

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TAMAKI MAKAU**

Decision [2024] NZEnvC 043

IN THE MATTER OF

a notice for application of enforcement
orders pursuant to s 317 of the
Resource Management Act 1991

BETWEEN

BARCLAY MANAGEMENT (2013)
LIMITED

(ENV-2023-AKL-000174)

Applicant

AND

CITY RAIL LINK LIMITED

Respondent

Court: Judge MJL Dickey
Commissioner ACE Leijnen

Hearing: On the papers
Last case event: Memorandum from Barclay Management (2013) Limited dated
29 February 2024

Appearances: BS Carruthers KC for the applicant
AJL Beatson / LM Lincoln for the respondent

Date of Decision: 18 March 2024

Date of Issue: 18 March 2024

DECISION OF THE ENVIRONMENT COURT

A: CRLI is prohibited from closing the Lower Albert Street slip lane in direct
contravention of condition 1.1(a), 1.1(b)(i) and 1.2(b) of Designation 2500/1 in
the Auckland Unitary Plan.



BARCLAY MANAGEMENT (2013) LIMITED

B: CRLI is required to maintain pedestrian and vehicle access in Lower Albert Street for the duration of its construction works in order to comply with the above conditions in the Designation 2500/1.

C: Costs are reserved.

REASONS

Summary

[1] City Rail Link Limited (**CRLI**) is responsible for the construction, operation and maintenance of the City Rail Link which is authorised by various designations and resource consents. The works comprise a 3.45km twin-tunnel underground passenger railway running between the existing Britomart transport centre and a redeveloped Mt Eden Station.

[2] Construction of the City Rail Link has impacted Barclay Management (2013) Limited (**Barclay**), which is the operator of a hotel business at 70-74 Albert Street. The works have, in recent times, required closure of part of the Lower Albert Street slip lane. That area contains a loading bay used by Barclay for its guests arriving and departing from the hotel. This area provides for both taxis and shuttle services such as the airport shuttle service. While a loading bay was provided close to the existing loading bay on closure, Barclay says that closure of the slip lane to vehicle traffic and the loss of the loading bay has adversely affected it.

[3] For various reasons that we will expand on, CRLI reopened the slip lane in early December 2023. It remains open. CRLI awaits this decision before determining its next steps.

[4] CRLI submits that the conditions of Designation 2500-1 authorising construction of the City Rail Link also authorise closure of the slip lane. Barclay disagrees.

[5] We find that Designation 2500-1 does not authorise the slip lane's closure because:

- (a) general condition 1 of that designation refers to numerous documents with which the works must comply. Certain of those documents address the slip lane;
- (b) the documents accompanying the notices of requirement for the works did not foreshadow its closure. In fact, in later proceedings about the Aotea Station Notice of Requirement, assurances were given that it would not be closed – either temporarily or permanently. There was no caveat or qualification to those assurances;
- (c) those assurances preclude CRLI from relying on the qualification to general condition 1 that its requirements are “subject to detailed design...”;
- (d) there would otherwise be no utility in providing unqualified assurances and statements in supporting documents as to how a particular work may be implemented;
- (e) conditions 25 and 27 require the development of traffic management plans in accordance with stated objectives. Those objectives refer, among other things, to maintenance of vehicle access to private properties on Albert Street. Read together with the documents attached to the Designation, those conditions indicate that the slip lane is to remain open. CRLI points to local vehicle access to properties on Albert Street having been maintained despite the slip lane’s closure. However, maintaining general access to the area while removing accessibility to Barclay’s property for loading and unloading is not the same. It has been deprived of its vehicular access.

Application for enforcement orders

[6] Barclay seeks that:

- (a) CRLI be prohibited from commencing its intended traffic management measures in Lower Albert Street in direct contravention of condition 1.1(a), 1.1(b)(i) and 1.2(b) of Designation 2500/1 in the Auckland Unitary Plan;

and

- (b) CRLL be required to maintain pedestrian and vehicle access in Lower Albert Street for the duration of its construction works in order to comply with the above conditions in the Designation 2500/1.

[7] Barclay's hotel fronts the Lower Albert Street one-way slip lane on the eastern side of Albert Street road reserve between Wyndham Street and Durham Lane. The location for which orders are sought is the construction site of the City Rail Link in Lower Albert Street, which encompasses the entire width of the Albert Street road reserve in this location, including the slip lane.

[8] Both parties have filed evidence in this matter together with an agreed statement of facts and issues to be determined.¹ They have also agreed that the issues between them could be determined on the papers. They have described the issue to be determined as follows:²

- 28. ... whether the designation authorises the closure of the Albert Street slip lane to vehicle traffic.
- 29. The consequences of the Court's ruling on the above are as follows:
 - (a) If authorised by the designation, the potential closure can be pursued through changes to the OPW and/or relevant management plans to expressly provide for the slip lane closure, following the proper process as set out in the designation conditions (the respondent's position); or
 - (b) If not authorised by the designation, a variation to the designation will be required (the applicant's position).

[9] CRLL acknowledges that none of the affidavits it provided are relevant to the determination of the issue, but notes that the affidavit of Mr Sinclair³ provides relevant background to the proceeding.

¹ Dated 29 November 2023.

² Agreed Statement of Facts and Issues to be Determined, at [28] and [29].

³ Affidavit of Matthew Eric Raymond Sinclair, managing construction delivery of Waihorotiu station, and dated 8 November 2023.

Designation 2500

[10] CRL is the requiring authority for Designation 2500 in the Auckland Unitary Plan – Operative in Part (**AUP**). Responsibility for the designation was transferred from Auckland Transport to CRL in October 2017.

[11] In the AUP, Designation 2500 is described as comprising six different designations numbered 2500-1 to 2500-6. Designation 2500-1 is the designation relevant in this proceeding.

