

ATTACHMENT 12

MATTERS IN CONTENTION REGARDING THE PREVIOUS PROPOSAL

Issues raised at Auckland Council hearing (first instance)

Proposal before the Council

1. The notified version of the Previous Proposal ("**Notified Proposal**") exceeded the Local Centre zone total height standard of 18m over parts of the Site (which allows five storeys at or above ground), most notably along the Patteson Avenue and Tamaki Drive frontages. The building height increased along those frontages to a maximum height of approximately 28m (eight storeys at or above ground) adjacent to the Patteson/Tamaki intersection. The five storey proposal for which fast track processing is sought ("**the Fast Track Proposal**") removes all height above 18m and complies with the zone total height standard.
2. The Notified Proposal also exceeded the zone occupiable height standard of 16m over much of the Site. The Fast Track Proposal complies with the zone occupiable height standard.
3. The submissions lodged on the Previous Proposal raised a wide range of matters, but the most prevalent and significant concerns related to the bulk and location of the building and in particular the parts of the building in excess of the zone height standard.
4. Key determinations of the Council commissioners in the first instance decision ("**Council Decision**") were as follows.

Technical Issues

5. The Council Decision concluded that the effects of the proposal regarding flooding and coastal inundation¹, construction effects² and traffic³ were managed appropriately through the proposed methodology and conditions.
6. Those matters are all unchanged in the Fast Track Proposal.

Effects on Local Centre Environment

7. With regard to effects on the Local Centre environment the Council Decision concluded:
 - (a) The six to eight storey components of the development (i.e.: those elements above the 18m zone height standard) start to modify the local centre environment in a way that incrementally shifts that environment from a local to a town centre-type environment, by introducing a level of dominance on the Tamaki Drive/Patteson Avenue intersection, and the development is more closely aligned with the town centre environment than the local centre environment⁴.

¹ Commissioner Decision on Application by Drive Holdings Limited LUC60324989 (land use) and WAT60325010 (water) (BUN60324987) ("**Decision**"), paras 386-412; Documents Bundle, Tab 35, pages 932-937.

² Ibid, Decision, paras 413-417; Documents Bundle, Tab 35, pages 938-939.

³ Ibid, Decision, paras 418-420; Documents Bundle, Tab 35, page 939.

⁴ Ibid, Decision, para 354; Documents Bundle, Tab 35, page 927.

- (b) Given the urban context of the Mission Bay the development will not have a significant impact on the beach and coastal environment⁵.
8. The applicant considers that the Council's concerns were addressed before the Environment Court:
- (a) The Notified Proposal included a cinema. That was the only element of the Notified Proposal that required full Discretionary Activity consent in the Local Centre zone. It would have been a Permitted Activity in the Town Centre zone (and hence might be said to be aligned with the Town Centre zone).
 - (b) The version of the Previous Proposal put to the Environment Court ("**Revised Proposal**") omitted the cinema in order to address this issue and also to enable the height of the central part of the Proposal to be reduced. As a consequence, all activities sought in the Revised Proposal were Permitted Activities and the structures required at most Restricted Discretionary Activity consents.
 - (c) The Fast Track Proposal also omits the cinema and, in any event, addresses this issue fully by removing all height above the 18m zone height standard.

Effects on views / neighbouring amenity

9. In assessing the effects of the Notified Proposal, the Commissioners:
- (a) Concluded that the adverse effects relating to residential amenity (views), landscape and dominance are not large but in combination represent a significant effect⁶.
 - (b) Accepted that, in terms of general building design, the development presented a high-quality face to the streets it borders, building mass was articulated and there were active frontages⁷.
10. The Council Decision commented on the alteration of views for, "*at least six dwellings close to the southern boundary of the site*"⁸. The Commissioners accepted that the views would remain expansive for those properties but noted that, for some, key features will be obscured. They concluded that, while the loss of views may be confined to a relatively small number of properties, the impact of the greater height on their amenity will be significant⁹. The Council Decision did not specify which six dwellings were of concern. The applicant has assumed that they were dwellings along the top of the escarpment to the south of the Site (including the properties owned by Ms Nathan and the Owen Family Trust).
11. The applicant considers that the Council's concerns regarding residential amenity (views), landscape and dominance are resolved by the Fast Track Proposal because the reduction in height will remove all intrusions above the zone height standard of 18m.

Overall Assessment

12. The Commissioners' position was summarised as follows in paragraph [443]

⁵ Ibid, Decision, para 355; Documents Bundle, Tab 35, page 927.

⁶ Ibid, Decision, para 422; Documents Bundle, Tab 35, page 940.

⁷ Ibid, Decision, para 429; Documents Bundle, Tab 35, page 941.

⁸ Ibid, Decision, para 365; Documents Bundle, Tab 35, page 929.

⁹ Ibid, Decision, para 367; Documents Bundle, Tab 35, pages 929.

