

In the matter of: Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**) and the Resource Management Act 1991 (**RMA**) - Appeal against decision about designation in Auckland combined plan – s 157(1) of the LGATPA – State Highway 1 – Newmarket Viaduct Height Restriction (6727)

And: **Tram Lease Ltd**

Appellant

And: **New Zealand Transport Agency**

Requiring Authority

And: **Auckland Council**

Local Authority

**Notice of appeal to Environment Court against decision
about designation in Auckland combined plan**

Dated: 22 November 2016



TREVOR DAYA-WINTERBOTTOM
MA IN ENVIRONMENTAL LAW *Barrister*

Form 7

**NOTICE OF APPEAL TO ENVIRONMENT COURT AGAINST
DECISION ABOUT DESIGNATION IN AUCKLAND
COMBINED PLAN**

*Section 157(1), Local Government (Auckland Transitional Provisions)
Act 2010*

- 1 Tram Lease Ltd (**TLL**) appeals against a decision of New Zealand Transport Agency (**NZTA**) about a designation, namely, State Highway 1 – Newmarket Viaduct Height Restriction (6727).
- 2 TLL has the right to appeal Council’s decision:
 - 2.1 Under s 157(1) of the LGATPA because TLL is the owner of land to which the designation applies and TLL made a submission on the relevant requirement.
- 3 Further details of the reasons for this appeal are provided below.
- 4 TLL is not a trade competitor for the purposes of s 308D of the RMA.
- 5 TLL received notice of the decision on 17 October 2016.
- 6 The decision was made by NZTA.
- 7 The decision that TLL is appealing is as follows:
 - 7.1 Confirmation of the designation with modifications.
- 8 The reasons for the appeal are as follows:
 - 8.1 The decision will not promote the sustainable management of natural and physical resources.

8.2 The designation as confirmed (condition 2) requires the approval of NZTA in relation to the development and use of private land, and includes a series of advice notes to provide guidance for owners and occupiers when seeking such written consent from NZTA. In essence these advice notes correspond to conditions which an applicant would need to satisfy to obtain NZTA's approval

8.3 Advice note 1.c. pertains to reflective building materials. The advice note as confirmed is unreasonable and unwarranted because:

- (a) It is subjective and the level of proof required from owners and occupiers to satisfy these requirements is not readily capable of being quantified in any reasonable way.
- (b) It relates to the motorway network as a whole, rather than being confined to the spatial extent of the designated area or works.
- (c) It is uncertain, in that it is unclear whether it relates to all buildings on private land in the vicinity of the designated area, or only those buildings that exceed 12.2m and the height of the level of the viaduct carriageway within the spatial extent of the designated area.

8.4 Advice note 1.d. pertains to signs. The advice note as confirmed is unreasonable and unwarranted because:

- (a) It purports to control signs below the level of the viaduct carriageway.
- (b) It unreasonably restricts the use of video screens and digital displays.

- (c) It unnecessarily duplicates controls regarding reflective materials.
- (d) It is subjective, and fails to articulate any objective criteria to discern which signs could cause confusion, alarm, or unduly distract attention.
- (e) It unreasonably precludes the display of more than one building identification sign, and in doing so precludes the display of advertising signage.

8.5 As a result, the designation as confirmed will prevent the reasonable use of private land.

9 TLL seeks the following relief:

9.1 The designation should be modified by:

(a) Amending advice note 1.c. by:

(i) Deleting paragraph i.

(ii) Amending paragraph ii so that it relates only to the spatial extent of the designated area.

(iii) Clarifying that it pertains only to those buildings that exceed 12.2m and the height of the level of the viaduct carriageway within the spatial extent of the designated area.

(b) Deleting advice note 1.d. entirely.

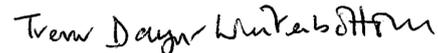
9.2 Such alternative, consequential or further relief as may be appropriate to give effect to this appeal.

9.3 Costs.

10 An electronic copy of this notice is being served today by email on the Auckland Council at unitaryplan@aucklandcouncil.govt.nz.

Waivers and directions have been made by the Environment Court in relation to the usual requirements of the RMA as to service of this notice on other persons.

