

# SOUTH WAIRARAPA DISTRICT COUNCIL

23 APRIL 2014

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## AGENDA ITEM C3

### CONSIDERATION OF UNOCCUPIED COMMERCIAL BUILDINGS BYLAW

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#### **Purpose of Report**

To inform Councillors of the issues associated with and obtain a decision on whether to introduce an "Unoccupied Commercial Buildings Bylaw".

#### **Recommendations**

Officers recommend that the Council:

1. *Receive the information.*
2. *Resolve to introduce an "Unoccupied Commercial Buildings Bylaw"; or*
3. *Resolve not to introduce an "Unoccupied Commercial Buildings Bylaw".*

#### **1. Executive Summary**

Issues have arisen in the community about the state of a number of commercial buildings within the District. In particular the near derelict state of some structures in Featherston has been of general concern to residents because of the perceived risk to people (from failure) and the image that the buildings present (detract from the township).

In response officers have investigated local authority practice around New Zealand when dealing with these types of problems. As part of this, the legality of the contents of the bylaws has been canvassed, as has the effectiveness of this type of bylaw where they exist. The effectiveness relates to the actual use of the bylaws and the risks that other Councils had identified when doing so.

#### **2. Background**

A number of buildings (mainly in Featherston) have been the subject of complaints because of perceived safety issues and because people consider them a "blight" on the township.

In response officers have on a number of occasions visited Featherston properties to assess whether there was any public safety issues under the Council's "Dangerous and Insanitary Buildings Policy", which was developed and operates under the provisions of the Building Act.

In every case the buildings, while appearing run down and somewhat dilapidated, did not qualify under the policy (and the purposes of the Building Act) to be classed as dangerous or insanitary. However minor remedial actions were required of the owner in some cases to resolve issues associated with broken windows/glass fragments.

Obviously, this inability to take more definitive action to clean and tidy up these buildings has been a source of frustration in the community and has resulted in a perception of the town centre being run down and in consequence, having a lack of appeal to a wider range of shoppers.

This situation has then led to a desire to do something effective which in turn raised the question of whether Council can address this problem by way of regulatory powers. Hence this review of a bylaw option.

### **3. Discussion**

#### **3.1 Is there a need for a bylaw**

In order to make a sound decision, a clear problem definition is required. On the surface the problem to be addressed is dilapidated or rundown buildings in our town centres, particularly Featherston. However in reality it is not that clear-cut as other factors come into play, including the legality of any response, economic and social circumstances and the situation of individual building owners.

##### **3.1.1 Legality**

In researching this issue, examples of bylaws already enacted by other Councils were reviewed. The most recent of these was adopted by Upper Hutt City Council in February 2013.

At that time legal advice to UHCC indicated that while a bylaw was probably the best regulatory method to address the problem (of rundown unoccupied commercial buildings) and in the most appropriate form because it stipulated a standard and provided for penalties if the standard were not adhered to, *it still may not meet the requirements of the Local Government Act 2002* (my italics).

The Bylaw could not authorise the Council to enter and interfere with private property as it conflicts with basic property rights and possibly the New Zealand Bill of Rights Act 1990, specifically, the right to be secure against unreasonable search and seizure of property.

A Bylaw must not be able to be interpreted as being more restrictive, in respect of buildings, than the Building Act 2004, which could also lead to it being overturned by the Courts. The Building Act explicitly states that bylaws cannot introduce a more stringent regime than the Act itself in relation to the construction and upkeep of a building (the Building Act

provides for Warrants of Fitness but these cannot address the type of issue under consideration).

Both of these matters are therefore potentially significant if it ever came to a point of enforcing such a bylaw. At that time the only defence for Council to use against a legal challenge would be that any infringement of private rights was justified on the basis of "for the good of the community". This would not place Council in a strong position.

### **3.1.2 Economic, developmental and social factors**

Buildings (and a landlord's ability to maintain them) are a reflection of the current state of development (the age and style of a building) and the changing economic and social forces that drive investment decisions.

