

PALMERSTON NORTH CITY COUNCIL

AGENDA
HEARING BY COMMISSIONER

9.30AM, FRIDAY 14 MAY 2021

COUNCIL CHAMBER, FIRST FLOOR,
CIVIC ADMINISTRATION BUILDING
32 THE SQUARE, PALMERSTON NORTH



MEMBERSHIP

Independent Commissioner Mark St.Clair

Agenda items, if not attached, can be viewed at:

pncc.govt.nz | Civic Administration Building, 32 The Square
City Library | Ashhurst Community Library | Linton Library

Heather Shotter
Chief Executive, Palmerston North City Council

Palmerston North City Council

W pncc.govt.nz | E info@pncc.govt.nz | P 356 8199
Private Bag 11034, 32 The Square, Palmerston North



HEARING BY COMMISSIONER

Friday 14 May 2021, 9.30am

ORDER OF BUSINESS

Note: All pre-circulated evidence is available for viewing on the Palmerston North City Council website – <https://www.pncc.govt.nz/participate-palmy/council-meetings/hearings/hearing-by-commissioner-objection-to-decision-aokautere-land-holdings-ltd-coc-5787-14-may-2021/>

1. Hearing of an Objection from Aokautere Land Holdings Limited, under section 357a of the RMA in relation to a decision on a section 139 of the RMA application RC COC 5787.

Hearing Procedure Sheet

Page [3]

To consider the following:

(i) Aokautere Land Holdings Limited (Objector)

a) Application for Certificate of Compliance dated 18 September 2020 lodged by Aokautere Land Holdings Limited

Page [7]

b) Letter of Objection from Aokautere Land Holdings Limited, dated 10 November 2020

Page [10]

c) Statement of Les Fugle, Director of Aokautere Land Holdings Limited, dated 7 May 2021

Page [11]

(iii) Palmerston North City Council (Respondent)

Statement of Evidence of Simon Mori (Head of Planning Services) dated 6 May 2021, with Attachments

Page [15]

(iv) Right of Reply of Objector

2. Exclusion of Public

The Commissioner will reserve the right to make the decision with the public excluded.



INFORMATION CONCERNING PROCEDURE FOR A HEARING

This information is for the assistance of persons participating in a hearing.

1. Engagement of Counsel

You can present your own case, but if you wish you can engage legal counsel or any other person to appear on your behalf.

2. Public Hearings

All hearings are public and the media and any member of the public is entitled to be present. The Hearings Committee or Commissioner has the power, however, to make an order to protect sensitive information. (See *paragraph 14 below*).

3. Hearings Committee or Commissioner Conducting the Hearing

The Council has delegated the conduct of the Hearing and the power to make a final decision to the Hearings Committee or a Commissioner. A Commissioner will conduct the Hearing if the Council has an interest in the application or the appointment of a Commissioner has been requested by the Applicant pursuant to section 100A of the Resource Management Act 1991.

4. Agenda

An agenda for the Hearing will be sent to you before the Hearing. The agenda lists generally the order of the day although there may be some variation to this. The agenda will also include pre-circulated evidence. (See *paragraph 6 below*).

5. Attendance of Parties

Unless you have previously sought and been granted an adjournment of the hearing, if you do not or are unable to attend the Hearing, the Hearings Committee or Commissioner may proceed and make decisions in your absence.

6. Preparation of Evidence

Important requirements for the preparation and circulation of reports and evidence are set out in the letter giving you notice of the hearing.

For all reports and evidence that are pre-circulated before the Hearing, the Hearings Committee or Commissioner may decide that the evidence be taken as read or that you may elaborate on principal points. In this case, there would be no need for this evidence read in full. You will not be obliged to elaborate any further unless asked to.



7. Content of Evidence

Parties may elaborate on points they have already raised in their original or further submission.

Where it is considered that there is likely to be excessive repetition, the Chairperson of the Hearings Committee or Commissioner may limit the circumstances in which parties having the same interest may speak or present evidence.

8. Venue for the Hearing

The Hearing will be held at the Palmerston North City Council in the Council Chamber which is situated on the first floor of the Civic Administration Building, 32 Te Marae o Hine - The Square, Palmerston North (unless otherwise stated). Please note that access is via the automatic doors on Te Marae o Hine - The Square side of the roadway where our Customer Service Centre is situated. There are stairs and a lift to the first floor on the right as you enter the building.

9. Evidence

The Hearings Committee or Commissioner may require evidence given at the Hearing to be on Oath or Affirmation. Any pre-circulated evidence may also be required to be sworn whether it is read or taken as read.

If a witness is unable to attend the Hearing, the Hearings Committee or Commissioner has the discretion to accept evidence in the form of an affidavit. An affidavit must be in writing, sworn before a solicitor, Justice of the Peace or other authorised officer, and should also set out the reasons why the witness is unable to attend the Hearing in person.

10. Cross Examination

There is no right of cross-examination. This means that the parties do not have the right to address questions to other parties, or to the Hearings Committee or Commissioner. The Hearings Committee or Commissioner may, however, question any party concerning their submission or evidence.

11. Conduct of the Hearing

At the start of the Hearing the Chairperson of the Hearings Committee or Commissioner will introduce the commissioners, if appropriate, and staff members present and will briefly outline the Hearing procedure.

The following order of appearance will usually apply:

- (i) Objector and witnesses;
- (ii) The Planning Officer for Palmerston North City Council;
- (iii) The Objector, who has a right of reply.



12. Tikanga Maori

Tikanga Maori is recognised where appropriate and the Hearings Committee or Commissioner will receive evidence written or spoken in Maori.

If you wish to speak in Maori at the Hearing, please contact the Democracy & Governance Administrator within seven days of the date you receive the letter notifying you of the Hearing. This is to enable arrangements to be made for a certified interpreter to attend the Hearing, (*Section 4(5) Maori Language Act 1987*)

13. Visual Aids

If you wish to use a data projector, video, whiteboard, pin-up board or a similar aid, please contact the Democracy & Governance Administrator no later than two days before the Hearing so that arrangements can be made.

14. Sensitive Information

The Hearings Committee or Commissioner may make an order to protect sensitive information. The reasons for which such an order can be made, and the consequences, are detailed in Section 42 of the Resource Management Act 1991.

15. Adjournment of the Hearing

The Hearings Committee or Commissioner has the power to adjourn the Hearing.

16. Decision of the Hearing

After the Hearings Committee or Commissioner has heard the evidence and submissions, it will usually declare the Hearing closed and will leave the Council Chamber to consider its decision. All parties will be advised in writing of the decision on the objection and the reasons for the decision.

17. Additional Information

After the Hearings Committee or Commissioner has reserved the decision, further details of information from any party involved in the proceedings may be requested. If this happens, all parties will be circulated with copies of the additional information obtained and will be given the opportunity to comment before the Hearings Committee or Commissioner makes a final decision.

18. Appeals against Council Decision

Any person who has made an objection has a right of appeal to the Environment Court. Such appeal may be against the whole or any part of the decision. The time within which the right of appeal to the Environment Court must be exercised is within 15 working days of notice of the decision being received in accordance with the Resource Management Act 1991.



Because the appeal procedure is more involved than the initial Hearing, it is suggested that parties consult a solicitor if they wish to appeal.

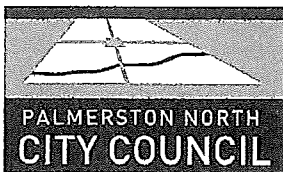
19. Variation of Procedure

The Chairperson of the Hearings Committee or Commissioner may, at his/her sole discretion, vary the procedures set out above if the circumstances indicate that some other procedure would be more appropriate.

20. General

You should not endeavour to contact members of the Hearings Committee or the Commissioner. However a staff member of the Council, on behalf of the Hearings Committee or Commissioner, may contact you to arrange an inspection of any property affected by the application. In this event, do not discuss the case with them.

* * * * *



Application for Certificate of Compliance

Resource Management Act 1991

To: Palmerston North City Council

Aokautere Land Holdings LTD

APPLICANT DETAILS	
Name:	Aokautere Land Holding LTD
Trading As:	A. L. H. L.
Mailing Address:	5 Courts Way Aokautere.
Contact:	Les Fugle fugle@extra.co -NZ
Phone:	021-517311 Fax:

PROJECT LOCATION	
Street Address:	52 Johnstone Dr Aokautere Palmerston North
Legal Description:	
Lot:	Lot 2 D.P. 484516
Section:	

Description of Activity (including No. of staff and hours of operation) :-

Please refer annex
together with email(s) and
plan previously forwarded
to Council C/- Mr Simon Mori

This is an application for
COC to earth build a
platform within Abby gully.

FOR COUNCIL USE

Amount received: _____
Account No.: _____
Receipt No.: _____
Received: _____

NOTE: Attach to this form all information necessary to demonstrate compliance with relevant performance standards of the District Plan(s). Please also attach to this application a detailed 1:100 site plan, which should detail all buildings on the site and their distances from boundaries, carparking, landscaping, elevations of new buildings and a floor plan.

This application for a Certificate of Compliance under Section 139 of the Resource Management Act 1991, is made for the purpose of demonstrating that the proposed use as described above meets the requirements of the Palmerston North City District Plan.

Signed for and on behalf of the Applicant:

Name: Les Fugle

Signature: *[Signature]*

Date: 18/09/20



Aokautere Land Holdings Ltd

Palmerston North City Council
32 The Square
Palmerston North.

Attention – Head of Planning

Application for Certificate of Compliance pursuant to s139 Resource Management Act 1991

1. Aokautere Land Holdings Limited ("Applicant") hereby applies for a Certificate of Compliance that the structuring of an earth platform within what is commonly referred to as Abby Rd gully is Permitted activity pursuant to Council district plan.
2. Documentation together with a plan and dimensions encircling that proposed has been provided to Head of Planning. That information is to be read along with this application.
3. For matter of clarity, the activity, is the construction of a 20 meter by 25 meter earth platform up to 1.5 meter (measure vertically) to be built above the existing ground level within the Abby Rd gully. The outer edges of the earth platform shall not make contact with the gully slopes. The platform is to be used to grow fir (Xmas) trees.
4. The proposed location for the earth platform is cited within the Limited Development zone and as such subject to the District Plan rule 10.7.1.6 together with the Earthworks rule 6.3.6.1
5. The earth spoil for the intended platform is currently stockpiled adjacent to Johnston Drive opposite the WGT school who ask for visual amenity reason the soil be relocated.

R 10.7.1.6 Limited Development in the Aokautere Development Area:

The following are Permitted Activities on any land shown as Limited Development land in the Aokautere Development Area, as shown on Map 10.1, provided they comply with the following Performance Standards:

- i. Landscape works.
- ii. Public reserves or reserves within the meaning of the Reserves Act 1977.
- iii. Drainage and water supply works.

Performance Standards

Stability

- i. *No works associated with any Permitted Activity shall involve the removal of more than 10m³ of soil, except that no works associated with any Permitted Activity shall involve the removal of any soil within those areas along any terrace edge abutting Class VI, VII, or VIII land (as defined on the NWASCO Land Resource Inventory Worksheets).*
- ii. *No works associated with any Permitted Activity shall involve any modification of an existing slope.*
- iii. *Neither (i) or (ii) shall preclude the temporary removal of soil or disturbance of a slope to plant trees or other plants.*

Rule 10.7.1.6 submission:

- 6. The rule does not prohibit reshaping of land within the zone but rather expects such to occur. This reinforced by the phrase "Limited" which arises from Council concern that uncontrolled earth disturbance within the zone could undermine land stability. The rule footnote "Note To Plan Users" further demonstrates need for care as planner's must consider whether application to carry out activity within the zone satisfies the Earthworks provisions of Section 6 of the District Plan.
- 7. It is Applicant position as the activity will not result in the removal of more than 10m³ of soil nor involve any modification of an existing slope, that proposed sits within the Permitted category.

R6.3.6.1 Earthworks are Permitted Activities within the City provided the following performance standards for the relevant zone are met

In the Residential Zone, no earthworks shall:

- i. *Result in the disturbance of more than 500m² of land in any 12 month period, or*
 - ii. *Result in the alteration of the existing ground level by more than 1.5 metres (measured vertically).*
- 8. Applicant purports that proposed is permitted activity pursuant to sub rule (ii) as the existing land will not be altered by more than 1.5 meter (measured vertically).
 - 9. In earlier communication Head of Planning Mr Moir has put forward the Abby gully has been subject to unconsented earthworks a view refuted by Applicant who says if Council is of such mind then invited to instigate remedy action.
 - 10. Notwithstanding aforesaid applicant says the rule language is straightforward. Consideration whether intended earth platform exceeds the permitted earthworks dimension must be measured from "the existing ground level".
 - 11. No consent is required from Manawatu-Wanganui Regional Council as that intended is permitted activity pursuant to One Plan r13.1

Dated 19/09/2020

Les Fugle

fugle@xtra.co.nz

Cell 021-517311



Aokautere Land Holdings Ltd

10 November 2020

Palmerston North City Council
32 The Square
Palmerston North 4410

[1] Pursuant to the RMA 1991 s357 to s358 applicant hereby Objects to Council decision that a resource consent is required.

[2] On 10 November 2020 Council Head of Planning Services release its decision declining applicant's application for a code of compliance to create an earth platform within that commonly referred to as Abby Rd gully.

[3] The core question for the planner consideration was whether that proposed by applicant was permitted without need for resource consent. The planner determining resource consent is required primarily as that proposed is to be undertaken on unconsented earthworks.

