both the baches to be scheduled and for the proposed TMB zone.
51. Subsequently the Court received and considered the provisions to be included in the City Plan. These were consented to by all interested parties and the Court ordered them to be included in the Plan accordingly. The Resource Management Act imposes a duty on the Council to give effect to its City Plan.

OPTIONS

52. Over recent years a number of options have been considered by Councillors in seminars and workshops for dealing with the matter of the baches at Taylors Mistake and Boulder Bay. These have included:
- (a) do nothing and leave matters as they are;
 - (b) grant licences to all scheduled and non-scheduled baches;
 - (c) initiate a plan change to require any or all baches to be removed;
 - (d) give effect to the provisions of the City Plan.
53. All of these options are open to the Council to adopt. However, it has to be pointed out that so far as options (a) and (b) are concerned any decision made not to give effect to the City Plan would also require the Council to initiate a plan change as neither of those options accord with the Plan. Regarding option (c) It could be expected that any decision to change the provisions relating to the baches would be the subject of another appeal to the Environment Court, taking up to two years to complete and costing \$300,000 - 400,000.
54. It should be noted that the current provisions were incorporated as rules in the City Plan following the Environment Court decision. Section 76(2) of the Resource Management Act states that every such rule has the force and effect of a regulation under that Act. The provisions are operative which means that they are beyond appeal. As a public body, and as the resource management authority for its district with the statutory role of administering the City Plan the Council should not knowingly allow an activity to continue which is not authorised by the City Plan.
55. Once the concept landscaping plan and subdivision of the Taylors Mistake Association land are completed, then the TMB zone will immediately come into effect.
56. As previously advised to Councillors the City Plan does not determine that any baches must stay. However, there is 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.

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57. In respect of the unscheduled baches, real difficulties would arise if the Council granted their owners a licence to occupy the Council's land. 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. It is open to any person to apply to the Environment Court for an enforcement order under that Act requiring the removal of the baches on the ground that their presence breaches rules in the City Plan. Potentially the Council could be served with an enforcement order in its capacity as the land owner permitting the continued presence of the baches on its land. The Council would be required to cease permitting the occupation in order to ensure compliance with the rules in the Plan.
58. As a public body, the Council should not knowingly authorise the carrying out of an activity prohibited in the City Plan. Neither should the Council, as Landowner, be granting licences to a third party which would put that party in breach of the Resource Management Act. Potentially this could result in the third party incurring the significant penalties that the Act provides of - two years imprisonment and/or a fine of \$300,000.
59. Whilst it has been appropriate to consider all options available to the Council before it decides whether or not to effect the current provisions in its City Plan, it is also apparent that a decision that would result in the need for the Plan to be changed should not be taken lightly. A working party established by the Council, a Commissioner appointed to make recommendations on the provisions in the City Plan and the Environment Court after hearing all parties and with the evidence being heard on oath have all reached similar conclusions in respect of those provisions over a period of 10 years between 1992 and 2003. For these reasons (a) and (b) are not realistic nor lawful options.
60. It follows that the recommendation of staff is for the Council to give effect to the City Plan provisions and to request that the bach owners take the steps necessary to enable the TMB zone to be created.
61. If arrangements satisfactory to the Council cannot be made with bach owners then, as owner of the road reserve, the Council would be entitled to require any or all of the baches to be removed.

COUNCIL DECISION – SEPTEMBER 2007

62. The last time the matter of the Taylors Mistake and Boulder Bay baches came before a formal meeting of the Council was in September 2007. Before it could be considered, Councillors were referred to correspondence received from solicitors acting for Te Runanga O Ngai Tahu expressing concern that there had been insufficient consultation with that organisation. The Council accepted a recommendation from staff that the matter be left to lie on the table until the extent of any previous consultation with Ngai Tahu could be confirmed and the issue discussed further.
63. The Council resolved that staff were to:
- (a) consult with Te Runanga O Ngai Tahu;
 - (b) continue discussions with Save the Bay Ltd; and
 - (c) discuss with the Taylors Mistake Association the proposed draft deed of licence for occupation of legal road.
64. The Council also asked staff to report on other instances where private structures are located on road reserve within the Christchurch City Council boundaries and noted that a report on the heritage status of the baches will be presented back to the Council.

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65. These resolutions are commented on as follows:

TE RUNANGA O NGAI TAHU

66. Further discussions were held with a representative of Ngai Tahu, through Mahaanui Kurataiao Ltd. A copy of a letter confirming those discussions is attached to this report (refer **Attachment 2**).

