Decision No. A 124/92

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of 2 appeals under section 325 of the Act

BETWEEN **AUCKLAND KART CLUB INCORPORATED**

(ENF: 58/92
ENF: 73/92)

Appellant

AND **AUCKLAND CITY COUNCIL**

Respondent

BEFORE THE PLANNING TRIBUNAL

Her Honour Judge Kenderdine (presiding)
Mr J R Dart
Mr T W Smallfield

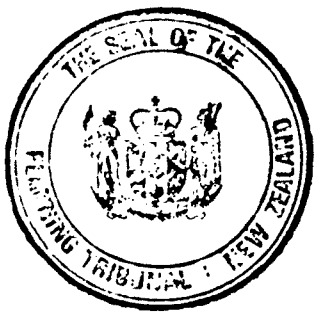
HEARING at AUCKLAND on the 11th, 12th and 13th days of August 1992

COUNSEL

Mr J D Lal for the appellant
Mr S C Bendall for the respondent
Mr S R Brownhill for the Waitakere City Council

INTERIM DECISION

These appeals pursuant to section 325 of the Resource Management Act 1991 ("the Act") arise out of the service of two Abatement Notices by the Auckland City Council ("the council") on the Auckland Kart Club Incorporated ("the kart club") dated 13 March 1992 and 21 April 1992 respectively, to limit its use of a small Auckland domain for go-karting purposes to specified times and noise levels. By the time of the hearing before the Tribunal, the first Abatement Notice had been withdrawn, leaving the one dated 21 April 1992 as the subject of this appeal. The second Notice has identical conditions as did the first, but with the addition that the measurement of noise levels was to be subject to wind strength at ground level at



Covil Park not exceeding "light air" which is 1-3 knots or 0.5 to 1.5 m/s as defined in the Beaufort Wind Scale. A copy of that Abatement Notice is attached to this decision marked Appendix "A".

The reasons given by the appellant for the appeal include (inter alia) the following: that it had adopted the best practicable option of ensuring that the noise emissions did not exceed a reasonable level; that the usage condition imposed in paragraph 3 of the Abatement Notice does not accord with the established practice undertaken by the appellant historically and further, it alters substantially the club's programme established for the year ending December 1992; the conditions were not reasonable, practical or just; that the condition imposed limiting the level of the noise emission in paragraph 5 of the Abatement Notice is impracticable to be achieved because of factors beyond the appellant's control; that the respondent had failed to give effect to the flow and direction of wind to the level of noise measured at the eastern end of Covil Park which has affected its determination of what is a reasonable noise level; that the Abatement Notice is not in the public interest, or that of the club because it has the potential to increase the risk of injury at the appellant's race meetings and threatens its economic viability; that the domain is an important community and recreational facility intended primarily for weekend use by both the kart club and the Auckland Speedway Riders Club which the respondent's Notice proposes to limit; that the appellant has used the domain for a period of 28 years without interruption or objection; that the noise enforcement officer of the council does not have reasonable grounds for believing that any of the circumstances in section 322(1) of the Act exist.

The relief sought by the appellant was that the Abatement Notice be quashed or suspended in the interim; alternatively, that an Order be granted modifying the Notice in such a manner as the Tribunal thinks fit especially with respect to the frequency of meetings and level of the noise emissions. Costs were also sought.

In accordance with its usual practice in this kind of case the Tribunal first called upon the council to support the Abatement Notice. The onus of proof is initially upon the respondent to support its actions with factual evidence and to establish its case to the civil standard of proof - that is on the balance of probabilities. That onus will shift when the appellant seeks to establish that it is adopting the best practicable option to ensure that the noise emissions from the go-karts do not exceed a reasonable level.

The Site and its Environs

The location in respect of which the Abatement Notice is applied, is all that parcel of land containing 9.3077 ha more or less and being section numbered (1) in the Parish of Titirangi bounded towards the north and east by the Waitemata Harbour, towards the south-east by section two (2) five hundred

and seventy (570) links and towards the west and north by the Whau River and being all that land comprised and described in CT 132/27 (North Auckland Registry) more commonly known as the Rosebank Park Domain, Rosebank, Auckland ("the domain").

Approximately 500 metres to the west of the domain across the Whau River is that part of Te Atatu South containing the houses of both the objectors and supporters of the club. Noise level readings were taken from the eastern end of Covil Park, being an agreed reasonable compromise of the typical exposure experienced by residents in the area. The domain is bounded to the north and east by the North Western Motorway. An embankment exists to the north, the west and, in part, to the south of the kart track. A copy of the map showing these features is attached to this evidence marked Appendix "B".

The speedway riders club, the subject of much complaint in the past, occupies a track adjoining that of the appellants.

In 1988-89, the go-kart track was upgraded to international standards by extending it 20 metres. From 1986 onwards, the council gave the kart club permission to remove the pine trees bordering the site - partly to allow for the extension and partly because of the age of the trees and their potentially hazardous state.

The Council's Case

The council has been investigating noise problems at the domain since the 1970s and '80s and particularly as a result of two petitions of approximately 290 local residents in November 1990 and April 1991, after the North Island Championships in October 1990 and the National Championships in April 1991. It freely acknowledges a noise nuisance exists and that the real issue is whether reasonable noise criteria have been set in the Abatement Notice and if the kart club is achieving the levels set. As a result of the recent upgrading, there have been increased levels of usage.

On 23 October 1987, Mr N I Hegley, an experienced acoustics consultant for the council, advised that the residents closest to Covil Park suffered from noise levels 2 dBA to 3 dBA above the desirable level. However, he concluded that "there was not a serious problem" when the total environment, including the proximity of the motorway, was considered as well as the fact that "racing occurs only once a week". In the same letter, he advised that "some form of screening around the go-kart track would assist in reducing the noise to the residential areas" and that "to have any influence on the noise level, lines of sight to the go-karts must be lost". Although the direct acoustic benefits would be small "there would be a subjective improvement" if screen planting was carried out.
The evidence next established that when Mr Hegley took measurements in Covil Park of the kart club's activities in March 1988, the noise from the go-karts ranged from 51 dBA to

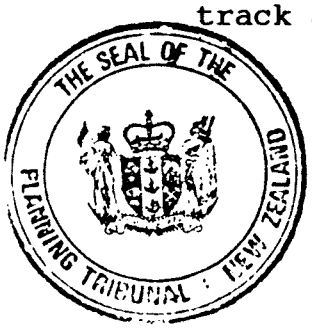
57 dBA with a 1-1.5m/s westerly wind blowing. In July 1988, the noise levels measured at Covil Park and 58 Jaemont Road (a resident objector's house), in the L_{10} range, were 64 to 67 dBA and 57 to 61 dBA respectively, with higher levels recorded than previously, due to wind conditions. Mr Hegley, in his advice to the council, stated that he did not consider those levels unduly annoying to the residents "taking all aspects of the environment into account". On 20 November 1988 with a south-westerly wind strength gusting occasionally to approximately 3m/s, measurements taken at Covil Park with direct line of sight to the go-kart track indicated that noise from the racing was at or below the background level of 43 dBA.

From November 1990 until March 1992, as a result of the championship events and increased usage of the go-kart track, the council undertook an extensive programme of noise measurements and consultations with the parties in an attempt to resolve the issue of whether the residents' complaints were justified and, if so, what remedies might be available. These events were outlined in the affidavit evidence of Mr A R Graham, Senior Environmental Health Officer with the council.

Various usage programmes were debated between the parties. One, dated 10 December 1991, did not comply with the respondent's usage criteria in that the club proposed 63 weekday sessions (the council proposed a maximum of 40 weekday sessions) and 34 weekend sessions (the council proposed a maximum of 25 weekend sessions) - both sets of usage within an L_{10} range of 56 to 60 dBA. In neither case did the kart club's figures include provision for speedway club sessions. No agreement was reached at this time with the kart club being told that the number of meetings allowed, related directly to the level of noise at Covil Park. If the programme had been followed, there would have been 14 instances where the track would have been used on consecutive weekends, despite the fact that the respondent's usage criteria required that it would be free from use on alternate weekends.

Following the failure of the kart club and speedway club to provide a <u>combined</u> usage programme which met with the council's usage criteria, the respondent formulated another programme dated 23 December 1991. Agreement on the noise levels was reached with the speedway club, which now complies with the scheduled sessions and observes the maximum L_{10} of 55 dBA. Again, no agreement was reached with the kart club. Several of the residents complained of its ongoing activities and, as a result, the Abatement Notices issued.

