IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for an existing use certificate pursuant to section 139A of the Resource Management Act 1991

DECISION OF COMMISSIONER
DAVID KIRKPATRICK
FOR CHRISTCHURCH CITY COUNCIL

23 September 2011

D A Kirkpatrick
PO Box 5844
Wellesley Street, Auckland
Telephone: (09) 379 9780
Facsimile: (09) 377 0361
Email: David.Kirkpatrick@parkchambers.co.nz

Introduction

1. I have been appointed by the Christchurch City Council pursuant to section 34 of the Resource Management Act 1991 ("RMA") to consider and determine an application for an existing use certificate pursuant to section 139A of the RMA.

2. The application has been made by 18 people (including three trusts) who, either singly or in pairs, own one of 14 baches at Taylor's Mistake, Christchurch. The applicants are:

Bach No.	Owner
28	Trevor Sydney & Dianne Barbara Graham
30	Evan & Beverley Rahurahu
31	Raymond Alexander Rankin
32	The Taylors Mistake Bach Trust
33	Ann Elizabeth James
47	Joan & Ron Moore
48	The Rowe Trust
49	McClurg Family Trust
51	Jason C McDonald
52	Timothy Robert & Lynne Cook
55	Daryl Neate
56	Margaret Anne Thomas
57	Kay Carole Hunter
58	Gorden Ross Richdale

3. The baches are identified by numbers on Plan 1 annexed to the form of application. This numbering corresponds to the numbering shown in Appendix 1 to Part 5 – Conservation Zones of the Christchurch District Plan. That Appendix also shows a further 32 baches, 10 located at Boulder Bay, 13 on the southern side of Taylor's Mistake and 9 at Hobson's Bay.

4. The application has been lodged as a single application in respect of all baches and by all owners. While it is convenient to address many of the issues using a global approach, I will need to consider whether all of the

applicants are entitled to a certificate or whether I should ultimately treat the application as being severable into 14 separate applications.

5. The application document, which is 19 pages long, concisely summarises and analyses the evidential material and sets out the legal basis on which the application has been made. Accompanying the application is a volume of 28 annexures which fill a large folder, including:

(i) Relevant statutory provisions (both current and repealed);

(ii) Relevant district plan provisions (both operative and superseded);

(iii) Relevant court decisions, including decisions specifically relating to district plan provisions affecting these baches, being:

(a) *Taylors Mistake Surf Lifesaving Inc & ors v Christchurch City Council* (Environment Court Decision No C 86/83) being a decision in respect of two appeals arising from the second review of the Christchurch District Scheme; and

(b) *Save the Bay Ltd & ors v Christchurch City Council* (Environment Court Decision No C 50/2002; I have also reviewed the final decision C 40/2003 and the addendum C58/2003) being a decision in respect of three references arising from the third review of the Christchurch District Plan, together with the decision of the Council Commissioner, Mr N S Marquet (decision no 165D) which was the subject of those appeals;

(iv) Plans and photographs of the baches; and

(v) A range of historical documents, including public records and photographs and a copy of the published history of the Taylor's Mistake Surf Lifesaving Club.

6. A great deal of effort has clearly been put into gathering this material and presenting this application. As I set out below, the requirements for demonstrating that a use of land is subject to existing use rights under section 10 of the RMA to the standard required for the issue of a certificate pursuant to section 139A is likely to require substantial evidence and these applicants have sought to do that. The subject matter of this application requires careful consideration of the history of these baches, the relevant planning provisions applicable to Taylor's Mistake and the relevant planning legislation over time, which combine to produce a number of complex issues. I am grateful for the careful way in which the application has been presented.

7. As well as considering this material, I travelled to Christchurch on 22 July 2011 to visit the site and to meet with Mr Tom Evatt, the solicitor for the applicants, as well as Mr Jim Turpin and Mr Jason McDonald as representatives of the bach owners.

8. I also met that day with Mr Otto Snoep and with Mr David Evans. Mr Snoep has currently applied for enforcement orders against both the council and the applicants seeking the removal of these baches, and he requested that I meet with him. Mr Evans is a member of an incorporated group called Save the Bay Limited. Both Mr Snoep and Save the Bay Ltd have been involved in litigation in the Environment Court relating to the baches.

9. The RMA does not provide for any hearing process in relation to applications under s139A of the RMA. I had that meeting with Mr Snoep and Mr Evans on a consultative basis, to be reasonably transparent in undertaking my commission in relation to the application. The applicants were made aware of this meeting and did not object to me having it. Mr Snoep subsequently sent me some information which he considered would be relevant to my inquiry, copies of which were provided to the solicitor for the applicant. I subsequently received a letter from the solicitor for the

applicants responding to issues raised by Mr Snoep. I have considered all of this material together with the material accompanying the application in reaching my decision on the basis that all of it is relevant to making a decision whether to issue a certificate or not.

