

RC LU 4085

IN THE MATTER of an Application for a Resource
Consent pursuant to section 42A of the
Resource Management Act 1991

BETWEEN Aokautere Land Holdings Limited

Applicant

A N D Palmerston North City Council

Consent Authority

SYNOPSIS OF SUBMISSIONS OF COUNSEL FOR APPLICANT

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The Applicant

1. The Applicant is Aokautere Land Holdings Limited, a duly incorporated company having its registered office at A R Short & Co Chartered Accountants, Level 8, FMG House, 55 The Square, Palmerston North 4440, New Zealand.
2. Aokautere Land Holdings Limited is primarily concerned with land developments, subdivision, and aligned contracting and construction works, undertaken throughout (predominantly) the greater Manawatu region.
3. The Applicant is represented at this hearing principally by Mr Kaleb Houlihan-Fugle, who is the Applicant's operations manager.
4. The application entails an application for land use consent simpliciter.

Site

5. The consent concerns Lot 2 DP 484516, CFR 706790; and part of Lot 1102 DP 519561, CFR 817001 (**the Land**), being a part of the Applicant's land at 30 Abby Road, and 33 Johnstone Drive, Aokautere, Palmerston North.¹
6. The site is zoned residential, with a subzone classification of Limited Developable Land.²
7. In the broader context the Applicant wishes to be able to utilise the titles at issues in the Consent sought for the purposes of residential development, and associated infrastructural works.

Specific Use/Ambit of Works

8. The application substantively relates to works, which are essentially the necessary precursors/predicates to the viable utilisation of the Land for its zoned residential purposes.

¹ Statement of Evidence, P Pirie, at page 3, para 6.

² Statement of Evidence, K Houlihan-Fugle, at page 6, para 33

9. One characteristic of the Land is a gully, comprising some (approximately) 270 metres in length,³ and approximately 60 metres in width; and approximately 20 metres in width at base. This gully is referred to in the consent application as the Abbey Road Gully.⁴
10. LU4085 seeks, summatively, to authorise the compaction and filling of the Abbey Road Gully, entailing an earthworks of some 270 metres in length, and of up to 75 metres in width.⁵
11. The application estimates the filling of the Abbey Road Gully will entail total volumetric earthworks of some 54,000m³, effecting some 15,100m² of total land area.⁶ Axiomatically, the preponderance of the works will be focused within the area delineated by the gully fissure itself.
12. It is proposed to source fill material, primarily from materials available within the Land,⁷ from proximate land parcels forming part of the overall scheme of development.
13. The gully fissure has been the subject of prior works, undertaken pursuant to, inter alia, RM2466, which land use consent authorised, among aligned works, the filling of the Abbey Road Gully.⁸
14. In consequence of earlier consent(s) the Abbey Road Gully has been the subject of extensive earthworks, remodelling and alteration to its natural landforms, during the period from July 2007-February 2008⁹; including the stripping of the natural batters, construction of haulage routes into the gully, installing subsoil drainage, and modifying the base/batters in height by up to 2m.¹⁰

³ Statement of Evidence, A. McArthur, at page 3, para 10.

⁴ LU4085 Application at page 7, para 3.4.1

⁵ Ibid, at 3.4.2.

⁶ Ibid.

⁷ Ibid at 3.4.3.

⁸ Statement of Evidence, P Pirie, page 3, at paras 7-9.

⁹ Ibid, at page 4, para 9.