- 11 The following documents are **attached** to this notice:
 - 11.1 A copy of the relevant decision.
 - 11.2 A list of names and addresses of persons served with a copy of this notice.
 - 11.3 A copy of TLL's submission.
- 12 Copies of the submission and decision may be obtained, on request, from TLL.
- 13 TLL agrees to participate in mediation or other alternative dispute resolution.



Trevor Daya-Winterbottom

Counsel for Tram Lease Ltd

22 November 2016

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Telephone: 0275 182 196

Email: daya.winterbottom@xtra.co.nz

Contact person: Trevor Daya-Winterbottom

Advice to recipients of copy notice of appeal

How to become party to proceedings

- 1 You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.
- 2 To become a party to the appeal, you must, within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003) with the Environment Court by email (to unitaryplan.ecappeals@justice.govt.nz) and serve copies of your notice by email on the Auckland Council (to unitaryplan@aucklandcouncil.govt.nz) and the appellant.
- 3 Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.
- 4 You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003).

How to obtain copies of documents relating to appeal

- 5 Copies of TLL's submission or the decision appealed may be obtained, on request, from TLL.

Advice

- 6 If you have any questions about this notice, contact the Environment Court in Auckland.

COPY OF THE RELEVANT DECISION

6727 State Highway 1 - Newmarket Viaduct Height Restriction

Designation Number	6727
Requiring Authority	New Zealand Transport Agency
Location	Vicinity of Newmarket Viaduct (State Highway 1), Newmarket
Rollover Designation	Yes
Legacy Reference	Designation D09-32, Auckland Council District Plan (Isthmus Section) 1999
Lapse Date	Given effect to (i.e. no lapse date)

Purpose

The designation is for the purpose of ensuring the safe and efficient functioning and operation of the Newmarket Viaduct (as part of State Highway 1). This enables the New Zealand Transport Agency (NZ Transport Agency) to manage neighbouring land use effects which may adversely affect the operation, maintenance or structural integrity of the Newmarket Viaduct.

The designation does not enable the NZ Transport Agency to undertake any project or work relating to the Newmarket Viaduct which is already covered under Designation 6720 (formerly A07-01B) Motorway: Newmarket Viaduct Improvement Project.

The extent of the designation is shown on the attached Designation Plan.

Conditions

1. Any use or development within the designation boundary:
 - i. which involves any structure that exceeds both a height of 12.2m and the height of the edge of the Newmarket Viaduct carriageway closest to the development, when measured from ground level on the development site; or
 - ii. which involves any earthworks within 12m or piling within 16m of a pier of the Newmarket Viaduct; requires prior written consent from the NZ Transport Agency under section 176(1)(b) of the Resource Management Act 1991.
2. When considering whether to give its consent to any person doing anything that is subject to Condition 1, the NZ Transport Agency will only consider the following matters:
 - i. adverse effects on traffic safety on the carriageway of the Newmarket Viaduct caused by:
 - a. obstruction to identified sight lines;
 - b. lighting;
 - c. reflective materials;
 - d. signs;
 - e. falling debris; or
 - f. wind effects.
 - ii. adverse effects of excavation and vibration on the structure of the Newmarket Viaduct.

Advice Notes – Guidance for section 176 consent

Advice Notes 1, 2 and 3 have been included to provide guidance to persons seeking to undertake any use or development of sites within the extent of the designation as to how the NZ Transport Agency will give consideration to the giving of its consent in accordance with Conditions 1 and 2. Persons seeking consent are advised to contact the NZ Transport Agency at an early stage to discuss the particular circumstances of their proposed use or development and whether, or to what extent, the following assessments are necessary.

