

## 7. DEVELOPMENT OF OFFICE BLOCK AT FERRYMEAD

<b>Officer responsible</b> Environmental Services Manager	<b>Author</b> David Mountfort, Team Leader City Plan, DDI 941-8669
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The purpose of this report is to inform the Committee of the implications of an application received to build a 14 story office building at Ferrymead and to report on a related petition.

### THE APPLICATION

An application has been received for a resource consent to erect a 14 storey office building in the Business 4 Zone at Ferrymead, together with an associated eight level car-parking building. The site is close to the Estuary and Ferrymead Bridge and has aroused considerable public concern, largely because of its visual impact. The application was received on 1 June 2004. Further information was requested on 11 June 2004 and the application was placed on hold. Nothing further has been received from the applicant since then.

As the City Plan currently stands, the resource consent application is only in respect of some comparatively minor matters. The main aspect requiring consent is in respect of traffic generation. Developments triggering a requirement for more than 25 car parking spaces require consent as a restricted discretionary activity, with the Council's discretion limited to matters relating to vehicle access to the site. However, Council's traffic engineers' preliminary view is that the proposal may not have significant adverse traffic effects. The Council has requested further information about aspects of the development and ceased processing it until this is received. However, once this information is received, there may be little reason not to grant the application, and it may not even need to be publicly notified.

### THE PETITION

A petition has been received, signed by 1,289 people asking for a height restriction to be imposed on the land zoned Business 4 at Ferrymead.

### CITY PLAN PROVISIONS

The site is zoned Business 4. When the City Plan was notified in 1995 this zone was intended to be a Light Industrial Zone. Retailing, and offices were restricted to ancillary industrial activities. There were no height limits in this zone, or in any of the other Industrial Business Zones (B3, B3B, B4, B4T, B4P, B5 and B6). There was a plot ratio requirement of 1.0, which means that for every square metre of site area, one square metre of floor space can be built. Obviously, if that floor space is built on more than one level, the building would therefore occupy less of the site.

Examination of the files indicates that height limits were considered for this zone but were not considered necessary because tall buildings would not be required by the largely industrial and storage activities expected to be developed. The plot ratio requirement and the nature of industrial activities suggests that large ground floor areas would be more suitable.

Submissions were lodged against the City Plan provisions in 1995. There were no submissions or further submissions lodged seeking a height limit. These requested a more liberal attitude to retailing and office uses. The Hearings Panel allowed these submissions. Staff had recommended that these submissions not be allowed, but the Panel also heard evidence from submitters (including submissions from central government) representing the market-oriented philosophy of the day. The Panel made a decision, in its quasi-judicial role, based on the evidence it heard. It could have imposed a height limit to mitigate the effects of its changes to the Plan, but does not appear to have had its attention drawn to an unintended consequence of its decision.

Office developments are more likely to want taller buildings to get good views and so attract tenants. As a result, retail and office activities are now permitted to be established in the zone without having to be associated with industrial activities. This decision has led to a major proliferation of retailing in the Business 4 Zone to the extent that the Council has resolved to vary the City Plan in respect of retailing. To date there has not been a similar proliferation of offices in the B4 Zone.

## **ISSUES**

### **Visual appearance**

The main issue which is causing public concern is the appearance of the proposed building. It would be clearly visible from the foreshore, from the Estuary itself, and would be dominant in the view from houses on the lower slopes of St Andrews Hill.

It is clear that some people consider that this will detract from the surrounding area, especially the natural appearance of the area as it is perceived from the foreshore, estuary and hills. A contrary view has also, less commonly been expressed that the sorts of industrial buildings which can be built as of right, such as large plain industrial or retail buildings are also not attractive and in some ways a slim tower leaves a great deal more of the site open and available for landscaping. The question needs to be asked if this issue is unique to Ferrymead or could occur in other B4 Zones.

There are no other B4 Zones as close to the sea or the Port Hills, however, there are numerous B4 Zones in close proximity to residential areas. These have some degree of protection from recession plane requirements but this does not prevent all the adverse effects of tall buildings. Excellent views can be obtained from tall buildings virtually anywhere in the City so it need not be assumed that such developments would only occur in coastal locations.

Height is not the only potential visual impact of developments in the B4 Zone, especially in a sensitive coastal environment overlooked from the Port Hills nearby. Other aspects of the appearance of industrial activities and buildings may well warrant examination.

### **Impact on City Centre and Existing Centres**

As with the proliferation of retailing in B4 Zones, there is some potential for office development in B4 Zones to detract from the viability of the central city and possibly B2 Zones. Staff have discussed this with the consultants who assisted with the retail variation, and their advice is that this impact would be difficult to assess. The Central City Zone has an advantage because it has a much higher plot ratio, which varies between 2.0 and 6.5 depending on location.