[12] The Explanatory Note in the AUP describes the Designation’s purpose as:

2500-1 A surface designation extending from Britomart Transport Centre to Albert Street/Mayoral Drive (in the vicinity of the Aotea carpark entrance on Mayoral Drive) for the construction, operation and maintenance of the CRL – including two rail tunnels and Aotea Station.⁴

[13] Figure 1 of the Explanatory Note provides an overview map. It is noted that:

The land requirement plans and associated schedule of directly affected parties (attached to each notice of requirement) should be referred to for the actual area of land required.

[14] Barclay’s hotel is not within the designated land, but its legal access is to Albert Street, which forms part of the designated area.

[15] Since the Designations were confirmed, several amendments have been made to the designations and conditions. Changes were confirmed in January 2017 to accommodate variations to works relating to the Aotea Station and the Bluestone Wall.

Aotea Station Notice of Requirement

[16] One of the variations sought was to enable changes to the works including the relocation of the Bluestone Wall located in the Lower Albert Street slip lane 1.5m east of its existing location (**Aotea Station NOR**). That relocation was considered necessary to accommodate the Aotea Station ventilation structures within Albert Street and four traffic lanes, and to provide footpaths of sufficient width. The

⁴ Aotea Station will be known as Te Waihorotiu Station.

Bluestone Wall needs to be reinstated to preserve its acknowledged heritage values.

[17] The Aotea Station NOR was publicly notified. Barclay submitted and attended the Council hearing between 28 October 2016 and 14 November 2016. On 24 January 2017 Auckland Transport confirmed the Aotea Station NOR. Amendments were made to conditions 1.1 and 1.2 of Designation 2500-1 (and others).⁵

Conditions of Designation

General Conditions

[18] Condition 1.1 of Designation 2500-1, with amendments made by the Aotea Station NOR underlined, is attached as Schedule **A** to this decision. Relevant excerpts are:

1.1 The City Rail Link Project (City Rail Designation, 2, 4, 5 and 6) shall be undertaken in general accordance with the following, subject to final detailed design:

(a) the information provided by the requiring authority in the Notice of Requirement dated 23 August 2012 and supporting documents (as updated by information provided by the requiring authority up until the close of the hearing and during the course of the Environment Court proceedings), being:

...

(b) Except as modified by the following alterations:

(i) Assessment of Environmental Effects ..., Design and Construction Report ..., (Aotea Alteration – CRL Designation 1); and

...

(iv) Assessment of Environmental Effects ... dated 19/12/17, s 92 Responses dated 19/2/18 ...

[19] Condition 1.2 states:

1.2 Where there is inconsistency between:

(a) The documents listed above in these conditions, these conditions shall prevail; and

(b) The information and plans set out in conditions 1.1(a) and 1.1(b) lodged with the requirements and presented at the Council hearing

⁵ 10 September 2018 version of the conditions, Common Bundle, Volume 2, Tab 19.

and during the course of Environment Court proceedings, the most recent information and plans shall prevail;

- (c) The indicative Management Plans and evidence presented at the Council hearing and Management Plans (PWPs, CMP, etc) required by the conditions of these Designations and submitted through an Outline Plan, the requirements of the Management Plans shall prevail.

[20] Requirements for various Outline Plans of Work and management plans are contained in many conditions. We address those relating to Construction and Transport.

Construction Conditions

[21] Condition 10 of Designation 2500-1 requires that an Outline Plan be submitted to the Council, including a number of management plans (such as a Construction and Environmental Management Plan and Delivery Work Plan).

[22] Condition 22 requires the review of the Construction and Environmental Management Plan and Delivery Work Plans annually as a result of a material change to the project or to address unforeseen adverse effects arising from construction or unresolved complaints.

Transport, Access and Parking

[23] Condition 25 of Designation 2500-1 requires the preparation of Transport, Access and Parking Delivery Work Plans to manage the adverse effects of construction of the City Rail Link on the transport network. The objective of the plans is described in condition 25.2:

General Transport, Access and Parking

...

25.2 The objective of the Transport, Access and Parking DWP is to, so far as is reasonably practicable, avoid, remedy or mitigate the adverse effects of construction on transport, parking and property access. This is to be achieved by:

- (a) managing the road transport network for the duration of construction by adopting the best practicable option to manage congestion;

- (b) maintaining pedestrian access to private property at all times; and
- (c) providing on-going vehicle access to private property to the greatest extent possible.

...

25.3 To achieve the above objective, the following shall be included in the Transport, Access and Parking DWP:

...

- (f) how disruptions to the use of private property will be mitigated through:

- (i) ensuring pedestrian and cycle access to private property is retained at all times, except for temporary closures where landowners and occupiers have been communicated and consulted with in reasonable advance of the closure; and

...

- (iii) how the loss of any private car parking will be mitigated through alternative car parking arrangements.

[24] The term “temporary closure” is defined in the conditions as follows:

25.3

- (g) ...

Note: For the purposes of designation conditions 25, 27, 28, 29 and 30 ‘temporary closure’ is defined as the following:

- (i) in place for less than six hours ...
- (ii) in place for between six and 72 hours ...

[25] Condition 27 provides:

Transport, Access and Parking: Specific Requirements (Britomart to Mayoral Drive)

27.1 To achieve the objective in condition 25, the following measures shall be implemented:

- (a) A vehicle access lane at least 3 metres wide shall be provided along the eastern side of Albert Street between Customs Street and Victoria Street to provide access to properties (except that while the Albert Street/Victoria Street intersection is closed, this access lane is only to be provided between Customs Street and Durham Street);

...

- (h) Providing pedestrian and cycle access to private property at all times;

...

27.2 The Traffic, Access and Parking DWP shall demonstrate how these measures will be implemented and shall also include the following:

...

(c) How disruption to the use of private property located immediately adjacent the designation with access onto Galway Street, Tyler Street, Queen Elizabeth Square, Customs Street, Albert Street, Kingston Street, will be mitigated through:

(i) Providing vehicle access to private property as practicably possible at all times;

(ii) Retaining local vehicle access to properties located along Albert Street (which may include only left in, left out access);

(iii) Retaining access for loading and unloading of goods located along the service lane on the eastern side of Albert Street, between Victoria Street and Wellesley street; and

...