(emphasis added):

“[433] This is not an easy decision to make, and we hasten to add that there may well be scope for some additional height on the site, given the size and position of the site in the centre. It could be said that the effects generated by the development sit close to the point of balance between being appropriate and inappropriate. In the context of our interpretation of the objectives and policies of the Plan, we consider that we must take a conservative view of the scale and significance of the adverse effects generated. Taking the adverse effects together and looking at them through the lens of a plan that refers to development reinforcing planned character and being in keeping with surrounding environments, we have formed the view that the development takes a step too far from the planned outcomes for the area. In other words, the objectives and policies tip the assessment of the effects from being appropriate to being inappropriate. There are positive effects of the development which are supported by a number of objectives and policies. We do not consider that these positive effects tip the balance back the other way.”¹⁰

13. It is clear from this paragraph that the Decision was finely balanced - the effects generated by the Notified Proposal, “*sit close to the point of balance*”.
14. The Commissioners expressly took a “*conservative view of the scale and significance of adverse effects*”. That arose from their reading of the policy provisions and in particular their focus on, “*development reinforcing planned character and being in keeping with surrounding environments*”. In that regard, the Appellant considers it important that:
 - (a) The Unitary Plan enables much more intensive development of the Mission Bay Local Centre and along the southern side of Tamaki Drive (now zoned Mixed Use with an 18m zone height standard) than was previously the case.
 - (b) The Fast Track Proposal complies with that zone height standard and in doing so reinforces the planned character for the area and is in keeping with the surrounding Local Centre and Mixed Use zonings.
15. It appears from the statement that “*the objectives and policies tip the assessment of the effects from being appropriate to being inappropriate*” that, had the Commissioners taken a less conservative view of the policy framework, the effects of the development may well have been seen as being appropriate.

Issues raised at Environment Court hearing (appeal)

Proposals before the Court

16. The applicant appealed the Council Decision to the Environment Court. Following mediation the Appellant revised and reduced the scope of its proposal (“**the Revised Proposal**”¹¹). During the Environment Court hearing in May and June 2021 further revisions and reductions were made to the proposal (“**the June Proposal**”¹²).
17. The Revised and June Proposals each required a series of Restricted Discretionary resource consents under the AUP:

¹⁰ Ibid, Decision, para 443; Documents Bundle, Tab 35, page 944.

¹¹ See the selection of Revised Proposal and June Proposal plans and images; CB Tab 56, 302.0279 - 302.0365.

¹² See the selection of Revised Proposal and June Proposal plans and images; CB Tab 56, 302.0279-302.0365.

- (a) In both cases the applicant sought height in addition to the zone total height standard of 18m (and the zone occupiable height standard of 16m). The Revised Proposal was an eight storey development. The June Proposal was a seven storey development.
 - (b) The technical aspects of the proposals (traffic, earthworks etc) were unchanged from those considered acceptable in the Council Decision.
18. The contentious issues before the Environment Court related to the Restricted Discretionary Activity resource consents required for:
- (a) The construction of new buildings in the Local Centre Zone under AUP Rule H11.4.1(A44)¹³; and
 - (b) The infringements over parts of the Site of the Local Centre Zone occupiable height and overall height standards under AUP Rules C1.9(2) and H11.6.1(1) & (3)¹⁴.
19. The Fast Track Proposal removes the need to approve additional height. That height was also a critical factor in the Environment Court's assessment of the construction of new buildings.

Content of the Environment Court Decision

20. The Environment Court Decision ("**EC Decision**") contains extensive background information. It does not address the AUP provisions in detail, instead relying on analysis in two other Environment Court decisions dealing with similar but not identical matters. The only sections of the Decision that arguably address the environmental effects generated by the proposal are those headed "*Conclusion as to the Revised and June Proposals*" (paras [100]-[113]) and "*Outcome*" (paras [114]-[122]).
21. The absence of coherent reasons in support of the determination in the EC Decision to decline consent to the proposal forms the basis of the applicant's High Court appeal. It is clear and explicit in the EC Decision, however, that the matters in contention related solely to the height and bulk of the proposal:
- (a) The Introduction (para [1] of the Decision)¹⁵ states that the, "*key issue on appeal is the overall height of the project and the consequence of the bulk and scale of the building over the multiple sites*".
 - (b) The Decision records¹⁶ that there are a range of other matters for which consent is required (e.g.: parking, traffic and flooding) that are not in contention and that are not addressed further.
22. The Fast Track Proposal addresses those matters in contention before the Court by:
- (a) Removing the additional height sought in each of the Notified, Revised and June Proposals; and instead
 - (b) Complying with the zone overall height standard of 18m and the zone

¹³ AUP Rule H11.4.1; CB Tab 51, 301.0100

¹⁴ AUP Rule C1.9(2); CB Tab 48, 301.0044 and AUP Rule H11.6.1(1) & (3); CB Tab 51, 301.0101.

¹⁵ CB Tab 2, 101.0085.

¹⁶ See Decision paras [30] and [100]. CB Tab 2, 101.0092 and 101.0108.

occupiable height standard of 16m.

23. That is not to say that consent will inevitably be granted to the Fast Track Proposal, as the expert panel will need to address it on the merits and in the context of the relevant AUP provisions. The scope of the enquiry is reduced significantly, however, because of the Fast Track Proposal's compliance with the zone height standards.