

WebbFarry Lawyers

www.webbfarry.co.nz

Dunedin
79 Stuart Street, Dunedin 9016
T: 03 477 1078 • F: 03 477 5754

Mosgiel
107 Gordon Road, Mosgiel 9024
T: 03 489 5157 • F: 03 489 2021

All correspondence to:
PO Box 5541, Dunedin 9058, NZ

Partners
David J Ehlers, BCom, LLB
John A Farrow, BA, LLB
James H Lovelock, BMgmt, LLB
Megan L Bartlett, BA, LLB

Associates
Brenda Thom, BCom, LLB
Aimee Edwards, LLB
Lana Jensen-McCloy, LLB
Melanie H Hayes, BA, LLB
Chris Thomsen, BA, LLB
Warren Moffat, BA, LLB

30 August 2013

Dunedin City Council

Dunedin City Council
Planning Enquiries
Ground Floor, Civic Centre
50 The Octagon
Dunedin

30 AUG 2013

By Delivery

By Email:
planning@dcc.govt.nz

Attention: Paul Freeland

Dear Paul

re **DIS-2013-1 – DUNEDIN HARBOURSIDE ARTERIAL**

- 1 We confirm we act for Anzide Properties Limited, Hall Brothers Transport Limited and Dunedin Crane Hire (2005) Limited.
- 2 We **enclose** for filing our clients' Submission on the above Notice of Requirement.

Yours faithfully
WEBB FARRY


Chris Thomsen
Associate
Email: cthomsen@webbfarry.co.nz

Copy to: Opus International Consultants
(by delivery) Opus House
197 Rattray Street
Dunedin
Attention: Julie McMinn

Copy to: Anderson Lloyd
(by email) Attention: Michael Garbett
By Email: michael.garbett@andersonlloyd.co.nz

**Submission on requirement for designation that is subject to public notification
by a territorial authority**

Resource Management (Forms, Fees, and Procedure) Regulations 2003

Schedule 1 Form 21

To: Dunedin City Council

Name of submitters: Anzide Properties Limited, Hall Brothers Transport Limited and
Dunedin Crane Hire (2005) Limited (jointly the "Submitters")

- 1 This is a submission on a notice of requirement from the Dunedin City Council for a designation (the "Notice of Requirement").

The Notice of Requirement seeks to designate two areas of land. Designation 1 is for part of the Dunedin Harbourside Arterial, which links Anzac Avenue (D465) with Ravensbourne Road (D845) to south of Parry Street West. Designation 2 is for the Dunedin Harbourside Arterial Access Road that will give access from Designation 1 to 80 Anzac Avenue.

- 2 The specific parts of the Notice of Requirement that the Submitters' submission relates to are:

2.1 Designation 1 – Approximately 120 to 130 metres from the intersection of Anzac Avenue and Frederick Street to the east towards Ravensbourne Road.

2.2 Designation 2 – Access road to 80 Anzac Avenue.

- 3 The Submitters' submission is:

Background

3.1 The Submitters own 70, 76 and 80 Anzac Avenue ("the Anzide Land"). The Anzide Land is held in three separate Certificates of Title. Attached and marked "A" is an aerial photograph of the Anzide Land.

3.2 The properties at 76 and 80 Anzac Avenue have previously been used for the purposes of a truck yard and a crane hire business. 70 Anzac Avenue is leased to AJ Allen Limited who operates a coal distribution yard.

- 3.3 In 2003 80 Anzac Avenue was leased to Jackos Timber, which held the lease until the end of 2007. A copy of an aerial photograph of the Anzide Land from around 2007 is annexed and marked "B".
- 3.4 In February 2006 the Submitters entered into discussions with the Dunedin City Council in relation to the purchase of the Anzide Land for roading.
- 3.5 In December 2007 the DCC's agent, Mr Abercrombie of Abercrombie & Associates Limited, corresponded with the Submitters in relation to the purchase of the Anzide Land under the Public Works Act 1981.
- 3.6 In June 2008 the Submitters entered into a lease with the University of Otago in relation to the property at 80 Anzac Avenue. A resource consent was obtained from the DCC for a carpark with a term of three years from 28 October 2008 to 28 October 2011. The lease expired in or about November 2010. 80 Anzac Avenue was then used for storage and as a truck yard.
- 3.7 The Submitters were directed by Mr Abercrombie to obtain an alternate piece of land from which to operate the Submitters' businesses.
- 3.8 On 8 January 2009 the DCC (as Requiring Authority) obtained a Designation for the Harbourside Arterial Link (D845). Part of the alignment of that Designation was over the Anzide Land. The Submitters did not file a submission on that Notice of Requirement because they understood DCC would require the Anzide Land for the Arterial and therefore purchase it.
- 3.9 In May 2010 Anzide Properties Limited purchased an alternate site. In the same month the DCC purchased 14-20 Parry Street.
- 3.10 On 15 July 2010 a Notice of Requirement altering the alignment of D845 so that it no longer crossed the Anzide Land and instead crossed 14-20 Parry Street, was confirmed by the DCC.
- 3.11 The DCC as Territorial Authority failed to notify the Submitters of the Notice of Requirement to alter the alignment of D845.
- 3.12 At the beginning of June 2010 contractors for the DCC began construction of the Harbourside Arterial Link.

