IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-3290
[2017] NZHC 1457

BETWEEN	VIPASSANA FOUNDATION CHARITABLE TRUST BOARD Plaintiff
AND	AUCKLAND COUNCIL First Defendant
	RAYMOND MYLES O'BRIEN AND VICTORIA MEI SIEN PICHLER Second Defendants
	AUCKLAND SHOOTING CLUB INCORPORATED Third Defendant

Hearing:	12 and 13 June 2017
Counsel:	S J Ryan and S Cates for Plaintiff N Whittington for First Defendants J M Savage for Second and Third Defendants
Judgment:	28 June 2017

JUDGMENT OF WHATA J

This judgment was delivered by me on 28 June 2017 at 3.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors:	Cullen – The Employment Law Firm, Wellington Meredith Connell, Auckland Blackwells, Auckland

[1] Vipassana Foundation Charitable Trust Board (the Trust) operates a meditation retreat in Kaukapakapa. Mr O'Brien and Ms Pichler were recently granted a certificate of compliance by the Auckland Council (the Council) for a pistol shooting range about 1.2km from the meditation retreat. The Trust challenges the legality of the grant.

[2] With the benefit of argument, I understand the Trust seeks to have the certificate of compliance quashed and injunctive relief granted because:[1]

(a) there was a material misinformation about the number of participants, with consequential errors in relation to the use of the site;

(b) there was no proper assessment of the wastewater effects in terms of relevant discharge rules for wastewater;

(c) the proposed activity includes a non-compliant ancillary building of more than 25 m^2;

(d) there was no proper assessment of the effects of discharge of contaminants (specifically lead) to land caused by the shooting activity; and

(e) there was no proper assessment of noise effects, as the measurement standard used in the Auckland Council District Plan (Rodney section) (the AC District Plan) is inapposite or invalid.

[3] I will address each of these claims and then, if necessary, address the issue of relief.

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[1] Issues about car parks and vegetation removal, raised in the Trust's amended statement of claim, were withdrawn at the hearing.

Preliminary issues

[4] There are two preliminary issues, first as to the admissibility of evidence, and secondly dealing with the Council's belated indication that discharges to land are a discretionary activity.

[5] Dealing first with the evidential issue, both the applicant and respondents seek to adduce affidavit evidence which was not before the decision-maker. The Trust however claims that much of the evidence for the respondents is focused on ex post facto rationalisations that are of limited relevance. I agree with Mr Ryan that evidence that is not related to the application process has little if any bearing on the legality of that process. But in a case concerning the effects of an activity, evidence about those effects may provide helpful context to the assessments actually made, including on issues of sufficiency and materiality. I proceed on that basis.

[6] The Council filed a memorandum post hearing indicating that the AC District Plan rules dealing with discharge of contaminants relate only to discharges from land. Mr Savage sought leave to respond. I do not consider it necessary to require further submission as I address issues of construction of the Plan as it relates to discharges based on the submissions at hearing and without regard to the Council's post hearing position at [42]-[55]. Any alignment between my concluded view and the Council's position is coincidental.

Context

[7] The Trust runs meditation courses at the Dharma Medini Vipassana Meditation Centre located at 153 Burnside Road, Kaukapakapa. The purpose of the Trust is to promote the teaching of Vipassana meditation, both in theory and practice.

[8] The meditation centre has been operating at this location for almost 30 years. Annually there are approximately 24 ten day residential Vipassana meditation courses held at the meditation centre, attended by approximately 1,800 people.

[9] The technique of Vipassana meditation is learned by attending a ten day residential course with a qualified teacher, where students meditate for eleven hours

per day between 4.00 am and 9.00 pm. The courses are conducted in silence, without any interaction between student meditators or with the outside world.[2]

[10] Mr O'Brien and Ms Pichler are competitive shooters and active members of the New Zealand shooting community. Both of them have competed regionally, nationally and internationally. Ms Pichler is a current New Zealand Ladies' champion and was also Australian Ladies' champion in 2016. Mr O'Brien is currently the New Zealand champion and last year represented New Zealand in a team that finished third in the Australasian championships in Indonesia where 22 countries were represented.

[11] In June 2016, Mr O'Brien and Ms Pichler applied for a certificate of compliance, pursuant to s 139 of the Resource Management Act 1991 (RMA), deeming a shooting range to be located at 287 (previously 273) Tuhirangi Road a permitted activity. Prior to this Mr O'Brien had made inquiries about the activity status of a shooting gallery in the locality with Ms Harris, a planner in the Northern Resource Consenting team in the Council. He sent in photos identifying the property. He was told it was likely to be a permitted outdoor recreation activity. He was also referred to noise standards by Ms Harris.

[12] The application described the activity as:

> Outdoor target shooting with firearms, including pistols, shotguns and rifles, involving tests of proficiency (accuracy and speed). Clearly defined shooting areas will be constructed in a manner compliant with all safety requirements, as referred to in the other attachments. The primary ancillary building required is a toilet and a storage area for targets and target holders.
>
> As such, this activity falls under the provisions of Outdoor Recreation in the Auckland Council District Plan Operative Rodney Section 2011 Rule 7.9 as a Permitted Activity.

