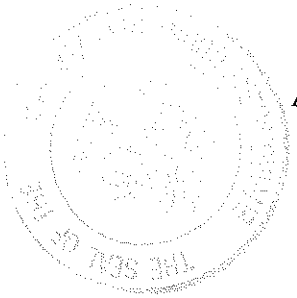
BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 137

IN THE MATTER	of an appeal under a decision on one of the Notices of Requirement for the City Rail Link pursuant to s174 of the Resource Management Act 1991 (**the Act**)
BETWEEN	TRAM LEASE LIMITED (ENV-2014-AKL-000057) Appellant
AND	CJM INVESTMENTS LIMITED A party under s274 RMA
AND	AUCKLAND TRANSPORT Respondent/Requiring Authority
AND	AUCKLAND COUNCIL Territorial Authority

Hearing at:	Auckland on 29 and 30 June and 1, 2 and 3 July 2015,
Court:	Principal Environment Judge LJ Newhook Environment Commissioner IM Buchanan Environment Commissioner JA Hodges
Appearances:	Mr T Daya-Winterbottom for the appellant and s274 party



Mr A Beatson and Ms S Anderton for the respondent/requiring authority
Ms V Evitt and Mr R Wilson for Auckland Council

Date of Decision: 21 August 2015.

DECISION OF THE ENVIRONMENT COURT REFUSING APPEAL

A. The designation will be confirmed, subject to the finalising of appropriate conditions.

B. Costs are reserved.

C. Commentary is offered on the work of expert witnesses and the related duties of counsel.

REASONS FOR DECISION

Introduction

[1] This appeal by Tram Lease is against one of six Notices of Requirement (NOR6) for infrastructural works proposed in Auckland for a 3.4km underground passenger railway line to connect Britomart station and the North Auckland Line near Mt Eden station.

[2] NOR6 is the part of the proposed works in the near vicinity of land owned by Tram Lease in the suburb of Mt Eden. The land is the subject of a head lease to CJM Investments Limited, which in turn has sub-leased parts to various businesses.

[3] The evidence on behalf of Auckland Transport ("**AT**") was to the effect that the City Rail Link involves a very significant investment of the order of $NZ2.8b, and it was AT's counsel's submission that the positive effects of the project should be taken as overwhelmingly in favour of the designation being confirmed. It was his

submission that there was no challenge credibly mounted to suggest that the CRL is not necessary to meet the objectives of Auckland Transport or the needs of Auckland.

[4] NOR6 provides for works to upgrade the Mt Eden railway station and connect the CRL lines into the North Auckland line of KiwiRail. The works would include the grade separation of the Normanby Road rail crossing, comprising a raising of the existing road level, and a lowering of the adjoining railway track, thereby necessitating the construction of an access ramp into the Tram Lease site.

Problems of process

[5] While pre-reading the evidence for the hearing during the preceding week, members of the Court gained the understanding that one of the reasons for the evidence being so voluminous and the parties so polarised, was that they had taken it upon themselves to terminate expert conferencing part-way through, contrary to the Court's directions about what they were to endeavour to achieve by that process. The Judge was then obliged to issue 3 Minutes directing resumption of expert conferencing and requiring counsel to confer and produce a succinct statement of issues in dispute, narrowed he hoped by outcomes of the further conferencing.

[6] Witnesses are not to take it upon themselves to terminate conferencing when that has been directed by the Court. (On this occasion, witnesses had promised the facilitator that they would undertake some further studies then resume sessions at a later date, but instead they undertook no further conferencing until the Court issued further directions just prior to the hearing). Counsel have a responsibility to ensure that witnesses undertake independent conferencing to a professional conclusion, and to manage client expectations in that regard.

[7] When conducted appropriately, conferencing can produce professional narrowing of disputes and save everybody time and expense (as belatedly proved possible in this case after conferencing resumed). Undertaken in the manner and negative tone that counsel permitted to occur here however, conferencing will instead simply add another layer of cost onto proceedings. The Court in such instances in future might give consideration to the NSW approach of limiting experts to one Court-sanctioned witness per discipline.

The issues

[8] Remarkably (given the climate between the parties), issues narrowed significantly after the resumed facilitated conferencing.

[9] The whole thrust of the appeal had, prior to that, appeared to be to bring about a result whereby AT be forced to acquire the site and compensate Tram Lease and CJM Investments. That flavour did not entirely disappear, but crumbled somewhat as the hearing progressed and Tram Lease's and CJM's positions were tested. Subsidiary to that, the issues divided themselves into:

(a) effects prior to commencement of works;

(b) temporary effects during construction;

(c) permanent effects after completion of the works.

We now proceed to list the sub-categories of effects within each of those.

Effects prior to commencement of works

[10] (i) "planning blight" due to uncertainty of commencement of these public works of significant scale, with a related complaint that the "specified date" for triggering an ability to claim compensation under s62(2)(c) of the Public Works Act is entirely under the control of AT;

(ii) lapse period for commencement of works (ultimately agreed at ten years);

(iii) effects on tenants due to uncertainty (possible tenant loss, possible problems gaining replacement tenants, possible reduced rentals);

(iv) consequent property value reduction;

Temporary effects

[11] Effects during construction, and particularly during the 3-4 week ramp construction period alleged to include:

(i) reduction in the number of on-site carparks;

(ii) accessibility of replacement off-street carparking provided by AT;

(iii) safety of that pedestrian access to off-site parking;

(iv) how to manage allocation of parking as amongst the several tenants.

