

**IN THE MATTER OF  
AND**

the Resource Management Act 1991

**IN THE MATTER OF**

an objection under section 357A by  
Aokautere Land Holdings Limited to  
decision by Palmerston North City  
Council on a section 139 application at 52  
Johnstone Drive, Palmerston North.

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**DECISION OF THE HEARING COMMISSIONER APPOINTED BY  
PALMERSTON NORTH CITY COUNCIL PURSUANT TO SECTION 34A OF  
THE RESOURCE MANAGEMENT ACT 1991**

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**Independent Commissioner:**

Mark St.Clair

**11 June 2021**

## **APPOINTMENTS**

- [1] Pursuant to Section 34A of the Resource Management Act 1991 (RMA), independent commissioner Mark St. Clair was appointed as a commissioner by Palmerston North City Council to hear and determine the objection under section 357A of the RMA lodged by the Aokautere Land Holdings Limited (the Objector) to a decision by Palmerston North City Council (PNCC – the Respondent) to decline an application made under section 139 of the RMA (COC 5787) at 52 Johnstone Drive, Palmerston North.

## **PROCEDURAL MATTERS**

### **Directions and Procedural Matters**

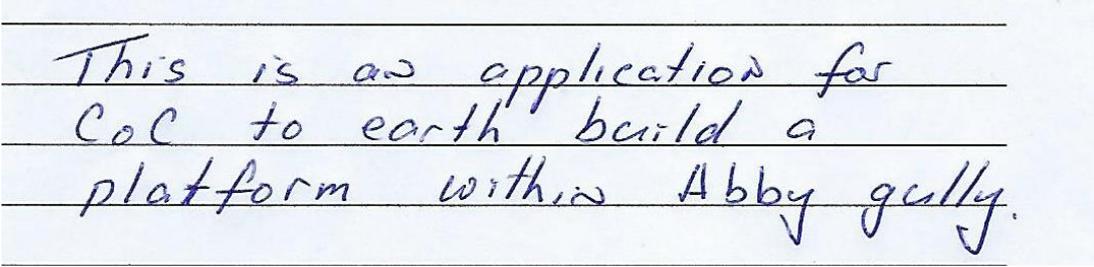
- [2] On 30 March 2021, I issued Minute #1 directing the pre-circulation of any expert evidence to be filed on behalf of the Objector, as well as any expert evidence from PNCC as the Respondent. Expert evidence was filed by PNCC in accordance with the timetable set out in Minute #1. Mr Fugle, on behalf of the Objector did file a written statement prior to the hearing which was sent to the Respondent. That written statement was not an expert witness statement of evidence.
- [3] At the hearing on 14 May 2021, no procedural matters were raised by the parties.

## **THE APPLICATION PROCESS**

- [4] There is some history to the application and resultant decision process. That process was set out in the evidence prepared by Mr S Mori for Council as the respondent<sup>1</sup> and is not repeated here in full. Rather, I summarise the main points of the process as follows:
- Section 139 of the RMA application lodged on 18 September 2020.
  - Section 139(4) of the RMA request for further information was issued by Council on 25 September 2020, including request for site plan, cross sections, height and area of earth platform.
  - Further information was provided by the Applicant on 8 October 2020.
  - Decision on application issued by Council 10 November 2020.
  - Objection under section 357A of the RMA, filed by the Objector on 10 November 2020.
- [5] The proposal, as described in the application form filed by Aokautere Land Holdings Limited, was as follows;

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<sup>1</sup> Mr S Mori, Evidence in Chief (EIC), dated 6 May 2021.



