IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA411/2017
[2019] NZCA 100

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

Hearing:	7 and 8 August 2018
Court:	Cooper, Gilbert and Williams JJ
Counsel:	S J Ryan and O J Towle for Appellant N M H Whittington and P I C Comrie-Thomson for First Respondent J M Savage for Second and Third Respondents
Judgment:	10 April 2019 at 10 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is disposed of in accordance with the terms of [21] of this judgment.

B The appeal is allowed.

C The certificate of compliance issued by the first respondent on 18 August 2016 (and reissued on 21 November 2017) is set aside.

D The respondents are jointly and severally liable to pay the appellant one set of costs for a standard appeal on a band A basis and usual disbursements.

E Costs in the High Court are to be determined in that Court.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] Vipassana Foundation Charitable Trust Board (the Trust) sought judicial review of the decision by Auckland Council (the Council) to issue a certificate of compliance under s 139 of the Resource Management Act 1991 (the RMA) to the second respondents. The Trust's purpose is to promote the teaching of Vipassana meditation. The certificate of compliance was issued in respect of a proposed outdoor shooting range to be located in a rural setting at 273 Tuhirangi Road (the property) in Kaukapakapa. The site was about 1.2 km from the Trust's meditation retreat.

[2] The Trust claimed the certificate should not have been issued because the activity for which the certificate was sought did not comply with the relevant district and regional plan provisions. The activity was described as follows in the application:

> 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 for Outdoor Recreation in the Auckland Council District Plan Operative Rodney Section 2011 Rule 7.9 as a Permitted Activity.

[3] Further information was provided to the Council about the activity in an email dated 24 June 2016, from Mr O'Brien, who owned the property jointly with his wife, Ms Pichler. The email advised the Council that a club was to be formed, affiliated with Pistol New Zealand; the latter's range certification process would require the ranges to be provided to comply with all safety and other requirements of the police and Pistol New Zealand. Normal operations would involve about 30 people at the ranges on any given day, although this figure might rise to 50 or 60 for club matches. For national competitions (perhaps three or four times per year) there would normally be between 100 and 150 competitors, and in the case of international competitions (most likely one per year) there would be around 300 to 400.

[4] Hours of operation were described in the email as follows:

> 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.

[5] In relation to noise, the email said:

> 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.

[6] The following was said in relation to 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.

[7] The Council officer dealing with the application, and who was to report on it, was Ms Rebecca Harris. She appears to have taken a proactive approach, actively

seeking further information from Mr O'Brien about the proposal, which was provided down to the day on which the certificate was issued. In the course of this process, Mr O'Brien confirmed there would be no more than three major events per year, those having 100–150 competitors and with a total of no more than a total 200 people in attendance.[1]

[8] Email exchanges between Ms Harris and Mr O'Brien also resulted in the provision of further information concerning the extent of the earthworks proposed, and in an amended description of the activity referred to in the application. On 16 August, Ms Harris emailed Mr O'Brien saying that following an earlier conversation between them she had altered the description of the proposal to read as follows:

> 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.

[9] The certificate of compliance when issued on 18 August described the activity in those terms, with the addition of a final sentence: "Vegetation removal will not exceed 1 ha in area."

[10] Ms Harris's report relied on the material received including that in the email of 24 June as well as reports dated 27 July and 8 August 2016 from Marshall Day Acoustics, a well-known firm with expertise concerning the effects of noise and its measurement, who had been retained by the second respondents.

The proceeding in the High Court

[11] The Trust alleged in the High Court that the certificate was invalid because:

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1 *Vipassana Foundation Charitable Trust Board v Auckland Council* [2017] NZHC 1457, [2017] NZRMA 339 [High Court judgment] at [32].

(a) The proposal included material misinformation about the number of participants in the activity, with information provided varying between maxima of 300 to 400 and 200.

(b) No detailed plans had been provided clearly setting out the scope of the activities as required for a certificate of compliance. Assurances given by Mr O'Brien about earthworks and the description of the earthworks activity given in Ms Harris's report were not consistent with the grant of the certificate to cover 15 berms for the Eastern and Western ranges identified in plans provided to the Council.

(c) There was no proper assessment of the wastewater effects in terms of relevant discharge rules for wastewater.

(d) The proposal included a non-compliant ancillary building of more than 25 m^2 that had not been assessed.

(e) There was no proper assessment of the effects of discharge of contaminants (in particular, lead) to land caused by the shooting activity.

(f) There was no proper assessment of noise effects, because the relevant measurement standard used in the District Plan was inappropriate for measuring noise emanating from use of firearms or was invalid.

[12] Whata J rejected the argument relying on the insufficiency of the plans provided, observing 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."[2] Further, the location and layout of the shooting ranges had been shown on plans accompanying the acoustic reports. There was also nothing to prevent the applicant for a certificate of compliance modifying a proposal during its processing; the maximum number of 200

2 At [30].

persons on site had been provided by Mr O'Brien during the processing of the application and the Council could rely on and enforce that limit.[3]

[13] As to the extent of the necessary earthworks, the Judge noted that Mr O'Brien had also indicated that he was prepared to limit the earthworks on the site to 1000 m^3 or 1000 m^2 and had produced some information to show this was achievable.[4] Relevantly, he had "referred to earthworks calculations for the berms" (there were raised areas dividing off the individual ranges along which the guns were fired) and these had been adopted in indicative terms in Ms Harris's report. Once again, the efficacy of the numbers was for the Council, not the Court on review: and the figures were "readily capable of verification and enforcement" and compliance could "be assured".[5] The Judge also held it was legitimate for the assessment and design of the appropriate system to be deferred to the building consent stage.[6]

[14] However, the High Court held that the application was flawed because it did not disclose the existence of a building, and the Council erred by not taking into account or assessing the significance of the building.[7] Nevertheless, the Judge considered that was an error that could be remedied by either the removal of the building, or alternatively the giving of an undertaking that the building would not be used in conjunction with the activity.[8]

[15] The Judge also found that the application contained no information about compliance of the activity with s 15 of the RMA, or any applicable discharge standards.[9] It was common ground that the operation of the shooting range would cause discharges of lead, a contaminant, to the land, but the effects of this discharge had not been "transparently assessed" as part of the application, which made no reference to the relevant discharge rules.[10] After reviewing relevant evidence on this

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3 At [31]–[32].
4 At [33].
5 At [33].
6 At [34].
7 At [40].
8 At [74(a)].
9 At [42]. Section 15(1) of the Resource Management Act 1991 states that no person may discharge a contaminant onto or into land in circumstances which may result in the contaminant entering water.
10 At [42].

issue, the Judge found that there was "a small risk only" that there might be contamination of water so as to engage the prohibition on discharge in s 15(1) of the RMA; but the risk was one that could not be completely discounted, so the failure by the Council to consider the issue was not immaterial.[11] Nevertheless, the effects of both this and the omission to consider the building were minor, if not de minimis, and did not directly affect the Trust at all.[12]

[16] The errors were unintentional and understandable in context; the viability of the site for the activity had been diligently assessed by the applicants, and they had invested in establishing the shooting range in good faith.[13] In these circumstances, and given his rejection of other issues raised by the Trust, he said that he proposed to refer the application back to the Council and not to quash the certificate of compliance.[14] However, he afforded the parties the opportunity to address further submissions on the question of relief.