In his evidence, Mr Hegley referred to his methodology for the purpose of determining whether the complaints about noise were justified. It included the effect of wind conditions, the position from which the measurement of noise was made, and finally a determination of what is a reasonable level of noise. He stated that because there is a distance between the track and residential area of approximately 500 metres, weather



can have a significant positive or negative influence on the measured noise level at residential boundaries. The witness considered that the appropriate conditions to assess the go-kart noise in such circumstances, are during "zero" meteorological conditions, that is, when there is no significant positive or negative influence on the measured noise level from the wind, ("zero met"). On this basis, the effect on residents would be, that at times the noise levels would be higher, and at other times lower, giving a variation of up to 8 dBA. (We pause here to note that the agreed evidence was that the wind directions based on the wind rose for Auckland City show that 62% of all winds are from the north-west through to the south - ie, away from the residents - and less than 11% are from the north-east and the east ie, towards the residents.) The witness's approach has been supported by the recent revision of the 1977 Standard NZS 6801, that being NZS 6801: 1991 Measurement of Sound.

The second Abatement Notice stated that noise measurements should be subject to wind strengths not exceeding "light air" (ie, not more than 1.5m/s) at ground level at Covil Park. Mr Hegley stated this approach was discussed with the residents who, although they felt the technique would expose them to unreasonable noise levels on a number of occasions, accepted its basic proposition. These conditions were also discussed with representatives from the kart club.

Mr Hegley's evidence was that the residents were adamant that the district plan requirements should be complied with. For most of the time there is some form of recreational activity at Rosebank Park Domain (Saturday afternoons, Sundays and public holidays) and, as such, a corrected L_{10} of 40 dBA relating to industry noise would be required, with 50 dBA (corrected L_{10}) at all other times. Such controls, however, would mean the club could neither operate effectively nor achieve the design requirement. The witness therefore considered a different approach should be taken to that adopted for industrial types of noise control. This was because recreation noise is generally confined to periods when the general workforce is at home. However, although there is generally a greater tolerance to recreation noise than industrial noise, there are definite limitations. Mr Hegley stated as a guide, if recreation noise complies with levels set out for industry in the district plan, there is unlikely to be a noise problem. However, as noise levels increase, the amount of exposure needs to be reduced. The aim of the council is therefore to contain the total noise received by residents. This may be achieved by multiplying the noise level by the duration, the result being kept constant. To reduce the noise from the karts at the adjacent residential land, the council effectively required a 20 dBA attenuation if it was going to allow 90 sessions annual usage of the track.

As far as the Abatement Notice was concerned the council maintained that the levels had not been achieved. The council alleged breaches in both the number of meetings and the levels of noise (56 dBA - 63 dBA).

The Waitakere City Council

The chief evidence for the Waitakere City Council was given by Mr R A Davidson, Senior Environmental Health Officer employed by the council, whose experience was that of monitoring industrial and environmental noise. He deposed that his council had become involved in the noise issue following the receipt of several complaints from local residents in Te Atatu South falling within that council's jurisdiction. Prior to that time, the Waitemata City Council (as it then was) had received similar written and verbal complaints. His council had received a copy of the petition of October 1990 which indicated that the noise level had become intolerable for the residents. Accordingly, he was instructed to undertake consultations with the health officers at the Auckland City Council and, in the process, took noise level readings on the activities to ascertain whether or not the go-kart and motor bike noise was a nuisance in terms of the Health Act 1956. He deposed as follows:

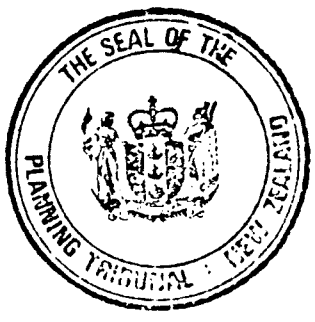
> "In June 1991 a noise level standard was formulated, following consultation with the Environmental Health Officers at the Auckland City Council, members of the Go-Kart Club and speedway riders club and affected residents. The standard agreed to was L_{10} 60 dBA as measured from Covil Park.
>
> Waitakere City Council considered that the L_{10} 60 dBA decibel level was acceptable as it is some 10 decibels above the normal background noise level at Covil Park. If this noise level was exceeded it would constitute a nuisance in terms of the Health Act (section 29(ka)). ... It is recommended in the New Zealand Standard 6802:1977, 'Assessment of Noise in the Environment', that noise abatement procedures be initiated if this level is exceeded."

Mr Davidson put in evidence a table from NZS 6802:1977 showing that: at 5 dBA above the background noise level, the expected community response would be sporadic complaint; at 10 dBA, there would be sporadic complaint ranging to mild threats of community action; at 20 dBA and above, the expected response would be vigorous community action. His noise measurements in respect of the kart club ranged from 67 dBA (when the wind speed was 3 to 5m/s from the east) in May 1992 down to 51.5 dBA on 7 December 1991. On the occasions that the kart club did not exceed the L_{10} noise level at 60 dBA measured at Covil Park, the wind direction was from the west-southwest thus carrying the noise away from the residents. He concluded that, with the wind moving from a westerly direction, the go-kart noise is unlikely to exceed the 60 dBA L_{10} level.

The Residents

The residents were clearly divided in their approach. The Waitakere City Council called those opposing the club's activities. Mrs P E Stanton variously described the noise as "intolerable" and like that "of the high speed drill at the dentist". The witness stated: "I am an outdoor person and enjoy my leisure hours in my garden. The enduring whine of the go-karts' engines and the screeching tyres for hours on end have often caused me to leave my property in despair." She would like the noise levels reduced to a corrected noise level of 55 dBA. (Again we pause to note that the "corrected noise level" is the measured noise level plus 5 dBA to allow for the special tonal characteristics of a 2-stroke engine, in accordance with NZS 6802:1977.) Mrs E M Brooker deposed that the noise levels from the track created an "environment of distress" which severely affected her and her family, with the peace and enjoyment of their home being dictated by the frequency of the club's meetings. Mrs Brooker found it difficult to distinguish between the speedway and kart club activities although when the kart club is operating there is only a brief interval between events. She stated that there had been a decrease in activity since the issue of the Abatement Notice and that during winter the operations are not so intrusive. She also stated that there had been a marked deterioration in noise levels with the removal of the trees around the perimeter of the domain. She and other residents were aggrieved that they had not been consulted about the upgrading. Mrs J M Faesenkloet spoke of being reduced to tears and "being short and grouchy" with her children particularly in summertime when the windows and doors were open to the noise from the go-karts. She felt that her family had been subjected to levels of stress over and above what is acceptable in a residential area. Mrs S M Hoskins found the noise to be like a chainsaw overcoming that of even her sewing machine when in use. Mr G N Keighley likened the noise to "having a swarm of high-pitched bees buzzing inside your head" and of having to reorganise his family's life to accommodate the noise generated by the go-karts, taking them out when meetings were in progress. Messrs G J Denley and D T Bunce spoke in similar vein. Mr G B Douglas spoke of having complained for 20 years and of the noise in certain climatic conditions being "intolerable". He discerned three distinct types of noise: that from the go-karts; that from the motorcyles; and, thirdly, the commentary from the public address system.

Mrs Stanton and Mrs Brooker were of the opinion that the upgrading of the track to international levels allowed the go-karts to travel faster increasing the noise received. There was also some evidence from the residents in opposition, including that noted above, that the removal of the trees to accommodate the new part of the track had taken away an effective noise barrier.



The residents in support of the appellant unanimously stated that over the past year the noise reduction from the club's activities is such that it is no longer unbearable or even noticed. One resident stated that the neighbour's next door motor mower was worse. All deposed that the only time the noise is now heard is when the wind is blowing from the track towards them.

The Appellant's Case

It was the appellant's case that the usage programme imposed by the council on a club of 150 members, mostly made up of families, was unreasonable and impracticable for it to operate, and financially ruinous for its survival. It was also alleged that the L_{10} noise level criterion of 60 dBA had not been exceeded in recent usage and that the limited use of the track at that noise level was not feasible for the club to sustain. It was submitted that the club has adopted the best practicable option in terms of the Act to minimise the noise, and the technical and financial evidence supported its approach. It was further submitted that the noise levels the council is complaining about, were not necessarily perpetrated by the go-karts, but by the other user of the park, the speedway riders' club.