SAVE THE BAY LTD

67. Following the September 2007 meeting further attempts were made to engage with representatives of Save the Bay Ltd. A meeting was held with the solicitor acting for the company who undertook to either get instructions from his client or alternatively suggest that contact was made directly with Council staff. Despite a number of follow-up enquires there has been no response, other than the solicitor confirming that he had fulfilled his undertaking to advise Save the Bay Ltd of the opportunity to engage with Council staff.

68. The last stated position of Save the Bay Ltd was that it is opposed to the Council granting licences to the owners of baches scheduled to remain at Taylors Mistake and Boulder Bay.

PRIVATE STRUCTURES ON LEGAL ROAD

69. Council staff have carried out an exercise to identify structures such as baches and boat sheds situated on legal road within Christchurch City Council boundaries. As expected, most of these are in the former Banks Peninsula District and it is apparent that it is a matter that will need to be addressed. Most of the structures are boat sheds at the waters edge.

70. It has always been the advice of staff that because of the historical nature of the issues arising from the existence of the Taylors Mistake and Boulder Bay baches and the particular issues that have arisen with regard to them, it is appropriate that they be treated separately and without prejudice to any rights that the Council may wish to enforce in respect of other legal structures on land set aside as legal road. The task of dealing with such structures in the former Banks Peninsula District will be a major undertaking and is likely to take a relatively long time to complete. For the reasons set out in this report, Council staff believe that there is a need to formalise decisions relating to Taylors Mistake and Boulder Bay in a much shorter time frame.

71. The matter of whether or not the Council has the legal right to grant licences to bach owners has been the subject of advice obtained from the Council's external legal advisors over many years. Those providing that advice have included John Fogarty QC (now a High Court Justice), David Palmer (Weston Ward and Lascelles) and Denis Sheard and Willie Palmer (Buddle Findlay).

72. Buddle Findlay's most recent advice has followed earlier opinions that, although not entirely conclusive, the Council has the power to grant licences to the owners of the scheduled baches situated on unformed road at Taylors Mistake and Boulder Bay provided for in the City Plan.

73. However, the Council's right to grant licences cannot interfere with the rights of members of the public to pass and re-pass along that road. Buddle Findlay advises that High Court decisions on the issue of whether or not the rights of the public would be interfered with if licences to occupy legal road were granted, accept that a degree of obstruction is permissible. The conclusion reached is that because the road at Taylors Mistake and Boulder Bay 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, the right to pass and re-pass is not interfered with. The road has been sufficiently surveyed to establish that the baches do not materially interfere with this right.

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74. So far as other structures on legal road are concerned, the Council has a policy covering ramps, retaining walls, garages and parking platforms. The Council requires all such structures to be licensed and is to be satisfied that, amongst other things, legal right of access is maintained for individual property owners, the structure is consistent with the City Plan objectives for property access and parking requirements, the road environment is not duly compromised and that the visual intrusion to the street-scape will have minimal effect on road users.
75. This policy does not apply to structures such as the baches at Taylors Mistake and Boulder Bay.
76. Buddle Findlay has advised Council staff that the Council can grant a licence to occupy and that it does not have the power to grant a lease. This is supported by earlier views expressed on the subject, in particular with reference to section 45 (1) of the Public Works Act 1981 which is the basis for the bach owners request that leases be granted instead of licences. In January 1985 John Fogarty QC noted as follows:

“Section 45 of the Public Works Act 1981 contains a general power in subsection 1 to the Local Authority to lease any land held for any public work. That section, on the face of it, is extremely wide. The definition of public work in section 2 of the same Act is also extremely wide. However, in our opinion, land held as unformed highway is not a public work. When unformed there has been no construction, undertaking, establishment, operation or maintenance by the Council. The formation of a road certainly is a public work. The use of land for a highway is also a public work but the mere holding of land as an unformed highway in our opinion is not a public work.”

HERITAGE STATUS OF THE BACHES

77. As indicated earlier in this report Neil Carrie, a Senior Planner (Urban Design and Heritage) for the Council advised the Court that in his view the baches at Hobsons Bay and Boulder Bay have historical and social significance. The baches in Rotten Row have registration under the Historic Places Act 1993 as a heritage area.
78. Mr Carrie has confirmed that the matters contained in his report on which he gave evidence to the Environment Court hearing remain current and continue to reflect his views.