(v) Providing access for loading and unloading of goods between Wyndham Street and Victoria Street West.

...

The Lower Albert Street slip lane works

[26] The works in the slip lane have the potential to affect the access to and from the precinct serviced by Durham Street West and bounded by Albert Street, Wyndham Street, Queen Street and Victoria Street West.

[27] Vehicles are able to enter and exit the precinct as follows:

(a) entry from either Queen Street (left turn from Queen Street into Durham Street West) or southbound on Albert Street;

(b) exit into Albert Street.

[28] It is accepted that, at the time the original notices of requirement were sought, concept design provided for the Albert Street slip lane to remain open throughout the works.

[29] This understanding and concept design remained unchanged at the time the Aotea Station NOR was lodged and confirmed. It was communicated in the application material and in the evidence before the Hearing Panel – particularly in the

Assessment of Environmental Effects for Designation 2500-1 dated 13 March 2016, the Integrated Transport Assessment and the statement of evidence of Mr MPC Jongeneel.⁶

CRLI's position

Initial view that closure authorised by Outline Plans and Delivery Work Plans

[30] CRLI closed the slip lane to vehicle traffic in order to undertake the construction works in the slip lane. It advised that it initially understood the road closure was properly authorised by the Outline Plans and Delivery Work Plans that had been developed pursuant to the Designation conditions and complied with the specific traffic, access and parking requirements in condition 27.1(a) relating to works in Albert Street.

[31] CRLI relied on Management Plans, an Outline Plan and advice from the Council, the details of which are attached as Schedule **B** to this decision.⁷ It says it was focussed on the nature of General Condition 1 and compliance with the measures in condition 27 during design and implementation of the works. It investigated several alternative construction methodologies for the works in the northern section of the slip lane and concluded closure of that section was the only practicable and safe option.⁸ CRLI considered that the works complied with condition 27.1(a), (h) and (i) and that vehicle access to private property was provided as practically possible at all times in accordance with condition 27.2(c)(i). Finally, it considered that the requirements of conditions 27.2(c)(ii) and (v) were achieved because all properties retained local vehicle access. Loading zones were provided at various locations.

[32] Following careful analysis, CRLI now accepts that the Management Plans it developed for Designation 2500-1 do not properly authorise closure of the slip lane. That is why it stopped the works and reinstated the slip lane.

⁶ Statement of evidence of Michael Peter Craig Jongeneel dated 25 October 2016, filed in support of the Aotea Station Notice of Requirement.

⁷ Agreed Statement of Facts, at [22]-[27].

⁸ Affidavit of Matthew Eric Raymond Sinclair for CRLI, dated 8 November 2023, at [16].

What does the Designation authorise?

[33] Within its footprint, Designation 2500-1 authorises the construction, operation and maintenance of the City Rail Link. That authority is subject to compliance with certain conditions. The conditions on which CRL rely for closure of the slip lane are conditions 1.1, 1.2 and 27.

[34] Condition 1.1 is not dissimilar to many conditions attaching to designations and resource consents in its reference to the works being undertaken “in general accordance” with various plans and documents and “subject to final detailed design”.

[35] An immediate difficulty of interpretation arises, however, when one considers the breadth of information, assessments, reports and evidence referred to in the condition. None of the documents referred to are ‘attached’ to the designation or contained in the Unitary Plan. There is no indication where they are held and how they can be accessed. What can be gleaned is that reports and plans dated August 2012 are relevant; CRL confirmed that at the time of the original 2012 NORs, concept design provided for the Albert Street slip lane to remain open throughout the CRL works.

[36] More recent reports dated 2013 and relating to the Aotea Station NOR are also relevant, and may supersede all or aspects of the detail in earlier reports given the requirements of condition 1.2(b) that speak to recent information and plans prevailing over earlier information and plans.

[37] Specific to these proceedings and referred to in condition 1.1, the specified supplementary report on Traffic Modelling of Alternative Construction Scenarios prepared by Flow Transportation Specialists Limited, dated 22 May 2013, has not been provided. Supplementary evidence provided to and at the Council hearing, including but not limited to the statement of evidence by Ian Clark (transport) dated 2 July 2013, is not provided. As these are documents referred to in conditions they must be accessible and clear in order to be enforceable. It is unlikely that those documents will be in the format of a condition. More likely they will contain descriptive professional analysis and opinion.

2012 Assessment of Effects on the Environment

[38] The Assessment of Effects on the Environment (**the 2012 Assessment**) accompanying the notices of requirement for Designation 2500 expressly noted that it was the very first phase of project delivery and based only on concept designs developed to a level that demonstrate construction and operational feasibility of the City Rail Link and to enable an understanding of the effects of construction and operation to inform the Assessment.⁹

[39] The Assessment stated that the concept design was subject to future detailed design¹⁰ and set out the outline plan process and a number of proposed management plans. There was a need for flexibility in the design and associated conditions framework, given the project would not be designed or built for some years – in fact the Assessment expressly proposed that localised traffic effects, such as those arising from road closures, would be dealt with at the time of construction by way of management plans:¹¹

As a construction project of this scale will proceed in stages, a number of delivery work plans (i.e. mini management plans) will be developed and implemented by the contractor throughout the construction period to deal specifically with the management of localised effects as works are physically occurring, i.e. localised traffic management plans to address the temporary closing of a traffic lane for a short time period. These delivery work plans will be developed in accordance with the measures contained within the CEMP.

[40] CRLL asserts that the conditions on the Designation, including condition 1, and the outline plan process were expressly intended to provide flexibility for a project that had not been fully designed¹² and to ensure that any effects arising out of final design would be appropriately managed.

[41] However, some aspects of Designation 2500-1 were changed through the Aotea Station NOR process.

⁹ City Rail Link Notice of Requirement: Assessment of Effects on the Environment, 15 August 2012 (**2012 Assessment Effects**), at page 64, section 4.1.

¹⁰ 2012 Assessment of Effects at page 64, section 4.2.1.