In support of these submissions the appellant called ten witnesses including Mr C Day, an experienced acoustics consultant who gave evidence that on the measured noise level the kart club did not exceed 60 dBA and that it operated within the guidelines as set by the council. Mr R Donohue, the president of the club, gave evidence that the restrictions imposed for 1992 by the Notice prescribed 9 racing days and 28 weekday practice days to the kart club, and 14 racing days and 25 weekday practice days to the speedway club. He also gave evidence that the club had adopted the best practical option by voluntarily reducing its usage from 25 to 17 weekends; by reducing the practice days from every day to two afternoons a week; by making modifications to the karts by fitting silencers; by stopping the use of the PA system; and by meeting the standards imposed by the council in its Abatement Notice. Ms Simone French, the vice president of the club, gave evidence regarding the club's history and development. She told us that junior competition starts at 7 years of age, but that most of the drivers are teenagers. Seven residents were also called who gave evidence that since signing the residents' petition against the club's activities, they had changed their minds and now support the club.

From the appellant's evidence it was established that the domain has been used for vehicular racing activities since the 1950s onwards, for both go-kart and motor bike racing. The club has been operating the go-kart facility from the domain for some 27 years on a continuous basis. Until objections from the Te Atatu South residents, the facility was available on a daily basis, the club generally using it for 25 weekends each year for racing and every afternoon on weekdays for practice.

(A weekend constitutes Saturday afternoon (between noon and 5.00 pm) and Sunday (between 10.00 am and 5.00 pm).) Since the objections from the residents and since the Abatement Notices were served, the use of the track has been reduced to 17 weekends and 2 weekday practice afternoons. Thus it has diminished its use from that previously, by 8 weekends overall, and by 3 afternoons a week.

In 1977 a lease of the reserve was signed between the Minister of Lands and the Power Sports Association which ran for 21 years with a right of renewal for one further term of 21 years from 26 April 1977, hence it has six years to run. The lease was issued in response to a request by the council who wished to formalise the activities of the Power Sports Association which formed a combined body then comprising of the Auckland Kart Club, the Auckland Speedway Riders Club and the Auckland Model Aero Club. The Model Aero Club is no longer part of the group. Meanwhile existing use rights were alleged.

In 1988/89 the council granted a loan to the club to upgrade its track and facilities supported by a council resolution that the loan be tagged to the extent that the club undertake upgrading works to a standard approved by the council's Director of Parks. As a result of the objections from the residents following the upgrading, the club's members have now fitted in-take silencers to all karts to reduce the noise, which Ms French, herself an experienced driver, told us represented the latest in technology, . The result of this has been to reduce the noise level by 5 dBA in most cases. Recently the public address system has not been in use.

The amount of the council's loan was $80,000. It was submitted by the appellant's counsel that having undertaken the works and expended the money, the club is now in a position of "no return" if it is not allowed to maintain its activities at previous use levels.

Legal Provisions

Section 16(1) of the Act imposes on every occupier of land a duty to adopt the best practicable option to ensure that the emission of noise from that land does not exceed a reasonable level.

Section 17(1) imposes a duty on every person (which includes a body corporate under section 2 of the Act) to avoid, remedy or mitigate any adverse effect on the environment arising from the activity. Under section 17(3)(b) an abatement notice may be made requiring something to be done if it is necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.

Section 322(1)(c) provides that an abatement notice may be served on an occupier of land, requiring that person, who is contravening section 16 of the Act, to adopt the best practicable option of ensuring that the emission of noise from that land does not exceed a reasonable level.

The "Best practicable option" in relation to a noise emission is defined under section 2 of the Act as follows:

> "It means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to -
>
> (a) The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and
>
> (b) The financial implications, and the effects on the environment, of that option when compared with other options; and
>
> (c) The current state of technical knowledge and the likelihood that the option can be successfully applied:"

Section 2 of the Act defines "environment" as including people and communities.

EVALUATION

The Actual Noise Measurements

The 21 April 1992 Abatement Notice has as a condition that the noise caused by go kart racing or practice, shall not exceed 60 dBA as measured at the eastern end of Covil Park, Rosebank, in terms of Measured Noise Levels L_{10} used without correction [as defined in New Zealand Standard NZS 6801:1977 Methods of Measuring Noise] subject to the wind strength at ground level at Covil Park not exceeding "light air" as defined in the Beaufort Wind Scale.

Mr Day was commissioned by the kart club to measure the level of noise emissions from their race meetings and to comment on their compliance with the noise condition imposed by the Abatement Notice. In his evidence, Mr Day noted that noise surveys were carried out by his firm, Marshall Day Associates, on the six race days that occurred between 29 February 1992 and 6 July 1992. These are detailed in Appendix C which is a table taken from Mr Hegley's evidence. Mr Davidson gave evidence that noise level readings for the kart club were also conducted by his council's environmental health officers on eight occasions in 1991 and 1992, but that only one of these was conducted at zero met conditions (see Appendix C). It was Mr Davidson's evidence that the inclusion of the Beaufort wind

standard reduced the opportunity to take noise readings that would be otherwise accepted in terms of the 1977 Standard. He expressed some surprise at the Auckland City Council's "light air" stipulation.

We, however, are satisfied that the council's zero met measurement is the appropriate approach given that the noise standard was implemented after the Resource Management Act 1991 was passed (see page 2 "Related Documents" New Zealand Standard: Measurement of Sound). The Abatement Notice was issued as a result of that Act which has the requirements of reasonableness and best practicable option as considerations under section 322(1)(c). The zero met conditions therefore are reflected in both of these considerations. We refer to them again below.

After studying the evidence of Mr Day, Mr Hegley and Mr Davidson, it is clear that wind strength and direction are critical factors with respect to the actual noise measurement received at Covil Park. This was clear, too, from the residents who appeared in support of the council. As can be seen from Appendix "B", Covil Park, which was chosen by the council as the appropriate measuring position, would be downwind of the track in winds from a north-east and easterly direction. From the noise measurements obtained, the actual measurements were higher when Covil Park was downwind of the kart track. This is shown from the table showing the readings attached as Appendix "C".

Two areas where a difference of opinion existed between Mr Day and Mr Hegley were firstly, the lengths of time over which a measurement should be made to be valid, and secondly, the relevance of data of wind conditions at Whenuapai from the National Institute of Water and Atmospheric Research (NIWAR). These latter are accurate scientific measurements as opposed to site estimates which rely upon such as smoke drift and leaf and twig movement observations, i.e., the Beaufort Scale test.

The first issue arose from measurements taken by Mr Hegley on 23 May 1992. That first measurement showed the wind strength as 0-1 m/s from an easterly direction at 63 dBA and the duration of the measurement was for 3 minutes and 50 seconds (the race being already in progress before Mr Hegley commenced his readings). The appellant challenged this test as not conclusive. Mr Day stated that it is generally accepted that 10 minutes is the length required for such measurements and referred to the revised New Zealand Standard NZS 6802: 1991. Mr Hegley in his reply stated that the fact that the measurement interval was of shorter duration did not render it useless for an assessment. He also stated that the New Zealand Standard goes on to say that the measurement interval should be representative of any variations in the sound or sounds of interest, and considered, as a result, that the noise levels and the wind measurements reached on this occasion were correct. The second of Mr Hegley's three readings on that day

extended over the whole of the race of 7 minutes 20 seconds and recorded an L_{10} of 65 dBA in an easterly wind "gusting for short periods up to 4m/s", but generally of 1-2m/s. The third and last race was also fully recorded. It lasted 6 minutes 15 seconds and the L_{10} was 61 dBA in a 1-3m/s easterly wind. We therefore accept his evidence on that point and reject Mr Day's criticism.

In respect of the NIWAR measurements, we accept that they reflect accurate scientific data and are to be preferred to estimates based upon perceptions. It will be seen from the table in Appendix "C" that there is a wide discrepancy in the readings from Whenuapai and Covil Park. However, we consider that because of the distances (some seven or eight kilometres) between the two sites, there is too great a possibility of time variations in wind speeds and we accept Mr Hegley's evidence on this question also.

Determination of Reasonable

The council, after consultation with Mr Hegley, has by way of Abatement Notice, specified what it considers is a reasonable noise level. The evidence from both Mr Hegley and Mr Day with respect to the measurements, is that the kart club has achieved this within the terms of the Abatement Notice with the exception of the reading by Mr Hegley on 23 May 1992.

