

233 Taylors Mistake Road  
CHRISTCHURCH 8081

8 April 2011

**By Post**

To  
The Registrar  
Environment Court  
PO Box 2069, WX11113  
CHRISTCHURCH



Attention: Mr D Goodman

**Env-2010-CHC-0262: Snoep v Christchurch City Council & Others**

Please find **enclosed**:

- (a) Memorandum of Applicant dated 8 April 2011.
- (b) Sworn affidavit by Applicant for filing.

Yours faithfully

A handwritten signature in blue ink, appearing to read "Otto Snoep".

Otto Snoep

**Copy by Post:**

To Christchurch City Council c/- W Palmer of Buddle Findlay Lawyers

And to The Second to Fourteenth Respondents c/- T Evatt of White Fox & Jones Lawyers

And to Taylors Mistake Association Inc. c/- T Evatt of White Fox & Jones Lawyers

And to Fifteenth Respondent, Mr R A Rankin (in person)

BEFORE THE ENVIRONMENT COURT  
AT CHRISTCHURCH

Env-2010-CHC-0262

BETWEEN O SNOEP  
Applicant

AND CHRISTCHURCH CITY COUNCIL  
First Respondent

AND TREVOR SIDNEY GRAHAM and  
DIANNA BARBARA GRAHAM  
Second Respondent

AND EVAN MITTA RAHURAHU and  
BEVERLY JOAN RAHURAHU  
Third Respondent

AND ROSEMARY PURSE and  
LORRAINE ABBOTT  
Fourth Respondent

AND ANN ELIZABETH JAMES  
Fifth Respondent

AND RON MOORE and JOAN MOORE  
Sixth Respondent

AND SANDRA McSHERRY and  
ADRIAN ANDERSON and HELEN  
TIMMS  
Seventh Respondent

AND GREGORY JOHN MCCLURG and  
TREVOR SIDNEY GRAHAM and  
RICHARD ANDREW LOGAN  
Eighth Respondent

AND JASON CUMMING McDONALD  
Ninth Respondent

(continued next page)

AND TIMOTHY ROBERT COOK and  
LYNN COOK  
Tenth Respondent

AND DARYL TENNYSON NEATE  
Eleventh Respondent

AND MARGARET ANNE THOMAS  
Twelfth Respondent

AND KAY CAROLE HUNTER  
Thirteenth Respondent

AND GORDON ROSS RICHDALÉ  
Fourteenth Respondent

AND R A RANKIN  
Fifteenth Respondent

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MEMORANDUM FROM APPLICANT

*OTM* April 2011

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OTTO SNOEP

Applicant

233 Taylors Mistake Road  
CHRISTCHURCH 8081

**MAY IT PLEASE THE COURT**

1. This memorandum is to respond to information requested and directions given by the Court in the Minutes to the Parties of 30 March 2011 that was received on 5 April 2011.
2. I did advise Mr David Goodman (Case Manager) by telephone at his location in Auckland at 1.28 pm of 25 February 2011 that I was experiencing difficulties in affecting the despatch of documents for filing by this date in accordance with the court's directive of 9 February 2011 as a consequence of the Christchurch earthquake aftermath.
3. Mr Goodman granted an adjournment for filing the documents by 7 March 2011 if at all possible and would make a file note accordingly.
4. I can confirm that all the documents referred to in paragraph 1 of the Minutes to the Parties of 30 March 2011, received by the court on 21 March 2011, were posted from Rangiora on 3 March 2011.
5. I can also confirm that the Notice of an amended application for an enforcement order was served on 3 March 2011. The parties being:
  - (a). Mr W Palmer of Buddle Findlay Solicitors, counsel for the First Respondent (Christchurch City Council), by post.
  - (b). Mr T W Evatt of White Fox & Jones Solicitors, counsel for the Second to Fourteenth Respondents (the unscheduled bach owners), by post.
  - (c). Mr R A Rankin, the Fifteenth Respondent, by Express Courier Post as a tracked document.And to Mr Evatt of White Fox & Jones, counsel for the Taylors Mistake Association Incorporated for information only.
6. I apologise for sending out an unsworn affidavit and in an incorrect format to the court's requirements. I will endeavour to ensure that this will not be repeated. A sworn affidavit, hopefully in the correct format, has now been forwarded to the Registrar of the Court on 8 April 2011 for filing. In mitigation I offer that I did not have access to my lawyer, who is advising

me in relation to matters in these proceedings, after the earthquake of 22 February 2011 and that I am still having difficulties in this regard at this moment.

