IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Mane-Tail Land Development Ltd., 2006 NSPC 40

Date: 2006-09-25
Docket: 1531512, 1531513
Registry: Halifax

Between:

Her Majesty the Queen

v.

Mane-Tail Land Development Limited

Judge:	**The Honourable Judge Jamie S. Campbell**
Heard:	**December 9, 2005; June 26, 2006; June 29, 2006; August 16, 2006**
Oral Decision:	**September 25, 2006**
Charges:	**BETWEEN October 20th, 2004 and April 19th, 2005 at or near West Lawrencetown Road, Halifax, Nova Scotia, did, being the owner of the property located at West Lawrencetown Road, Halifax (PID 00638429) did unlawfully have or permit a motorcycle racing training track contrary to the uses permitted in the RR-1 (Rural Residential) Zone of Part 6.1 of the Land Use By-law for Lawrencetown; pursuant to Section 505(1) of the *Municipal Government Act,* c.18, S.N.S., 1998;** **AND FURTHERMORE, at the same time and place aforesaid, did unlawfully permit the use of equipment that created a nuisance by virtue of noise, contrary to Part 6.13 of the Land use By-law for Lawrencetown; pursuant to section 505(1) of the *Municipal Government Act,* c.18, S.N.S., 1998.**
Counsel:	**Randall Klinghorn, for the Crown** **Warren Keith Zimmer, for the Defence** **David S. Green, for the Defence**

By the Court:

[1] The West Lawrencetown Road area is a short drive from downtown Halifax. It is also close to the ocean, and from most of the properties in the area, when the wind is right, the sound of the ocean on the beach can be heard. There are horses in the fields, wildlife in the woods and a sense that this is what life in Nova Scotia should be like. As in most other rural communities, the idyllic pastoral soundtrack is interrupted by passing cars, occasional farm tractors and equipment and noises as diverse as barking dogs and in this case, a naval gunnery range.

[2] Motor cross sports are a high energy, high excitement form of recreation and entertainment. They almost certainly bring people together through the common appreciation of the sport, but on the West Lawrencetown Road, motor cross and the noise that goes with it, have pitted neighbour against neighbour. Some neighbours claim that the sound of motorbikes from a private motor cross practice facility created in the area has plumbed the depths of their patience. The owner says that the activity undertaken on the property is entirely legal, and that the noise is neither excessive nor out of keeping with the nature of the area itself.

[3] The owner of the land in question, Mane-Tail Investments Ltd. ("Mane-Tail") is not a faceless corporation that exists only in minute books. It is, in fact, a holding company owned by David Green, one of the neighbours in the area. Mr. Green in the sole shareholder and officer of the company. It's actions are Mr. Green's actions for these purposes. The dispute is between Mr. Green and his family and the neighbours whose complaints have prompted the Halifax Regional Municipality ("HRM") to lay charges.

[4] Mr. Green's son, Julian, known to many by his nickname "Boo", is a professional motor cross driver. He is, in fact, rated as one of the best in Canada at the sport, which requires strength, agility, balance and quick reflexes. Those attributes are developed through practice and undoubtedly aided by a natural aptitude for the sport. Boo Green appears to be in every

respect a fine and articulate ambassador for his sport.

[5] Mr. Green and his family live on Conrad Road in Lawrencetown. David Green has, on the property in question on the West Lawrencetown Road, created an area where his son and others can refine and practice their skills in the sport. The area, as shown in the photographs entered as *Exhibit 1*, is not highly developed. There are no spectator facilities, such as grandstands, canteens, washrooms or even a large parking area. There is no pit area and in fact there are very few if any of the kinds of things one would normally associate with a developed track. There are in fact no buildings at all.

[6] What Mr. Green has created on his property are a series of jumps along a figure eight shaped track. The word "track" may convey a sense of a level groomed surface. In this case it is not. Motor cross sports require a track that is much more rough and ready, with a dirt path and various jumps and turns. In this case, the jumps are mounds of earth, put in place by earth moving machinery and are not random creations. They replicate the technical features of tracks on which races are held, including banked turns (berms), rutted areas and 90 degree and 180 degree turns. The area has been designed for practice not racing.

