

# Decision following the hearing of an objection under section 357A the Resource Management Act 1991

## Description of Objection

Objection under section 357A of the Resource Management Act 1991 (**Act**) to a decision not to issue a certificate of compliance certifying that an outdoor firearms (pistol) shooting range at 287 Tuhirangi Road, Kakanui, comprising two groups of bays operating up to 8 hours per day, 7 days per week (but with the western range bays not operating on Sunday's), together with enabling earthworks and ancillary structures is a permitted activity on the date the application was received (18 June 2016).

The objection is **UPHELD**. The certificate of compliance application dated 20 June 2016 shall be issued under section 139 of the RMA. The reasons are set out below.

<b>Application number:</b>	Objection to CER70001889
<b>Site address:</b>	287 Tuhirangi Road, Kakanui
<b>Objectors:</b>	Raymond O'Brien and Victoria Pichler
<b>Hearing commenced:</b>	Tuesday 31 October 2017, 10.00am
<b>Hearing panel:</b>	Kitt Littlejohn Robert Scott
<b>Appearances:</b>	<u>For the Applicant:</u> Michael Savage (Legal Counsel) <u>For Council:</u> Robert Andrews, Reporting Officer Corina Faesenkloet, Legal Services Saskia Vitasovich, Hearings Advisor
<b>Hearing adjourned</b>	N/A
<b>Commissioners' site visit</b>	N/A
<b>Hearing Closed:</b>	Tuesday 31 October 2017

## Introduction

1. This decision is made on behalf of the Auckland Council ("**the Council**") by Independent Hearing Commissioners K R M Littlejohn and R B Scott appointed and acting under delegated authority under sections 34 and 34A of the Resource Management Act 1991 ("**the Act**").
2. This decision contains our findings following the hearing of and deliberations on an objection made under section 357A of the Act to the refusal by Council's Commissioner on duty C Lane (dated 31 August 2017) to uphold a certificate of compliance granted to the objectors on 18 August 2016 ("**the CoC**").

## Background

3. Section 139 of the Act enables a person to request the consent authority to issue a certificate of compliance if an activity could be done lawfully in a particular location without resource consent. The consent authority must issue the certificate if the activity can be done lawfully and in a particular location without resource consent; and the person pays the appropriate administrative charge.
4. The objection relates to a certificate of compliance issued by the Council on 18 August 2016. The certificate certified that an outdoor firearms (pistol) shooting range at 287 Tuhirangi Road, Kakanui, comprising two groups of bays operating up to 8 hours per day, 7 days per week (but with the western range bays not operating on Sunday's), together with enabling earthworks and ancillary structures was a permitted activity on the date the application was received.
5. Subsequent to its issue, the Council's decision was challenged by a judicial review application brought in the High Court by Vipassana Foundation Charitable Trust Board. In his judgment dated 28 June 2017,<sup>1</sup> Whata J upheld the grant of the CoC, but identified that it was flawed in two respects. In the Judge's view, the request for the certificate failed to record the existence of a farm building on the site (unrelated to the shooting range), and contained no information about possible discharges of contaminants (lead bullets) to the environment.
6. In the First Judgment, Whata J found:

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

- (a) The first error could be remedied by the removal of the building and/or undertaking that it would 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 minimus category and do not 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."*

And further:

*"[76] I propose therefore to refer the matter back to the Council to reconsider in light of my decision. I do not propose to quash the certificate of compliance or*

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<sup>1</sup> *Vipassana Foundation Charitable Trust Board v Auckland Council and others* [2017] NZHC 1457 ("First Judgment")

*grant any injunctive relief. I am not satisfied on the information before me that the activities are unlawful or that the effects of the activity are/or will be more than minor on the Trust.”*