Background

10. The 14 baches are situated on land at Taylor's Mistake, Christchurch as shown on Appendix 1 to Part 5 – Conservation zones in the District Plan. Five of them (nos 28, 30, 31, 32 and 33) are at the eastern end of the southern row of baches known as The Row; one (no. 47) stands alone at the south-eastern corner of the carpark adjacent to the reserve; and eight (nos 48, 49, 51, 52, 55, 56, 57 and 58) are at the northern end of the beach and on the rocks at that end. As discussed below, in the planning history of the land the northern and southern areas of Taylor's Mistake have generally been zoned differently. I have grouped the baches on that basis and for convenience, I will refer to the first six as baches 28 – 47 and the latter eight as baches 48 – 58. The other baches are nos 1 – 10 at Boulder Bay, nos 34 – 46 to the south in The Row and nos 59 – 70 around Hobson's Bay.

11. It is acknowledged by the applicants that all of these baches are located on unformed road which is vested in the Council. The origin of the status of the land as road is likely to have been the result of the original surveys of the area (see *Save the Bay v CCC* at paras [22 – 24]). As a consequence none of the applicants have title or any other registrable interest in the land: the presence of the baches and the occupation of them appear to be based on licences (whether express or perhaps, at this stage, implied) from the Council. From the information supplied with the application, these licences are personal to each holder, issued for fixed terms and not renewable, although successive licences have been issued. I note that tenure is not a matter on which existing use rights depend: the focus of s 10

of the RMA is on the use of the land rather than any right to use or occupy it. I therefore am not required to and do not make any finding as to tenure.

12. The detail of the history of the building of the baches is uncertain in various matters of detail, but the general parameters appear to be reasonably clear, as recorded in the decisions of the Planning Tribunal in *Taylor's Mistake Surf Lifesaving Inc & Ors v CCC* and of the Environment Court in *Save the Bay Ltd & ors v CCC*.

13. A comprehensive summary of the historical material is set out in *Save the Bay v CCC* at paras [25 – 56]. For present purposes the key points appear to be:

(i) The first baches at Taylor's Mistake date from at least a century ago, with the first being erected in the 1890's and by late 1910 the Sumner Borough Council minutes recording 10 or a dozen "cave dwellings" "either on the Government Road or between high and low water mark".

(ii) The Council decided to licence such occupation "to prevent anything like a vested interest". Permits were required from around 1911.

(iii) The baches are located on land owned or administered by the City Council, which has the status of unformed legal road.

(iv) By World War II there were some 72 baches from Hobsons Bay to Boulder Bay.

(v) When Sumner Borough united with and became part of Christchurch City in 1945, the same arrangements continued and the properties were rated.

(vi) The most recent formal arrangements for occupation of the land on which the baches are located was pursuant to licences granted by the

City Council in March 1979 and which expired on 31 March 1986. The licences did not give a right of renewal and provided for removal of baches on expiry.

(vii) After 31 March 1986, no new licences were issued and the Council ceased collecting licence fees.

(viii) Since 1989 a number of processes have been taken under relevant planning legislation in respect of various matters at Taylors Mistake, including making differing provision for the activity status of the baches, as further discussed below.

14. The current planning controls applying to the land are clear. The land is shown on planning map 56A and is identified on that map as "C1A", which is the Conservation 1A (Coastal Margins) zone. The zone description and purpose (Volume 3: Part 5 Conservation Zones:1.3) contains the following statement:

> *Some 32 baches at Taylor's Mistake, Boulder and Hobson Bay situated on legal unformed road (see Appendix 1) have been recognised as part of the social and cultural history of Christchurch and character of Taylor's Mistake. These baches, which are considered not to have undue detrimental impacts on visual, landscape or recreational values, have accordingly been scheduled in the Conservation 1A Zone. It is nevertheless recognised that they are located in a sensitive environment and controls are therefore needed. The remaining 14 unscheduled baches (see Appendix 1), which are considered to have unacceptable adverse effects on access and recreational values are to be removed.*

15. Critical Standard 2.4.4 specifically controls the Taylor's Mistake baches and provides:

> *(d) Any bach located in the Conservation 1A Zone, which is not scheduled in Part 5, Appendix 1 is a prohibited activity.*

16. The baches which are the subject of this application are all identified in Appendix 1 as "*Baches to be removed*". The other baches are identified as "*Scheduled baches*".

17. While the immediate focus of this application is on the current planning controls relating to the land and the baches, it is also necessary to review the planning history of the land.

The first District Scheme

18. The evidence, accepted in *Taylor's Mistake Surf Lifesaving Inc & Ors v CCC*, is that the first planning controls applying to the land were the provisions of the Christchurch District Planning Scheme which was notified on 15 November 1961 and made operative on 1 April 1962 (there having been no prior district scheme in Sumner Borough). Map 22 in that scheme shows Taylor's Mistake and includes what appear to be indicative locations of buildings, including these baches (although it seems clear that these have not been surveyed). The area of the reserve is shown in green; to the north of the reserve and between Taylor's Mistake Road and the sea the land is zoned Residential "A", while to the south of the reserve and to the west of it and Taylor's Mistake Road the land is zoned Rural.