[4] The applicant says while denied has carried out unconsented earthworks the relevant baseline is the "existing" status of the site at time of application. The planner was therefore wrong to find consent is necessary.

Les Fugle
On behalf Applicant
fugle@xtra.co.nz

BEFORE THE HEARING COMMISSIONER:

IN THE MATTER OF:
357A

Notice of objection pursuant to section
of the Resource Management Act 1991

BETWEEN:

Aokautere Land Holdings Limited
("Applicant")

AND

Palmerston North City Council – Council
("Respondent")

**Statement of Les Fugle
Director of the Applicant
Dated: 7 May 2021**

Certificate of Compliance

Introduction:

1. I am the director of Aokautere Land Holdings Limited ("ALH")
2. Following an exchange of communication with the Palmerston North City Council ('Council') ALH sought from Council a Certificate of Compliance ("CoC") pursuant to s139 of the Resource Management Act 1991.
3. On 10th of November 2020, Mr Simon Mori wrote, on behalf of Council, declining the application. That letter is attached to Mr Mori statement of evidence dated 6 May 2021.

The law:

4. Section 139(5) of the RMA specifies a Territorial Authority "must" grant CoC if the activity can be done lawfully, without a resource consent and the required fee having been paid.
5. ALH submits the proposed activity is within Council's permitted rule(s) and having paid the required fixed fee a CoC must be issued.

The proposal:

6. To create a earth platform measuring 20 x 25 meters (500m²) and to a height 1.5 meter above the existing land within the Limited Development zoning. The outer edges of the earth platform do not make contact with the surrounding embankment slopes.
7. The platform shall be used to grow trees.

Issues:

8. In determining whether activity sits within Council permitted activity rules Commissioner must consider whether the proposal is outside the governing Earthworks rule 6.3.6.1 and the Limited Development rule 10.7.1.6

Earthworks R6.3.6.1:

9. The proposed earth platform does not exceed the 500m² nor the 1.5meter (measured vertically) permitted threshold pursuant to r6.3.6.1(b)(i) and for reasons outlined hereafter the activity is within the second limb (ii)
10. Mr Mori advances while the platform size is within the permitted rule a consent is still required as the platform shall be position on un-consented fill.
11. Responding to Mr Mori's view: ALH refutes the site contains un-consented earthworks and, in any event, say whether or not there is un-consented earthworks is immaterial because;
 - a) To satisfy the second limb of the rule there must be "no alteration of the existing ground level by more than 1.5 meter (measured vertically)". The rule language is clear in

that measurement is measured from “existing” height and must not exceed 1.5 meter upward in order to be permitted activity. That intended fits within both limb (i) and (ii)

- b) Mr Mori’s position is founded on having substituted the rule word “existing” with “previous” in order to account for un-consented work. Not only is un-consented work denied but there is no scope to rewrite a rule ahead of formal process.
- c) Mr Mori has raised the site previous history: RM2466 was a consent granted by Council to earth-fill the entire gully albeit project ceased midstream as consent had expired. The situation becomes if no consent alive control of the land is governed by the territory authority’s district plan i.e. r6.3.6.1 allowing the activity if within the rule performance standards
- d) Mr Mori points to Mr Pirie’s evidence during LU4085 hearing that earthworks were undertaken on the site after RM2466 became stale. While that statement is correct Mr Pirie’s comment has been taken out of context. Mr Pier was simply confirming earth had been placed in the gully not whether or not that placement exceeded the permitted quantum.

Limited Development zoning 10.7.1.6:

- 12. It is important to understand the purpose behind the rule. The intent of the zoning is to give Council control over land within the zoning to ensure an activity is not carried out in a manner that could undermine the gully slope(s) stability as if disturbance were undertaken that could expose neighbouring land to subsidence. Plainly, earth filling of the gully removes aforesaid risk. As alluded above Council had granted consent to earth fill the gully and, prior to RM2466 the head of the gully had been filled with housing now built upon.
- 13. It is for above stability reason that Council has set performance standards that no modification of an existing slope may occur without consent. ALH activity does not require modification of any “existing” slope.
- 14. Mr Mori acknowledges within his last paragraph on page 3 of his decision that the earth platform is “landscape earthworks” and the work is a permitted activity providing the performance standards of the rule are met. Thereafter on page 4 Mr Mori addresses why AHL application does not satisfy the rule performance standards.
- 15. At (i) Mr Mori says application does not explicitly state whether construction of the platform shall involve removal of soil. That point would only require addressing had removal of spoil being intended while noting the rule permits removal of 10m³ of spoil. This latter point acknowledges while protection of the slopes is necessary a degree of slope disturbance may occur as of right
- 16. At (i) Mr Mori questions what constitutes a slope and addresses that issue at section 5 albeit the report contains no such section. Given application clearly states the platform will not extend to the gully embankments/slopes Mr Mori must be calling the surface beneath the platform a slope. If so, application points out the land is flat i.e., cross fall between the gully embankments is horizontal, further, bearing in mind the intent of the rule and, platform is to be built on existing cross fall/slope the activity does not breach the rule performance standards.

17. Mr Mori point (iii) is somewhat confusing but appears to accept performance standard (iii) is to allow trees to be planted in the situations of temporary removal of spoil but then says the rule does not allow planting of trees on the platform. ALH says it makes no logical sense not to allow tree planting on the platform yet allow on the slope(s). In any event the sub clause is irrelevant as that applies to a situation where planting is carried out on a slope.
18. ALH says Mr Mori has read more into the rules than rules state. It is furthermore noted Council has issued a RMA 1991 Notice of Requirement wanting to construct a road between Abby Rd and Johnstone Dr and in doing so requires filling of the gully. This in turns involves modification of the gully slopes.
19. In conclusion: ALH says its earth platform is permitted activity pursuant to Council's district plan rules therefore a CoC must be granted.

Dated: 7 May 2021

BEFORE THE HEARINGS COMMISSIONER – PALMERSTON NORTH CITY COUNCIL

IN THE MATTER

Of a notice of objection under section 357A of the
Resource Management Act 1991

AND

IN THE MATTER

An objection to the decision for a Certificate of
Compliance application **CoC 5787** at 52 Johnstone
Drive, Palmerston North.

BY

Mr Les Fugle on behalf of Aokautere Land Holdings Ltd
(ALHL)

STATEMENT OF EVIDENCE OF
SIMON MORI (HEAD OF PLANNING SERVICES)

Dated: 6 May 2021

1 INTRODUCTION

- 1.2 My name is Simon Mori and I am the Head of Planning Services at the Palmerston North City Council ("**PNCC**").
- 1.3 This statement of evidence is intended to assist the Commissioner in deciding on Aokautere Land Holdings Limited's ("**ALHL**") objection to the decision to decline CoC 5787. The objection has been made under section 357A the Resource Management Act 1991 ("**RMA**").

2 BACKGROUND

- 2.2 On 10 November 2020, **PNCC** issued a "decline" decision on a certificate of compliance application made by **ALHL**. A copy of this decision is at Appendix A.
- 2.3 The proposal is for an earth platform measuring 20 by 25 metres in area and up to 1.5 metres vertically. The earth platform is to be used to grow fir trees. The outer edges of the earth platform were described as not making contact with the gully slopes. A copy of the documents making up the application at Appendix B.

3 STATUTORY FRAMEWORK

- 3.1 Section 357A(1)(a)(iv) provides a right of objection to a consent authority in respect of a decision made by the consent authority concerning an application for a certificate of compliance under section 139 of the **RMA**.

4 THE OBJECTION

- 4.1 On 10 November 2020, **PNCC** received an objection to the Certificate of compliance decision from Les Fugle on behalf of the applicant, **ALHL**. The objection says that **ALHL** denies that it carried out unconsented earthworks and that the relevant baseline is the existing status of the site at the time of the application. Mr Fugle considers that planner was therefore wrong to find a consent is necessary. A copy of the objection is at Appendix C.

5 CONSIDERATION

- 5.1 **ALHL** has not made a submission for this hearing in support of their objection, or explained the objection in further detail. In the absence of any submissions from which to respond, I rely on the reasons from the 10 November 2021 decision for this statement of evidence.
- 5.2 **PNCC**'s 10 November decision to decline **ALHL**'s application sets out the reasons why the application was declined, which are summarised as follows:
- (i) The proposed earthworks are to be carried out on unconsented earthworks which requires a retrospective consent to make lawful. Accordingly, the

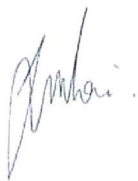
proposed activity cannot be lawfully done without resource consent (section 139(3) RMA).

- (ii) The unconsented earthworks were considered in ALHL's land use consent application (**LU4085**) to fill the gully, which was declined by the hearings commissioner. The LU4085 decision records evidence given by Mr Pirie for ALHL at the hearing that earthworks were undertaken in 2016 after RM2466 had lapsed in 2012. The LU4085 decision recording that "further unconsented works were undertaken on the gully in December 2016 – February 2017." A copy of LU4085 is at Appendix D.
- (iii) Aerial photographs of the subject site also depict earthworks having been undertaken, corroborating the evidence given by Mr Pirie. A copy of the aerial photographs is at Appendix E.
- (iv) If the above reason is incorrect and the current gully floor does set the existing ground level and existing slope for the purposes of applying R10.7.1.6 Performance Standard (ii) and R6.3.6.1(b)(ii), the proposed activity will involve modification of an existing slope under R10.7.1.6 Performance Standard (ii).

5.2 In relation to (iv) above, the 'existing slope' of the gully includes the sides of the gully as well as the gully floor. Placing an earth bund 1.5m in height on the gully floor will modify the slope of the gully floor and thus trigger a resource consent via non-compliance with R 10.7.1.6 performance standard (a) (ii).

6. RECOMMENDATION

For the reasons detailed in the decision dated 10 November 2020 I recommend that the objection be dismissed.



Simon Mori
HEAD OF PLANNING SERVICES
PALMERSTON NORTH CITY COUNCIL

10 November 2020

Attention: Les Fugle

RC CoC 5787

Email: fugle@xtra.co.nz

NOTICE OF DECISION – CERTIFICATE OF COMPLIANCE

Application Details:

LOCATION:	52 JOHNSTONE DRIVE, AOKAUTERE, PALMERSTON NORTH
THE APPLICANT:	AOKAUTERE LAND HOLDINGS LIMITED
ZONING:	RESIDENTIAL WITHIN LIMITED DEVELOPMENT LAND IN THE AOKAUTERE DEVELOPMENT AREA
PROPOSAL:	EARTH PLATFORM IN THE ABBY ROAD GULLY

1. BACKGROUND

On 18 September 2020, Aokautere Land Holdings Limited (**ALHL**) applied for a certificate of compliance under section 139 of the Resource Management Act 1991 (**RMA**) to construct an earth platform within the Abby Road Gully (**the Application**).

On 25 September 2020, Simon Mori requested further information from ALHL pursuant to s 139(4) RMA because there was insufficient information Application to assess the proposed activity against the relevant rules. One of the deficiencies being reference to plans previously submitted to Mr Mori, which contained different dimensions in the Application and did not provide a clear depiction of the intended platform. The Council sought a proper site plan to clearly show the location of the platform within the gully, a cross section of the platform showing the existing slope, heights and area of the earth platform.

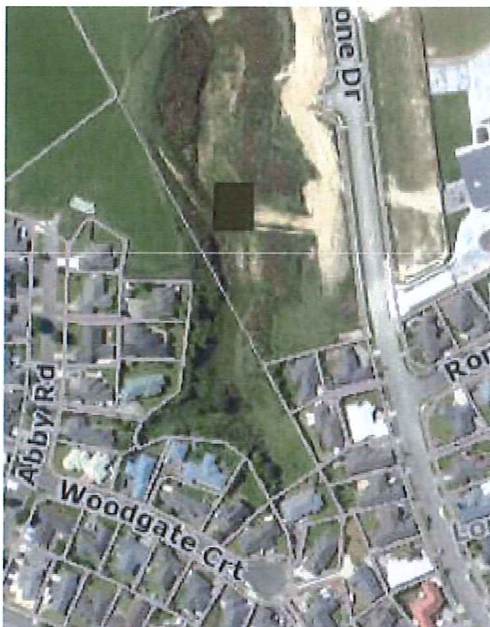
On 8 October 2020, a topographic survey plan was submitted to Council with further comments on R 10.7.1.6 and R 6.3.6.1.

2. DECISION REPORT

Site Description

The subject site is 52 Johnstone Drive, Aokautere, Palmerston North legally described in the records of title Lot 2 DP 484516, Lot 694 DP 500578, Lot 695 DP 509873 and Lot 1102 DP 519561.¹

The subject site for the earthwork platform is a gully running parallel to Johnston Drive known as the Abby Road Gully. The site is zoned residential and is subject to specific District Plan provisions for Limited Development Land in the Aokautere Development Area.



Location of proposed Earth Platform

The subject site is the location of previously unconsented earthworks. A brief summary of the subject site is as follows:

- On 17 April 2007, resource consent (**RM2466**) was granted to Pacific Farms Ltd to subdivide land and carry out earthworks, which included the filling of the Abby Road Gully.
- Between 2007 and 2008 earthworks were undertaken in the gully under the authority of RM2466. The earthworks were partially completed with the gully being partly filled, but RM2466 was not fully implemented.
- On 30 March 2012, an application to extend the lapse date of RM2466 was sought and declined. The applicant objected and the matter went to a hearing. During the hearing the applicant withdrew the application to extend the application.
- Following lapse of RM2466, earthworks occurred in Abby Road Gully without resource consent.