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

- [6] The proposal, as described in the letter attached to the application form filed by Aokautere Land Holdings Limited<sup>2</sup>, was as follows;
1. Aokautere Land Holdings Limited (“Applicant”) hereby applies for a Certificate of Compliance that the structuring of an earth platform within what is commonly referred to as Abby Rd gully is Permitted activity pursuant to Council district plan.
  2. Documentation together with a plan and dimensions encircling that proposed has been provided to Head of Planning. That information is to be read along with this application.
  3. For matter of clarity, the activity, is the construction of a 20 meter by 25 meter earth platform up to 1.5 meter (measure vertically) to be built above the existing ground level within the Abby Rd gully. The outer edges of the earth platform shall not make contact with the gully slopes. The platform is to be used to grow fir (Xmas) trees.
  4. The proposed location for the earth platform is cited within the Limited Development zone and as such subject to the District Plan rule 10.7.1.6 together with the Earthworks rule 6.3.6.1
  5. The earth spoil for the intended platform is currently stockpiled adjacent to Johnston Drive opposite the WGT school who ask for visual amenity reason the soil be relocated.
- [7] In summary, the application stated that the proposal complied with the relevant rules, being R.10.7.1.6 and R 6.3.6.1. The reason being that, in relation to Rule 10.7.1.6, that, “... *the activity will not result in the removal of more than 10m<sup>3</sup> of soil nor involve any modification of the existing slope, ...*”.<sup>3</sup> In relation to Rule 6.3.6.1, the reason being that the “*existing land will not be altered by more than 1.5 meter (measured vertically)*”, that claims that the unconsented earthworks had occurred on the site were refuted by the applicant and the language was clear that the dimension must be measured from the “existing ground level”.<sup>4</sup>
- [8] A topographic plan prepared by Pirie Consultants in response to the section 92 of the RMA request from Council, was filed on 8 October 2020, along with an email with further assessment of the proposal as to the applicable rules.
- [9] The decision of the council was to decline the s139 of the RMA application, in summary because<sup>5</sup>,
- (i) The proposed earthworks are to be carried out on unconsented earthworks which requires a retrospective consent to make lawful. Accordingly, the

<sup>2</sup> Aokautere Land Holdings Limited, Application letter, dated 19 Sept 2020, Paras 1- 5.

<sup>3</sup> Aokautere Land Holdings Limited, Application letter, dated 19 Sept 2020, Para 7.

<sup>4</sup> Aokautere Land Holdings Limited, Application letter, dated 19 Sept 2020, Paras 8-11.

<sup>5</sup> Mr S Mori, EIC, dated 6 May 2021, Para 5.2.

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

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

## The Objection

- [10] A notice of an objection under section 357 to section 358 of the RMA was received by the Council on 10 November 2020 from Mr Fugle on behalf of Aokautere Land Holdings Limited as the Objector.
- [11] I note that the objection was filed within the time frame of 15 working days under section 357B of the RMA.
- [12] In summary, the reasons given for the objection were<sup>6</sup>;

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

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

## THE STATUTORY FRAMEWORK

- [13] Where an activity may be undertaken lawfully without a resource consent, an applicant may apply under section 139 of the RMA which states:

**139 Consent authorities and Environmental Protection Authority to issue certificates of compliance**

- (1) *This section applies if an activity could be done lawfully in a particular location without a resource consent.*
- (2) *A person may request the consent authority to issue a certificate of compliance.*

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<sup>6</sup> Aokautere Land Holdings Limited, Notice of Objection, dated 10 November 2020, Paras 3 - 4.

- (3) *A certificate states that the activity can be done lawfully in a particular location without a resource consent.*
- (4) *The authority may require the person to provide further information if the authority considers that the information is necessary for the purpose of applying subsection (5).*
- (5) *The authority must issue the certificate if—*
  - (a) *the activity can be done lawfully in the particular location without a resource consent; and*
  - (b) *the person pays the appropriate administrative charge.*
- (6) *The authority must issue the certificate within 20 working days of the later of the following:*
  - (a) *the date on which it received the request;*
  - (b) *the date on which it received the further information under subsection (4).*
- (7) *The certificate issued to the person must—*
  - (a) *describe the activity and the location; and*
  - (b) *state that the activity can be done lawfully in the particular location without a resource consent as at the date on which the authority received the request.*
- (8) *The authority must not issue a certificate if—*
  - (a) *the request for a certificate is made after a proposed plan is notified; and*
  - (b) *the activity could not be done lawfully in the particular location without a resource consent under the proposed plan.*
- (8A) *The authority must not issue a certificate if a notice for the activity is in force under section 87BA(1)(c) or 87BB(1)(d).*

[14] Section 139(9) sets out the process where an applicant may object to the to a decision on a request, namely:

*Sections 357A, 357AB, and 357C to 358 apply to a request for a certificate.*

[15] Section 357A of the RMA provides applicants with the right to object to the decline of a request under section 139:

***357A Right of objection to consent authority against certain decisions or requirements***

- (1) *There is a right of objection to a consent authority,—*
  - (a) *in respect of a decision of that authority, for any person who has made an application under—*
    - (i) *...*
    - (iv) *section 139 (which relates to certificates of compliance): ...*

[16] Finally, Section 357D of the RMA sets out the range of actions the local authority may take when considering an objection to the decline of a request:

*357D (1) The person or body to which an objection is made under sections 357 to 357B may—*

- (a) dismiss the objection; or*
- (b) uphold the objection in whole or in part; or*
- (c) ...*

## **THE HEARING and ATTENDANCES**

- [17] The hearing was held in the Council Chambers at the Palmerston North City Council Offices, 32 The Square, Palmerston North on 14 May 2021, commencing at 9:30am.
- [18] Having heard from the Objector, the Council as the respondent, and the Objector's reply, I adjourned the hearing at 12.04pm on 14 May 2021, in order to receive additional information. That information being;
- copies of case law referenced in Mr Mori's evidence;
  - the original plan supplied by the Objector to Council, referred to in the application form for CoC 5787;
  - the Plan Change that introduced the earthworks provisions for the current operative District Plan;
  - Consent RM 2466 - Decision and Plans; and
  - Copy of the Certificate of Title that applies to the application site.
- [19] Mr Mori, the reporting officer, helpfully collated that information and provided the information, via the hearing administrator by 4pm on Wednesday 19<sup>th</sup> May 2021. That information was distributed to the Objector.
- [20] Having considered that I had all the information I required, I closed the hearing by way of minute (Minute #2) on 20 May 2021.
- [21] The attendances at the hearing were as follows:

### **Objector**

- [22] For the Objector:
- Mr L Fugle – Director of Aokautere Land Holdings Limited.
- [23] Mr Fugle spoke to his hearing statement, a copy of which was pre-circulated on 7 May 2021. No additional material was tabled by Mr Fugle at the hearing.

### **Respondent**

- [24] In attendance and responding to matters raised for the Council was:
- Mr S Mori – Head of Planning Services for PNCC, Reporting officer.
- [25] Evidence was prepared by Mr Mori, which was pre-circulated to the parties on 6 May 2021. That evidence set out the background to the application process, the decision and appendices of relevant background documents.
- [26] I was assisted in an administrative capacity by Ms S Figlioli, Hearing Administrator, at PNCC.

- [27] As noted above Mr Mori provided additional material in response to my directions and questions at the hearing.
- [28] All of the material presented by the above parties is held on file at PNCC. I took my own notes of the verbal presentations and any answers to my questions. For the sake of brevity I do not repeat that material in the decision. However, I do refer to relevant matters raised in the material in subsequent parts of the decision.

## **OBJECTION ASSESSMENT**

- [29] In terms of assessing the objection I find it useful to address each of the reasons set out in the objection recorded in paragraph 12 above, and the applicable rules against which the proposal was assessed, under the following headings:
- The proposal;
  - The existing environment;
  - Assessment as to the applicable rules;
- [30] In undertaking the assessment below, I have had regard to the statutory provisions, the objection as filed and the evidence of Mr Fugle, the evidence of Mr Mori, the responses to my questions at the hearing and the additional information filed and the relevant case law.

### **The proposal**

- [31] I recorded in paragraphs 5 - 6 above the proposal as set out in the application documents. In his hearing statement, Mr Fugle clarified the proposal in his hearing statement as follows;
6. To create a [*sic*] earth platform measuring 20 x 25 meters (500m<sup>2</sup>) and to a height 1.5 meter above the existing land within the Limited Development zoning. The outer edges of the earth platform do not make contact with the surrounding embankment slopes.
  7. The platform shall be used to grow trees.
- [32] In response to my questions, Mr Fugle explained some further aspects to the application proposal, which I summarise as follows;
- The earth spoil to be used to create the platform is currently stockpiled adjacent to the western side of Johnstone Drive across the road from the WGT School, with the school requesting that the stockpile be moved for visual amenity reasons;
  - The trees to be planted are fir trees, Christmas trees and that the trees are to be used for by a neighbour for fund raising. The trees would not be permanent, in so far as they would be harvested twenty-five years after planting.
- [33] I note the proposal as explained by Mr Fugle is somewhat different from that set out in the original application. In his presentation at the hearing, Mr Mori noted that the harvesting of trees was new information not considered at the time of the application. At this point I observe that this clarification as to the proposal goes beyond the objection to the decision, in that the proposal, in Mr Mori's view would not meet the definition of "landscape works" as a permitted activity set out in Rule R10.7.1.6, as the trees are to be harvested. I address the change in the proposal later in my decision (see paragraph 63). I now proceed to consider the objection as based on the proposal