Difficult economic conditions limit the number of potential tenants, particularly in the retail and business services sector. This means small townships often do not have a high demand for retail and commercial service floorspace and rental flows can be restricted for landlords.

When rental levels are difficult to maintain (let alone increase), a landlord's first response is to try to hold or reduce costs and building maintenance is invariably the first place they look to do this. This is because deferred maintenance does not usually have any immediate impact on an asset.

However, if the rental situation does not recover sufficiently in the short to medium term (say 3-8 years), it does start to show in a building's appearance, this eventually being followed by declines in the structure itself.

In my view we are seeing some impacts of wider economic and social change. However this is not a clear cause of the number of buildings which are of concern. Equally structural problems within Featherston's commercial centre, (e.g. spread out commercial activities with little sense of place i.e. no clear commercial core, successful businesses scattered about the town with little visual impact (as opposed to condensed together), do not to me provide a sole cause either for what the community observes.

So the question arising from that analysis boils down to: are these factors what we are seeing in our townships, particularly Featherston? The answer would appear to be no.

### **3.1.3 Owners**

Building owners normally play a strong role in how their buildings are presented, as this reflects on their rental appeal and/or business appeal (if they are an owner operator).

In strict market terms owners are incentivised to have an attractive building subject to normal financial constraints. In our townships this is readily apparent as the vast majority of properties are quite well presented and kept. One or two buildings can be affected by absentee owners not being as committed to the upkeep of their buildings but even this issue is uncommon.

Looking at Featherston however, there is a particular problem as there are quite a number of buildings standing empty and a number that are becoming or at least verging on being derelict. Most of these buildings are held by one or two owners who are seemingly either not driven by normal commercial imperatives or are solely focussed on one element of commercial concern, simply maximising profit to the detriment of tenants.

This tends to suggest that the underlying issue is not generic to normal "landlord or owner" behaviour (i.e. easy dealt with by regulation) but is a result of circumstances relating to the attitudes of a couple of owners. A bylaw is not a good tool to deal with this.

### **3.2 Would a bylaw make a difference**

Taking into account the issues discussed above, it is doubtful in my view, that a bylaw could make a substantial difference to the problems that are the subject of community concern.

Legally this type of bylaw is effectively untested and so the outcome of any Court challenge would be uncertain and there is a risk in financial terms for Council.

If Council used the bylaw to address issues in the district, it could become exposed to a compensatory payment to a property owner and payment of costs for losses/expenditure incurred in response to a notice under the bylaw. If a Court case was lost then obviously the bylaw would be ineffective.

In terms of wider economic and social forces, a bylaw could be seen as little more than being a "band aid" solution to a much bigger problem. As noted above though, our town centres have withstood the worst effects of a strong recession over the last 7 years and the town centres, with the exclusion of particular properties in Featherston, have been quite well kept.

In the case of Featherston, there are some structural problems with the commercial centre that need to be addressed, but even taking that into account, the problem arises largely from another cause. A bylaw would not alter this.

In terms of owners, again, most of the districts commercial properties are in good order and are generally maintained to a sound standard. Those that do not fit this picture are largely owned in common and the owner is not motivated by normal commercial aims.

Given the apparent indifferent attitude of such an owner to the condition of his own investment properties (they would be severely devalued due to the lack of maintenance), a bylaw is unlikely to be effective.

## **4. Conclusion**

While an unoccupied buildings bylaw would undoubtedly have a strong degree of community support, it could not be relied upon either legally or practicably to "fix" the problem it would seek to address.

Use of such a bylaw could also expose Council to legal challenge and substantial costs if that challenge held sway in Court.

On the balance of probabilities (as currently understood) it would be likely that the bylaw would fail if tested in Court.

Even after identifying some uncertainty, UHCC still chose to proceed with the bylaw and has since "used" the bylaw to "prompt" some property owners to better maintain their properties.

