

**BEFORE THE ENVIRONMENT COURT**

Decision No: [2010] NZEnvC 115  
ENV-2009-WLG-000231

**IN THE MATTER** of an appeal under s336 of the Local  
Government Act 1974

**BETWEEN** THE CITY IS OURS INC  
Appellant

**AND** THE WELLINGTON CITY COUNCIL  
Respondent

Court: Principal Environment Judge C J Thompson  
Environment Commissioner K A Edmonds  
Deputy Environment Commissioner D Kernohan

Hearing: at Wellington 6 - 8 April 2010. Site visit 8 April 2010

Counsel/Appearances:

B M Easton and B T K O'Shaughnessy as representatives of the appellant  
K M Anderson and J J Fowler for the Wellington City Council

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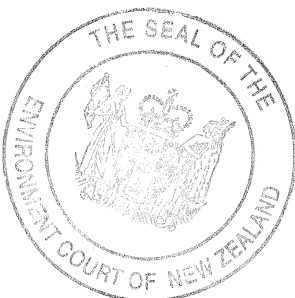
**DECISION OF THE COURT**

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Decision issued: 15 April 2010

The appeal is declined and the Council's decision is confirmed

Costs are reserved



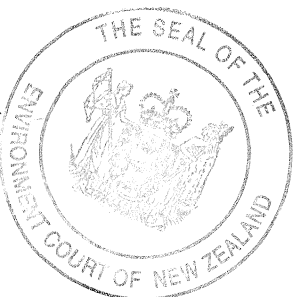
### *Introduction*

[1] Until c1979 the stretch of Manners Street, between what is now Victoria Street and Cuba Street, was a conventional two-way central city street. It was part of the existing bus routes and earlier had been an integral part of the tram route through the city. By a Special Order made by the City Council in October 1978 that part of Manners Street (estimates of its length vary but it seems to be between 110 and 115m) was closed to vehicular traffic and a pedestrian mall was established. From that point on, west-bound bus traffic travelled along Dixon Street to Victoria Street, and east-bound bus traffic travelled on Wakefield Street, by-passing the closed portion of Manners Street.

[2] As outlined in the evidence of Ms Teena Pennington, the Council's Director of Strategy, Planning and Urban Design, of more recent times however the Council and other agencies have become dissatisfied with the level of service provided, particularly to bus traffic, through that part of the city. Through an incremental process of studies and informal and later formal consultation, the Council formed the view that a better option for bus traffic would be to reopen that part of Manners Street to bus traffic. In the course of late 2008 the Council prepared relatively informal, but extensive, consultation documents and undertook a quite detailed publicity and discussion process with interest groups and the public generally. Some 722 submissions were received and considered. In March 2009 a firm of consultants was appointed to conduct an evaluation of possible options, including allowing two-way bus access through the Mall. The consultants produced a report in May 2009.

[3] The consultation process gave rise to some modifications of what was an initial proposal – in particular it introduced the concept of having what is referred to as a *shared space* precinct in lower Cuba Street, in part to compensate for the loss of public space in Manners Street. This is an area in which pedestrians and one-way low speed traffic share an area in a somewhat mall-like environment.

[4] The provisions of the Local Government Act 2002 required the Council to undertake what is known as a *Special Consultative Procedure* before making a formal decision to revoke the Mall status, and that was begun in September 2009.



[5] At the end of that process, which we shall describe in more detail shortly, on 11 December 2009 the Council made a formal decision under s336(1) of the Local Government Act 1974 to revoke the pedestrian status of the affected part of Manners Street. This proceeding is an appeal under s336(3) and (4) against that decision.

*The statement of proposal*

[6] As part of the *Special Consultative Procedure*, the Council approved, as required by s83 of the Local Government Act 2002, a *statement of proposal*. In summary, the proposal was to:

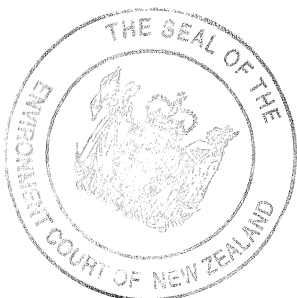
1. Revoke the pedestrian status of Manners Mall to allow two-way bus traffic.
2. Create a wide footpath on either side of the street to cater for high volumes of pedestrian traffic in a similar fashion to the more westerly part of Manners Street between the existing mall and Willis Street.
3. Reconfigure lower Cuba Street as a shared space to compensate for the loss of public space in the Manners Mall.
4. Consult further on detailed aspects of traffic and transport operations, including parking, taxi-stands, loading zones, motor cycle parks and bus stops and shelters.