meeting the definition of “landscape works” as a permitted activity set out in Rule R10.7.1.6.

- [34] In describing the proposal I also find it useful to set out that the earth platform is proposed to be placed primarily on a relatively flat area at the base of the gully. This location was shown on Site Plan for ALHL, October 2000, Job No. 2043-204, included as part of the response to the Section 92 request for further information. That response also included the following description of the activity, “*The Activity can cause no modification nor effect on the existing [sic] slope(s) of the gully as the proposed platform sits entirely upon “existing” earth flat surface and, activity does not extend to any edge of the gully slope.*”<sup>7</sup>

## The Existing Environment

- [35] The objection states that the relevant baseline to be considered is the “existing” status of the site at time of application.<sup>8</sup> I concur in so far as what is the existing environment needs to be determined before an assessment of the applicable rules can be undertaken. In order to understand the existing environment some background as to the history of the site needs to be set out and Mr Fugle and Mr Mori assisted in providing explanation and information, albeit each drawing different conclusions as to the implications for the rule assessment.
- [36] There was no disagreement between Mr Fugle and Mr Mori that the location of proposed earth platform is in what is commonly referred to as Abby Road gully which is located on land adjacent to Johnstone Drive; which is an area that has been subdivided for residential purposes and that new houses are being constructed in this area. However, Mr Fugle and Mr Mori were of differing views as to what was the existing environment within the gully itself.
- [37] Setting out firstly Mr Mori’s view, some background as the consenting of development of the area is useful. Appendix A of Mr Mori’s evidence includes the decision report on the section 139 application<sup>9</sup> which summaries the consenting history as to earthworks as follows;
- On 17 April 2007, resource consent (**RM2466**) was granted to Pacific Farms Ltd to subdivide land and carry out earthworks, which included the filling of the Abby Road Gully.
  - Between 2007 and 2008 earthworks were undertaken in the gully under the authority of RM2466. The earthworks were partially completed with the gully being partly filled, but RM2466 was not fully implemented.
  - On 30 March 2012, an application to extend the lapse date of RM2466 was sought and declined. The applicant objected and the matter went to a hearing. During the hearing the applicant withdrew the application to extend the application.
  - Following lapse of RM2466, earthworks occurred in Abby Road Gully without resource consent.
  - On 22 January 2016 an interim enforcement order was granted by the Environment Court preventing further earthworks on the land: *Palmerston North City Council v Fugle* [2016] NZEnvC 10.
- [38] In evidence, Mr Mori also referenced the decision report on LU 4085, a proposal to undertake earthworks to develop land at Johnstone Drive, and to fill the gully at Abby Road, Palmerston North, which was declined by the hearing commissioner, and which

<sup>7</sup> Section 92 Response, dated 8 Oct 2020.

<sup>8</sup> Aokautere Land Holdings Limited, Notice of Objection, dated 10 November 2020, Para 4.

<sup>9</sup> Mr S Mori, EIC, dated 6 May 2021, Appendix A, Pages 2 – 3.

references the un-consented earthworks.<sup>10</sup> Mr Mori also included copies of a series of aerial photos, to show the extent of the un-consented earthworks over time.<sup>11</sup>

