

**APPLICATION FOR EXISTING USE CERTIFICATE PURSUANT TO SECTION 139A OF THE
RESOURCE MANAGEMENT ACT 1991**

TO: Christchurch City Council
Attention: Ian Thompson
PO Box 237
CHRISTCHURCH 8141

Applicants:

| 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 RICHDALÉ |

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Land Owner's name: Christchurch City Council

Legal description: Road Reserve

Description of use: Baches and the use of the Baches for temporary accommodation

Location of the existing use: Taylors Mistake

Introduction:

- 1 This is an Application for Existing Use Certificates for baches 28, 30, 31, 32, 33, 47, 48, 49, 51, 52, 55, 56, 57 and 58 (*the Baches*) pursuant to s139A of the Act. See **TAB1** for a plan showing the location of the Baches and **TAB 2** for photographs of each of the Baches and a building footprint.
- 2 The Baches are zoned Conservation 1A (Coastal Margins) in the City Plan. The Baches are not scheduled in the City Plan. Rule 2.4.4: Taylors Mistake Baches, prohibits baches in the Conservation 1A zone which are not scheduled (Rule 2.4.4 (d)). See **TAB3**.
- 3 The City Plan (including Rule 2.4.4) was first notified on 24 June 1995. The land on which the Baches are located was zoned Conservation 1. No specific provision was made, either by zoning or rules or by way of policy recognition, for the retention of the Baches.
- 4 Following a hearing and Commissioner's recommendation, the Council determined to provide for certain scheduled baches as permitted activities. The Council's decision was notified on 10 May 1999. References were filed against the Council's decision resulting in the Environment Courts decision in Save the Bay v CCC (C 50/2002) (**TAB4**) and changes to the City Plan as set out in the Environment Courts decision in Save the Bay v CCC (C 40/2003) dated 7 April 2003 including what is now Rule 2.4.4(d).
- 5 Enforcement Orders have been sought seeking the removal of the Baches on the basis that the Baches contravene Rule 2.4.4.
- 6 The Baches are 'existing uses' for the purposes of s10 of the Act, which uses may continue notwithstanding Rule 2.4.4.
- 7 The Baches were lawfully established and the effects of the Baches are the same or similar in character, intensity and scale to that which existed before Rule 2.4.4 was notified.

Statutory Requirements:

8 The Council must issue a certificate if it is satisfied that the use of land is a use allowed by s10 of the Act.

9 Section 10 states:

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) either—

(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;

(b) or—

(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.

(4) For the avoidance of doubt, this section does not apply to any use of land that is—

(a) controlled under section 30(1)(c) (regional control of certain land uses); or

(b) restricted under section 12 (coastal marine area); or

(c) restricted under section 13 (certain river and lake bed controls).

(5) Nothing in this section limits section 20A (certain existing lawful activities allowed).

- 10 *“Lawfully established”* means lawfully established in terms of the relevant planning legislation at the time starting with the Town Planning Act 1926 (*the 1926 Act*), the Town and Country Planning Act 1953 (*the 1953 Act*), the Town and Country Planning Act 1977 (*the 1977 Act*) and the Resource Management Act 1991 (*the Act*).
- 11 The Council must issue a certificate within 20 working days of receiving a request for a certificate, further information or payment of the appropriate administrative charge.
- 12 Although an existing use certificate is treated as a resource consent, many of the provisions which relate to the processing of resource consents do not apply to applications for existing use certificates, including provisions relating to public notification.
- 13 The onus is on the Applicants to satisfy the Council, on the balance of probabilities, that the use of the land is a use allowed by s10. In the absence of direct evidence, it is possible to draw inferences, which on the balance of probabilities establish that an existing use existed under previous legislation.
- 14 The Act constitutes a code for existing use rights. Existing use rights can only be lost by discontinuance in accordance with s10(2) or where the effects of the use are greater in character, intensity and scale than the existing use.