¹ The Application refers only to Lot 2 DP 484516. However, the other records of title listed are included in the rates parcel for 52 Johnstone Drive, to which the Application refers.

- On 22 January 2016 an interim enforcement order was granted by the Environment Court preventing further earthworks on the land: *Palmerston North City Council v Fugle* [2016] NZEnvC 10.

Application and Proposal

The proposal is for an earth platform measuring 20 by 25 metres in area and up to 1.5 metres vertically. The earth platform is to be used to grow fir trees. The outer edges of the earth platform were described as not making contact with the gully slopes.

District Plan Rules

The Application contains an assessment of relevant rules within the District Plan, specifically R 10.7.1.6 and R 6.3.6.1. In order to be a permitted under the District Plan the activity must comply with both R 10.7.1.6 and R 6.3.6.1. These rules are included in full:

R 10.7.1.6 Limited Development in the Aokautere Development Area:

The following are Permitted Activities on any land shown as Limited Development land in the Aokautere Development Area, as shown on Map 10.1, provided they comply with the following Performance Standards:

- i. Landscape works.
- ii. Public reserves or reserves within the meaning of the Reserves Act 1977.
- iii. Drainage and water supply works.

Performance Standards

Stability

- i. No works associated with any Permitted Activity shall involve the removal of more than 10m³ of soil, except that no works associated with any Permitted Activity shall involve the removal of any soil within those areas along any terrace edge abutting Class VI, VII, or VIII land (as defined on the NWASCO Land Resource Inventory Worksheets).
- ii. No works associated with any Permitted Activity shall involve any modification of an existing slope.
- iii. Neither (i) or (ii) shall preclude the temporary removal of soil or disturbance of a slope to plant trees or other plants.

The proposed construction of the earthwork platform is 'landscape earthworks' within the meaning of R 10.7.1.6(i). It is a permitted activity provided the performance standards of R 10.7.1.6 and the totality of R 6.3.6.1 are met.

R 10.7.1.6 Performance Standards:

- (i) The Application does not explicitly state whether construction of the earthworks platform shall involve removal of soil, whether permanent or temporary;
- (ii) The Application states that the earth platform will sit on the 'existing' flat surface of the Abby Road Gully and will not extend to or make contact with any edge of the gully slope. What constitutes the existing slope and floor of the Abby Road Gully is addressed at section 5 below;
- (iii) Performance Standard (iii) operates as an exception to performance standards (i) and (ii). If a person temporarily removes soil or disturbs a slope to plant trees or other plants then performance standards (i) and (ii) do not preclude that from occurring.

Although the Application states that the purpose of the earth platform is for growing fir trees, the Council does not consider that performance standard (iii) operates as an exception to performance standards (i) and (ii) on this application.

The purpose of performance standard (iii) is to permit the planting of trees and other plants that may result in temporary removal of soil or disturbance of a slope as a natural occurrence of the predominant purpose, being the planting. It is not an exception allowing landscape works to occur upon which trees will then be planted. For example, the planting of trees or other plants set not on the earthworks platform but on the slope or gully floor would fall within the exception in performance standard (iii).

The proposed landscape works must therefore comply with performance standards (i) and (ii), which is considered at section 4 below.

R6.3.6.1 Earthworks are Permitted Activities within the City provided the following performance standards for the relevant zone are met

(b) In the Residential Zone, no earthworks shall:

- i. *Result in the disturbance of more than 500m² of land in any 12 month period, or*
- ii. *Result in the alteration of the existing ground level by more than 1.5 metres (measured vertically).*

R 6.3.6.1(b):

- (i) The proposed earthworks platform of 20x25m is within the 500m² permitted by R 6.3.6.1(i).
- (ii) The Application states that the "existing land will not be altered by more than 1.5 meter [sic] (measured vertically)". Whether this is the case depends on what constitutes the 'existing land'. This question is addressed at section 4 below.

3. Section 139 Assessment

Section 139 applies to activities that "could lawfully be done in a particular location without consent". This includes activities permitted by the plan and activities that can lawfully be carried out without resource consent. It enables a person to apply to the consent authority to issue certificate of compliance, which must be issued on request "when the activity can be done lawfully in the particular location without a resource consent" and the appropriate administrative charge is paid.

Conversely, the consent authority must not issue a certificate if "the activity could not be done lawfully in the particular location without a resource consent under the proposed plan" and the request is made after a proposed plan is notified. There are no applicable notified proposed plans so this is not at issue.

Therefore, the primary question is whether the construction of the earth platform in the Abby Road Gully can be lawfully done without resource consent.

4. Decision and Discussion

ALHL's application for a certificate of compliance to construct an earthworks platform in Abby Road Gully for the purpose of planting fir trees is **declined** pursuant to s 139(8)(b), for the following reasons.

What is the existing land (R6.3.6.1) and existing slopes (R10.7.1.6) from which the proposed activity can be assessed?

As stated at section 2 above, the subject site is located on unconsented earthworks. Earthworks which altered the contours of the Abby Road Gully. The unconsented earthworks were considered in ALHL's land use consent application (**LU4085**) to fill the gully, which was declined by the hearings commissioner. The LU4085 decision records evidence given by Mr Pirie for ALHL at the hearing that earthworks were undertaken in 2016 after RM2466 had lapsed in 2012. The LU4085 decision records that "further unconsented works were undertaken on the gully in December 2016 – February 2017." Aerial photographs of the subject site also depict earthworks having been undertaken, corroborating the evidence given by Mr Pirie.

The issue is whether the Council is required to disregard the unconsented earthworks for determining this certificate of compliance. If Council disregards the unconsented earthworks by treating them as part of the existing environment the unconsented earthworks set the existing ground level and slope upon which the proposed activity is to occur.

On this point, the Council assesses that the existing environment includes what lawfully exists on the site.² There is no presumption that an existing but unlawful activity has some

² *Schofield v Auckland Council* [2012] NZEnvC 68; *New Zealand Kennel Club Inc v Papakura DC* W100/2005; *Maskill v Palmerston North City Council* W037/2006.

form of existing use advantage. Where an application is reliant on an existing unlawful activity the proposal must be assessed as if it is a greenfields proposal.³

The unlawful earthworks do not form part of the permitted baseline or existing onsite environment, which apply to lawfully existing activities.⁴

Can the proposed construction of the earth platform be lawfully done without resource consent?

The question is whether the proposed activity can be lawfully done without resource consent. The Council's conclusion is that it cannot. The proposal is to occur on unconsented earthworks, which require retrospective resource consent to make lawful. The unconsented works do not lawfully exist on the subject site. The proposed activity cannot, therefore, be done in the location proposed without first obtaining the retrospective consent or removing the unlawful earthworks.

Further, the unconsented earthworks cannot be considered as providing the baseline or existing land or slope. The Council cannot disregard the unconsented earthworks and cannot, therefore, conclude that the proposed activity is permitted in order to determine this certificate of compliance.

Information provided with the application

A certificate of compliance is deemed to be a resource consent. Accordingly the issue of a certificate must meet the strictures of s139. It must describe the activity and the location with sufficient particularity. To do so, the Council must be provided with adequate information about the extent of the activity in order to issue certificate of compliance.

Without retrospective resource consent to legally establish an existing environment the Council, on this particular application, cannot assess whether the proposed activity is or is not compliant with R 10.7.1.6 Performance Standard (ii) and R 6.3.6.1 (b) (ii).

To put it another way, the Application does not correctly identify the lawfully established ground level or existing slope for the purposes of applying R 10.7.1.6 Performance Standard (ii) and R 6.3.6.1 (b) (ii).

The Applicant must either obtain retrospective consent for the unlawful earthworks or fix the unlawful earthworks so that a precise and adequate assessment of the activity against the District Plan rules can be made.

However, as it exists presently, the Application must be declined pursuant to section 139(8)(b).

Alternative

If the above decision and discussion is incorrect and the current gully floor does set the existing ground level and existing slope for the purposes of applying R 10.7.1.6

³ *Maskill v Palmerston North City Council* W037/2006.

⁴ *Schofield v Auckland Council* [2012] NZEnvC 68.

Performance Standard (ii) and R 6.3.6.1(b)(ii), the proposed activity will involve modification of an existing slope under R 10.7.1.6 Performance Standard (ii).

As discussed at section 2, the exception in R 10.7.1.6 Performance Standard (iii) does not apply to the proposed activity. Rule 10.7.1.6 performance standards (i) and (ii) must therefore be met. Performance standard (ii) prevents modification of an 'existing slope'. Council considers that the existing slope would include the Abby Road Gully floor, which would be modified by the earth platform. Consent would therefore be required under R10.7.1.6.



Dated: 10 November 2020

Simon Mori

Head of Planning Services

Palmerston North City Council

Advice Notes:

1. Rights of objection to the decision above may be exercised by the applicant pursuant to sections 357A, 357AB and 357C to 358 of the RMA. Any objection must be made in writing, setting out the reasons for the objection within 15 working days of being notified of this decision or within such extended period as the Council in any special case may allow.

Appendix B



Application for Certificate of Compliance

Resource Management Act 1991

To: Palmerston North City Council

Aokautere Land Holdings Ltd

APPLICANT DETAILS	
Name:	Aokautere Land Holdings Ltd
Trading As:	A.L.H.L
Mailing Address:	5 Courts Way Aokautere.
Contact:	Les Fugle fuggle@extra.co.nz
Phone:	021-517311 Fax:

PROJECT LOCATION	
Street Address:	52 Johnstone Dr Aokautere Palmerston North
Legal Description:	
Lot:	Lot 2 D.P. 484516
Section:	

Description of Activity (including No. of staff and hours of operation) :-

Please refer annex together with email(s) and plan previously forwarded to Council C/- Mr Simon Mori

This is an application for CoC to earth build a platform within Abby gully.

FOR COUNCIL USE

Amount received: _____
Account No.: _____
Receipt No.: _____
Received: _____

NOTE: Attach to this form all information necessary to demonstrate compliance with relevant performance standards of the District Plan(s). Please also attach to this application a detailed 1:100 site plan, which should detail all buildings on the site and their distances from boundaries, carparking, landscaping, elevations of new buildings and a floor plan.

This application for a Certificate of Compliance under Section 139 of the Resource Management Act 1991, is made for the purpose of demonstrating that the proposed use as described above meets the requirements of the Palmerston North City District Plan.

Signed for and on behalf of the Applicant:

Name: Les Fugle

Signature: *[Signature]* Date: 18/09/20



Aokautere Land Holdings Ltd

Palmerston North City Council
32 The Square
Palmerston North.

Attention – Head of Planning

Application for Certificate of Compliance pursuant to s139 Resource Management Act 1991

1. Aokautere Land Holdings Limited ("Applicant") hereby applies for a Certificate of Compliance that the structuring of an earth platform within what is commonly referred to as Abby Rd gully is Permitted activity pursuant to Council district plan.
2. Documentation together with a plan and dimensions encircling that proposed has been provided to Head of Planning. That information is to be read along with this application.
3. For matter of clarity, the activity, is the construction of a 20 meter by 25 meter earth platform up to 1.5 meter (measure vertically) to be built above the existing ground level within the Abby Rd gully. The outer edges of the earth platform shall not make contact with the gully slopes. The platform is to be used to grow fir (Xmas) trees.
4. The proposed location for the earth platform is cited within the Limited Development zone and as such subject to the District Plan rule 10.7.1.6 together with the Earthworks rule 6.3.6.1
5. The earth spoil for the intended platform is currently stockpiled adjacent to Johnston Drive opposite the WGT school who ask for visual amenity reason the soil be relocated.

R 10.7.1.6 Limited Development in the Aokautere Development Area:

The following are Permitted Activities on any land shown as Limited Development land in the Aokautere Development Area, as shown on Map 10.1, provided they comply with the following Performance Standards:

- i. Landscape works.
- ii. Public reserves or reserves within the meaning of the Reserves Act 1977.
- iii. Drainage and water supply works.

Performance Standards

Stability

- i. *No works associated with any Permitted Activity shall involve the removal of more than 10m³ of soil, except that no works associated with any Permitted Activity shall involve the removal of any soil within those areas along any terrace edge abutting Class VI, VII, or VIII land (as defined on the NWASCO Land Resource Inventory Worksheets).*
- ii. *No works associated with any Permitted Activity shall involve any modification of an existing slope.*
- iii. *Neither (i) or (ii) shall preclude the temporary removal of soil or disturbance of a slope to plant trees or other plants.*

Rule 10.7.1.6 submission:

- 6. The rule does not prohibit reshaping of land within the zone but rather expects such to occur. This reinforced by the phrase "Limited" which arises from Council concern that uncontrolled earth disturbance within the zone could undermine land stability. The rule footnote "Note To Plan Users" further demonstrates need for care as planner's must consider whether application to carry out activity within the zone satisfies the Earthworks provisions of Section 6 of the District Plan.
- 7. It is Applicant position as the activity will not result in the removal of more than 10m³ of soil nor involve any modification of an existing slope, that proposed sits within the Permitted category.