[13] Information in support of the application included:

(a) a letter from a range inspecting officer, noting that the site would be suitable for developing a pistol range; and

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2 Affidavit of Kirsty Frances McKay dated 22 December 2016, at [5].

(b) a photo from the Council GIS viewer, identifying the location of the site.

[14] Further information sent by email on 24 June 2016 included:

> …Here is the further information you requested. If I have missed any items please let me know.
>
> A Club is to be formed affiliated with Pistol New Zealand. The range certification process requires the ranges to comply with all the safety and other requirements of the police and Pistol NZ.
>
> Expected that normal operations would see about 30 people on any given day at the ranges. Club matches might see around 50 or 60 people, and occasionally there would be national or international competitions held. National competitions (perhaps 3 or 4 times per year) normally have around 100 to 150 competitors, and international competitions (most likely only one per year) would have around 300 or 400.
>
> Hours of operation:
>
> 7 days, 8am to 6pm, but perhaps later in daylight saving hours. If there is demand for night operations these would be considered but unlikely to be in the first few years of operation.
>
> Noise:
>
> The ranges will be constructed to minimise the sound footprint (location, orientation, berms, tree planting) to ensure that the sound limits are adhered to. The aim from design and construction will be to have noise levels at or below the requirements 10 metres inside the property boundary.
>
> Parking:
>
> This will be predominantly in the central area of the range boundaries and largely or completely be invisible from the road.
>
> Earthworks:
>
> Once the CoC is issued we will be doing detailed range construction plans. Earthworks will be kept to the minimum required for construction, making maximum use of the natural contours and features, but at this time I don't have an estimate of the earthworks required.
>
> The purchase of the land for this purpose is complete, but once the CoC is issued we can put together a plan for developing what we hope will become a valuable outdoor recreation facility.
>
> …

[15] Reports from Marshall Day Acoustics (noise experts), dated 27 July 2016 and 8 August 2016, which included a detailed description of the proposed activity, were also forwarded to Ms Harris. Key observations are noted at [59] below.

[16] Information was also supplied by the applicants about the scale of the earthworks. They considered that six 20 m deep ranges would require 301 m^3, and that in total 18 ranges could be constructed and still be below the 1000 m^3 limit. However they proposed a mix of 15 m and 20 m deep ranges, with ends of ranges bermed and individual ranges fenced to meet the safety criteria set out by the New Zealand Police, and a target of between six and 12 ranges in total.

[17] A report on the proposal was produced by Ms Harris recommending grant of the certificate of compliance. It describes the proposed activity in the following terms:

> The applicant proposes to create an outdoor shooting range involving firearms (pistols) in the General Rural zone of the Auckland Council District Plan (Rodney Section). There will be two separate groups of ranges, an Eastern Range which will operate for a maximum of 8 hours per day between the hours of 6am and 6pm, Monday to Sunday and the Western Range which will operate for a maximum of 8 hours per day between the hours of 6am and 6pm, Monday to Saturday. The Western Range will not operate on Sundays. When both the Western and Eastern Ranges are in operation (Monday to Saturday) a maximum of 6 bays in total will be in use at any one time.
>
> A Club will be created in affiliation with Pistol New Zealand. Targets (approximately 1.5m in height) will be constructed in compliance with the safety regulations of Pistol New Zealand and the New Zealand Police.
>
> A toilet and storage area for targets and target holders will also be constructed with a total gross floor area of less than $25m^2$. A septic system will be installed for the toilets and this will not discharge more than $2m^3$ of wastewater to land per day. Drinking water will be provided via a mix of rain water and delivered water, with quality filter system installed.
>
> …

[18] The proposed activity is assessed against provisions of the AC District Plan in terms of rule 7.9.2 Activity Table 1, Appendix 21B Parking, Noise, Hours of Operation, rule 7.9.4.2.1.1 Earthworks, rule 7.10.3 Rule – Yards, rule 7.10.4 Site Coverage, rule 16.16.2.2 Signs in Rural Zones, Use of a site, and rule 7.9.4.1.3.2

Vegetation removal. It is also assessed by reference to the Proposed Auckland Unitary Plan (PAUP), Part 3 Chapter H4.2.1.1 Earthworks.

[19] Overall the report concludes that the proposal is a permitted activity under the relevant rules of the AC District Plan and the operative rules of the PAUP.

[20] A certificate of compliance was then issued on 18 August 2016 on the following terms:

> To construct an outdoor firearms (pistol) range which will operate for a maximum of 8 hours per day between the hours of 6am and 6pm, Monday to Sunday, involving accessory buildings with a total gross floor area of less than $25m^2$ for a toilet and storage facilities, with a minimum of 10 on-site parks provided. The proposed 'Western Range' will not operate on Sundays. When both the Western and Eastern Ranges are in operation (Monday to Saturday) a maximum of 6 bays in total will be in use at any one time. Earthworks will not exceed $1000m^3$ or $1000m^2$ and will be undertaken in accordance with the performance standards in Rule 7.9.4.2.1.3. No earthworks will take place within 10m of a wetland or natural watercourse. Vegetation removal will not exceed 1ha in area.

Legislative frame

[21] Section 139 of the RMA imposes a duty on a Council to grant certificates of compliance for permitted activities in the following terms:

> **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.
>
> (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
>
> …

(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.