[7] As options, the *statement of proposal* contained three variations of the status quo, being:

1. To ban the right turn from Victoria Street into Manners Street west; or
2. To establish a two-way bus route via Mercer, Wakefield, lower Cuba and Manners Street east; or
3. To establish a two-way bus route via Dixon Street and upper Willis Street.

The other two options were:

4. To revoke the pedestrian mall status of Manners Mall to permit two-way bus traffic;
5. Varying the pedestrian mall status of Manners Mall to allow vehicles but maintaining its pedestrian mall status as a matter of law.

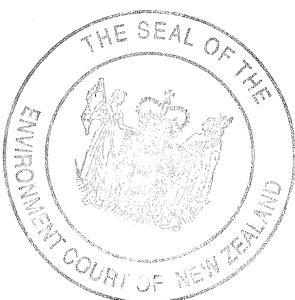


The *statement of proposal* expressed the Council's view that the last of those options was not a reasonably practicable option (in terms of s87 of the Local Government Act 2002) and it was taken no further.

*Benefits and disadvantages*

[8] In terms of benefits and disadvantages the Council's *statement of proposal* indicated that the main benefits of revoking the pedestrian status of the mall to allow two-way bus traffic were:

1. Public transport reliability and reductions in bus travel times.
2. Walk-ability by creating an improved pedestrian access linking Cuba Mall to Civic Square in the waterfront.
3. The ease of understanding of public transport services in the area by eliminating the current *split route* [ie Wakefield Street and Dixon Street] and placing all bus services on a single route through the area (known as *legibility*).
4. Improving the legibility of walking routes in public space in the area by creating a linear pedestrian space running from Cuba Mall to Civic Square.
5. As an important first step in implementing the Ngauranga to Airport transport plan.
6. It would be an integral part of a package of measures to improve the performance of the central city public transport *spine* which is a key part of the Council's urban development and transport strategies.
7. It would provide a suitable transport corridor to assist a future significant upgrade of the city's public transport system [ie future-proofing for possible options such a light rail].
8. It would assist in establishing a clear framework for future development of this area around a coherent vehicular/public transport/pedestrian network.
9. It would provide a net improvement in public space in the area.
10. It would respond to advice received from bus operators and the Wellington Regional Council that improvements to the performance of the bus network are required.
11. It would ease growing bus congestion and provide additional capacity for growth and bus patronage.



12. It would obtain maximum value from past and current investment in transport networks and public spaces.
13. Finally, it would provide good economic performance assessed on a benefit/cost ratio.

[9] The disadvantages of the project were stated to be:

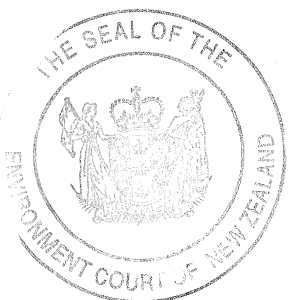
1. The financial cost of constructing a new road way and overhead trolley wires through the existing mall space and in lower Cuba Street.
2. The potential impact on retailers along what is now Manners Mall.
3. The reduction in existing public space in what is now Manners Mall.

[10] The *statement of proposal* attracted a total of 523 submissions, the majority of them in writing. Those submitters wishing to make oral submissions were heard over a period of two days. The end result of that process was a decision on the part of the Council's Strategic Policy Committee (a committee formed of the Mayor and all Councillors) to recommend the adoption of the proposal, largely as contained in the statement of proposal.

*Legal framework for decision-making in this Court*

[11] As the Court has said on earlier occasions (see eg *Trayling v Christchurch CC* [2005] NZRMA 488), s336 does not provide criteria against which a proposal to declare a road a pedestrian mall is to be measured, nor for a proposal to revoke mall status. The Act is silent on all of those issues. Section 336(8) does not contain any indication of a *burden of proof* or a threshold which a party to an appeal in this Court has to achieve either. That said, there is a general evidential burden, in any litigation, on a party who asserts a position to provide or point to evidence sufficient that a Court could reasonably find that position to be tenably made out: - see *Trayling*, para [13].

[12] We have the power to confirm the decision, to cancel it or, to make modifications to it. In the case of a proposed revocation however, the last of those alternatives seems impracticable. We think the practical position is that we must either outright confirm or cancel the Council's decision.