Permanent effects

[12] Issues concerning landscaping, street frontage and visual effects (visibility of site from public areas), traffic ramp design, and carparking numbers and arrangements, following the conclusion of construction, as follows:

(i) gradient of ramp into the site from grade separation of raised street – safe and efficient?

(ii) Reduced car parking numbers available compared to the existing situation and surveyed needs;

(iii) visibility of the site for people passing in the local streets;

(iv) visual aspects of lowering the adjoining railway tracks (views from within the Tram Lease site);

(v) extent of landscaping necessary to mitigate adverse effects.

Key issue

[13] The key issue in this case is, after mitigation of adverse effects (many ultimately agreed among the experts) are the adverse effects so significant that the Notice of Requirement should be cancelled?

Some preliminary legal issues

[14] Counsel for Tram Lease Mr Daya-Winterbottom raised some preliminary legal issues which he foreshadowed as hurdles for the designation. While he resiled from that strong position under questioning from the Court, conceding that "they are not road blocks", some quite considerable time was taken up addressing them,

particularly through comprehensive submissions that other counsel felt compelled to present.

[15] These issues were:

(a) Alleged non-availability of some adjoining Kiwi Rail land for mitigation purposes.

(b) Alleged further problem with that land, being that its use for mitigation would be precluded by Part 4 of the Nga Mana Whenua o Tamaki Makaurau Collective Redress Act 2014.

(c) The legal principle of non-derogation from grant.

(d) That the appellant's land would become legally "landlocked".

(a) Alleged non-availability of some adjoining KiwiRail land for mitigation purposes

[16] This issue appeared to have been at the heart of difficulties of communication amongst the parties earlier this year, and may to some degree have led to the improper termination of expert conferencing in April.

[17] Auckland Transport had proposed to mitigate the effects of the proposed designation and works on the Tram Lease property by utilising a narrow strip of land owned by KiwiRail adjacent to it, essentially to allow for an alternative entrance strip, additional permanent parking, and landscaping opportunities.

[18] Auckland Transport claimed to have reached agreement in principle with KiwiRail to obtain and utilise the strip for those purposes, but legal rights to the land were yet to be formalised.

[19] Auckland Transport offered to make utilisation of the KiwiRail land for these purposes an express condition of the Designation, but this approach was resisted by Tram Lease and the s274 party CJM Investments.

[20] There was a suggestion during the lead-up to the hearing that Tram Lease's counsel would make an issue of the legality of the draft condition offered by Auckland Transport, although little information was forthcoming at that stage. AT and Auckland Council therefore had to prepare in detail to argue the issue.

[21] Lack of detailed allegations from Tram Lease and CJM was one of the concerns noted by the Court in Minutes issued to the parties in the week before the hearing.

[22] Counsel for AT and Auckland Council took steps to anticipate an argument, and came to the hearing equipped with highly detailed submissions about the validity of imposition of a "condition precedent," and the possible relevance or otherwise of property rights in this context.

[23] Mr Daya-Winterbottom submitted that there was no documentary evidence before the Court concerning the availability of the KiwiRail land, such that it could only therefore be assumed that the land would be available. He argued that the draft conditions were intended to take effect as conditions precedent.

[24] Mr Daya-Winterbottom however then acknowledged that the use of conditions precedent in planning and resource management was well established.[1] He argued, however, that there remained a need to ensure that conditions were reasonable and could be enforced, particularly where an applicant did not own or control the relevant land. He tentatively indicated that such difficulties could be avoided by framing conditions to require that the designation should not be given effect to unless access had been constructed. He acknowledged that a similar approach could be used to overcome any potential invalidity from requiring a consent-holder to rely on the consent, authorisation, or activities of a third party.

[25] He then argued that KiwiRail would need to remove its designation from the allegedly redundant operational land under s182 RMA (to avoid the continued need for written consents under s176 RMA); for AT to obtain resource consents from Auckland Council for construction of the new access ramp and provision of parking spaces on the KiwiRail land; and for AT to enter into legal arrangements to make the land available to Tram Lease and its successors for use in connection with activities on their site. He pointed to certain rules in the Operative Isthmus District Plan.

[1] ***Grampian Regional Council v City of Aberdeen*** (1984) 47 P&CR 633

[26] Rather remarkably, Mr Daya-Winterbottom conceded at that point in his submissions that the issue was not "a road block" for the Designation!

[27] Despite the latter concession, counsel for AT and Auckland Council had prepared detailed submissions on the issue. In view of the concession we will very much summarise the submissions.

[28] Those parties argued that conditions precedent (that is, that must be satisfied before a consent-holder can undertake activities authorised by a consent or a designation) are lawful, subject to requirements that they do not:

(a) purport to impose conditions prior to the substantive consent having legal effect;[2]

(b) require the consentholder to do something that it cannot lawfully do;[3]

(c) frustrate the grant of consent;[4]

(d) give rise to undue uncertainty as to the effects of the consented works.[5]

[29] Detailed arguments were put by both counsel to the effect that none of these limitations arose in connection with the draft conditions put forward by AT.

[30] We consider that the draft conditions appropriately anticipate mitigation utilising the KiwiRail land, prior to the activities the subject of the designation commencing. As was said by the High Court in the ***Director-General of Conservation v Marlborough District Council*** case:[6]

> While none of the options can be determined at this stage with certainty, they are nevertheless technically feasible... To require an applicant for a large infrastructural consent process such as this, to have all the necessary property rights in place at the resource consent stage, would be untenable.