(9) Sections 357A and 357C to 358 apply to a request for a certificate.

(10) A certificate is treated as if it were an appropriate resource consent that—

(a) contains the conditions specified in an applicable national environmental standard; and

(b) contains the conditions specified in an applicable plan.

(11) A certificate treated as a resource consent is subject to sections 10, 10A, and 20A(2).

(12) A certificate treated as a resource consent is subject to this Act as if it were a resource consent, except that the only sections in this Part that apply to it are sections 120, 121, 122, 125, 134, 135, 136, and 137.

…

[22] The leading case on the operation of this section remains *Pring*.[3] Relevantly for present purposes, the Court of Appeal there stated:[4]

> Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine, but, of course, there must have been *some* material capable of supporting the decision. Having said that, it must also be recognised that because neighbours and users of adjoining streets may well be adversely and directly affected by a development which obtains a certificate of compliance and thereby is deemed to have a resource consent (subs (6)), the Court will scrutinise what has occurred more carefully and with a less tolerant eye when considering whether the decision was one open to the consent authority on the material before it than it will do in a case where the decision which is being questioned required the balancing of broad policy considerations and there was less direct impact upon the lives of individual

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3 *Pring v Wanganui District Council* (1999) 5 ELRNZ 464 (CA).

4 At [7].

> citizens as, for example, where the exercise of statutory power involved the striking of a general rate (Wellington City Council v Woolworths New Zealand Ltd (No 2), [1996] 2 NZLR 537).

[23] And further:[5]

> If a proposal complies, s 139 requires the consent authority to issue a certificate within the short specified statutory time-frame. The authority must first be satisfied that there is compliance. Before it can be properly satisfied it must have had sufficient information in order to be able to make a thorough comparison of the proposal with the applicable rules. It must therefore ensure that it has an adequate description of the subject matter, of what is proposed. It is given power to ask for further information relating to the request for a certificate (subs (2)). What the authority needs to know will depend upon the nature of the proposal and upon the particular rules which must be complied with. It will rarely, if ever, be appropriate for it to give an approval without being supplied with plans (in this case it had a site plan and it requested and received elevation drawings), but the requisite degree of detail will vary with the application.

The planning framework

[24] The AC District Plan provides activity status classification for different activities in particular zones. Two such classifications are particularly relevant here, namely:

ACTIVITY	**General Rural Zone**
OUTDOOR RECREATION not involving BUILDINGS except for goal posts, seating, fencing and ancillary buildings (eg. toilets, ticket offices, storage) up to a combined total floor area of 25m^2 per site and excluding HORSE RIDING SCHOOLS or HORSE RIDING FACILITIES and HORSE TRAINING FACILITIES	P
…	…
Use of a SITE on not more than a total of 3 days within any 12 month period for events such as festivals, carnivals, markets, race meetings and rallies (including temporary structures for such activities) provided that the number of persons catered for and attending such events does not exceed 200 for each event and where access for the activity is not obtained from a STATE HIGHWAY.	P

5 At [10].

[25] There is no dispute that the proposed activity is classified as an Outdoor Recreation activity. It was also processed on the basis that it was a Use of a Site. Other applicable standards will be addressed below where relevant.

Participant numbers, site use, wastewater and earthworks

[26] I will deal with the claims based on participant numbers, wastewater and earthworks together as they are based on similar claims of insufficiency or misinformation.

[27] The report on the application for a certificate of compliance addressed earthworks and site use (which deals with participant numbers) in these terms:

Rule 7.9.4.2.1.1 Earthworks – Less than 200m^3 or greater than 200m^3 but less than 1000m^3 subject to compliance with the performance standards set out in rule 7.9.4.2.1.3	The applicant has confirmed that the proposed earthworks will be within the permitted threshold for the General Rural zone (less than 1000m^3). Although exact designs are yet to be finalised the approximate volume of a 20m x 7.525m^2 trapezoid shaped earth bund will result in approximately five ranges (requiring six earth bunds) being able to be constructed as a permitted activity. The applicant may use a mixture of earth bunds and fences constructed to meet the safety criteria set out by the NZ Police. The proposed location of both the Eastern and Western ranges are outside of the area labelled as a floodplain on Council's GIS maps. No earthworks will take place within 10m of a wetland or natural watercourse.
…	
Use of a SITE on not more than a total of 3 days within any 12 month period for events such as festivals, carnivals, markets, race meetings and rallies (including temporary	The applicant has advised that competitions will have around 100-150 competitors and will occur no more than 3 times per year. The amount of persons attending will not exceed 200. Access is not obtained from a State Highway. As a result, the proposed activity

structures for such activities) provided that the number of persons catered for an attending such events does not exceed 200 for each event and where access for the activity is not obtained from a STATE HIGHWAY.	meets the permitted threshold for the use of a Site provision.

[28] In terms of wastewater, the report observes that a septic tank will be installed for toilets that will not discharge more than 2 m^3 of wastewater per day. No reference to standards is made however. The relevant standard for wastewater is recorded at Rule 5.5.20 of the Air Land and Water Plan (part of the AC District Plan) and Rule 4.15 of the PAUP. They basically impose the same standards. The discharge of domestic wastewater from one dwelling (commercial, industrial or other premise) to land within a lot via a treatment and land application disposal system is a permitted activity subject to specified conditions, including compliance with Technical Publication 58 – an Auckland Regional Council document (TP 58).