- [39] Mr Mori, in the section 139 decision report referenced caselaw<sup>12</sup>, recording that the un-consented earthworks do not form part of the existing environment and that the application must be assessed as if it were a greenfield proposal.
- [40] To summarise, I understood Mr Mori's position to be that the existing environment is the slope and form of the gully prior to undertaking the un-consented earthworks and that it is from this point that any assessment as to compliance with the permitted activity rules and standards should be undertaken.
- [41] In his written statement Mr Fugle denied the un-consented works<sup>13</sup> and considered that it was immaterial as to the context of the rules. I address those context matters later under the rule assessment. In response to my questions Mr Fugle advised that there was no stream in the gully, that the gully base had been stripped out and a subsoil drain installed along the length of the gully. Mr Fugle also advised that there was no 'sign-off' of earthworks, such as engineering approval, as the works were not complete. Mr Fugle, also noted in his verbal reply that the proposed earth platform was to be located on the base of the gully which was flat and the land in the gully was not a slope, but rather a cross fall. Finally, Mr Fugle advised that there had been no earthworks conducted on the site since before December 2020. In summary, Mr Fugle's position was that the baseline for the consideration of the rules was the 'existing' status of the site at the time the application was filed and not the "existing environment" scenario as put forward by Mr Mori.
- [42] Having considered all of the evidence and material on this matter, including the identified case law, I find for the reasons set out in Mr Mori's evidence, that it is appropriate to undertake the assessment of the applicable rules with the reference point being the form and shape of the gully prior to the unconsented earthworks being undertaken. Essentially that the unconsented earthworks do not form part of the baseline on which an assessment of the proposal against the rules should be undertaken.

### Assessment of the Applicable Rules

- [43] As set out above, the applicable rules against which the assessment of the application is to be made are R6.3.6.1 and R10.7.1.6. In response to my questions, Mr Mori advised that there are no other applicable rules as to the application and this position was not challenged by Mr Fugle. I adopt that position. I deal with each rule in turn.
- [44] R 6.3.6.1 states;

#### **R6.3.6.1 Permitted Activities for Earthworks**

Earthworks are Permitted Activities within the City provided the following performance standards for the relevant zone are met (unless exempted under R6.3.6.2):

##### **Performance Standards:**

The following standards apply to earthworks located on any site in the following zones:

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<sup>10</sup> Mr S Mori, EIC, dated 6 May 2021, Appendix D, Paras 10, 39 and 64

<sup>11</sup> Mr S Mori, EIC, dated 6 May 2021, Appendix E.

<sup>12</sup> *Schofield v Auckland Council* [2012] NZEnvC 68; *New Zealand Kennel Club Inc v Papakura DC* W100/2005; *Maskill v Palmerston North City Council* W037/2006.

<sup>13</sup> Mr L Fugle, Hearing Statement, dated 7 May 2021, Para 11 and 11 b).

**(b) Residential Zone**

In the Residential Zone, no earthworks shall:

- i. Result in the disturbance of more than 500m<sup>2</sup> of land in any 12 month period, or
- ii. Result in the alteration of the existing ground level by more than 1.5 metres (measured vertically).

- [45] The decision report recorded that the proposed platform at 20m x 25m was within the 500m<sup>2</sup> permitted by R6.3.6.1(b)(i).<sup>14</sup> In his hearing statement Mr Fugle agreed that the earth platform does not exceed the 500m<sup>2</sup> and is permitted under the first limb of the rule.<sup>15</sup> I note that the rule R6.3.6.1(b)(i) requires not only a 500m<sup>2</sup> area limit but also limits the disturbance of land in any 12-month period. In response to my questions of Mr Fugle in his initial presentation at the hearing, Mr Fugle advised that there had been no earthworks on the site since December 2020. Later, in reply, Mr Fugle considered that the 12-month period was not at issue as the works could occur 12 months following the last time that earthworks had occurred on the site.
- [46] In relation to R6.3.6.1(b)(i), there was no disagreement between the parties as to the proposal as at the time of the decision on the s139 application and it was not included as part of the objection notice. As such I am not required to reach a finding on this aspect.
- [47] As to the second limb R6.3.6.1(b)(ii), the objection notice addresses the aspect of “existing” status of the s139 decision.<sup>16</sup> The evidence of Mori, relying on the unconsented earthworks, as I have set out in paragraphs 37 - 38 above, was that the existing ground level should be that that existed before the unconsented earthworks occurred. At the hearing Mr Mori’s view was that as the current ground level was not lawfully established therefore that was not the starting point for the assessment of compliance with the rule.
- [48] Addressing R6.3.6.1 at the hearing, Mr Fugle’s position was, in summary,
- The rule language is clear in that the measurement is to be measured from the existing height.
  - Mr Mori had substituted the rule word ‘existing’ with ‘previous’ in order to account for the un-consented earthworks.
  - If RM2466 has expired, no resource consent is in place, therefore the district plan R6.3.6.1 applies if the activity is within the performance standards.
  - Mr Mori’s reliance on the evidence of Mr Pirie during LU4085 hearing on earthworks, while Mr Pirie’s statement is correct, however, it is has been taken out of context in that Mr Pirie simply confirmed that earth had been placed in the gully not whether or not that the placement exceeded the permitted quantum.
- [49] At the hearing I questioned Mr Fugle as to the relevance of the definition of “ground level” as set out in the District Plan in relation to the rule R6.3.6.1 which refers to “existing ground level”. For completeness, the definition of ground level in the District Plan is as follows;