[7] The area was formerly an open field surrounded by predominantly evergreen trees. The track or facility was constructed or developed, with some thought and effort, from its previous state. It is not something that has resulted from the consistent use over time of that particular area for that particular purpose.

[8] Mr. Green is certainly not insensitive to his neighbours' concerns regarding the noise of the motorcycles that use the practice track. He had a track on a piece of land much closer to his home. That track cost between $20,000 and $30,000 to develop. After noise complaints from a neighbour, whose home was less than 200 feet away from the track, Mr. Green stopped the use of that track.

[9] In early 2004, he began development of a new track on the property on the West

Lawrencetown Road. Having invested money in the previous track, Mr. Green wanted to make some effort to make sure that this track did not suffer a similar fate. He ran a motorcycle in the area where the track was to be laid out and he and others listened to the sound from various areas nearby. He was satisfied that the noise was not unreasonable. At that time no sound measurements were taken and the views of the neighbours as to the level of noise were not sought.

[10] Over the course of this dispute Mr. Green has offered accommodations in the manner in which the property was to be used, limiting the times of day and times of year when the facility would be used.

[11] The neighbours, for their part, are acutely aware that the Green family home is not adjacent to the facility but is some distance away, though in the same community. Each time they hear the track in use they appear to be reminded of the fact that those using the track are hearing the sound by choice, while they are not.

Issues:

[12] Mane-Tail has been charged with use of the area as a practice facility or practice track which is not compatible with it's being in an RR-1 designated zone, and is thus in breach of the zoning bylaw.

[13] It is also charged that the noise from the practice area is a public nuisance, also in breach of the zoning bylaw.

[14] The formal charge, as amended, reads as follows:

> **Between** October 20th, 2004 and April 19th, 2005 at or near West Lawrencetown Road, Halifax, Nova Scotia, did being the owner of the

property located at West Lawrencetown Road, Halifax (PID 00638429) did unlawfully have or permit a motorcycle racing training track contrary to the uses permitted in the RR-1 (Rural Residential) Zone of Part 6.1 of the Land Use By-law for Lawrencetown; pursuant to Section 505(1) of the ***Municipal Government Act*** c. 18, S.N.S., 1998;

And furthermore, at the same time and place aforesaid, did unlawfully permit the use of equipment that created a nuisance by virtue of noise contrary to Part 6.13 of the Land use By-law for Lawrencetown; pursuant to section 505(1) of the ***Municipal Government Act***, c.18, S.N.S. 1998.

Nature of the Training Track:

[15] There was some question at the outset as to whether the facility was or was not a racetrack. The defendant maintained that the term racetrack or racing track implies a place where competitions, particularly those involving speed, take place. There is, however, no allegation that the area in question was used as a racetrack. The charge is that the area was used as a racing training track and the fact that the property was used for that purpose does not appear to have been in serious dispute.

[16] While the debate as to the precise definition of racetrack may rage on, it will have to be resolved elsewhere. The area in question has been modified, if in a rudimentary way, to create a place where motor cross sports can be practiced. It may well not be a racetrack but it is surely a practice area or practice track. Furthermore, it is a practice area for a professional motor cross sport racer. It has been designed and modified for that purpose and is not merely a track created by repeated use over the same area. The question is whether that form of use is inconsistent with the designation of the property as RR-1.

[17] Mane-Tail as owner of the property has rights to use the land. Mr. Green characterized this case as being fundamentally about private property rights. He has the right to own and use

motor cross motorcycles and to invite his son and his friends to use them on the property, much the same as anyone can, subject to some legal restrictions, drive a motorcycle or a bicycle on his own land. They can drive them in the same pattern regularly. The issue here is whether the use of the property as track or training facility is prohibited under the land use by-law.

Off- Highway Vehicles Act:

[18] Does the by-law restrict the operation of vehicles, which would be permitted within the provisions of the ***Off-Highway Vehicles Act***, R.S.N.S. 1989, c.323?