[29] Mr Ryan submits:

(a) There were no detailed plans supplied with the application clearly setting out the scope of the activities subject to the application, and as stated in *Pring*, it will rarely if ever be appropriate for a Council to give approval without being supplied with plans.

(b) The assurances provided by Mr O'Brien about earthworks and the description of the earthworks activity in the report is not consistent with the grant for 15 berms for the Eastern and Western Ranges identified in supporting plans supplied to the Council.

(c) To assess compliance with wastewater rules, the Council needed to know, having regard to TP 58, the site to assess system suitability and the system design based on anticipated maximum number of persons.

(d) The information supplied about numbers varied from "300-400" to "will not exceed 200 persons".

Assessment

[30] I am not persuaded that these claims give rise to a material error or deficiency. It is necessary to observe at the outset that at a general level the proposed activity is not at all difficult to digest. The nature of the activity, a shooting range, is obvious. A single ancillary building is proposed. The location and layout of the shooting ranges was provided to the Council, including as part of the Acoustic reports. I therefore see nothing in the claim that no or insufficient plans were supplied.

[31] Furthermore, an applicant for a certificate of compliance may modify a proposal during an application process in order to meet the permitted activity standards required by the planning documents. Provided the proposal, as modified, has some cogent information to support a conclusion that it can comply with the permitted activity standards, the weight to be afforded to any particular matter in reaching that conclusion is not amenable to review.[6]

[32] Turning to the particular issues raised under the present heading, Mr O'Brien agreed to limit the numbers of persons using the proposed shooting range to meet the Site Use rule to three major events per year, with no more than 200 people in attendance. That number is readily capable of independent verification and enforcement. Mr O'Brien can limit the numbers of persons invited to attend major events,[7] and the Council can require information in support and then enforce compliance.

[33] Mr O'Brien also indicated that he was prepared to limit the earthworks on the site to 1000 m^3 or 1000 m^2 and produced some information to show that this was achievable. He referred to earthworks calculations for the berms, which were adopted in indicative terms in the planner's report, as noted above. This sets a clear

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6 *Pring v Wanganui District Council*, above n 3, at [7].

7 This is in contrast to *Pring,* in which the activity under scrutiny was a Burger King restaurant, and the uncertainty of traffic numbers was put forward as a basis for challenging the grant of a certificate of compliance.

frame for the earthworks. The evaluative assessment of the efficacy of these numbers is for the Council, not this Court on review. But in any event, like the number of participants, these figures are also readily capable of verification and enforcement. Compliance can be assured.

[34] Finally, I see nothing wrong with the Council deferring the final design of "wastewater treatment" to the building consent stage as happened here. Ms Harris told Mr O'Brien that the septic system should not trigger a requirement for resource consent and deferred assessment to the building consent process. This approach was plainly available to her. In reality, a toilet in a 25 m^2 building is contemplated on a 38 hectare section. By the time of the grant, she was aware of the expected regular (30) and maximum potential (200) numbers of persons using the site on any given day. She was also aware that the maximum figure may only be reached three times a year. Furthermore, whatever is constructed on the site must satisfy all relevant criteria, including TP 58 guidelines. This is everyday work for councils and there is simply no prospect of a non-compliant waste disposal system.

[35] Mr Ryan nevertheless placed some significance on strong dicta in two cases, *Queenstown Casinos Ltd v Dunedin City Council* and *Turners & Growers v Far North District Council*, to the effect that a marked lacked of particularity is fatal,[8] and a territorial authority is required to make a point-by-point scrutiny of a proposal by reference to all applicable district plan rules.[9] But the degree of particularity required and the sufficiency of scrutiny is context specific.[10] For the reasons already expressed, I do not consider that there was either a marked lack of particularity or failure to scrutinise the matters raised under this heading.

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8 *Queenstown Casinos Ltd v Dunedin City Council* [1998] NZRMA 209 (HC) at 220. This case was about a proposed casino. The Court found, at 220, that "the detail of the proposal was neither exposed nor considered." This is the context for the statement that a marked lack of particularity is fatal.

9 *Turners & Growers Horticulture Ltd v Far North District Council* [2012] NZHC 1142, [2012] NZRMA 435 at [21]. This case was about a waste transfer station. The Court observed, at [11], that no "information [was] provided as to how the facility would operate." Inevitably, in these circumstances, the Court set aside the certificate of compliance.

10 *Pring v Wanganui District Council*, above n 3, at [10].

[36] Accordingly, the Council had a proper basis upon which to conclude that the proposed activity will comply with relevant standards as it relates to earthworks, site use and wastewater disposal.

Buildings

[37] Mr Ryan submits that the application was misleading because it did not refer to the fact that there was an existing building of 84 m^2 located within the site, which was to be used for the shooting range. This is significant because a distinction is made in the AC District Plan between Outdoor Recreation involving a building and not involving a building. Only the latter is permitted. No explanation was able to be given for the policy reasons for the difference. It can be assumed however that it is a material difference.