[13] In an appeal subsequent to *Trayling (Bain v Waimakariri DC (C111/2008))* the Court held that the sustainable management concept of the Resource Management Act should also guide decision-making in this context. In that regard, we can accept that if there are relevant provisions in the District Plan or other relevant planning documents, they may well be of assistance in providing a useful planning background, and we shall return to consider the relevant planning documents shortly.

[14] We emphasise that it is also the case that the Court considers the application *de novo*. That is, it makes its own decision based on the evidence placed before it. Subject only to s290A, procedural or other issues involved in the Council's decision-making are irrelevant.

#### *Section 290A – the Council's decision*

[15] Section 290A requires the Court to *have regard to* the Council's decision. That does not create a presumption that the decision is correct but it does, implicitly at least, call for an explanation if we should come to disagree with it. As will be apparent from the balance of this decision, we have considered the Council's decision and agree with it. No further comment is necessary.

#### *The Council's position*

[16] In summary, it is the Council's position that while the proposal does have some disadvantages (see para [9]) overall it is preferable to the *do nothing* option and to any other reasonably practicable option put forward for consideration. The Council contends that it will improve the flow of public transport through the central city; that the loss of public space in Manners Street will be offset by the creation of better quality open space in lower Cuba Street; that at worst the effects on Manner Street retailers will be neutral. In short, the Council says that advantages outweigh disadvantages by a heavy margin and that the proposal will represent a better outcome in sustainable management terms than the existing position or other reasonable options.



*The planning documents*

[17] Mr Easton submitted that the proposal compromised the Council's operational plans, and specifically mentioned many of the documents we now consider.

[18] Ms Pennington gave evidence that the proposal accords with the Council's Long-Term Council Community Plan (LTCCP), the Transport Strategy and the District Plan. She said that the proposal is strongly supported by the New Zealand Transport Agency and the Wellington Regional Council and is in accordance with the regional plans prepared by these organisations, including the Ngauranga to Airport Corridor Plan (NWACP), and the Land Transport Management Strategy. She said that all of these policy documents indicate the need for improvements to the bus network between Taranaki and Willis Streets, including Manners Mall. Ms Alison Newbald, who is a planner for the Council, gave evidence in similar vein for the Council.

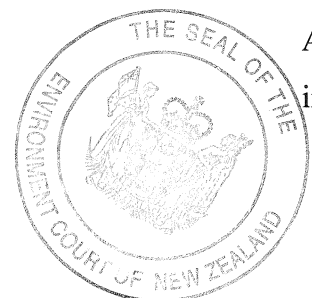
[19] The NWACP has the following measure to be implemented within 10 years from adoption of the plan in 2008:

Implement passenger transport improvements (including bus priority measures, signal redemption, real time information) along the Golden Mile route to improve journey times, reliability and passenger waiting and boarding provisions. Improvements to include:

Golden Mile (from Lambton Interchange to eastern end of Courtenay Place).

That is a method to implement the Regional Land Transport Strategy (RLTS) prepared in accordance with the Land Transport Act 1998 by the Wellington Regional Council. That strategy recognises the southern end of the *Golden Mile* as causing issues for the reliability of public transport and supports measures to address the issue of bus priority and the overall efficiency and effectiveness of the entire public transport system.

[20] Both Council witnesses also gave evidence that the Council's Transport Strategy 2006 and relevant LTCCP provisions make it clear that bus priority measures are an essential means of providing for the City's transport needs. Ms Pennington also made it clear that the proposal aligns with the Council's approved citywide Bus Priority Plan (12 April 2007) which outlines an overall approach to managing the bus network and improving reliability and efficiency.



[21] Mr Easton took issue with Ms Pennington's description of the *Golden Mile* as the transport and commercial spine of the central business district (CBD) of Wellington. He referred to the introduction to the operative District Plan describing the Council's vision and guiding principle for steering development for the Golden Mile:

#### 12.1.3 The 'Golden Mile'

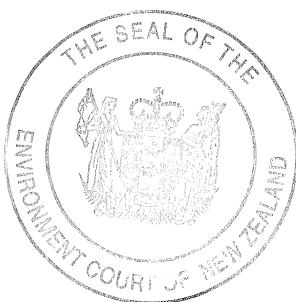
The 'Golden Mile' refers to the main retail strip which extends generally from the Cenotaph near Parliament buildings to the eastern end of Courtenay Place. This 'Golden Mile' concept reflects the natural form of the Central Area and helps structure the way the city is perceived and the way people move within it. By enhancing this powerful organising influence, a sense of place and orientation can be improved for people. Council aims to ensure that the physical and conceptual links provided by the 'Golden Mile' are reinforced where appropriate.