[19] Mane-Tail maintains that off road vehicles are regularly used by their owners in the Lawrencetown area. It asserts that it was never the intention of the by-law to prevent people from riding off road vehicles in the area, or to prevent them from riding those vehicles over the same course in such a way as to create a "track".

[20] The by-law does not purport to limit the right of off road vehicle owners to ride their vehicles anywhere the law allows. It does purport to regulate development and use of property.

[21] An individual may ride his off road vehicle on his own land or on other land where that activity is permitted. The use of such vehicles is accessory to residential or agricultural uses. As Mr. Green has pointed out, it is a normal activity in Lawrencetown. The by-law does not purport to regulate the use of off road vehicles or motor cross motorcycles.

[22] When property is developed or modified to accommodate a particular use, that development is certainly regulated. Here the property has been developed or modified as a motor cross practice track. Furthermore, even if no structures are build or no landscape modifications are undertaken, the by-law may regulate otherwise legal activity on that property. That activity becomes an issue when it can no longer be characterized as being accessory to one

of its permitted uses.

[23] Riding an off road vehicle around one's property may be entirely appropriate and entirely legal in an area that is zoned rural residential. When that use becomes more than accessory, or incidental in nature it must fit within one of the permitted uses set out in the by-law.

[24] The By-law is not inconsistent with the ***Off- Highway Vehicles Act*** in that it regulates land use and not vehicle use.

Recreational Use:

[25] Is the use made of the property inconsistent with the provisions of the by-law?

[26] The Land Use By-law for Lawrencetown provides at Section 3.5(a) that any use not listed as being permitted within a zone is deemed to be prohibited. The land in question is zoned RR-1.

[27] The permitted uses for properties in that zone are set out in Section 6.1 of the by-law. The by-law refers to the granting of development permits for those listed uses, but it is clear that this section of the by-law is intended to establish those uses that are permitted within the zone. The listed permitted uses include single unit dwellings and various other residential uses, non-intensive agriculture, forestry uses (except permanent sawmills or industrial mills), fishing and fishing related uses, public and private parks and playgrounds and certain existing commercial and industrial uses.

[28] In argument Mr. Green agreed that the use of the property as a practice facility was a recreational use. That use is not set out as one of the permitted uses in the RR-1 Zone. Mr. Green asserted that the bylaw was poorly drafted and that the provisions of Section 6.1 should be interpreted to include recreational use. He maintained that if this were not the case, those training horses would have to stop that activity and backyard tennis courts, notably the

one located in the backyard of one of the complaining neighbours, Dr. Draper, would have to be removed.

[29] Recreational uses are permitted in the Business Industrial zone and are clearly not permitted in the RR-1 zone. Other activities currently carried on in the RR-1 zone are not the subject of this trial but for purposes of interpretation equestrian activities may fall within the non-intensive agricultural use, permitted in the zone and activities ranging from private backyard tennis courts to children's croquet sets may be considered accessory, or incidental to residential use.

[30] If the court were to add recreational use to the permitted uses set out in Section 6.1, in this case, it would be usurping the proper legislative role of the municipal council.

[31] Mane-Tail also asserts that the use of the property as a training facility for motor cross sports falls within the permitted uses as a private park or playground. Mr. Green says that this facility is essentially his private park or playground.

[32] Neither of those terms are defined in the by-law.

[33] As generally understood, a park may either be a larger area of land preserved in a form of natural state, or an area set aside for recreational purposes, ranging from baseball diamonds and soccer pitches to locations for amusement rides. A park may encompass the range from the Cape Breton Highlands National Park to the baseball fields on the Halifax Commons to a smaller green space like Victoria Park at the corner of Spring Garden and South Park Streets in Halifax. One might suggest that parks are areas set aside for recreation in its broadest sense, including both passive and more active pursuits.

[34] The by-law does however have a definition of "recreational use", which would suggest that recreational parks have been specifically considered. Recreational uses under the by-law include commercial recreation, recreation, camping, sport or entertainment. Because

different terms are used, a park and a recreational use must be different.