¹¹ 2012 Assessment of Effects at page 30, section 2.2.2.

¹² Recommendation of Independent Commissioners, dated 28 February 2014 (**2014 Recommendation**), at [181].

[42] CRLI states that this general approach was not intended to be, or in fact was, undermined by the subsequent alteration in 2016. It says that there was no suggestion in the 2016 NOR for Aotea Station that the general approach to effects management had been amended, or that this alteration represented the ‘final detailed design’ for the City Rail Link. The final detailed design is clearly the content intended to be included in the outline plan of works (and the management plans that form part of this).

[43] Given the flexibility afforded by condition 1 and the hierarchy of priorities set out in that condition, CRLI submitted that the designation conditions can provide for closure of the slip lane through the management plan process if this is necessary following detailed design, provided those plans are consistent with the requirements of any specific conditions, regularised so that they are not inconsistent with each other or out of date, and are created following the proper process as set out in the conditions. It observed that the consultation and peer review required as part of that process, providing for closure of the slip lane will not give rise to a breach of natural justice. We explore those submissions with reference to the materials accompanying the NOR.

2016 Assessment of Environmental Effects¹³

[44] In the Assessment of Environmental Effects 2016 which accompanied the Aotea Station NOR, Figure 2-1 identifies changes to the extent of the land to be designated. There is no change in respect of the slip lane; it is not included in the designation. Further, there is no discussion of any changes to the management of traffic along the slip lane, but assurances as to vehicle loading spaces and pedestrian movements are provided. Part of the NOR’s focus was reconstruction and relocation of the Bluestone Wall.

[45] Regarding permanent works, the Assessment states:¹⁴

2.3 Permanent works:

¹³ Assessment of Environmental Effects for Aotea Station NOR Alteration dated 30 March 2016 (**2016 Assessment**).

¹⁴ 2016 Assessment, at [2.3].

2.3.3 Bluestone wall relocation

It is proposed that the bluestone wall will be permanently reconstructed 1.5m east of its current position.

This would enable the widening of the Albert Street corridor on the west side of the wall, ensuring the footpath works can be achieved on both sides of the street in combination with the relocated station ventilation structures in Albert Street.

Construction of the CRL under the existing designation requires works to the bluestone wall. The effects of these works are managed through condition 43 of the CRL designation, which requires the establishment of a heritage advisory group (HAG).

...

The HAG also endorsed the proposed permanent movement of the bluestone wall 1.5m to the east, which will allow the Aotea Station ventilation to be accommodated in Albert Street.

Shifting the bluestone wall necessitates the permanent removal of the kerbside parking and loading within Albert Street one-way link and the two vehicle ramps providing egress from two parking buildings located at 76 and 92-96 Albert Street respectively. Alternative loading spaces will be provided elsewhere within the immediate area (refer Flow Transportation Integrated Transport Assessment, attached as Appendix G).

...

[46] There is no discussion in the alternatives analysis about traffic arrangements in this area. Further, Part 5 *Potentially Affected Parties*, does not include the Barclay property address as a directly affected property owner or occupier but does list the address in the “Proximity Property Owners and Occupiers”. Here it is recorded that the owners of that property “... would like to review the loading plans for the new loading area in the new Albert Street one-way lane and the Assessment of Environmental Effects before they provide a letter of support”. Consistent with the Assessment, there is no mention of road closure in this area.

[47] Part 6.4.2 *Temporary Transportation Effects* only mentions removal of all loading spaces on the Albert Street one-way link. That is proposed to be mitigated with provision of a temporary loading space on Wyndham Street, with reference to be made to the Outline Plan of Works recommendations contained later in the Assessment.

[48] Part 6.4.3 *Proposed Mitigation* includes:

- Providing for a right-hand u-turn manoeuvre when exiting the Albert Street

one-way link and signals at the Victoria Street West/Albert Street intersection.

- Priority control at the intersection of Durham Street West and the Albert Street southbound service lane.

and under proposed temporary mitigation, relevantly:

- Provision of temporary parking spaces (including for Police vehicles).
- Providing for on-street loading spaces.

[49] Specific to these proceedings, section 10 proposes a condition amendment (1.1(b)(i)) which is now contained in the designation conditions for 2500-1 so as to reference the 2016 Assessment.

[50] The 2016 Assessment relies on an Integrated Transport Assessment undertaken by Flow Transportation System Specialists Limited.¹⁵ That assessment addresses parking and loading in the slip lane and traffic movements. At section 3.1, entitled *CRL Temporary Construction Network Changes*, only the closure of a portion of Kingston Street is signalled.

[51] For Albert Street:¹⁶

Narrowing of the Albert Street one-way link by 1.5m, resulting in the permanent removal of all existing on-street parking spaces, and the permanent removal of some existing on-street loading spaces.

...

This final road layout is illustrated in Figure 17.

[52] While the dimensions on this figure are difficult to read, one can ascertain that the overall width of the lane is at least 8 metres.

[53] That the slip lane would remain open was provided for in the concept design for the 2012 NORs. That understanding and concept design remained unchanged at

¹⁵ At Appendix G of the 2016 Assessment.

¹⁶ At Appendix G of the 2016 Assessment, at section 3.2.

the time the 2016 NOR was lodged.¹⁷

[54] That seems clear to us from our reading of the documentation. There was no mention of closure of the slip lane.

[55] Relevant excerpts from the Flow Transportation Report to relocate the wall, among others, are as follows:¹⁸

1. Introduction

1.1 Flow Transportation Specialists Limited (**Flow**) has been commissioned by Auckland Transport to identify and assess traffic engineering matters related to proposed changes to the existing designation for the City Rail Link (**CRL**). **The proposed changes are variously temporary and permanent in duration, and relate to Victoria Street West, Kingston Street and Albert Street in Auckland's city centre. This ... report accordingly addresses traffic engineering matters associated with the proposal including:**

- a description of the existing transport provisions with the area affected by the proposed designation changes;
- a description of the proposed temporary and permanent changes to the transport network arising from the changed designation;
- an assessment of the impacts of the proposed designation changes on the transport network, with;
 - the traffic effects on the immediately surrounding streets;
 - the pedestrian effects;
 - what mitigation measures are considered necessary to avoid, mitigate or reduce the effects that have been described;
- changes to the existing CRL designation conditions that are recommended to support the proposal.