R6.3.6.1 Earthworks are Permitted Activities within the City provided the following performance standards for the relevant zone are met

In the Residential Zone, no earthworks shall:

- i. *Result in the disturbance of more than 500m² of land in any 12 month period, or*
 - ii. *Result in the alteration of the existing ground level by more than 1.5 metres (measured vertically).*
- 8. Applicant purports that proposed is permitted activity pursuant to sub rule (ii) as the existing land will not be altered by more than 1.5 meter (measured vertically).
 - 9. In earlier communication Head of Planning Mr Moir has put forward the Abby gully has been subject to unconsented earthworks a view refuted by Applicant who says if Council is of such mind then invited to instigate remedy action.
 - 10. Notwithstanding aforesaid applicant says the rule language is straightforward. Consideration whether intended earth platform exceeds the permitted earthworks dimension must be measured from "the existing ground level".
 - 11. No consent is required from Manawatu-Wanganui Regional Council as that intended is permitted activity pursuant to One Plan r13.1

Dated 19/09/2020
 Les Fugle
fugle@xtra.co.nz
 Cell 021-517311

25 September 2020

Oasis 14671202

Mr Les Fugle
Palmerston North

By email:

fugle@xtra.co.nz

**RE: LU 5787 – Certificate of compliance application for an Earth platform in the Abby Rd Gully,
Palmerston North**

Dear Mr Fugle

Council requires further information under s 139(4) of the Resource Management Act 1991 to determine whether Aokautere Land Holdings Limited's request for issue of a certificate of compliance should be granted.

On review of the application, Council does not consider that there is sufficient information in the application to determine whether the activity could be done lawfully without resource consent, for the following reasons:

1. Insufficient information to assess the proposed activity against the relevant rules:

The activity is described as the construction of a 20 metre by 25 metre earth platform up to 1.5 metres in height, measured vertically, for the purpose of growing fir trees. It states that the outer edges of the platform will not make contact with the gully slopes.

The application simply refers to plans previously submitted to Simon Mori. The plan previously submitted to Simon Mori is an aerial photograph of a 17m by 30m rectangle without a clear depiction of the intended platform.

The Council considers that the information submitted alongside the application is insufficient to determine whether the proposed activity is compliant with the relevant rules. To determine whether the activity is a permitted activity, the Council would require a proper site plan clearly showing the location of the platform within the gully. A cross section of the platform showing the existing slope, heights and area would also be required.

The application states that the platform is to be used to grow fir trees. There is no assessment of this activity against the relevant rules, for example whether it is landscape works. The application must consider all activities against the relevant rules and explain why a resource consent is not needed, which, in this case, requires consideration of whether the growing of fir trees within the Abby Road gully is permitted.

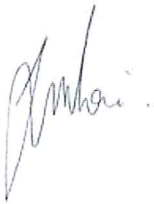
2. General comment on the slope of the gully

The application states that the outside of the platform will not make contact with the gully slopes. Firstly, there is insufficient detail in the application and the plans submitted to assess whether this is the case. A plan showing the contours of the gully as affected (or not affected as may be the case be) by the platform is required.

Secondly, as a general comment, consideration ought to be given to the effect of the platform on the slopes of the gully. Rule 10.7.1.6 states that *"no works associated with any Permitted Activity shall involve modification of an existing slope."* Without having seen detailed plans on the proposal Council does not make a final decision on this point, but the preliminary interpretation is that a 'slope' could include any surface of the gully, including the physical gully floor. Therefore, earthworks that change the slope of the physical surface would engage R 10.7.1.6 and would thus require resource consent.

Clause 5 of the application states that the earth spoil for the platform is currently stockpiled adjacent to Johnstone Drive and the WGT school want the stockpile moved for visual amenity reasons. I draw your attention to land-use consent 4400 (conditions attached). This consent allowed for a stockpile to be located within stage D of 6F7 (see attached plan). I invite you to consider moving the earth spoil intended for the Abby Road gully to this location as LU 4400 allows this without further consent.

Regards,

A handwritten signature in dark ink, appearing to read 'Simon Mori', with a stylized, cursive script.

Simon Mori

**Head of Planning Services
Palmerston North City Council**

Simon Mori

From: Les Fugle <fugle@xtra.co.nz>
Sent: Thursday, 8 October 2020 9:44 AM
To: Simon Mori
Subject: Abby Road LU 5787
Attachments: 2043-204.pdf

Follow Up Flag: Follow up
Due By: Monday, 12 October 2020 2:00 PM
Flag Status: Flagged

Re: your letter dated 25/09/2020 requesting further information:

Please find enclosed topography survey plan.

No assessment measured against the Earthworks rule is necessary as the activity is within the threshold of R6.3.6.1(b) – permitted.

The activity can cause no modification nor effect on the existing slope(s) of the gully as the proposed platform sits entirely upon “existing” earth flat surface and, activity does not extent to any edge of the gully slope.

You have suggested the gully slope “could include the physical gully floor”. I submit would be ridiculous to describe the gully floor, status it is, as a slope. To support view, Tokin & Taylor who were commissioned in 2005 to report on land stability within Aokautere describing land with slope angle of 20 degree or less as class A land, suitable for building.

The activity sits within the Performance standards R10.7.1.6

Should any matter not be addressed then please do not hesitate to contact the writer for further information.

Regards

Les

From: Phil Pirie <phil@pirieconsultants.co.nz>
Date: 8 October 2020 at 9:28:10 AM NZDT
To: fugle@xtra.co.nz
Subject: Abby Road



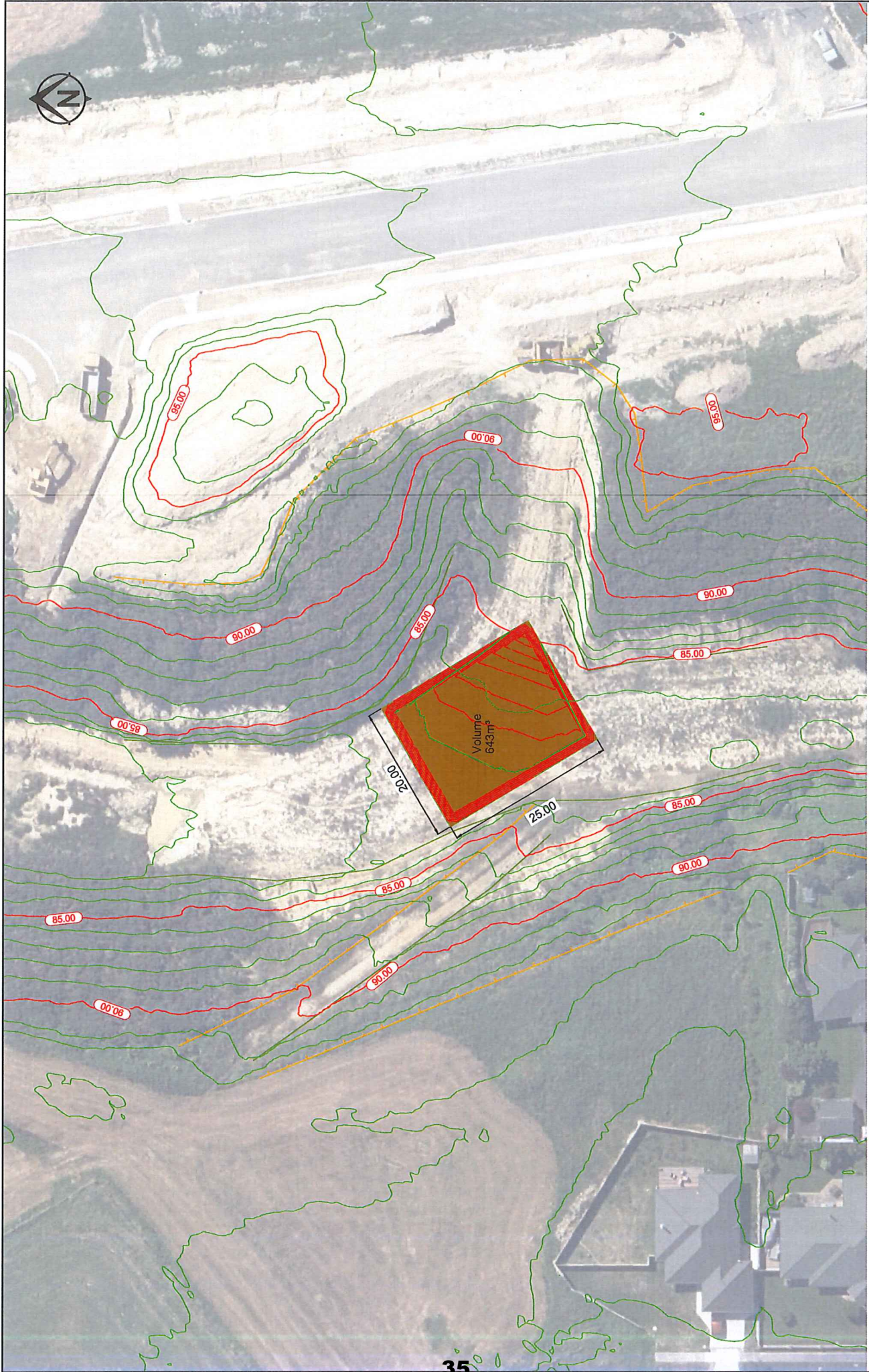
168 Grey Street, Box 10050, Palmerston North
Phone 06 357 5383, 0800 WE SURVEY (0800 93 78 78), Fax 06 354 0340
www.pirieconsultants.co.nz

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Attention:

The information on this email is confidential and may be legally privileged. It is intended solely for the addressee. Access to this email by anyone else is unauthorised. If you are not the intended recipient, any disclosure, coping, distribution or any action taken or omitted to be taken in reliance on it, is strictly prohibited and may be unlawful. When addressed to our clients any opinions or advice contained in this email are subject to the terms and conditions expressed in the client engagement letter.

#####



Date: **OCTOBER 2020**
 Scale (@ A3 size) **1:500**
 Job No. **2043-204**
 Sheet 1 of 1 Rev-

SITE PLAN FOR **ALHL**

JOHNSTONE DRIVE
PALMERSTON NORTH

This plan may only be reproduced in full without the written consent of PIRE CONSULTANTS LTD. The Contractor must verify all dimensions on the job before commencing work.

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Aokautere Land Holdings Ltd

10 November 2020

Palmerston North City Council
32 The Square
Palmerston North 4410

[1] Pursuant to the RMA 1991 s357 to s358 applicant hereby Objects to Council decision that a resource consent is required.

[2] On 10 November 2020 Council Head of Planning Services release its decision declining applicant's application for a code of compliance to create an earth platform within that commonly referred to as Abby Rd gully.

[3] The core question for the planner consideration was whether that proposed by applicant was permitted without need for resource consent. The planner determining resource consent is required primarily as that proposed is to be undertaken on unconsented earthworks.

[4] The applicant says while denied has carried out unconsented earthworks the relevant baseline is the "existing" status of the site at time of application. The planner was therefore wrong to find consent is necessary.

Les Fugle
On behalf Applicant
fugle@xtra.co.nz

Appendix D

DECISION OF HEARING COMMISSIONER UNDER THE RESOURCE MANAGEMENT ACT 1991

Proposal:

Consent is sought to undertake earthworks to develop land at Johnstone Drive, and to fill a gully at Abby Road, Palmerston North.

This resource consent application is **DECLINED**. The reasons for this decision are set out below.

Application Number:	LU 4085
Site Address:	Abby Road and Johnstone Drive, Palmerston North
Legal Description:	Lot 2 DP 484516; Lot 1004 DP 490091; Lot 694 DP 500578
Applicant:	Aokautere Land Holdings Limited
Hearing Commenced:	2 May 2018
Hearing Panel:	Angela Jones
Appearances:	<p><u>For the Applicant:</u> Philip Pirie- Surveyor Angela McArthur- Landscape Architect Kaleb Houlihan-Fugle - Aokautere Land Holdings Ltd Gregor Woollaston - Legal Counsel</p> <p><u>For Council:</u> Andrew Sowersby- Reporting Planner John Hudson- Landscape Architect Hamish Peters- Geotechnical Engineer Nicholas Jessen - Legal Counsel</p> <p><u>Submitters:</u> Jenny Parry Mr & Mrs Astle Peter & Alison White Ann Ainscough Lynne & Tony Bishop Bo Yu Hu Jim & Marie Henderson George & Sharon Campbell</p>
Hearing Adjourned:	3 May 2018
Commissioners' Site Visit:	3 May 2018
Hearing Closed:	9 May 2018 (via Commissioner Minute #2 dated 10 May)

Summary of Decision

1. I, the Independent Resource Consents Hearing Commissioner, acting under delegated authority from the Palmerston North City Council ("the Council"), pursuant to section 104D of the Resource Management Act 1991 ("the RMA"), and under the provisions of the Palmerston North District Plan ("District Plan"), decline resource consent for the reasons outlined in this decision report.

Appointment

2. I, Angela Jones, an independent hearing commissioner was appointed by the Palmerston North City Council in terms of s34A of the RMA to hear the Applicant, Submitters, and the Reporting Officer for the Council, and to make a decision on the application.

Time Period for Decision

3. At the close of the hearing (via Commissioner Minute #2) it was stated that it was anticipated that the 15 working days to release the decision would be met as required by the Act.

Proposal

4. Aokautere Land Holdings Limited ("the applicant") lodged a resource consent application with the Palmerston North City Council (received 20 July 2017) to undertake earthworks to develop the land at Johnstone Drive, and to fill in a gully at Abby Road, Palmerston North.
5. The proposal involves two interrelated elements, being cutting and filling earthworks as described below:
 - Cutting- approximately 34,200m³ of earthworks at Johnstone Drive to create a formed road linking two ends of Johnstone Drive, which are already formed; and earthworks either side of the road to contour the land for a future residential subdivision, resulting in a lowered ground level.
 - Filling- depositing approximately 54,000m³ of soil excavated from the Johnstone Drive cutting works and from stockpiles, into a gully at the terminating point of Abby Road (adjacent to the Manga o Tane Reserve), to fill the gully up to a level that is consistent with the adjoining residential properties at the top of the gully.