For any use or development that requires consent under section 176 the person seeking consent will be expected to address the following matters:

Traffic safety

1. For any use or development within the designation boundary which involves any structure that exceeds both a height of 12.2m and the height of the edge of the Newmarket Viaduct carriageway closest to the development, when measured from ground level on the development site, a person seeking prior written consent from the NZ Transport Agency should identify and address whether the proposed use or development, including signage and taking into account any proposed mitigation measures, will result in any adverse effects on traffic safety on the Newmarket Viaduct carriageway caused by obstruction of sightlines, lighting, reflective materials, signs, falling debris or wind effects using the following guidance:
 - a. Obstruction of sight lines: Any development located within the inside curve of the Newmarket Viaduct (both north and south) should not obstruct the visibility of a driver on the Viaduct to see at least 270m ahead, when measured along the centreline of the nearest lane.
 - b. Lighting:
 - i. Outdoor artificial lighting operating on any site between sunset and sunrise must not produce a threshold increment which exceeds a value of 15%, as measured or calculated:
 - a. from any point on the State highway in the centre of any traffic lane for the given direction of travel; and
 - b. using a method of calculation or measurement that is consistent with AS/NZS1158.2:2005 Lighting for Roads and Public Spaces section 2.1.5.
 - ii. The average surface luminance for an intentionally artificially lit building façade shall not exceed 5cd/m².
 - c. Reflective materials: Any proposed building must be:
 - i. located, oriented, designed, covered or screened so as not to cause sunstrike or light reflections which may obscure vision and reduce safety of drivers on the motorway network; or
 - ii. constructed so that light reflectivity from any building material used on any façade visible from the motorway does not exceed 20%.
 - d. Signs: To limit driver distraction the following types of signs must not be visible from the motorway:
 - i. Video screens or digital displays;
 - ii. Flashing, rotating, or moving displays or lighting, except as may be required by any Civil Aviation Authority Rules to denote an obstacle to aircraft;
 - iii. Signage that contains reflective, fluorescent or phosphorescent materials likely to reflect light onto the road or distract drivers from traffic signs or driving;
 - iv. Signage which could cause confusion or be mistaken for an official road sign or traffic control device;
 - v. Signage which could cause alarm or unduly attract the attention of people operating vehicles on the road;
 - vi. Signage which could create or contribute to a traffic safety hazard.

Notwithstanding the above, the following signage will be considered to be acceptable:

- vii. Advertising signage which sits below the level of the Newmarket Viaduct carriageway and is not visible to vehicle drivers;
- viii. A single building identification sign with a fixed or constant text and/or logo which may be illuminated externally or internally provided it meets the illumination and glare from advertising provision in section 6.3 of the NZ Transport Agency Traffic Control Devices Manual - Part 3 Advertising Signs (NZTA January 2011 or any subsequent update) and provisions of 1(d)(i)-(vi) above.
- e. Falling debris: For any proposed development that projects beyond a building envelope of a 45 degree recession plane above the top of the outer Viaduct safety barrier, the proposed development shall be designed and constructed to avoid the potential for falling debris from buildings (including from balconies and open air activities).
- f. Wind Effects: For any proposed development that projects beyond a building envelope of 10m plus a 45 degree recession plane above the height of the Viaduct carriageway, the person seeking consent should provide a wind impact report that demonstrates that the proposed development does not increase wind speeds on the Newmarket Viaduct to a degree that adversely affects traffic safety. This may include the results of wind tunnel tests or appropriate alternative test procedures undertaken by a suitably qualified expert.

Excavation and vibration

2. For any use or development within the extent of the designation which involves earthworks within 12 metres or piling within 16 metres of any pier of the Newmarket Viaduct (including its foundations) a person seeking prior written consent from the NZ Transport Agency should provide:
 - a. a Construction Vibration Management Plan (CVMP) prepared in accordance with the relevant parts of