...

2.2.3 **Albert Street**

...

On the section of Albert Street between Wyndham Street and Kingston Street, a southbound link runs below the level of the main Albert Street carriageway, separated by a bluestone retaining wall. This link provides access to the properties with frontage to the east side of Albert Street, in addition to one of two vehicle routes into Durham Street West (along with the Queen Street access). The lane also provides the only egress out of Durham Street West.

¹⁷ CRL Legal submissions dated 6 December 2023, at [9].

¹⁸ At Appendix G of the 2016 Assessment.

The one-way link provides on-street parking and loading, with this existing provision illustrated in Figure 4. ... The northern-most loading zone is located directly outside the Barclay Suites serviced apartments.

Automatic vehicle tube counts were undertaken ...

2.2.4 Loading zones

Occupancies of the two existing loading zones within the Albert Street one-way link were surveyed ...

3. Proposed Changes To Transport Provision

...

3.2 Permanent Changes

The following permanent changes to the transportation network are proposed, following the completion of the CRL:

...

- narrowing of the Albert Street one-way link by 1.5m, resulting in the permanent removal of all existing on-street parking spaces, and the permanent removal of some existing on-street loading spaces ...

4. Assessment of Effects

4.1 Assessment of permanent effects

...

4.1.5.1 Traffic effects

... The proposed relocation of the heritage wall raises an issue with heavy vehicle tracking into and out of Durham Street west at the Albert Street one-way link. ...

4.1.5.2 Parking and loading

Given the need to move the heritage wall, all parking spaces and some loading spaces on the Albert Street one-way link will need to be removed.

...

It is expected that the loading requirements at the northern end of the Albert Street one-way link, including those for the Barclay Suites, will be adequately met by the proposed new loading space, in conjunction to that available on Wyndham Street. ...

4.2 Assessment of construction effects

The temporary changes during construction will generally be equivalent to permanent changes addressed above. The exceptions relate to the Kingston Street closure.

...

4.2.2 Albert Street

...

During the relocation of the bluestone retaining wall, it is likely that there will be a construction period where there are no on-street loading spaces provided on the Albert Street one-way link. During this period, demand for the remaining adjacent loading spaces is expected to exceed capacity. To mitigate this, a replacement loading space should be made available at the nearest alternative location, being the south side of Wyndham Street, nearest Albert Street. This temporary loading space should be the same size as the proposed new loading space on the Albert Street one-way link (11m or approximately two car spaces).

5 Summary and Conclusions

...

The following matters will need to be addressed as part of an Outline Plan of Works, and should be accommodated in any transport, access and parking delivery works plan (DWP) as required in CRL condition 25.1:

- During works on the Albert Street one-way link that temporarily remove all on-street loading spaces on the street, two existing on-street parking spaces on the south side of Wyndham Street, nearest Albert Street, should be temporarily marked as loading zones.

...

(emphasis added)

[56] Finally, evidence was given by Mr MPC Jongeneel, a traffic engineer at Flow Transportation Specialists Limited in support of the Aotea Station NOR. Under the heading 'Temporary Traffic Effects' Mr Jongeneel stated:¹⁹

[30] During the works to the bluestone wall in the Albert Street one-way link, both loading spaces on this street will be temporarily unavailable. This is to be mitigated by the provision of a temporary loading space on Wyndham Street. This will result in a supply of on-street loading spaces within the area equivalent to the permanent supply discussed in paragraphs 13 and 14, with comparable effects.

[31] During the works to the bluestone wall and the Albert Street one-way link, pedestrian and vehicle access to all adjacent properties will be maintained.

Relevant law

[57] Barclay asserts that the Designation conditions require the slip lane to remain open for vehicle use at all times because its closure was not anticipated at the time of confirmation of the Notices of Requirement in 2012 and 2016.

¹⁹ Statement of evidence of Mr MPC Jongeneel dated 25 October 2016.

[58] CRLI asserts that that position is in direct conflict with its understanding of the RMA as it relates to designations and the outline plan of works process, and that the designation conditions expressly acknowledge the need for, and provide, flexibility via the use of management plans following the final detailed design.²⁰

[59] CRLI argues that the Barclay's argument is essentially one of scope. That is, Designation 2500-1 is confined by the application documents and evidence filed in 2012, except as altered by the 2016 Aotea Station NOR. CRLI submits that while resource consent applications are confined by the scope of the materials supporting the application, this is not the position in the designation context.²¹

Outline Plans

[60] CRLI submits that the RMA expressly provides for matters of detail, such as vehicle access and circulation (including their associated effects) to be determined at a later stage, after a designation has been confirmed, but before construction commences. It referred to s 176A(3) of the RMA which provides that an Outline Plan of Works may be submitted to the territorial authority before construction commences, showing:

- (a) the height, shape, and bulk of the public work, project or work; and
- (b) the location on the site of the proposed work, project or work; and
- (c) the likely finished contour of the site; and
- (d) the vehicular access, circulation, and the provision for parking; and
- (e) the landscaping proposed; and
- (f) any other matters to avoid, remedy or mitigate any adverse effects on the environment.

²⁰ CRLI's Legal Submission, at [45].

²¹ CRLI's Legal Submissions, at [46].

[61] CRLI referred to *Quay Property Management Limited v Transit NZ*²² where the Court noted that the outline plan provisions in s 176A:²³

... provide a means whereby work that is not otherwise approved by the RMA, or incorporated into the designation, is subject to the territorial authority's (and if necessary the Court's) scrutiny before commencement.

[62] CRLI argues that the Court has, therefore, recognised that the extent of work or effects authorised by designations can be expanded by the outline plan of works process.