[17] Two days later, having received the further submissions, the Judge delivered a second judgment in which he disposed of the application in the manner he had foreshadowed.[15] Thus the matter would be referred back to the Council for reconsideration but without the Court quashing the certificate of compliance.[16] He made final orders directing the Council to reconsider the decision made under s 139 of the RMA in light of his first judgment, and noting that pursuant to s 4(5C) of the Judicature Amendment Act 1972, the decision to be reconsidered continued to have effect unless and until revoked or amended by the Council.[17] He reserved leave to the parties to seek further directions if necessary including in the event that the reconsideration was unduly delayed.[18]

[18] It was implicit in the first of these orders that the Council would have the ability to make a fresh decision on the application under s 139 of the RMA if, following

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11 At [51].
12 At [74(b)].
13 At [74].
14 At [76].
15 *Vipassana Foundation Charitable Trust Board v Auckland Council* [2017] NZHC 1492, [2017] NZRMA 313 [second High Court judgment].
16 At [6].
17 At [11].
18 At [11].

reconsideration, it thought a different decision should initially have been made. This was clearly within the contemplation of s 4(5B) of the Judicature Amendment Act.[19] The Judge recognised the course he was taking was unusual. He said:

> [7] I acknowledge the maintenance of the certificate pending reconsideration is an unusual, indeed rare course. But this is an unusual case. In addition to the matters set out at [74] and [75] of my judgment,[20] it is relevant to note the concession made by the Council and the plaintiffs that the decision will be reconsidered on the basis of the planning instruments in play at the time of the application. This is relevant because on the issues and evidence *properly* before me:
>
> (a) the proposed activity does not contravene a rule in an applicable planning instrument; and
>
> (b) the effects of the activity do not exceed any relevant applicable permitted activity standards.
>
> (Footnote omitted.)

[19] The Judge italicised "properly" here because, as he explained in the first judgment, the Council had filed a memorandum after the High Court hearing concerning the activity status of discharges of contaminants under the Council's District Plan, claiming that the District Plan rules relate only to discharges from land. The Judge proceeded without reference to the Council's memorandum, dealing with the issues as they had been raised at the hearing.

Application for leave to adduce further evidence

[20] We dealt at the outset of the hearing of the appeal with an application made by the Trust for leave to adduce further evidence. The proposed further evidence was contained in an affidavit of Kirsty McKay, a trustee and the office manager of the Trust. The affidavit related to the ongoing use of the existing building on the land, compliance with the earthworks standards, the fact the Club had made a resource consent application in reliance on the permitted baseline established by the certificate

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19 Section 4(5) of the Judicature Amendment Act 1972 enabled the High Court to direct a decision maker to reconsider and determine any matter to which the application for review relates "in addition to or instead of granting any other relief", and s 4(5B) confirmed the jurisdiction of the original decision maker to reconsider and determine the matter in accordance with the Court's direction. Section 4(5C) provided, consistently with what happened here that in the case of such a reference back, the act or omission to be reconsidered continues "to have effect according to its tenor unless and until it is revoked or amended by that person". Section 17 of the Judicial Review Procedure Act 2016 now provides for relief in similar terms.

20 We have summarised these at [15] and [16] above.

of compliance and what had happened during the reconsideration of issues by the Council directed by the Judge.

[21] We rejected the application except in relation to the evidence about the reconsideration by the Council. We said we would give our reasons in this judgment. Our reasoning was essentially that whether or not the High Court erred must depend on the evidence about the Council's issue of the certificate of compliance as it stood before that Court. But we considered it would be relevant for us to know what had happened on the reconsideration by the Council directed by the High Court. So we allowed the application to that limited extent.

Reconsideration by the Council

[22] The Council's reconsideration of the application followed in accordance with the Judge's direction. It had two stages. It was addressed first by a duty commissioner, Ms Cherie Lane, who considered the certificate of compliance should be revoked. Ms Lane's decision was then the subject of objection by Mr O'Brien and Ms Pichler, under s 357A of the RMA. A hearing panel of two different commissioners, Messrs K Littlejohn and R Scott, allowed the objection. By their decision issued on 21 November 2017, they determined that the proposal was a permitted activity on the day the application for the certificate of compliance was made. They directed that the certificate of compliance be reissued.

[23] We mention one issue, if only to clear it away. It arises from the commissioners' reference to the certificate being reissued and the fact that there has been no application to review the 21 November decision. The pleadings remain in the form they took when the application for review was before the High Court: the amended statement of claim dated 10 May 2017 focuses on the Council's original decision to issue the certificate of compliance. The notice of appeal relates to aspects of the Judge's decision and the Council's original decision, seeking as relief the quashing of the certificate of compliance dated 18 August 2016. There is no mention of the subsequent decision made by the panel of independent commissioners.

[24] The parties did not raise any issue in this respect, and we are satisfied they were right not to do so. The pleadings are adequate to challenge the certificate. In this

respect, although the commissioners decided to reissue the certificate, they apparently contemplated that the original certificate would be the certificate that applied. They made no provision for it to be changed in any respect. That was appropriate given that the process envisaged by the High Court orders was that the application would be reconsidered, but pending such reconsideration, the original certificate would not be quashed. It was also appropriate since only one certificate had been sought, and under s 139(7)(b) of the RMA, a certificate must state that the proposal to which it relates can be done lawfully "as at the date on which the authority received the request". Since the result of the reconsideration was not to quash the certificate, the result was that the original certificate remained in force. It would only have been if the commissioners had decided that it should be quashed that they would have needed to make any order concerning it. In the circumstances, the reference to the certificate being reissued was otiose, and cannot affect the Trust's ability to proceed with its challenge to the certificate's lawfulness.