The intent of section 322(1)(c) of the Act is that noise emissions do not exceed a reasonable level, and this should be satisfied by means of the application of what is the best practicable option, as defined in section 2 of that Act. Section 322(4) requires the enforcement officer for the council not to serve an Abatement Notice unless he believes reasonable grounds exist for its issue.

Whilst properly issuing the second Abatement Notice in accordance with the 1991 noise standard, in our opinion, the council did not take proper account of the alteration to the wind standards when it issued the second Notice. With respect to the reasonableness of zero met wind condition, Mr Davidson considered that it was appropriate to allow the noise measurement to be made in wind conditions up to 5 m/s. However, under the NZS 6801: 1991, section 5.3.3, "zero met" conditions are considered appropriate, that is, where there is no significant positive or negative wind component from source to measurement position, as noted in the evidence of Mr Hegley. We accept that the appropriate meteorological conditions are those stated in the Abatement Notice, but the council's measurements do not stand up to what the experts maintain should happen. Mr Day pointed out that all Mr Hegley's measurements where the noise level was over 60 dBA were in "downwind" conditions. He stated "there is some uncertainty as to the velocity of this wind, but there is no dispute regarding the direction - it was downwind - the

condition Mr Hegley wanted to avoid". If the noise measurements are to accurately reflect zero met conditions, then they should not record significant downwind conditions.

With respect to the L_{10} figure of 60 dBA, we accept the evidence of Mr Hegley that a different approach should be taken for recreational noise from that adopted for industrial types of noise control. In the absence of guidance from the district plan - what is reasonable in terms of section 16(1) of the Act is clearly what is most reasonable to the receiver, set in the context of what the kart club can achieve as the best practicable option. There have been many Tribunal decisions which state that noise intrusion is clearly subjective. In this case we note the residents are sharply divided. We note that those who favour the kart club have not noticed the noise intrusion recently. In Mr Hegley's early advice to the council recorded earlier in this decision he did not consider levels above 60-67 dBA unduly annoying to the residents. The noise tests more recently show that the appellant chiefly operates in the 56-60 dBA category.

Mr Davidson stated that 60 dBA was a reasonable noise level being 10 dBA above the ambient of 50 dBA, but the only evidence of ambient levels is from Mr Day's figures which range from 47 - 56 dBA at L_{10}; Mr Hegley's reading on 1 March 1992 of 56 - 58 dBA and Mr Davidson's statement to Mr Lal in cross-examination that "generally" the background levels were 49 - 53 dBA. It is likely that if 47 dBA is taken as the best case scenario, 60 dBA is a generous level. On the other hand, Mr Davidson acknowledged to Mr Lal, also in cross-examination, that if the background noise level was 49 - 50 dBA, 10 dBA above those levels "could be considered reasonable". Marshall Day Associates, in advice to the kart club earlier in the year, stated that the L_{10} levels at Covil Park over several months ranged between 48 - 60 dBA, but the noise from the go-kart engines and tyres was clearly audible at Covil Park. It seems to us that what is reasonable would fluctuate with the background noise levels, but the parties have all agreed to 60 dBA as reasonable even if it is, at times, unfavourable to the kart club and, at times, unfavourable to the residents. The Abatement Notice specifies that the noise measurements to be used are the measured noise levels L_{10} without corrections. As corrections add on 5 dBA for the go-karts, then the respondent's approach seems very reasonable in terms of the Act.

We therefore consider the level of noise at 60 dBA at L_{10}, as noted in the Abatement Notice as being reasonable within the meaning of section 16 and section 322(1) of the Act.

We turn next to the question of the number of meetings allowed by the council in the Abatement Notice. Given that we expect a 56-60 dBA noise level as set out in the Abatement Notice and given that some of the residents have not noticed any noise intrusion since the kart club has cut back on its number of meetings, we consider that the level of usage now sought and

put to the council in December 1991 - every third weekend with two practice days per week - is a reasonable level of use. It is a major reduction from previous levels of usage. It was also alleged to be the absolute minimum the club requires to financially continue. The key to the success of this level of usage will lie in the fact that the noise levels are to be restrained at 60 dBA but also in the fact that the speedway club should race on the same weekends so that the residents are not disturbed every week-end. The evidence disclosed that the noise levels of the two clubs operating simultaneously has no increased effect on the residents. The speedway club did not appear before the Tribunal and thus we have no jurisdiction to require that the meetings be held together, but it is commonsense that if the residents are not to be subjected to noise every weekend, there should be some management involved - namely, co-ordination of the two clubs' meetings. This can only be achieved by the council with the co-operation of the clubs.

Did Reasonable Grounds Exist for the Issue of the Abatement Notice?

We do not consider the noise level has been breached. We looked carefully at Mr Hegley's analysis of the issue.

On the 23rd of May he took three measurements. One at 0-1 m/s recording 63 dBA, one at 1 to 2 m/s recording 65 dBA and one at 1 to 3 m/s at 61 dBA. The recording which was the focus of close scrutiny was the 63 dBA reading because that was in near zero met conditions (0-1 m/s) as specified in the Abatement Notice. There are two aspects to this measurement. Firstly, as Mr Day pointed out, the other wind data for that day (Mr Davidson's measurement recorded 2-3 m/s and Mr Hegley's other readings are as already detailed) suggest the wind speed was "probably not under 1.5 m/s and probably not 1.5 m/s". Applying the balance of probability test to the issue, we think Mr Day is more than likely correct. It was, therefore, not taken in zero met conditions. Secondly, the difference between 1.0 m/s and 1.5 m/s (2 knots and 3 knots) is very slight. Mr Hegley's method of assessment of zero met conditions was a visual one. That is, he looked at the flags on the yachts in the river and the wind in the trees (as but two examples). Mr Day, with 30 years' experience as a sailor, explained how difficult it is to tell the difference between 2 and 3 knots. We accept his proposition and are therefore doubtful whether the condition was breached and if it was the breach was so slight as to be not unreasonable in terms of section 16(1) of the Act. The evidence established that an increase in noise levels by 2 dBA is so slight as to be undiscernible, particularly if it lasted for only three minutes.

Best Practicable Option

The question of what is the best practicable option for the management of the noise emanating from the go-karts is a key aspect of the appeal.

At paragraph 2(1)(c), the Abatement Notice states that the club is not adopting the best practicable option to ensure that the emission of noise does not exceed a reasonable level.

In establishing the December noise programme, the evidence disclosed that it was imposed before the council had requested financial information from the appellants, but that Mr Graham had instructed Hegley Consultants Limited by letter to take into account financial restraints that may be imposed by any party having an interest in the land. Mr Graham, in his affidavit-in-chief, deposed that he did not believe the financial consideration should be allowed to affect what is the best practicable option to ensure that the emission of noise does not exceed a reasonable level. Conversely, Mr Hegley, whilst instructed to take into account the financial restraints and restrictions that may be imposed on the club, admitted in cross-examination that he did not do so in respect of the reduced usage programme he prescribed. Under further cross-examination, he accepted that if he had been in possession of the club's financial information, he would have taken that information into account as a factor in determining the usage criteria in the Abatement Notice. Meanwhile, the council did request financial details from the kart club together with any requests for assistance in February 1992. This information had not been forthcoming before the Abatement Notice was issued.

Both Messrs Hegley and Graham stated that if the club cannot afford to survive financially with its reduced usage programme, then it should locate elsewhere.

The best practicable option is made up of three components. It means the best method of preventing or minimising the adverse effects on the environment having regard to the nature of the emission and the sensitivity of the environment; the financial implications of employing the best method of prevention and the effects on the environment of that option when compared with other options; the current state of the technical knowledge and can it be successfully applied to the emission in question. The preamble to the definition of best practicable option in section 2(1) of the Act states that there "are other things" to which regard must be had apart from (a), (b) and (c). However, "other things" are not specified in the Act. Mr Lal submitted that the "other things" which should be taken into account in this case are the long time use of the reserve by the kart club; the fact that it has had a 21 year lease with right of renewal for a further 21 years until the year 2019; the fact that it upgraded its facilities in 1989 with the blessing of the council and its financial assistance; the fact that the council did not find complaints made previously by the residents justifiable when the noise levels were higher than the levels under which they are proceeding now.