¹⁰ Ibid, Fn 8 at page 4, para 10

15. The timetable for the filling of the residual gully fissure is dependant, to some extent upon climactic conditions, given there are moisture limitations intersecting with compaction standards to be accommodated.¹¹
16. The proposed land use has been assessed by Palmerston North City Council as non-complying, principally (in Counsel's understanding) due to the absence of an accompanying subdivisional consent tagged to the land use consent sought in this application.¹²
17. Whilst these submissions are premised upon classification as a non-complying activity, it is noted that Mr Pirie has, in his Statement of Evidence, expressed the view that to the extent that the classification of the activity status is fixed by the presumption that earthworks are a non-complying activity for the purposes of rule 10.8.1.7, that such classification may be amenable to critique, as in his view such determination lies contrary to Rule 22.9.1 which classifies earthworks as either a Discretionary Restricted Activity or a Discretionary Activity, likewise in re Rule 6.3.7.1 which classifies earthworks as a Restricted Discretionary Activity; Subdivision Rule 7.7.2.1(3) is likewise noted by Mr Pirie in re categorisation of the proposed use.¹³
18. As LU4085 pertains primarily (indeed near exclusively) to earthworks, the due classification of the activity status for earthworks within a residential use/Limited Developable Land subzone is an issue of significant import.
19. It is common ground that the application entails no subdivisional component, *per se*, rather it entails those works anticipatory to the bringing down of the subdivisional plan; there are, however, indicative schema plans provided for such subdivision as an informational component of the application.¹⁴

¹¹ Ibid at FN 5, page 3.4.4

¹² Report of A Sowersby, at page 12, para 38.

¹³ Statement of Evidence, P Pirie, page 11, at para 31.

¹⁴ As noted in the Sowersby report, at page 8, para 24 *et seq.*

20. In this respect Counsel once more respectfully notes Mr Pirie's view *in re* the appropriate treatment of earthworks within the Limited Developable Land zone.
21. Counsel interpolates the observation that the tendering of an application for subdivision comprises only a performance standard to rule 22.9.2.1; if the absence of same were thought to comprise a significant impediment to the filling of the Abbey Road Gully, there would not appear to be an logical impediment to the imposition of a condition requiring the deposit of a subdivisional plan (as contemplated in the material aligned to the application in any event) pursuant to section 104B(b).

Submissions Received

22. This application was assessed as appropriate for a limited notification.
23. A number of submissions were received; the preponderance of the issues being raised by such submitters being concerned with visual amenity considerations, and (to a lesser degree) in respect of potential construction nuisance (noise and dust).
24. Certain submitters predicated their submissions upon axiomatically flawed legal propositions; by which Counsel means those who contend (without basis) there is an obligation to bring the gully fissure into reserve status, or retain it in an undeveloped (notwithstanding its significant extant modification, canvassed below) due to their expectations held at the time of acquisition of their sites.
25. Firstly, there can be no valid expectation that the fissure is retain as reserve; no designation exists, nor has Palmerston North City Council expressed any interest in classifying the fissure as reserve. Thus these submissions must be wholly discounted at law.
26. Secondly, as Mr Pirie's evidence canvasses¹⁵ the legitimate expectations, in planning terms, as to the retention of the submitters views of the fissure, ought

¹⁵ Statement of Evidence, P Pirie, page 15-25, at paras 50-56.

be viewed in the context of the head zoning (residential) of the Land, and needs to be tempered by the planning extant at time of acquisition.

27. Of those potentially effected, Mr Pirie identifies two properties only, that did not acquire their properties at a time when (stated summatively) planning instruments afforded an as of right alteration to/filling of the fissure.
28. It is the Applicants position that, to the extent submissions are premised upon an expectation of entitlement to maintain fissure views, firstly, the legitimacy of such expectation at law, must be factored having regard to the planning regime and consent instruments pertaining to the gully fissure at the date of acquisition; it is apodictically unsound to apply an expectation matrix (the nearest litigation analogue would be to detrimental reliance) in circumstances where there is no valid basis for such expectation entitlement at acquisition.
29. Likewise it is quite plain that potential diminution of proximate property values is not a legally valid predicate for objection.¹⁶
30. Putting aside those issues that are not amenable to consideration, and factoring the analysis against a proper baseline expectation, *in re* land that is head zoned for residential development, and intended to be so residentially developed¹⁷.
31. Viewed in the context that the Land is residentially zoned, and developable, subject to the limited development (principally engineering overlay), the baseline expectation extant under the relevant plan must be taken, in the Applicants respectful submission to entail residential construction activity.
32. This must be so insofar as much of the Land encircling the gully fissure is of a topography such that it would be amendable to residential development absent substantive earthworks.