19. Ordinance 9 of this first district scheme sets out rules controlling activities and the bulk and location of buildings. In the Rural zone (where baches 28 – 47 are located), the predominant uses (i.e. those permitted as of right) included farming of any kind and buildings accessory to a predominant use. The applicants accept that these baches, not being associated with any farming activity, would therefore have been non-conforming with the provisions of the scheme. In the Residential "A" zone, dwellinghouses were a predominant use, so that baches 48 – 58 would have conformed to the scheme.

20. It is pertinent to note that Ordinance 11 of this scheme prohibited the erection of any building on land forming part of a proposed road or designated open space or public work without the prior consent of the Council. As the baches existed prior to 1961, I do not need to inquire into the potentially difficult area of what might constitute "prior consent".

Ordinance 20 allowed any existing non-conforming building to be repaired, altered or modified so long as such repair, alteration or modification did not increase the extent to which the building failed to conform. I return to the effect of this ordinance below.

The first review of the District Scheme

21. The District Scheme was reviewed in 1968. According to the summary in the Planning Tribunal's decision in *Taylor's Mistake Surf Lifesaving Inc & ors v Christchurch CC* (Decision C86/83) this review as notified proposed a larger area of the valley floor to be zoned for recreation purposes, including provision for holiday cottages. There were objections to this provision and that provision was then deleted. The first review of the scheme became operative in August 1972.

22. The material I have been shown includes planning map 4A, which indicates that baches 28 – 47 were situated in the Recreation 1 zone, and clause 14, being the scheme provisions for that zone. The Zone Statement refers to a "scheme of development in principle" which was Appendix E (but which I have not seen), and says that "a viable comprehensive scheme will consider . . . the existing bach situation . . .". The ordinances do not provide for residential use and so it appears that baches 28 – 47 were non-conforming in that zone. Baches 48 – 58 were in an area which appears on the map not to have any zoning indication, although the applicants say that this area was zoned Residential 1, the same zoning as in the adjacent area of housing to the north and consistent with the zoning that had applied under the first District Scheme. If that is the correct position (and on balance, notwithstanding the map, it makes more sense to me) then baches 48 – 58 would have been conforming uses.

23. This scheme includes, in the provisions relating to the Recreation 1 Zone under the heading "(2) Predominant uses and conditions (a) Parks recreation grounds and accessory buildings", a clause 14(2)(a)(i) which provides:

> *No land or buildings shall be used for purposes involving any operation which, in the opinion of the Council will be detrimental to the amenities of the neighbourhood.*

This appears to be a restatement of section 38A of the Town and Country Planning Act 1953 ("TCPA 53"). I discuss this provision below at paragraphs 53 - 54. For reasons which I discuss in detail below, and essentially because this rule post-dates the establishment of the subject baches, I do not think it needs any further analysis.

The second review of the District Scheme

24. The second review of the District Scheme was notified in December 1979. In it the Council proposed various recreation zonings for the land at and around Taylor's Mistake. In *Taylor's Mistake Surf Lifesaving Inc & ors v Christchurch CC* (Decision C86/83) the appellants had lodged objections seeking the creation of a special zone to recognise and provide for the existing community in the appeal area. While some zonings were changed, the objections were disallowed and the appeals followed. As an alternative relief they sought protection in the scheme to preserve the existing baches. The Planning Tribunal's decision records that the appellants regarded protection as existing uses under sections 90 and 91 of the Town and Country Planning Act 1977 ("TCPA 77") as being inadequate.

25. At the conclusion of its decision, the Planning Tribunal recorded that while it did not find it easy to come to a conclusion which could lead eventually to the loss of the groups of baches which had been allowed to develop over a lengthy period of time, it was not persuaded that planning recognition should be given as sought by the appellants. The Tribunal noted that the legal status of the batch owners' occupancy was a different matter altogether from planning recognition. On that basis, the Tribunal disallowed the appeals and confirmed the Council's zoning decisions.

26. As a result of this decision, all of the baches were made non-conforming with the provisions of the second review of the District Scheme. This review was made fully operative on 1 July 1986.

The Current District Plan

27. The current district plan was publicly notified on 24 June 1995.

28. The relevant provisions in this case were the subject of appeals to the Environment Court in *Save the Bay Ltd & ors v Christchurch CC*. That case involved three references in relation to decisions by the Council on submissions concerning provisions of the third review of the Christchurch District Plan as they related to Taylors Mistake. The Council's decisions had been made following recommendations by its commissioner Mr N S Marquet.