- 3.13 On 31 August 2010 the Submitters received a letter from the DCC. This letter indicated that the DCC no longer wanted all of the Anzide Land.
- 3.14 In March 2011 the Submitters raised safety concerns with the new alignment of the road. Discussions were initiated by the Submitters with the DCC to discuss the safety concerns.
- 3.15 On 5 April 2011 the DCC's representative advised that the DCC intended to proceed with the roading project despite the safety concerns.
- 3.16 Because of this, on 7 April 2011 the Submitters applied for a Without Notice Interlocutory Application for Interim Orders from the High Court.
- 3.17 The Submitters sought a declaration from the High Court that the decision to alter the designation was illegal and an injunction to prevent the use of the newly built road and to provide safe access to the Anzide Land.
- 3.18 On 24 October 2011 the High Court made the following Orders by consent:
- a The decision of the Independent Commissioner dated 30 June 2010 altering the designation is declared to be invalid and is quashed accordingly;
 - b The parties are to meet to see whether the remaining design issues can be resolved;
 - c Until agreement or further Order of the Court the existing temporary access arrangements are to remain in place.
- (The "Orders").
- 3.19 Despite significant attempts to resolve the design issues an agreed solution has not been able to be reached.

Consultation

- 3.20 The Notice of Requirement includes details of consultation with several parties, notably the University of Otago and New Zealand Transport Authority. The letters provided from those two parties are dated mid to late 2012. It is not clear from the Notice of Requirement whether the Requiring Authority consulted upon the notified Notice of Requirement or a previous design of Designation 1 (possibly as detailed in Appendix E to the Notice of Requirement).

The Environment

- 3.21 The Notice of Requirement fails to properly consider the receiving environment that the effects of the Designations are to be assessed against following the Orders.
- 3.22 The Arterial was constructed before the alteration to the Designation was quashed.
- 3.23 The Orders had the legal effect of uplifting the designation from the approximately 120 to 130 metres from the intersection of Anzac Avenue and Frederick Street to the east towards Ravensbourne Road, as referred to in Designation 1 ("Designation 1")¹.
- 3.24 In the absence of a designation, construction of a road is either a discretionary activity under the Transportation Section of the Dunedin City District Plan or may be consented to as part of a subdivision consent.
- 3.25 The Requiring Authority does not hold resource consent for Designation 1.
- 3.26 The effect therefore of the Orders is that the constructed alignment of Designation 1 is unlawful.
- 3.27 If the Alteration to the Designation dated 15 July 2010 had been notified (see High Court proceedings) Designation 1 may not have been constructed along its present alignment.

¹ See paragraph 2 of this submission for the part of Designation 1 this submission relates to. For the avoidance of doubt this short-hand is not intended to broaden the scope of this submission to include reference to those parts of Designation 1 not referred to in paragraph 2.

- 3.28 The accepted legal principal is that no-one can gain an advantage by their own wrong-doing. By failing to properly identify the environment and then assess the effects of the Designations against it, the Notice of Requirement seeks to take advantage of the unlawful construction of Designation 1. To attempt to rely upon a Designation 1 as physical resource that must be sustainably managed is unlawful, improper and unfair.
- 3.29 No weight should be placed upon the physical resource that is the unlawfully constructed road. Any reliance upon the existence of the road constructed unlawfully is an irrelevant consideration and an error of law.
- 3.30 The environment that the territorial authority must consider under section 168A is the pre-construction layout of the land affected by Designation 1.
- 3.31 It is accepted that the balance of Designation D845 that was not quashed by the High Court forms part of the environment for the purpose of the consideration of effects under section 168A.
- 3.32 The Notice of Requirement points out that the Requiring Authority is not seeking to alter the existing designation at the intersection of Anzac Avenue and Frederick Street (D465). Frederick and Ward Streets approaching the intersection are not subject to any designations. However the changes to the intersection of Anzac Avenue and Frederick Street, including its signalisation, are an effect upon the environment as a consequence of the Notice of Requirement. This is because the changes to the intersection would be unnecessary were it not for the Designations. Therefore those effects are to be properly considered by the Territorial Authority.