[31] In approving for present purposes, the latest version of draft condition 30.1(k) and (l) put forward by AT, we acknowledge that counsel appropriately

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[2] See ***Director-General of Conservation v Marlborough District Council*** (2004) ELRNZ 254
[3] ***Westfield (NZ) v Hamilton City Council*** HC Hamilton, CIV-2003-485-000956, 17 March 2004
[4] ***Hindeman v Waitaki District Council*** [2010] NZEnvC 51
[5] ***Laidlaw College Inc v Auckland City Council*** [2011] NZEnvC 248
[6] at paragraph [41]

realised the need for a strengthening of its wording at the time his submissions were delivered, and it is that version that we approve.

[32] We also agree with his submission that the appropriate term during which the land should be available would be until such time as the site is reconfigured and the access ramp into the property no longer required (agreed by AT that this would be determined by Tram Lease or successor).

(b) Use of the KiwiRail land precluded by Nga Mana Whenua o Tamaki Makaurau Collective Redress Act 2014?

[33] Seizing upon the description of the KiwiRail strip as "redundant," Mr Daya-Winterbottom submitted that Part 4 of this legislation might come into operation if there was a disposal of the land. Strangely, however, having raised the point, he acknowledged that there would be technical legal means by which the situation could be avoided.

[34] Mr Beatson offered submissions about such means, and it is perfectly clear (as we think was conceded by Mr Daya-Winterbottom) that the problem would not be insurmountable. Techniques are provided in ss128-141 of that legislation, some operating in concert with s50 of the Public Works Act 1981 whereby an existing public work or its associated land can be disposed of to another local authority whether of the same kind or not, if there are continuing requirements for it in the public interest. Auckland Transport would come within the definition of local authority in the PWA for such purpose.

[35] In the alternative, KiwiRail could continue to hold the land but authorise its use for mitigation works by AT.

[36] We hold that there is nothing in this issue, as seemed ultimately to be conceded by Mr Daya-Winterbottom.

(c) The legal principle of non-derogation from grant

[37] Another "straw man" was raised by Mr Daya-Winterbottom in his opening submissions, the doctrine of non-derogation from grant. He pointed to the existence

of leases and marked parking spaces, the latter said to be "District Plan compliant." He submitted that, while rights to these things are not real property, "*they create property-like interests and are protected by the doctrine of non-derogation from grant.*"[7]

[38] Under questioning from the Court about the inter-relationship of requirements for designation and extant resource consents, Mr Daya-Winterbottom appeared to resile from the proposition that consents could act as some sort of shield to a requirement for designation. This too ceased to be any sort of "road block."

(d) The appellant's land would become legally "landlocked"

[39] Mr Daya-Winterbottom submitted that the site owners have a right of access along the full frontage of their property with the existing road, and that there would be a statutory right to compensation under s330 Local Government Act 2002 where property was affected by a change in road level. He made the rather remarkable submission that "*absent the construction of the proposed access ramp the site would become landlocked in terms of ss326-331 of the Property Law Act 2007.*" He noted in addition a reduction of site frontage would be likely to come about, that there would be a reduction in parking space numbers, and that "*interference with access rights and alteration to road levels are recognised causes of action in private nuisance.*"(!)

[40] Mr Beatson on behalf of AT rightly pointed out that land is only landlocked if there is no reasonable access to it.[8] He noted that the site has approximately 29m of road frontage, that legal access could be obtained from any part of that, and that mitigation was proposed after the raising of the street, by the intended provision of an access ramp; also that it is not uncommon for sites to have a single access point, as indeed is the current state at the property.

[41] Once again, there was nothing in Mr Daya-Winterbottom's submission. It was not supported by fact or law, and was sadly a diversion from the true issues in the case.

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[7] RMA, s122; ***Thomas Gibbons "Property Rights in Resource Consents: Some thoughts from law and economics"*** (2012) NZULR 46; ***Tram Lease Limited v Croad*** [2003] 2NZLR 461; ***Aoraki Water Trust v Meridian Energy Limited*** [2005] 2NZLR 268

[8] s326 Property Law Act 2007

Potential adverse effects

[42] As we have already noted, the issues in the case narrowed somewhat after the belatedly resumed expert conferencing. Indeed, narrowing continued during the hearing itself.

[43] As we have also already indicated, the disputes focussed on three types of potential adverse effects:

(a) adverse effects prior to commencement of works;

(b) temporary effects (during construction); and

(c) permanent effects after completion of the works.

[44] It became clear during the course of the hearing that the latter two kinds of effect could be sufficiently mitigated by conditions of consent, and/or the subject of compensation. The dispute therefore tended to focus more on effects prior to commencement of works, than the latter ones. We perceived once again that the driver was money. The thrust of the legislation so far as compensation is concerned, is that there is no provision for compensation prior to the works getting under way. Tram Lease and CJM Investments made a very determined push for cancellation of the Requirement for Designation on this account, although quite unusually, the stance on even that topic changed by the end of the hearing, to a request by those parties for the case to be adjourned so that some sort of negotiation could take place. This notion was stoutly resisted by AT, on the understandable basis that a public body is strictly constrained by legislation in the extent to which it can offer money or other forms of compensation. AT's stance was that the Requirement should now either stand or fall; and that there was no basis established by Tram Lease and CJM for the latter. As will be seen, our decision is that the Requirement should be confirmed.

Effects prior to commencement of works

[45] In an earlier paragraph of this decision we listed four sub-topics under this head, but during the course of deliberating about them, we perceived that they would all more or less come under one umbrella, termed by the appellant, "planning blight."

[46] Mr Daya-Winterbottom submitted that the concept of planning blight refers to depreciation of existing land value because of the existence of proposals for public works, and has affinities with the concept of injurious affection, referencing the writing of Patrick McAuslan, "*Land, Law and Planning*" (Weidenfield & Nicholson, 1975 at page 689), although he cited no case law.