[38] Mr O'Brien admits that initially the building was to form part of the activity. But on learning that the building had to be no greater than 25 m^2, he repurposed the building to store farming equipment for the adjacent site also owned by him. Mr Savage added that the building can be removed if necessary to secure compliance. He also suggested that this issue was discussed with the Council during the application process, though there is not written confirmation of this.

[39] This aspect has caused me some pause. The application documentation was, objectively assessed, misleading. While Mr O'Brien has repurposed the use of the building, the application should have clearly stated that there was an existing building so that the Council could make a proper evaluation of the proposed activity against the existing environment. There is also nothing in the record to show that the Council specifically assessed the proposal having regard to the presence of the existing building. Ms Harris' report makes no mention of it.

[40] Accordingly, while the grant of the certificate of compliance refers only to one building of 25 m^2, the application was flawed and the Council, it appears from the available record, did not take into account or transparently assess the significance of the existing building.

[41] I address the significance of this error in my discussion on relief.

Discharges to land and water

[42] There is no dispute that the shooting range will cause discharges of lead, a contaminant, to land. The effects of this discharge were not transparently assessed as part of the application. There is no reference to the relevant discharge rules at all. Mr Ryan therefore submits that the certificate of compliance must have been issued in error, citing the following passage from *Turners & Growers*:

> [56] The Council was obliged to satisfy itself that no discharge consent was required. It did not have sufficient information to enable it to do so and therefore acted unreasonably in issuing its decision. It may well be, for the reasons discussed, that the Council completely overlooked this issue when reaching its decision. Either way, it erred in law.

[43] This statement must be approached with care. The district plan in that case stated that an activity is permitted if "it does not require discharge consent with the Northland Regional Council". There is no such provision in the present case, bar contaminated land rules 5.5.43 and 5.5.44 in the Air Land and Water Plan.[11]

[44] Even so, s 139 only applies "if an activity could be done lawfully in a particular location without a resource consent."[12] Section 15 controls discharges to the environment, including for present purposes as follows:

> **15 Discharge of contaminants into environment**
>
> (1) No person may discharge any—
>
> (a) contaminant or water into water; or
>
> (b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water;
>
> …
>
> (2A) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a regional rule unless the discharge—

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11 Expert evidence from Ms McDonald for the second and third respondents and Mr Hart for the applicant agreed that these provisions were unlikely to be relevant as the site's existing level of contamination was likely to be low.

12 Resource Management Act 1991, s 139(1).

(a) is expressly allowed by a national environmental standard or other regulations; or

(b) is expressly allowed by a resource consent; or

(c) is an activity allowed by section 20A.

[45] The application of s 15 to the present activity could not have been determined without an assessment of the likelihood of the discharge of lead to land reaching water, and if not, whether it would otherwise contravene a rule in the AC District Plan. Plainly the Council, in not satisfying itself about these matters, could not lawfully issue a certificate of compliance. This manifests a clear error of law.

[46] Mr Savage sought to repair the error by referring to a letter from the Council's in-house solicitor, Ms McCulloch, which states that:

> …Ms Harris the planner who reported on the application did not consider the proposal required a discharge consent when she processed the application because the likelihood of contaminants from the bullets reaching natural ground or any waterway would be extremely unlikely.

[47] But there are major problems with this. First, the letter purports to record a statement made by Ms Harris, yet she was not invited to own it in her evidence. The weight to be given to it must be limited.

[48] Second, and more importantly, the reasons expressed in the grant and the report supporting the grant provide the most cogent evidence of what was taken into account for the purpose of the decision. A council officer may well dispense with a matter in his or her own mind, but those musings were not transparently recorded and as such provide an improper basis for establishing legality.

[49] For completeness I have examined the submissions and evidence about compliance with discharge rules to the extent it may be relevant to materiality. Ms McDonald for the second and third respondents, an environmental engineer, concluded that the contamination from the proposed shooting range can be managed to acceptable levels and that the contaminated land rules would not have applied to the activity, given very low readings for existing contamination. But this was also accompanied by finding that "the highly permeable soils on-site and potential

shallow depth to groundwater increase the potential for groundwater contamination if lead were able to leach from spent bullets not retained by the bullet catchers."

[50] Conversely, Mr Hart for the applicant identified the risks associated with shooting ranges and lead contamination, but did not provide any detailed assessment as to the level of risk, aside from commenting on Ms McDonald's affidavit evidence. He also agreed with Ms McDonald that the land contamination rules did not appear to be triggered by the proposal.

[51] Taken as a whole, the evidence suggests a small risk only of contamination of water that would trigger the prohibition at s 15(1), but one that cannot be completely discounted. Therefore the failure by the Council to transparently consider this issue was not immaterial. I address the issue of relief below.

[52] For completeness, I make no comment on the activity status of the shooting range should s 15 be engaged. That matter was not fully ventilated before me. It is however a matter bearing on relief.