Clarification of details

[63] CRLI relied on *Aokautere Landholdings Ltd v Palmerston North City Council*²⁴ where the Court noted that the RMA envisages clarifications of the details of the designation in accordance with s 176A once specific design is known. In that case the areas shown in the requirement were conceptual and subject to detailed design. The Court observed that some tolerance should be allowed, and it is appropriate for there to be inbuilt flexibility to accommodate detailed design requirements.²⁵

[64] CRLI submits that the matters listed in s 176A that are permitted to be addressed later all have effects that are not necessarily anticipated at the notice of requirement stage. For example, the height or shape of a building may have different shading effects on adjoining owners; the likely finished contour of the site may have flooding or visual effects.

[65] It says that Barclay is focussed on the closure of a single lane of a road in the context of a broad authorisation to construct, operate and maintain the largest transport infrastructure project undertaken in New Zealand to date. This type of further detail and flexibility is exactly what s 176A(3)(d) of the RMA anticipates will be enabled and managed through the outline plan of works process. It says that the need for such flexibility is the reason why the information provided (and conditions

²² *Quay Property Management Limited v Transit NZ* EnvC W028/00, 29 May 2000.

²³ *Quay Property Management*, at [85].

²⁴ *Aokautere Landholdings Ltd v Palmerston North City Council* [2023] NZEnvC 35.

²⁵ *Aokautere Landholdings*, at [15]-[16].

were framed) with the express caveat that the matters listed (which Barclay contends constrain the scope of the designation) were to be complied with subject to final detailed design.

Subject to final detailed design – General Condition 1

[66] CRLI submits that the conditions provide for flexibility via the use of management plans and following final detailed design. It refers to Condition 1 which requires the project to be undertaken in general accordance with the plans and documents listed in condition 1.1(a) and 1.1(b) and *subject to final detailed design*. On a plain reading, the conditions make it clear that final detailed design prevails over the documents listed in conditions 1.1(a) and 1.1(b). CRLI also notes that condition 1.2(a) makes it clear that the information/supporting documents are also secondary to the Designation conditions, which prevail in the event of inconsistency.

[67] It observes that the phrase ‘subject to’ is a standard drafting technique to make it clear that the other provisions referred to would prevail where there is conflict.²⁶ It submits that the phrases ‘in general accordance with’ and ‘subject to final detailed design’ were intended to work together with the relevant Delivery Work Plans to provide the level of flexibility needed for this large scale project, without which it says there will be little ability to refine the concept design (which underpinned the application) following Designation 2500-1 being confirmed.

[68] It argued that where specific matters were identified that needed to be implemented to manage effects, these were expressly provided for as conditions, and these aspects are binding in the sense that they need to be provided for in the subsequent outline plan of works and Delivery Work Plans’ process. To find that the details as then understood and based only on concept design would be binding or define the scope of the designations, even if changes were consistent with directly applicable conditions, would be unworkable for a project of this nature.

²⁶ *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 (CA) at [260], also cited in *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991; *McGuire v Hastings District Council* [2001] NZRMA 557.

Management Plans

[69] CRLI points to condition 10.1 of the Designation conditions as providing a process for incorporation of final detailed design by requiring management plans to form part of the Outline Plan of Works submitted for construction of the CRL in accordance with s 176A of the Act. Referring to condition 1.2(c) it said that that condition makes it clear that the requirements (or content) of those management plans, submitted through the outline plan process, prevail over indicative management plans and evidence presented at the Council hearing.

[70] CRLI submits that leaving management plans to incorporate detailed design and be approved by the RMA outline plan process is legitimate, and is regularly used for designations. It relies on s 176A(3)(f) of the Act, which requires an outline plan to show 'any other matters to avoid, remedy, or mitigate any adverse effects on the environment'.

[71] It submits that it is clearly appropriate for the Court to proceed on the basis there is greater flexibility and a greater ability to defer detail regarding steps to address effects to the outline plan process than is the case for a management plan prepared in the resource consent context. It also said that, even then, case law confirms that management plans in the resource consent context are not confined to the management of only anticipated environmental effects. An applicant for a resource consent is not expected to try to anticipate and research all the hypotheses that may occur to someone during the course of an application process.²⁷ The duties of an applicant are to make a reasonable inquiry into adverse effects, where what is reasonable depends on the circumstances, including the scale of the project.²⁸ However the Court must be satisfied that the management plan can operate in a way that can serve the purpose of the RMA.²⁹

²⁷ *Crest Energy Kaipara Limited v Northland Regional Council* EnvC Auckland, A132/09, 22 December 2009 at [228].

²⁸ *Director-General of Conservation v Marlborough District Council* EnvC Christchurch, C113/04, 17 August 2004 at [41].

²⁹ *Crest Energy* at [229].

Authority to close slip lane

[72] CRLI relies on conditions 1, 25 and 27 as providing the scope to close the slip lane.

[73] Condition 25 requires a Transport, Access and Parking Delivery Work Plan addressing transport, access and parking “specific requirements” from Britomart to Mayoral Drive. Its objective is to manage the adverse effects of construction on the transport network. The objective is to be achieved by compliance with certain listed matters. They include providing on-going vehicle access to private property to the greatest extent possible (condition 25.2(c)). Condition 25.3 requires the identification of temporary closures, among others.³⁰ Disruption to private property is to be mitigated through ensuring pedestrian and cycle access at all times and providing access to private property as far as practicably possible at all times, except for temporary closure,³¹ among others.³²

[74] Barclay contends that condition 27.1(a) is clear in its requirement for an access lane: a vehicle access lane at least 3 metres along the eastern side of Albert Street between Customs Street and Victoria Street to provide access to properties. Condition 27.1(h) requires the provision of pedestrian and cycle access to private property at all times. Condition 27.2 requires that the Traffic, Access and Parking Delivery Work Plan shall demonstrate how these measures shall be implemented, and include how disruption to the use of private property will be mitigated by providing vehicle access to private property “as practicably as possible at all times” (condition 27.2(c)(i)). That is similar to the objective in condition 25.2(c) which requires vehicle access “to the greatest extent possible”.

