

BEFORE THE ENVIRONMENT COURT
CHRISTCHURCH

APPLICATION FOR ENFORCEMENT ORDER

Under sections 3 14 and 3 16 of Part 12, Resource Management Act 1991

Amended Affidavit by: Otto Snoep, retired Civil Engineer.

Address: 233 Taylors Mistake Road, Christchurch 8081

Date: 24 February 2011

Name of Authority enforcing provisions in the District Plan:

Christchurch City Council.

Introduction:

1. This application is an enquiry to the Environment Court (**the Court**) pursuant to section 314 (1)(b)(i) of the Resource Management Act (**the Act**) with respect to the non-compliance of a rule in the Christchurch District Plan (**Plan**). The application concerns a number of unscheduled baches at Taylors Mistake located in the Conservation Zone (**C1A**) of the Plan that are a prohibited activity. The Christchurch City Council (**Council**) named as the first respondent in the Application in its capacity as the landowner and in its capacity as the territorial authority has failed to take the necessary action to remove these structures from the zone. The 14 unscheduled bach owners named in the Application as respondents 2 to 15, in their capacity as occupiers of the land in the zone have failed to comply with the rule in the Plan and remove their baches.

2. Section 316(1) of the Act entitles me to make an application in person for an enforcement order in accordance with section 314(1).

3. My interest in this matter is as a member of the public in general, and as an adjoining property owner in particular, to see that the Council gives effect to the Plan. I have a further interest as one of the original referrers in the reference to the Environment Court in 2001 (ref. RMA 396/99) that culminated in Decision C50/2002. I, along with other parties to the reference, was subsequently invited by the Court to participate in the formulation of the provisions that are now incorporated in the Plan. The Court signed off on those provisions under the Consent Memorandum C58/2003, but not before the Court was satisfied that there was general agreement on those provisions between the parties. I have become increasingly apprehensive that the Council has no intention whatsoever to give effect to the Plan with respect to these unscheduled baches.

4. This enquiry to the Court results from the Council at their meeting of 23 July 2010 setting in motion a process that in effect frustrates compliance with rule 5-2.4.4(d) in the Plan indefinitely and after I had been rebuffed by the Council over many years on requesting the Council to enforce its Plan in relation to the unscheduled baches in Taylors Mistake. The latest development initiated by the Council has placed me at a dead-end with the only option available being to appeal to this Court and have my complaint taken seriously.

5. It is not my intention, nor do I believe that there is a need, to re-litigate the decisions already reached by the Court in 2002 that led to the provisions in the Plan with respect to unscheduled baches located at Taylors Mistake on legal foreshore road. In this respect I specifically refer to the decision by the Court in C50/2002 under paragraph 306, that the unscheduled baches are inappropriate in terms of the Plan's method, rules, objectives and policies. As far as I am aware nothing has changed since that would invalidate that assessment.

6. I should outline my understanding of the setting under which the Application is made:

The principal elements of the Court decision under C50/2002, C40/2003 and C58/2003, which are incorporated in the Plan relating to this application are:

- (a) The licensing of 30 scheduled baches in the C1A zone.
- (b) The creation of a bach zone on rural land for 18 bach sites.

- (c) The transfer of some 70 hectares of land from the Taylors Mistake Association Land Company Limited, a collective of bach owners, to the Council.
- (d) The removal of 14 unscheduled baches from the C1A zone, as described in the planning maps.¹ These being baches number: 28, 30, 31, 32, 33, 47, 48, 49, 51, 52, 55, 56, 57 and 58.

7. The elements involve two separate groups of owners of scheduled and unscheduled baches with different objectives in outcome and different provisions to achieve those objectives under the Plan. Both factions are represented by the Taylors Mistake Association Incorporated (TMA) in the reference to decision C50/2002 as a 274 party and in on-going negotiations with the Council at the present time.

8. This application for an enforcement order only concerns the compliance by and implementation of those provisions in the Plan that directly affects the unscheduled baches. There are other on-going compliance issues with the scheduled baches that are unrelated to this application. They are of concern only to the extent that the issues may impede the performance standards for the unscheduled baches.

9. The absence of the implementation of any of the provisions for the baches in the Plan requires scrutiny. The starting point would be to record, and where necessary examine, the function of the TMA, as the representative entity, in the dual role it performs for each group of bach owners in negotiations with the Council, and whether the duality of the role is proper with regard to the integrity of the Plan. The Council, likewise as the local authority, has a function as the regulator and must at all times be mindful of that dual role performed by the TMA in their negotiations to ensure an impartial separation of the issues that are represented throughout the dealings with each group.