Section 139

[25] Before dealing with the substantive issues that arise on the appeal, it is appropriate to discuss s 139 of the RMA. At the time the Council issued the certificate of compliance, the section provided:

> **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
>
> (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.

(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.

(13) If an activity relates to a matter that is or is part of a proposal of national significance for which a direction has been made under section 142(2) or 147(1)(a) or (b), a person may request a certificate from the Environmental Protection Authority and this section applies with the following modifications:

(a) a reference to a consent authority is to be treated as a reference to the EPA; and

(b) subsection (5)(b) does not apply; and

(c) the EPA may recover its actual and reasonable costs of dealing with the request from the person making the request.

(14) In this section, **activity** includes a particular proposal.

[26] The section was analysed by this Court in *Pring v Wanganui District Council*.[21] The Judge appropriately took that as the leading decision on the application of the section, quoting the following passages:[22]

> 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 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).
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> …
>
> 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.

[27] We think it appropriate to emphasise the requirement that the Council have sufficient information to enable it to make the appropriate comparison of the proposal with the applicable rules. Since the certificate can only be issued if the activity for which it is sought can lawfully be carried out without a resource consent,[23] it is necessary for the Council to form a view on which rules in the relevant planning instruments apply to the proposal. It must have sufficient information to enable it to do that, desirably in the application as presented but, failing that, as might be provided in response to requests for further information prior to the issue of the certificate.

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[21] *Pring v Wanganui District Council* [1999] NZRMA 519 (CA).

[22] At [7] and [10].

[23] This follows from s 139(1) and (3): the section only applies if an activity could be done lawfully in a particular location without a resource consent, and that is what a certificate issued states.

Unless or until the Council has sufficient information for this purpose, the certificate should not be issued.

[28] Further, the issue is compliance, or non-compliance, of the activity for which the certificate is sought, with the rules in the relevant plan or plans. Once the Council has ascertained which rules apply to the proposal it must then ask whether the proposal complies with the rules for permitted activities. The effect of the proposal is not relevant to that issue, unless compliance with a relevant rule turns on presence or absence of a particular effect. The latter situation ought to be unusual, as good drafting practice will have the consequence that permitted activities will be clearly specified, without the uncertainties inherent in assessing effects for the purposes of activity classification. It is clear in any event that the Council must be satisfied that the proposal complies with every relevant rule; if not, then resource consent would be required and, in accordance with s 139(1), there would be no power to issue a certificate. As this Court said in *Mawhinney v Waitakere City Council*, s 139:[24]

> … makes plain that a certificate of compliance will only be issued where the activity in respect of which it is sought could lawfully be carried out without a resource consent, and that means that an application must satisfy the council that every aspect of the activity (positively) conforms with the relevant rules …

The issues

[29] The Trust pursues five main issues on the appeal. It submits:

(a) The Judge erred in holding that the Council had sufficient information to conclude that the earthworks to be undertaken could comply with the earthworks rules, which restrict both the volume and area of earthworks. As part of this argument the Trust claims the plans provided were insufficient to show the existing ground topography, the dimensions of the bunds dividing the shooting bays, and the extent of cut and fill necessary to form them.

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24 *Mawhinney v Waitakere City Council* [2009] NZCA 335 at [28].

(b) As to noise effects, the Council and Marshall Day Acoustics had not assessed the activity by appropriate techniques. It is said that, properly construed, the relevant rules in the District Plan required the use of special noise measurement techniques appropriate for the measurement of impulsive sounds such as those arising from gunfire or blasting. That had not occurred. It was inappropriate to use the New Zealand Standards referred to in the district plan,[25] because the assessment techniques they contained were not appropriate for the measurement of impulsive noise such as gunfire; the Standards themselves recognised the measurement of that kind of noise was outside their scope. Consequently, the noise effects had not been assessed in accordance with the appropriate techniques.

(c) As to the discharge of contaminants, the substantive complaint is that the Judge misconstrued relevant rules in the Council's Air Land and Water Plan (the ALWP) which, properly construed, meant the prospective discharge of contaminants (lead) from shooting activities to land, or to land in circumstances where it might enter water, required a resource consent.

(d) As to the existing building on the land, the Trust says the Judge erred in allowing the Council to accept an undertaking not to use the existing building (of more than 25 m^2) on the land in conjunction with the shooting range activity.

(e) The Trust also complains that the Judge, in exercising his discretion to decline relief by quashing the certificate, did not properly take into account the fact that the issue of the certificate would establish a permitted baseline on the site, able to be relied on for the purposes of a subsequent resource consent application.

[25] NZS 6801:1999 Measurement of Environmental Sound; and NZS 6802:1999 Assessment of Environmental Noise.

[30] We will deal with these issues in turn. We record that the Council, while making submissions concerning discovery and the interpretation of plan rules relating to the discharge of contaminants and noise, otherwise abided the decision of the Court.

Earthworks

[31] Under the Council's District Plan the relevant activity classification was that of "outdoor recreation not involving buildings except for … ancillary buildings (eg. toilets, ticket offices, storage) up to a combined total floor area of $25m^2$ per site". The Judge noted that the application had in addition been processed on the basis that the activity fell within the category of:

> 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.

[32] The report on the application prepared by Ms Harris noted that under r 7.9.4.2.1.1 of the District Plan, earthworks were permitted if less than 200 m^3, or greater than 200 m^3 but less than 1,000 m^3 subject to compliance with the performance standards set out in r 7.9.4.2.1.3. She then recorded the applicant's confirmation that the proposed earthworks would be within the permitted threshold of less than 1,000 m^3. She noted that although exact designs were "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".

[33] She then recorded that the proposed location of the eastern and western ranges would be outside the area marked as a floodplain on the Council's GIS maps, and that no earthworks would take place within 10 m of a wetland or natural watercourse. These observations apparently dealt with the relevant performance standards for the earthworks to qualify as a permitted activity, set out in r 7.9.4.2.1.3.[26]

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[26] The rule contains additional standards, but we do not understand the Trust to claim they are not complied with.