7. Copies of the sworn affidavit have now been served on the counsels for the respective respondents and Mr RA Rankin the fifteenth respondent on 8 April 2011.

8. I hold no objections to the vacation of the timetable set out in the 9 February 2011 Minute as is requested by the Christchurch City Council in a memorandum dated 25 March 2011. I advise that I have committed to be overseas during the month of July on the basis of the earlier program set in February. If at all possible I request that my absence overseas can be accommodated in any revised program.

Dated this 8<sup>th</sup> day of April 2011

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**Otto Snoep**  
The Applicant

To The Registrar, Environment Court, Christchurch  
 AND TO The First Respondent, c/- Mr WJ Palmer, Buddle Findlay  
 AND TO The Second to Fourteenth Respondents, c/- Mr TW Evatt,  
 White Fox & Jones  
 AND TO The Taylors Mistake Association Incorporated, c/- Mr TW  
 Evatt, White Fox & Jones  
 AND TO The Fifteenth Respondent, Mr RA Rankin

BEFORE THE ENVIRONMENT COURT  
AT CHRISTCHURCH

Env-2010-CHC-0262

<b>BETWEEN</b>	<b>O SNOEP</b> <b>Applicant</b>
<b>AND</b>	<b>CHRISTCHURCH CITY COUNCIL</b> <b>First Respondent</b>
<b>AND</b>	<b>TREVOR SIDNEY GRAHAM and</b> <b>DIANNA BARBARA GRAHAM</b> <b>Second Respondent</b>
<b>AND</b>	<b>EVAN MITTA RAHURAHU and</b> <b>BEVERLY JOAN RAHURAHU</b> <b>Third Respondent</b>
<b>AND</b>	<b>ROSEMARY PURSE and</b> <b>LORRAINE ABBOTT</b> <b>Fourth Respondent</b>
<b>AND</b>	<b>ANN ELIZABETH JAMES</b> <b>Fifth Respondent</b>
<b>AND</b>	<b>RON MOORE and JOAN MOORE</b> <b>Sixth Respondent</b>
<b>AND</b>	<b>SANDRA McSHERRY and</b> <b>ADRIAN ANDERSON and HELEN</b> <b>TIMMS</b> <b>Seventh Respondent</b>
<b>AND</b>	<b>GREGORY JOHN MCCLURG and</b> <b>TREVOR SIDNEY GRAHAM and</b> <b>RICHARD ANDREW LOGAN</b> <b>Eighth Respondent</b>
<b>AND</b>	<b>JASON CUMMING McDONALD</b> <b>Ninth Respondent</b>

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AND                   TIMOTHY ROBERT COOK and  
                                  LYNN COOK  
  
                                  Tenth Respondent  
  
AND                   DARYL TENNYSON NEATE  
  
                                  Eleventh Respondent  
  
AND                   MARGARET ANNE THOMAS  
  
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AND                   KAY CAROLE HUNTER  
  
                                  Thirteenth Respondent  
  
AND                   GORDON ROSS RICHDAL  
  
                                  Fourteenth Respondent  
  
AND                   R A RANKIN  
  
                                  Fifteenth Respondent

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**AFFIDAVIT OF OTTO SNOEP (THE APPLICANT) IN SUPPORT OF  
APPLICATION FOR ENFORCEMENT ORDER**

**Sworn      8th April 2011**

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**OTTO SNOEP**  
Applicant

233 Taylors Mistake Road  
CHRISTCHURCH 8081

**AMENDED AFFIDAVIT OF OTTO SNOEP (THE APPLICANT) IN  
SUPPORT OF APPLICATION FOR ENFORCEMENT ORDER**

This is a sworn affidavit by I, **Otto Snoep**, retired Civil Engineer.

**Address:** 233 Taylors Mistake Road, Christchurch 8081

**Date:** Prepared on 24 February 2011 and sworn on  April 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.<sup>1</sup> 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.