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<sup>14</sup> Section 139 Decision Report, dated 10 November 2021, Page 4, Last Para.

<sup>15</sup> Mr L Fugle, Hearing Statement, dated 7 My 2021, Para 9.

<sup>16</sup> Aokautere Land Holdings Limited, Objection Notice, dated 10 November 2020, Para 4.

<b>Ground Level</b>	In relation to earthworks means the original contour level of land prior to any modification, or Where a subdivision or land use consent for earthworks has been approved, the contour level following that development, as per the approved engineering plans.
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- [50] In his verbal reply, Mr Fugle suggested that the rule overwrites the definition because the rule refers to “existing ground level”. Although not drawn to my attention by the parties, I am aware of the decision of the Court of Appeal, *Powell v Dunedin CC [2004]* where the Court held that while it was appropriate to seek the plain meaning of a rule, it was not appropriate to do so without reference to the immediate context and consideration of the objectives, policies and methods. Mr Fugle did not draw to my attention to any objectives, policies or methods to back up his suggestion.
- [51] Considering all of the above, I find that the proposal does not comply with R6.3.6.1(b)(ii). I find that the fill proposed is greater than 1.5m vertically in height than the existing ground level which is below the unconsented earthworks. I am persuaded by the evidence of Mr Mori that the consideration of the existing environment as excluding the unconsented earthworks is correct in terms of the relevant case law. I am not persuaded by Mr Fugle’s suggestion that the rule overwrites the definition noting that Mr Fugle did not address the rule and definition in relation to the context or objectives and policies.
- [52] Turning now to rule R10.7.1.6; the rule states;

#### **R10.7.1.6 Limited Development Land in the Aokautere Development Area**

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

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

#### **Performance Standards**

##### **(a) Stability**

- i. No works associated with any Permitted Activity shall involve the removal of more than 10m<sup>3</sup> of soil, except that no works associated with any Permitted Activity shall involve the removal of any soil within those areas along any terrace edge abutting Class VI, VII, or VIII land (as defined on the NWASCO Land Resource Inventory Worksheets).
- ii. No works associated with any Permitted Activity shall involve any modification of an existing slope.
- iii. Neither (i) or (ii) shall preclude the temporary removal of soil or disturbance of a slope to plant trees or other plants.

#### **NOTE TO PLAN USERS**

Earthworks involving Limited Development Land are also subject to the Earthworks provisions of Section 6 (General Section) of this Plan.

- [53] It was not in contention that site is located within the Aokautere Development Area as shown on Map 10.1 in the District Plan.
- [54] The section 139 decision report found that the construction of the earthwork platform for the purpose of planting trees is a listed permitted activity being “landscape work”

within the meaning of R 10.7.6(i)<sup>17</sup>, subject to the Performance Standards. Given the clarification and/or changes to the proposal identified by Mr Fugle at the hearing as I set out in paragraphs 32 - 33 above, I am not at all sure that that is correct. I take this matter no further for the present and focus on the objection as filed. For completeness, I record that the permitted activities listed in R 10.7.6 limb 'ii.' and 'iii.' do not apply to this objection hearing.