[47] As occurs with most major public works, there is some uncertainty about precise timing of commencement and completion of works in the vicinity of the Tram Lease property. AT was quite open about this, noting for instance the evidence-in-chief and rebuttal evidence of Mr WR Newns, the design manager for the Principal Technical Advisor team to AT for the City Rail Link project. In his rebuttal statement he candidly acknowledged that certainty regarding construction start and duration will not be known for some time. Similarly, Mr R Galli, AT's Land Acquisition and Programme Delivery Manager for the project, acknowledged that finalisation of alignment and development of detailed design would have a "considerable gestation period", and other uncertainties would arise from the need to resolve availability of funding and competing priorities, as with all such major projects.

[48] The concerns for Tram Lease and CJM Investments were summarised succinctly by the six valuation and real estate expert witnesses when they finally returned to the conferencing task at about the time of the commencement of the hearing. They recorded:

> Tram and CJM's witnesses' major concern is the negative effect of the impending works during the pre-construction period. In particular Tram and CJM witnesses consider that they will each suffer significant losses which will not be compensated under the PWA. This is exacerbated due to the ownership structure of the site – ie, Tram owns the freehold, CJM has a ground lease of the site, owns the improvements and pays ground rent to Tram, and sub-leases the improvements to the sub-tenants. AT witnesses acknowledge this concern.
>
> **Pre-construction effects**:
> (a) Tram & CJM witnesses consider that there remains considerable uncertainty as to when the works will commence and what the site will look like post-construction. In particular funding has yet to be confirmed for NoR6 and the final design has yet to be completed. In addition there is uncertainty around what the effects of the work will be on sub-tenants of the site.
> (b) Regardless of design and timing of the work, Tram and CJM witnesses consider that the existing sub-tenants, and any potential future sub-tenants will most likely consider the construction works to be a major business interference, and the site following construction will be significantly inferior to the status quo.
> (c) The effects of uncertainty, the knowledge of major construction interference, and the impending change in character of the site include:

(i) Tram is unable to complete the 1 January 2004 rent review and this position will continue for the lapse period or until completion.

(ii) CJM risks losing current sub-tenants or facing claims for rent reduction, achieving lower rents and shorter lease terms for replacement tenants as well as possibly lower quality sub-tenants. The combination of these for a leasehold interest (which CJM holds) can be terminal.

(iii) It will be extremely difficult for either Tram or CJM to sell their respective interests prior to construction and neither of them will be entitled to compensation under the PWA or otherwise.

[49] The planning witnesses also addressed these issues in their belatedly resumed conference. The planning consultant called by Tram Lease and CJM, Mr MJ Foster, stated that the draft conditions did not provide sufficient mitigation prior to commencement of construction because of a lack of recognition of the degree of uncertainty that could prevail for sub-lessees on the property and whether PWA compensation rights would be available to address such an issue. The planning consultant called by AT, Ms AJ Linzey, disagreed with Mr Foster, and considered that there were specific draft conditions to meet those concerns, including such steps to be taken by AT as providing information to the community. Beyond that, she did not consider it appropriate or possible to further quantify or compensate for such effects.

[50] Mr Daya-Winterbottom submitted (correctly) that under s62(2)(c) of the PWA the specified date that would trigger the ability to claim compensation would be either the date on which any interest in the land was vested in AT, or the date of entry on the land to commence work, whichever occurred first. His real concern was that both events were entirely under the control of AT, and uncertain as previously noted.

[51] The valuation witnesses called by each party gave significantly differing evidence about monetary quantification of such likely impacts. The approaches taken by the various witnesses were frankly speculative, and we noted that they were barely cross-examined, which tended to confirm our own view that the evidence on behalf of Tram Lease and CJM adopted extreme and unrealistic positions of a "worst case" type.

[52] At the heart of the question appears potential anxiety on the part of the sub-tenants about what may occur when construction gets under way, and the environment post-construction. Under questioning by Mr Beatson, Mr Foster offered the strange response "*...what it's boiled down to is that there may or may not be substance to the possible claim that a tenant may or may not walk, is that where we're at?*

[53] Counsel for AT referred us to decisions of the Environment Court concerning anxiety. In ***Telecom New Zealand Limited v Christchurch City Council***,[9] the Court found that social angst and lack of wellbeing in the community potentially affected by a proposal cannot be a material consideration when assessing merits. More directly, the Court stated in ***Shirley Primary School v Christchurch City Council***:[10]

> Whether it is expert evidence or direct evidence of such fears we have found that such fears can only be given weight if they are reasonably based on real risk.

[54] Of some note, no witnesses were called from amongst the existing sub-tenants to describe or explain any such anxiety.

[55] We accept the submissions of counsel for AT that uncertainty about precise construction commencement date is not uncommon with large infrastructure projects that take time for detailed design and funding to be completed. He told us that AT is committed to working with sub-tenants and tenants, noting that CJM Investments has claimed that it has strong relationships with its tenants. Intriguingly, not only were sub-tenants not called to give evidence, but there appeared to be a reluctance on the part of Tram Lease and CJM to allow AT representatives access to them during the pre-construction period to endeavour to allay fears.

[56] Counsel for AT addressed submissions on the subject of the relevance of property values in RMA cases, offering case law. The submissions were not challenged by counsel for Tram Lease and CJM. The principles are not complicated or controversial, and we can state them simply as follows.