[35] "Parks" as the word is used in the bylaw, must then be limited to those areas of land which preserve a natural state or at any rate are not used for sports or entertainment in anything more than a passive sense. Walking in a natural setting is a form of recreation, but is, under this by-law distinct from sport or entertainment. This suggests that the word "parks" as used in the by-law is intended to mean areas of land set aside for non-sporting use or for enjoyment in a more passive way. The facility at issue here, cannot be fit within the concept of a park.

[36] Neither can the word "playground" be so broadly defined as to include a motor cross training facility. A playground is an area set aside for children in which they can engage in physical activity, often using equipment specifically designed for that purpose. Granted, in those areas children may play games and sports though generally not sports involving motorized off-highway vehicles.

[37] The by-law has distinguished between recreational uses in general, and playgrounds, which would themselves be recreational. Areas which are characterized by swings and similar equipment are playgrounds. Motor cross training tracks are not playgrounds neither as that term would be commonly understood nor as it is intended in the bylaw.

[38] The land in question is used neither as a park nor as a playground but for what would normally be considered a recreational purpose, being training for motor cross sports. One might argue that the more intensive use of the area by a professional would take it beyond recreational use. That however is not an issue that needs to be decided.

[39] The bylaw sets more specific limitations on certain facilities that could otherwise be considered to come within the definition of "recreational". Recreational purposes are defined as specifically not including "vehicle race tracks, theatres/cinemas, golf courses, outdoor rifle ranges, drive-in theatres and night clubs or other beverage rooms." So, while

some of these activities might otherwise be considered recreational, for purposes of the by-law, they are not.

[40] Therefore, in areas where recreational uses are permitted, those uses do not include vehicle race tracks and the other enumerated uses. In areas where recreational uses are permitted, race tracks are not.

[41] Clearly this facility is not a race track. It is a practice track or practice facility . As such, and because it is not a vehicle race track, it may well be recreational use. That distinction does not assist Mane-Tail's position. Recreational uses are not permitted within the RR-1 zone.

[42] The use made of this land, to paraphrase Judge Carter, in ***R. v. Morgan*** 2002, SKPC 58 (CanLii) goes beyond riding dirt bikes around the field. This involved the creation of an area specific to the purpose of practicing motor cross skills. The area was not elaborate but was not created without significant effort and planning. It contains specific elements necessary for practicing and turns and jumps have been created to replicate the specifications of some of those found in formal racing venues.

[43] David and Julian Green were concerned about annoying their neighbours and when constructing the portions of the track, tested the sound levels by listening at the outer edges of the property. This track was not created without considerable effort and I should add, was not made without at least some effort to avoid inconveniencing the neighbours.

[44] The land in question is not an area which is used for other things and is sometimes incidentally used for motor cross practice. While Mr. Green has voluntarily limited his use of the property to certain times of day and times of year, the use of the property as a track is certainly its predominant use. While Julian Green has gone to the property at times to simply enjoy the area, or as he frankly agreed, to more publicly assert his right to be on his family's property when he chose to be there, it is not a part of the family's acreage that is regularly used for any other purpose.

[45] The use to which it is put is consistent with the changes that have been made to the property to accommodate that use. It is used by professional motor cross racers to practice their skills, as opposed to children who have found a conveniently placed hill in the back field.

[46] The use of motorcycles is consistent with a rural residential lifestyle, just like the use of ride on lawnmowers, small tractors and chainsaws. Here, that use becomes more formalized, with the property having been customized for that purpose and the use has become one which is in conflict with the zoning bylaw. The modification and development of the area, and it's more formal and regularized use as a training track for professional motor cross racers indicates that it's use is different in character from "riding dirt bikes around the field".

[47] Recreational uses are specifically permitted in the Industrial Zone. They are not permitted in the RR-1 zone. Because they are not specifically permitted, they are pursuant, to Section 3.5 of the By-law prohibited.

[48] By developing a motor cross training facility and by operating such a facility, Mane-Tail has breached the Zoning By-law for Lawrencetown and is guilty as charged.