Mr Lal submitted that the definition places equal weight on all three factors plus the "other things", the latter therefore not

limiting the inquiry to the three main provisions. He submitted that Mr Graham placed undue emphasis on the sensitivity of the receiving environment. He submitted also that from the definition of "best practicable option" at section 2(1)(b), it is clear that the financial implications are as important, if not more so, than the effects on the environment of any option. (our emphasis) Mr Lal referred us also to section 2 of the Noise Control Act 1982 which defines "practicable" as meaning "reasonably practicable having regard, among other things, to local conditions and to the current state of technical knowledge".

For the respondent, counsel for the council submitted that the phrase "best practicable option" had been interpreted by the appellant so that an occupier of land would be practising the best practicable option to ensure that the noise emission did not exceed a reasonable level if it was doing all it could financially afford to do in order to restrict noise emission. Counsel submitted that the appellant had reduced its noise emissions to what it financially could afford. He urged us to regard this approach as wrong in law as it offends against the purpose of the Act. Counsel maintained that section 16 of the Act imposes a duty on every occupier to avoid unreasonable noise and to satisfy the requirements of the section the best practical option must ensure (his emphasis) that the noise emission does not exceed a reasonable level. If the option fails then it does not fulfil the requirements of the section. He stated:

> "Parliament clearly did not intend to impose a duty on the occupiers of land to avoid unreasonable noise which would have the practical effect of still allowing occupiers to create unreasonable noise. In order to meet the requirements of section 16 the option must,
>
> (a) Ensure the noise does not exceed a reasonable level; and
>
> (b) Be the best practicable option."

In other words the best practicable option must achieve the result of making the unreasonable become reasonable. If it were otherwise, the best practicable option could be the option which neither prevented nor minimised adverse effects on the environment. The council alleged the appellant had concentrated on its own financial restrictions and historical matters, and ignored the detrimental effects on the neighbouring residential community by placing equal weight on the provisions within the definition of best practicable option. Mr Bendall made the submission that this was also an incorrect approach submitting that financial implications are just one of the factors to be accounted for and that the weight given each factor is that appropriate to the particular facts of the case. Counsel submitted that the weighting of the factors must lead to a result which is consistent with the purpose of the Act under section 5 pointing out that it is

significant that financial implications and effects on the environment are incorporated in the same paragraph in the definition of best practicable option. He submitted that the implications of the wording in section 2 paragraph (b) of the Act as to what is the best practicable option depends on the respective cost benefits of the various options (not just financial ramifications). The respondent submitted that this is an appropriate approach in determining the best practicable option and is a very different one from allowing the adverse effects to continue because the noise maker says it cannot financially afford to reduce it. Counsel submitted that the correct interpretation of best practicable option creates a result in this case which is consistent with the purpose of the Act.

Mr Brownhill, for the Waitakere City Council, submitted that the overriding purpose of section 16 of the Act is to ensure that the emission of noise from land does not exceed a reasonable level and to this effect, every occupier of land has a mandatory duty to adopt the best practicable option to avoid unreasonable noise. This obligation, it was submitted, is reinforced by a wider duty under section 17 of the Act - to avoid, remedy or mitigate any adverse effect on the environment. Mr Brownhill also submitted that section 16 is a matter of strict liability. The emission of noise must not exceed a reasonable level. Mr Brownhill further submitted that the character of the neighbourhood with reference to the rules in the district plan may be regarded as a useful guide as to what reasonable people should expect to be carried out in the area. Counsel referred us to several cases which applied to noise as a nuisance or noise as injurious to health under the Health Act 1956 Vanderpant v Mayfair Hotel Company [1930] 1 CH 138: Bloodworth v Cormack [1949] NZLR 1058: Murray v Laus [1960] NZLR 126. Counsel submitted that the noise of the go-karts (and motorbikes) emanating from the domain exceeds reasonable noise levels in terms of section 16 of the Act on the ground that it constitutes a nuisance and is also likely to be injurious to the health of those persons residing in the adjacent residential neighbourhood. With respect to the word "practicable", Mr Brownhill directed us to the Oxford English Dictionary definition, viz "capable of being carried out in action: feasible", citing Lee v Nursery Furnishings (1945) 1 ALL ER 387 where Lord Goddard had adopted that definition when deciding whether or not a circular chainsaw used for cutting wood had been protected by a guard extended "as low as practicable" to the chainsaw.

Counsel submitted that the best method adopted by the club to reduce the noise of the go-karts had to be a feasible one (as well as satisfying the criteria set out in section 2(1) of the Act). He concluded that the evidence produced at the hearing led inevitably to the conclusion that it was not feasible for the kart club to reduce the noise levels by 15 dBA.

Analysis of Best Practicable Option

We turn now to an examination of the criteria for the best practicable option available to the kart club as set out in section 2(1)(a), (b) and (c) of the Act.

(a) The Nature of the Noise Emission and the Sensitivity of the Environment

The noise generated by the go-karts clearly affects some of the residents more severely than others. For some its nature is very intrusive at times. The background noise levels will vary with the shifting direction of the winds and the noise from the Motorway. These in turn will produce varying noise levels at Covil Park. Thus the nature of the noise emission and its effect on the receiver is inextricably linked to the sensitivity of the environment.

The existence of the Speedway Riders Club, the existence of the motorway, the boat ramp and boats in the estuary, and the proximity of the Industrial 5 zone, however, all point to the fact that this is not a quiet residential neighbourhood such as existed in some of the cases cited to us by counsel for the two councils.

In 1986, the council required the appellant to plant trees on the land in substitution for the large and somewhat elderly grove which was cleared away, partly to stop dead and dying branches littering the track and partly because the council's Parks and Reserves Department doubted the long-term health of the trees. Early in the summer of 1989, replacement trees were supplied by the council, but they subsequently died due to difficulties with the club being unable to water them adequately. Since that time, it appears that council is undecided about the adequacy of trees as a noise barrier.

Both parties must bear some responsibility for the removal of the trees for it was done before there was any noise evaluation on the site. The residents perceived that the trees masked some of the noise and from their point of view the removal has increased the sensitivity of the environment, heightened its vulnerability, and reduced its ability to cope with the noise emissions from the club..

Mr Hegley stated that 30 m of dense trees would be required to reduce the noise level, but there is not enough room around the edge of the estuary to grow them. This fact was confirmed by us on our site visit. In addition, as counsel for the respondent submitted, it takes some considerable time for the trees to grow. Further, given the difficulties with watering and the previous poor history of attempts to grow trees on the site, it appears that screening by trees may not be the best practicable option in which either party should participate. Mr Day was of the opinion some bamboo screening might assist. In our opinion every possible effort should be made to provide screening and that the council should provide its best endeavours to do so.

Mr Donohue stated in cross-examination that given an option, he would not site the go-kart track in its present position, given the level of difficulty it has generated. If the Abatement Notice as amended by this decision is continually breached, then we are of the opinion, given the popular public facility it provides, that the council may give some thought to assisting in funding an alternative site where it will not affect the residential population. However, given the level of financial commitment already made by all the parties in this case, it is incumbent on all parties to assist in making the Abatement Notice work.

(b) Financial Implications

Counsel for the council submitted that it was not in breach of the requirements of the Act in devising a usage programme and that it had been responsible in its approach towards the financial implications for the kart club. We accept that submission partly because the club had not been forthcoming in respect of its financial affairs. Mr Graham stated in cross-examination he had repeatedly requested financial information from the appellant, but it had never been provided. In spite of this, the instructions given to Mr Hegley stated that all recommendations must take into account financial considerations, the council having been made aware in July 1991 that the kart club's usage of the track based on more stringent noise levels reading would make the club's position untenable. Had he been able to do so, in prescribing the reduced usage programme, he may have reached the conclusion on the levels of usage that we have done.

Meanwhile, the council costed a high barrier fence (at $30,000 to $40,000) (considered by Marshall Day Consultants as not a cost effective option). It had considered, too, that a bund was impracticable for various reasons including cost. Finally, it had considered that the structural wind-loading of such a fence would be high, and would involve expensive costs.

The council encouraged the kart club to upgrade its facilities and should consider ways of keeping it financially viable. In our opinion it will not remain so if it cannot utilise the facilities more than it is able to as required in the Abatement Notice. It is for this reason we have agreed to increase the number of weekends used in any one year to 17. Mr Donohue explained in his first affidavit that, for the club to run economically, it required two practices per week and one meeting per fortnight to generate the requisite income and levels of interest. We consider his concession to every third weekend as a major one in terms of the financial implications of the best practicable option. If the noise levels are restricted to 60 dBA, then the increased usage above that set down in the Abatement Notice should not further affect the environment.