7. In paragraph [11] of his second judgment, delivered on 30 June 2017<sup>2</sup>, Whata J made the following final orders:
  - (a) *I direct the Council to reconsider the decision made under s 139 of the Resource Management Act 1991 in light of my first judgment.*
  - (b) *Pursuant to s 4(5C) of the Judicature Amendment Act 1972 the decision to be reconsidered continues to have effect unless and until revoked or amended by the Council.*
  - (c) *Leave is granted to the parties to seek further directions if necessary including in the event that the reconsideration is unduly delayed.*
8. The Judge referred the matter back to the Council for reconsideration because of the importance of maintaining the integrity of the permitted activity process.<sup>3</sup>
9. The Council’s Commissioner on duty reconsidered the application in accordance with the High Court’s directions and in a decision dated 31 August 2017 revoked the CoC. In relation to the principal issue in contention, namely discharges of contaminants (lead bullets), the Commissioner found that such discharges were not expressly permitted by either of the relevant regional plans at the time the CoC was sought.<sup>4</sup>
10. The objectors submit that the duty Commissioner’s decision contains legal errors and misunderstands and/or ignores the judgments of the High Court in key respects.

### **Issues on Objection**

11. As was the position before the duty Commissioner, we were advised that the Council has accepted the applicants’ undertaking in respect of the building, as indicated by the High Court, and that this is no longer a matter in issue in relation to the granting of the CoC.
12. The sole issue left for re-consideration in light of the High Court’s directions is the question of the discharge of contaminants, namely bullets to land and lead from them potentially to groundwater at the shooting range.
13. In its Second Judgment the High Court said:

*“[6] Having afforded the parties the opportunity to be heard, I am content to confirm the approach that I foreshadowed in my first judgment. The matter*

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<sup>2</sup> *Vipassana Foundation Charitable Trust Board v Auckland Council and others* [2017] NZHC 1492 (“**Second Judgment**”)

<sup>3</sup> Whata J, First Judgment, at [75].

<sup>4</sup> Auckland Council Regional Plan (Air, Land and Water) (“**ALW Plan**”), Proposed Auckland Unitary Plan: Notified Version (“**PAUP**”).

*shall be referred back to the Council to reconsider in light of my first judgment but I do not quash the certificate of compliance.*

*“[7] I acknowledge that the maintenance of a certificate pending reconsideration is an unusual, indeed rare course. But this is an unusual case. In addition to the matter set out at [74] and [75] of my judgment, it is relevant to know that 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.*

*(b) The effects of the activity do not exceed any relevant applicable permitted activity standards.”*

(Emphasis in original)

14. The emphasized word “properly” in paragraph [7] quoted above had a footnote which read: “*The post hearing Council submission on the activity status of discharges was not raised in pleadings or the subject of evidence*”. Paragraph [10] of the Second Judgment went on to note that “*the status of the proposed activity in light of Council’s belated change of position on the discharge rules*” has not been considered because it was not pleaded or argued at the hearing. However, Whata J said that nothing in either of his first or second judgments “*purports to rule on that position*”. The essence of the argument referred to is that a certain ‘default’ rule applies to the discharges, rather than the relevant permitted activity rules, with the outcome being that the activity is not permitted and the CoC is invalid. This argument was the basis for the reporting officers’ support of the duty Commissioner’s decision and recommendation to revoke the CoC.

## **Analysis**

15. Section 15 of the Act sets the frame for our consideration of this issue. Relevantly, it provides:

- (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; ...*
  - (c) ...*
  - (d) ...*

*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) ...

(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](#).*

16. We accept that the firing range activity may lead to lead being introduced into the environment in a number of ways:

- Uncontained lead bullet casings oxidising when exposed to air;
- Uncontained lead bullet casings dissolving into the soil when exposed to acidic water or soil;
- Dissolved lead migration through soil to underlying groundwater;
- Uncontained lead bullet casings, bullet particles or dissolved lead migrating off-site in stormwater runoff;
- Uncontained lead bullet casings remaining in the soil.

17. These discharges are regulated by section 15 of the Act. In short they are prohibited unless, in the case of discharges controlled by section 15(1) of the Act, they are expressly allowed by a regional rule, or, for discharges controlled by section 15(2A), they do not contravene a regional rule.