29. In summary, the decisions of the Council were to schedule a number of baches (not including any of those that are the subject of this application) and to provide for them as permitted activities. Further, an area of land was to be zoned as the Living Taylors Mistake Bach ("TMB") zone, in which any unscheduled bach could be relocated or in which a new bach could be built provided an existing unscheduled bach was removed. The decision also refers to undertakings between the Association which owned this land and the owners of unscheduled baches in relation to this, but these were apparently private arrangements into which the Court did not inquire in detail.

30. The primary issues before the Court were whether:

(i) provision should be made in the plan for any of the existing baches as scheduled activities in the Conservation 1A (Coastal Margins) zone;

(ii) there should be a new Taylors Mistake Bach zone behind The Row; and

(iii) any public access should be provided to privately owned land in the new zone if created.

31. The Court reviewed the factual circumstances, including the history of the baches, in some detail. While recognising that the question of whether the baches had existing use rights was the subject of debate, it took the view (at paragraphs [25] and [71]) that the existence or otherwise of any existing use rights was not a matter before the Court to be determined or commented on in the context of references on the district plan. Further (at paragraphs [69 - 70]) the Court emphasised that it was not the Court's role to advise the Council as to how it should deal with the occupation of its land.

32. Ultimately, the Court generally upheld the Council's decisions with amendments that are not relevant for present purposes. The decision which is directly relevant to the present application was that the Court upheld the imposition of Rule 2.4.4(d) making the unscheduled baches a prohibited activity in the Conservation 1A zone.

33. The current District Plan was made operative on 21 November 2005.

Relevant Statutory Provisions

34. Section 139A of the RMA relevantly provides:

> ***139A Consent authorities to issue existing use certificates***
>
> *(1) A person may request the consent authority to issue a certificate that—*
>
> *(a) describes a use of land in a particular location; and*
>
> *(b) states that the use of the land was a use of land allowed by section 10 on the date on which the authority issues the certificate; and*

> *(c) specifies the character, intensity, and scale of the use on the date on which the authority issues the certificate.*
>
> . . .
>
> *(4) The consent authority must issue a certificate under subsection (1) if it—*
>
> *(a) is satisfied that the use of the land is a use of land allowed by section 10 on the date on which the authority issues the certificate; and*
>
> *(b) receives payment of the appropriate administrative charge.*
>
> . . .
>
> *(9) An existing use certificate is treated as an appropriate resource consent. The provisions of this Act apply to the certificate, except for sections 87AA to 119 and 123 to 150.*
>
> *(10) Sections 357A and 357C to 358 apply in relation to the issue or revocation of an existing use certificate.*

35. Section 139A plainly must be read in close conjunction with section 10 of the RMA, which relevantly provides:

> ***10 Certain existing uses in relation to land protected***
>
> *(1) Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—*
>
> *(a) . . . —*
>
> *(i) The use was lawfully established before the rule became operative or the proposed plan was notified; and*
>
> *(ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:*
>
> . . .
>
> *(2) Subject to sections 357 to 358, this section does not apply when a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless—*
>
> *(a) An application has been made to the territorial authority within 2 years of the activity first being discontinued; and*
>
> *(b) The territorial authority has granted an extension upon being satisfied that—*

> *(i) The effect of the extension will not be contrary to the objectives and policies of the district plan; and*
>
> *(ii) The applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.*
>
> *(3) This section does not apply if reconstruction or alteration of, or extension to, any building to which this section applies increases the degree to which the building fails to comply with any rule in a district plan or proposed district plan.*
>
> . . .

36. Taking sections 10 and 139A together, the consent authority must identify clearly what is required before an existing use certificate can be issued. The principal elements of an existing use certificate are set out in section 139A(1). The test for whether or not the consent authority must issue such a certificate is specified in subsection (4)(a). The essential elements of what constitutes an existing use are, for present purposes, clearly set out in section 10(1)(a), subject to limits based on discontinuance as set out in subsection (2) and potential loss through an increase in the extent of non-compliance pursuant to subsection (3). The nature and effect of such a certificate are as described in section 139A(9). There are rights of objection and appeal under section 139A(10).

37. The other relevant statutory provision is the definition of "use" in section 2 of the RMA:

> ***use,—***
>
> *(a) in sections 9, 10, 10A, 10B, 81(2), 176(1)(b)(i), and 193(a), means—*
>
> *(i) alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land:*
>
> . . .
>
> *(v) any other use of land; . . .*

38. In the next sections of this decision I review the meaning of the essential elements of the relevant statutory provisions governing what constitutes an existing use as set out in section 10(1)(a).

"Land may be used"

39. It appears straightforward that the baches which are the subject of this application are a "use of land" within the meaning of "use" and the scope of section 10. They certainly involve the erection or placement of a structure on land. The occupation of them, whether permanently or on a temporary basis, amounts to a use of a structure within the meaning of clause (a)(i) of the definition of "use" in section 2. In any event, both the baches and the occupation of them must fall within the very wide ambit of "any other use of land" in terms of clause (a)(v) of that definition.

