

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of a proposal to designate Land
via Notice of Requirement

BETWEEN **AOKAUTERE LAND HOLDINGS
LIMITED**

Applicant

AND **PALMERSTON NORTH CITY
COUNCIL**

Consent Authority

AFFIDAVIT OF LESLIE WILLIAM FUGLE

Sworn: 24 March 2021

Dewhirst Law

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I, **LESLIE WILLIAM FUGLE**, of Palmerston North, Company Director, swear:

1. I am the director and shareholder of Aokautere Land Holdings Limited (**ALHL**).
2. ALHL is the registered proprietor of the land at 52 Johnstone Drive, then comprised in Lot 2 DP484516, Lot 649 DP500578, Lot 695 DP509873, and Lot 1102 DP519561 (the **Land**) to which this designation proposal relates.
3. The Land owned by ALHL is the entirety of the land directly affected by the proposed designation corridor, and associated infrastructure works proposed under the Abby Road Notice of Requirement dated 7 September 2020.
4. Submissions have been filed on behalf of ALHL, dated 1 December 2020, and those submissions are adopted by me.
5. The Notice of Requirement (**NOR**) appears to be predicated upon the dual premise that link access is required to be formed from Johnstone Drive to Abby Road, being the substantive roading infrastructure proposed by the NOR, with the secondary consideration being the provision of enhanced access to the Council's land in the Manga o Tane Reserve.
6. There exists, presently, a single vehicle access (of 3m width approximately), exiting Aokautere Drive by which the reserve land owned by Council is understood to be serviced.
7. It is also understood that the reserve has a right of way, reserved to it from the southern end of Johnstone Drive, with the reserve land also enjoying the use of an unofficial pedestrian access from Aokautere Drive (although the unofficial nature of that access is acknowledged).

The Business Case – the Link

8. As ALHL has set out in its submissions in opposition to the designation, it had earlier sought resource consent authorisation, as a part of its broader intended subdivision scheme/the staged development then occurring, to form a road, broadly analogous in its traffic effects and enhancement of carrying capacity - however acknowledging that the roading sought did



entail a greater extent of gully fill/traversing works - to the link road aspects of what Council's NOR preferred alignment proposal now involves.

9. Those works were to be undertaken as a concomitant of the developer's resource consent entailing attachment "E" to the submissions in behalf of ALHL dated 1 December 2020.
10. The layout of the road ALHL's sought to further by way of the resource consent declined at hearing, was depicted in annexure "F" to ALHL's submissions of 1 December.
11. The consent application sought by ALHL was declined, largely upon the basis of the environmental impacts/considerations relating, in particular to the perception that the gully filling component of the consent sought was undesirable having regard to the limited development classification of the land, and the perceived amenity value considerations attaching to the gully's landform characteristics.
12. It is, ALHL says, problematic that a developer assisted roading proposal, broadly as effective and efficient in infrastructure and roading scheme development, was declined as a consequence of an anomalous treatment of the gully characteristics.
13. It was common ground at the hearing of that consent that that the gully natural landform characteristics did not actually subsist at this time, they already having been significantly altered as a consequence of work undertaken during the currency of an earlier (lapsed) consent. However the natural landform characteristics/natural baseline, free of that land forming work was adopted for the consent assessment purposes.
14. That led, inevitably, to the consent being declined.
15. That is unfortunate, ALHL says, in that if the road necessary for its development were consented, its contribution to the roading costs (given that road would have opened up significant tranches of its residential development land, would have been substantial.
16. It is anticipated that only a fraction of those costs which are likely to be incurred by Council in furthering the proposed designation, and associated



infrastructure works, would have been met by PNCC, had the development proposal contained in the consent set out at “E” in the submissions been able to be progressed.

17. In making that observation, I am conscious that there is a limited development classification attaching to the part of the Land and characteristics such as the gully-form are important amenity features in the plan (as it stands).
18. If there is to be a commercially viable, co-contributory road link formed, in cooperation between ALHL and PNCC (as could have been the case with the implementation of the roading link proposed under “F” as depicted in 2043/176), then there may need to be given some consideration to the continued suitability of the limited zoning of the Land; it is understood the Council is presently undertaking a rezoning/scheme development assessment, and that fact may be an element that it chooses to factor into its scheme development proposals.
19. ALHL has set out, in detail, its concerns in respect of the substantive designation component; I will not reiterate those concerns here, I simply adopt, and confirm as the concerns of the company, those set out in the submissions filed on ALHL's behalf in December 2020.

The subdivision consequences

20. The proposed link intersects with the Land at issue in ALHL's application for subdivision consent, being SUB5031; SUB5031 entailed an request for a six lot residential subdivision, situated at the terminus of the present Abby Road development, and to have been implemented on part of that land contained within what was then Lot 1102 DP 519561.
21. The request for subdivision consent made in respect of the proposed development of such lots, was declined, by PNCC's hearing panel under decision given on 8th May 2020, which decision was made in reliance upon the ALHL says erroneous view that the existence of a NOR, precluded the granting of resource consent as sought.
22. It is ALHL's clear view that the basis upon which the hearing panel declined consent was in error, at law, and that decision is the subject matter of an

appeal presently before the Environment Court, with His Honour Judge Dwyer having recently indicated that he will issue a decision upon the papers in respect of ALHL's challenged to the hearing panel's thesis that the existence of a NOR was an absolute bar to the consideration of the subdivision request.