10. The roles of the TMA and the Council appear to revolve around issues relating to allowances under specific zone provisions in the Plan that are not compatible nor have a dependency relationship between the zones. Items (a) and (d) in paragraph 6 relate to the performance standards in terms of the Plan's method, rules, objectives and policy under the Conservation Zones. Items (b) and (c) are isolated to those requirements within the Living Zones of the Plan.

¹ Copy of Planning Maps

11. Apart from the wish by the owners of the baches for them all to be located in a dress circle position close to the beach, the only bond between them that is apparent, and the one that matters, is the 70 hectares of land that is in common ownership. From my observation, the actual objective of each role is basically in conflict with the other. The scheduled bach owners require the continued retention of the land in their ownership as a lever until such time that they can ensure their security over permanent tenure in the conservation zone. The unscheduled bach owners require the land to be transferred to secure the bach zone for their future presence in Taylors Mistake.

12. The situation that has developed is that the collective bach owners are using the need for the creation of the bach zone and the transfer of land as a lever to obtain terms and conditions of a licence for the scheduled bach owners that would be no more restrictive on their control over the bach site than what would be permissible under a perpetual lease arrangement that would provide property rights over the occupation. The Council for its part is restricting the terms and conditions in the licence to the extent of the authority it believes to have to grant licences for habitable structures on legal road on which all the baches are located and one that can be terminated on notice.

13. The unscheduled bach owners seem to be comfortable with this situation as long as the Council does not enforce the removal of their baches from the conservation zone. It is common knowledge that the TMA in recent times has lobbied the Council for these baches to remain where they are into the future.² The scheduled bach owners appear equally comfortable with the present arrangement of not being controlled by a licence and avoiding otherwise the payment of licence fees as long as the Council takes permissive latitude over their unlicensed occupation on the road. The status of all the baches at the present time is that none of them are licenced and all are deemed by the Council to be illegal structures on the road.

14. The paragraphs traversed above set out my interpretation of the main issues and the dominant players in the consideration of my Application. I shall now examine the detail of those issues specific to the Application that prevail at the present:

² Extract from the TMA submission to the Council Meeting of 22 April 2010.

Background:

15. In the seven years since the Court Decisions the bach owners have taken no steps towards:

- (a) Boundary adjustments at the common interface between Lots 1 & 3 of DP 59234 to create new titles.
- (b) Transfer of the 70 hectares of land to the Council.
- (c) The creation of the Taylors Mistake Bach Zone.
- (d) Subdivision within the bach zone for leasehold titles for each individual bach site.
- (e) The preparation of a landscape concept plan within the bach zone.
- (f) The removal of the unscheduled baches.

16. There exists no obligation in the Plan for the bach owners to create the bach zone or transfer the land. The non-performance by the bach owners of these particular transactions merely defers the creation of the bach zone indefinitely. It is acknowledged that the Council does not possess the ability to enforce the creation of the bach zone or the transfer of the land. I consider that neither the bach zone nor the land transfer has a material effect on the performance of the Plan with respect to the unscheduled baches. On the other hand the Council has every power and duty to remove the unscheduled baches from the conservation C1A zone in its capacity as owner of the land and through the prohibited activity status attached to those baches. The Council has not enforced the removal of the unscheduled baches despite numerous requests for the Council to do so and in spite of the fact that every rule, to the limit of my understanding, has force and effect of regulation under section 76(2) of the Act.

17. The Council at its Ordinary Council Meeting of 23 July 2010 re-confirmed its commitment to give effect to the District Plan by way of Resolution 26 (c) in order not to run foul of section 84(1) of the Act where it is required of the Council to observe and to the extent of its authority enforce observance of its Plan.³

18. At this meeting it was revealed however that the Council's long term political agenda is to have the unscheduled baches scheduled in the next district plan review process, probably still some two years away, so as they

³ Copy of agenda report to the Council Meeting of 23 July 2010.

may remain in the C1A zone.⁴ The Council's agenda at the meeting was independently confirmed in the Press release of 24 July 2010.⁵ There is also an earlier indication of that agenda to stay the removal of the unscheduled baches as is revealed in a letter I received from the Council on 18 December 2008. In this letter the Council advises that the officers were stopped from initiating the removal of the unscheduled baches.

19. The Council overtly instructed the administration in the Meeting to find ways by which the removal of the unscheduled baches might be delayed without upsetting the requirement under the current operational plan that calls for their removal. Aside from that instruction to officials the Council indirectly incited the bach owners to ignore the requirement to observe section 76(2) of the Act at the meeting of 23 July 2010, by overt encouragement for the bach owners not to cooperate with the Plan's requirements and in particular the preparation of the planting concept plan.

