

5. WINDBREAK OUTSIDE THE 'BOULEVARD' ON OXFORD TERRACE

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The purpose of this report is to provide information to allow the Council to decide on an application by the owners of the "Boulevard" for a variation in their licence to occupy legal road. The variation is required to allow them to seek the necessary consents to construct a windbreak around and over the legal road they currently lease.

BACKGROUND

In August 2000 a deputation of Oxford Terrace restaurant and bar owners addressed both the City Services and Environment Committees on their proposal to erect windbreaks in front of their premises between the Clarendon Towers and the Bridge of Remembrance. They subsequently presented a petition to the Committee agreeing to work with the Committees to set guidelines for windbreak and awning protection. At that time, the premises trading as "Sticky Fingers" on Oxford Terrace had a particular proposal for a windbreak structure in mind.

The Environment Committee subsequently established a Windbreak Subcommittee to consider this matter further. The subcommittee met in September 2000, at which the petitioners were represented. A report was presented to the subcommittee from the City Streets Manager discussing the sorts of issues that would need to be addressed, including the need to obtain a resource consent and building consent, design issues, environmental effects and issues of health and safety. (This report is attached as Appendix A). The subcommittee, unfortunately, made no formal recommendations as to appropriate guidelines or policy for the erection of windbreaks along the strip. The subcommittee did agree to the erection of a windbreak on a trial basis, ending in February 2001, subject to a number of conditions. The trial did not proceed.

In late July 2001 the owners of the Boulevard Restaurant and Bar erected a tent-like awning over the legal road on Oxford Terrace which it leases from the Council. This was done without the Council's approval and without resource or building consents. There has been continuing, and as yet unresolved, legal debate about the removal of this structure. The Council has issued an abatement notice for the removal of the structures and the Boulevard owners have obtained a High Court injunction to stop this. The owners have agreed to apply retrospectively for the necessary approvals and the application to the Council to vary the lease is the first step in this process.

THE PROPOSAL

The application is to request the Council's approval for a change in the lease to erect a windbreak structure on legal road. There is no legal time frame for responding but the applicant needs a decision before applying for resource and building consents.

Photographs of the existing awning structure outside the Boulevard are attached as Appendix B. Colour photographs will be tabled at the meeting. The structure's purpose is to provide additional comfort to the restaurant's customers by giving protection from the wind and sun. The structure can function with sections of the wall and roof either open or closed as required. This can significantly alter the appearance of the structure.

REGULATORY CONSIDERATIONS

The Boulevard's awning does not comply with the following:

- Resource Management Act (a resource consent is required, primarily because of a visual appearance rule in the City Plan. This is discussed more fully later in this report).
- Building Act (a building consent is required)
- Hazardous Substances and New Organisms Act (the gas heaters placed in the awning when it is cold do not comply).
- Public Places and Signs Bylaw.
- The current licence to occupy legal road (this is restricted to furniture only).

The most significant non-compliance is that of the Building Act, and in particular the issue of fire safety. The Building Act requires the Council to ensure that marquee fabric will not be accepted until it has established the flammability, the fire spread capabilities and the degree to which the fabric will generate smoke. The priority is to ensure that the fabric will not burn, or that if it does, it will burn slowly enough so as to not inhibit the evacuation, that it will not give off flaming droplets, and that the smoke will not restrict visual conditions or occupants' vision or breathing ability. The applicants have been made aware of this issue, but have been unable to demonstrate compliance.

Comments have been made about other tent-like structures around the city, including the tents at the A & P Show and marquees erected for special events. The Council's building control section works closely with the manufacturers and suppliers of marquees, and agreed quality control measures and erection procedures are in place. Marquees greater than 30m² in area require a building consent, and this includes marquees erected for short-term special events. The Council itself goes through this process for its own events, as do the marquee companies. All of these marquees are made from certified, fire-resistant materials. Fire loading, egress routes, signage, lighting and layout are also considered as part of the building consent process for marquees.

Whilst the enforcement action currently being undertaken by the Council in respect to this awning is not directly relevant to the Council's decision as a landowner, it is worth noting that on 27 November the Judge considering this matter under the Resource Management Act stated that in his opinion the Council was wasting the Environment Court's time because the Council had the ability to deal with this issue itself as a landowner.

In deciding whether or not the awning ought to be allowed to remain in the meantime, the Council may wish to consider the equity of allowing this but not other non-conforming structures and how this would be perceived by the general public and the business community. Allowing the awning to remain in the meantime could be viewed as condoning building work or activities carried out without first obtaining the necessary consents, and has the potential to make future enforcement action more difficult than it already is.

DISCUSSION

In considering windbreaks on public footpaths there are a number of areas that need to be addressed. These are described in detail in the report prepared for the Windbreak Subcommittee which is attached as Appendix A, and are summarised below.

In summary, the areas that need to be addressed are:

- **Council's Legal Powers**
At what point does the size or permanency of the structure require the Council to follow road stopping procedures?
- **Suitability**
What parts of the City are suitable for, and the Council is comfortable with windbreak structures?
- **Maintenance Responsibilities**
Who is to maintain the area inside the windbreak structure? Should it be removed totally for scrubbing the pavers?
- **Environmental, including visual effects**
Should the public space be totally claimed for private use? Should there be strict design guidelines, or an insistence on total uniformity to provide a positive visual impact?

One issue with this application is the visual impact of the proposed structure, and its suitability in this environment. As it is essentially an urban design issue, comments were sought from Urban Design professionals within the Council.

The Urban Design Team leader from City Solutions comments as follows:

"Along Oxford Terrace there is a clear transition from private space, through semi-public space to public space. Although part of the outdoor space is physically occupied by seats and planters, because these are generally at a low level, the space is still visually part of the public realm."

This application for a windbreak structure with a roof and sides would:

- *Disrupt the ordered transition from public, through semi-public to private space*
- *Block the view along the terrace*
- *Break up the continuity of the street elevation*
- *Claim the public space for private commercial use*

It is accepted that the covering could be removed or retracted when not needed, but the not insubstantial framework would still remain.

Approval for this windbreak would create a precedent to accept similar types of structure not only on Oxford Terrace, but also in other significant pedestrian areas in the Central City.

Alternative windbreak structures may be appropriate, but guidelines and policy for these need to be developed.”

It is unfortunate that the Windbreak Subcommittee did not complete its assessment and produce a set of guidelines that could be used to assess this application. Any decision to approve this application now runs the risk of having the guidelines for such structures, and the way they are operated, set for the Council through the resource consent process. It would be preferable to have guidelines approved by the Council and available to both staff and owners for assessing this and any subsequent application.

If the Council were to approve this application it may also wish to reconsider the rental being charged. Clearly with the higher level of service being provided, then a higher rental would be appropriate. No work has been done on what might be an appropriate rental.

- Recommendation:**
1. That an ad hoc subcommittee, the Central City Streets Subcommittee, be established, comprising Councillors Stonhill, Wright, Megan Evans, Corbett and the Chairman, to develop policy proposals for recommendation to the Council via the Sustainable Transport and Utilities Committee, concerning windbreaks and similar structures and issues on central city streets, the Subcommittee to continue until all matters referred to it by the Committee are concluded.
 2. That consideration of the application be deferred pending development of the policy and guidelines by the Subcommittee.
 3. That especially because of fire safety considerations, the applicants be required by the Council as landowner, and also in terms of the Public Places and Signs Bylaw 1991, to take down the windbreak pending a decision on the application by the Council.

The Committee also **decided** that the applicant be invited to address the Subcommittee before 12 December 2001.