TAYLORS MISTAKE ASSOCIATION

79. Considerable efforts have been made to reach agreement with bach owners, through the Taylors Mistake Association, on the terms and conditions of licences to be granted in respect of scheduled baches. Unfortunately this has not been possible. Council staff have worked closely with Buddle Findlay to try and achieve resolution of outstanding issues but the bach owners remain of the view that the draft document put to them reflects an intention to get rid of their baches.
80. As noted in the letter and attachments from Buddle Findlay circulated with this report (refer **Attachment 3** under separate cover), this is simply not the case. However the draft deed of licence does give the Council the opportunity to terminate licences at the expiry of a suggested 10 year term should circumstances change and the bach sites are required to enable public use of the whole of the area currently set aside as legal road. This would appear to be a reasonable position to take on behalf of the Council.
81. A number of other issues have been raised by the bach owners. Firstly, they require a deed of lease to be put in place rather than a deed of licence to occupy. As indicated earlier, the advice to Council staff is that a licence is the only tenure that the Council can offer in respect of structures on unformed legal road. This is reflected in all other situations that Council staff are aware of involving such matters. A lease grants exclusive use of land whereas a licence enables the licensee to occupy land only on the basis that public access is not unduly restricted.

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82. The bach owners are also requiring the matter of the transfer of land to the Council to be conditional upon the granting of licences and subject to the land being returned to the bach owners if the Council was to terminate those licenses within 50 years. This was not the position presented by the bach owners to the Environment Court. The advice from Council staff is that the Court assumed that the balance of the land not required for the TMB zone would be transferred to the Council once the zone was created. This has been provided for in the City Plan and any other arrangement would require a plan change to be initiated.
83. At one point, it was suggested by Council staff that the transfer be taken out of the negotiations with bach owners but this is not possible given the City Plan provisions.
84. The draft deed of licence prepared by Buddle Findlay and Council staff provided for rental reviews at no less than one year intervals. Any review was to represent a fair and reasonable assessment of the annual cost of the administration of licences. The bach owner's position is that any future increases must be linked to the Consumer Price Index.
85. On instructions from Council staff, Buddle Findlay has carried out a comprehensive analysis of the two draft licences to be considered. This is included in the letter of 3 March 2010, circulated with this report (refer **Attachment 3** under separate cover).
86. In February 2009, Council staff instructed Simes Ltd to carry out an assessment of an appropriate licence fee. At that stage, it was proposed that the term of licence be for five years only and the Simes valuation discounted the assessment accordingly in arriving at a suggested fee of \$5,000 plus GST per bach per annum at both Taylor's Mistake and Boulder Bay. In the course of negotiations Council staff suggested a 10 year term and indicated that they would be prepared to recommend to Councillors that the annual licence fee could be set at, say, \$3,000 plus GST per bach for the first year.
87. Notwithstanding this, the bach owners have advised that in their view the fee should be no more than \$800 plus GST per bach per annum.
88. Simes Ltd was asked to update its assessment to take account of the suggested increase in the proposed term from 5 years to 10 years and the limited right of assignment proposed by Council staff. The response was that this would have the effect of increasing the licence fee assessed from \$5,000 to \$6,000 per annum, plus GST per bach.
89. It should also be noted that in similar circumstances, the (then) Auckland Harbour Board was found to have acted correctly in relying on a registered valuer's report before setting the level of a licence fee for the occupation of foreshore land. The High Court held that it was perfectly legitimate to relate the fee for use of the foreshore to the benefit enjoyed by the licensee in the same way that the rental under a tenancy or lease is related to the benefit exclusive possession bestows on the tenant or lessee.
90. Council staff have reached the point where further negotiation with the bach owners seems fruitless. They appear to suggest that the Council should interpret the Environment Court decision, and the subsequent provisions in the City Plan, in a way that weakens the Council's position as landowner and the rights that it has to control the occupation of land that it owns. It is recommended that Council staff be instructed to continue negotiations in the hope that an outcome can be achieved that is not materially different to that reflected in the Council's draft document. If this is not possible then the matter can be returned to Councillors for a further decision.
91. It is stressed that in order to comply with the City Plan provisions the bach owners should be requested to take the steps required to create the TMB zone without delay. There is nothing in the City Plan that enables the bach owners to use the terms of licence in respect of scheduled baches as a reason for not complying with these obligations. Whilst compliance with the Plan is mandatory, whether or not the Council issues licences is not.