The Current State of the Technical Knowledge

Mr Davidson deposed that the L_{10} 60 dBA level measured at Covil Park is acceptable being some 10 decibels above the normal background noise level. He further deposed "if this noise level was exceeded, it would constitute a nuisance in terms of the Health Act 1956 (s.29ka)". He went on: "it (the noise level) is recommended in the New Zealand Standard 6802:1977, 'assessment of noise in the environment' ".

Mr Hegley's evidence demonstrated that the intake attenuators fixed by the appellants have reduced the noise emissions by around 5 decibels. Even so, the levels still fall in the category 56 to 60 dBA. There will also be a further reduction of 2 dBA as from the 1st of December when the Federation will require a maximum trackside level of 88 dBA compared with the present 90 dBA. Meanwhile, the New Zealand Kart Federation is investigating more sophisticated noise reducing equipment, but a further reduction of 15 dBA, as sought by some of the residents, does not seem possible in view of the current state of the technology. It is clearly in the club's interests to continue with these investigations.

It seems to us that the appellant is in a no-win situation if it breaches the terms of the Abatement Notice. On the one hand, if the club cannot meet the 60 dBA at Covil Park then under the terms of the lease the council has the right to terminate if the noise becomes a nuisance. (Clause 9 of the lease agreement states that the lessee will not suffer or permit upon the premises anything which may be or become a nuisance or source of damage or annoyance to any person in the vicinity.) On the other hand, it may be forced to close if the number of meetings is too restricted.

Given all the difficulties, we have concluded that the number of meetings should be increased provided that the kart club keeps within the noise levels set. If the go-karts exceed the 60 dBA, then other remedies are available to the affected parties.

Legal Findings on Best Practicable Option

There is now a statutory prescription for avoiding unreasonable noise (section 16 of the Act). The tests and criteria now include "financial implications" and the effects of that option on the environment which is an extension of the criteria set out in the Noise Control Act 1982. For this reason we have been cautious about reflecting in our decision any of the case law cited to us in the extensive helpful submissions of counsel on what is meant by best practicable option. This is not to say that the case law was not carefully considered for it has been. However, we are now acting under a different statutory regime which requires different analysis from that provided for the law relating to nuisance and noise injurious to health under the Health Act 1956 and the Noise Control Act 1982.

The purpose of the Act at section 5(1) is to promote the sustainable management of natural and physical resources. This purpose includes at section 5(2)(c) "avoiding, remedying or mitigating any adverse effect" of the go-karts on the environment. The term "effect" in relation to the environment is defined at section 3(a), (c), (d), and (e) of the Act and includes an adverse effect; any past, present or future effect, and any cumulative effect which arises over time regardless of intensity, duration or frequency and includes any potential effect of high probability. It is for all these reasons we have taken some time over setting out extensively the background history to the Abatement Notice, because part of our assessment of the conditions of the Abatement Notice must include the potential for breach of the noise level. We consider the noise disturbance aspects of the go-karts activities have been cumulative, peaking before the issue of the Abatement Notice and the time when the attenuators were fixed.

We accept that the noisy occupier has a mandatory duty to adopt the best practicable option under section 16 of the Act. The phrase as defined in section 2(a), (b) and (c) of the Act, however, has too many matters of interpretation and discretion built into the definition (such as the sensitivity of the receiving environment) to transpose it to one of strict liability. The section does not impose such a strict test because by its very nature it cannot do so. The definition states "every person ... shall adopt the best practicable option to ensure the emission of noise from that land ... does not exceed a reasonable level". This may be termed an obligation or duty to adopt the best practicable option which is to achieve reasonable noise levels in terms of section 322(1)(c). What is reasonable is a question of fact and degree. In this regard some attention must be paid to the word "practicable". Under the Noise Control Act 1982, it meant "reasonably practical" having regard to local conditions and the current state of technical knowledge. Under the new legislation, the local conditions may be seen as the sensitivity of the receiving environment as specified in section 2(1)(a) of the Act, whilst the current state of technical knowledge is specified in section 2(1)(b).

The onus is then on the occupier of the land to demonstrate it has adopted the best practicable option to ensure that noise emissions do not exceed a reasonable level (section 16(1) and section 322(1) of the Act). Turning to the question of what weight is to be given to each provision of section 2(1)(a), (b) and (c) including the "other things" mentioned in the preamble (which in this case include the long-time use of the site, its upgrading, the cutting of the trees, the variability in wind conditions, the sensitivity of the environment and the lease), we consider that each subsection requires careful consideration of the issues it contains. The phrase "other things" does not limit the regard given to just the three provisions. Nor does it mean that the provisions of one subsection should prevail

over the other. As Mr Bendall submitted, the question of weight accorded each provision will depend on the particular case. The conjunctive use of the word "and" at the end of each subsection points to the fact that any evaluation of the best method to limit the noise emission should take into account all factors mentioned in the provision. However, one or two of the options may, at any one time, be exclusive of others. For example, although the technical knowledge might exist to reduce noise levels successfully under section 2(1)(c), the financial implications of doing so may be so prohibitively expensive that there is little likelihood that the option can be applied successfully. The effect of that occurring must be then assessed in relation to its impact on the environment under section 2(1)(b). (See In Re An Application by the NZ Synthetic Fuels Corporation 8 NZTPA 1981 to 82 at 138).

In this appeal, we are required to look at the two options separately, the one technical and the other financial. We cannot accept the appellant's view that financial implications are as important if not more so than the effects on the environment of any option. It is merely one of the factors to be considered. We have taken section 2(1)(b) to mean the financial implications of the best method for noise prevention and the effect on the environment of that option when compared with the others. In this case, the council's option of limiting the number of club meetings, whilst protecting the residential environment, has direct financial implications for the club in that it will limit the revenue generated by its activities. We do not consider that if the kart club increases its usage to every third weekend it will impact adversely on the environment as long as it keeps within 69 dBA.

In this case also, it is not a question of lack of funding for expenditure on technical knowledge. It is the case that the technical knowledge for noise reduction of go-karts is still evolving. The best option available to the club at this point in time has already been adopted, in fitting the in-take attenuators and excluding the sound system. The willingness to investigate further noise reducing measures was not in question.

The council must come to its own assessment of best practicable option on the facts available to it at the time it issues the Abatement Notice. Sometimes those facts may be wrong, as in this case, where the council did not establish to our satisfaction that the Notice had been breached. Sometimes the developer will not have made all the facts known to the council - again as in this case, where the kart club did not draw to the attention of the council the implications of its financial status. This issue was critical because the effect of reducing the number of meetings has meant the kart club may be likely to close. Some of the responsibility for the council's neglect of this issue, however, must lie with the kart club's failure to produce on request the relevant details.

We have concluded that the best practicable option in terms of this case is the optimum combination of all the methods

available to the kart club to limit the noise damage to the residents in terms of the provisions of section 2(1) - to the greatest extent achievable. Some of the methods are management ones, implicit in the provisions of the Act. It is then up to the club to ensure that the methods employed restrain the go-kart noise emissions at a reasonable level commensurate with the provisions of section 16. In this regard, the 60 dBA noise level seems the best option available to protect the residents.

Existing Use Rights

We do not consider the existing use rights an issue in this appeal. The rights of the kart club to use the domain lie with the lease not with the existing use rights.

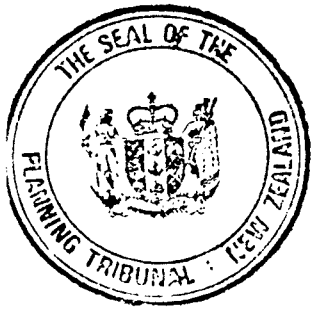
SUMMARY

The background to the appeal may be reduced to this: the go-kart racing has been an authorised activity for many years; that there are two separate and independent clubs, the motorcycle and the kart club generating noise which together in terms of volume, duration and frequency, have adversely affected the living environment for residents on the other side of the Whau estuary at Te Atatu South; that a major upgrading of the kart club's track has been completed under the supervision of the Auckland City Council and with its active support in the form of an $80,000 loan and that the authorised removal of a shelter belt of larger pine trees has exposed the site to some residents and resulted in a perceived increase in noise over and above that measured mechanically. The situation now is that the kart club's investment in the site is such that it is not a practical option for it to move; that it is unable or unwilling to hold its race meetings at the same times as those of the motorcycle club because there is insufficient space to accommodate all the combined crowds; and that there is no early prospect of further mechanical innovations to reduce engine noise significantly.