[57] The starting point is that effects on property values are generally not a relevant consideration, and that diminution of property values will generally simply be found to be a measure of adverse effects on amenity values and the like: ***Foot v Wellington City Council***.[11]

[58] Similarly in ***Bunnik v Waikato District Council***,[12] the Court held that if property values are reduced as a result of activities on an adjoining property, then any devaluation experienced would no doubt reflect the effects of that activity on the environment. The Court held that it was preferable to consider those effects directly

[9] Decision number W165/96
[10] [1999] NZRM 66 at paragraph [193]
[11] Decision number W7398, at paragraph [256]
[12] Decision number A42/96 [Environment Court, Auckland]

rather than the market's response, because the market can be an imperfect measure of environmental effects.

[59] In ***Hudson v New Plymouth District Council***,[13] the Court held that people concerned about property values diminishing were inclined to approach the matter from a rather subjective viewpoint. The Court held that such people become used to a certain environment, and might consider that property values would drop after physical changes occurred, however a purchaser who had not seen what was there before, would take the situation as he/she/it found it at the time of purchase, and might not be greatly influenced by matters of moment to the present owner or occupier.

[60] We agree with the findings in those cases and the reasoning behind them.

[61] The valuation and real estate witnesses for AT were not cross-examined, particularly on the issue of whether existing sub-tenants would leave the site, and/or whether it would prove difficult to re-let parts of the property. We agree with counsel for AT that such claims must, on the evidence before us, be viewed as being entirely speculative.

[62] We consider that Parliament has deliberately created a framework for compensation under the RMA and PWA, in particular s185 of the former and s62 of the latter. This legislative framework contemplates that compensation is not available until a taking occurs or works commence. We discern a number of reasons for this regime. First, losses caused by possible anxiety would be extremely difficult of calculate objectively. Secondly, the "public purse" is involved, and is to be protected from payments being sought beyond compensation expressly ordained by statute. Thirdly, if designations could be successfully attacked and cancelled in the absence of provision for pre-construction compensation, it is conceivable that many major infrastructural projects would never get off the ground, particularly those that require some years of detailed planning and implementation. We were offered no sensible legal framework for finding the existence of a novel type of compensation, and indeed Mr Daya-Winterbottom's own submission about s62 PWA recorded at paragraph [50] above, runs directly counter to the possibility of such existing in law.

[13] Decision number W/138/95 [Environment Court, Wellington]

Temporary effects (during construction)

[63] The evidence on behalf of AT tended to focus on the length of time it would take to construct a new ramp into the Tram Lease property, approximately 3-4 weeks. That however would be to ignore the potential impact of construction effects from the grade separation works between the railway to the north of the property and its road frontage onto Normanby Road.

[64] We consider it important to start by remembering that when major infrastructural works occur in cities, roading patterns are at least temporarily disrupted, and adverse effects such as noise, vibration and dust can be experienced by occupiers of properties in the vicinity. The question is whether these can be adequately mitigated in any given case, or whether a requirement for a designation should be cancelled.

[65] The principal adverse effects here are likely to be of the traffic and transport variety, including vehicular and pedestrian access to the Tram Lease site where there are commercial outlets including a commercial stationery operation and a subscription gymnasium.

[66] The traffic and transport witnesses (Mr I Clark and Mr M Nixon for AT, Mr G O'Connor for the Council, and Mr B Harries for Tram Lease and CJM) were able to reach agreement about a number of matters at the belatedly resumed expert conference.

[67] First they agreed that a safe and operable pedestrian route could be provided between the temporary parking area and the site throughout the ramp construction period. They also agreed that a pedestrian route for persons with disabilities, to and from the temporary carpark to the north of the site, could not be provided because it would need steps; but that this could be addressed through Condition 61. All agreed that the pedestrian accessibility from Normanby Road could be provided for all persons through the existing driveway, and that the permanent arrangement for pedestrian access into the site from Normanby Road would be safe and reasonable.

[68] They also agreed that the on-site parking supply available during the ramp construction period would be less than existing peak demands as surveyed. They agreed that temporary off-site parking would be inconvenient when the carpark on the site was fully occupied during this period, including the need for an approximately

1km diversion route between the two carparks, for vehicles. Mr Nixon offered the opinion that the difference between regular and repeat customers could be taken account of, and "repeat customers," for instance those attending the gym, could be better informed of access to the temporary off-site carparking area, and irregular visitors given priority on site.

[69] The witnesses agreed that the reduction in on-site parking spaces during the construction period would be 15.

[70] Disagreements arose amongst them over the practicality of maintaining the best possible access for parking by customers of the stationary business OfficeMax on account of the 1km quite complex detour. Mr O'Connor and Mr Nixon continued to hold the view that management of parking spaces as between tenancies would assist with mitigation. They considered that offsite provision, combined with such management, would offer acceptable mitigation. The witnesses agreed that if such steps could not be taken, the customers of OfficeMax would be most likely to shop elsewhere if the carpark were full at any time during the 3-4 week construction period (AT's estimate).

[71] We have looked closely at the work done on draft conditions of consent in this regard, and consider that it has been approached sensitively and constructively by AT. There remains the potential for some adverse effects to be somewhat more than minor (but not greatly so).

[72] There was a dispute amongst the witnesses as to the validity of parking surveys that had been undertaken to compare availability of parking at "peak times" with actual usage. The impact on the case of this relatively minor dispute was not addressed in the legal submissions on behalf of the appellant, and Mr Clark was not cross-examined on it.