[22] Mr Easton put to Ms Pennington that this only referred to the retail function, and not to the transport function, of the Golden Mile. Ms Pennington said that the Urban Design Strategy covered the transport function of the Golden Mile. That strategy has a Central City Framework, which includes *Lines of Movement* and the following specific reference:

#### The Golden Mile

While marking the original shoreline, the Golden Mile has developed a different character from the Quays which form the major entrance/exists (sic) to and from the city. It is the backbone of the framework and is recognised as the spine of the central city. Along it are located the commercial, retail and entertainment centres of the central area, and it provides the main links with other parts of the inner city. As a physical concept it requires strengthening as it still appears as more of a series of separate places rather than a continuum, made up of Lambton Quay, Willis Street, Manners Street and Courtenay Place.

[23] Ms Newbald gave more detailed evidence for the Council on the provisions of the District Plan (the operative Plan and Proposed Plan Change 48 – Central Area Review) which give effect to the sustainable management purpose of the Resource Management Act. She found that, overall, the proposal would be consistent with the principles and the objectives and policies of the operative plan that seek to maintain and enhance the physical character of the Central Area (Objective 12.2.3); maintain and enhance the streetscape through continuing programmes of street improvements (Policy 12.2.3.4);





enable efficient, convenient and safe access for people and goods (Objective 12.2.8); improve access for all people within the Central Area, including those on public transport (Policy 12.2.8.1); protect and enhance access to public spaces (Policy 12.2.8.5); and ensure that a range of public open spaces and through routes for pedestrians to and from the waterfront are provided and maintained (Policy 12.2.11.2). She mentioned Principle 12.1.4 of the operative Plan which refers to the relationship between the city and sea and the opportunity to create and enhance links (which would be achieved with the lower Cuba Street upgrade). We concur with that assessment. We also accept Ms Anderson's submission that the sunlight provisions referred to by Mr Easton are not relevant in this context.

[24] The District Plan also mentions the *Urban Design Strategy* as a method for implementing Policy 12.2.3.4 on maintaining and enhancing the streetscape. We are satisfied that the proposal does not run counter to the thrust of the Urban Design Strategy

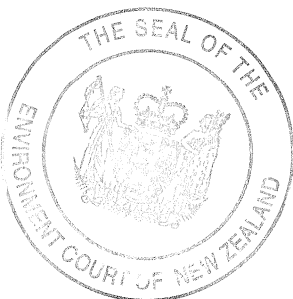
[25] Proposed Plan Change 48 covering the Central Area expands on and amends the guiding principles, as well as other provisions. Ms Newbald gave evidence on provisions she said were not under appeal and are therefore effectively operative and considered that the proposal was consistent with them. Of particular relevance is the amended Principle 12.1.3, as follows:

Enhance the role of the 'Golden Mile' and 'Cuba'

The 'Golden Mile' refers to the main retail and commercial strip extending from the Cenotaph near Parliament Buildings, to the eastern end and entertainment hub of Courtenay Place. This 'Golden Mile' concept reflects the natural form of the Central Area, and helps structure people's perceptions of the city and the way they move within it. Cuba Street is a premier pedestrian-based retail promenade that forms an important axis with the 'Golden Mile'.

The 'Golden Mile' and 'Cuba' will be enhanced and supported by reinforcing their key retail function, promoting nearby office location, enhancing the pedestrian environment and improving the roll-out of quality public transport infrastructure.

We accept the evidence of Ms Newbald. The proposal will largely *enhance the pedestrian environment* through the improved lower Cuba Street area with its enhanced connectivity to Civic Square and the waterfront. Similarly with Policy 12.2.15.14 -



*protect and enhance access to public spaces.* The proposal will achieve Objective 12.2.15 and Policy 12.2.15.1 in improving access for all people, especially those travelling by public transport.

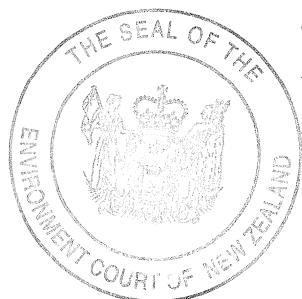
[26] We accept that the proposal is consistent with the operative District Plan and Proposed Plan Change 48 after considering the evidence, the submissions and questions from Mr Easton on particular provisions (not all of which we have referred to in this decision) and the documents themselves. We have also looked at other Council policy and strategy documents that may have some relevance. Mr Easton was critical of the Council witnesses for not specifically mentioning most of these. Other documents he mentioned were reports that informed the District Plan and Proposed Changes to it and other Council policy and strategy documents. We were satisfied that we did not need to consider these.