Noise:

[49] The defendant is also charged that it breached the zoning by-law by permitting the use of equipment that created a nuisance by virtue of noise.

[50] Section 6.13 of the by-law reads:

> " No materials or equipment shall be used which creates a nuisance by virtue of noise, vibration, smell, glare or which is obnoxious."

[51] Judge Williams in ***R. v. Kelly*** [1997] N.S.J. No.579 dealt with a noise complaint against a

company that was using a chainsaw and a backhoe to the annoyance of its neighbours. His words in my view, cannot be improved upon as a concise description of the competing values at play in situations of this kind:

> It is a truism that life in an organized society such as ours involves unavoidable clash of interests. It is also true that we must each, at times, put up with some annoyances in a "give and take or let and live" situation. But, we should not be subjected to and be compelled involuntarily to accept serious annoyances that interfere substantially with our enjoyment of life.

[52] Noise is everywhere, or at least almost everywhere. Except in specially designed environments, there is no absolute silence and the quest for tranquility may be a more spiritual undertaking than either a physical or legal one.

[53] People living in a residential community have to accept that noise is a part of living in a community. Birds sing. Waves roll. Dogs bark. Children play. Cars pass...with or without mufflers. Sirens wail. Lawnmowers buzz. Depending on the community, there may be chainsaws and farm tractors or a neighbour’s questionable taste in music.

[54] Noises cannot be categorized neatly. One might consider a rough continuum that leads from ambient noise, to daily noise to unusual noise then crosses over into nuisance noise. That linear approach deals with some aspects of noise but like almost any such categorization misses the nuances. Much depends on the nature of the community and the surrounding circumstances.

[55] Some noise is simply part of the environment. The sound of the environment ranges from birds singing, to the sound of the sea, and in some environments passing cars and playing children.

[56] Daily noises are those that while not constant parts of the environment are part of daily life. The lawnmower, the heavy delivery truck, and the ambulance siren can all disrupt the quiet of those who seek it, but are acknowledged as part of normal life. They happen every day,

are noticed then forgotten.

[57] Some noises, even though annoying, and sometimes intensely so, may well be part of the give and take of living in a community. The rural neighbour cutting wood with a chainsaw or the urban neighbour pounding away at building a new deck are things that are accepted precisely because they are unusual. They occur but because they do not occur regularly or because they are a necessary or understandable part of life they are accepted. People do their best to accommodate each other. The neighbour builds his deck hopefully during reasonable hours and while it might interrupt a summer Saturday afternoon, it does not happen that frequently.

[58] At some point, noise crosses over from being acceptable to a nuisance. At what point noise transcends that which neighbours should be expected to accept is the question. At what point does the noise interfere substantially with their quality of life?

[59] The neighbours in this case are certainly frustrated. Written language does not afford the tools necessary to replicate the various attempts made to convey verbally an imitation of the sound of a motor cross motorcycle. The attempts to do so will tax the creativity of those charged with preparing any transcript of these proceedings.

[60] Mane-Tail brought evidence as to the level of noise. The noise from the motorcycles according to that evidence was no louder than the noise of passing trucks and cars.

[61] David H. Swan PhD. was qualified as an expert to give opinion evidence regarding the physics of sound and its measurement. Dr. Swan prepared a report with respect to motor cycle sound measurements undertaken on the West Lawrencetown Road on November 4, 2005. The sound meter used had not been calibrated since it had been purchased and Dr. Swan could not testify as to accuracy when measurements were taken.

[62] The report used the dBA weighting system which is accepted as the method used for

environmental, regulatory, law enforcement and work place sound measurements. The dBA weighting most closely mimics the response of the human ear. An increase of 10 decibels is equivalent to ten times the sound power.

[63] Decibels do not measure annoyance. They measure volume.

[64] Two motorcycles were ridden on the track. While Dr. Swan did not see the motorcycles being ridden, there is no reason to believe that they were being ridden in a way to minimize the noise.