[73] The parking surveys tended to favour the AT view that disruption would be less than was claimed by Tram Lease and CJM. We agree with the submission made in closing by Mr Beatson that further mitigation measures could be implemented through operation of conditions of consent, for instance through the Social Impact and Business Disruption Deliver Work Plan, assisting with management of parking by different groups of people.

[74] At the end of the day there is also provision for compensation for injurious affection, if needed, under Part 5 of the Public Works Act 1981.

Permanent effects

[75] Adverse effects on Tram Lease, CJM Investments, and sub-tenants and their customers, can be summarised broadly as:

(a) changes to the site frontage;

(b) the addition of an access ramp;

(c) the loss of six carparks (which could have been lessened to 5 carparks absent a request by the appellant about the geometry of the ramp).

[76] The effects tended principally once again to be in the traffic and transport area, but also in the area of urban design and visual amenity.

[77] The traffic and transport witnesses noted that the main section of the new ramp structure as proposed by AT would comply with the maximum gradient in Standard AS2890.2 (that is, 1:6.5), but would not meet the operative District Plan standard of 1:8. The witnesses for AT and the Council agreed that the solution was "not ideal, but safe and reasonable" and as anticipated by draft condition 30.1(i). Mr Harries, called by Tram Lease and CJM, considered that design to the District Plan standards was preferable and achievable because it would provide "greater familiarity to Auckland car and truck drivers, albeit at the cost of one parking space." We consider that this matter can be adequately addressed in conditions of consent.

[78] Bearing in mind the agreement amongst landscape witnesses about minimising the area required for a landscaping strip, the traffic and transport witnesses were able to agree that car parking spaces lost following completion of the construction works would be precisely 1 with a fully compliant District Plan ramp design, and zero with an Austroads design ramp. Having regard to the surveys, Mr Clark considered that a permanent arrangement of 35 carparking spaces would be sufficient to accommodate the observed peak parking demand. Mr Harries considered that tenant access to "legally entitled parking spaces" should take precedence over general carparking occupancy surveys when assessing the situation. Mr Clark maintained the view that parking surveys are useful to establish existing rather than theoretical parking demand, and therefore to understand the actual adverse effect of

loss of parking. He was supported in this by Mr O'Connor and Mr Nixon. We make the same findings concerning the survey issue as we did in discussing temporary effects above.

[79] The urban design and visual amenity witnesses were Mr R Pryor called by Tram Lease, Mr A Ray by AT, together with assistance provided by Mr Newns for explanation of engineering drawings and minimum landscaping dimensions, and Mr S Chapman, a vegetation expert called by AT.

[80] Once again, the resumed expert conferencing proved capable of resolving more than the parties anticipated back in April.

[81] The witnesses agreed that the principal issue in the case is the diminished visibility and physical separation arising from grade separation. Other issues such as the amount of landscaping to be provided were considered comparatively minor.

[82] The visualisations provided with Mr Pryor's evidence-in-chief, and the landscaping elements in the visualisations in Mr Ray's evidence-in-chief, had been superseded as the number of engineering design elements was evolving.

[83] The witnesses agreed that in terms of landscape and visual effects the site and surrounding environment would change substantially. Some of the changes would be positive and some negative.

[84] The positive changes would include:

(a) removal of the level crossing and associated visual clutter and sounds;

(b) lowering of the rail lines adjacent to the site, reducing noise and visual effects, noting however that there was a risk that the catenary might be brought to eye level from the OfficeMax site.

[85] Negative changes comprised most of the matters on which the witnesses were unable to agree, discussion of which follows.

[86] Agreement was reached about modifications to detail such as balustrades (permeability of view favoured), and a balance of the quantum of carparking and

landscaping to be provided. The witnesses agreed that while landscaping would enhance on-site amenity, it was not critical to the functioning of the site.

[87] It was also noted that a 1m wide landscaping strip shown in earlier drawings, could be reduced to 0.5m and offer visual mitigation through planting.

[88] The witnesses agreed that the project has "CPTED" implications (crime prevention through environmental design), which could be addressed through the detailing of permeable balustrades, maximising the width of footpath, orientation of steps parallel to the overbridge, good level of lighting, and selecting materials for ramp and footpath to enhance visual amenity. The witnesses agreed that the draft conditions of consent were heading in the right direction.

[89] Where this group of witnesses was unable to reach agreement, was as to the degree of visual impact anticipated. Mr Ray believed that the design proposals would result in an environment not uncommon in the city fringe area, and believed that the site would still be capable of functioning for activities enabled by the District Plan. Mr Pryor considered that the reduced visibility and physical separation of the site created as a result of grade separation would have an adverse effect on the site's visual amenity. There is some force in both views, but we find Mr Ray's opinion about the locality more powerful, and Mr Pryor's concerns capable of being significantly addressed through mitigation.

[90] We consider that there is nothing in Mr Pryor's complaint that the electric rail catenary might come into view when the overall infrastructure is lowered. Indeed we consider that there would be an improvement in outlook to the north from the site overall, and that the presence of a wire running horizontally through the view would be a minor adverse effect at worst.

[91] There is no doubt that visibility of the site and existing development on it from Normanby Road and wider surrounds will change significantly. The lower part of the building occupied by OfficeMax will be obscured below the raised Normanby Road feature. There was concern on the part of Tram Lease and CJM witnesses that this lessened visibility could result in a downturn in business on the site, but as pointed out to them by the Court during the hearing, signs could be placed on the top of the building (albeit requiring permission under bylaws – as to which we encourage Auckland Council to consider such an approach favourably); and the current relatively

low level of development on the site might not necessarily pertain indefinitely in any event.