#### *Walking Policy*

[27] The Walking Policy has objectives and related policies (plus proposed actions) to promote the benefits of walking so that more people walk; improving pedestrian safety throughout the city; improving the experience of those walking through or about the Central Area; increasing the number of commuter trips taken by foot to and from the Central Area, and improving the experience of those walking to and from public transport stops. We do not consider that the proposal cuts across any of the objectives, policies and proposed actions. The Central Area will remain interconnected for pedestrians, with active edges along Manners Street and frequent safe crossing points. Lower Cuba Street will provide an alternative attractive route between the Waterfront, Civic Square and Cuba Mall.

#### *Footpath Management Policy*

[28] This Policy guides the prioritisation of footpath space for pedestrian activity and contains principles that apply when considering activities on footpaths, such as outdoor cafe seating and street performances. We have already found that the footpaths along central Manners Street, on either side of the bus lanes, can be designed to accommodate the primary use of pedestrian movement. The proposal would not discourage people from walking as their primary transport mode. We accept that some other activities, which



contribute to the character and vibrancy of public spaces, are likely to relocate into an area like the nearby lower Cuba Street.

### *Cycling Policy*

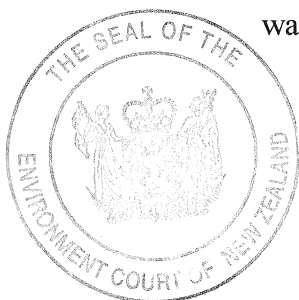
[29] The Cycling Policy has objectives and related policies (plus proposed actions) on improving cycle safety and the convenience of cycling and the experience of cycle trips to and from the central area. Riding cycles is currently not allowed through Manners Mall, although we understand it occurs. Dr Stewart gave evidence that cyclists sharing the proposed bus lanes (at least at the planned widths) would not be appropriate for safety reasons. He said that there are alternative routes for cyclists, such as along Dixon Street, and that there are advantages in separating buses and cyclists. The proposal does not, in our view, cut across the overall intent of the Cycling Policy.

### *Parking Policy*

[30] The Parking Policy addresses how the Council should manage on-street parking spaces on the public road space. It has a number of overarching principles and location-specific policies covering (among others) the Central Area. We find that the proposal recognises these principles and policies including the policy direction that *an important role for the Golden Mile will be as a corridor for public transport, walking and cycling to support the retail and commercial sector.*

### *Capital Spaces*

[31] The open space strategy describes the open space values the inner City has now (and specifically identifies the Golden Mile as a feature contributing greatly to the sense of a Wellington identity) as a vibrant inner city where the streets, parks, squares and waterfront form a network of safe, functional and stimulating spaces for people and events; and the design, features and planting give a unique sense of Wellington. We find that the proposal would not detract from the values and opportunities identified in that document, with the lower Cuba Street upgrade also assisting with the connection of the waterfront to the city.



*Significance Policy*

[32] Given that effectively the whole of this proposal, including the *shared space* in lower Cuba Street, has been processed under the *Special Consultative Procedure*, this policy has been complied with, whether intentionally or not.

*Summary of our views on the planning documents*

[33] We conclude that the proposal is consistent with the operative District Plan and Proposed Plan Change 48. We also consider that the proposal is consistent with the other relevant strategy, policy and planning documents of the City Council.

*The Society's basis for opposing the proposal*

[34] The City is Ours Inc is a society of persons opposed to this proposal. Their complaints about it are many and, we have to say, they were not always coherently expressed and readily analysed. We shall do our best to explain why the Society did not persuade us that the proposal's demonstrable disadvantages outweigh the demonstrable advantages.

[35] Some grounds advanced in opposition to the proposal can be shortly dealt with. In the face of strong material to the contrary, witnesses for the society continued to maintain, until a very late stage, assertions that the carriageway width proposed for the restored road would not be wide enough for buses travelling in opposing directions to pass, or for buses travelling in the same direction to overtake. They also maintained that the proposed layout would not be adequate to meet Fire Service requirements. There was also an assertion that footpath widths would be inadequate.