The decision for Council is whether to follow suit regardless of those legal and cost considerations and the practical limits of the bylaw to address the particular problem Council faces. If Council does resolve to proceed then necessary documents will be prepared and submitted to the next Council meeting for consideration and adoption.

## **5. Appendices**

Appendix 1: Copy of UHCC Bylaw Documents : Policy Document including Statement of Proposal and draft Unoccupied Buildings Bylaw

Contact Officer: Murray Buchanan, Group Manager, Planning and Environment

# **Appendix 1 – UHCC Chairperson and Councillors**

**Policy Committee [24 October 2012]**

## **Proposed Bylaw setting Standards for Unoccupied Commercial Premises [Statement of Proposal]**

### **Purpose of report**

#### **The purpose of this report is to:**

1. Be the Statement of Proposal for the Bylaw setting standards for unoccupied commercial premises.
2. Present a Draft Bylaw annexed hereto as annexure 1 to impose a standard on unoccupied commercial premises and to:
  - a. Determine whether a Bylaw is appropriate, and b. Approve the Draft Bylaw for consultation using the special consultative procedure.
3. Approve:
  - a. This report as the Statement of Proposal
  - b. The Summary of Information for consultation using the special consultative procedure.
4. Address the requirements for adopting bylaws under the Local Government Act 2002.

# Background

Council has been investigating, for some time, the best way to deal with the problem of the negative impact on both Upper Hutt City's community and the external perception of Upper Hutt, caused by badly maintained or derelict commercial premises. Research has confirmed that premises in poor condition, appearance or that have poor physical security provide venues for criminal activity and contribute to a perception of insecurity, vulnerability, risk and threat.

Further, criminal activity and negative perceptions contribute to an accelerating spiral of decay of both buildings and the community where they are situated. The downward spiral impacts on a community's economic, social and physical health.

Council has instructed officers to prepare a Bylaw aimed at reducing the problem.

The Local Government Act 2002 both limits the Council's bylaw making power and stipulates the steps the Council must take to adopt a bylaw.

## **First, a bylaw must fit within the following purposes:**

- a. Protecting the public from nuisance
- b. Protecting, promoting, and maintaining public health and safety
- c. Minimising the potential for offensive behaviour in public places.

There are other specific bylaw making powers but the proposed bylaw does not fall within them.

## **Secondly, the steps require the Council to:**

- a. Identify the problem that is to be addressed
- b. Determine whether a bylaw is the most appropriate way of addressing the problem
- c. Determine that the form of bylaw is the most appropriate
- d. Determine whether the bylaw gives rise to any implications under the New Zealand Bill of Rights Act
- e. Consult the community using the Special Consultative Procedure. As part of that procedure:
  - i. Give public notice of the proposal
  - ii. Decide whether other notice is appropriate, and give that notice
  - iii. Prepare a Statement of Proposal for and Summary of Information
- f. Not impose requirements on buildings that are more restrictive than the Building Act 2004.

## **Perceived problem**

Unoccupied commercial premises that are not maintained and are allowed to fall into a bad state contribute to:

- a. People feeling unsafe in the area.
- b. An increase in criminal activity linked to unoccupied commercial premises leads to a negative perception of the City.
- c. The accumulation of rubbish which threatens public health and safety and creates a nuisance for the public all of which lead to a negative perception of the City.

# Ways of addressing the problem

Officers have identified the following solutions:

- i. Targeted rates
- ii. Rates relief
- iii. The Council carries out the necessary remedial work at its cost
- iv. Controls included in the District Plan
- vi. Use of other legislation
- vii. A bylaw.

The above solutions are discussed in more detail below.

## **Targeted rates**

Targeted rates cannot be used because the Local Government Rating Act 2002 does not permit targeted rates to be set to deal with the identified problem.

## **Rates relief**

This would involve a policy granting rates relief to owners of unoccupied commercial buildings that are maintained to the required standard. This solution reduces rates revenue and leads to the Council paying owners to keep their properties to a reasonable standard.