[65] The ambient sound at the track itself was less than 55 dBA with a peak at 61 dBA. That included the low hum of the ocean, a distant chain saw and a car on the West Lawrencetown Road. Ten metres from a motorcycle being ridden aggressively, the typical level was 85 dBA with a peak at 100 dBA.

[66] At the entrance to the property, once again the ambient sound level was less than 55 dBA with a peak at 71 dBA because of a barking dog. When a motorcycle was ridden aggressively, the peak reached 63 dBA with a typical reading of 56 to 60 dBA.

[67] Readings were taken at two other properties, Civic # 700, the Draper property, and Civic #211. The Draper property is about 400 meters from the centre of the track. Civic #211 is about 600 metres from the centre of the track.

[68] At the Draper property the measurement was at 55 dBA for an ambient level and a peak of 80 with a truck passing. Aggressive riding of a motorcycle resulted in readings of 60 to 62 dBA with a peak of 75. The evidence of Dr. Swan was that there was the discernable sound of a motorcycle, even at the typical level.

[69] Dr. Draper, in his evidence, indicated that the noise that he experienced from the property affected his lifestyle. He testified that he could not walk his horses when the track was being

used and that the sound was considerably more annoying than lawnmowers or chainsaws.

[70] The measurement at Civic #211 showed an ambient sound level of 55 dBA with a passing car bringing the reading to 76 dBA. With aggressive riding of motorcycles on the track, the typical reading was 55 dBA with a peak of 58 dBA. The report notes that while there was some difficulty in measuring the sound of the motorcycle above the ambient level, the motor cycle sound was easily distinguishable.

[71] While the measurements done by Dr. Swan may not have been done with a calibrated instrument, they do show relative noise levels. They also show noise levels on one day, with very little wind. As Dr. Swan testified, wind and temperature as well as other environmental factors such as landscape affect the transmission of sound.

[72] Mr. Green describes the evidence of those neighbours who testified about their annoyance as being "embellished and contrived", because they are concerned that permitting the use of motorbikes on the property will lead to the development of a commercial racing facility, which would devalue their properties. If the matter were about volume alone, which it is not, the expert's report would at least be some supporting evidence for this contention.

[73] The matter is not about volume alone. I could certainly find no evidence to suggest that those who were annoyed by the noise were expressing anything other than their honestly held beliefs. While the volume may have been limited, volume is not the only issue in assessing the claim of sound nuisance.

[74] Litigation by its nature moves people away from the common ground they often share. It leads almost inevitably to the questioning of character and motives. In this case, neither Mr. Green nor the neighbours who have complained appear to have been operating with improper motives. Each is acting on honestly held beliefs and understandings as to their respective rights. Without adopting the tastes or sensitivities of either side, the court must determine whether the noise can be properly characterized as constituting a nuisance.

[75] The neighbours are annoyed. There can be no doubt of that. The volume of the noise itself however may not be louder than other sounds in the neighbourhood.

[76] The determination of whether a noise constitutes a nuisance involves a balancing of social utility of the activity against the harm done, in the context of the particular locality and having due regard to ordinary standards of behavior, comfort and convenience. Clearly there is a distinction between discomfort and material injury to property. That is not to say that causing discomfort to one's neighbours cannot constitute a nuisance.

[77] That weighing of utility and harm must be undertaken in context. The context will include the time, place and manner of commission of the act which gives rise to the noise. It will include a consideration of whether the acts are occasional or continuous and a consideration of the nature of the area itself. The nature, including the volume of the noise itself is obviously a factor.

[78] Motor cross motorcycles or dirt bikes, make a whining sound that is more high pitched than a car, and is modulated by the gearing up and down of the bikes. There is also the affect of motorcycles circling a track which adds another dimension to the sound. It gets louder and softer as the motorcycles round the course. Pitch and volume change. It is intensely irritating for those who are not willing participants or spectators.

[79] The matter cannot be resolved by scientific measurements of volume alone. Those who complained were consistent in expressing their genuine frustration with the character of the noise itself. One need only listen to the videotape with sound of the motorcycles to appreciate that while volume is an issue it is not the predominant one.