Issues for determination

- 15 The key issues for determination are:
- 15.1 When were the Baches first established?
- 15.2 When did the Baches first require planning permission?
- 15.3 What was the character, intensity and scale of the effects of the Baches immediately prior to June 1995 and prior to the Baches first requiring planning permission?
- 16 It is commonly accepted that the baches at Taylors Mistake (including the Baches) were all established before 1945. See Save the Bay v CCC p. 14 (TAB4).
- 17 All of the Baches were permitted activities up until 1962. Baches 28, 30, 31, 32, 33 and 47 were likely non-conforming activities after 1962 and thereafter planning permission would likely have been required to establish these baches.
- 18 Baches 48, 49, 51, 52, 55, 56, 57 and 58 were likely permitted activities up until 1979 and there after would have likely required planning permission.
- 19 The Baches were all lawfully established (in a planning sense).

- 20 The third issue concerns changes to the Baches which may have been made following their establishment and after planning permission would otherwise have been required for the Baches. A question arises as to the status of these changes - whether the changes are lawful and covered by existing use rights.
- 21 Changes to the Baches most likely occurred before planning permission was first required in 1962 in respect of Baches 28, 30, 31, 32, 33 and 47 and 1979 in respect of Baches 48, 49, 51, 52, 55, 56, 57 and 58.
- 22 The Baches otherwise enjoyed existing use rights and any changes to the Baches were within the scope of the existing use at the time and therefore lawful (that is did not increase the character, intensity or scale of the effects of the existing Baches on the environment); or the changes were approved by the Council.
- 23 Notwithstanding the above, from a practical perspective, if the Baches were lawfully established and the scale and nature of the Baches today is modest it would be a nonsense to find some of the changes unlawful or outside the scope of the original use prior to planning permission being required – that is part of a bach was lawful and another part unlawful (and therefore not protected by existing use rights).

When were the Baches established?

- 24 It is generally accepted that the Baches were established some time **before 1945**.
- 25 The first bach in the area known as 'The Row' appeared in 1913 and by 1920 another 12 were added. Between 1920 and 1930 many (if not all) of the Baches were established. By World War II there were some 72 baches in total on the foreshore from Hobsons Bay to Boulder Bay (including the Baches). The Army took over Taylors Mistake (and the Baches) between 1939 and 1945 and excluded the public from Taylors Mistake.
- 26 Photographs taken in the 1920's and 1930's show Baches 29, 30, 31, 32, 33, 47, 48, 56, 57 and 58. See **TAB5**.
- 27 Bach 33 was purchased by Barbara Carter in 1950 for three hundred and fifty pounds. A Building Permit was issued for additions to Bach 33 in 1953 including a plan showing the proposed building work which is the same or similar today. Photographs (dates unknown) show the original Bach, the building work being carried out and the Bach as it is today. A Rate Demand was issued for Bach 33 in 1960. See **TAB6**.
- 28 Bach 48 is shown in the photograph taken in the 1930's (TAB5) (and again in 1960 – see TAB11) and is the same or similar today.

- 29 Bach 31 was established in 1914 following an application for “...a permit to build a hut on site shown sketch...” dated 1914 including a sketch which shows a number of other baches likely Baches 30, 32, 33, 48 and 49). Bach 31 appears in the photograph taken in circa 1918 (TAB5) however was destroyed by fire (and is as a result absent from the photograph taken in the 1930s – TAB5). Bach 31 was rebuilt in the Art Deco style in 1944 following an Application for Building Permit (or Notice of Intention to Build) including specifications and plans and issue of a Building Permit dated 1944. See **TAB7**.
- 30 Bach 47 is shown in the photograph taken in the 1930’s (TAB5) and is the same or similar today.
- 31 The photographs taken of Baches 29, 30, 31, 32, 33, 47, 48, 56, 57 and 58 in the 1930’s (TAB5) while distant show the scale and nature of these Baches which are similar to today.
- 32 In 1935 the Sumner Borough Council decided that no further permits should be granted for bach sites at Taylors Mistakes excepting in special circumstances of which the Council should be the sole judge. This resolution was confirmed by the Christchurch City Council on 30 April 1951 which took over from the Sumner Borough Council in 1945. See **TAB8**. It seems very unlikely that any baches established after this date would have gone unnoticed by the Council and/or require a permit or licence of some sort. The Baches were regulated one way or another from (at the latest) 1935.
- 33 In 1958, the Council investigated making a further six bach sites available on The Row (in the vicinity of Baches 46 and 47). An inspection of this area was made by members of the Council’s Finance & Town Planning Committees in late March 1958, when members of both Committees formed the view that in view of the improbability of a roadway ever being formed, six sites should be available for baches on the same terms as the existing baches. At its meeting on 7 July 1958, the Council resolved, on the recommendation of the Committee that six sites be made available to persons whose names were drawn by ballot subject to usual conditions and fees. See **TAB9**.
- 34 The following month (August 1958) objections to the Council’s decision to make further bach sites available were lodged on behalf of Messrs JC Elworthy and BJ Gould, the owners of a block of land on Scarborough Hill, running down into Taylors Mistake, by Wilding Perry & Ackland (Solicitors). Because of these objections, the Council resolved at its meeting on 27 August 1958 to defer the proposal to allocate further bach sites. See **TAB10**.
- 35 At the same meeting the Council considered applications for additions to various baches including Baches 53 and 55. The Council’s minute sets out the scope of the additions to Bach 55 in particular, being for the reconstruction of the ground floor and addition of another storey – the addition being a total of 444 square feet. The character scale and nature of Bach 55 is the same now as it was immediately following the additions in 1958. See **TAB10**.