18. Based on the materials before us, we find that there is no intention to discharge bullet casings or particles or dissolved lead to stormwater (a containment and surface water treatment system is proposed), and so we are satisfied that no activity is proposed that breaches section 15(1) of the Act in respect of discharges of contaminants to surface water. We do not consider this matter further.

19. In his First Judgment, Whata J found that ALW Plan rule 5.5.41 expressly allowed for those aspects of the shooting range's lead discharges that involved a discharge of a contaminant to land from land, or to water from land. The Judge stated:

*“[55] ... However, Rule 5.5.41 is part of a regime designed to protect against the risks to the environment of ongoing discharges to the land from contaminated land, not discharges to land from other sources. The prefatory statement is simply making clear that the rule does 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 on to the land”. In short, the combined level of contaminant*

*should 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”.*

20. Ms McDonald was to the applicants’ environmental scientist who provided evidence in the High Court proceedings as to on-site contamination being below the relevant ALW Plan permitted activity level. This evidence was provided to us in the Agenda for the objection hearing.<sup>5</sup> The High Court found that ALW Plan rule 5.5.41, which provides for discharges *from land to land* to certain specified levels as a permitted activity, applied in the present case, and that based on Ms McDonald’s evidence, the shooting range described in the certificate of compliance application was a permitted activity in terms of that rule.
21. We understand that in reconsidering this aspect of the application the Council has sought no further information in respect of compliance of the activity or otherwise with this permitted activity *from land to land* discharge rule. In the officer’s report for the hearing, however, there is a reference to discussions with Council’s Senior Consents and Compliance Advisor – Contaminated Land, to the effect that the information indicates that the activity requires no consent under any of ALW Plan rules 5.5.40 to 5.5.43,<sup>6</sup> at least at present.
22. On the evidence before us therefore, being both Ms McDonald’s affidavit<sup>7</sup> and specific contaminant assessments provided in support of an integrated ‘Stage 2’ application at the same site,<sup>8</sup> we find that in terms of discharges to land from land this discharge aspect of the activity is permitted.
23. In reaching this conclusion we are mindful of the fact that the shooting range will need to be managed to achieve ongoing compliance with this rule. Section 15 of the Act (and the rule in question) imposes an ongoing requirement of compliance on the operators of the facility in order to ensure the shooting range can continue as a permitted activity in relation to this discharge. We find that the proposals by the objectors to implement management measures as part of the activity to minimize contaminant discharges, in combination with the powers of the Council under section 332 of the Act to inspect land (and take samples if required), are important features of maintaining that on-going compliance. Non-compliance at any time in the future may require remedy by the way of resource consent. For now though, this aspect of the proposal is permitted.
24. The next issue for us to confront is whether those contaminant discharge aspects of the proposal that are not expressly allowed by ALW Plan rule 5.5.41 (lead oxidation to air; bullet casings into ground) are managed in terms of section 15 of the Act and the ALW Plan, and if so, how.
25. Mr Savage submits, in effect, that ALW Plan rule 5.5.41 (and its equivalent PAUP discharge rules) provide a complete answer on these points; namely, they permit all

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<sup>5</sup> Agenda, p 367.

<sup>6</sup> Agenda, p 30.

<sup>7</sup> Agenda, p 367.

<sup>8</sup> Agenda, p 252.

of the discharges. He goes on to submit therefore that it was not open to the Commissioner in reconsidering this aspect of the CoC to depart from the ruling of the High Court as to the interpretation of that rule and its application to the shooting range activity.