The two councils' responses were predicated on the basis that the Abatement Notice had been breached, that the kart club was not exercising its duty under section 16 of the Act, and that it was not exercising the best practicable option under section 322(1). For the reasons given above we do not accept that approach:

1. Applying the "zero met" New Zealand Standard for measuring wind levels, it is unlikely that the kart club has breached the noise levels set out in the Abatement Notice and if it did so on 23 May, the breach was not unreasonable.

2. According to the residents, the kart club has breached the number of meetings held, although we have no evidential proof of this. However, we note in this regard that it is possible that the go-kart and motorcycle meetings were confused.



3. Having accepted for itself that 60 dBA is a reasonable level of noise emission, it is up to the kart club to stay within that range and the evidence indicated that it is possible to do so.

4. We accept that the kart club has done everything it can, including reduction in usage of the track; deletion of a public address system; having attenuators fixed to the intake pipes; and continuing its efforts to reduce the noise levels still further to ensure the noise emission maintained is the best practicable option.

Although it is not our duty to plan for the parties in these appeals, it has occurred to us that there are several measures which may be explored between the parties to ensure the issue does not reach the same degree of annoyance and complexity that it has in the past.

(a) That the council explore with the kart club a screen planting programme which may assist in masking the noise from the karts.

(b) That the council and the kart club explore further, with the motorcycle club, at least combined practice times and that the council examine, in co-operation with both clubs, the possibility of increasing spectator parking so that both uses can be accommodated together.

(c) That at least every other weekend is free of all meetings.

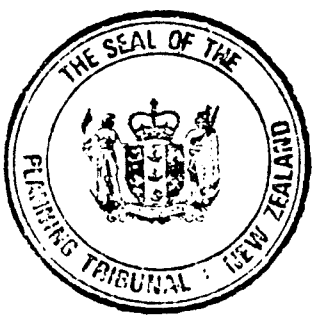
(d) That the kart club advertise in the local papers when it is holding North Island and National Championships thereby forewarning the residents.

In conclusion we again note that if the Abatement Notice continues to be breached there are other remedies available under legislation and also in terms of the lease.

Costs

In accordance with leave reserved by the Tribunal on 13 August 1992 the various parties submitted memoranda on costs to be filed at a later date. In a memorandum filed on 27 August 1992 the appellant sought costs as follows:

(a)	Legal costs	$30,241.58
	Expert costs	7,592.20
		$37,833.78



Counsel submitted it was a proper case for costs to be awarded to the appellant; that the respondent's actions in serving the Abatement Notice restricting the usage of the facility did not take into account the financial predicament the council had left the club as a result of the restrictions on the number of meetings that could be held. It was submitted also that the action taken by the council was not justified either in law or on a practical basis; and, further, that both the Waitakere City Council and the Auckland City Council should be ordered to pay the costs of this appeal, including the cost of its expert.

In a memorandum filed on 28 August 1992 the Waitakere City Council supported the approach of the council towards costs and listed the following:

(a)	Counsel's fees	$5,600
(b)	Mr Davidson's costs	
	(1) Preparation time	362
	(2) Tribunal time	425
(c)	Administrative expenses	50
		$6,437

Counsel submitted that he was on secondment to the Waitakere City Council and that it is an established principle that an employer of an inhouse solicitor is entitled to recover costs in relation to that legal service (Henderson Borough Council v Auckland Regional Authority 1 NZLR 16 at 23.

In support of its application for costs filed, counsel for the council cited the opposition of the appellant to the council's application for a priority fixture; the necessity of a judicial conference to seek a priority fixture; the necessity to prepare a list of discoverable documents which total over 680, including a supplementary list; the lengthy preparation of affidavits and of cross-examination because of complicated technical issues; the cost of defending an appeal for the benefit of residents not within its own territory; and the substantial cost of retaining an acoustic consultant. In support of its application, counsel cited Auckland Heritage Trust v Auckland City Council (1992) 1 NZRMA 174 at 177 where the Tribunal held that the practice of the general Courts on costs will normally have more application to proceedings for enforcement orders than it will to other proceedings (such as the content of regional and district plans). Counsel submitted that the Abatement Notice and enforcement order procedures should be treated similarly in regard to awards of costs as the procedures are similar, leading possibly to defended hearings requiring affidavit and/or oral evidence and cross-examination of witnesses. Counsel also took issue with the appellant calling itself a charitable organisation when in fact it is an incorporated society conducting a sporting activity. Counsel

submitted that if we were to consider that the appellant is entitled to special treatment on public interest grounds, then our consideration should be given to case law which held that such groups are not immune from responsibility for costs: see Environmental Defence Society (Inc) and Others v The Manukau City Council and Liquigas Limited (Decision A 61/86), The Remarkables Protection Committee v Lake County Council (1980) 7 NZTPA 273. He submitted also that the financial position of the appellant is seldom a consideration relevant to the question of costs McGraw v BNZ (1988) 1 PRNZ 257.

The respondent submitted that costs in the sum of $10,000, together with $5,515.45, being disbursements and expenses, should be awarded.

Evaluation on Costs

Both councils have proceeded on the basis that this decision will find against the appellant.

In fact, the reverse is the case in some of its aspects. We find that the appellant was justified in bringing the appeal. Our reasons for so holding are as follows:

1. That we are not satisfied that the club exceeded the conditions contained in the Notice.

2. That the number of meetings imposed by clause 3 of the Notice is unduly restrictive.

Normally it is the Tribunal's practice for costs to follow the event, but we consider that in this appeal there were genuine public interest issues to be tried, involving close examination of very technical evidence the results of which will add to the knowledge of all the parties and hopefully result in a resolution of the problem. We have concluded that the club is entitled to nominal costs to meet some its consultant's fees and we set these at $2,000.

Conclusion

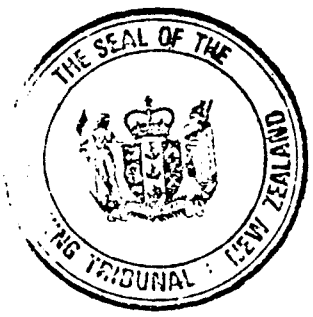
In the relief sought, the appellant requested in the alternative that an order be granted modifying the Notice in such a manner as we think fit.

Accordingly, and for all the reasons given, we hereby order:

1. That the parties submit an agreed amended schedule to replace paragraphs 3.1 to 3.3 for 12 months commencing from the 1st of November and subject to the following:

   (a) that there be no more than 17 weekend meetings;

   (b) that there be no more than 2 weekday practice sessions in any one week;



(c) that no practice session shall extend beyond the hours of noon to 5:00 pm;

(d) that a register be kept by the club of the track-side testing of each kart as required by the New Zealand Kart Federation and that the register be available for inspection by the Auckland City Council and the Waitakere City Council.

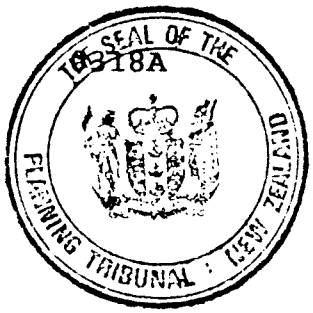
This agreed amended schedule will then be issued as a Consent Order.

2. That costs of $2,000 be awarded to the Auckland Kart Club Incorporated against the Auckland City Council such order to be enforced if necessary in the District Court at Auckland.

DATED at AUCKLAND this 22nd day of October 1992

S.E. Kenderdine

S E Kenderdine
Planning Judge



AUCKLAND CITY

ABATEMENT NOTICE UNDER SECTION 322 OF THE RESOURCE MANAGEMENT ACT 1991

AREA OFFICE
AVONDALE-MT ALBERT-WESTERN BAYS
Area Manager, David Rankin
Writer's direct dial number:
When replying or calling please refer to:

TO: Auckland Kart Club Incorporated
5 Waianiwa Place
BLOCKHOUSE BAY
AUCKLAND 7

ADDRESS:

1. Location in respect of which Abatement Notice applies: Rosebank Park Domain, being all that parcel of land containing 9.3077 hectares more or less and being section numbered one (1) in the Parish of Titirangi bounded towards the North and East by the Waitemata Harbour, towards the South-East by Section two (2) five hundred and seventy (570) links and towards the West and North by the Whau River and being all that land comprised and described in CT 132/27 (North Auckland Registry), more commonly known as the Rosebank Park Domain, Rosebank, Auckland ("the land").

