ORIGINAL

Decision No. W 100 /2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of appeals under section 120 of the Act

BETWEEN THE NEW ZEALAND KENNEL CLUB INCORPORATED
(RMA 006/01 and ENV A 0360/04)
B and J HERRING
(RMA 079/01 and ENV A 0363/04)
ARDMORE and BLACKWOOD FAMILY TRUSTS
(ENV A 0368/04)
K J WARD
(ENV A 0369/04)
Appellants

AND THE PAPAKURA DISTRICT COUNCIL
Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson
Environment Commissioner W R Howie
Environment Commissioner H A McConachy
Hearing at Auckland on 3 and 4 October 2005. Site visit on 4 October 2005
Closing submissions 10 November 2005
Counsel/Appearances
H J Ash and C Malone for the NZ Kennel Club Inc
S J Simons for B and J Herring
S A G Kirkbride as agent for the Ardmore and Blackwood Family Trusts
K J Ward for himself
P R Hassall and L Fontanilla for the Council

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

INTERIM DECISION

Introduction

[1] The New Zealand Kennel Club has owned a property of some 9.1ha at Clevedon Road, Papakura, since about 1986 and has developed it, in stages, as a centre for the showing and training of dogs and related activities, primarily to service its membership from Taupo north. It refers to it as the Ardmore Events Centre. The planning history surrounding its development was given more colourful descriptions during the hearing, but it will suffice for now to say that it is very confused.

[2] The three resource consent applications giving rise to these six appeals were, first, an application in 1999 (granted in 2000) to undertake earthworks to construct a metalled carpark in the north-eastern area of the site presently used as a grassed carpark. Secondly, an application in 2004 for retrospective consent for the use of an Indoor Arena building (constructed c1999/2000) for the showing and training of dogs, and for community use. Thirdly, an application in 2004 for consent to the use of the southwestern area of the site (known as the Triangle Paddock) for dog training/agility/racing and to alter and clarify certain conditions of earlier consents.

[3] After a hearing before an independent Commissioner the 2004 applications, except that for the use of the Indoor Arena building for community use, were granted subject to conditions. The 1999 application for the carpark had been granted long since, and was subject to appeals which were consolidated with those against the 2004 grants.

[4] The Club appeals against the refusal of consent for community use of the building. Mr and Mrs Herring, who own the property immediately to the east, appeal against the grant of the consents. So do the Ardmore and Blackwood Family Trusts which own the property immediately to the northeast, and Mr Ward who owns the property immediately to the northwest. The Herrings' house is but 10 or 12 metres from the boundary with the Club property. Their property is about 8.5ha in area and they graze horses, alpacas and sheep on it. Mr and Mrs Kirkbrides' house, on the Trusts' land, is about 200m from the Club boundary. They breed and graze standard-bred horses and cattle on the land, which is about 18ha in area. Mr and Mrs Ward have a substantial kiwifruit orchard on their land. Their residence is about

600m from the Club boundary, but they also have another house, presently tenanted, on their land close to the western point of the Triangle Paddock.