26. Despite this submission, the High Court's interpretation of the application of rule 5.5.41 is very clear (*from land to land*), and we are also drawn back to paragraph [10] of the Second Judgment and the fact that the learned Judge's decision excluded reference to the 'default rule argument' presented to it after the hearing by counsel for the Council. Relevantly, the Second Judgment also records (at paragraph [9]) that Mr Savage accepted that if the Council subsequently concluded that the default discharge rule applies, then the CoC could not survive.
27. In this regard we agree with the reporting planner<sup>9</sup> that there are contaminant discharges potentially arising from the activity that do not fit easily within rule 5.5.41 (or its PAUP equivalent), properly understood in its ALW Plan context<sup>10</sup> and bearing in mind Whata J's determinative interpretation of that rule (which we are bound by).<sup>11</sup> While the rules clearly address the fate of lead discharges once in the ground, the discharge of the bullets themselves to the ground (from firearms) and their oxidation to the air are not addressed by these rules in any way, or any other land use rule that we are aware of. We also agree with the post hearing legal submissions of the Council in the context of the High Court proceedings<sup>12</sup> that discharges such as lead bullets onto land are not expressly provided for as a permitted activity by a rule in a regional plan.<sup>13</sup>
28. However, we do not agree with the claimed legal consequence of that position – being application of the default rules to this aspect of the activity. This is because we find the assumption that such discharges must be “expressly provided for” by a regional rule is flawed. Our conclusion is that these discharges are not covered by section 15(1) of the Act and ALW Plan rule 5.5.41. Rather they are discharges regulated by section 15(2A) of the Act. Therefore, they are only prohibited if they “contravene a regional rule” (and permitted if they do not).
29. There is no rule in the ALW plan (or the PAUP) which says that the firing of bullets from a firearm into land (or the oxidation of their lead casings to air) is not allowed. Nor are there rules prohibiting the day to day discharge to land or air of commonly used materials that would all arguably fall within the very broad definition of contaminant in the Act (e.g., building materials such as nails, screws etc; aerosols; spilt sunscreen). To contemplate such discharges requiring a resource consent on every occasion of their discharge boggles the mind and would seem ridiculous. We find that this lack of regulation is consistent with the intent of the ALW Plan (and

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<sup>9</sup> Agenda p 31.

<sup>10</sup> See ALW Plan 5.1.3.7, Issues 5.2.21 – 5.2.23B, Objectives 5.3.14 – 5.3.16, Policies 5.4.29 – 5.4.37B.

<sup>11</sup> First Judgment, para [55].

<sup>12</sup> Agenda, p 331.

<sup>13</sup> Supplementary Submissions for Auckland Council, Agenda p327, paragraphs 2.1 to 2.2.

carried through into the PAUP) to manage the discharges of contaminants with minor effects with low (or no) regulation.<sup>14</sup>

30. Is ALW Plan rule 5.5.68 a rule that the residual discharges of interest in this case contravene? The rule says: “Any discharge which is not otherwise provided for in any other rule in this chapter is a Discretionary Activity”. On its face, the discharges are not provided for by other rules, so the conclusion that the rule applies could be seen to have substance. But we do not think that this is the intent of the rule. To make all inadvertent contaminant discharges to air or ground that result from day to day human activity require discretionary resource consent is inconsistent with the overall scheme of Chapter 5 of the ALW Plan, and its expressed intention of limited regulation for discharges of minor effect.
31. Accordingly, we consider that rule 5.5.68 is to be construed in a narrower way as being engaged only where discharges of the type expressly provided for under the preceding rules are unable to meet the standards or terms prescribed by those rules. We agree that rule 5.5.68 is a default rule; but only for non-compliances with the activity rules expressly included in Chapter 5, not for those activities that are not.
32. In summary, we find that the discharges arising from the proposed shooting range are either expressly provided for by ALW Plan rule 5.5.41 (and its PAUP equivalent) or do not otherwise contravene a rule in a regional plan or proposed regional plan (as at the date of receipt of the application.
33. We uphold the objection and find that the proposal was a permitted activity on the day the application for the certificate of compliance was made. We direct that the certificate of compliance be reissued.



**Name: K R M Littlejohn**

**Chairperson**

21 November 2017

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<sup>14</sup> ALW Plan, 5.1.3.9.