[36] Dr Wayne Stewart, a consulting transport engineer to the Council, in a brief of supplementary evidence, provided some empirical measurements which responded to such issues. He was able to confirm that measurements were taken of the width of Manners Mall between shop fronts on either side of the road at three locations. The width between the shop fronts varied from 15m to 15.3m. In comparison, a matching set of three measurements were taken in Manners Street west: (ie the length between Victoria Street and Willis Street). Along that stretch the width between shop fronts varied between

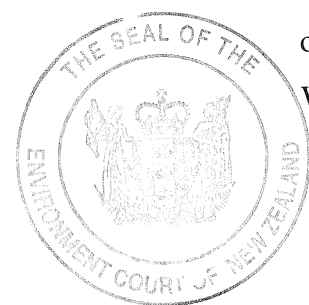


14.2m and 17.2m. In this stretch of Manners Street the width of the carriageway (which carries two west-bound lanes) between kerbs is 6.6m, leaving the total width available for pedestrians to vary between 7.6 and 10.6m. That width is not split evenly between the footpaths and the widths of the footpaths vary between 3.4 and 5.8m.

[37] Dr Stewart confirms that the present intention (subject to final designs being done) of the Council is to provide a carriageway width for buses along the affected length of Manners Street of 6.5m. It is his clear view that that is sufficient width for two buses to pass each other and he says that there are number of existing situations in New Zealand where the successful movement of traffic, including heavy vehicles, occurs on a carriageway width of 6.5m or less. Examples mentioned in his brief of evidence are:-

- The Mount Victoria Tunnel in Wellington;
- The Dublin Street Bridge in Whanganui;
- The Auckland Harbour Bridge;
- The Fitzherbert Bridge in Palmerston North.

[38] Additionally, the most recent additions to the city's trolley bus and diesel bus fleets were measured. The width of these buses ranged between 2.43 and 2.45m with rear vision mirrors extending out from those dimensions between 150mm and 330mm. The widest buses, if fitted with the widest mirrors, would therefore total 3.11m. But Dr Stewart confirms that the Land Transport Rules specify the legal permitted width of heavy commercial vehicles, including buses, as being up to 2.5m. Any vehicle exceeding that width is deemed to be over-dimensioned and special rules applied to it. The Rules do allow collapsible mirrors that extend not more than 240mm beyond the side of such a vehicle. That means that the overall legal width of a bus, including mirrors, must be less than 2.98m. It is therefore apparent that the buses measured in this exercise can, and must, comply with the Rules and, by use of tracking software, he confirms that buses will be able to pass and overtake in the 6.5m carriageway (noting that, regardless of carriageway width, unless they are using battery packs trolley buses cannot overtake each other). He also confirms that buses will be able to safely turn into Manners Street from Willis Street.

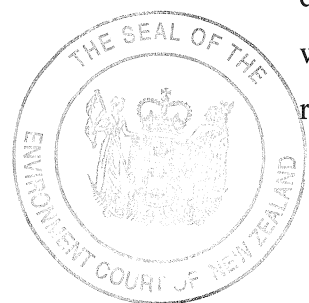


[39] On a related topic, we heard from Mr James Linton, a witness for the society. He is a retired teacher and is currently a Wellington city bus driver. He was critical of the proposal, and of the general management of traffic and public transport in the city streets, in a number of respects. In particular he said that Dr Stewart's calculation of the distance required (3.2m) for a bus to pull away from the kerb and pass another parked bus was demonstrably wrong, and that something of the order of three times that would actually be required. We are prepared to accept that. But what it demonstrates is just that: - such a manoeuvre may need about 10m to be done safely. That is not a reason to decline the proposal.

[40] Mr Brent Blann, the Service Quality Controller for Mana Coach Services, a significant provider of bus public transport in and around the City, had completed a joint witness statement with Dr Stewart. Despite that, he was called under subpoena by the society. He confirmed that his organisation supported the proposal as being likely to provide a more direct route through the city with bus priority, and that all its concerns had been considered and addressed.

[41] It is also the case that fire appliances must meet these dimensional Rules, and a further joint statement from Dr Stewart and Mr Ray Kennedy, the Area Manager for Wellington-Kapiti, of the New Zealand Fire Service, confirms that the Fire Service has no concerns about the proposal – in fact it believes that it will be beneficial in providing faster access from the Central Fire Station in Courtney Place to The Terrace area of the city. Mr Kennedy was also called by the society to give evidence under subpoena. His evidence clearly confirmed that any concerns the Fire Service may have had have been addressed and that it is perfectly comfortable with the proposal.

[42] On this topic we were pleased to hear, eventually, that Mr Ian Drysdale, a retired architect called by the society, was prepared to accept that the proposed carriageway width is ... *adequate, but still narrow and tight*. It may well be that when it comes to the final design further consideration might be given to this and that the carriageway could be widened somewhat without unduly compromising the available footpath width. In response to questions from the Court, Dr Stewart indicated that this may be possible.