The Consequences of Considering the Unlawfully Constructed Road

- 3.33 The requiring authority in its Notice of Requirement has fundamentally misdirected itself in its assessment of effects. The Notice of Requirement is therefore fundamentally flawed because its assessment of effects (section 168A) is based upon the unlawfully constructed alignment of Designation 1.
- 3.34 Relying upon the constructed layout of Designation 1 is unsound because it presupposes that this alignment promotes sustainable

management under Part 2, has proper regard to the relevant statutory planning instruments and leads to acceptable effects upon the environment (including having regard to positive and negative effects).

Consideration of Alternatives

- 3.35 The Notice of Requirement considers some alternative alignments for Designation 1 and therefore accepts that the work will have a significant adverse effect on the environment and in particular the Anzide Land (see section 168A).
- 3.36 However the consideration of alternatives is incomplete, cursory and was arbitrary. This is because the consideration of the alternatives is unlawfully influenced by the physical alignment of Designation 1.
- 3.37 The objectives of the Plan Change include avoiding the need to take any private land (see further below). By fettering its consideration of alternatives in this way the requiring authority has misdirected itself and erred in law by not properly considering alternative routes to undertake the work (section 171(1)(b)).

Objectives of the Requiring Authority

- 3.38 The requiring authority has erred in law by stating a specific objective for the Designation to be "*Avoid having to purchase private land*".
- 3.39 This objective has the consequence of elevating matters relating to cost and private property rights over environmental effects as defined in the Act. These matters are more properly considered under public works legislation.
- 3.40 The objective is inconsistent with the Council's historic decision to purchase lessor and lessee interests in the private land where Designation 2 is located (14-20 Parry Street).
- 3.41 By stating an objective to be avoiding purchasing private land the Requiring Authority:
 - a Is excluding consideration of alternatives;
 - b Excludes a number of possible alignments for Designation 1 that achieve the purpose of the Act;

c Fails to achieve the purpose of the Act.

- 3.42 It is accepted that a designation is necessary to achieve the balance of the objectives of the Requiring Authority. However it is not accepted that the alignment, extent and conditions of Designation 1, along with Designation 2, are necessary to achieve those objectives and achieve the purpose of the Act.

Effects Upon the Anzide Land

- 3.43 The nature of the vehicles the Submitters use upon the site require significant room to manoeuvre in and out of the site. The dimensions of 80 Anzac Ave make manoeuvring on site for these vehicles impossible. For this reason the two accesses from Parry Street could be used in tandem to enter and exit the site. Designation 2 (the "Access Road") is designed to address the loss of the tandem Parry Street access.
- 3.44 The Access Road does not replace the Parry Street access because the Anzac Avenue and Frederick Street intersection (the "Frederick Street Intersection") cannot be used safely and efficiently by the Submitters and any tenants of the Anzide Land.

Access Issues

- 3.45 The Notice of Requirement fails to provide an assessment of effects upon the Anzide Land and other surrounding landholdings.
- 3.46 The Anzide Land is zoned Industrial 1.
- 3.47 Permitted uses in Industrial 1 often involve the movement of heavy vehicles.
- 3.48 The historic access arrangements from Parry Street provided suitable, efficient and safe access into 80 Anzac Avenue, with full turns onto the roading network. Access into 70 and 76 Anzac Avenue was from Ward Street. The Notice of Requirement does not provide equivalent or better access to and from 80 Anzac Avenue. The access to and from that site in the Notice of Requirement will have unacceptable adverse effects upon the Anzide Land and the operation of the Submitters' businesses from the site.