Site and Locality

6. The site is located south-east of Palmerston North City, in an area known as Aokautere. The land in the surrounding area largely consists of built residential development, up to the current extent of the formed roads. The land beyond these roads, is undeveloped or is in the process of being developed

for residential use. The site where the cut and fill works are proposed is in an area that is largely undeveloped and adjoins existing residential properties.

7. In the area of Johnstone Drive, where cutting works are to be undertaken, some earthworks have previously been undertaken with some soil stockpiled.
8. The Abby Road gully is currently undeveloped in rough pasture and some scrub and gorse, with a small area of previous fill earthworks being undertaken at the base of the gully. The current head of the gully is adjacent to existing residential development on Abby Road, Woodgate Court and Johnstone Drive.
9. The northern half of the Abby Road gully is a Council owned reserve known as Manga o Tane reserve, which contains a small pond and extensive native tree plantings. This reserve is accessible to the public, but there are no formed access tracks.

Background

10. There is an extensive history, which includes many consent applications and consents, for development within the wider Aokautere area. Some of this background is outlined in the evidence of Mr Houlihan-Fugle and Mr Pirie, as well as in the legal submission of Mr Jessen. This background provides a useful 'backdrop' to this application although the current application has been considered on its own merits. Notwithstanding this, the most notable of this consenting history, that has direct relevance to this application, is resource consent (RM 2466) granted in 2007 for earthworks to fill the subject gully. This consent lapsed in 2012 with a s125 a time extension application being unsuccessful. Prior to this consent lapsing, some fill material was deposited into the gully, however the consent lapsed prior to the consent being given effect to. Further unconsented works were undertaken on the gully in December 2016-February 2017. This background is discussed in more detail in the statement of evidence of Mr Pirie and legal submission of Mr Jessen.
11. By way of background to the District Plan framework applying to the application area, the site is zoned Residential and is within the Aokautere Development Area overlay. The Plan Change that created the Aokautere Development Area became operative around 1996 and paved the way for former farmland to be used for greenfield residential development. The Aokautere Development Area is defined on Planning Map 10.1 under Chapter 10 of the District Plan. The map identifies a number of areas that are subject to the "Limited Developable Land" overlay, which indicates that the land is likely to be subject to land instability hazards, due to the natural contour. The District Plan includes rules that control subdivision, earthworks and development within these identified Limited Developable Areas to ensure that appropriate engineering investigations and landscape considerations are taken into account.
12. Resource Consents have been granted by Horizons Regional Council to undertake the proposed earthworks (Consent Number 106967 and 2016200681.00). These consents cover the same extent of work as proposed by this application. Conditions of consent relate to erosion and sediment control; seasonal timing of works; monitoring during construction; and certificate of as-built sediment controls.

Activity Status

13. The site is located within the Aokautere Development Area, where it is zoned Residential, and the part of the site which is identified as Abby Road gully, is subject to the Limited Developable Land overlay.
14. The section 42A report completed by Mr Sowersby, considers the application to be a Non-Complying Activity for the reasons outlined below.
15. Rule 6.3.6.1 provides for earthworks within the Residential Zone as a permitted activity subject to compliance with the performance conditions set out under 6.3.6.1 (b) and (e). These performance conditions state that earthworks shall not disturb more than 500m² of land in any 12-month period; result in the alteration of the existing ground level by more than 1.5m (measured vertically); and be clear of the National Grid Yard. The proposed earthworks exceed the permitted threshold and therefore cannot be considered a permitted activity.
16. Any earthworks in the Residential Zone that do not comply with the permitted activity performance conditions, are required to be considered under Rule 6.3.7.1 as a Restricted Discretionary Activity. Discretion is restricted to the following matters:
 - Landscape and visual impact;
 - Effects on adjoining properties, including amenity values;
 - Impact on flood plains and flood flows;
 - Increase in hazard risk and effects on land stability;
 - Effects on erosion and sedimentation; and
 - Effects on overland flow paths.
17. As the proposal seeks to restructure land within the Aokautere Development Area, the application is also subject to the Rule of Chapter 22, pertaining to Natural Hazards. Rule 22.9.2.1 states that the restructuring of land through earthworks or other works to create land with improved slope and soil stability, in the Aokautere Development Area, shall be a Restricted Discretionary Activity subject to compliance with performance conditions. These performance conditions require that any application to restructure the land shall be made at the same time as any application for a subdivision consent for the same land.
18. The application presented is for a land use consent to undertake earthworks only and has not sought subdivision consent. The proposal therefore does not meet the performance condition required to be considered as a Restricted Discretionary Activity under Rule 22.9.2.1.
19. The proposed activity is not provided for under any other rule in Chapter 22, and therefore elevates to a Non-Complying Activity pursuant to Rule 22.9.4.1.
20. Overall the application is required to be considered as a **Non-Complying Activity**, in which Council must consider any relevant actual or potential adverse effects.

21. It is noted that the applicant questions the activity status of the proposal. This is therefore discussed later in this decision report.

Notification and Submissions

22. Pursuant to s95 of the Act, the application was processed on a limited notified basis. Notification of the application was served on 13 parties.

23. A total of 12 submissions were received. The cover letter stated that the notification period closed on the 13/02/2018, however, the submission form stated that the notification period closed Monday 18/02/2018 (note: the 18/02/2018 was a Sunday). Two of these submissions were received between 13/02/2018-19/02/2018. In accordance with the s42A report, these submissions were accepted, as it is not considered that the applicant is unfairly impacted by this administrative error.

24. All 12 submissions opposed the application.

25. The s42A report identifies the following matters as the key issues raised by the submitters:

- Loss of views of the gully, the farmland and distant hills;
- Negative change to the existing character and landscape;
- Loss of amenity and aesthetic values;
- Loss of gully trees; open space; and natural landscape;
- Loss of privacy and restfulness;
- Filling of gully would not produce and reflect a high-quality environment;
- Negative Dust; noise and vibration effects;
- Long workdays during the summer period;
- Concern over substandard level of hazard analysis;
- Concern over impact on flood flows, erosion, seismic activity; and geotechnical risk to properties;
- Concern that engineering standards won't be followed;
- More geotechnical testing required now not as a condition of consent;
- Houses were purchased with the understanding that the gully was to be a reserve;
- Should be made into a reserve;
- Loss of wildlife;
- Loss of property values;
- Alternative options (cul-de-sac, or follow gully contour);
- Concern over maintenance of drainage; and
- Concern over competency of developer.

Summary of Hearing

26. The hearing, held pursuant to section 100 of the RMA, was held in Palmerton North and evidence was heard over 2 days, being the 2nd and 3rd May 2018.

27. The hearing was opened at 10am on the 2nd May 2018 and after initial introductions and procedural matters, the hearing commenced with the presentation by the applicant's legal counsel. The submitter presentations were heard in the afternoon of 2nd May 2018. The morning of the second day commenced with presentations by the Reporting Planner who gave supplementary evidence followed by the start of the applicant's right of reply. The hearing was then adjourned following the agreement between the Applicant and the Reporting Planner and Legal Counsel to allow the Applicant to provide a supplementary legal submission to be received by 5pm on 8th May 2018.
28. A site visit to the gully and to a number of the Submitters properties was undertaken in the afternoon of 3rd May 2018.
29. The Supplementary Submission of the Counsel for the Applicant was received on 8th May and the hearing was closed on 9th May 2018 via Commissioner Minute #2 dated 10th May 2018.
30. During the hearing proceedings I exercised my right to question all persons presenting.
31. During the proceedings evidence was heard from the Applicant, their Legal Counsel and Witnesses; from Submitters; and from Council Reporting Planner and Council's Legal Counsel. I also took my own notes of the verbal presentations and answers to their questions. The hearing was also recorded. The written evidence and reports tabled and presented by these parties are held on file at the Council.
32. For the above reasons, I do not intend to record that material in full detail in this decision report. However, specific issues raised in the material are referred to as appropriate in the Evaluation section of this decision report. The following is a summary of the hearing sequence and presentations.

Applicant

Mr Gregor Woollaston – Legal Counsel

33. For the applicant, I heard from their legal counsel, Mr Gregor Woollaston, Mr Houlihan-Fugle, Ms McArthur and Mr Pirie. Mr Woollaston introduced the proposal, set the statutory scene, and gave the context of the surrounding environment which in his view was a modified landform and outlined that the residential zoning provided the expectation for future residential development. A synopsis summary was tabled by Mr Woollaston.

Mr Kaleb Houlihan-Fugle – Aokautere Land-Holdings Limited

34. The statement of evidence of Kaleb Houlihan-Fugle was taken as read. The main points in Mr Houlihan-Fugle's evidence include:
- Outlining his disagreement with Mr Hudson's landscape conclusions and questions the 42A officer's reliance on Mr Hudson's views.
 - The Abby Road gully is a significantly modified, non-natural landform in its present condition.
 - Outlines the history of Limited Developable Land.
35. In response to questions Mr Houlihan-Fugle:

- Confirmed that reference to 'C1085' (on page 3 of her evidence) was in fact an error and that this should have read "LU4085".
- Confirmed he would provide a copy of the initial resource consent RM2466 for reference.

Ms Angela McArthur – Eco-Landscapes & Design Ltd

36. Ms McArthur read her statement of evidence in full. The main points of Ms McArthur's evidence include:

- Describes the landscape and visual character of the site and surrounds.
- With respect to landscape, mentions that within the proposal site the gully "appears badly degraded due to past earthworks and stripping of vegetation."
- The visual character being predominantly recently established and emerging residential while the lower section of the gully is being replanted and is now a Council reserve.
- Outlines the methodology of assessment used and outlines the distinction between landscape effects and visual effects.
- Assessment of landscape and visual effects concluding that overall the landscape effects will be moderate and the magnitude of visual effects experienced by neighbouring residential properties will range between low to very low.
- Provides an assessment and consideration of the statutory planning matters relevant to landscape and visual effects.
- Outlines the reasons for disagreement between her own assessment and that of Mr Hudson with particular mention that Mr Hudson's report focuses on the wider landscape character, that in her view little of the gully's natural shape or vegetation remained and a difference in opinion that future development will reduce the sense of diversity and visual amenity.
- Considers the submitters concerns, however notes that the land is zoned for residential development and that there is no expectation within the residential zone that views will be protected.
- Concludes that the earthworks can be absorbed within the local area and further development will be consistent with the local urban form.

37. In response to questions Ms McArthur:

- Stated that originally the top of the gully would have gone beyond the top end of Woodgate Court.
- Confirmed she had not visited the neighbouring properties, although she had visited the gully and gully edge.
- The seven-point scale described in her evidence to categorise the scale of potential landscape and visual effects is the same as used in the Auckland Unitary Plan.
- Confirmed the mitigation planting on the batter slope alongside the reserve can occur at the first planting season after the earthworks as no earth settlement is required.
- The mitigation planting should become reasonably established within one year of planting.

38. Mr Pirie read his statement of evidence in full. The main points of Mr Pirie's evidence include:

- Outlines his 37 years' experience in the fields of surveying, resource management, land development and civil engineering.
- Describes previous earthworks that filled neighbouring gullies.
- In his view the application should be processed as a Discretionary Activity.
- The District Plan anticipates earthworks and the residential development of the site.
- The earthworks effects will be less than minor and mitigated by construction methodology.
- The landscape form has already been modified by the 2007/2008 earthworks undertaken within the jurisdiction of the initial resource consent.
- Is unaware of enquiries or complaints made by any neighbours about prior earthworks that occurred in 2007/2008 and many of the submitters owned their properties at that time.
- The Abby Road gully has never been or intended to be a reserve.
- Property values should not be a consideration.
- Outlined the benefits of the Abby Road connection.
- The earthworks will not create any land stability issues.
- The Horizons Regional Council earthworks consent imposes conditions which will be complied with.
- Earthworks will not create runoff or stormwater issues for neighbours.
- Outlines the possible conditions in Mr Sowersby's report that in his view are not necessary.
- Presents a table outlining when the submitters purchased their properties.
- Presented photos and played some short videos taken from the gully.

39. In response to questions Mr Pirie:

- Confirmed that the photos that were presented were taken in 2008 while the resource consent RM2466 was still live and that subsequent earthworks were undertaken in 2016 after this initial resource consent (RM2466) had lapsed in 2012.
- Stated that he understood that the time extension application for the initial earthworks consent (RM2466) as not granted because of a change in Council policy regarding earthworks and the additional consideration for landscape.
- Outlined the difference between the 2007/2008 earthworks and the 2015/2016 earthworks, using the cross sections at the rear of his evidence as reference.
- Outlined that other resource consent applications were at various stages of processing by the Council, one of which sought consent for the earthworks required to construct Johnstone Drive, however did not include earthworks in the gully.
- Questions were raised regarding the activity status of the application as Mr Pirie's evidence was in agreement with the Council Reporting Planner that Rule 10.8.1.7 did not apply. Mr Pirie's evidence however did not respond to the Council Reporting Planners assessment that the application was elevated to a Non-Complying Activity status through Rule 22.9.4 because there is no subdivision application sought alongside the land use consent for the earthworks. Mr Pirie did not agree that Rule 22.9.4. was applicable. Mr Pirie was asked to address this further in the applicant's right of reply.