[75] Finally, Barclay points to condition 27.2(c)(ii) which requires local vehicle access to be retained to properties on Albert Street; and the provision of access for loading and unloading of goods between Wyndham Street and Victoria Street West. Barclay says these clear requirements cannot be overridden by condition 27.2(c)(i) or

³⁰ Condition 25.3(e).

³¹ Condition 25.3(f)(ii).

³² Condition 25.3(f)(i).

condition 25.2(c), both of which require vehicle access to be provided “as practicably as possible at all times” and “to the greatest extent possible”.

[76] CRLI observed that the Commissioners’ recommendation on the 2012 notices of requirement concluded that the management plan approach (as revised during the hearing process) was appropriate and lawful within the context of designations and the outline plan process.³³ Relevant to this proceeding, this included extended standards and specific requirements for the Transport, Access and Parking Delivery Work Plans – included as an improvement to the initially proposed management plan conditions – condition 25.1 and 25.2, condition 27.1 and 27.2.

[77] CRLI referred to the Commissioners’ recommendations on transport conditions:³⁴

... in terms of the management of the transport network and traffic effects, there were areas that needed further consideration, particularly in terms of acceptable management approaches to appropriately mitigate adverse effects. Key aspects of concern were the management of construction vehicles and vehicle access to properties. ...

[78] CRLI argues that traffic effects of construction in Albert Street were considered as a whole, with a set of specific designation conditions provided to ensure effects on adjoining properties were appropriately managed. It also notes that these are set out in condition 27 and were to be addressed in the Transport, Access and Parking – Delivery Work Plan and have been complied with by CRLI as they relate to the slip lane.

[79] Importantly, CRLI says that the complex set of designation conditions before the Court were subject to significant scrutiny in 2012/2013 and nothing in the 2016 alteration was intended to undermine the management plan framework approach, or to suggest that CRLI was removing any of the flexibility it understood it was retaining for matters arising during final design. It pointed to the Assessment of Environmental Effects for the 2016 Aotea Station NOR, which noted:³⁵

³³ 2014 Recommendation, at [47].

³⁴ 2014 Recommendation, at [352]-[357].

³⁵ 2016 Assessment at [2.4.2].

The anticipated effects from the alteration will largely be covered by the existing suite of designation conditions. ...

As per conditions 25-30 of the CRL designations, traffic management plans and construction management will be specified in delivery work plans (DWPs) to be submitted to AC as part of the outline plan of works required for the CRL.

[80] Barclay submits that the 2012 Notice of Requirement material (as amended by the 2016 Aotea Station NOR) includes the supporting documentation listed in condition 1, set the outer limits or envelope of effects that can be generated during construction, and that while the design can be refined and changes can be made through the management plan process, the effects must remain within that envelope in order for the works to remain authorised.

[81] CRLC says that if that narrow approach was correct, the purpose of condition 22 would be seriously undermined. That condition requires the various Construction Environmental Management Plan and Delivery Work Plans to be reviewed "... as a result of material change to the City Rail Link project or to address unforeseen adverse effects arising from construction ...". If the only effects that are permitted to be addressed by management plans are those specified in the application material, then there is no real scope for material changes or unforeseen adverse effects to be addressed by management plans and therefore no point in large part of condition 22.

[82] CRLC accepts that changes to the Construction Environmental Management Plan and Delivery Work Plans to provide for closure of the slip lane are 'material' as defined by the designation conditions. Accordingly, it is now intending to follow the process for reviewing plans in condition 22 and anticipates the need to update the plans in accordance with the process in condition 23 because of a material change. In terms of public participation, the development and updating of management plans under the designation conditions is a much more inclusive, participatory process than the standard outline plan of works process set out in s 176A of the RMA.

Discussion

[83] No issue is taken with the law applying to designations as described by CRLC. It does not appear to us as if Barclay is seeking any change to the way in which

designations are interpreted. What Barclay seeks is that the authorised scope of works is prescribed by the evidence and assurances given in support of the relevant notices of requirement.

[84] The closure of the Lower Albert Street slip lane was not envisaged during the proceedings leading to confirmation of the 2012 and 2016 notices of requirement. On the face of the documents accompanying the notices of requirement, Barclay could not have foreseen its closure.

[85] CRLI submits that the slip lane can be closed via an amendment to the relevant management plan. If this method is not available, then a variation to the Designation is required. It relies on condition 1 and the various documents referred to in that condition. It argues that there has been no change to the high level approach to works between when Designation 2500-1 was first confirmed and now; that when first confirmed the conditions reserved rights to amend the works through ‘detailed design’. Further, that conditions 25 and 27, and the development of a management plan, enable the closure of the slip lane.

[86] However, as is clear through the various changes that have been made from 2012-2018, condition 1 has been modified to provide for changes to the works. A management plan is a method by which a condition is implemented. While condition 25 is quite broad it still sets boundaries, and it would appear that known closures are anticipated. The closure of the slip lane was not known or understood throughout the project’s development. It has come to light as contractors have considered the detail of the implementation of the reinstatement of the bluestone wall. At the time the change to the Designation was made to accommodate that reinstatement in 2016, there was a clear indication that the slip lane would not be closed but that parking and loading facilities would be affected.

[87] We find that condition 27 does not authorise anything other than a temporary closure of the slip lane. Condition 27.2(c)(ii) is specific in its reference to retaining vehicle access to properties along Albert Street. That specific requirement qualifies the requirements in 27.2(c)(i) and 25.2(c), which are of more general application.

[88] Mr Jongeneen's evidence contains precise and unequivocal statements as to what will happen at the time of works to the bluestone wall. There is no caveat or qualification to those words. Those involved in determining any submissions on the notice of requirement and submitters are entitled to rely on statements such as these and also those in the Assessment of Environmental Effects and associated reports. If there had been a caveat or qualification noting that those assurances and statements were 'subject to final or detailed design' then that situation might change and we accept that there then may be flexibility to make the alterations via management plan that CRLI speak of.