[34] As already noted above, the original application for the certificate of compliance simply described the activity as "outdoor target shooting with firearms" while noting that "[c]learly defined shooting areas will be constructed in a manner compliant with all safety requirements, as referred to in the other attachments". The other attachments comprised a letter from a New Zealand Police approved "range inspecting officer", Mr Peter Miles, who said he had visited the site to see whether it would be suitable for developing into a pistol range. He expressed his opinion that the "lower" part of the property where there was an existing motocross track would be "more than suitable for developing into a number of 25 and 50 Metre outdoor no danger area Pistol and rifle ranges". It appears that an aerial photograph was attached to Mr Miles' letter identifying that area of the property, but it did not identify where within the area the shooting bays would be located. Nor did it state a number of bays.

[35] Although the Council's standard application form for a certificate of compliance provided for the provision of a site plan, none was submitted. The box on the form marked "Plans prepared in accordance with Guidance note 1: Preparation of Plans", was ticked, but the only "plan" initially submitted was that attached to Mr Miles' letter.

[36] It will also be recalled that when Mr O'Brien wrote to the Council on 24 June 2016 providing further information he was unable to give any particulars as to the extent of the earthworks. Rather, he proposed that detailed range construction plans would be provided after issue of the certificate of compliance. Although earthworks would be kept to the minimum required, he acknowledged that "at this time" he did not have an estimate of the earthworks required. This should have thrown up a red flag for the Council.

[37] Then, when Ms Harris wrote to Mr O'Brien on 16 August with her altered description of the proposal, she included a provision that earthworks would not exceed 1,000 m^3 or 1,000 m^2 and would be undertaken in accordance with the District Plan's performance standards. This was then reflected in her report on the application dated 18 August 2016. The report's reference to the eastern and western ranges can be understood by reference to a plan that was included in the report provided by Marshall Day Acoustics on 8 August 2016. This was the first depiction of the proposal

in plan form, although it was really no more than a sketch with bays showing superimposed on an aerial photograph. Western and eastern ranges were identified, with six bays being depicted in each range. Although a total of 12 bays were shown, Ms Harris apparently calculated the amount of necessary earthworks on the basis of there being approximately five ranges. Notwithstanding that calculation, she also wrote in her report that when both the western and eastern ranges were in operation a maximum of six bays in total would be used at any one time. So the report itself contemplated that more than five ranges would be implemented.

[38] Given Mr O'Brien's approach of deferring the provision of detailed range construction plans until after the issuing of the certificate of compliance, it is not surprising that throughout the processing of the application doubt surrounded the extent of the earthworks that would be necessary to construct it. The Council dealt with this inherent difficulty by treating the application as if the earthworks would comply with both the district (1,000 m^3) and regional (1,000 m^2) limit. But the application did not say that. Ms Harris herself did a calculation demonstrating that was possible, but only with fewer bays constructed than the application purported to show. Mr Savage submitted in this Court that the applicant had in fact built only four shooting bays in order to comply with the District Plan rules, but the application was not so limited.

[39] We have concluded in all the circumstances that the Council had insufficient information to properly assess the extent of earthworks involved in the proposed activity. Further, it is not sufficient for a council to take the view in issuing a certificate of compliance that compliance can be assumed in respect of the relevant plan rules. Neither is it appropriate for certificates of compliance to be issued which are conditional on compliance with the District Plan. The whole point of the statutory process is to enable applicants to receive the Council's certificate that a specified proposal complies with the District Plan. Unless the Council can properly be so satisfied, the certificate must not be issued, as we have already said.

[40] The Judge evidently thought it was sufficient that Mr O'Brien had volunteered to comply with the earthworks limits in the plan, and the Council could enforce that. But the certificate, in fact, clearly concerned a proposal that contained a significantly

larger number of shooting ranges than could be provided within the earthworks limitations in the plan. Such a certificate should not have been issued.

Noise

[41] The Trust raises three issues. The first is whether the noise effects of the activity were assessed in accordance with NZS 6801:1999 "Measurement of Environmental Sound" and NZS 6802:1999 "Assessment of Environmental Noise", as required by r 16.9.2.1.5 of the District Plan. The second issue asks the related question of whether the Council observed r 16.9.2.1.5 when it accepted the report of Marshall Day Acoustics dated 8 August 2016 as demonstrating that the noise limits in the plan would not be exceeded for gunfire noise. The third and consequential issue is whether, if the answer to the first or the second issue is in the negative, that means the activity is not a permitted activity.

[42] The starting point of the appellant's argument is that the relevant District Plan in this case, in common with many other district plans throughout New Zealand, provides for a noise limit expressed as dBA L_{eq} (6 am–6 pm) and dBA L_{max} (applicable at all other times for night time noise). Compliance with that noise limit is then to be established by measurement and assessment of the noise limits in accordance with the provisions of the New Zealand Standards (r 16.9.2.1.5(a)), and in the case of doubt about whether a particular activity will comply with the noise limit, a stipulating provision of an acoustic design certificate from a recognised acoustic consultant demonstrating that the noise limit will not be exceeded. The report of 8 August 2016 from Marshall Day Acoustics, and signed by Micky Yang of that firm, was intended to be the acoustic certificate for the purposes of r 16.9.2.1.5(b). Although the Trust questioned the basis of Marshall Day Acoustics' advice, we do not understand it to assert that it was not a report from a recognised acoustic consultation.

[43] In the 8 August report, Mr Yang stated that r 16.9.2.1.2 provided that the noise levels measured inside the notional boundary of the site must not exceed 50 dB L_{Aeq} Monday to Saturday 0600–1800, and 45 dBA L_{Aeq} for Sundays and public holidays between the same hours. In fact, the district plan rules are expressed in terms of L_{eq}

values as opposed to L_{Aeq} values; however, r 16.9.2.1.5(a) permits averaging within certain limits:

> (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.

[44] Mr Yang recorded his assumptions concerning the activity in the following paragraph:

> It is understood that the proposed hours of operation would be 8 hours of the available 12 hour daytime period giving 1 decibel of duration adjustment in accordance with New Zealand Standard NZS 6802:2008 "*Acoustics - Environmental Noise*". Between Monday to Saturday, the pistol club will use a total of six bays from the eastern and western ranges and on Sunday, only the eastern range will be used. The noise level was predicted based on the proposed pistol range configurations and 5m high earth berms (Figure 1). The Monday to Saturday predicted levels were based on the six western ranges and the Sunday predicted levels were based on the six eastern ranges. The predicted levels are presented in Table 1 with Figure 2 showing the dwellings of the nearest receivers …

This was a reasonable reflection of the nature of the application as known at the time.