The site generally

[5] The Events Centre is about 2.6km from the fringes of Papakura township, in a distinctly rural area. The surrounding land accommodates a variety of agricultural, pastoral and horticultural activities. The immediate neighbours have already been mentioned. The southern boundary of the site is Clevedon Road, and there are houses on the southern side of that road, immediately opposite. We did not hear from their occupants. As noise featured prominently in the evidence, it is appropriate to mention that Ardmore Aerodrome is a relatively short distance away to the north, and that aircraft (mostly general aviation) movement overhead the site is frequent. Working from west to east along the Clevedon Road boundary the site can be divided into six units or areas. First, the Triangle Paddock. The *point* of the triangle is at the western end. A consent granted in 1986 reserved this area for horticultural use. It seems that it never has been put to that use, and the Club now wishes to use it for hound racing on a long, internally fenced, strip close to the road and for other dog-related activities. The northern boundary of this area is against the Ward land. Next is the House Paddock. This occupies a little less than half of the site's depth and is mostly surrounded by mature windbreaks and vegetation. At its eastern edge is the caretaker's house, an ablution block and other, relatively small, utility buildings. From time to time the House Paddock is used by exhibitors for overnight camping, of which more later. Behind the House Paddock is the existing main carpark, which is metalled. Its northern boundary is against the Ward land. Next to that is what is known as the Show Arena, a grass-surfaced area which, as the name indicates, is used for dog showing. Its northern boundary is against the Trusts' land. East of the caretaker's house is what is known as the Obedience Area, presently mostly used for obedience training and agility exercises. It occupies about half of the site's depth. Its eastern boundary is against the Herrings' land. Behind that area is the Indoor Arena and Amenities Building, surrounded to the north and east by a grass paddock presently mostly used for parking, although it is boggy underfoot in wet weather and can be unusable for many months of a year. Its eastern and northern boundaries are against the Herrings' and the Trusts' land respectively. The Indoor Arena building is large – 2520m^2 - and is about 9m high at its roof peak. The evidence did not entirely agree on the point, but its eastern wall is between 50 and 60m from the Herrings' boundary.

Activity status

[6] It is common ground that the site is in the Rural Zone and is, within that general zone, specifically identified under the Discretionary Activity Rule 7.1.4 of the Papakura District Plan as:

> Exhibition Centre on Lot 1 DP 88397, being the site currently occupied by the New Zealand Kennel Club.

The Plan does not define *Exhibition Centre*. Further development of the site is subject to discretionary activity consent procedures. It is also agreed that *Community Use* of the centre would be a non-complying activity, and thus subject to crossing either of the s104D thresholds before a consent could be considered.

Permitted baseline

[7] We take the permitted baseline as being the effects of what lawfully exists on the site at present; what may be done there as of right (ie without needing a resource consent); and, although not relevant here, what might be done under a granted but unexercised resource consent. We have mentioned the murky and unhappy planning history of the site but, relevant to this head, we cannot regard the use of the Indoor Arena building as lawfully existing at present. That the Club is applying for a retrospective consent to validate its use says all that is necessary. The Club does though have a consent granted in 1986 for the showing and training of dogs. That of course did not involve the Indoor Arena and the activities under that consent which directly involve dogs were to be conducted outdoors, in the area noted on the application plan as *Obedience School,* abutting the Herrings' boundary but to the rear of their house. The potential for considerable noise disturbance from those permitted activities is clear, although the Herrings do not, we gather, have experience of activities in that rear area because, by the time they arrived in 1998, those activities were being conducted (and are still) in the area abutting the front of their property, in what we have described in para [5] as the Obedience Area. Mr Greer, for the Club, confirms that this area was levelled and grassed in 1990 and has been in use since then. It is questionable whether that is lawful – certainly Mr Harry Bhana, the Herrings' consultant planner, has the clear opinion that it is not.

[8] As a permitted use in the Rural Zone, it seems that a very substantial glasshouse structure could be erected on the site, at least comparable in area with the Indoor Arena

(although probably it would not be as high). It is very unlikely though that a glasshouse complex, even of comparable size, would generate anything approaching the effects of the Indoor Arena in terms of traffic, parking, noise and impacts on rural amenity. So while a building of comparable size might be a non-fanciful possibility, it is not the building of itself which creates the permitted baseline, it is the effects of the activities carried on within and around it. It is a case, we think, where we should exercise our discretion under s104(2) by putting aside what might be permitted by the Plan.

[9] We were not told of any relevant unexercised resource consents so, in all, the concept of the permitted baseline is of little practical assistance in helping us assess the effects of these proposals on the relevant environment.