20. Council in effect went further at the 23 July 2010 meeting to ensure that delays to the removal of the unscheduled baches will be realised. The Council by order passed a resolution under 26(d)(iv) (the Resolution) to make the removal of the baches subject to and dependent upon the creation of the bach zone together with the approval of the planting concept plan.⁶ The Council did this in the full knowledge that the Council is impotent to enforce the creation of the zone or the preparation of the planting concept plan. By its action the Council has rendered the provisions in the operative plan with respect to the removal of the unscheduled baches ineffective. In my view the intention of the Resolution is defective in that it contradicts the requirement of resolution 26(c) passed at the same meeting to give effect to the Plan of which rule 5-2.4.4(d) forms part. The Legal Services Unit of the Council is complicit in the passing of the Resolution. The actual recommendation to delay the removal of the unscheduled baches was made by Legal Services in the agenda report for the 23 July 2010 Council meeting under 26(c)(iv).

21. I record the Resolution in full, as it is important to this Application. The Council seems to rely on the Resolution to retain the unscheduled baches in location:

⁴ Notes taken of debate of the Council Meeting 23 July 2010.

⁵ Copy of Press report 24 July 2010.

⁶ Confirmation of the minutes to agenda item 26 of the 23 July 2010 Council Meeting.

"Confirm the Association's undertaking on behalf of affected bach owners that immediately upon fulfilment of the conditions in (d)(i) to d(iii) above, all unscheduled baches will be removed."

Item (d)(i) refers to a planting concept plan; item (d)(ii) relates to the issue of leasehold titles within the zone; and item (d)(iii) refers to the land transfer.

Here it has to be assumed that the TMA held the necessary instructions to act for all its members and of service of notice at this time. Confirmation of that position of authority is at large and any force the Resolution may have is possibly ineffective. It has been confirmed by Council that it holds no register of the names of the bach owners.

22. Notwithstanding the rights or wrongs of the Resolution, the forbearance by the Council towards the unscheduled baches does not appear to me to absolve the bach owners of their personal liability of non-compliance with the rules in the Plan. The unscheduled bach owners are not only negligent by not observing section 76(2) or complying with section 9, notably rule 5-2.4.4(d); they are in breach of these sections under section 338(1) of the Act. The bach owners also appear to be guilty of non-performance of the only enduring undertaking given that still has substance. In its submission on the notified plan in 1995 the TMA, on behalf of its members, gave an undertaking that the unscheduled bach owners would remove their baches from the C1A zone as a quid pro quo for the rezoning of rural land for a bach zone.

23. The Commissioner in hearing the submission did confirm the zone change. The Environment Court, on appeal, subsequently upheld this decision by the Commissioner, albeit in a deferred state, until the land transfer was complete and the Council approved the planting concept plan. The "price" to the bach owners for the zone change ruling was the gifting of 70 hectares of land to the Council. There were other undertakings given and asked for in the past, such as the Agreement in the terminating Deed of Licence in 1976 to remove all the baches in 1986 and the undertaking given at the request of Judge Smith in 2001 to carry out the removal of the unscheduled baches on approval of a zone change (**the Undertaking**). The most recent undertaking was requested by the Council from the TMA on 23 July 2010 under 26(d)(iv). The request for confirmation of the latest undertaking is absurd in its naivety to any one with an inquiring mind. It is unlikely to result in the removal of the unscheduled baches. The undertaking is predicated by three other steps to be performed by the bach owners that the Council has no control over. The proposition under 26(d)(iv) appears to

be designed to frustrate compliance. In my view all undertakings have by nature an element of voluntary performance attachment that is vulnerable to misinterpretation and abuse. They are expressions of intent without the obligations of enforceable contract. I believe that both the Council and the bach owners have lost sight of the decision in C58/2003 where all undertakings are replaced by rules in the Plan. These rules have force of regulation. The Undertaking the bach owners seem to rely on is the one given during the hearing of C50/2002. That undertaking has fallen by the wayside under C58/2003. The Plan is specific in this regard under clauses 1.12, 2.1.3 and 7.1.28 of Vol 3, Part 2 that state the TMB zone is deferred for only two reasons: the transfer of land and the planting concept plan requirements. There is no reference whatsoever in the plan of an undertaking to stay the removal of the unscheduled baches until the TMB zone is ready for occupation. In my opinion if it was intended that rule 5-2.4.4(d) could be deferred it would have been drafted in such a way that any deferment would have been made abundantly clear in order to remove any elements of doubt.