36 It is relevant to note the City Engineer's Report regarding the application to extend Bach 53 where he states:

"On the 30 April 1951 a resolution was passed by Council that no further additions to the baches would be approved except under special circumstances. In the last 3 years, four building permits have been approved for additions to baches in this area."

37 Photographs (taken at various times) of Bach 49 show the original cave dwelling established some time before circa 1910. See **TAB11**. Bach 49 was purchased as a "cottage" in 1963 after being substantially rebuilt in the 1950's. A lean-to was added in 1966 pursuant to a Building Permit. See **TAB12**.

38 All of the Baches were established before 1945. While each of the Baches have likely evolved since they were first established, changes as a result of this evolution must have been relatively modest given the modest scale and nature of the Batches today. It is doubtful that any changes to the Baches have substantially increased the scale and nature of the Baches, effect of the baches on the environments or extent to which the Baches failed to comply with the City Plan. Any changes which may have been made are likely lawful and do not effect the status of the Baches.

39 While it is possible to quantify changes to some of the Baches by reference to photographs and Building Permits, it is impossible to do so for all of the Baches. That said the Baches are all of a similar scale and nature and on the basis that they were all lawfully established should be treated equally irrespective of any changes which might have been made to individual baches.

40 A useful chronology of the history of the Baches is set out in the Environment Court's decision in Save the Bay v CCC (C 50/2002) from page 12. See TAB4.

41 A useful history of the baches at Taylors Mistake can be found in David Hill's thesis entitled *Living on the Queen's Chain* dated July 1988 (which is referred to in Save the Bay v CCC at p.9) and evidence given by various bach owners (and others) in Save the Bay v CCC. Copies of Mr Hill's thesis and other relevant evidence can be provided as required.

Licences and Rates

42 From circa 1911 permits were required by the Sumner Borough Council for each bach and bach owners were required to pay an annual licence fee. The Baches have been recognised by successive Council's through a licensing/permit system. The licenses included terms requiring the holder to apply to the Council for a permit before erecting a hut – that is to suggest that all the huts were licensed at one time or another, and later that it was an offence to enlarge any of the huts without first obtaining written permission from the Council including submitting plans and specifications for approval by the Council suggesting that any alterations

or additions to the huts were approved by the Council. See **TAB13** for copies of licences issued by the Sumner Borough Council and later Christchurch City Council.

- 43 Rates were levied and paid by the Bach owners from time to time up until 1 April 1976 when the sites ceased to be rateable (following a resolution of the Council on 24 May 1976) to coincide with the Council's issue of new licences in 1977 and requirement that following the expiry of the new licences the baches would be removed. From 1 April 1976 the Bach owners were charged a licence fee only until the expiry of the licence on 1 April 1986.
- 44 The issue of licences demonstrates the existence of the Baches and is evidence of their lawfulness (in every respect) and further that any changes to the Baches, in particular affecting the scale and nature of the Baches, would likely have likely been approved by the Council. It is inconceivable that the Council would issues licences for baches which were unlawful or to bach owners who failed to comply with the terms of the previous licences.
- 45 The Baches were ultimately controlled through the issue of licences and by-laws as opposed to a planning scheme. The Baches evolved under the watchful eye of the Council (and no doubt other bach and land owners) as evidenced by the licences and Council minutes.
- 46 On the basis that licences were issued to at least some of the bach owners it can be inferred that licences were issued to all the bach owners (save having to point to a licence for each individual bach). Further, given the vulnerability of their tenure and restrictive terms of the licences bach owners would have sought and obtained approval from the Council before making any changes to their baches.