"In a manner that contravenes a rule in a district plan or proposed district plan"

40. As noted above, there is a rule, being Critical Standard 2.4.4(d) of Part 5 in Volume 3 of the operative Christchurch District Plan, which states:

> *Any bach located in the Conservation 1A zone, which is not scheduled in Part 5, Appendix 1 is a prohibited activity.*

41. The baches which are the subject of this application clearly contravene that rule, as they are located in the Conservation 1A zone and unscheduled in Part 5, Appendix 1.

"If the use was lawfully established"

42. The meaning of the phrase "lawfully established" was considered in detail by the High Court in *One Tree Hill Borough Council v Lowe & Ors* (Unreported, High Court Administrative Division, Wellington Registry, M No 270/84, 25 March 1986, Chilwell J). In that case, the High Court was

considering the meaning and application of section 90 of the TCPA 77. The relevant parts of section 90 provided:

> ***90. Existing use may continue—***
>
> *(1) Any land or building may be used in a manner that is not in conformity with the district scheme or any part or provision of it as in force for the time being if—*
>
> *(a) The use of that land or building—*
>
> *(i) Was lawfully established before the district scheme or the relevant part or provision of it became operative [; and]*
>
> *(ii) Is of the same character, intensity, and scale as, or of a similar character, intensity, and scale to, that for which it was last lawfully used before the date on which the district scheme or the relevant part or provision of it became operative; . . .*
>
> *(2) Notwithstanding the provisions of subsection (1) of this section, if at any time after the date on which the district scheme or the relevant part or provision of it became operative the use of any land or building authorised under subsection (1) of this section is discontinued for a period of 6 months, no use of that land or building shall at any subsequent time be regarded as permitted by this section unless the Council, on application made to it within 12 months after the use first being discontinued, consents to that period of 6 months being extended to a period coinciding with the period during which the use was discontinued.*

43. It is immediately apparent that section 90 of the TCPA 1977 was a predecessor provision to section 10 of the RMA. Although there are a number of differences between section 90 TCPA 1977 and section 10 RMA 91, the phrase "lawfully established" is used in the same context and for the same purpose. I note that in *Stretton v Bilkey & Ors* (Env Ct Decision No A68/2000) the Environment Court at paragraph [43] accepted the authority of the *One Tree Hill DC v Lowe* decision in the context of the RMA. This decision has also been followed in *Lendich Construction Ltd v Waitakere CC* (Env Ct Decision No A77/99), which is discussed further below.

44. The key issue before the High Court was whether the phrase "lawfully established" should be assessed in terms of the planning legislation relevant to the particular case, or whether the Court should also consider whether the use had been lawfully established in respect of any other relevant law such as (in that case) a building by-law. The High Court noted (p30) that in general the use of land and buildings is affected by a large number of statutory and common law provisions. The Court drew a distinction between planning legislation and other legislation affecting the use of land and building and held that a use will be "lawfully established" for the purposes of section 90(1)(a)(i) where it was established in accordance with the planning legislation and any subordinate legislation thereunder then in force.

45. The Court also noted that although the effect of existing use rights is that the person carrying on that use may continue to do so despite the fact that it does not comply with the district scheme, the use does not become lawful for all purposes. The Court said (p32):

> *In establishing and carrying on a use, one is still bound to observe the requirements laid down by the general law apart from planning law, and still liable, in the event that any of those requirements are not met, to such sanctions as the law may provide. To enlist the existing use provisions of the 1977 Act as a supplementary means of ensuring compliance with rules relating to land use arising outside of the scope of planning statutes, or of punishing non-compliance with such rules, is neither necessary nor conducive to the effective functioning of the law relating to existing use rights.*

"Before the rule became operative or the proposed plan was notified"

46. Critical Standard 2.4.4(d), together with Appendix 1 to Part 5, is the relevant rule in the Christchurch District Plan for the purposes of Section 10(1)(a) RMA.

47. These provisions of the plan were determined by the decision of the Environment Court in *Save the Bay Limited & Ors v CCC* (including the

final decision C40/2003 dated 28 March 2003 and the addendum decision C58/2003 dated 7 May 2003). The Plan as a whole was made operative on 21 November 2003.

48. Section 10(1)(a) also requires consideration of when the proposed plan (rather than the rule) was notified. The current operative Christchurch District Plan (called the City Plan) was publically notified on 24 June 1995. As I understand the position, Critical Standard 2.4.4(d) was not in the Plan as originally proposed at that time, but resulted from the appeals in *Save the Bay Ltd v CCC*.