[92] We agree with submissions by Mr Beatson that mitigation activity could be further addressed through operation of conditions of consent, including the Social Impact and Business Disruption Delivery Work Plan. Also, that loss of value arising from the change in road level (as with any decrease in carparking spaces) could be the subject of claim under Part 5 PWA. The negative sentiments expressed by valuation and real estate witnesses called by Tram Lease and CJM Investments, not tested by cross-examination, were in our view unduly pessimistic and speculative, and have not succeeded in persuading us that we should contemplate cancelling the requirement for designation. We consider that market forces will be many and varied, will change constantly over time, and should have very little influence on the outcome of the present proceedings other than through imposition of appropriate conditions of consent.

Difficulties with the planning evidence called by appellant and s274 party

[93] We had significant concerns about the evidence of Mr Foster, not just because it covered a great many more issues than it was ultimately necessary to consider (for reasons already discussed), but also because of the way it had been constructed, unsupported by much reasoning, and the use of pejorative and unprofessional expressions about other people and other evidence.

[94] Mr Foster recorded that he is a planning and resource management consultant with over 30 years experience, the last 20 of which have included extensive involvement in large commercial development planning and major infrastructure projects.

[95] Our first concern about Mr Foster's evidence, including his answers to questions in Court, was his tendency to over-confident assertions of opinion backed by little in the way of professional analysis of fact, planning instruments, or expert evidence, but instead amounting to an invitation to us to trust his judgment, something he appeared proud of. The point can be illustrated by an early answer from him to cross-examination by Mr Beatson as follows:

> ...I was looking for a mechanism that actually would allow the concerns of both Tram and CJM as to the effects of the designation on their leasing abilities and so on in the interim period. Now I've always approached major infrastructure projects and I've led many of them, on the basis of

> attempting to as far as possible mitigate any adverse effects whether they be real or perceived and what I'm outlining to the Court in my view is a pragmatic way of addressing the kind of issues that are being raised. Well now it may be off the wall, unusual, but, hello, I have a bit of a reputation for that.

[96] The flavour of his significant confidence in his track record in infrastructural projects unfortunately manifested itself in the tone he employed throughout his evidence, particularly his rebuttal evidence.

[97] With that flavour came a related concern for us, that much of the evidence amounted to advocacy, contrary to the expectations of the Court in its December 2014 Practice Note guiding the work of expert witnesses.

[98] These approaches led him to offer such statements as:[14]

> ...AT fails to recognise or acknowledge such effects. The reality is that an experienced infrastructure provider would realise that such effects are sufficiently significant to warrant a pragmatic approach that involves "buy the property, do the work, and then on-sell it."

[99] Further observations, immediately following the last, included that, in his opinion, the temporary and long-term measures proposed by AT were "unworkable, unrealistic and impractical", followed by an observation that the "*whole thrust of the AT case is founded on the assumption that land will allegedly be made available by KiwiRail to mitigate the adverse effects of the project* [no such arrangement having been made]."

[100] Much of the rest of the evidence-in-chief followed the pattern of starting with a strong negative advocated position, supported by little more reasoning than that we should accept his word because of his considerable experience with major infrastructure projects over the last 20 years.

[101] Yet another concern was that in his evidence, Mr Foster would repeat the expert evidence of other witnesses called by his clients, supply the assertion about his experience, then offer a conclusion that somewhat resembled an assessment of the sort that should be left to the decision maker, in this case the Court. This occurred particularly in his rebuttal evidence.

[14] Mr Foster, evidence-in-chief, paragraph [3.2]

[102] Members of the Court were sufficiently concerned about all of these aspects of Mr Foster's evidence that the Judge questioned him to enquire whether he wanted to stand by them, resile from them, or express them in different terms. With one exception (where he accepted from the Judge that he could have expressed his criticism of AT as "arrogant" better, by saying that they had proved more difficult to deal with than a certain national infrastructure authority), he refused to resile from his positions.

[103] In addition, the Judge gave Mr Foster the opportunity to explain why he and others brought the facilitated expert conferencing to a premature end, and he acknowledged that with hindsight that decision was "*probably unfortunate*."

[104] We took the rare approach of asking the witness to recite from memory the requirements of the Court's Practice Note for the work of expert witnesses, and after some hesitation, and some prompting from the Court, he accepted the need for truthfulness, independence, objectivity, impartiality, and respect for other experts even if fundamental disagreements existed between their positions.

[105] The Court took Mr Foster through the passages of evidence in his two statements that were of concern to it. Mr Foster proved resolute in defence of them, considered that they represented an appropriate expert witness approach, and returned to the theme that he considered that AT had been difficult to negotiate with (we inferred as some sort of justification for the strength of his own responses and statements). Regrettably, all that was finally forthcoming was a heavily qualified and mis-directed apology:

> All I can say is that if I have offended the Court then I apologise. That was not my intention. I have appeared before the Court on a considerable number of occasions and never before had the kind of questions that Your Honour has directed to me been directed at me and that's why I say that I did not – that I, sorry not I did not – I gave very, very serious consideration as to how I should frame my evidence.

[106] We are bound to record that whether or not the Court is "offended" is not the issue. The issue is the requirement of the Court's practice note calling for professionalism.

[107] After the Court had questioned Mr Foster, Mr Daya-Winterbottom re-examined on these matters. Even then, Mr Foster took no opportunity to resile from his positions. It needs however to be said that counsel shares responsibility for

ensuring professionalism of performance by a witness, from the earliest stages of the life of a case.