The scope of rule 5.5.41

[53] I address however an argument that sprung to life during the hearing that may have some bearing on how matters unfold. The second respondents submit that the discharges are permitted pursuant to Rule 5.5.41. That rule states:

> Other than is provided by Rule 5.5.40A, the discharge of contaminants to land or water from land is a Permitted Activity subject to:
>
> (a) Concentrations of target contaminants, or the 95% upper confidence limit of the mean which shall be determined in accordance with the Contaminated Land Management Guidelines No 5 Site Investigation and Analysis of Soils (MfE, February 2004), shall not exceed the greater of (i) or (ii) below:
>
> (i) for in situ soil and material imported and/or deposited onto the land:
>
> 1. The criteria specified at Schedule 10: Permitted Activity Criteria. The human health values in Schedule 10 apply unless the effects of land use on human health have been expressly authorised either through District Plan rules or a resource consent by a ***territorial authority***. For contaminants not included in Schedule 10;

…

(ii) for in situ soil and material imported and/or deposited onto the land the natural ***background levels*** for that soil or material or the relevant ***background levels*** specified in ARC Technical Publication "Background concentrations of inorganic elements in soils from the Auckland Region", TP153, October 2001.

...

[54] Schedule 10 then (relevantly) states:

> The contaminant levels specified in the table below apply to historical land uses only. They are not to be construed as levels to which land can be polluted up to as a result of ongoing discharges or as levels to which land must be remedied.

Contaminant	Permitted Activity Soil Criteria (mg/kg)	
	Discharge	Human Health
Lead	250.0	

(citations omitted)

[55] Mr Ryan highlighted the prefatory comment and submitted that the table relates only to historical land use only. However, rule 5.5.41 is part of a regime of rules designed to protect against the risks to the environment of ongoing discharges to land *from* contaminated land, not discharges to land from other sources. The prefatory statement is simply making clear that the rule does not purport to set a standard for discharges per se. It is then tolerably clear that the rule sets a permitted activity threshold for discharges *from* contaminated land by reference to a combined concentration of contaminant "in situ soil *and* material imported *and/or* deposited onto land". In short, the combined level of contamination must not exceed the specified standard. Based on the evidence provided by Ms McDonald, the shooting range is permitted by this rule in terms of discharges from land to land.

Noise

[56] The following noise standards applied to the proposal:

Table 16.9.2.1.2(i): Noise Received in Rural Zones (L_{eq})

	NOISE LIMITS dBA L_{eq}		
Within the notional boundary	**Mon-Sat 6:00am - 6:00pm**	**Sundays and Public Holidays 6:00 am – 6:00 pm**	**At all other times**
Group A background noise level	**50**	**45**	**40 and 70 dBA L_{max}**
Group B background noise level	**55**	**50**	**45 and 75 dBA L_{max}**

(citations omitted)

[57] Rule 16.9.2.1.5 of the AC District Plan requires assessment of noise in accordance with various provisions of the New Zealand Standard in the following terms:[13]

> (a) Noise levels shall be measured and assessed in accordance with the provisions of New Zealand Standard NZS 6801: 1999 "Measurement of Environmental Sound" and New Zealand Standard NZS 6802: 1999 "Assessment of Environmental Noise" except that averaging of measured L_{eq} noise levels shall be permitted for comparison with the relevant limit as follows:
>
> The averaged L_{eq} value shall not exceed the relevant limit, and in any case the limit shall not be exceeded by more than 5 dBA for any single time interval. L_{eq} values shall be averaged on an energy basis whereby the logarithmic mean is determined. Measured L_{eq} levels shall not be averaged if comparison is to be made with a night-time limit between 10:00pm and 7:00am.
>
> (b) Where there is doubt whether a particular activity will comply with the noise performance standards under Rule 16.9.2, an acoustic design certificate from a recognised acoustic consultant shall be provided, demonstrating that the noise limits in the table will not be exceeded.
>
> …
>
> (d) Notwithstanding the above performance standards, the Council reserves the right to use its power under the Resource Management Act 1991, to control any noise which contravenes the provisions of that legislation.

[13] The New Zealand Standard provides methods for measurement of sound. It is prepared with a view to local authority use in rules of local authority plans and resource consent conditions.

[58] NZS6802:1999 states at 1.2:

> This Standard shall not be applied to assessment of sound where the source is within the scope of, and subject to, the application of other New Zealand acoustical Standards, except as provided for in 1.3 or 1.4. In particular, assessment of specific sources including transportation, construction, port noise, wind turbines, and impulsive sound (such as gunfire and blasting), requires special techniques that generally are outside the scope of this Standard. This Standard covers airborne sound but does not cover structure borne sound (vibration).

[59] The application was accompanied by two acoustic engineer reports prepared by Marshall Day Acoustics. Both concluded that the activity could meet the AC District Plan standards. Key observations included:

> A SoundPlan computer based model, which uses International Standard ISO 9613-2:1996 *"Acoustics – Attenuation of sound during propagation outdoors – Part 2: General method of calculation"*, was developed to determine the noise received at the notional boundary of the nearest existing receivers. The activity sound power was based on a measurement of moving and stationary shooters using a variety of pistols comprising mainly of 9 mm bore weapons at a similar club. The model was calibrated to an unattenuated noise level of 67 dB L_{Aeq} at 115m. The noise source was assumed to be at a height of 1.5m.
>
> …
>
> As shown, the Rating levels comply with the noise performance standard in the District Plan at all receivers with the pistol club open on all days assuming a special audible character correction and they operation within the day specific ranges. It is noted that the predicted sound level at the notional boundary of the nearest dwellings range between 37 and 46 dB L_{Aeq} from the western range, and 33 and 41 dB L_{Aeq} from the eastern range, which is a relatively low level during the day time. Other background noise sources may mask the club activity which would mean that the special audible character would not apply. We recommend that noise surveys are undertaken when the club first opens to determine effects.
>
> We recommend that an operational management plan be implemented that restricts activity to specific ranges i.e. on Monday to Saturday any combination of bays in the western and eastern ranges may be used provided that no more than six bays are in use. On Sunday only the eastern range is used.
>
> …