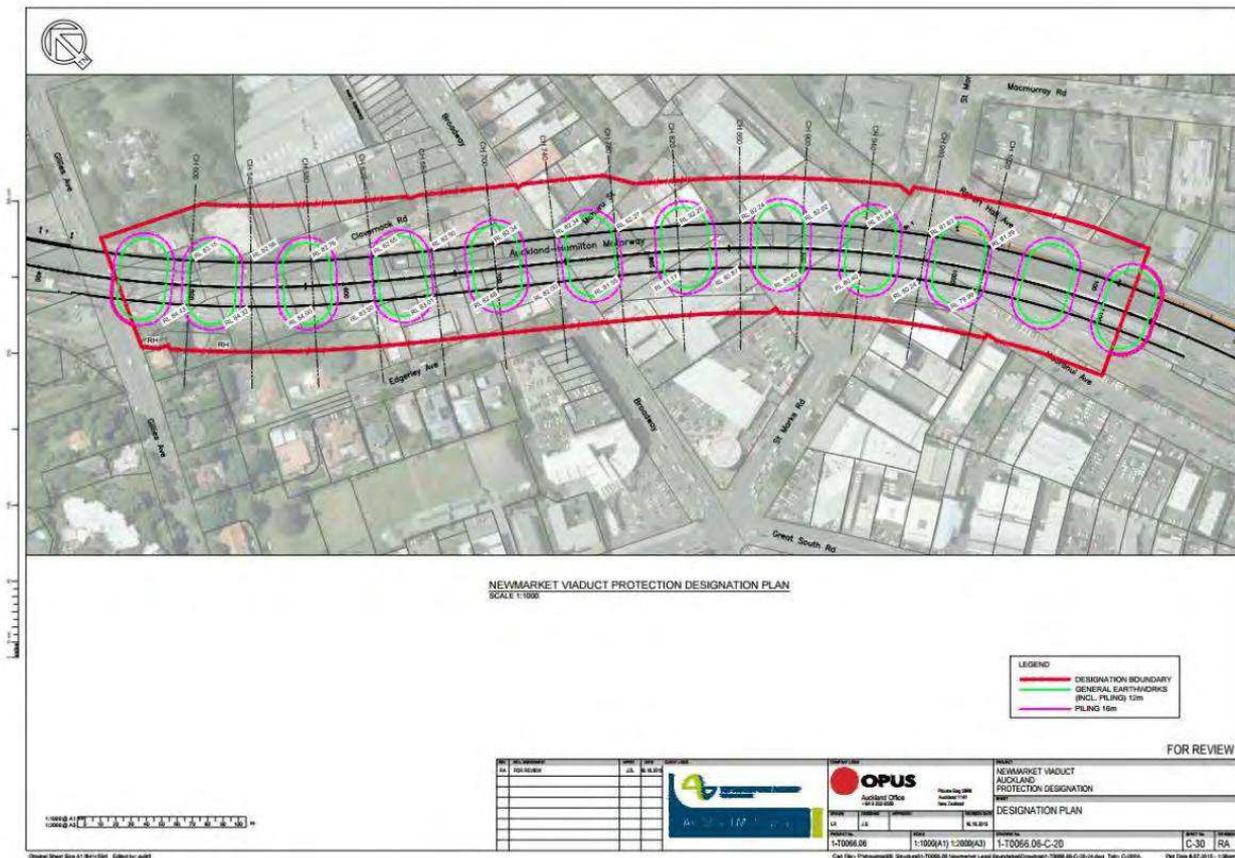
- condition C1 in Section 2.6 - Designation Conditions in State highway construction and maintenance noise and vibration guide, (NZTA, August 2013 or any subsequent update), and include the procedures, methods and measures for the control of vibration associated with all relevant construction works; and
- b. a methodology prepared by a suitably qualified and experienced person which details how the structural stability of each pier will be maintained at all times during and after earthworks or piling; and
- c. written confirmation to the satisfaction of the NZ Transport Agency that the use or development will proceed at all times in accordance with those documents.

General

- 3. Any person undertaking any use or development, (particularly any open air use on, in or around any building), within a 10m horizontal distance from the edge of the Newmarket Viaduct at or below the level of the carriageway, should note there is a risk of falling debris from vehicles or unsecured loads travelling on the Newmarket Viaduct.

Attachments

Designation Plan



**LIST OF NAMES AND ADDRESSES OF PERSONS SERVED
WITH A COPY OF THIS NOTICE**

New Zealand Transport Agency cameron.law@nzta.govt.nz,
mike.ward@nzta.govt.nz, patrick.mulligan@buddlefindlay.com

Auckland Council at unitaryplan@aucklandcouncil.govt.nz.