Planning permission

- 47 Baches 28, 30, 31, 32, 33 and 47 likely required planning permission from 1962 and Baches 48, 49, 51, 52, 55, 56, 57 and 58 from either 1979 when the second review of the district scheme was notified or 1986 when the second review was ultimately finalised (although nothing likely turns on the dates).
- 48 Prior to 1962, in the absence of a district scheme, the Baches were under the direct control of the relevant legislation – the Town Planning Act 1926 (the 1926 Act) and Town and Country Planning Act 1953 (the 1953 Act).
- 49 Irrespective of the above dates and requirement for planning permission, the Baches were existing uses from 1945 which uses were provided for in the 1962 Scheme and protected by the relevant legislation. Any changes to the Baches following the requirement for planning permission (whether in 1962 or later) were within the scope of the existing use.
- 50 Alternatively, to the extent that the Baches required planning permission for any changes the Council consented to these changes by granting licences and/or issuing Building Permits.

There was no prescribed form for granting planning permission. Building Permits were issued without reference to any legislation so as to distinguish them from planning permissions (unlike today). It is unlikely the Council would have issued separate permits for the same building work under the district scheme or Town and Country Planning Act, and under the relevant building by-laws or legislation.

1962 Scheme

- 51 The Council's first District Planning Scheme was approved by the Council on 15 November 1961 and operative on 1 April 1962.
- 52 Under the 1962 Scheme Baches 28, 30, 31, 32 and 33 were zoned Rural and Baches 48, 49, 51, 52, 55, 56, 57 and 58 Residential A. A small part of the valley floor behind the Baches was zoned for recreation. Notwithstanding the Rural zoning the Baches are identified on the planning map. See **TAB14**.
- 53 *Dwellings* in the Residential A zone were permitted activities (subject to bulk and location requirements and loading and parking).
- 54 It is not clear whether or not the Baches complied with the bulk and location and loading and parking requirements or were required to on the basis that the Baches were located on legal road.
- 55 *Dwellings* in the Rural zone were permitted activities provided they were accessory to a predominant use such as farming (subject to bulk and location requirements and loading and parking). *Dwellings* were otherwise *non-conforming*.
- 56 Ordinance 11 provided that any building on any land forming part of the site of a proposed road or public work was prohibited without the prior consent of the Council. There was no proposal or intention to form the road consistent with the Council's grant of licences to occupy the road and/or issue of Building Permits. Alternatively, the Council consented to the occupation of the road through the issue of licences. See also s35 of the Town and Country Planning Act 1953. See TAB14.
- 57 Ordinance 20 provided for existing buildings which did not conform with the provisions in the scheme which could be repaired, altered, or modified so long as the repair, alteration, or modification did not increase the extent to which the building failed to comply with the scheme. It is doubtful whether s36 of the 1953 Act in relation to existing uses affords any further protection - the test under s36 being a 'same or similar character' test as opposed to an 'increase in non-conformity' test (under Ordinance 20). See TAB14.
- 58 It is possible Baches 28, 30, 31, 32 and 33 otherwise required planning permission from 1962 on the basis that these Baches were non-conforming uses in the Rural zone.

59 If permission was required under the ordinances for the Rural zone, permission was granted pursuant to Ordinance 11 (in the form of a Building Permit in respect of any changes – the Baches being existing uses). Alternatively, the Baches were existing uses pursuant to Ordinance 20 (and s36 of the Town and Country Planning Act 1953).

1972 Scheme

60 In 1968 the Council promulgated its first review of its district scheme and as publically notified this included a larger area of the valley floor zoned for recreational purposes including provisions for *holiday cottages*. There were objections to this provision and as a result specific provisions for holiday cottages were deleted. See **Taylor's Mistake Surf Lifesaving Incorporated and TMA Incorporated and Others v CCC C86/83** at p.2 - **TAB15**. The first review became operative in August 1972.

61 Under the 1972 Scheme Baches 28, 30, 31, 32 and 33 were zoned Recreation 1 and Baches 48, 49, 51, 52, 55, 56, 57 and 58 Residential 1. See **TAB16**.