[80] There is no scientific measurement of annoyance.

[81] The activity took place on more than rare occasions and when it did take place it could last

for two or more hours as a virtually nonstop but annoyingly high pitched modulating sound. At times it was loud enough to be heard indoors with the doors and windows closed. The evidence is that the noise affected the quality of peoples' lives, one choosing to remain away from home when she would find out that the facility was being used.

[82] The noise can in no way be compared to passing cars, which are gone in a moment and are in any event an unavoidable part of life. It cannot be compared to guns firing from a naval gunnery range some distance away or shots from a rifle range. The intensity of the sound over a period of a few hours is entirely different.

[83] While the activity is important for Julian Green, and while occasional dirt bike use might well be part of rural residential life, the noise resulted from a use as a motor cross practice facility, which is not contemplated in a rural residential zone. The fact that the noise was coming from a use which was not a permitted use in that zone is a compelling consideration.

[84] It did not come from the property in which Mr. Green lived but from an area set aside predominantly for use as a practice track.

[85] All of this suggests that the annoyance endured by the neighbours was not fabricated or embellished. That however does not end the matter. There are other factors that form part of the context of this situation.

[86] Mr. Green and his son have made some efforts to limit the adverse impact of the noise on their neighbours. They were neither entirely insensitive nor naive with respect to that potential impact. The facility is set back from the highway. It is used for a number of hours at a time but over a period of about ten months, not all of which was within the period to which the charge relates, it was used for approximately 32 hours or 16 times.

[87] The track was certainly not used daily. There were periods of the year during which the facility was not used at all, particularly the late fall and winter months. There is no evidence

that the facility was used by motorcycles during the night, late evening or early morning hours.

[88] Furthermore, Mr. Green offered to limit use to two hours per occasion, a maximum of two days per week and never on Sunday. That offer was made in Julian Green's letter of July 2, 2004 to Dr. Draper.

[89] Mr. Green has presented evidence from Dr. Swan about the level of volume. He was prepared to allow the municipality to participate in sound testing. The municipality chose not to accept that offer. In many noise nuisance matters, the prosecution does not have access to that kind of information. Here the offer was made and not accepted.

[90] Whether a nuisance exists depends on the unique circumstances of each case. Much depends on context. Part of that context involves the reasonable efforts of the property owner to comply with the bylaw. In this case, there is clearly evidence to support both sides of the issue.

[91] The court's purpose here is not to resolve what may be seen as the problem or to facilitate an agreement between Mr. Green and his neighbours. Given that the facility itself is not a permitted use in the RR-1 zone, that may be a moot issue at this stage. The only proper role for the court is to determine whether the charge has been proven.

[92] Here the noise is intensely annoying and comes from a prohibited use. Whether the use is utilitarian or not is not even in issue. Here, it is a prohibited use.

[93] That being said, the noise is not daily. It is not undertaken during the entire year. The activity does not happen at night or in early morning hours. The activity is undertaken in an area that is not immediately adjacent to homes and is separated from them to some extent. The nearest residence is 1500 feet away. The neighbourhood itself is not one in which one would expect relative silence and the level of volume of the annoying noise is on an

objective standard, discernable but not overbearing.

[94] Significantly, the charge relates to a specific time period. During the period to which the charge relates, counsel agreed that the property was used as a practice track about four times. Use had stopped by October 2004 and recommenced by April 2005.

[95] From June 24, 2004 until April 19, 2005 however, the facility was used only 16 times. During that time, the use was limited to periods of roughly two hours. Clearly a nuisance can be founded on the four uses during the charge period, with consideration of those outside the period of the charge to determine the context. For example, minimal use during the charge period preceded by extensive use outside that period may indeed be sufficient. In this case however, four uses, in the context of only 32 hours of use during an entire ten month period, considered in light of the other mitigating factors, and considered in light of the obligation on the Crown to show proof beyond a reasonable doubt, are not sufficient to prove that there has been a breach of the bylaw.

[96] I find the Defendant Mane-Tail Development Limited not guilty on the second charge.

J.