[45] Mr Yang also referred to his use of a computer-based model which had been developed to determine the noise received at the notional boundary of the nearest existing receivers. This model used the general method of calculation contained in International Standard ISO 9613–2:1996 "*Acoustics - Attenuation of sound during propagation outdoors*". He said:

> 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.

[46] He set out in a table a predicted level of dB L_{Aeq} which on the face of it demonstrated compliance with the District Plan provisions. He concluded:

> 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 operate 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.

[47] Mr Ryan was critical of the adjustment to which Mr Yang referred as having been made in accordance with NZS 6802:2008 "*Acoustics – Environmental noise*". Resort to that standard was necessary to arrive at a predicted level of dB L_{Aeq} with adjustments for "restricted time" and the "special audible character" of noise generated by gunfire. Mr Ryan noted that a Council officer, Mr Winter, had questioned the appropriateness of using L_{Aeq} as the most appropriate descriptor to assess noise effects for a shooting range. Mr Ryan submits that the Council failed to address the issue identified by Mr Winter and was also critical of Marshall Day Acoustics for also having failed to do so.

[48] In the High Court, the Trust relied on evidence from an experienced acoustical consultant, Mr Nevil Hegley, who gave evidence that the measuring and assessment for impulse sound such as gunfire requires special techniques that are generally outside the scope of NZS 6802:1999, and indeed the use of the Standard for "the general use of assessing gunfire sound" is specifically excluded by cl 1.2 of the Standard. It was therefore "incorrect" to adopt NZS 6802 for the assessment of gunfire noise. He said in addition that the reason for the exclusion of gunfire noise was that there is no known correlation between gunfire and the assessment criteria set out in NZS 6802, which had been adopted to assess general environmental noise, which has a different

characteristic to gunfire noise, the latter generating what he referred to as "an impulse sound".

[49] The Club relied on expert evidence from Mr Graham Warren, also an experienced acoustical consultant employed by Marshall Day Acoustics. Mr Warren confirmed that the noise emission levels likely to be generated by the activity were determined by means of a computer model which incorporated data relating to the topography in the area and the sound levels together with various factors affecting sound propagation. He observed that the computer software used has international recognition and acceptance, and that Marshall Day Acoustics has had many years of experience in its operation. He noted that the topographical data used in applying the program had come from the Council's "GIS viewer", and the sound power level had been determined from line-of-sight sound level measurements undertaken and reported by Council officers at another shooting range. While he agreed with Mr Hegley that NZS 6802:1999 excluded the assessment of gunfire noise, he was of the opinion that NZS 6802 could be satisfactorily used for comparison against district plan rules "when applied selectively and with experienced professional judgment". He referred to his past experience in carrying out such an assessment at another pistol club.

[50] The Judge essentially accepted Mr Warren's evidence and we are satisfied he was right to do so. The Trust's argument, based on Mr Hegley's evidence, is inherently difficult to sustain because the District Plan sets noise levels which are applied to permitted, controlled or restricted discretionary activities subject to certain exceptions. Shooting ranges or other outdoor activities involving gunfire are not an exception to the rule. At the same time, the plan requires that the stipulated 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 Environment Noise", subject to an exception allowing for the averaging of a measured L_{eq} noise level. In other words, the District Plan itself requires the application of NZS 6802:1999 notwithstanding difficulties that may arise because it is an inappropriate control when applied to gunfire. It would not be a sensible outcome to hold that activities which the District Plan intends should be permitted (subject to meeting the relevant controls)

must be excluded because the rules require the assessment of noise to take place in accordance with a standard that cannot be applied to those activities. We do not construe the district plan as requiring that outcome.

[51] Rule 16.9.2.1.5, which contains the obligation to measure and assess noise levels in accordance with NZS 6801 and NZS 6802, also provides at (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.

[52] That is what occurred in the present case. Mr Yang and Mr Warren explained the process they adopted to assess compliance, given the difficulty that the measurement techniques required by the plan could not be directly applied. Apart from a mildly expressed criticism in relation to the modelling of the relevant ground contour, Mr Hegley was not critical of Mr Yang's methodology per se. His point was rather that the standard was inappropriate as a means for assessing gunfire noise. But the plan contemplates noise consultants giving a certificate of compliance, having applied their expertise to the issue. We consider the Judge was entitled to hold that the certificate given by Mr Yang in the present case provided a proper basis for the Council to conclude that the proposal would comply with the applicable noise standards.[27]

[53] For completeness, we note that a similar issue arose in respect of a different District Plan and an earlier version of NZS 6802 (NZS 6802:1991) in *North Canterbury Clay Target Association Inc v Waimakariri District Council*.[28] This Court refused to upset the finding of the Environment Court that the shooting activity in that case complied with the noise limits in the District Plan, notwithstanding the inapplicability of NZS 6802:1991.[29] In the present case, the Judge properly applied *Canterbury Clay Target Association Inc* as he was bound to do.

[54] We accordingly reject the Trust's argument on this issue.

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27 High Court judgment, above n 1, at [66].

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

29 At [17].

Discharge of contaminants

[55] As noted above the Trust's substantive argument in this part of its case claim that the Judge misconstrued the ALWP.[30] It will be recalled that it was common ground in the High Court that the operation of the shooting range would cause discharges of lead to the land. However, the Judge held the effects of such discharges were not "transparently assessed" as part of the application, which had made no reference to the relevant discharge rules.[31] It seems from the discussion in the judgment that the Judge used the expression "transparently assessed" in response to a submission made by counsel for the second and third respondents based upon a statement in a letter from a Council in-house solicitor. This was to the effect that Ms Harris did not consider the proposal required a discharge consent when she processed the application, because it was extremely unlikely that contaminants from the bullets would reach natural ground or any waterway.[32] The Judge pointed out that Ms Harris had not been called to give evidence to that effect.[33] Also, the reasons given in the grant of the certificate and the report supporting the grant were the most cogent evidence of what had been taken into account for the purpose of the decision.[34] There had been no reference to the relevant discharge rules in either document.