23. Whilst these are matters necessarily constrained to the Environment Court, they have relevance for this panel's purposes, as the financial reality of the six lots sought to be subdivided, being declared to have been valid for such purposes, in terms of the land access sought to be taken.
24. It is unclear to ALHL whether PNCC has modelled its proposed NOR costings, taking account of such considerations; ALHL anticipates that the costings before Council may be predicated upon a bare developed land analysis, which pricing framework is unlikely to be the cost basis required to inform the final acquisition compensation, particularly given what ALHL sees as the likely disposition of the appellate proceedings.
25. ALHL considers that the value of the Land adversely affected by this proposal, on an unconstrained market sale basis, would be approximately \$3,000,000.00

Reserve access

26. The servicing of the Council's land contained within the reserve, by way of a compulsory taking under the Public Works Act, is ALHL says, less defensible; this position is adopted, as the land in PNCC's reserve, already enjoys existing access, facilitated via the access strip from Aokautere Drive, together with the potential for further access to be formed off Pacific Drive.
27. It is ALHL says, not commensurate with the exercise of compulsory taking functions, to appropriate for public works, land that is not reasonably necessary, or required for the purposes of facilitating those public works.
28. As the reserve land has available appropriate pedestrian and aligned access already afforded to it, it is unreasonable, the developer says, to impose the burden of an unplanned, unsought taking, of its land, by way of designation and thereafter Public Works Act functions, where to do so is



not reasonably necessary to facilitate/enable the use of the community asset.

29. It is, in essence, the extent to which the proposed designation is sought so as to further access to the reserve - which access is ALHL contends already sufficient in that respect -that ALHL says, respectfully, represents the designation overreaching; the designation, ALHL says, ought to be constrained to the formation of the link road, and preferably in circumstances where that link road formation facilitated the potential for co-development, between ALHL and PNCC of a roading alignment that serviced ALHL future subdivisional development, and the anticipated traffic movement requirements, collaboratively. That form of development was what was contemplated in ALHL's alignment contained in 2043/176 (being exhibit "F" to ALHL's counsel's submissions in opposition).
30. It is not reasonably open to PNCC, to seek to utilise the designation, and entailed subsequent Public Works Act compulsory taking functions, to facilitate the construction of roading which is not reasonably necessary/ operationally essential for the use, enjoyment and utility of the reserve land.
31. Essentially, ALHL says that there ought to be a "minimum intervention" threshold applied to the designation functions exercised by Council wherever possible – to the effect that only the minimum amount of land necessary for the proper use, enjoyment and functioning of the proposed public works ought to be imposed upon by designation.
32. ALHL says that that approach is commensurate with the efficient, and prudent utilisation of ratepayers' funds (in that it minimises the expenditure occasioned by Council in land takings compensation) and is a recognition of the adverse consequences often caused to private landowners, in terms of their ability to use and enjoy those property rights ordinarily vested in them, which flow from designation, and thereafter compulsory acquisition.
33. The proposed link component, set aside for the purposes of dealing with the Manga o Tane Reserve is excessive, in that Council already has satisfactory pedestrian, and opportunities for efficient/effective vehicle access into the Manga o Tane Reserve land.



34. ALHL considers that if the designation is to enter at all, it ought to enter in a way that restricts the extent of land taken from ALHL, to the minimum necessary to give effect to a link road from Abby Road to Johnston Drive, issues of access to the Manga o Tane Reserve can be addressed via continued pedestrian access, as it now exists and formation of vehicle access by way of the existing access pathways.
35. ALHL opposes the designation, and in particular as it relates to the taking of land for the purposes of facilitating access to the Manga o Tane Reserve.

Land Cost considerations

36. The Land the subject of SUB5031 which land is caught in the designation corridor, is contiguous to Abby Road, residentially developable land; it would be ALHL's intention to trigger, as soon as available to it, the compulsory purchase requirements which exist in the Public Works Act legislation.
37. The designation proposed, once notified, will effectively curtail ALHL's ability to implement its proposed six lot subdivision, at the current terminus of Abby Road, and it will further impact upon the developer's ability to secure consent to access its land, by way of roading infrastructure development, given the infrastructure it would need to implement would inevitably traverse the designation corridor/ would need to intersect with Council's proposed roadworks – thereby making ALHL dependent upon PNCC timetables for such development also.
38. That has a doubly inhibiting effect on ALHL's use and benefit of its Land; the Land directly within the designation cannot be utilised in any manner which may adversely impacted the proposed works, and therefore the proposed six lot subdivision, presently the subject of appeal before the Environment Court, would need to wait in abeyance, for PNCC's decisions whether to further, or not, the designated works.
39. The second inhibiting function is the fact that ALHL cannot implement its own roading infrastructure proposals, within the broader designation area,



as those works will intersect with a designation boundary, and be presumptively prohibited because of the designation corridor.

40. ALHL continues to wish to develop its Land in the proximity of the proposed designation, including by way of undertaking roading works on land which will now be designation land.

Disposition

41. ALHL is the directly affected party; its Land is proposed to be designated.
42. It says that the minimum designation, necessary to facilitate the essential public works ought to be all that is implemented.
43. It expresses significant financial, and planning reservations, as to the suitability of the proposed designation, in its entirety, but in particular expresses concerns as to the need for, and appropriateness of the designation use, for the proposed link to the Manga o Tane Reserve.
44. ALHL asks that the designation is declined, and in particular the function of the designation which purports to take its Land, for the purposes of securing access (which is otherwise, as practicably available) to the Manga o Tane Reserve is declined.

SWORN at Palmerston North
 this 24 day of March 2021,
 before me:



A Solicitor of the High Court of New Zealand



Jordan Marr
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