COPY OF THE RELEVANT SUBMISSION (extract)

92 *Decision sought:*

- 92.1 Amend the plan (Map 32) to provide for a maximum permitted building height of 32.5m, and amend the volcanic viewshaft restriction accordingly by deleting the volcanic viewshaft (T7) from the plan and amending the plan (Chapter J, Rule 6.3 and Urban Map 32: Natural Heritage) and the GIS viewer to provide for a minimum 32.5m (above ground at the site) floor of the volcanic viewshaft.
- 92.2 Delete Rules 2.11.1.1 and 2.11.1.2 and the basic floor area ratio and bonus floor area controls.

*Site 24B: **Broadway, Newmarket: Balm – Mahuru** (Map 24)*

93 *Issues:* maximum permitted building height, green building requirements, frontage controls, designation ID 6727 height restriction, and volcanic viewshaft controls.

94 *Specific provisions:*

- 94.1 Urban Map 32 Infrastructure: Designation ID 6727 Newmarket Viaduct; Urban Map 32 Additional Height Controls.

95 *Reasons for submission:*

- 95.1 The specific provisions referred to above are **opposed** in relevant part. The specific reasons for the submission include:
- 95.2 The site is well served by public train and bus transport, and is also well connected to the regional and National motorway network. This is a Metropolitan Centre with the highest and least restrictive zoning outside the CBD.
- 95.3 The site is zoned Metropolitan Centre. The zoning is considered appropriate, subject to service lane clarification
- 95.4 Given the site location and its Metropolitan Centre status it is considered that building to the maximum height of 32.5m ought to be a Permitted Activity on 100% of the site.
- 95.5 Providing for a maximum permitted building height of 32.5m is generally consistent with the volcanic viewshaft controls in the operative Isthmus district plan. Accordingly, the volcanic viewshaft controls in the plan should either be consistent with a 32.5m maximum permitted building height being achieved on the site, or the relevant operative district plan provisions should be retained. However, the proposed volcanic viewshaft T7 is not supported by any evidence of probative value and should be deleted.
- 95.6 Applying floor area controls to the site is not consistent with the purpose of the Metropolitan Centre zone, and the basic floor area control and bonus floor area control should be deleted.

95.7 Designation ID 6727 NZTA Viaduct assigns part of the site a maximum building height of 12.2m. It is considered that this designation is inappropriate and should be deleted.

- (a) The maximum building height limit of 12.2m will reduce the urban form in this part of Newmarket to that of a suburban (not Metropolitan) scale.
- (b) The contrast in scale and height of the Newmarket Viaduct and the buildings adjoining it will result in the Viaduct dominating its built context. If the designation were removed or significantly reduced in extent, the Viaduct would sit more comfortably and less dominantly amongst its neighbouring buildings.
- (c) Motorists using the Newmarket Viaduct will be denied the traditionally urban and dynamic experience of passing through (rather than above) a Metropolitan Centre.
- (d) In particular, NZTA has undertaken to review the designation on completion of the viaduct, and affected landowners can legitimately expect the this review will proceed as the new viaduct alignment has moved to the west away from the site.
- (e) The designation is not necessary either generally or (inter alia) for fire, safety or maintenance purposes.

95.8 A certificate of compliance (deemed resource consent) has been granted by Council for demolition of all buildings on the subject site under the operative District Plan, except 352 Broadway and 45-55 Nuffield Street which are not comprised in the subject site.

95.9 Reasonable (highest and best) use of this site will include: metropolitan centre zoning, no FAR controls, maximum permitted building height of 32.5m, and 100% site coverage by buildings.

96 *Decision sought:*

96.1 Amend the plan by deleting in relevant part the Infrastructure Overlay (Designation ID6727 NZTA Viaduct) in so far as it affects the site.

96.2 Amend the plan (Map 32) to provide for a maximum permitted building height of 32.5m, and amend the volcanic viewshaft restriction accordingly by deleting the volcanic viewshaft (T7) from the plan and amending the plan (Chapter J, Rule 6.3 and Urban Map 32: Natural Heritage) and the GIS viewer to provide for a minimum 32.5m (above ground at the site) floor of the volcanic viewshaft.