- 3.49 Access to and from 80 Anzac Avenue at the Frederick Street Intersection in large / heavy vehicles is impossible without travelling across the northern corner of 70 Anzac Avenue, which includes the right-of-way in favour of 76 Anzac Avenue. While in common ownership, encroaching onto 70 Anzac Avenue is not a problem. However, if any of the Anzide Land was sold or leased the access from the Frederick Street Intersection could be blocked, for example by building a fence (which A J Allen could choose to do). Given the restrictions on manoeuvring upon 80 Anzac Avenue this is a significant adverse effect upon that site because it would leave only one usable access. Therefore access to and from 70, 76 and 80 Anzac Avenue must recognise property boundaries. The Notice of Requirement fails to do this.
- 3.50 The Notice of Requirement indicates that the Requiring Authority, as road controlling authority, will prohibit right turns at the Frederick Street Intersection travelling east (see Appendix D - Transportation Assessment Report). It is not clear what the historic arrangement is for right turns into the Anzide Land from that direction. The effect of the Notice of Requirement is that the Submitters' vehicles will be required to travel to the Access Road to enter 80 Anzac Avenue. Vehicles travelling to 70 Anzac Avenue will need to enter the site straight ahead from Frederick Street or via a left turn travelling to the south west. (Vehicles travelling west and turning left into the Anzide Land will not be affected by this issue).
- 3.51 Vehicles attempting to enter the Anzide Land at the Frederick Street Intersection on their green phase will be blocked from completing that manoeuvre by vehicles waiting to exit the Anzide Land on their red phase.

Safety Concerns

- 3.52 The Notice of Requirement fails to assess the effect upon the intersection at Anzac Avenue and SH88 where it becomes Ravensbourne Road; i.e. to the immediate west of the Hocken Library.
- 3.53 The proposed signalisation of the Frederick Street Intersection is not the optimum solution to control traffic entering and exiting the Anzide Land.

- 3.54 Even if the signalisation of the Frederick Street Intersection and Designation 2 can be shown to be safe and lead to acceptable effects upon the Submitters, the road controlling authority (DCC or NZTA) could make changes to the functioning of the road that could lead to unacceptable effects upon the Submitters. Given the recommendation in the Notice of Requirement and in the affidavits in support of the High Court proceedings that the intersection and functioning of the road generally will need to be reviewed to determine what changes may be necessary, this uncertainty is an adverse effect.
- 3.55 Traffic turning right from State Highway 88 into the Access Road may “stack” in the right turning lane, blocking traffic travelling towards Ravensbourne from the Frederick Street Intersection. In particular, when more than one vehicle is attempting to turn right there is insufficient room for large vehicles to “stack” in the right turning lane. The nature of the businesses operated from the Anzide Land means that a large number of vehicles attempt to exit and / or enter the Anzide Land at peak times. Therefore traffic will back up behind the vehicles leading to inefficiencies in the affected area of the transportation network.
- 3.56 The Notice of Requirement makes no provision for cyclist safety, in particular at the Frederick Street intersection.
- 3.57 The Notice of Requirement fails to consider the effect upon pedestrians walking to the University.
- 3.58 The Notice of Requirement fails to consider the effects of the Designation (including at the Frederick Street intersection) when there are events on at the Stadium. Of particular concern are the pedestrian desire lines to cross the Frederick Street intersection when travelling to the Stadium from Ward Street.

General

- 3.59 The Notice of Requirement does not analyse or consider amending the alignment of the arterial to take some or part of the Anzide Land.
- 3.60 The Submitters’ position is that the safest and most appropriate alignment for Designation 1 is through the Anzide Land, generally on the basis of the original alignment of D845 prior to the Alteration to the Designation dated 15 July 2010 that was quashed by the High Court.

3.61 The Notice of Requirement is contrary to and inconsistent with the Objectives and Policies of the District Plan, in particular but not limited to Objective 20.2.1 and 20.2.4 and Policy 20.3.1.

3.62 The Notice of Requirement overlooks and fails to consider relevant matters in the 2011 Regional Land Transport Strategy.

3.63 The Designations do not achieve the purpose of the Act.

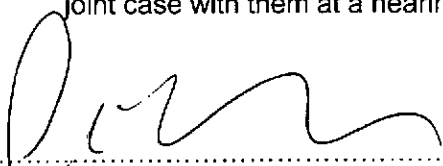
4 The Submitters seek the following recommendation or decision from the territorial authority:

4.1 That the territorial authority modify the Notice of Requirement to address the concerns of the Submitters set out above in a fashion that is satisfactory to the Submitters; or