[108] As a consequence of the belated outcomes of the facilitated conferences and counsels' ability to produce a considerably narrowed statement of unresolved issues, much of Mr Foster's evidence was not needed. If the other elements had remained in contention however, we would have struggled to assign much of it any real weight. (Mr Daya-Winterbottom offered us detailed submissions on the last day of the hearing, from which it was apparent from decided authorities that such problems usually go to weight rather than admissibility. Having said that, our attention was subsequently drawn to a recent decision of the Privy Council ***Pora v R***,[15] a criminal appeal, where an expert witness was held to have purported to supplant the Court's role as the ultimate decision maker on matters that were central to the outcome of the case. The transgression having been significant, his evidence was held to be inadmissible. For the reasons given at the start of this paragraph we have not needed to make a determination as between admissibility and weight on this occasion).

Decision

[109] It will be apparent from the findings that we have been made in earlier parts of this Decision, that we will not be cancelling the Requirement for Designation, but instead have the intention of confirming it. This will need to be on appropriately framed conditions of consent, as to which we provide guidance to the parties in the following paragraphs.

[110] Our intention is that the parties should work further on the draft conditions of consent, and refer them back to the Court. We comment that the Court has already been asked to consider draft consent orders in relation to four of the six Notices of Requirement for the CRL project, and a fifth is due shortly.

[111] In that context, AT and Auckland Council are to conduct an additional exercise of ensuring consistency where necessary, of conditions proposed to attach to all six Designations. The Court will then consider the draft conditions of consent in the present case along with the others, and no doubt issue consent orders in the others, and will a final decision in the present one.

[112] Costs are reserved.

[15] [2015] NZPC1: [2015] UKPC 15 (3 March 2015)

Guidance on draft conditions of consent

[113] The following are the matters the Court requires the parties to attend to concerning the conditions for the designation:

A. Add a new 1.1(g) to include information provided at the Environment Court hearing;

B. Amend condition 1.2(b) to add in a reference to the Environment Court hearing;

C. Amend condition 2.1 so that the lapse period is ten years;

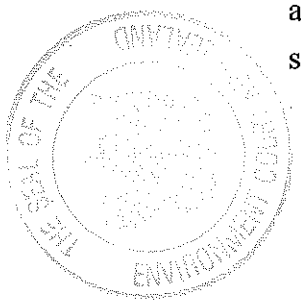
D. Minor clarification proposed by AT to condition 30.1(c);

E. Revised condition 30.1(i) recommended by Ms Linzey in her rebuttal evidence paragraph [10] concerning pedestrian and two-way vehicle access being maintained at all times to 32 Normanby Road. (Note that we approve the changes to (iii));

F. New and revised aspects of conditions 30.1(j) and (k) based on proposal by counsel for AT in legal submissions on 29 June 2015 in relation to KiwiRail land, incorporating tracked changes proposed by the planners at expert conferencing on 29 June, and further changes recommended by Ms Linzey in her rebuttal evidence paragraph [10]. Note that in (j) references should be to 34 carparking spaces in two places, revision 5.0 of Plan 0058, and a reference to District Plan design standards should be added into (i). Sub-clause (v) to read:

> Provision for landscape planting both on the site and on KiwiRail land in the areas shown on DRG 0058 Rev 5.0, in accordance with condition 47.2(c)(x) where appropriate; indicative widths of landscaping to 1m for the section shown alongside the railway and 0.5m for the section on the southern side of the ramp.

In 30.1(k), reference in the first line to be to sub-condition (j), and reference added to the requiring authority in the second line, and a reference to the access ramp no longer being required by the landowner in the third line. In the sixth line, a timeframe to be referred to.



The trigger point for the condition precedent is to be "construction of grade separation works at Normanby Road… not commencing until KiwiRail land is available…"

G. Condition 47.2(b)(ix) to be as recommended by the planners in their expert conference report dated 29 June, with sub-clause (d) to add in reference to ARCOP guidance for pathways in high risk, high brightness areas;

H. New condition 47.2(c)(x) as recommended by Ms Linzey in the tracked change version and further modified in her rebuttal evidence paragraph [7], concerning landscaping on private property, to take account of comments made by Mr Foster and Mr Scrafton;

I. Revised condition 48.1, which was the subject of the joint witness statement by the visual witnesses, remove the last sentence from Ms Linzey's version as recommended also by the planners;

J. Condition 55.1A – to remain as in the Commissioner's version, with Ms Linzey's tracked changes not to apply – see Ms Linzey rebuttal evidence paragraph [5];

K. Condition 55.3(c) – Ms Linzey's recommended addition to address a concern raised by Mr Scrafton in his EIC paragraph 36, appears appropriate;

L. Provide a condition about a permeable balustrade being required not just for CPTED purposes, but also to provide views into the site to address Tram Lease's concerns;

M. An appropriate condition is to be prepared allowing for AT to consult with sub-lessees in the presence of landowner and head lessee, concerning mitigation and to lessen anxieties;

N. Mr Scrafton in his rebuttal evidence paragraph [50] suggests that the visualisation as prepared by Mr Ray be added to the list of drawings in new condition 1.1; however we doubt the wisdom of that pending detailed design;

O. The footprint of the area of the designation should either be extended to include the additional sliver of KiwiRail land, and to accommodate the steps down from Normanby Road; or provision made for KiwiRail to utilise its designation to authorise necessary the works;

P. There is to be no provision for transfer of KiwiRail land to Tram Lease. The conditions should simply remain silent on this point;

Q. Similarly, there is to be no requirement for periodic reports back to the Court, and the conditions will remain silent on that point;

SIGNED at AUCKLAND this 21st day of August 2015

For the Court

L J Newhook
Principal Environment Judge