## **LEGAL ADVICE**

The petition contains a request to amend the City Plan to incorporate a height limit into the B4 Zone at Ferrymead. This could be done by way of variation to the City Plan. If it was to affect the current proposal, then such a variation would need to be introduced urgently, before the resource consent application is considered. There could be legal difficulties with this. In particular it could deprive the applicant of what is currently a legitimate expectation that he can erect the building under the provisions of the City Plan which are beyond challenge and effectively operative. The Council faced a similar situation some years ago with the Gloucester Towers development, and was prevented by the High Court from urgently changing the district plan to thwart a proposal.

Therefore a legal opinion was obtained from Mr Aidan Prebble. The opinion deals first with the issue of whether or not the application should be publicly notified. The second part deals with the variation issue.

A summary of the main points of the opinion relevant to the possible variation follows:

1. Mr Prebble reminds the Council of the outcome of an earlier and somewhat similar case, the Gloucester Towers case. He advises that before embarking on a variation the Council should give notice to the developer that it is contemplating such a variation, give him the opportunity to consider and be heard on that and give careful consideration to the harm or injury which might result to the developer.
2. He reminds the Council of its duty to prepare a section 32 report and to carry out consultation under the Local Government Act 2002.
3. He points out that there could actually be a case for arguing that the Council ought to prepare a variation urgently if the application has exposed a potentially serious flaw in the City Plan. However, this would still be subject to the need for a section 32 report and consideration of the position of the developer.

4. He points out that, even if the Council did vary the Plan, the application would still be deemed to be a restricted discretionary activity because of Section 88A of the Resource Management Act 1991. Although the Council must have regard for the provisions of the variation, the proposal would still be related to a restricted discretionary activity with consideration restricted to the effects of vehicular access.

Each of these four points is considered in turn.

### **Effect on developer**

Introducing a height limit would not affect the amount of floor space the developer could build if the plot ratio remained at 1.0. He would simply have to erect fewer but larger floors to achieve the permissible floor area. Even a four storey building could have excellent views, and would presumably be more economic to erect and maintain. It is noted that the equivalent of the first five floors of the proposed building are void and the leasable floors start at the 5th floor level. Presumably the higher floors have a higher value and there would be a trade-off between income and development costs.

A report from property and building experts would be necessary to discover where the balance should lie.

### **Section 32 and Consultation**

The Council does not yet have a proper basis for commencing a variation as it has not completed a section 32 report or carried out any systematic consultation. This issue requires at least a report from an urban design or landscape expert, and consultation with landowners and neighbours as well as the signatories to the petition. Normal practice when preparing a draft variation is to post a copy of the document to affected landowners and neighbours, as well as interested parties. In this case interested parties would include the professional groups representing architects, designers, planners and property developers. An article would probably need to be placed in the City Scene newsletter, the ESU Gazette, and on the Council's website. Depending on the issue, public meetings may need to be held.

### **Urgency**

Given that this is the first case that has arisen since the City Plan was changed in 1999, there does not seem to be a case for urgency. However, as similar proposals could emerge, the matter should be dealt with as promptly as possible. This issue should be addressed quickly but not in such a manner that proper process is ignored.

### **Current proposal not affected**

Section 88(a) of the Resource Management Act 1991 provides;

- (1) *Subsection (1A) applies if-*
  - (a) *an application for a resource consent has been made under section 88; and*
  - (b) *the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made under section 88, or for which the activity is treated under section 77C, is altered after the application was first lodged as a result of-*
    - (i) *a proposed plan being notified; or*
    - (ii) *a decision being made under clause 10(3) of the First Schedule; or*
    - (iii) *otherwise.*
- (1A) *The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.*
- (2) *Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with section [104(1)(b)].*
- (3) *This section applies subject to section 150D.*

Clauses (1A) and (2) are the critical clauses. Clause (3) is not relevant to this case. It would not actually be possible to treat the matter as a restricted discretionary activity under clause (1A) while having regard to the provisions of a variation which changed that status under clause (2). These two clauses of the Act seems quite contradictory. This matter has been discussed by the writer and Mr Prebble who both consider that clause (1A) would prevail over clause (2). (1A) is clear and precise in its application to this case, while the legal test of 'having regard to' is one of the weaker tests that occur.

The effect of this is that there is no point in attempting to process a variation urgently as it would not affect this application. There is time to investigate and assess the issue properly and proceed with a variation or plan change in the new year.

At the Committee meeting the following amendment was moved to recommendation 1:

*"That an investigation be carried out urgently and a report prepared on whether the requirements of the Industrial Business Zones are sufficient to protect surrounding amenities especially in sensitive locations and whether there would be a distributional impact from the proliferation of offices in suburban areas."*

(Note: The above amendment on being put to the meeting was declared **lost** on Division No 5 by six votes to two, the voting being as follows:

**Against (6):** Councillors Cox, Evans, Ganda, Sheriff, Wells and Withers.

**For (2):** Councillors Broughton and Rutland.)

**Committee**

- Recommendation:**
1. That an investigation be carried out and a report prepared on whether the requirements of the Industrial Business Zones are sufficient to protect surrounding amenities especially in sensitive locations and whether there would be a distributional impact from the proliferation of offices in suburban areas.
  2. That the Council consider whether to proceed with a change to the proposed City Plan when this report is received.