- Confirmed that in his view the 40dBA noise limited for construction noise is achievable - even given the close proximity to neighbouring residential properties.
- Earthworks would commence at the bottom of the gully and move up. The earthworks at the top of the gully, in close proximity to the neighbouring properties, should only take a few days.
- Confirmed that the Structure Plan that is included in the application was the developers Structure Plan and did not form part of the District Plan and therefore had no statutory weight.

Submitters

40. Five of the submitters who requested speaking rights attended the hearing as follows:

- Jenny Parry (5 Woodgate Court)
- Mr and Mrs Astle (24 Abby Road)
- Peter and Alison White (22 Abby Road)
- George and Sharon Campbell (3 Woodgate Court)
- Lynne and Tony Bishop (11 Woodgate Court)
- Mr Henderson (17 Woodgate Court)

41. All of the submitters opposed the application and their concerns had some common themes. A summary of their presentations is outlined below:

Jenny Parry (5 Woodgate Court)

- Has spoken to real estate agents who are of the view that their property value will be affected. She believes she should not have to take a financial loss for someone else's financial gain.
- There is a large hedge at the rear of their property which is toward the end of its life and will be removed in the future. This will open views from her property toward the gully.
- Expressed a distrust toward Mr Fugle as she understood he had previously done works without consent.
- She wants the gully to remain as it is or be beautified.
- In response to questions Ms Parry confirmed she purchased the property in December 1999 and was not aware of the 2007/2008 consent for earthworks.

Mr and Mrs Astle (24 Abby Road)

Mr White spoke on behalf of Mr and Mrs Astle:

- Raised concern with the integrity of the developer.
- Has environmental concerns with the development

Peter and Alison White (22 Abby Road)

Mr White spoke on their behalf:

- This proposal does not protect the environment – this is their main concern.
- Does not agree that the effects of the proposal are less than minor.

- Does not agree that the noise from the machinery can be managed as machinery noise is very loud when it is 50m away from their house.
- The current state of the gully should not be considered because if the gully was restored it would be beautiful. It is not too late to restore the gully.
- Does not want houses on their fence line.
- The dust from the earthworks will be significant.
- Doesn't want to see an extension to Abby Road as there is no need for a through road here.
- Acknowledges the 2007/2008 earthworks and the further works in 2016.
- Property values will be affected.
- They enjoy the outlook to the gully. They cannot see the floor of the gully but about half way down.

George and Sharon Campbell (3 Woodgate Court)

Mr Campbell spoke on their behalf:

- The assessments of the proposal have not been robust, and the residents will be the ones who bear the brunt of the development.
- The proposal should have included the subdivision aspect of the final development
- The proposal demonstrates bravado on the part of the applicant.
- The current state of the gully is not relevant.
- They enjoy space and privacy that they do not want to lose.
- The applicant has gone to great lengths to demonstrate the gully has been modified – this should not be relevant.

Lynne and Tony Bishop (11 Woodgate Court)

Ms Bishop spoke on their behalf and included a power point presentation. Ms Bishop also tabled a written copy of their presentation. The main points in her presentation include:

- The gully can be restored.
- Applicant's reports/information is misleading and not impartial.
- Disputes the effects are only minor.
- The gully was advertised as being a reserve.
- They raised concerns regarding the previous earthworks.
- They have views over and into the gully which they value.
- The earthworks will result in the loss of a natural landform.
- Disputes Ms McArthur's landscape assessment.
- The adjoining roads can be built without building up the land – the example of Cashmere Drive and Waicola Drive demonstrates this.
- The effects are more than minor.

Mr Henderson (17 Woodgate Court)

- His property is lower than the neighbouring properties and has experienced issues with flooding. He has concerns that development in this area will make this worse.

- He relies on others to do the right thing.
- Mr Henderson acknowledges that he did know about the 2007/2008 earthworks consent.

Council

42. For the Council, Mr Andrew Sowersby was the section 42A Reporting Planner; Mr Hamish Peters presented engineering evidence; Mr John Hudson presented landscape evidence; and Mr Nicholas Jessen is the Council's Legal Counsel. A summary of the Council response includes:

Mr Andrew Sowersby – Section 42A Reporting Planner

43. A section 42A report was prepared by an independent planning consultant, Mr Andrew Sowersby, on behalf of the Council, and was pre-circulated to all parties and taken as read. This report evaluates the proposal against the relevant statutory criteria, including the effects on the environment, the policy framework of the District Plan and the Regional Policy Statement.

44. It was Mr Sowersby's view that overall the effects of the proposal were more than minor and was contrary to the objectives and policies of the District Plan. For this reason, the proposal did not pass either of the threshold tests of section 104D. Mr Sowersby's recommendation is therefore that the application is declined pursuant to section 104D of the RMA.

45. At the hearing Mr Sowersby's tabled summary response statement includes:

- Confirmation of his view that the proposal is a Non-Complying Activity because the earthworks do not comply with Rule 22.9.2.1, which requires that applications for earthworks must be submitted alongside applications for subdivision consent.
- Based on the evidence of Mr Hudson, his assessment of the proposal will have more than minor adverse landscape and visual amenity effects.
- The proposal does not satisfy either of the threshold tests of section 104D of the RMA and therefore has the view the consent authority is not able to grant the resource consent. His recommendation has therefore not changed from that outlined in the section 42A report.
- Responds to Mr Pirie's objections to possible conditions should consent be granted.

Mr Hamish Peters – Engineer

46. The statement of evidence of Mr Hamish Peters was taken as read. The main points in Mr Peters evidence include:

- Outlines his review of the application documents.
- Outlines his recommended conditions that would deal with the geotechnical matters.

47. In his oral presentation Mr Peters outlined the difficulty he has with applicants using the correct/appropriate methodology.

48. In response to questions Mr Peters confirmed that his concerns could be dealt with via the engineering conditions outlined in Mr Sowersby response.

Mr John Hudson – Landscape Architect

49. Mr Hudson's statement of evidence was taken as read. In addition to this Mr Hudson tabled, and spoke to, a reply that responds to the matters heard that includes the following points:

- That he and Ms McArthur do agree on many facts fundamental to the hearing, quoting passages in Ms McArthur's evidence with reference to landscape character.
- Finds the effects definition table in Ms McArthur's evidence unhelpful.
- Notes that Ms McArthur's evidence makes no mention of cumulative effects.
- Ms McArthur's evidence appears to confuse "landscape," "visual" and "amenity."
- Argues that landscape and visual should not be considered in terms of viewpoints. It is appropriate for amenity to do this, but visual relates to character, and character exists irrespective of specific viewpoints.
- Potential landscape values can develop over a short number of years.
- Landscape character does not have to be seen to be appreciated.
- Outlines policy 6.3.7.1 and notes the unequivocal language used where it states that earthworks that materially impact on the landscape values associated with the land in its surrounding context must be avoided. Mr Hudson relates this language back to the Supreme Court's decision on King Salmon (*Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*) which states that avoid means avoid. In his view, the earthworks are not avoided, remedied, and would be inadequately mitigated.
- Describes submitters concerns with the proposed earthworks and notes that many of their concerns reference the wider landscape character of the natural landscape of Aokautere.
- Mr Hudson concludes that in his view the effects are more than minor for the reasons he outlines.

50. In response to questions, Mr Hudson confirms that the aerial photo in Figure 1 of his evidence was taken on 27 March 2012.

Nicolas Jessen – Legal Counsel

51. Mr Jessen tabled, and spoke to, a legal submission. The main points including:

- Mr Pirie has no qualifications as a planner, landscape architect nor is he a chartered professional engineer. Therefore, when opinion clashes, expert statement should be preferred.
- The Non-Complying Activity status is a "black and white" application to a rule.
- Mr Pirie does not acknowledge or assess the relevance or application of Chapter 6 policies and objectives.
- The applicant is materially misrepresenting the timeline of earthworks within the gully and notes significant quantities of earthworks unlawfully deposited in the gully in December 2015-February 2016.
- Council does not accept that modification of the landform is irreversible.

- There is no such thing as a partially implemented consent therefore the modifications of the partially implemented RM2466 and the 2015-2106 modifications do not provide the environment against which effects of the proposal should be assessed against.
- Council maintains its reliance on the evidence of Mr Hudson with respect to landscape.
- The initial consent (RM2466) was granted prior to the City Council's plan change that introduced the entire subsection of 6.3 earthworks.
- The s125 time extension application for (RM2466) was declined by the Council because the applicant had not demonstrated substantial progress; and the changes to the District Plan provided new considerations relevant to the consent, namely the amendments to Chapter 6.
- Describes some background to earthworks in the gullies in the Aokautere area.
- The avoidance policy has not yet been tested on a gully filling application.
- Response to Mr Pirie's reliance on Ms Marr's notification assessment.
- Outlines the meaning of the term 'minor' in the context of the s104D(1)(a) gateway, noting that 'minor' effects are a narrow gateway that only truly exceptional cases pass through.
- The applicant does not rely on any adequate planning assessment with respect to policy.
- The most relevant policies are those within 6.3.7.1 which the application is directly contrary to.
- Reference to the King Salmon caselaw with respect to the meaning of 'avoid'.
- The application cannot pass the second gateway.
- District Plan integrity and precedent effects are legitimate considerations. Particularly in this case where consent is sought on a Non-Complying Activity in direct conflict with a policy that directs avoidance.

Applicant Right of Reply

52. The applicant's right of reply was presented by the applicant's legal counsel, Mr Woollaston. Mr Pirie did also respond to some questions of clarification. It is noted that Ms McArthur was not present on day 2 of the hearing and was therefore not present to hear Mr Hudson's landscape response nor present a right of reply with respect to landscape.
53. Mr Woollaston made the following points in his oral right of reply:
 - Much of the submitters evidence is not relevant for the following reasons:
 - Property values are not a relevant consideration;
 - The site has not been, nor is it intended to be, set aside as reserve;
 - If consent is declined it should not be expected that the gully will be restored as it could be cleared as of right;
 - The underlying zoning is residential even in light of section 6 earthworks rules in the District Plan;
 - The applicant has demonstrated it can deal with geotechnical matters so there is an expectation that the site can be developed;
 - The expectation matrix is that the site will be developed in the fullness of time;
 - Residential rules contemplate building up to 9m, so this should be factored into what the neighbours expect;
 - Neighbours have 'borrowed amenity' from the openness of the existing gully.

- No enforcement orders have been served on the applicant of this application, so they should not be held to account for the previous enforcement history.
 - Any wildlife comes from the nearby Council reserve and not the subject gully.
54. As a point of clarification, Mr Pirie was able to confirm his view that the proposal is a Discretionary Activity as Rule 22.9.3.1 allows earthworks for the purpose of avoiding or mitigating a land stability hazard. His reasoning is that the site cannot be developed until the slip hazard is addressed and only then can the site be subdivided.
55. The hearing was adjourned to allow Mr Woollaston to respond to legal matters via a written response. Mr Woollaston's Supplementary Submissions of Counsel for the Applicant was received within the agreed timeframe prior the close of the hearing. Mr Woollaston's submission is limited to issues arising in reply from the submissions of Mr Jessen on behalf of the Council:
- Mr Pirie's extensive experience in matters including planning allow that Mr Pirie's evidence can be accepted.
 - Reiterates that the Applicant's view is that the earthworks are regulated by Rule 29.2.3.1 as the earthworks are for the purpose of 'avoiding or mitigating any land instability hazard'. The proposal therefore falls with the Discretionary Activity status of Rule 22.9.3.
 - The interim enforcement order tabled by Mr Jessen is not relevant as it is unrelated to those involved in this application.
 - This application must be determined on facts and that determination need to be undertaken devoid of inaccurate conduct of unrelated entities.
 - Ms Marr's notification assessment was prepared under a different statutory framework.
 - The gully was never intended to be a reserve.
 - Does not believe granting of consent would create a precedent.

Findings of the Principle Issues in Contention

56. After analysing the application and evidence; undertaking a site visit; reviewing the s42A report; reviewing the submissions; and reviewing the right of reply; the proposal raises a number of principle issues in contention. These matters are concerned with;
- The activity status of the application
 - The existing environment
 - Construction effects
 - Earthworks effects
 - Landscape and visual effects
 - Neighbour amenity effects
 - Property value effects
 - Reserve status of the gully
 - Mistrust of the applicant's development practices
 - Flooding and stormwater effects
 - Mr Pirie's experience and expert status

57. It is noted that the earthworks to construct Johnstone Drive road and contour the land either side of the road, is not a matter of contention and therefore is not discussed in detail.

Activity Status

58. The Non-Complying Activity status of the application in the s42A report has been questioned by the applicant. In Mr Sowersby's view, the proposal is a Non-Complying Activity pursuant to Rule 22.9.4.1, as it fails to meet the Restricted Discretionary Activity Performance Conditions under Rule 21.9.2.1, which requires that applications for earthworks must be submitted alongside applications for subdivision consent. Mr Pirie however, is of the view that the application should go no further than to be considered as a Discretionary Activity under Chapter 22; and under Rule 10.8.1.7 for non-residential activities. This argument for this view rests on Rule 22.9.3.1 that allows earthworks for the purpose of avoiding or mitigating a land stability hazard. His reasoning is that the site cannot be developed until the slip hazard is addressed and only then can the site be subdivided.
59. I am of the view that Mr Pirie's argument in this regard is a stretch at best. The application has clearly demonstrated that the purpose of the earthworks is to facilitate future residential development. The application even includes an indicative subdivision layout to demonstrate this. Although the site is located within the Limited Development Area, whereby the District Plan indicates the land is likely to be subject to moderate to high risk of erosion or slippage due to the existing slope (based on land use classification), the application has not identified a specific land stability hazard which they are seeking to avoid or mitigate. Rather, they wish to provide an appropriate land contour for future residential development. It is also important to note that much of the proposed earthworks are to recontour the land to provide for the extension of Johnstone Drive, which is not identified as being prone to Hazard and not located within the Limited Developable Area.
60. I therefore concur with the Non-Complying Activity status as outlined in the s42A report.