- [55] In relation to **Stability a)** limb 'i.' of the Performance Standards. it was common ground following clarification at the hearing, that no soil was proposed to be removed as part of the proposal.
- [56] **Stability a)** limb 'ii.' of the Performance Standards, in summary states that the works associated with a permitted activity shall not involve the modification of an 'existing slope'. Mr Mori's view was similar to that set out in paragraph 47 above and as set out in the section 139 Decision Report<sup>18</sup>, that due to the unconsented earthworks the current slope of the gully was not in effect the existing slope and therefore the proposal did not meet that limb of the performance standard.
- [57] Mr Fugle, in his hearing statement, suggested that it was important to understand the intention of the rule, which was in summary to avoid undermining the gully slope stability so as to not to expose neighbouring land to subsidence; and that filling the gully would avoid that risk.<sup>19</sup> In addition, that the activity would not require any modification of the existing slope and further that, "*the land on which the platform is to placed is flat and that, bearing in mind the intention of the rule and, platform is to be built on existing cross fall/slope the activity does not breach the rule performance standards.*"<sup>20</sup> In his presentation, Mr Fugle stated that earthworks would not touch the slope of the gully.<sup>21</sup>
- [58] On this latter point, Mr Mori explained at the hearing that he was of a different view, that the plan from the section 92 response<sup>22</sup> shows contours through to the bottom of the gully and that the rule required consideration of the natural slope. Mr Mori also expressed the view that the platform would modify the slope which was not part of earthworks within the rule itself. In relation to intent of the rule, Mr Mori's view was that the intention was to provide for landscaping to be undertaken noting **Stability a)** limb 'iii.' of the Performance Standards and not for filling of the gully.
- [59] In reply, Mr Fugle, noted that the earthworks section of the District Plan does not refer to 'slope'. Mr Fugle's view was that this was important because while all land has a degree of slope, slope was not defined by the earthworks section of the plan and the gully is not a slope, rather it is a crossfall. In addition, Mr Fugle referred to the gully edges and it was those edges that the rules sought to protect.
- [60] As to findings, I am not persuaded by Mr Fugle's evidence as to the intention of the rule as he describes it. Again, I am mindful of the decision of the Court of Appeal, *Powell v Dunedin CC [2004]* where the Court held that while it was appropriate to seek the plain meaning of a rule, it was not appropriate to do so without reference to the immediate context and consideration of the objectives, policies and methods. Mr Fugle referred to edge protection as to the purpose of the rule, without reference to the context, objectives or policies. I find Mr Fugle's reading of the rule too narrow. As Mr Mori points out, the rule intention is to provide for, in this case landscape works, with those works not to affect the stability of the landform. I find that the effective filling of

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<sup>17</sup> Section 139 Decision Report, dated 10 November 2020, Page 3, Last para.

<sup>18</sup> Section 139 Decision Report, dated 10 November 2020., Page 6, Para 7.

<sup>19</sup> Mr L Fugle, Hearing Statement, dated 7 May 2021, Para 12.

<sup>20</sup> Mr L Fugle, Hearing Statement, dated 7 May 2021, Para 16.

<sup>21</sup> This point is also detailed in the Application letter dated 19 September 2020, Para 3.

<sup>22</sup> Site Plan for ALHL, October 2020, Job No. 2043-204

the gully through the placement of the earth platform would not meet the performance standard.

- [61] Secondly, I am not persuaded by Mr Fugle's evidence about the terms 'gully' and 'slope' in relation to the placement of the earth platform. The plan supplied in response to the section 92 request for further information clearly shows contours with a slope to the bottom of the gully.

## **DECISION**

- [62] In addition to the individual matters addressed above, I find that the proposal does not meet the applicable permitted activity performance standards in R6.3.6.1 and R10.7.1.6.
- [63] I also observe that even if I had found in favour of Aokautere Land Holdings Limited and upheld the objection, given the additional information provided by Mr Fugle at the hearing as to the proposal,<sup>23</sup> then there would be additional grounds to revoke any section 139 request.
- [64] Pursuant to Section 357D of the RMA in accordance with the authority delegated to me, and for the reasons set out above, I dismiss the objection by Aokautere Land Holdings Limited to the decision by Palmerston North City Council on an application under section 139 of RMA at 52 Johnstone Drive, Palmerston North.

DATED this 11th day of June 2021.



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Mark St.Clair (Independent Commissioner)

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<sup>23</sup> Paragraphs 32 and 33 of this decision.