2. The reasons for this Notice are:

   (a) The Auckland Kart Club Incorporated is an occupier of the land;

   (b) The Auckland Kart Club Incorporated is emitting unreasonable noise from the land;

   (c) The Auckland Kart Club Incorporated is not adopting the best practicable option to ensure that the emission of noise from the land does not exceed a reasonable level.

   (d) The Enforcement Officer has reasonable grounds for believing that circumstances set out in Section 322 (1) of the Resource Management Act 1991 exist.

3. The action required to be taken is to limit the use of the land during the period 29 April 1992 to 31 December 1992 for go-kart racing or practice or any other use of go-karts except at the times specified in paragraphs 3.1 - 3.26 below, and you are required to cease these uses referred to except during the times specified in paragraphs 3.1 - 3.26 below.

409 New North Road Private Bag 41900 St Lukes Auckland
Telephone (09) 846-0014 Facsimile (09) 815-1658

3.1 Wednesday 29 April between 12 noon and 5.00 p.m.

3.2 Friday 1 May between 12 noon and 5.00 p.m.

3.3 Sunday 3 May between 10.00 a.m. and 5.00 p.m.

3.4 Wednesday 13 May between 12 noon and 5.00 p.m.

3.5 Friday 15 May between 12 noon and 5.00 p.m.

3.6 Wednesday 10 June between 12 noon and 5.00 p.m.

3.7 Friday 12 June between 12 noon and 5.00 p.m.

3.8 Sunday 14 June between 10.00 a.m. and 5.00 p.m.

3.9 Wednesday 22 July between 12 noon and 5.00 p.m.

3.10 Friday 24 July between 12 noon and 5.00 p.m.

3.11 Sunday 26 July between 10.00 a.m. and 5.00 p.m.

3.12 Wednesday 2 September between 12 noon and 5.00 p.m.

3.13 Friday 4 September between 12 noon and 5.00 p.m.

3.14 Sunday 6 September between 10.00 a.m. and 5.00 p.m.

3.15 Wednesday 14 October between 12 noon and 5.00 p.m.

3.16 Friday 16 October between 12 noon and 5.00 p.m.

3.17 Saturday 17 October between 10.00 a.m. and 5.00 p.m.

3.18 Sunday 18 October between 10.00 a.m. and 5.00 p.m.

3.19 Wednesday 28 October between 12 noon and 5.00 p.m.

3.20 Friday 30 October between 12 noon and 5.00 p.m.

3.21 Wednesday 25 November between 12 noon and 5.00 p.m.

3.22 Friday 27 November between 12 noon and 5.00 p.m.

3.23 Saturday 28 November between 10.00 a.m. and 5.00 p.m.

3.24 Sunday 29 November between 10.00 a.m. and 5.00 p.m.

3.25 Wednesday 9 December between 12 noon and 5.00 p.m.

3.26 Friday 11 December between 12 noon and 5.00 p.m.

use of the land during the times specified in paragraphs 3.1 - 3.26 is to be in accordance with the conditions set out in paragraph 5 below.

4. The date on or before which you must comply with the requirements of this Notice is 29 April 1992.

5. The further conditions imposed by this Notice are:

   (a) The noise caused by the use of the land during the period 29 April 1992 - 31 December 1992 for go-kart racing or practice or any other use of go-karts at the times specified in paragraphs 3.1 - 3.26 shall not exceed 60 dBA (as measured at the eastern end of Covil Park, Rosebank, in terms of measured noise levels L_{10} used without correction {as defined in New Zealand Standard NZS6801:1977 Methods of Measuring Noise, subject to the wind strength at ground level at Covil Park not exceeding "light air" as defined in the Beaufort Wind Scale}).

6. This Notice relates to Section 322 (1) (c) of the Resource Management Act 1991 (which relates to the emission of noise) and the Enforcement Officer may enter the place (with a Constable if the place is a dwelling house) and:

   (a) Take all such reasonable steps as the Enforcement Officer considers necessary to cause the noise to be reduced to a reasonable level; and

   (b) When accompanied by a Constable, seize and impound the noise source.

7. You have the right to appeal to the Planning Tribunal against the whole or any part of this Notice by lodging a Notice of Appeal with the Tribunal, in accordance with Section 325 of the Resource Management Act 1991, not later than Tuesday 28 April 1992. The lodging of a Notice of Appeal will act as a stay of this Notice until the appeal is heard.

8. The name of the Enforcement Officer serving this Notice is Andrew Roy Graham.

9. The authority under which the Enforcement Officer is acting is Sections 16, 38 and 322 of the Resource Management Act 1991.

10. The name and address of the local authority whose Enforcement Officer served this Notice is the Auckland City Council, Avondale-Mt Albert-Western Bays Area Office, 409 New North Road, Kingsland, Auckland.

11. Note: If you do not comply with this Notice or lodge a Notice of Appeal with the Planning Tribunal in accordance with Clause 7 above, you may be liable to prosecution under Section 338 of the Resource Management Act 1991.

ARG

Andrew Roy Graham
ENFORCEMENT OFFICER

21 April 1992
Dated

THE SEAL OF THE PLANNING TRIBUNAL NEW ZEALAND


Joins Map 15
5
6
7
8
9
Y
Z
AA
BB
CC
DD
WEST HARBOUR
MASSEY EAST
TE ATATU NORTH
TE ATATU SOUTH
LINCOLN
Henderson Creek
Lawsons Creek
Manutewhau Stream
Hurihuru Creek
Waiarohia Creek
Pollen Island
WHAU
Joins Map 22
Joins Map 28

Appendix C

Survey Date	Measured by	WIND (Speed & Direction)		Measured L_{10}
		Estimated	NIWAR	
31 Mar 91	Davidson	1.5-3 m/s N	-	62 dBA
17 Mar 91	Hegley	1-2 m/s NE	-	60 dBA
12 May 91	Davidson	2-5 m/s W	-	60 dBA
13 Feb 83	Wong	Calm	-	55 dBA
9 Jun 91	Davidson	5 m/s SW	-	57 dBA
7 Dec 91	Davidson	3-8 m/s SW	-	52 dBA
8 Feb 92	Davidson	5 m/s NE	4-5 m/s E/SE	62 dBA
9 Feb 92	Davidson	Calm	1 m/s SW	52 dBA
1 Mar 92	Hegley	4-5 m/s S/SE	5-6 m/s S/SE	56-58 dBA
1 Mar 92	MDA	5-8 m/s S	5-6 m/s S/SE	54-58 dBA
22 Mar 92	MDA	10-13 m/s SW	5-9 m/s W/SW	47-51 dBA
12 Apr 92	MDA	0-5 m/s SW	3-6 m/s S	48-52 dBA
2 May 92	Davidson	8-11 m/s NE	4-6 m/s NE	55-61 dBA
3 May 92	MDA	0-3 m/s SW	3-4 m/s	51-53 dBA
23 May 92	Davidson	3-5 m/s E	3 m/s	67 dBA
23 May 92	Hegley a)	0-1 m/s E	3 m/s NE	63 dBA
23 May 92	Hegley b)	1-2 m/s E	3 m/s NE	65 dBA
23 May 92	Hegley c)	1-3 m/s E	3 m/s NE	61 dBA
24 May 92	MDA	9-12 m/s S	7-8 m/s S	58-60 dBA
5 Jul 92	MDA	0-2 m/s NW	4-6 m/s	56 dBA

Decision No.	A 124/92
IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of 2 appeals under section 325 of the Act
BETWEEN	**AUCKLAND KART CLUB INCORPORATED**
	(ENF: 58/92 ENF: 73/92)
	Appellant
AND	**AUCKLAND CITY COUNCIL**
	Respondent

BEFORE THE PLANNING TRIBUNAL

Her Honour Judge Kenderdine (presiding)
Mr J R Dart
Mr T W Smallfield

HEARING at AUCKLAND on the 11th, 12th and 13th days of August 1992

COUNSEL

Mr J D Lal for the appellant
Mr S C Bendall for the respondent
Mr S R Brownhill for the Waitakere City Council

CORRIGENDUM

The parties are asked to note a typographical error on page 22, second paragraph which reads "as long as it keeps within 69 dBA, and which should read -"as long as it keeps within 60 dBA".

S E Kenderdine
Planning Judge

0473P