Existing Environment

61. Throughout the hearing there was a difference in opinion on what is the baseline environment from which this proposal is assessed. The applicant and his respective experts argue that the gully has already been highly modified through previous fill earthworks which were undertaken in accordance with resource consent (RM 2466) in 2007/2008.
62. The Council considers that reference to this previous consent is misleading as the works consented under RM2466 were only partially implemented, and following the lapsing of this consent, significant quantities of material were unlawfully deposited into the gully between December 2015-February 2016.
63. Given the previous consent was not fully implemented prior to the consent lapsing, and no time extension was granted, this application seeks retrospective consent for all previous work in the gully, in addition to the additional earthworks to complete the filling of the gully.

64. Given this application encompasses the earthworks proposed to be carried out, and those works which have previously been carried out; the existing environment from which this proposal is assessed shall be considered to be the gully in its natural state prior to RM2466 being granted.

Construction Effects

65. Noise and vibration effects have been identified as a key concern by many of the submitters, who are of the opinion that the proposed works will fail to comply with the construction acoustic and vibration standards, and that the hours of work are unreasonable.
66. Due to the proximity of the site to adjacent residential properties, the Reporting Planner has suggested in the s42A report, that a condition of consent be imposed (if consent were to be granted) requiring a noise management plan and vibration management plan to be submitted and complied with.
67. The Applicant considers that such conditions (if consent were to be granted) are unnecessary and unreasonable, stating that compliance with NZS 6803:1999 Acoustics - Construction Noise and BS 5228-2:2009 "Code of Practice for Noise and Vibration Control on Construction and Open Sites- Part 2", is appropriate on its own, and that such conditions have never been imposed on any other earthworks. The applicant also states that the hours of work outlined in NZS 6803:1999 Acoustics- Construction Noise are contrary to those hours stated in Palmerston North City Council Engineering Standards for Land Development (ESLD).
68. The District Plan does not contain rules that control noise from construction activities, but instead relies on the New Zealand Standard (NZS 6803:1999 Acoustics- Construction Noise). The District Plan does also not contain rules that control vibration levels, however this condition is a recommendation of the geotechnical review undertaken by Mr Peter's on behalf of Council.
69. Construction noise, while undesirable, should be anticipated in a greenfield environment. I concur with the applicant, that a condition requiring compliance with NZS 6803:1999 Acoustics- Construction Noise, is appropriate.
70. With respect to construction vibration; the geotechnical review undertaken by Mr Peters of Geocivil, on behalf of the Council makes the recommendation that a condition of consent be imposed requiring the consent holder (if consent is granted) to submit to Council for review and approval, a Vibration Monitoring Plan, that is to be in accordance with and BS 5228-2:2009 "Code of Practice for Noise and Vibration Control on Construction and Open Sites- Part 2". In accordance with the recommendation of a suitably qualified Geotechnical Engineer, I consider this condition appropriate.
71. Overall, construction related effects are somewhat unavoidable in earthworks of this scale in close proximity to neighbouring residential properties. These effects are however somewhat mitigated by the fact they are temporary in nature and will be managed (as best as reasonably possible) through best practice and compliance with the applicable NZ standards and code of practice. I therefore concur with the applicant and Council that construction effects are expected to be no more than minor on the adjoining properties, and to have less than minor effects on the wider environment.

Earthworks Effects

72. Earthworks effects are considered to encompass those effects relating to natural hazards, and instability, dust, erosion and sediment control. Effects relating to landscape and visual effects will be discussed separately in turn.
73. All geotechnical information submitted with this application has been reviewed by Mr Peters - of Geocivil on behalf of the Council. Mr Peters makes further recommendations on conditions of consent. In accordance with the recommendation, of the applicant's Geotechnical Report, the peer review undertaken by Mr Peter's on behalf of the Consent Authority, and the conclusion reached by Mr Sowersby regarding this matter in the s42A report, that the conditions of consent to ensure sufficient methodology, monitoring, testing and certification, will ensure that any adverse effects regarding stability, dust and erosion and sediment control will be less than minor.

Landscape and Visual Effects

74. Ms McArthur and Mr Hudson are the only witnesses at the hearing with landscape expertise and it is only their evidence which I have considered in this regard. Any views expressed by others with respect to landscape and visual effects have been disregarded.
75. The opinions expressed by both landscape architects seem to agree that 'Landscape' extends across three categories being; the physical landscape; the perceptual landscape; and the associative landscape. Both also agree that landscape, visual and amenity are also separate considerations. This section considers landscape and visual. Amenity effects are discussed separately below. This report does not dissect these assessments fully as the assessments of both experts are clearly outlined in their evidence.
76. Both Mr Hudson and Ms McArthur do however agree that the naturally dissected landform of terraces and small gullies gives a significant landscape character to the Aokautere area. In their evidence, they both make a statement that the proposed works will significantly modify the existing landscape. Continuing this debate around the level of adverse effects that this modification will have on the landscape, Ms McArthur considers that the gully has little remaining natural character due to the works that have already been carried out, therefore resulting in low landscape effects. Mr Hudson considers that the works will result in a significant change to the natural landform, therefore resulting in significant landscape effects.
77. As discussed earlier, the existing natural environment is to be considered in the context of the natural gully prior to any earthworks having being undertaken. Given Mr Hudson's landscape and visual assessment is taken from this baseline environment I must give more weight to Mr Hudson's assessments. Ms McArthur's assessment appears to rely on the unlawfully modified environment as the baseline for her assessment and therefore I must in turn give it less weight in my consideration. It is also noteworthy that Ms McArthur did not respond to the Council view on the baseline environment in the applicants right of reply which makes it more difficult for me to give more weight

to Ms McArthur's landscape assessment. Mr Hudson's response therefore was uncontested in the applicants right of reply.

78. For these reasons I therefore rely on the evidence of Mr Hudson and concur with the s42A reporting planner that the landscape and visual effects of the earthworks in the gully will be more than minor.

Neighbour Amenity Effects

79. In Ms McArthur's assessment and evidence, amenity values and effects on these values are referenced based on viewpoints. Ms McArthur goes on to say that views of the gully are generally obscured and overall the magnitude of amenity effects from filling the gully are considered to be low due to the lack of vantage points.

80. Mr Hudson's evidence does not agree with this and considers that amenity values are an entirely different matter from 'visual impacts.' In his reply Mr Hudson notes that *'amenity values mean those natural and physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.'* He concludes that amenity value effects will be more than minor.

81. The submitters best describe the amenity values that the gully has to them. The submission from Mr and Mrs Astle and Mr and Mrs White states that they have great views of the gorse in the gully and can see water flowing when it rains.

82. The submission from Jose Roman, who did not wish to be heard, commented that to be able to have an open space at your backyard, and a pleasant area with a reasonable view away from a busy urban centre where you can unwind, relax or study and work from home without noise and a high level of privacy is not always appreciated.

83. Mr and Mrs Bishop commented that the majority of properties have sloping yards which do enable views down to the gully, built up decks and second storey windows allow further views into the gully.

84. With respect to amenity, the question is whether the amenity currently experienced by these submitters is anticipated under the District Plan (as is the view of Mr Hudson) or is it 'borrowed' amenity because the gully is zoned residential although not yet developed (which is the view of Ms McArthur). Mr Jessen, legal counsel for the Council, correctly states that the District Plan rule framework does not allow earthworks in this area as a permitted activity and therefore the earthworks cannot have been anticipated by the residential neighbours, despite the residential zoning of the site. Furthermore, the policy framework of the District Plan requires the consideration of the residential amenity of adjoining neighbours as part of the assessment of any earthworks proposal. For this reason I concur with the Council that the submitters should be able to anticipate that any earthworks do not affect their residential amenity.

85. Where I disagree with the Council is the extent that the residential amenity of adjoining properties is affected by the proposed earthworks. During my site visits I visited a number of submitter's properties which back onto the gully. I agree these submitters enjoy an openness at the rear of their properties

that the gully provides. The proposed earthworks will however not extend above the top of the gully and in itself will not obstruct this sense of openness. In this regard I concur with the assessment of Ms McArthur with respect to the amenity effects of the earthworks on the submitters.

86. Many of the submitters also expressed concerns with the effect that future residential development will have their amenity. This application is for the earthworks only and is not for the intended future residential development of the site. This would need to be done via a separate resource consent application should this resource consent for application be granted.

87. For these reasons I consider the overall actual and potential for neighbouring amenity effects to be no more than minor.

Reserve Potential

88. It was a common point noted in the submissions, that adjoining neighbours believed that the Abby Road gully was to become a reserve, as many of the gullies in the immediate area are. Some submissions go on to say that properties were purchased on the belief that this gully was to be a reserve.

89. Council have confirmed that this is not a reserve nor are there any plans in place for Council to purchase this land for reserve purposes.

90. Notwithstanding the possible misinformation or misinterpretation of information I must consider this application on the facts. The fact being in this regard that the gully has no reserve status nor is there any stated intention from either the applicant or the Council for the gully to be a future reserve.

Property Values Effects

91. A number of the submitters raised in their submissions, that the loss of the gully, through the earthworks and the subsequent intended future residential development, would devalue their properties. Property values is not an RMA matter and cannot be taken into consideration as part of this decision.

Mistrust for the applicant's development practices

92. A number of submitters raised some concern with the development practices of the applicant and questioned the likelihood of the conditions of consent being met, should consent be granted.

93. This application is being considered on its own merits and any background to the applicant's development practices have not been evaluated or questioned. Whether the accusations be fact or otherwise, they are not a consideration of this decision.

Flooding and Stormwater Effects

94. At least one submitter raised concern with the potential for flooding and stormwater effects on their property following the earthworks given their property's lower ground level relative to some neighbouring properties.
95. Both the applicant and the Council have raised no concern with the potential flooding risk. This will be a matter that would be assessed as part of the engineering plan approval process with any potential issues being able to be mitigated.

Mr Pirie's Expert Witness Status and Experience

96. There are areas that the applicant's witness, Mr Pirie, and the s42A reporting planner, disagree, particularly with regard to the activity status of this application and the planning assessment, as well as consideration of landscape matters.
97. Mr Jessen, in his legal submission, notes that Mr Pirie has no qualifications as a planner, landscape architect nor is he a chartered engineer. Therefore when opinion clashes expert statement should be preferred.
98. In response, Mr Woollaston, in the applicants right of reply is of the view that Mr Pirie's extensive experience in matters including land development and planning allow that Mr Pirie's evidence can be accepted.
99. Mr Pirie has clearly outlined in his statement of evidence he has had extensive experience in land development matters, including resource management. For this reason, I have accepted Mr Pirie's expertise in these areas. In saying this, Mr Pirie's evidence includes a planning assessment (paragraphs 29-49). This assessment however does not include an assessment against the relevant objectives and policies of the District Plan, although I note that an assessment is undertaken in the application AEE. Mr Pirie's planning assessment is however taken with the view that the site is already modified. For the reasons discussed earlier, this is the incorrect baseline environment for the application to be assessed. For this reason, I have given more weighting to planning evidence of Mr Sowersby with respect to his assessment against the relevant District Plan matters.
100. Mr Pirie has however not been able to demonstrate he has any qualification or experience in matters directly relating to landscape assessment. Any opinions expressed by Mr Pirie with respect to landscape have therefore been disregarded and reliance on the evidence of the applicant's landscape architect, Ms McArthur has been taken instead.

Statutory Evaluation

Section 104D

101. The test under Section 104D of the Act, requires applications for Non-Complying Activities to satisfy at least one of the following matters which is commonly referred to as 'the gateway'. The first test

considers whether the adverse effects of the activity on the environment will be minor. The second test considers whether the application is for an activity that will not be contrary to the objectives and policies of the relevant plan.

Adverse Effects on the Environment

102. In considering the effects on the environment, I have reviewed the application and assessment of environmental effects submitted by the applicant, the evaluation undertaken in the s42A report, with consideration of the Council's experts in landscaping and engineering, and submissions from the identified potentially affected parties. In addition to this, I have also had the benefit of being provided further evidence and assessment on the respective matters from all parties involved at the hearing, including the applicant.
103. For the reasons discussed earlier in the findings of the principle issues in contention, and relying on the evidence of Mr Hudson, I concur with the s42A reporting planner's assessment that the effects with respect to landscape will have a more than minor effect on the environment. As such, the application fails to meet the first test for a Non-Complying Activity under Section 104D of the Act.

Objectives and Policies

104. I concur with the s42A reporting planner that the objectives and policies of Chapters 6 (Earthworks) and 22 (Natural Hazards) of the District Plan are relevant to this application. The specific objectives and policies are assessed further below:

Objective 6.3.3 To provide for earthworks activities where the associated adverse effects are able to be avoided, remedied or mitigated.

Policy 1.1 To limit the location and scale of earthworks where adverse effects may result.

Policy 1.2 To avoid, remedy or mitigate any adverse effects on the environment from earthworks on:

- *Natural landform;*
- *Landscape values;*
- *Visual amenity values;*
- *Natural hazards and processes;*
- *Effects on the National Grid*

Further Policy under Rule 6.3.7

(a) To ensure that earthworks do not adversely affect the residential amenity of adjoining neighbours.