¹⁶ *Foot v Wellington CC* EnvC W073/98; *Tram Lease Ltd v Auckland Transport* [2015] NZEnvC 137.

¹⁷ Statement of Evidence, K Houlihan-Fugle, at page 9, paras 52-53.

Visual Amenity Considerations

33. Mr Hudson, in his report characterises the gully fissure as a natural landform, and opines that the loss such natural landform element would result in visual amenity impacts that are more than minor.¹⁸
34. That view diverges from that expressed by Mrs Angela McArthur, in behalf of the Applicant, who concludes that the visual amenity impacts will be low.¹⁹
35. In Counsel's respectful submission, the view advanced by Mrs McArthur is to be preferred; Mr Hudson's evidence appears to be predicated upon a mistaken assumption that the gully fissure is both extant in its natural landform, and rests within a proximate and broader receiving environment that likewise remains possessed of complementary and intersecting landform characteristics.
36. As the evidence of Mr Houlihan-Fugle and Mr Pirie²⁰ demonstrates (counsel notes in particular those videos adduced by Mr Pirie illustrating certain of the earlier works under the Initial Consent being undertaken) the extant gully fissure results from prior significant earthworks/remodelling.²¹
37. The extent of such remodelling, and the resultant transformed/modified²² landform cannot, in the Applicant's respectful submission, properly be characterised as a natural landform. To the extent that Mr Hudson's assessment of the landscape impacts of the proposed filling of the residual elements of the gully fissure is predicated upon preservation of any notionally pristine or natural landform characteristics, that predicate is, the Applicant respectfully submits, manifestly ill-predicated.

¹⁸ Report of A Sowersby, at page 19-20, para 52-53 (summative analysis of Hudson report).

¹⁹ Statement of Evidence of Angela McArthur, at page 9, paras 27 *et seq.*

²⁰ Refer, *inter alia*, Statement of Evidence of Kaleb Houlihan-Fugle at pages 3-6, paras 13-33, Statement of Evidence, P Pirie, at pages t by way of example only, Pages 3-5, at paras 7-16.

²¹ *Ibid.*

²² On the evidence adduced it may be properly opined that the extant fissure subsists as a predominantly man-made structure.

38. Likewise the evidence adduced in behalf of the Applicant demonstrates that the proximate, and broader receiving environment is itself (being predominantly remodelled/recontoured landforms implemented for prior residential development, roading and infrastructure purposes) substantively modified/alterd.
39. Extensive, proximate earthworks are proposed/underway for the purposes of land remodelling aligned to the Westmount School²³.
40. As to visual amenity considerations, the Applicants view, stated summatively, is that:
- (i) the appropriate baseline analysis for works preparatory to use of residentially zoned land as such, is an anticipation of such development; the effect of the limited development overlay being simply to impose additional engineering criterion to mitigate land instability risks, not to subvert the primary development expectations attaching due to the head zoning.
 - (ii) the Abbey Road gully, exists in a heavily modified state; devoid of the preponderance of its prior natural landform characteristics.
 - (iii) the proximate and broader receiving environment likewise subsists in a heavily modified status.
 - (iv) the preponderance of submitters are demonstrated to have no, peripheral or marginal views of the gully fissure (if the determination if made that preservation of such fissure entails a valid amenity criterion); with suitable mitigation measures being available.²⁴
 - (v) Much of that which is contained in the submitter's materials is to be discounted at law; the balance must be modelled via an appropriate baseline analysis, having regard to the heavily

²³ Ibid Fn 18 at page 8, para 47; see also Ibid Fn 16, at pages 8-9, para 25.