*Footpath width*

[43] On the topic of footpaths, Dr Stewart points out that with an available width along the Manners Mall area of 15m, 8.5m will be available for footpaths once the 6.5m carriageway is subtracted. That will be sufficient to provide one *through route* on either side of the road of 2.15m which is, according to the NZTA Guide, sufficient to provide for 70 pedestrians per minute. On the assumptions made from pedestrian count surveys undertaken in 2009 this will be more than ample to cater for the present pedestrian use and reasonably predictable increases in the future.

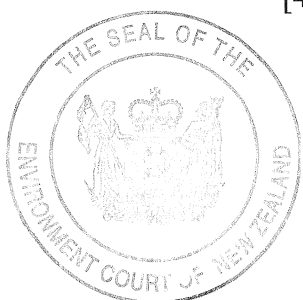
*General safety*

[44] Ms Maria van der Meel, a member of the society, was particularly concerned about two issues of safety. We must agree that it is self-evidently the case that putting pedestrians and buses on the same length of street increases the possibility that, through carelessness or mischance, a pedestrian might be struck by a bus. Sadly, that happens from time to time in the City, and it may happen in this street also. We do not live in a risk-free world and neither the Local Government Act nor the Resource Management Act do, or could, require the elimination of all risk. There is no reason to think that the risk of mishap here will be greater than on any other city street. And it needs to be borne in mind that the adoption of this proposal will remove buses from Wakefield Street, lower Cuba Street and Dixon Street, thus taking the risk of bus v pedestrian conflicts away from them.

[45] Ms van der Meel also expressed concern about the introduction of diesel bus produced atmospheric emissions into this part of the Manners Street environment. That too will undoubtedly be the case. But again there is a *zero-sum* scenario here. There will no longer be diesel bus produced emissions in the streets where buses will no longer run. In a perfect world we would all like to see carbon-emission free cities, but for so long as our vehicle fleets are predominantly carbon-fuel powered, we cannot achieve that.

*Consultation and other processes*

[46] Mr Easton mounted an argument which he expressed in his opening submissions as:  
That the process is fatally flawed under s83A, Local Government Act 2002 (and without doubt, ss(2)(b)) for including an un-consulted modification into a statutory section 83

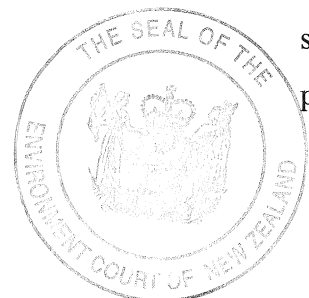


demand, (section 336, Local Government Act 1974) on a pedestrian mall (not shared space) status...

As we understood him, this relates to the inclusion in the *statement of proposal* (see para [6]) of the intention to create the *shared space* in lower Cuba Street. This, it will be recalled, was a concept that arose from the first round of (relatively informal) public consultation about the Manners Mall revocation and was intended to mitigate or offset the loss of public space, and to provide other benefits in terms of pedestrian access and flow.

[47] We agree with Ms Anderson's submission that this argument rests on a misunderstanding of the structure of the legislation. There is no mandatory requirement that a proposal presented in a s83 *special consultative procedure* must have been preceded by some other form of consultation. Nor is there anything in the Act which prevents the inclusion in a *statement of proposal* of an intended course of action which, of itself, does not require a *special consultative procedure* but which could fairly be considered along with some other proposal which does require that procedure. Far from rendering the process *fatally flawed*, the Council could be commended for presenting an entire and coherent package for scrutiny and comment.

[48] On a semi-related issue, Mr Easton also argued that the *statement of proposal* contains a further *fatal flaw*, in that at one point it described one of the options – Option B (known as the Wakefield Street option) as being a *split route*. We should pause to say that the current position is a *split route* with west-bound buses travelling on Dixon Street, and east bound buses on Wakefield Street. Option B would have had buses travelling in both directions on Wakefield Street. The Council acknowledges that this was an error, but points out that when the document is read as a whole, the error is apparent and the true status of the option as a two-way route would be perfectly obvious. There is for instance express reference elsewhere in the statement to Wakefield Street being part of a two-way route. We agree that, to any reader of the statement who was paying attention, the error would be obvious – taking that one reference at face value would simply not make sense and it cannot be supposed that anyone sufficiently interested as to be motivated to make a submission would have been misled. Nor can there be any doubt that when the whole proposal came before the Strategic Policy Committee and the full Council the options



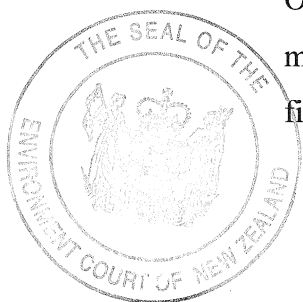


were clearly and correctly understood, both by those making submissions and by the Committee and the Council.