62 Baches 48, 49, 51, 52, 55, 56, 57 and 58 were permitted activities (subject to bulk and location requirements and loading and parking).

63 The Recreation 1 zone, comprising 6.7 hectares at Taylor's Mistake was intended as a beach holiday area to be developed by the Council or private enterprise in conformance with the scheme of development in principle shown in Appendix E. A comprehensive scheme was to consider among other matters the *existing bach site situation and any modifications or changes of bach sites in the valley, as a whole*.

64 Permitted activities in the Recreation 1 zone included buildings provided they were not *used for purposes involving any operation which, in the opinion of the Council will be detrimental to the amenities of the neighbourhood*.

65 *Other development* was to be in accordance with a comprehensive scheme of development to be published at a latter date.

66 Planning permission was otherwise required where the use did not comply with bulk and location and parking requirements.

67 While not specifically provided for in the 1972 Scheme Baches 28, 30, 31, 32 and 33 appear to have been permitted activities on the basis that the buildings and use of the buildings was not *detrimental to the amenities of the neighbourhood* and in the absence of any comprehensive scheme of development.

68 Baches 28, 30, 31, 32 and 33 were otherwise existing uses.

1986 Scheme

69 In December 1979 the Council promulgated the second review of its district scheme. The second review became operative on 1 July 1986. Under the 1986 Scheme the Baches were zoned Recreation 4. See **TAB17**.

70 The Applicants are not able to determine the planning status of the Baches when the second review was first promulgated or throughout the course of the planning process, including no doubt variations, culminating in the 1986 and subsequent changes to the 1986 Scheme following the operative date.

71 Assuming the Baches required planning permission before the second review was promulgated in 1979, the second review as notified and 1986 Scheme are likely irrelevant on the basis that the Baches were established and any changes to the Baches made before 1979. Certainly, the Baches are the same or similar now as they were in 1979.

1926 and 1953 Acts

72 Notwithstanding the above, the Baches were existing uses prior to the Council's first district scheme and any suggestion they may have required planning permission.

73 Prior to the first district scheme in 1962, the Baches were controlled by the Council under the relevant legislation at the time being s34 of the 1926 Act (up until 1 February 1954), and from 1954 s38 and later s38A of the 1953 Act. See **TAB18** and **TAB19**.

74 Section 34 of the 1926 Act gave the local authority a wide power of interim control in relation to the erection of buildings. It did not however require persons to apply to the local authority for planning permission for buildings or works prior to building or undertaking the works.

75 Section 34 of the 1926 Act states:

34. Pending approval of scheme, local authority may prohibit erection of buildings, &c., that would contravene the scheme:

- (1) Any local authority that, by this Act or by Order in Council under this Act, is under an obligation to prepare a town-planning scheme or an extra-urban planning scheme, and any local authority that, not being under an obligation to prepare a scheme as aforesaid, has resolved, pursuant to section thirteen or to section twenty-five of this Act, to prepare a scheme, may at any time before the scheme has been approved by the Town-Planning Board absolutely or conditionally refuse its consent to the erection of any building or the carrying out of any work within its district, or may definitely prohibit the erection of such building or the carrying out of such work, if it appears to such local authority that the erection of such building or the carrying out of such work would be in contravention of the scheme if it had been completed and approved, or would be in contravention of town-planning principles, or would interfere with the amenities of the neighbourhood.

- (2) Any person injuriously affected by any determination of a local authority under this section may appeal from that determination to the Town-Planning Board.
- (3) The determination of the Town-Planning Board for the purposes of this section on any question relating to principles of town-planning shall be conclusive and shall bind the local authority.