(b) Avoid earthworks that materially impact on the landscape and visual values associated with the land in its surrounding context.

(c) Avoid material increases in the susceptibility of the land or adjoining land to flooding.

(d) Ensure that all earthworks are carried out in accordance with the relevant technical standards

105. I note that the further policy under Rule 6.3.7 is in an unusual place being in the Rule and in some ways appears as assessment criteria. Notwithstanding this, they are specifically referenced to as policy and therefore must be considered as policy.

106. These objectives and policies have been assessed in the applicant's AEE but is not referred to in Ms McArthur's Landscape and Visual Report in full. Ms McArthur does mention part of this objective and policy in her evidence, but no assessment is undertaken. It is considered that an assessment of this objective and policy is vital to this proposal given its Non-Complying status.

107. The s42A Report includes a comprehensive assessment of this objective and policy, as does Mr Hudson's reply. The language of the objective and policy both use the word 'avoid' effects on the environment. Where this is not achieved, the objective and policy then relies on remediation or mitigation to reduce the effects on the environment. As detailed above, the assessment of the effects and the measures of mitigation proposed are not considered to avoid, remedy or mitigate the effects on the environment to a level where they are minor or less than minor. As such, it is considered that the application is contrary to the above objective and policies.

Objective 22.3 To control the type of development on land which is or might be affected by natural hazards.

Policy 2.1 To exclude development on hazard-prone land where the hazard cannot be effectively avoided, remedied or mitigated.

Policy 2.2 To establish appropriate controls to avoid, remedy or mitigate the effects of natural hazards.

108. Again, these objective and policies have been assessed in the Applicant's AEE, although it is noted that at this point in the application the applicant did not consider that the rules of Chapter 22 to apply to this application. The Geotechnical Report submitted in support of the application does not make an assessment of these objective and policies, as this report is concerned with the technical assurance of the proposed works. The s42A report does undertake an assessment of these objective and policies and concludes that the proposal is consistent with Objective 22.3 and Policies 2.1 and 2.2. I concur with the s42A assessment that this application does meet the above objective and policy.

109. To conclude this assessment, in my opinion, the proposed application and all assessments and evidence in support of the application, is contrary to Objective 6.3.3 and Policies 1.1, 1.2, and 6.3.7. As such, the application fails to meet the second test for a Non-Complying Activity under Section 104D of the Act.

Section 104D Determination

110. The above assessment finds that the proposal to undertake earthworks at Abby Road and Johnstone Drive, Palmerston North, fail to satisfy both of the gateway tests under s104D of the Act for a Non-Complying Activity.

Other Matters

111. The National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (2011) is not applicable to this application.

112. As the proposal fails to satisfy both of the gateway tests under s104D of the RMA no further assessment of the proposal against any other s104 matter is required.

Decision

113. Consequently, having regard to the evidence presented, and the relevant statutory criteria under s104D and for the reasons set out below, the Independent Commissioner **DECLINES** consent to undertake earthworks to develop the land at Johnstone Drive, and to fill in a gully at Abby Road, Palmerston North, being Lot 2 DP 484516; Lot 1004 DP 490091; Lot 694 DP 500578.

Reasons for the Decision

114. Section 113(1)(a) of the Act requires that I state my reasons for the decision of decline. Although it will be clear from the assessments carried out above, for the avoidance of doubt I confirm that the principal reasons for decline are:

1. The proposed earthworks within the extent of the Abby Road gully are considered to have more than minor effects on the natural landform.
2. The proposed earthworks within the extent of the Abby Road gully are considered to have more than minor effects on the Landscape Values of the environment.
3. The proposed earthworks within the extent of the Abby Road gully are considered to have more than minor effects on the Visual Amenity Values of the environment.
4. The proposal is inconsistent with the Objectives and Policies of Chapter 6 pertaining to earthworks.



ANGELA JONES
Independent Hearing Commissioner
29 May 2018

Simon Mori

From: Simon Mori
Sent: Friday, 28 August 2020 10:13 AM
To: 'Les Fugle'
Subject: Abby Road gully Platform
Attachments: SnipImage.JPG; SnipImage.JPG; SnipImage.JPG; SnipImage.JPG

Hi Les

In 2007 a consent was granted to fill in Abby Road gully. Aerial photo's (attached) show that earthworks in the gully were undertaken between 07 and 08. This consent lapsed in 2012 after an unsuccessful application to extend timeframes. Aerials show in 2015 that earthworks have occurred between the lapse of consent in 2012 and 2015 - there is no record of any consent for this work and it is not enabled by the 2007 consent. Even if these earthworks were consented you are now proposing to put a 1.5m high earth platform in the gully. This will modify the existing slope and thus not comply with the performance standards of Rule 10.7.1.6.

You have stated that *"the platform will act as a storage area plus improve the farm access track from one side of the gully to the other"*. This storage area use is not one of the 3 permitted activity uses that are listed in Rule 10.7.1.6. Therefore a non-complying land-use consent is required (Rule 10.7.5.1) as what is proposed is not permitted .

Regards

SIMON MORI | Head of Planning Services

Palmerston North City Council | Private Bag 11034 | Palmerston North
 P: +64 (6) 3568199 | F: +64 (6) 3514471 | www.pncc.govt.nz

From: Les Fugle <fugle@xtra.co.nz>
Sent: Friday, 28 August 2020 4:51 AM
To: Simon Mori <simon.mori@pncc.govt.nz>
Subject: Re: Abby Road gully Platform - abatement dated 15 May 2020

Hello Simon, have yet to receive reply !

On 21/08/2020, at 10:09 AM, Les Fugle <fugle@xtra.co.nz> wrote:

Thank you, first, please provide detail of the 'unconsented earthworks'; I also draw attention the rule language is "existing slope" and "alter existing ground level" which clearly means consideration begins at the current land contour. If Council perceives unauthorised activity has been undertaken then it is open to Council to seek remedy.

To satisfy the rule the proposed area will be reduced by 10m²; while it is not necessary to explain 'the use' when activity is permitted the platform will act as a storage area plus improve the farm access track from one side of the gully to the other.

I await your reply
 Regards
 Les

Sent from my iPad

On 21/08/2020, at 9:07 AM, Simon Mori <simon.mori@pncc.govt.nz> wrote:

Hi Les

Thank you for sending through a plan of where the proposed "earth platform" in the Abby Road Gully is to be located.

The proposed location has a zoning of "Residential" and is within the "Limited Development Land" in the Aokautere Development Area.

Rule 10.7.1.6 states

The following are Permitted Activities on any land shown as Limited Development land in the Aokautere Development Area, as shown on Map 10.1, provided they comply with the following Performance Standards:

- i. Landscape works.*
- ii. Public reserves or reserves within the meaning of the Reserves Act 1977.*
- iii. Drainage and water supply works.*

Performance Standards

(a) Stability

- i. No works associated with any Permitted Activity shall involve any modification of an existing slope.*
- ii. This shall not preclude the temporary removal of soil or disturbance of a slope to plant trees or other plants.*

As you are proposing an "earthwork platform" and modifying the existing slopes by 1.5m in height a land-use consent would be required as the above rule is not complied with.

The earthworks rule for the residential zone states:

"In the Residential Zone, no earthworks shall:

- i. Result in the disturbance of more than 500m² of land in any 12 month period, or
- ii. Result in the alteration of the existing ground level by more than 1.5 metres (measured vertically)."

The earthwork platform plan you have provided shows the dimension being 17m by 30m this is a total area of 510m² and thus exceeds the 500m² maximum rule above, therefore a land-use consent is required.

In the past unconsented earthworks in the form of fill has been deposited into the Abby Road gully, including the location of the proposed earthwork platform as shown in your plan. The unconsented earthworks have altered the existing ground level from the natural contours of the gully and would need to be addressed in the land-use consent application.

Would be helpful if you explained the purpose of the earthwork platform.

Regards

SIMON MORI | Head of Planning Services

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From: Les Fugle <fugle@xtra.co.nz>
Sent: Thursday, 13 August 2020 1:32 PM
To: Simon Mori <simon.mori@pncc.govt.nz>
Subject: Re: Abby Road gully Platform - abatement dated 15 May 2020

Hello Simon, plan re below was left at front counter; would you please advise council's position

Rgds

Sent from my iPhone

On 24/06/2020, at 9:51 AM, Simon Mori
<simon.mori@pncc.govt.nz> wrote:

Hi Les

The abatement notice issued on 15 May 2020 will not be rescinded.

As noted in the notice, before it can be determined if what is proposed complies with the District Plan information including at least a site plan showing the precise location of the platform and a cross section showing the dimension of the platform must be submitted to me.

Regards

SIMON MORI | Head of Planning Services

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From: LES FUGLE <fugle@xtra.co.nz>
Sent: Monday, 25 May 2020 6:23 AM
To: Simon Mori <simon.mori@pncc.govt.nz>; Chris Dyhrberg
<chris.dyhrberg@pncc.govt.nz>
Subject: abatement dated 15 May 2020

Gentlemen, please see attached; I am available to discuss via cell
021-517311

Rgds

Les.



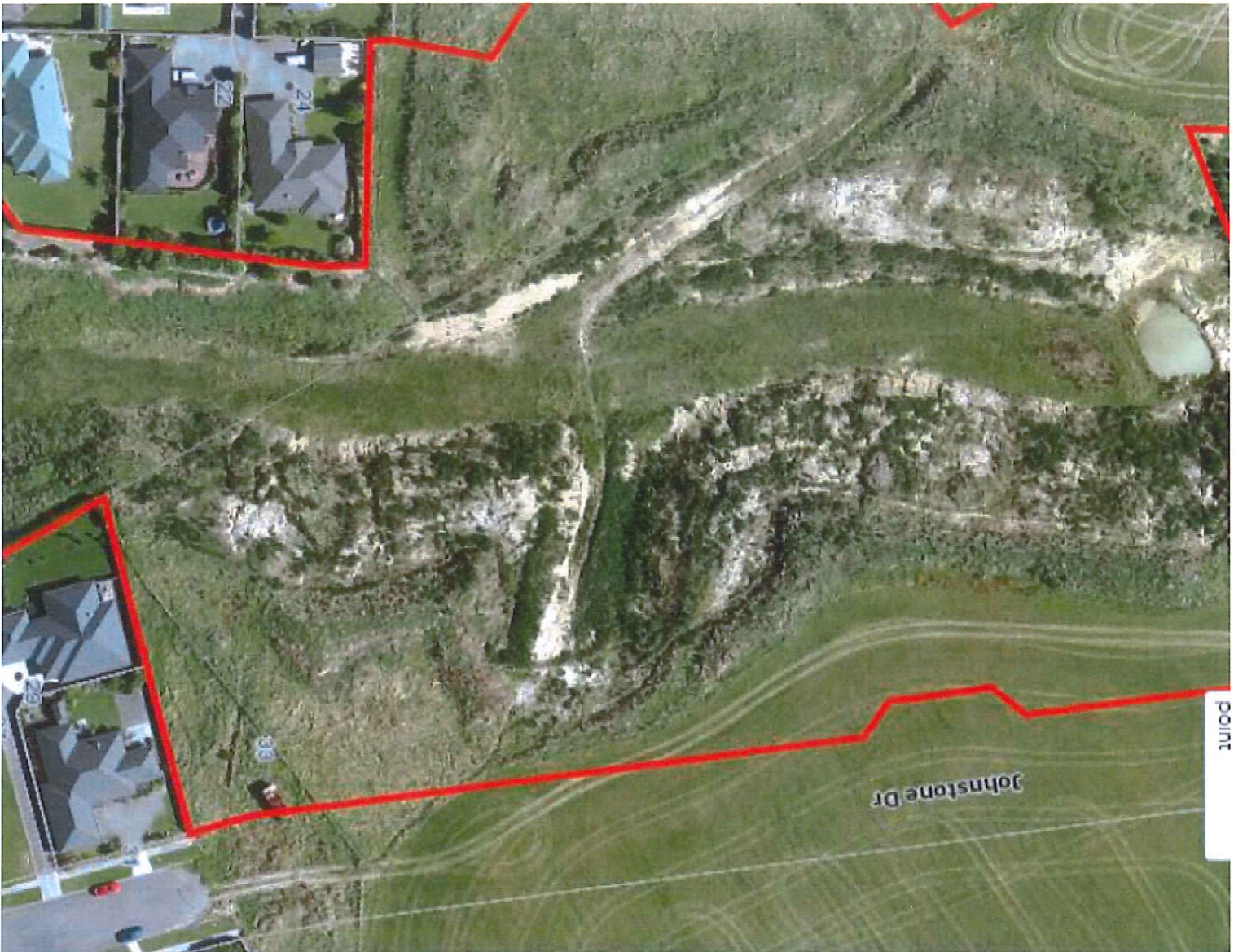


Layer List

- ☐ Aerials_adhoc
- ☒ Aerials_Hist
- ☐ 2018_19 - Urban
- ☐ 2018_19 - LiDAR_Suppl
- ☐ 2016_17 - Urban
- ☐ 2015_16 - Rural
- ☐ 2014_15 - Urban
- ☐ 2013_14 - Rural
- ☐ 2012_13 - Urban
- ☐ 2010_11 - Rural
- ☐ 2010_11_ASH - Urban
- ☐ 2010 - MDC (Longburn, Bunnythorpe
- ☐ 2009_10 - Urban
- ☐ 2008_09 - Rural
- ☒ 2006_07 - Urban
- ☐ 2002_03 - Urban
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☐ Aerials_Archive



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