49. The detail of this chronology does not need to be examined closely because in any event there is no dispute whatsoever that all of the baches were certainly in existence prior to 24 June 1995 and so would be entitled to protection under section 10(1)(a) in respect of the operative District Plan, whatever the form in which it was notified. In terms of the decision of the Court of Appeal in *Rodney DC v Eyres Eco-Park Ltd* [2007] NZCA 13 at para [24], that is the time at which the character, intensity and scale of the effects of the baches must be determined for the purposes of the operative plan. The issue that then arises is whether there was any earlier rule in a plan which would have resulted in some need for resource consent. As noted by the Court of Appeal in *Eyres Eco-Park* (at para [23]), this earlier consideration is of factual significance because it defines the existing use right at the time of the first plan (i.e. at the time s 10 (or a predecessor provision) is first brought into play) for the purposes of determining whether the current use is "lawfully established".

50. Prior to section 10 of the RMA, existing use rights arose under sections 90 and 91 of the TCPA 77. I have quoted the relevant parts of section 90 above at paragraph 42. Section 91 related to reconstruction of buildings and relevantly provided:

> ***91 Reconstruction, etc, of non-conforming buildings***
>
> *(1) Except as otherwise provided by any provision in the district scheme relating to the matters set out in clause 8(a) of Schedule 2 to this Act, where any existing building is not in conformity with a district scheme or any part or provision of it as in force for the time being, then the building may be reconstructed, altered, or added to if—*
>
> > *(a) The reconstruction, alteration, or addition does not increase the degree by which the building fails to conform to the scheme or any part or provision of it; and*
> >
> > *(b) The reconstruction, alteration, or addition would not increase the current market value of the building by more than 60 percent.*

51. It is pertinent to note that section 23 of the Town and Country Planning Amendment Act 1980 replaced "or" with "and" between s90(1)(a)(i) and (ii) with effect from 23 December 1980. The amendment made both the lawful establishment of the use and the continuation of the same or similar character, intensity and scale of use essential to the continuation of existing use rights. The potential significance of this change was discussed by the Environment Court in *Lendich Construction Ltd v Waitakere CC* (Decision No A 77/99), where it was held that the word "character" does not include the concepts conveyed by the words "intensity" and "scale". The consequence of this was that prior to 1980 an increase in the intensity and scale of effects over time, but without any change in their character, did not result in the loss of existing use rights.

52. Prior to the TCPA 77, existing use rights arose under sections 36 and 37 of the TCPA 53. The relevant provisions are quoted in *One Tree Hill BC v Lowe* at pp 4-6. It is sufficient to note that these provisions defined "existing use" as meaning a use of land or buildings for any purpose that did not require substantial reconstruction or alteration or addition to the buildings and that is of the same or similar character as that for which it was last used before the district scheme became operative.

53. More relevantly, section 38A of the TCPA 53 (as inserted by section 26 of the Town and Country Planning Amendment Act 1957 which commenced

on 1 November 1957) provided that except with the consent of the Council, no use of any land or building that was not of the same character as that which immediately preceded it could be commenced before the date on which the district scheme became operative "in any case where the use detracts or is likely to detract from the amenities of the neighbourhood."

54. In absence of any prior district scheme in Christchurch, section 38A would appear to be the relevant planning provision which first constrained the common law right to establish new activities on land, albeit subject to the rather amorphous test of whether the new activity detracted from the amenities of the neighbourhood. For present purposes this appears to me to make 1 November 1957 the starting date for identifying whether any non-conforming activities at Taylor's Mistake had existing use rights.

55. For the sake of completeness, I note that prior to the TCPA 53 there was a Town Planning Act 1926. As enacted, it does not appear that this Act contained either any constraint on the use of land in the absence of a district scheme or any provision for existing use rights. Subsequent amendments did enact such provisions; see the discussion in *One Tree Hill BC v Lowe* at pages 4 – 6, which notes:

    (i) section 76 of the Statutes Amendment Act 1941, which made it an offence to use any building or land in a manner not in conformity with the town planning scheme unless it was an existing use or was allowed pursuant to a consent under s 77; and where "existing use" was defined in subsection (4) in terms of being the same character as that for which it was last used before the district scheme came into force; and

    (ii) section 6 of the Town Planning Amendment Act 1948 which controlled new works on land and re-defined "existing use" to allow them to be of a similar character.

56. For present purposes my detailed inquiry need go no further back than 1957 amendment to the TCPA 53, as neither Sumner Borough nor Christchurch City had a district scheme under the 1926 Act.

57. Any existing use rights are preserved through the statutory changes by section 17(1) of the Interpretation Act 1999 and its predecessor provision section 20(e) of the Acts Interpretation Act 1924, which both provide that the repeal of an enactment does not affect a number of things including an existing right. As noted in *One Tree Hill BC v Lowe* at page 59 (after an extensive discussion beginning at page 42) and followed in *Lendich Construction v Waitakere CC* at [12], the better view is that an owner can rely on these provisions to save rights which arose under the existing use provisions of an earlier enactment.

58. Drawing the threads of these historical statutory provisions together, I conclude that if it can be shown, on the balance of probabilities, that the baches were established prior to the commencement of s38A TCPA 53 on 1 November 1957 without the consent of the Council or prior to the operative date of the first district scheme on 1 April 1962 with such consent, then this aspect of the requirements for existing use rights would be met and the baches would be lawfully established for the purposes of s10 of the RMA.