[60] Mr Ryan submits however that the NZS6802:1999 methodology laid out in the AC District Plan for assessing noise is inapplicable to gunfire.[14] He says this has

[14] He also submits that gunfire is outside the scope of NZ 6802: 2008, which supersedes NZS

two consequences. First, the expert assessments were flawed, and second, because the standard is invalid insofar as concerns gunfire, the ranges must be assessed as a restricted discretionary or discretionary activity. He also submits that the rules are invalid for uncertainty.

[61] Mr Ryan notes that the issue of the applicability of the standards to gunfire was raised by David Winter, principal environmental health specialist, on at least four occasions. By way of example, in a email dated 9 August 2016, Mr Winter said:

> I refer [to] my previous comments and question if LAeq is the most appropriate descriptor to assess noise effects for a shooting range. LZpeak can be used for impact noise, such as is proposed to be used to control bird scaring devices in the PAUP, with consideration made to frequency and duration as well[.]

[62] Mr Hegley, an experienced noise expert, has provided evidence that the L_{Aeq} measure from NZS6802:2008 *"Acoustics – Environmental Noise"*, which the Marshall Day Acoustics reports referred to, is inapplicable because the AC District Plan refers to NZS6802:1999. He stated that in his view regardless of which standard is adopted, there is no correlation between either the L_{Aeq} as applied in NZS6802:2008 or the L_{eq} level as applied in NZS6802:1999, and community response to the sound of gunfire.

[63] Mr Hegley is also critical of the Marshall Day reports. He says:

(a) They were based on the full application of NZS6802:2008, which, like NZS6802:1999 is inapplicable to gunfire.

(b) There was no indication as to the number of shots or types of guns so an accurate measurement could not be made.

(c) There is no method to assess if the level recorded in the reports is comparable to that proposed on the shooting range, as there are no limitations in the proposal on any variable other than hours of operation.

6802:1999 and is referred to in the excerpt above.

(d) The reported lowering of ground levels to that modelled means the screening effects that have been reportedly used are not correct.

(e) Generally, the report writers appear not to know (on the basis of their reports) the existing noise environment for the location well enough to reach the conclusions they did.

[64] The respondents produced an affidavit by Mr Graham Warren, who like Mr Hegley is an experienced noise expert. Mr Warren agrees that the NZS6802 can be inappropriate for assessment of gunfire noise if used in its entirety. But he also says that "when applied selectively and with experienced professional judgment its application can be satisfactory for comparison against district plan rules". Mr Warren concludes that shooting club could comply with noise limits and the certificate of compliance in relation to acoustical matters was appropriate. In particular he noted:

> 2.2 I consider that the MDA assessment is valid and satisfactorily demonstrates that the ASC can operate in compliance with the noise limits of 16.9.2.1.2 of the Auckland District Plan (Rodney Section) for the following reasons.
>
> 2.3 The noise emission levels from ASC site were determined by means of a computer model (SoundPlan) which incorporates data of the relevant topography and sound power levels together with the various factors affecting sound propagation. The SoundPlan computer software has international recognition and acceptance, and MDA has many years of experience its operation which has demonstrated its reliability and accuracy over a wide range of projects.

Assessment

[65] In the absence of invalidity or unreasonableness, the alleged methodological inappositeness of NZS6802:1999 to gunfire does not give rise to an issue of legality or improper process. The efficacy of NZS6802:1999 in terms of gunfire in a particular context is an evaluative matter for the Council. The outcome in *North Canterbury Clay Target Association Inc* is illustrative.[15] As the Court of Appeal noted:[16]

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[15] *North Canterbury Clay Target Association Inc v Waimakariri District Council* [2016] NZCA 305, [2016] 3 NZLR 764.

[16] At [17]; citing *Waimakariri District Council v North Canterbury Clay Target Association* [2014] NZEnvC 114 at [32], [52], [61]-[62].

> It was agreed in the Environment Court that gunfire noise cannot be assessed under NZS 6802:1991. Clause 1.2 of the Standard says as much. The Court nonetheless found that the MHA Report complied with NZS 6802:1991 so far as applicable and correctly interpreted rr 31.11.1.1 and 31.11.1.2. The Court declared that shooting was correctly assessed to be a permitted activity under r 31.11 at the time the certificate of compliance was issued.

[66] In terms of the present framework, the AC District Plan requires an assessment by reference to specified standards in accordance with NZS6802:1999, with expert certification required where there is doubt about whether an activity will comply. The Council is obliged to apply these standards to a proposed activity,[17] subject to the limited discretion reserved to the Council at rule 16.9.2.1.5(d). People order their lives based on strict adherence to these rules. The Council followed that process as it was obliged to do. A certificate of compliance was obtained. While there may be expert disagreement about the correctness of that evaluation, it provided a proper basis for the Council to conclude that the proposal would comply with the applicable noise standards. To this extent, the Council decision about compliance with the noise standards is not amenable to review.