96.3 Delete Rules 2.11.1.1 and 2.11.1.2 and the basic floor area ratio and bonus floor area controls.

Site 25: 2-38 Nuffield Street, Newmarket (Map 24)

- 97 *Issues:* rezone part of the site from Mixed Use to Metropolitan Centre, green building requirements, frontage controls, maximum permitted building height, designation ID 6727 height restriction, and volcanic viewshaft controls.
- 98 *Specific provisions:*
- 98.1 Map 32 Infrastructure: Designation ID 6727 Newmarket Viaduct; Map 32 Additional Height Controls.
- 99 *Reasons for submission:*
- 99.1 The specific provisions referred to above are **opposed** in relevant part. The specific reasons for the submission include:
- 99.2 The site is well served by public train and bus transport, and is also well connected to the regional and National motorway network. This is a Metropolitan Centre with the highest and least restrictive zoning outside the CBD.
- 99.3 The site is zoned in part as Metropolitan Centre and Business (Mixed Use). The Metropolitan Centre zoning is considered appropriate, however it should be extended to cover also the part of the site that is currently zoned Mixed Use. Given that the site is in single ownership it represents a significant opportunity to realise the full potential of an intensified Metropolitan Centre development.
- 99.4 Given the site location and its Metropolitan Centre status it is considered that building to the maximum height of 32.5m ought to be a Permitted Activity on 100% of the site.
- 99.5 However, in the Mixed Use zone a maximum permitted building height of up to 24.5m applies. This is considered too low for a site that is so well served by train and bus public transport and so well connected to the regional and national motorway network.
- 99.6 Providing for a maximum permitted building height of 32.5m is generally consistent with the volcanic viewshaft controls in the operative Isthmus district plan. Accordingly, the volcanic viewshaft controls in the plan should either be consistent with a 32.5m maximum permitted building height being achieved on the site, or the relevant operative district plan provisions should be retained. However, the proposed volcanic viewshaft T7 is not supported by any evidence of probative value and should be deleted.
- 99.7 Applying floor area controls to the site is not consistent with the purpose of the Metropolitan Centre zone, and the basic floor area control and bonus floor area control should be deleted.
- 99.8 The Part 7 Designation ID 6727 NZTA Viaduct assigns the sites a maximum building height of 12.2m. It is considered that this designation is inappropriate and should be deleted.

- (a) The maximum building height limit of 12.2m will reduce the urban form in this part of Newmarket to that of a suburban (not Metropolitan) scale.
- (b) The contrast in scale and height of the Newmarket Viaduct and the buildings adjoining it will result in the Viaduct dominating its built context. If the designation were removed or significantly reduced in extent, the Viaduct would sit more comfortably and less dominantly amongst its neighbouring buildings.
- (c) Motorists using the Newmarket Viaduct will be denied the traditionally urban and dynamic experience of passing through (rather than above) a Metropolitan Centre.
- (d) In particular, NZTA has undertaken to review the designation on completion of the viaduct, and affected landowners can legitimately expect this review will proceed as the new viaduct alignment has moved to the west away from the site.
- (e) The designation is not necessary either generally or (inter alia) for fire, safety or maintenance purposes.

99.9 Reasonable (highest and best) use of this site will include: metropolitan centre zoning, no FAR controls, maximum permitted building height of 32.5m, and 100% site coverage by buildings.

100 *Decision sought:*

100.1 Amend the plan by rezoning the site from the Mixed Use zone to the Metropolitan Centre zone, and for consistency also rezoning the balance of the eastern side of Mahuru Street to the junction with St Marks Road.

100.2 Amend the plan by deleting in relevant part the Infrastructure Overlay (Designation ID6727 NZTA Viaduct) in so far as it affects the site.

100.3 Amend the plan (Map 32) to provide for a maximum permitted building height of 32.5m, and amend the volcanic viewshaft restriction accordingly by deleting the volcanic viewshaft (T7) from the plan and amending the plan (Chapter J, Rule 6.3 and Urban Map 32: Natural Heritage) and the GIS viewer to provide for a minimum 32.5m (above ground at the site) floor of the volcanic viewshaft.

100.4 Delete Rules 2.11.1.1 and 2.11.1.2 and the basic floor area ratio and bonus floor area controls.

*Site 26: **Other sites:** (Maps 26A to 26I)*

101 Other sites where similar decisions are sought regarding the general amendments listed in Appendix D include: