

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 Woolaston'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