The rest of the community would be subsidising neglectful owners. It would encourage owners to only maintain their property if they received a remission and discourage owners from taking pride in their property.

## **Upper Hutt City Council carries out work**

This solution would require the Council to subsidise owners. In addition extra processes and staff would be required to organise the work. The Council has not budgeted any funding to carry out this work and there are inherent legal issues. For example, the Council may not have the right to interfere with owners' properties or to be on their premises.

Such an approach could expose the Council to the risk of civil proceedings. Further, contractors could risk criminal prosecution. Controls included in the District Plan. It is unlikely that the Resource Management Act requirements for the evaluation of any proposed plan to control the maintenance of unoccupied commercial premises will be met. Therefore use of the District Plan is not a solution.

## **Other legislation**

For example, the Health Act or the Building Act gives the Council power to take action but these powers are usually inadequate and the problems identified are not usually within the scope of the legislation. Previously Council officers have used this legislation if it is applicable and will continue to do so.

## **Bylaw**

A purpose written bylaw is the most appropriate way of handling the problem because it focuses on the problem and gives an expectation that a certain standard must be maintained. It is also likely to empower the community to informally hold owners to the standard.

Unfortunately, people are not usually prepared to take action unless there is a benefit to them or they are compelled to. A bylaw will provide the compulsion that the other solutions do not. Although a bylaw is the best solution it must also satisfy the requirements of the Local Government Act 2002 and the Bylaws Act 1910 or it will not be at risk of being over-turned or unenforceable.



## **Proposed Bylaw**

The Draft Bylaw as it stands is the best method to address the problem and it is also in the most appropriate form, because it stipulates a standard and provides for penalties if the standard is not adhered to. Despite this it may not meet the requirements of the Local Government Act 2002.

The Bylaw authorises the Council to enter and interfere with private property. This authority conflicts with basic property rights and could also conflict with New Zealand Bill of Rights Act 1990, specifically, the right to be secure against unreasonable search and seizure of property. It may be arguable that this infringement is justified for the good of the community.

The Bylaw may also be able to be interpreted as being more restrictive, in respect of buildings, than the Building Act 2004 which could also lead to it being overturned by the Courts.

## **Consultation**

The Council must consult the community using the Special Consultative Procedure. It is proposed that this report is the Statement of Proposal and that it will be, with a copy of the Draft Bylaw annexed, available on the Upper Hutt City Council website and in hard copy from the Civic Administration Building, the i-Site, and the Library.

The Summary of Information is the document annexed hereto as annexure 2. It is proposed that it be distributed by being published in the Upper Hutt Leader, posted on the Upper Hutt City Council website, and by being made available at the same locations as the Statement of Proposal.

It is proposed that the Council only allow one [1] month from the date public notice of the proposed bylaw is published for submissions to be made. Accordingly, it is suggested that if the Council wishes to proceed with the Bylaw, that the public notice is published in the Upper Hutt Leader on the 7th November 2012 and also made available from the Upper Hutt City Council website and in hard copy from the Civic Administration Building, the i-Site, and the Library. Submissions would therefore close on the 10th December 2012.

## **Financial**

The associated costs if the Council adopts the Bylaw, and uses its powers, are not budgeted in the LTP. The associated costs will include staff time, contract and material costs. Due to time constraints the financial analysis of those costs is not available.

## **Legal**

While the Draft Bylaw addresses the problem and purports to empower the Council to enforce a minimum standard for unoccupied commercial buildings. There may be a risk that the Bylaw will not pass the tests for bylaws in the Local Government Act 2002 however the only way to test this is through the Courts. Three areas of risk are:

1. The Bylaw may be found to be invalid on the basis that it is outside the Council's bylaw making powers, in that it does not fit within the scope of the purposes listed in the Act.
2. Council's power to enter private property and do work to that property is a significant violation of basic private property rights and civil rights. Such powers are usually only available in emergency situations or to prevent serious crime. The Bylaw may be overturned under the Bylaws Act 1910.
3. If the Bylaw is valid, it is also possible that an owner will successfully argue that the exercise of it in relation to his or her property is invalid.