59. As there appears to be no dispute that all of the baches were originally established well prior to 1957, this requirement is satisfied.

"The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified"

60. "Effect" is broadly defined in section 3 RMA. The reference to character, intensity and scale reinforces the sense that as well as measurable effects

such as physical dimensions, less tangible effects such as character must also be assessed.

61. Under previous legislation, the assessment was stated to be of the use, rather than expressly the effects of the use. There is a comment by the High Court in *Russell v Manukau CC* [1996] NZRMA 35 suggesting that a comparison of uses rather than their effects might be somehow different. With great respect, I would venture that this is a distinction without a difference, as the cases (including *Russell*) demonstrate that any assessment of the character, intensity and scale of a use necessarily involves an assessment of its effects.

62. Much more important is the use of the phrase "same or similar" which appears to have been part of the test for an existing use since at least the enactment of section 6 of the Town Planning Amendment Act 1948. This phrase makes it clear that an existing use is not limited to having effects that are exactly the same as those of the original lawfully established use, although. This allows scope for recognition of the practical reality that uses (especially activities) may vary through time and that "some reasonable evolution is permitted by the legislation" as it was put in *Russell v Manukau CC* at p41. Having said that, the caselaw also includes instances where the expansion of activities has gone beyond what may properly be considered to be "similar": see e.g. *Horowhenua DC v Roache* Env Ct Decision No W 20/94.

63. The "character" of a use, be it an activity or a structure, relates to its nature and the qualities and characteristics that distinguish it from other uses. Character might be described in very broad terms by such words as urban or rural or more particularly by such use types as residential, commercial, industrial or recreational. Within those use types the character of the effects of a use may be described by identifying the particular types of effects which contribute to its character, such as the generation of noise, light or traffic.

64. The "intensity" and "scale" of effects are usually expressed in terms of the measurable amount of some quality of the use. They have been held to mean much the same thing: see *Lendich*, where the Environment Court held that they refer to the degree or size of the effect the use has on amenities. Perhaps intensity may be better suited to an assessment of activities while scale may be more apt for assessing the relative dimensions of structures.

65. It is not necessary to carry this part of the interpretive exercise too far in this case. There does not appear to be any suggestion that the character of the baches as residential accommodation has changed over time and in that context the issue as to the intensity and scale of effects can be reasonably confined to the physical dimensions of the structures and the extent to which they are used.

66. The evidence in support of application includes a range of material such as photographs from the 1920's and 30's showing the baches, correspondence over time between bach owners and the Councils of first Sumner Borough and then Christchurch City in relation to various matters including hut licence fees, the transfer of licences, building permits and rates demands. There are also copies of different versions of a form of "licence to occupy building on street" by the Sumner Borough Council and the Christchurch City Council. There appears from this material to be no doubt that these baches were known by the relevant territorial authorities to exist and were the subject of various bureaucratic processes, including licensing.

67. In the material I received from Mr Snoep there appears to be confirmation that all of the baches were first established before 1931, although he raised two further issues:

    (i) That the establishment was not "lawful" because the bach owners had no registrable interest in the land they occupied; and

(ii) That the use of the baches or the effects of such use are not the same or similar in character intensity and scale as they originally were.

68. As to the first issue, as held by the High Court in *One Tree Hill BC v Lowe* and discussed above, the requirement for "lawful establishment" under s90 TCPA 77 and now s10 RMA is determined by the relevant planning legislation in force at the time of that establishment. It is not affected by other laws such as those in relation to the control of building work in that case or, by analogy, property law. In the absence of any restriction on land use in Christchurch pursuant to any district scheme prior to 1962, or otherwise by legislation prior to 1957, my inquiry for the purposes of s10 RMA as to whether the baches were lawfully established is satisfied by the evidence that the baches were built prior to 1957 and have been there ever since.

69. As to the second issue, this is more complex because, as acknowledged on behalf of the applicants, the documentary record for the baches is incomplete. Mr Snoep questions the absence of building plans, saying there must be Council records for the purposes of building permits. Based on my experience as a legal advisor to local authorities, I do not consider that the absence of complete building records is probative of anything other than that historical public records are often incomplete. He also notes that two baches have been rebuilt, one after a landslip (no. 55 in 1940) and the other after a fire (no. 57 in 1933). As these structures were rebuilt prior to any relevant control they would have been lawfully established then in any event. Even after land use controls were imposed in 1957, such reconstruction work is within the scope of protection by existing use rights pursuant to s37 TCPA 53, s91 TCPA 77 and s10(3) RMA.

70. Mr Snoep has pointed to a number of baches which he says have had additions made to them. These include some additional internal floorspace and the construction of balconies and decks adjoining the baches and

alterations to external design. This raises issues in terms of s10(3) RMA and its predecessor provisions s91 TCPA 77 and s37 TCPA 53.