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

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<sup>1</sup> Copy of Planning Maps



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.<sup>2</sup> 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:

#### **Background:**



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<sup>2</sup> Extract from the TMA submission to the Council Meeting of 22 April 2010.

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.<sup>3</sup>

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 may remain in the C1A zone.<sup>4</sup> The Council's agenda at the meeting was independently confirmed in the Press release of 24 July 2010.<sup>5</sup> There is also

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<sup>3</sup> Copy of agenda report to the Council Meeting of 23 July 2010.

<sup>4</sup> Notes taken of debate of the Council Meeting 23 July 2010.

<sup>5</sup> Copy of Press report 24 July 2010.

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.<sup>6</sup> 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:

*"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."*

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<sup>6</sup> Confirmation of the minutes to agenda item 26 of the 23 July 2010 Council Meeting.



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 bachs.<sup>7</sup> 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 bachs in the C1A zone, or in the alternative,
- (b) Whether the immediate removal of the unscheduled bachs 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 the other hand there is every requirement in the Conservation Zones of the Plan for the unscheduled bachs 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 bachs are a prohibited activity.

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<sup>7</sup> History of correspondence with the Council.





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.<sup>8</sup> 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 earlier indicated that the Resolution is a proposition designed to make parts of the provisions for the baches in the Plan fail.

35. In reading the Council's solicitor's advice to the bach owners, by way of service through the TMA, in the letter of 22 October 2010, it is clear that

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<sup>8</sup> Copy of letter from the Council to the TMA dated 22 October 2010.



despite the confident picture the Council has portrayed over the past seven years for not removing the unscheduled baches when requested to do so, all is not well with that promotion. By overlaying the interview the Mayor gave with the media in The Press on 24 July 2010 the colour of the picture is vividly filled in. It reveals the Council's hand in a well-advertised public way. It is unfortunate for Mr Thomson to say that the officials are now bound by Council's instruction of 23 July 2010 and had no part in the decision.

36. If the Resolution were to survive this Application the destiny of the unscheduled baches would be under the sole control of the owners, with the officials directed to take a back seat on instructions of the Council. Other interest groups would be frozen out by the Resolution of any future involvement with the implementation of the provisions in the operational plan contrary to their interest and contribution to those provisions under decision C58/2003. The bach owners are now firmly in the driver's seat on a trip to nowhere as was intended by the elected members of the Council.

37. I am troubled that the bach owners have not accepted the reality of the present situation when they signed up to the agreement for the provisions in the Plan under the Consent Memorandum C58/2003. It appears the bach owners have forgotten the process that led to that memorandum. I am troubled that the bach owners therefore fail to recognise that the price for having rural land rezoned into the bach zone is the transfer of land without further consideration (Clause 2.1.3(a), Vol 3, Part 2). I am troubled that the land transfer is now being used as a lever to obtain better terms and conditions in a licence for the scheduled bach owners. And, I am troubled that the licensing of the scheduled baches has been allowed to become the stumbling block to the removal of the unscheduled baches.

38. Essentially I am asking in this Application of the Court whether there are reasons why the unscheduled baches should not be removed this instance under the operative plan.

39. In any event it is unreasonable for the Council and the TMA, when it has become apparent that the TMA holds no instructions to act for the bach owners, to stay the removal of the unscheduled baches whilst those parties conduct negotiations on the creation of a bach zone and on terms and conditions acceptable to either party for a licence that extends over a period of seven years without resolution. It points to gross negligence in giving effect to the Plan with due diligence or a deliberate attempt to delay due process



until a plan change can be made in the next plan review process to schedule the unscheduled baches. Transparency has been a matter of concern to the referrers all along. That concern was conveyed to the Court by the referrers. In C40/2003 the Court warned of the need for transparency in due process of the Plan. There is clear evidence that the Council has not heeded that advice. It is worthy to remind the Council and bach owners of the Court's comment in paragraph 13 of decision C40/2003: *"It is important that the rules in the plan are clear and precise so that those who administer the plan or who are effected by it are able to identify without difficulty the provisions which apply to the property"*. There is in my mind no ambiguity in the rules or in their intent to remove the unscheduled baches. The ambiguity lies in the uncertainty over the implementation of the Plan created by the elected members of the Council.