If the Bylaw or part of it is overturned it is possible that the Council will be ordered to pay the owner court costs and damages. If the Council has also arranged for work to be done it will not be able to collect the "debt".

### **Conclusion**

The text of the Bylaw addresses the problem caused by unoccupied commercial premises and empowers the Council to take action to address the problems caused by unoccupied or derelict buildings.

### **Recommendations**

#### **1. THAT the Council adopts the Draft Unoccupied Commercial Premises Bylaw for consultation and:**

- i. that a Bylaw is the most appropriate way of addressing the problem caused by unoccupied commercial buildings
- ii. that the Draft Bylaw is in the most appropriate form
- iii. that the Bylaw may have New Zealand Bill of Rights Act implications, and that if this is so, its limit if any rights is justifiable
- iv. that the attached summary of information is approved
- v. that this report is the Statement of Proposal and is made available from the Civic Administration Building, the i-Site and the Library
- vi. that consultation will be carried out by publishing the Summary of Information in the Upper Hutt Leader on 7th November 2012 and also making it available on the internet and in hard copy from the Civic Administration Building, the i-Site, and the Library;

### **OR**

#### **2. THAT the Council do not proceed with the Draft Unoccupied Commercial Premises Bylaw.**

Chris Upton  
CHIEF EXECUTIVE

October 2012

## Annexure 1

# Draft Upper Hutt City Unoccupied Commercial Premises Bylaw

## Contents

1. Introduction
2. Interpretation
  - 2.1. Definitions
3. Application
4. Owners obligations
5. Offences
6. Penalties

### 1. Introduction

The Council is conscious that if Unoccupied commercial premises are allowed to fall into disrepair or are not maintained to immediately tenantable standards they undermine public health and safety, increase the potential for offensive behaviour in public places and expose the public to nuisance.

This Bylaw aims to protect the public from nuisance, protect, promote and maintain public health and safety and minimise the potential for offensive behaviour in public places by setting standards for the maintenance of unoccupied commercial premises.

### 2. Interpretation

#### 2.1. Definitions

**"Immediately Tenantable"** means premises that do not require any work done to them other than that work required for the purpose of a new tenant before they can be let. The listed examples of the type of work that would not be considered to be "required for the purpose of a tenant" are for clarification and s are not exhaustive:

- repair or maintenance of broken or rusty or unmaintained fences
- repair of broken windows
- removal of boarding or permanently attached materials from windows

- removal of accumulated litter, and or rubbish
- removal of noxious weeds or plants
- removal of weeds or plants reducing the usability of the yard
- painting areas of peeling paint
- fumigation, eradication of vermin
- building work required to make the premises comply with the Building Act 2004.

"**Nuisance**" means both a private and public nuisance and includes criminal nuisance and the meaning in section 29 of the Health Act 1956.

"**Offensive Behaviour**" means behaviour in or within view of a public place, which would be considered by an ordinary and reasonable New Zealander to be such as would wound the feelings of, or arise real anger, or resentment, or disgust, or outrage, in the mind of the type of person actually subjected to it.

"**Owner**" means in relation to any Premises the person for the time being entitled to receive the rent from the Premises, whether on his or her own account or as an agent of, or trustee of for any other person, or who would be so entitled if the Premises were let at a rent; and Owner includes any person for the time being registered under the Land Transfer Act 1952 as a proprietor of the Premises.

"**Premises**" means any area of commercial land either whole or part of the land included in the Computer Freehold Register able to be separately occupied and includes buildings, or part buildings, fences, yards, and any other structures situated on the area of land.

"**Unoccupied**" means Premises that are available for occupation whether or not they are subject to a lease or tenancy agreement.