[56] In the circumstances, the Judge considered that there had been a material error because the question of compliance with s 15 of the RMA had not been addressed, and this was one of the bases upon which he had referred the matter back to the Council for further consideration.[35]

[57] Notwithstanding that, the Judge said he had examined the submissions and evidence about compliance with the discharge rules because it might be relevant to materiality.[36] He then referred to the evidence on the potential for contamination as it was before him, which he thought suggested a "small risk only of contamination of

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30 Argument was focused on this plan rather than what were said to be similar provisions in the Proposed Auckland Unitary Plan.
31 High Court judgment, above n 1, at [42].
32 At [46].
33 At [47].
34 At [48].
35 At [51] and [79]–[80].
36 At [49].

water" such as might trigger the prohibition in s 15(1), although the risk could not be completely discounted.[37]

[58] He proceeded to address an argument that had arisen during the course of the hearing in the context of a submission made by the second and third respondents that properly construed, r 5.5.41 of the ALWP permitted the discharges. The commissioners who took part in the reconsideration of the matter and determined that the certificate of compliance should be reissued considered themselves bound by what the Judge said on this issue.

[59] Rule 5.5.41 of the ALWP states as follows:[38]

> 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.
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> …

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37 At [51].

38 The version quoted is as set out in the High Court judgment, above n 1, at [53].

[60] As can be seen, the meaning of this provision has to be ascertained by reference, among other things, to the ALWP's sch 10: Permitted Activity Criteria. The Judge set out the relevant part of sch 10 in the judgment:[39]

> 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	

[61] The Judge thought it clear that rule 5.5.41 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".[40] The combined level of the contamination must not exceed the specified standard. The Judge noted that Ms McDonald, an environmental engineer called by the Club, had given evidence that the contamination from the proposed shooting range would not offend the contaminated land rules, given very low readings for existing contamination.[41] He concluded, based on Ms McDonald's evidence, that the shooting range would be permitted by the rule "in terms of discharges from land to land".[42]

[62] The Trust put a counter argument, based on the opening words of sch 10, that the contaminant levels specified in the schedule apply to historical land uses only. The Judge rejected that submission, noting that r 5.5.41 is part of a regime of rules designed to protect against the environmental risks arising from ongoing discharges to land *from* contaminated land, not discharges to land from other sources.[43]

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39 At [54].
40 At [55].
41 At [49].
42 At [55]. The Judge had earlier (at [49]) summarised Ms McDonald's evidence as being that the contaminated land rules would not have applied to the activity because of very low levels of existing contamination. The Judge's discussion of discharges from land to land presumably reflects the mechanism of any contamination caused by the bullets entering the land and lead then leaching out.
43 At [55].

[63] Mr Ryan submitted that when read in its proper context r 5.5.41 of the ALWP is directed at remediating land that has already been contaminated as a result of historic use of the land. In this respect, he referred to the location of the rule within chapter 5 of the ALWP which deals with various forms of discharges to land or to water and characterised the rule as part of a set of rules that regulate discharges from contaminated land. He also relied on the introductory language in the ALWP about contaminated land, provisions in the issues section of the ALWP, objectives stated for the issues, and policies, in particular policy 5.4.37B. That provides:

> The contaminant levels specified in Rules 5.5.41, 5.5.42 and 5.5.42A do not establish ***remediation*** criteria for land which must be met in all cases, although land owners may choose to remediate ***contaminated land*** to those levels should they wish to comply with those Rules.

[64] That policy is said to relate to objectives 5.3.14–5.3.16 on which Mr Ryan also relied. However, these are expressed in language that is too general to assist the interpretative exercise.

[65] Mr Ryan also relied on sch 10 of the ALWP, in particular its introduction. That provides:

> 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 remediated.

[66] So, Mr Ryan claimed, r 5.5.41 does not contemplate allowing a landowner to conduct discharges from land to land up to a certain level. Counsel argued that in assessing a proposal for the purposes of granting a certificate of compliance, the approach to discharges must be prospective in nature. In the case of the shooting range, the task was to assess the discharges that would occur as a result of shooting activities and whether they would comply with all of the relevant rules. This was "at odds" with r 5.5.41 which in fact requires a determination of the extent to which the land is contaminated "as it exists".

[67] Mr Ryan next contended that if it was correct that r 5.5.41 did not apply, then the discharges were caught by the default r 5.5.68, which provides:

> Any discharge, which is not otherwise provided for in any other rule in this chapter is a Discretionary Activity.

[68] Mr Ryan observed that under s 87B(1)(a) of the RMA, an application for a resource consent for an activity must be treated as an application for a discretionary activity consent if pt 3 requires a resource consent to be obtained for the activity and there is no plan or proposed plan, or no relevant rule in a plan or proposed plan. He relied on the presence of s 15 in pt 3.

[69] For the Council, Mr Whittington submitted that r 5.5.41 of the ALWP protects against the risks to the environment of ongoing discharges to land *from* contaminated land. He submitted the shooting activity is permitted under the rule. It does not, however, deal with discharges to land from other sources. Contaminant discharges resulting from the shooting range activity, for example lead oxidation to air and bullet casings into ground, which are not permitted by r 5.5.41 are not dealt with under any other rule in chapter 5 of the ALWP. However, rather than being caught by the default r 5.5.68, the Council argued that the discharges were regulated by s 15(2A) of the RMA, and therefore prohibited only if they contravene a regional rule. Applying this approach, the Council's Commissioners who reconsidered the matter concluded that there was no rule in the ALWP (or the Proposed Auckland Unitary Plan) stating that the firing of bullets from a firearm into land (or the oxidation of their lead casings to air) is not allowed.

[70] Section 15 of the RMA provides 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; or
>
> (c) contaminant from any industrial or trade premises into air; or
>
> (d) contaminant from any industrial or trade premises onto or into land—

unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

(2) 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 national environmental standard unless the discharge—

(a) is expressly allowed by other regulations; or

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

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

(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—

(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.

(3) This section shall not apply to anything to which section 15A or section 15B applies.

[71] It is unnecessary in this case to refer to s 20A. In the present case, there is no suggestion that the Club intended to apply for a resource consent to discharge a contaminant. The question is whether an application was required under s 15(1) or s 15(2A) of the RMA.[44] Under the former, discharges are prohibited unless allowed (relevantly) under a rule in a regional plan or a resource consent. Under the latter, discharges are prohibited only if they contravene a regional rule, and are not allowed, amongst other things, by a resource consent.

[72] We agree with the Judge that r 5.5.41 is to be understood as controlling discharges of contaminants from land: the opening words embrace the discharge of contaminants "*to* land or water *from* land". The rule states this is a permitted activity, subject to compliance with the concentrations of contaminants limited by the rule. We also agree with the Judge that the limit on concentration is to be applied by arriving

44 Section 15(2) is not relevant because there is no relevant national environmental standard.

at the sum of existing contamination and what is added by the discharge. It is the combined level that must not exceed the specified standard.