4.2 That the Notice of Requirement be withdrawn.

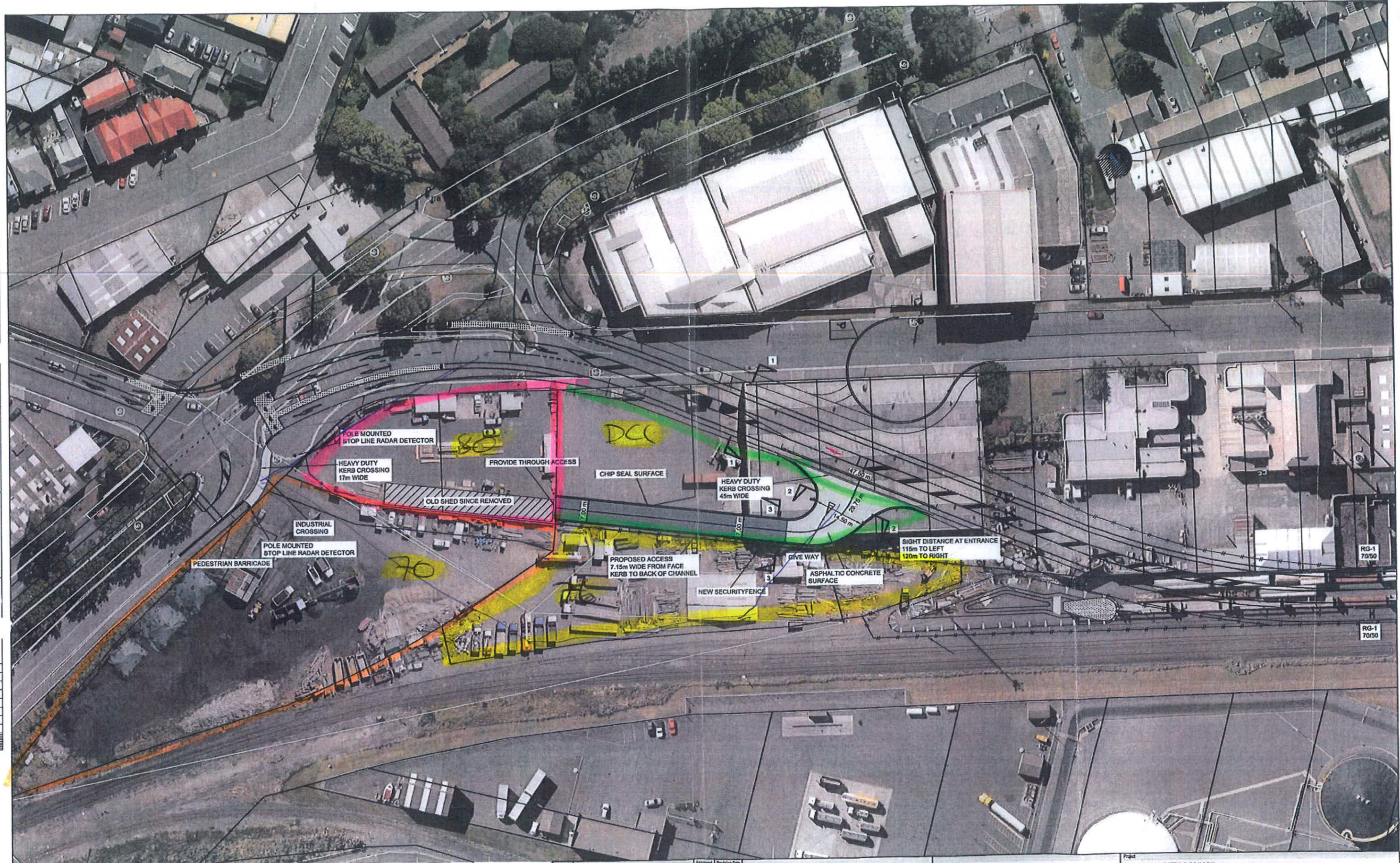
5 The Submitters wish to be heard in support of their submission.

6 If others make a similar submission, the Submitters will consider presenting a joint case with them at a hearing.


.....
C P Thomsen
Counsel for the Submitters

30/8/13
.....
Date

Address for service of Submitter:	Webb Farry Lawyers, PO Box 5541, Dunedin 9016
Telephone:	03 477 1078
Fax:	03 477 5754
Email:	cthomsen@webbfarry.co.nz
Contact Person:	Chris Thomsen



Revisions	Amendment	Approved	Revision Date
R1	DIMENSIONS ADDED		17/9/12
R2	Island to be left in place	D.D.	17/10/12