- 76 Section 34 was replaced by s38 of the 1953 Act. Under s38, local authorities could prohibit or refuse to consent to *detrimental works* where there was an undisclosed or proposed district scheme. Detrimental work (at the time) included a change of use which detracted or was likely to *detract from the amenities of the neighbourhood*.
- 77 Later s38A (enacted by the Town and Country Planning Amendment Act 1957 with effect from 1 November 1957) empowered local authorities to control any change of use before a District Scheme became operative if the change was likely to detract from an existing amenity.
- 78 From 1929 (following amendments to the 1926 Act), the 1926 Act, followed by the 1953 Act provided a measure of planning control in the absence of a district scheme. The Baches were permitted activities under both the 1926 Act and the 1954 Act prior to 1945 when they were first established and up until 1962 - in respect of Baches 28, 30, 31, 32, 33 and 47 and 1979 - in respect of Baches 48, 49, 51, 52, 55, 56, 57 and 58.
- 79 As previously stated, at least two of the Baches (Baches 33 and 49) were added to in 1944 and 1966 pursuant to Building Permits (see TAB6 and TAB12).
- 80 Any changes which may have been made to the Baches between 1962 and 1972 were permitted pursuant to Ordinance 20 of the 1962 Scheme up until 1972 (and s36 of the 1953 Act).
- 81 All of the Baches were subject to licences between 1976 and 1986 including a requirement that the Baches be demolished following the expiry of the licence so that any substantial changes after 1976 were unlikely (bearing in mind that Baches 48, 49, 51, 52, 55, 56, 57 and 58 were likely permitted activities up until 1979).
- 82 Baches 29, 30, 32, 33 and 47 can be seen in the photograph taken in the 1930's (TAB5). From the photograph, Baches 32 and 47 appear to be substantially the same and Baches 29 and 30 appear to be (at least) very similar in character. Bach 31 was rebuilt in 1944 (see TAB 7) and Bach 33 added to in 1953 (see TAB6). If there were any changes to Baches 29, 30, 32 and 47 after 1962 (and there is no evidence to suggest these Baches were significantly

altered) then the changes were unlikely to have increased the extent of non-conformity (pursuant to Ordinance 20).

- 83 The tenure of the Baches has always been vulnerable and incredibly uncertain. This uncertainty, the granting of licences and enforcement of building by-laws has resulted in the Baches being maintained in their original form or at least true to their original character.
- 84 The history of existing use rights was traversed by the High Court in its decision The One Tree Hill Borough Council v Lowe and Others including a detailed history of planning legislation and the expression '*lawfully established*'. See **TAB20**.

Ashburton County v Cooney

- 85 It is commonly accepted that the Baches are on a public road. Roads are generally not subject to zoning ordinances and accordingly there is no obligation to conform to the uses permitted by the underlying zone(s). If the Council wanted to control activities on the road then it must be by means of other relevant legislation or by-laws – see *Ashburton County v Cooney* 6 NZTPA at 122 – **TAB21**. In the absence of any planning controls the Council issued licences under the Municipal Corporations Act 1908 (s153) and Building Permits under the building by-laws.
- 86 The decision in *Ashburton County v Cooney* requires careful analysis as to whether or not it is authority for the proposition that the Baches did not require planning permission under any of the district schemes on the basis that they are on a legal road. Nothing likely turns on the decision on the basis that the Baches were established well before the Council's first district planning scheme in 1962 however is potentially relevant with respect to the lawfulness of any changes to the Baches following the Council's first district scheme in 1962 and is mentioned for the sake of completeness.

Character, Intensity and Scale

- 87 The effect of the Baches is the same or similar in character, intensity and scale to those effects which existed before Rule 2.4.4 was first notified in June 1995.
- 88 The Baches were all established before 1945. Whether any subsequent alterations or modifications required separate planning permission and were therefore lawful is more vexed, though likely of academic interest only.
- 89 In the absence of copies of Building Permits and/or plans for each of the Baches it is appropriate to consider the position had the changes come about after the requirement for planning permission.

- 90 Changes to the Baches post planning permission being required were not inherently unlawful or serve to make the Baches themselves unlawful. Given the modest scale and nature of the Baches and the uncertainty over tenure, it is reasonable to assume that any changes were equally modest and had little or no effect on the overall effect of or scale and nature of the Baches. Reasonable evolution is of course permitted. Any changes were likely within the scope of the existing use at the time insofar as the effects were the same or similar and did not extend the areas of non-conformity.
- 91 The question is ultimately whether the effects of the use are similar. The effects were identified by the Environment Court in Save the Bays as being in relation to public access to the foreshore area, use of these areas recreation including for picnicking, sunbathing and shade, and visual amenity.
- 92 Changes to the Baches which may have occurred are unlikely to have had any effect increasing or decreasing public access to the foreshore, improving spaces for recreation or visual amenity. Any effects in this respect are a result of the existence of the Baches and privatisation of public space. A modest increase in the floor area (for example) is unlikely to have any effect one-way or the other.