[67] I have nevertheless taken into account the competing expert positions. I am not satisfied that the Marshall Day Acoustics reports were flawed. Adjustments were made to accommodate the special audible characteristics in issue. An expert evaluation was then made as to the ability of the proposal to comply with the applicable standards. The cogency of that assessment is now supported by an expert of longstanding. This confirms that the decision by the Council to find code compliance was not unreasonable in an administrative law sense.

[68] I am also doubtful that shooting ranges must default to restricted discretionary or discretionary activity if there is no applicable standard. Mr Ryan's central contention is that as the activity cannot comply with a permitted activity standard, it cannot be deemed to be a permitted activity. But the RMA and the AC District Plan are not structured that way. Section 9 of the RMA only places restrictions on use of land that contravene rules. The salient rule 16.9.1.1.1 of the AC District Plan states:

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[17] Resource Management Act 1991, s 104 provides that when considering an application for resource consent the consent authority must have regard to, among other things, the relevant provisions of a plan.

> Any Permitted, Controlled or Restricted Discretionary Activity in any zone *which does not comply* with the Performance Standards for noise in Rule 16.9.2 is a Restricted Discretionary Activity.
>
> (Emphasis added)

[69] Accordingly, if there is no applicable noise standard to breach, the activity remains a permitted activity.

[70] But it is unnecessary for me to express a concluded view about this because I am not prepared to entertain the claim of invalidity based purely on contestable expert opinion, even from an expert as experienced as Mr Hegley. While there is some consensus about the general inapplicability of NZ6802:1999 to gunfire, the experts disagree about the efficacy of those standards in combination with other inputs, including experience. That is hardly a sound basis to declare a planning regulation invalid, particularly one that has been through a thorough public process, where competing interests have had an opportunity to fully test the correctness of rules, including oversight by an Independent Hearings Panel comprised of experts in planning and assessments of effects. It would need to be shown why the Panel got it wrong. There is nothing about that before me.

[71] Moreover the scheme of the rules provides ample protection of the environment from adverse noise effects. The requirement for expert certification combined with a residual discretion to control noise at rule 16.9.2.1.5 guards against unmitigated noise effects. Indeed, it remains available to the Trust to try to persuade the Council that the noise effects of the shooting range are not mitigated adequately by the strict application of the relevant New Zealand Standards.

[72] Accordingly, the challenge based on the noise effects must fail.

Relief

[73] I have found two errors: first the application was, objectively assessed, misleading in so far as it failed to record the existence of a building on the subject site. Second, the application contained no information about compliance with s 15 of the RMA or any applicable discharge standards. I consider both errors to be material.

[74] Ordinarily, errors of law will result in the grant being set aside. But that is not an absolute rule.[18] In the present case I am mindful of the following factors:

(a) The first error can be remedied by the removal of the building and/or an undertaking that it will not be used in conjunction with the activity.

(b) The effects in relation to the first and second error appear to be in the minor, if not *de minimis* category and do not directly affect the Trust at all.

(c) The errors were unintentional – there was no evidence of an intention to mislead and the errors were understandable in context.

(d) The applicants were diligent in assessing the viability of the site for the activity, including pre application discussion with the Council.

(e) The applicants in good faith have invested in establishing the shooting range.

[75] But, as Mr Ryan has highlighted, the integrity of the permitted activity process is important. The grant of a certificate of compliance means that the public can have no direct influence on the control of the effects of the compliant activity. This case perhaps illustrates more than most the vulnerability of people and communities to the unforeseen effects of activities. While the noise standards have been met, it is easy to understand the anxiety of the Trust members.

[76] I propose therefore to refer to the matter back to the Council to reconsider in light of my decision. I do not propose to quash the certificate of compliance or grant any injunctive relief. I am not satisfied on the information before me that the activity is unlawful or that the effects of the activity are or will be more than minor on the Trust.

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[18] See *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [73]-[75] and *Bailey v Christchurch City Council* [2013] NZHC 1933, [2013] 3 NZLR 679 at [86]-[87].

[77] Finally, while the Council is not obliged to apply a different methodology to its noise assessment, the testing suggested by Mr Hegley might well demonstrate that the effects on the Trust's community will be minor. But that is a matter for the Council.

[78] Given relief was not discussed at length, and particularly given the Council's most recent position in further submissions, I propose to convene an urgent telephone conference to afford the parties the opportunity to comment on the precise form of relief.

Outcome

[79] The grant of a certificate of compliance was flawed in two respects: the application failed to record the existence of a building and the application contained no information about discharges of contaminants (lead) to the environment.

[80] I propose to refer the application back to the Council to reconsider in light of my judgment. But I do not propose to quash the certificate of compliance. However, as relief was not canvassed at length, and given the Council's post hearing change of position, I will convene an urgent conference to address relief.

Costs

[81] My preliminary view is that costs should lie where they fall given that the driving reason for setting aside the certificate of compliance relates to maintenance of the integrity of the process rather than any suggestion of intentional default or significant adverse effect.