40. After seven years of no apparent activity in terms of compliance with the provisions in the Plan, it is not credible to assume that the bach owners, by threat of this Application, will behave any differently in the future. This is particularly so when the bach owners have been encouraged to delay the process of compliance in the knowledge that the Council will support them to continue with the delay. The TMA is on record that there will never be a land transfer until the scheduled bach owners are given a perpetual lease.<sup>9</sup> Mr Turpin of the TMA at the 23 July 2010 Council meeting once again confirmed that pre condition with respect to the land transfer.

41. Upon careful scrutiny of the situation, I make the point in differentiation, in what I believe to be significant and important, that in my assessment the removal of the unscheduled baches would not put in jeopardy or destroy any of the other provisions in the Plan from satisfactory performance outcome, such as the licensing of the scheduled baches, the transfer of the land and the creation of the Taylors Mistake Bach Zone if the bach owners and the Council so desire.

42. In the final analysis the overriding misdemeanour by the Council and the stumbling-block in so far this enquiry applies, is the Council's refusal to accept the Court ruling in C50/2002 that the unscheduled baches are inappropriate in the C1A zone in terms of the Plan's method, rules, objectives and policy. In my opinion this contempt by the Council to ignore the Court's

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<sup>9</sup> Submission by Mr Turpin to the Council dated 20 August 2004



determination is a direct challenge against the integrity of the judiciary and against due process.

43. It is my contention that the Council in balancing the competing uses of public land has failed to provide adequately for the needs of the public on the following grounds:

- (i) Under the Resource Management Act: Sidelineing the enforcement of rule 5-2.4.4(d) in the Plan.
- (ii) Under Common Law: Where every part of the road on which the baches are located must be available for use and passage by members of the public at all hours of the night and day.
- (iii) Under the Bill of Rights: Therein the freedom of movement is guaranteed in section 18(1) of the Bill.
- (iv) Under the Christchurch City Council Public Places Bylaws 2008: There is no provision in the bylaw that permits habitable structures on roads vested in the Council.

44 .Like I was troubled by the bach owners actions under paragraph 37, I am equally troubled by the role thrust upon me by the Council as the enforcer of the provisions in the Plan for the unscheduled baches in default of the Council to comply with its own obligations to observe those provisions. Paragraph 6 in the letter to the TMA of 22 October 2010 by Mr Thomson is manifest to the role of enforcer he wants others to perform on Council's behalf now that the officers' hands are tied.

45. Before proceeding with the filing of this Application I have invited the Council on 27 October 2010 to give consideration, without success, to revoke the offending resolution 26(d)(iv) and serve abatement notices forthwith on the unscheduled bach owners for the removal of their baches.<sup>10</sup>

46. In conclusion:

- (a) The Christchurch City Council in its capacity as landowner of the unformed legal road on which the baches are located is acting in breach of its own District Plan and appears to commit an offence

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<sup>10</sup> Copy of letter to the Council dated 27 October 2010.



under section 338(1)(a) of the Act, by continuing to permit the occupation of that land by 14 unscheduled baches in contravention of rule 5- 2.4.4(d) of the District Plan.

(b) The Council in its capacity as territorial authority appears to be acting in breach of its duty to observe and to the extent of its authority is in breach for not enforcing the observance of its District Plan pursuant to section 84(1) of the Act.

(c) Each of the owners, separately, of an unscheduled bach as listed in the Application for Enforcement Order, appears to be in breach under section 338(1)(a) and commits an offence by failing to comply with section 9 of the Act and by failing to comply with rule 5-2.4.4(d) in the District Plan in particular, and by failing to remove their unscheduled bach from the road.

**Relief sought:**

47. (a) Enforcement of rule 2.4.4(d) in Part 5 of the Plan. The rule states:

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


(b) An enforcement order for the removal of the unscheduled baches at Taylors Mistake as is required in Clause 1.3 of Part 5 of the Plan. The removal to be completed within two months after the issue of the Court's determination on the hearing of this Application.

(c) Subject to this Application being upheld, a callback by the Court of the parties to verify the fulfilment of the order after the expiry of the two month period.

Sworn by OTTO SNOEP )

This day 8<sup>th</sup> of April 2011 )

before me: )



Signature of witness: )

**Michael Francis Toomey**  
**Solicitor, Christchurch**