[73] It follows that we cannot accept Mr Ryan's argument that r 5.5.41 is about remediating the environment; rather, it authorises the discharge of contaminants, subject to limits. The more general provisions in the objectives, issues and policies on which he relied do not alter that fact.

[74] The Judge's conclusion that the discharges involved in the present activity would be permitted by r 5.5.41 insofar as they involved discharges to land from land was based on the evidence provided by Ms McDonald.[45] We have not been given any basis for reaching a different view. Coupled with the fact that no other rule required a resource consent to be obtained for the shooting activity, this means that, for the purposes of s 15(2A) of the RMA, the discharge of contaminants involved in the shooting activity did not contravene a regional rule. That conclusion also has the consequence that there is no room for the application of r 5.5.68 which, as mentioned above, has effect to require discretionary activity consent where a discharge is not otherwise provided for. We agree with Mr Whittington on this point.

[75] The Judge's residual concern about the possibility of contamination reaching water was one of the reasons that led him to refer the matter back to the Council, but it is clear he thought there should be explicit consideration of all issues relevant to compliance with s 15, and any applicable discharge standards. The conclusions he expressed in the judgment about the scope of r 5.5.41 and their implications were for the purposes of considering "materiality".[46] In the event, the commissioners' consideration of these issues led to the reissuing of the certificate.

[76] For the reasons we have given we reject the Trust's principal contention on this part of the case.

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45 At [55].
46 At [49].

Existing building

[77] The Trust argued that the Club's application was misleading because it omitted reference to an existing building of 84 m^2 located within the site. The Trust at that stage alleged that the building was to be used for the purposes of the shooting range. The Judge concluded that the application documentation was in fact misleading in this respect.[47]

[78] The relevant District Plan provisions in fact contained a limit of 25 m^2 in the floor area of a building able to be used in conjunction with outdoor recreation. On learning of this error, Mr O'Brien had "repurposed" the building to store farming equipment for an adjacent site also owned by him. The Club also adopted the stance that if it were thought necessary to ensure the proposal complied with the District Plan, the building could be removed.

[79] Reference to this building in the plan of the proposal was one of the two bases on which the Judge found that the certificate of compliance was flawed.[48] He recorded that the error in relation to the building could be remedied by the removal of the building and/or an undertaking that it would not be used in conjunction with the activity.[49] By the time of the second judgment he was in a position to write:[50]

> … the shooting range owners have given an undertaking not to use the building in association with the proposed activity effectively eliminating the significance of one error from consideration.

[80] In this Court, Mr Ryan has complained that the Judge should not have accepted the undertaking. He referred to evidence obtained by the Trust of the use of the building in conjunction with the activities of the Club and also noted that the Council would have been aware of that ongoing activity from site inspections made prior to the hearing in the High Court. Further evidence was sought to be lead establishing ongoing use of the building in conjunction with the Club's activities, but we declined the application to adduce that evidence.

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47 At [39].
48 At [73].
49 At [74(a)].
50 Second High Court judgment, above n 15, at [8].

[81] The short point is that the undertaking having been given to the Court, the Club must now not use the building in conjunction with its activities. Any such use could be the subject of an appropriate enforcement proceeding by the Council and would not of course be authorised by the certificate.

[82] We consider the approach taken by the Judge on this issue was available to him and was a sensible way of dealing with the issue.

[83] We reject the Trust's argument on this point.

Discretion

[84] As noted earlier, the Trust complains that the Judge, in exercising his discretion to decline relief by quashing the certificate, did not properly take into account the fact that the issue of the certificate would establish a permitted baseline on the site, able to be relied on for the purposes of a subsequent resource consent application. The Trust also submits that the Judge erred by dissecting the individual errors alleged, and by engaging in a merits-based assessment of the effect on the Trust of each alleged error. Mr Ryan submitted this was not the function of the court on review nor the subject of evidence relevant to the grant of the certificate.

[85] For the second and third respondents, Mr Savage submitted that the material errors found by the Judge were not significant and related to issues that did not affect the Trust. By referring the matters back to the Council, the Judge had dealt adequately with the identified errors: the undertaking not to use the building had effectively cured its inclusion in the application and the further consideration required for the discharge of contaminants issue had satisfactorily resolved it. As to earthworks, the certificate had not been fully implemented, only four bays had been installed mindful of the plan limits on earthworks. Mr Savage pointed out that Mr O'Brien and the Club had done all that was required of them by the Council including the provision of information, and the commission of independent expert reports concerning noise.

[86] This case is unusual because of the fact the Judge found there had been material errors but nevertheless declined to set aside the certificate and required further consideration from the council. Our consideration of the legal issues raised against

the certificate has resulted in a conclusion that the Council had insufficient information properly to assess the extent of earthworks involved in the activity, and that the number of shooting ranges authorised by the certificate would necessarily exceed the extent of earthworks permitted by the Council's plans. We have rejected the Trust's arguments on the other issues raised. In the case of the contaminants discharge issue, like the Judge, we would have held that there was a material error in the Council's consideration of that issue, but we think it would be unrealistic now to consider that as favouring the grant of a remedy because it was effectively dealt with in the process required by the Judge.

[87] What needs to be considered now is whether the Trust should have relief in relation to the issue of the certificate for the proposal, given the number of shooting bays authorised and the lack of information sufficient to demonstrate there could be compliance with the relevant earthworks controls.

[88] We accept Mr Ryan's submission that the issue of a certificate of compliance has the effect of establishing a permitted baseline on the site. The purpose of the permitted baseline is "to isolate, and make irrelevant, effects of activities on the environment that are permitted by a … plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application."[51] The logic that underpins the approach was explained by Tipping J in *Arrigato Investments Ltd v Auckland Regional Council*:[52]

> Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[89] Where a certificate of compliance is obtained it confirms that the proposal to which it relates is one that complies with the plan and any subsequent proposal to intensify the use of the site need only be assessed in terms of its incremental impact. The permitted baseline is of some significance in this case, because on the day after the grant of the certificate, the activity status of an outdoor shooting range changed,

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51 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [65].
52 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA) at [29].

as a result of decisions made on the proposed Auckland Unitary Plan, which had the effect that a resource consent would have been required for the proposal. But the point is a significant one, even without that particular consideration. Because of their status as effective resource consents, certificates of compliance will always establish a permitted baseline unaffected by subsequent plan changes.[53] They are a formal statement by the relevant authority of what the planning instrument in question permits as of right.