24. I acknowledge the potential protection for the bach owners under section 10 of the Act for existing land use rights. The Court in C50/2002 was not required to determine on that existing use right potential in that decision. I have discounted the likelihood that a valid claim for existing use right applies. In particular:

- a. The TMA on behalf of the bach owners of the unscheduled baches in their submission on the Notified Plan in 1995 did not seek recognition for them to remain in the Conservation 1A Zone.
- b. The bach owners are not the landowners of the unformed road they occupy. Section 172(2) of the Lands Act 1948 may apply.
- c. The Council as landowner can order the removal of the baches at any time as of right.

25. Whilst the bach owners appear to be negligent in their reliance on the perceived importance of undertakings, the culpability of the offending against the provisions in the plan for the baches in my opinion must lie foremost with the Council as the regulator and by failing in its duties under section 84(1) obligations to put a stop to the offending by the unscheduled bach owners.

Reason for Application:

26. The background provides the foundation for the disagreement that exists between the Council and myself and is the cause for this Application to the Court.

27. I have on a number of occasions requested that the Council effect to its Plan and takes enforcement action against the unscheduled baches.⁷ In response to those requests the theme of the Council's letters was: Not yet, the removal is discretionary on the Council, will be gradual, not before the TMB zone is ready for occupation, staff are to await a full Council instruction to do so, and as of 23 July 2010, the removal will not occur at all if the Council can prevent this from happening.

28. The root of the disagreement with the Council, and their resistance over a long period of time, is a matter of interpretation on the meaning of the words in the Plan over an alleged inter-dependency in performance standards as between the various classes of zones designated in the Plan that supposedly affect the sequence in which the Plan should be given effect to. In order to resolve the impasse that exists I request from the Court that it confirms or determines in the course of this Application as a preliminary step:

- (a) Whether the creation of the bach zone is in any way dependent physically or by implication on the continued occupation of the unscheduled baches in the C1A zone, or in the alternative,
- (b) Whether the immediate removal of the unscheduled baches from the C1A zone physically, emotionally or by necessity prevent the performance in any way of the creation of the bach zone.

29. I am of the view that there is no relationship between the requirements of the Conservation Zones with those specific requirements for the creation of a bach zone in the Living Zones of the Plan.

30. Put another way; there is no requirement in the Living Zones of the Plan that a bach zone must be created. It only provides the opportunity for its creation and that is the choice for the bach owners alone to exercise, provided certain performance standards are met as set out in the Plan. On

⁷ History of correspondence with the Council.

the other hand there is every requirement in the Conservation Zones of the Plan for the unscheduled baches to be removed. Clause 1.3 Part 5 of the Conservation Zones requires the removal. Rule 2.4.4(d) Part 5 has determined that the unscheduled baches are a prohibited activity.

31. Through public scrutiny of the Council's performance, the Council has come to the realisation that its claim over an alleged inter-dependency relationship in the Plan that prevents the removal of the unscheduled baches before the completion of the bach zone would probably not be tenable as a defence under examination before the Court. The Council appears to have come to the conclusion that changes to the provisions in the operative Plan are required to ensure that the removal of the unscheduled baches is delayed until the next plan review process.

32. It was not until the Resolution was passed that correspondence was received by way of my request under the Official Information Act from the Council's solicitor on 22 October 2010. In this letter the Council acknowledges that the Council is not entitled to set conditions that prevents the removal of the unscheduled baches under the operative Plan.⁸ This very recent admission of course is not in accord with Council's apparent political agenda to delay the removal of the unscheduled baches. The admission by the Council seems to have been deliberately withheld until the Resolution was safely in place.

33. I allege that the Resolution passed by Council on 23 July 2010 signifies the desire to delay the need for the removal of the unscheduled baches by introducing performance dependency relationships that did not exist before and have the consequence of making some provisions in the Plan with respect to the unscheduled baches inconsistent with the operative Plan. It is unlikely that the Council can arbitrarily set aside a policy or rule in an operative plan it has held public consultation on. The Council also appears in breach under sections 77 and 78 of the Local Government Act 2002 on public consultation process requirements.

34. I further allege that the Resolution constitutes in effect an unauthorised plan change that has the effect of a materially different outcome from the provisions in the operative Plan. The Order in Council in my opinion is corrupt in its construct and unlawful in practice because due process has not been followed to make such plan change without a public notification procedure. I

⁸ Copy of letter from the Council to the TMA dated 22 October 2010.