²⁴ Counsel respectfully notes the sight lines specified in Annexure 2 of Angela McArthur's Statement of Evidence; refer also those mitigation measures contained within the landscape management plan (annexure 1 to the Statement of Evidence of Angela McArthur).

modified status of the gully fissure, and a principle zoning amenable to residential development.

Noise Assessment

41. Mr Pirie notes that contemplated works will be undertaken in compliance with the Engineering Standards for Land Design;²⁵ Mr Sovesbury opines potential adverse noise consequences can be regulated to less the minor via conditions.²⁶
42. The Applicants position *in re* noise, is that insofar as the head zoning in residential developable land, with the subzone only, primarily entailing engineering controls/regulations, the baseline expectation must entail development activity, including earthworks, aligned to residential development activities.

Dust/Vibration

43. The Applicant considers adherence to standard construction practices and applicable standards, will mitigate these concerns to below minor.

Mitigation of Adverse Environmental Aspects.

44. The residual gully fissure presently subsists in an overgrown, gorse affected state. The proposal entails the elimination of such environmental detritus, and the formation of landforms amenable to utilisation to remediate the supply difficulties impacting the provision of residential accommodation.

²⁵ *Ibid*, Fn 1, at page 24, para 56 l; see also *Ibid*, Fn 13, at page 25, paras 71-72.

²⁶ *Ibid*.

Gateway Assessment

45. Upon the premise the classification of the subject earthworks as non-complying is apposite, the remodelling proposed comprises a non-complying activity within the Aokautere Limited Development subzone, and consequently it is necessary for the Applicant to establish that the proposed consented use nevertheless satisfies either of the savings provisions set out in 104D(1).
46. It is the Applicant's respectful submission that the consent sought, meets the criteria specified in both 104D(1)(a) and 104D(1)(b) in that the effects of the activity (upon the expert evidence and in the Applicant's assessment) will be no more than minor in every material regard, and insofar as the activity is not contrary to the objectives and policies of the Plan (or any other instrument relevant for these purposes).
47. In order for Council to approve the non-complying activity under the first gateway, the Commissioner must find that the:
- Adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor
48. The primary adverse effect contended for by Mr Hudson is loss of visual amenity. The Applicant's position in re that aspect is sufficiently canvassed above; it is sufficient to submit at this juncture that construed against an appropriately predicated factual and baseline matrix, the adverse effects in visual amenity terms are rendered *de minimis*, particularly once the intended mitigation measures are adopted.
49. Likewise the balance of the, less substantive, amenity considerations identified are amenable to regulation to a less than minimal standard via compliance with extant development schemas/by way of suitable conditions.

The Second Gateway

50. The proposal to hand is directed at readying the Land for use in discharge of the function (residential development) for which it is primarily zoned.
51. LU 4085 pertains to completion of the previously consented²⁷, and partially implemented, filling and compaction of the gully fissure.
52. The implementation of suitable engineering controls/development protocols serves to obviate any risks associated with land instability and the like; indeed the proposal can be seen to obviate a source of land instability insofar as it substantively contemplated the formation of a compacted, contiguous landform suitable for residential development. It is evident that overall landform stability within the limited development subzone is prone to enhancement, should such works proceed.
53. It is thus Counsel's submission that the second gateway is also met. Counsel respectfully submits that to the degree that there is any divergence with policy objectives, the conditions which are sought to be imposed fully remediate that concern.

Gateway Outcome

54. It is Counsel's respectful submission that the consent as sought satisfies both the First and Second 104(D) gateway assessments.
55. It is further Counsel's respectful submission that the use contemplated is both reasonably aligned with the subzone classification (as engineering considerations are satisfied/landform stability enhanced) and is indeed contemplated by the primary zoning of residential use/development pertaining to the Land.

²⁷ Ibid Fn 2 at page 2, para 7

56. Counsel invites the Commissioner to now take in the Statements of Evidence in behalf of the Applicant, in the absence of any questions for Counsel.

G J Woollaston
Counsel for the Applicant