71. It appears as though these alleged additions occurred prior to 1986, when all of the baches became non-conforming in terms of the second review of the district scheme. Prior to 1986, there were two groups of baches in terms of relevant plan controls:

(i) Nos 28 – 47, which were non-conforming activities in the Rural zone prior to 1972 and in the Recreation zone prior to 1986; and

(ii) Nos 48 – 58, which were permitted as residential uses in a Residential zone.

In both cases, as the baches were located on unformed road rather than their own sites, it is not clear that any development controls were applicable to them, so that there would have been no planning control in respect of their size (although there may have been control available in terms of the licences issued by the Council in respect of them). Any complaint that any external additions or decks encroached on public amenities such as paths must be seen in light of the fact that the baches are all on a public road to start with.

72. In terms of identifying any planning control in respect of the first group, nos 28 – 47:

(i) between 1962 and 1972, Ordinance 20 of the first District Scheme allowed modifications to buildings provided the modifications did not increase the extent to which the building failed to conform to the scheme. In the absence of relevant development controls, it does not appear that any additions to the baches did increase the degree of non-conformity.

(ii) between 1972 and 1986, Ordinance 14(2)(a)(i) of the first review of the District Scheme applied as discussed above at paragraph 23 and limited any use that was considered by the Council to be "detrimental to the amenities of the neighbourhood". There is no evidence to suggest either that the Council did turn its mind to this or that, if it had, it could properly have said that the additions to the existing baches were detrimental

73. Mr Snoep also raises the issue of intensity, both in terms of the presence of the baches overall at Taylors Mistake and in relation to particular use of individual baches. In relation to the presence of baches overall, I do not think that this application raises any issue as to intensity. Certainly, the availability of existing use rights in relation to one or all of the group of baches that is the subject of this application does not provide any basis on which any new bach could be erected. In relation to the intensity of use of individual baches, I do not consider there is any basis in the relevant legislation or ordinances or rules under it on which to say that the amount of use of any bach has ever been the subject of planning control, whether for one day a year or all year round.

74. In overall terms, I do not consider that any changes which may have occurred to the baches between 1962 and 1986 increased the degree of non-conformity of any of them or went beyond the bounds of what was the same or similar in character, intensity and scale to what had existed prior to the first imposition of control in 1957 or 1962.

75. The issues raised by Mr Snoep about the effect of these baches (and any additions to them) on matters of public amenity do not, in my opinion, demonstrate any contravention of any control based on planning legislation or the provisions of the District Plan or previous district schemes, given the protection the baches have in terms of existing use rights. While control may well be able to be exercised in relation to these effects in terms of other legislation or the general law, I consider I am bound by the decision

of the High Court in *One Tree Hill BC v Lowe* to disregard those other legal controls when deciding on an application for a certificate under s139A of the RMA.

Conclusion

76. On the evidence I find that the baches were all established prior to 1957. Prior to 1957 there was no planning control in respect of the land on which the baches are situated. Within the scope of any relevant planning legislation, there was therefore no issue of planning consent being required prior to their establishment. On that basis, the baches were lawfully established for the purposes of s10 RMA.

77. The baches have been of the same character, being modest residential structures, throughout their existence.

78. The intensity and scale of the baches over time is somewhat more difficult to be precise about. It is clear that there have been some changes, but in my opinion the changes were either after the effective date when planning control was first imposed in Christchurch, being either:

    (a) 1 November 1957 pursuant to s38A TCPA 53; or

    (b) 1 April 1962 pursuant to the first operative district scheme and s36 TCPA 53;

or otherwise were not such as would increase the degree to which the baches failed to conform to any relevant planning control or would take them beyond the "same or similar" test at any stage so as to remove any existing use rights.

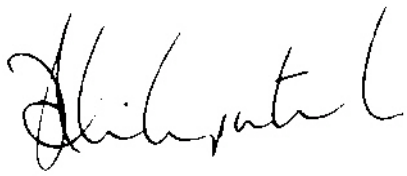
79. In reaching these conclusions I am mindful that the onus of proof under s139A RMA is on the applicant, and that the requisite standard of proof is on the balance of probabilities. In my opinion, the evidence in support of

the date of establishment and of the character, intensity and scale of effects is clearly stronger than any doubt raised from the material before me.

80. I therefore conclude that a certificate should issue in response to the application. The form of certificate must state the extent of the existing use certified. That should clearly be that the existing use is the use as residential baches in the form shown on the plans attached as appendix 2 to the application

81. I note, as in *One Tree Hill BC v Lowe* (referred to above at paragraph 45), that these existing use rights do not have any effect beyond section 9 and related provisions of the Resource Management Act 1991. In particular, the issue of such a certificate does not affect any matter under the general law including (without limitation) matters of tenure or under any other legislation.

Dated at Auckland this 23rd day of September 2011



David Kirkpatrick
Commissioner for Christchurch City Council