Conclusion

- 93 The Baches were lawfully established before 1945.
- 94 Baches 28, 30, 31, 32, 33 and 47 were permitted activities up until 1962.
- 95 Baches 48, 49, 51, 52, 55, 56, 57 and 58 were permitted activities up until 1979.
- 96 Modifications to the Baches following the requirement for planning permission were likely minimal given the modest nature of the Baches today and uncertainty over tenure, in particular after 1976 when the Council issued licences for 10 years including a requirement to demolish the Baches on the expiry of the licence.
- 97 Modifications to the Baches did not extend the areas of non-conformity, materially affect the character of Baches, or increase the scale and nature of the Baches or effect of the Baches on the environment.
- 98 The Council controlled the Baches through the issue of licences and compliance with by-laws including a requirement that any building work in relation to the Baches be approved by the Council.
- 99 The effect of the Baches is the same or similar in character, intensity and scale as it was when the Baches first required planning permission and/or 1995 when Rule 2.4.4. was

notified. Any changes to the Baches since 1962 and 1979 are unlikely to have materially affected the effect of the Baches.

- 100 **Baches 29 and 30:** Baches 29 and 30 were lawfully established (most likely in the 1920's), before planning permission was required. The photographs (TAB5) show the scale and nature of the original baches being the same or similar to today.
- 101 **Bach 31:** Bach 31 was lawfully established (most likely before 1914), before planning permission was required. The original Bach 31 was burnt down and later rebuilt by Mr G Haxell in 1944, pursuant to a building permit, including specifications and a plan showing the scale and nature of the bach, which is the same today. The plans showing the design of Bach 31 are slightly different to the footprint of today, however given the bach is constructed out of concrete, more likely the changes were made at the time the bach was re built in 1944. See TAB7.
- 102 **Bach 32:** Bach 32 was lawfully established (most likely before 1918), before planning permission was required. The photographs of Bach 32 (TAB5) show the scale and nature of the original bach being the same today, in particular when compared against Bach 33, which history (and evolution) is well documented.
- 103 **Bach 33:** Bach 33 was lawfully established (most likely before 1918), before planning permission was required. The photographs of Bach 33 (TAB5) show the scale and nature of the original bach, which was added to in 1953. Modifications made to Bach 33 are clearly shown in the photographs in TAB6. The bach was established and modifications made well before planning permission was required.
- 104 **Bach 47:** Bach 47 was lawfully established in the 1930s or earlier. The photograph of Bach 47 (TAB5) shows the scale and nature of the original bach being similar today. The outline of the bach can be clearly made out from the photograph taken in circa 1930s, being the same today.
- 105 **Bach 48:** Bach 48 was lawfully established (most likely before 1918). The original bach is clearly shown in early photographs. A comparison between the photographs taken in circa 1918 and circa 1930s shows the bach was likely reconstructed before the 1930's. The photograph of the bach taken in circa 1930s shows the bach as similar to today.
- 106 **Bach 49:** Bach 49 started as a cave dwelling (likely before 1910). The bach was purchased as a cottage in 1963, suggesting it was substantially rebuilt prior to this date (before planning permission was required). A lean-to was added in 1966 pursuant to a building permit (see TAB12). Planning permission for Bach 49 was unlikely required up until 1979. Additions to the bach in 1966 were approved by the Council.

- 107 **Baches 51 & 52:** Baches 51 & 52 do not appear in any of the early photographs (its location being out of view). Presumably the baches were established prior to 1945, along with all the other baches and licenses issued. It is inconceivable that the two baches were established without the Council's knowledge, after 1979 (when the baches would have first required planning permission).
- 108 **Bach 55:** Bach 55 does not appear in the photograph taken in circa 1930s (TAB5), however is specifically referred to in the Council's Minutes taken in 1958, including in particular the proposed additions to the bach and description of the bach generally (see TAB10).
- 109 **Baches 56, 57 and 58:** Baches 56, 57 and 58 appear in the photographs taken in circa 1930s (see TAB5) and are similar today.
- 110 All of the baches are shown on the planning maps from the 1962 Scheme. See TAB14.

Brad McDonald (on behalf of the Applicants)

Dated:

I hereby certify that to the best of my knowledge and belief, the information given in this application is true and correct.