[90] Section 139 is clearly drafted on the assumption that if issued, a certificate will accurately state that the particular proposal would comply with the plan. There is a specific power in s 139(4) for the authority to require the provision of further information where that is "necessary for the purpose of applying subsection (5)". Subsection (5) requires the authority to issue the certificate if "the activity can be done lawfully in the particular location without a resource consent". Subsection (7) requires those same words to be recited in the certificate when issued.

[91] Section 139(8) provides that a certificate must be refused if the request is made after a proposed plan is publicly notified which has the effect that an activity could not be done lawfully in the particular location without a resource consent under the proposed plan. There is no equivalent provision proscribing the issue of certificates where a proposal fails to comply with an operative plan, because there does not need to be. That is axiomatic. Indeed, s 139(1) states that the section only applies if an activity could be done lawfully in a particular location without a resource consent.

[92] Considering all these provisions together it is fair to say the statutory scheme requires the authority to act as a certifier of a state of affairs, comprising mixed law and fact. Ideally, given appropriately drafted plan provisions, that will not involve the exercise of judgment, it will be a matter which should be readily apparent. But if it does involve judgment, great care would be needed before deciding to issue the certificate. That is because the consequence of issue of a certificate will be that no resource consent is required for the proposal and there will consequently be no public

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[53] Section 139(10) of the Resource Management Act, set out above, provides that the certificate is treated as if it were an appropriate resource consent. Since s 139(12) applies s 125 of the Act (among other provisions), the certificate remains good currency for up to five years.

participation in the decision-making process. More than that, if a certificate is wrongly issued, people may be adversely affected by the activity in a way not in fact contemplated by the relevant plan.

[93] The nature of certificates of compliance and their role under the RMA is such that where it is established a certificate has been wrongly issued, the issues relevant to whether the certificate should be set aside will not properly be limited to an assessment of the position of the holder of the certificate and the party or parties who have raised a legal challenge. If left in place the wrongly granted certificate will be effective to establish a right to use the land and create a permitted baseline that might affect persons not before the court (there has been no process of public notification, nor is there any right of appeal for a person claiming to be adversely affected), or people subsequently coming to the area.[54] The issue of the certificate is in this sense a public act, and in this context, the authority's obligation to reach the correct decision about whether the proposal complies must have special emphasis.

[94] As the Judge recognised in the present case, ordinarily errors of law will result in the grant of a certificate of compliance being set aside.[55] However, he also observed that that was not an absolute rule. In *Air Nelson Ltd v Minister of Transport* O'Regan J, delivering the judgment of this Court, said:[56]

> [59] Public law remedies are discretionary. In considering whether to exercise its discretion not to quash an unlawful decision or grant another remedy, the court can take into account the needs of good administration, any delay or other disentitling conduct of the claimant, the effect on third parties, the commercial community or industry, and the utility of granting a remedy.
>
> [60] Nevertheless, there must be extremely strong reasons to decline to grant relief. For example, in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (HL), Lord Bingham described the discretion as being "very narrow" (at p 608) whereas Lord Hoffmann said cases in which relief would be declined were "exceptional" (at p 616).
>
> [61] In principle, the starting point is that where a claimant demonstrates that a public decision-maker has erred in the exercise of its power, the claimant is entitled to relief. …

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[54] Although s 120 of the Resource Management Act applies, the right of appeal conferred is only for the applicant for the certificate; since there is no right to make a submission on the application a party claiming to be adversely affected could not be brought within s 120(1)(b) of the Act.

[55] High Court judgment, above n 1, at [74].

[56] *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139.

[95] In his text *Judicial Review: A New Zealand Perspective*, Dr Taylor refers to *Air Nelson Ltd* as having established the "default position".[57] Other cases have said that where an error of law is involved refusal of relief will be "rare"[58] and "[i]f some form of relief could have a practical value then it ought to be granted."[59] Although Dr Taylor refers to three subsequent cases which are said to depart from this principle in favour of a wider discretion, those cases were decided in contexts far different from the present.[60] In our view, having regard to the nature of the powers and duties conferred in s 139 of the RMA, the discretion issue should be approached on the basis of the normal *Air Nelson Ltd* test.

[96] It cannot be said here that there would be no point in granting a remedy. Quashing the certificate would obviously remove the ability of the Club to rely on it, and as matters would then stand a resource consent would be required for the activity recorded in the certificate. All this would be of practical value to the Trust. It is probable the Trust (possibly others) would be able to participate in that application.[61] Whether or not that is the case, it would enable a proper focus to be brought on the extent of earthworks required and consequentially the intensity of any development permitted on the site.

[97] There has been no delay or disentitling conduct on the part of the Trust. Nor do we consider there are extremely strong reasons to decline granting relief. We do not overlook the Judge's conclusion that the second and third respondents have invested in establishing the shooting range, but while we accept his further conclusion they had no intention to mislead, it was for them as the applicants for the certificate to advise

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57 Graham Taylor, *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [5.29].

58 *GXL Royalties Ltd v Minister of Energy* [2010] NZCA 185, [2010] NZAR 518 at [67].

59 *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 (CA) at [39].

60 *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48]; *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549 at [89]–[91]; and *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [117].

61 The application would require restricted discretionary activity consent. The plan says that the normal tests for notification apply. And the matters to which the Council has restricted the exercise of its discretion are quite broad and include effects on amenity values of the neighbourhood, effects of noise on amenity values of the neighbourhood, and effects of traffic volume on the safety and convenience of other road users (r H19.12.1). Similar issues are referred to as assessment criteria, which also include whether site landscaping and other matters "avoid, remedy, or mitigate the adverse visual effects of the buildings and related site works on rural … character and amenity values" (r H19.12.2).

the Council as to the precise area and volume of the earthworks involved in the proposal.

[98] Having considered all of the circumstances we have concluded the appeal should be allowed and the certificate set aside.

Result

[99] The application for leave to adduce further evidence is disposed of in accordance with the terms of [21] of this judgment.

[100] The appeal is allowed.

[101] The certificate of compliance issued by the first respondent on 18 August 2016 (and reissued on 21 November 2017) is set aside.

[102] The respondents are jointly and severally liable to pay the appellant one set of costs on a band A basis and usual disbursements.

[103] Costs in the High Court are to be determined in that Court.

Solicitors:
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Meredith Connell, Auckland for First Respondent
Blackwells, Auckland for Second and Third Respondents