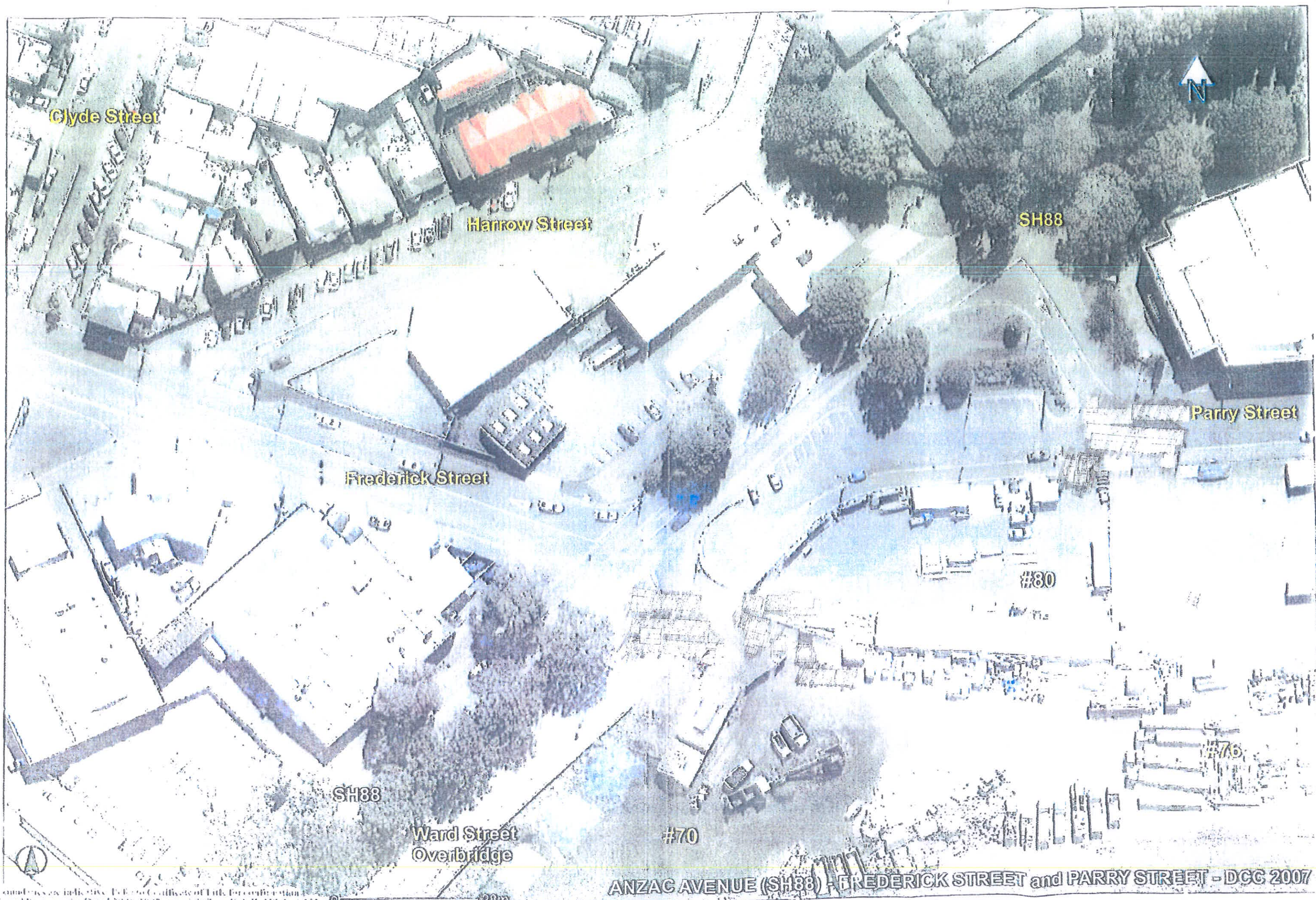


Drawn	Designed	Approved	Revision Date
D. Dickson		R. Underwood	17/09/12
Project No.	Scale		
6CD026.00	1:500 @ A1		

Project	DUNEDIN CITY COUNCIL HARBOUR ARTERIAL STADIUM BYPASS SH88 REALIGNMENT
Sheet	LAYOUT PLAN
Drawing No.	7/583/154/3704
Sheet No.	1
Revision	R2

1:1
0 10 20 30 40 50 60 70 80 90 100 m

"B"



and/or indicative of the Certificate of Title for confirmation
Aerial Photography Dept 2006-2007 copyright Landlink, NZ Aerial Map

ANZAC AVENUE (SH88) - FREDERICK STREET and PARRY STREET - DCC 2007