[49] Some issue was made too of the adaptation or modification of the Manners Street option (presented as Option D in the *statement of proposal*) between the publication of the statement and its consideration by the Council. This became known as Option D(i) and differed from Option D in two respects. First, in D(i), bus priority would be implemented along almost all of the southbound route and about 40 percent of the northbound route. Secondly, in D(i), general (non-bus) traffic would travel west on Manners Street (east of Cuba Street) and north on lower Cuba Street. Option D had it flowing in the reverse direction. There is nothing in the legislation requiring the Council to adopt exactly what was published without the slightest change – otherwise the process of receiving and considering submissions would be confined to a simple yes/no exercise, and that cannot be what is intended. The primary thing to be noted is that these differences affected streets other than the present Manners Mall. In any event, in the overall scheme of things neither of these modifications was of such significance that it could be said that what the Council finally opted for was so different from the proposal that the consultation process was subverted in some way.

[50] Dr Stewart partly supported his view that Option D(i) was the best alternative by undertaking a comparative Benefit to Cost Ratio (BCR) analysis of the options. The results ranged from a low of 0.8 for Option C (Dixon Street) to a high of 2.3 for Option D and 2.1 for Option D(i). Mr O'Shaughnessy disputed the validity of this analysis. But for reasons which remain unknown he did not explain his criticisms in the written material he lodged as his statement of evidence. Nor could he, or would he, get to the point of putting his criticism to Dr Stewart before his largely incomprehensible cross-examination of him was brought to a halt.

[51] There may have been some germ of merit in his criticism, although we doubt it. Mr O'Shaughnessy has no disclosed experience or expertise in traffic flow analysis or data modelling, whereas Dr Stewart is a very experienced and qualified practitioner in his field. So long as the same assumptions and criteria are applied in analysing each of the



options, the comparison should be valid. In any event, the BCR analysis was not the only basis of support and the other comparative evidence leaves us confident that this option can tenably be supported.

[52] Finally among the grounds of objection to be separately mentioned, was the argument, as Mr Easton put it, that a pedestrian Mall in this part of Manners Street is,:

... (as retail on the Golden Mile) ... “a public taonga” and national asset “promised” to Wellington City.

As far as we were able to understand it, this assertion rested on the reported remarks of the then Prime Minister in opening the Manners Mall in 1978 or 1979. Even assuming that he then spoke for the City Council, an argument that these reported remarks could override the provisions of legislation under which the status of streets and malls can be altered by defined processes can have no possible legal foundation.

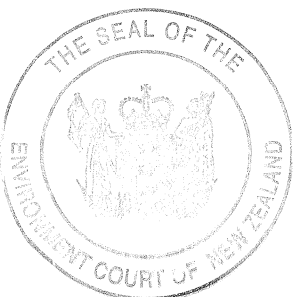
### *Conclusions*

[53] Neither singly nor cumulatively do any of the arguments put forward by the society come remotely close to persuading us that the disadvantages of this proposal outweigh the advantages or, put another way, that the concept of sustainable management would be better served by maintaining the status quo or by adopting any of the other options put forward as being reasonably practicable.

[54] For those reasons, the appeal must be declined and the decision of the Council is confirmed.

### *An aside*

[55] As a final comment, we have to say that we are not entirely persuaded that there is, as a matter of law, a right of appeal against the revocation of Mall status, as opposed to the declaration of a Mall. Perhaps we read too much into the fact that subsection 336(8), as it now stands, post the 2004 amendments, mentions only ... *the procedure in subsection (1)* ... and says nothing about the appeal procedures under subsections (3) and (4). Given that a revocation of the Mall status would not deprive the public of access to the *road*, the absence of a right of appeal would not, at first glance, seem to be contrary to the philosophy of the Act. This possibility was not raised by the parties, and this did not seem



to be the appropriate occasion for the Court to raise the issue of its own motion. We have therefore dealt with the appeal on its merits as we see them, but there may be a point to be considered in the future.

*Costs*

[56] We reserve the issue of costs. Any application should be lodged by 30 April 2010 and any response should be lodged by 14 May 2010.

Dated at Wellington this 14th day of April 2010

For the Court



C J Thompson  
Principal Environment Judge