### **3. Application**

3.1. This Bylaw applies to all Unoccupied Premises within Upper Hutt City.

### **4. Owners obligations**

4.1 . An Owner of Unoccupied Premises shall keep and maintain those Premises to an Immediately Tenantable standard. To keep Unoccupied Premises to an Immediately Tenantable standard an Owner must both do the following and ensure the Unoccupied Premises comply with the definition of Immediately Tenantable:

4.1.1. remove accumulated litter and rubbish that is likely to attract, harbour, or promote the breeding of rodents, flies, cockroaches, mosquitos, or other vermin from the premises

4.1.2. maintain all verandas constructed over public places so that they are not a nuisance to the public, they do not reduce public health and safety or increase the likelihood of Offensive Behaviour in immediately neighbouring public places

4.1.3. repair all damage to the ground floor level of the Unoccupied Premises by removing graffiti and taking whatever steps are necessary to ensure that the Unoccupied Premises condition does not undermine public health or safety, increase the likelihood of nuisance or offensive public behaviour in neighbouring public places.

4.2. The Council will decide at its discretion with reference to the examples in this Bylaw whether work is required to make any Unoccupied Premises Immediately Tenantable or for the Owner to comply with the Owners' obligations under clause 4.

4.3. Where Council considers an owner is not maintaining Unoccupied Premises to an Immediately Tenantable standard or is not fulfilling the Owner's obligations in clause 4.1 of this Bylaw, the Council may:

4.3.1. By notice in writing require the Owner to within a reasonable time do such work or take such action to make the Premises comply with the Immediate Tenantable standard in this Bylaw and fulfils the Owner's obligations in clause 4.1. Both the reasonable time and the required work or action will be prescribed in the notice.

4.3.2. In the event the Owner does not comply with the notice, the Council may carry out the action prescribed in the notice and recover the cost of doing such work from the Owner as a debt.

4.3.3. The Council may only enter the premises and carry out the work if it has given the Owner 48 hours' prior written notice delivered or posted to the owner's address for Upper Hutt City council rates tax invoices of its intention to do so.

4.3.4. Prosecute the Owner under this Bylaw.

## **5. Offences**

5.1. Everyone commits an offence against this Bylaw who does not comply with this Bylaw.

5.2. The Council is not required to issue a notice under clause 4.3.1 before prosecuting an Owner under clause 4.3.4.

5.3. The continued non-compliance of Unoccupied Premises with one or more of the provisions of this Bylaw shall be deemed to be a continuing offence under this Bylaw.

5.4. The compliance with a clause 4.3.1 notice by an Owner is not a defence to prosecution under this Bylaw.

## **6. Penalties**

6.1. The Council may, at its sole discretion, limit a fine for a first offence under this Bylaw to no more than \$500.

6.2. If Council has not limited a fine to a maximum of \$500 under this Bylaw or the offence is not a first offence the penalties prescribed by section 242(4) of the Local Government Act 2002 apply.

## **Annexure 2**

### **Proposed new Upper Hutt City Unoccupied Commercial Premises Bylaw - Summary of Information**

The Council now wishes to consult with the community in relation to the new Upper Hutt City Unoccupied Commercial Premises Standards Bylaw in terms of section 86

of the Local Government Act 2002. The Bylaw requires owners of unoccupied commercial premises to keep them maintained and in good repair. Premises include yards, fencing, landscaping, structures and buildings.

The Bylaw authorises the Council to enter premises and do any work necessary so that the premises comply with the Bylaw. The Council may then recover the cost of work done from the owner. The Council may also prosecute the owner of premises that do not comply.

The statement of proposal including the proposed bylaw can be viewed on our website [www.upperhuttcity.com](http://www.upperhuttcity.com) or at any of the following Council sites: The Civic Administration Building (level 2 reception), City Library, Pine haven Branch Library, and Upper Hutt I-Site.

Submissions on the proposal will be received by the Council up until 5pm Monday 10 December 2012 and should be sent to Upper Hutt City Council, Private Bag 907, Upper Hutt 5140 or [askus@uhcc.govt.nz](mailto:askus@uhcc.govt.nz) Documents