[89] The Integrated Transport Assessment Report accompanying the 2016 Assessment for the Aotea Station NOR is also specific in the way in which it addresses temporary and permanent effects of the required works. It does not paint potential effects with a broad brush, it actually details all effects. It goes so far as to propose what will need to be addressed in any outline plan of works – the only relevant proposal for the Albert Street slip lane is the provision of temporary loading spaces on Wyndham Street, where works occur.

[90] To that extent then, the statements, assessments and assurances made in the 2016 Aotea Station NOR Assessment of Environmental Effects and evidence provide the specifics of the proposed works and transportation measures in the vicinity of the Albert Street slip lane. Were it to be otherwise, and the generality contended for in the 2012/13 assessments was to apply, the later process of assessment and decision-making would be of no import or utility for decision makers and submitters.

[91] Therefore, if the only way to effect the works to the bluestone wall and complete street enhancement is to close the slip lane in other than a 'temporary' capacity, an amendment to the designation is required.

[92] The Court suggested the parties work together to find a solution that would address vehicle access through a shared pedestrian and light vehicle driveway/slip lane while those works take place. However, agreement was not reached.

[93] In all the circumstances, it is appropriate to order:

- (a) CRLC is prohibited from closing the Lower Albert Street slip lane in direct contravention of condition 1.1(a), 1.1(b)(i) and 1.2(b) of Designation 2500/1 in the Auckland Unitary Plan; and
- (b) CRLC is required to maintain pedestrian and vehicle access in Lower Albert Street for the duration of its construction works in order to comply with the above conditions in the Designation 2500/1.

[94] Costs are reserved. Any application for costs are to be filed within 20 working days; any reply 10 working days after that and any final reply, if any, 5 working days thereafter.

For the Court



Judge M J L Dickey
Environment Judge



Schedule A

1.1 The City Rail Link Project (City Rail Designation, 2, 4, 5 and 6) shall be undertaken in general accordance with the following, subject to final detailed design:

(a) the information provided by the requiring authority in the Notice of Requirement dated 23 August 2012 and supporting documents (as updated by information provided by the requiring authority up until the close of the hearing and during the course of the Environment Court proceedings), being:

(i) Assessment of Environmental Effects Report (contained in volume 2 of the Notice of Requirement suite of documents, dated 15 August 2012)

(ii) Supporting Environmental Effects reports (contained in volume 3 of the Notice of Requirement suite of documents, dated August 2012);

(iii) The Concept Design Report (contained in volume 2 of the Notice of Requirement suite of documents, dated 13 August 2012, Rev 3);

(iv) Plan sets:

- Land requirement plan ...
- Plans contained in the Concept Design report appendices...;
- Plan CIV-000-DRG-001 attached at Appendix 1 to the conditions.

(v) Information provided in response to the s 92 requests and/or in advance of the Council's s 42A report, including the following:

- "City Rail Link Notice of Requirement: Social Impact Assessment"; ...
- "City Rail Link – Supplementary Report: Traffic Modelling of Alternative Construction Scenarios" prepared by Flow Transportation Specialists Ltd, dated 22 May 2013; ...

(vi) Evidence (including supplementary evidence) provided prior to and at the Council hearing, including but not limited to:

- Statement of evidence by Ian Clark (Transport) dated 2 July 2013;
- Drawing 0220, Revision B dated 20 August 2013; ...

- City Rail Link Notice of Requirement: Outline Plan Process and Environmental Management Plan System (Indicative) ... dated 27 September 2013;
- City Rail Link: Indicative Communication and Consultation Plan ... dated September 2013;
- Outline Social Impact and Business Disruption Delivery Work Plan; ... dated 26 September 2013.

(vii) All material and evidence (including rebuttal evidence) provided by the requiring authority in the Environment Court proceedings (ENV-2014-AKL-000057).

(b) Except as modified by the following alterations:

(i) Assessment of Environmental Effects ..., Design and Construction Report ..., (Aotea Alteration – CRL Designation 1); and

...

(v) Assessment of Environmental Effects ... dated 19/12/17, s 92 responses dated 19/2/18 ...

Schedule B

1. The *Public Realm Reinstatement Outline Plan*:
 - i. Identified the construction works in the slip lane as falling in construction “Stage 1B”; and
 - ii. Provided for Long Term Temporary Traffic Management Plans (TMPs) to be implemented for each stage of the works with evolving requirements; but
 - iii. **Made no express mention of the need for any closure of the slip lane as part of Stage 1B.**
 - a) The Construction Environmental Management Plan for the *Public Realm Reinstatement Works*:
 - i. Identified the slip lane as construction “Stage 1B”;
 - ii. Included one staging drawing showing the northern section of the slip lane as being closed (i.e. entirely subsumed within a construction work area) during Stage 1B.
 - b) The Transport Access and Parking Delivery Work Plan for the *Public Realm Reinstatement Works*:
 - i. Identified the slip lane as construction “Stage 1B”;
 - ii. **Included one staging drawing showing the northern section of the slip lane as being closed (i.e. entirely subsumed with a construction work area) during Stage 1B; and**
 - iii. Recorded that the construction stages described in the Plan had been assessed to comply with the specific Designation Transport conditions 27.1 and 27.2.
 - c) **The Link Alliance had received advice from Auckland Council that traffic management arrangements that included closure of the slip lane achieves compliance with condition 27.1(a).**
(emphasis added)
2. The Public Realm Reinstatement Outline Plan describes the reinstatement works as generally consisting of the following:
 - (a) construction of new stormwater infrastructure;
 - (b) installation of utilities;
 - (c) construction of tree pits;

- (d) installation of new road pavement;
 - (e) installation of new footpath pavements;
 - (f) landscaping works;
 - (g) installation of street furniture;
 - (h) reinstatement of building canopies.
3. In the slip lane and Durham Street West, public realms are to be reinstated to achieve aesthetic, spatial and pedestrian outcomes that align with the pre-existing conditions.