Isolating what remains in issue

[10] It will help set this section of the decision in context if we say that the Club and the Council now accept that the Club's neighbours, and the three appellants in particular, have had to put up with a great deal in the last 15 or even 20 years. The Indoor Arena building was constructed when it should have been plain, from the most rudimentary inquiry, that the consent for it had long since lapsed and did not in any event authorise a building even approaching its actual size. There has been protracted and serious non-compliance with many consent conditions, and the Plan. Legitimate and reasonably expressed complaints about non-compliance have been ignored or brushed aside by both the Club and the Council. All of that, and more, has unsurprisingly lead to resentment and some scepticism that the future will be different. Nevertheless, there is cautious hope that the Club may now have adopted a management regime that will see things attended to when they should be, and its responsibilities honoured. Mr Raymond Greer, who is the Chairperson of the Club's Regional Committee responsible for the administration of the Events Centre, expressed regret at past failings which he attributed to its management by a voluntary, amateur and regularly changing group with little continuity of record management and institutional memory. He pointed out also that until relatively recently the Club had not engaged professional assistance in the necessary disciplines of planning, acoustics, landscaping, stormwater engineering and the law. That has now been done, and the Club is to employ a part-time administrator to remedy its internal deficiencies. He gives assurances that its responsibilities will be met in the future.

[11] Against that somewhat unpromising background the parties themselves, and the expert witnesses engaged by them, have conferred for the purpose of isolating matters upon which they can find agreement, and those they cannot. We list each appeal and put aside those issues on which agreement has been reached.

Appeals RMA 006/01 and RMA 079/01

[12] These two appeals; 006/01 by the Club against conditions imposed on the carpark consent, and 079/01 by Mr and Mrs Herring against the grant of the carpark consent, are resolved. In respect of the Club's appeal the Council now agrees that conditions 13 and 14 of the consent can be deleted. Mr and Mrs Herring do not now oppose the carpark, if constructed with the landscaping designed by Ms de Lambert. Among the areas of dissatisfaction with levels of compliance, the Club's efforts at past and current landscaping requirements as a mitigating factor loomed large. We shall deal with that as a separate issue.

Appeal ENV A 360/04

[13] This appeal against the 2004 consents by the Club encompassed several issues. As indicated, the Club now accepts that the consent for the construction of the Indoor Arena, and for its community use, had lapsed before it was built. It seeks clarification of the wording of conditions 5 and 6(iii), and what it sought was not contentious. In respect of condition 5 the reference to ...*remain sealed*...was intended, plainly enough, to apply to the main vehicle entry/exit from the site and not to the main carpark which has always been metalled, but not sealed. Condition 6(iii) related to the extent of the buffer in the Triangle Paddock. There was some concern that it was to be interpreted as extending along the entire northern boundary of the Paddock, adjoining the Ward property. Mr Ward confirms that that was never what he had sought and that he is happy with the extent of the buffer as shown on Ms de Lambert's landscaping plan. The Club wishes to use the Triangle Paddock for agility training and racing to attempt to accommodate the Herrings' concerns about noise from those activities in the Obedience Area. We mention here that during our review of the evidence after the hearing it appeared we may have misunderstood an issue of detail about *racing* on the Triangle Paddock. There are references to whippets being raced, and to hounds being raced, with an inference that a distinction is to be drawn between the two. This is reflected in the draft conditions. In reconsidering the conditions, the parties may wish to satisfy themselves that [illegible] intended distinction between the two types of dogs has been accurately recorded.

[14] The question of the Community Use of the Indoor Arena remains a matter of dispute, and we shall return to it.

Appeal ENV A 363/04

[15] This is the Herrings' appeal against the grant of the 2004 consent for the Indoor Arena or, alternatively, the amendment of conditions attached to it. As Ms Simons put their position in her opening submission...*They are prepared to concede that if the effects are controlled they can manage as a neighbour with the New Zealand Kennel Club.* The effects in issue for them are noise and the visual impact of the Indoor Arena building. Primarily though it is noise attenuation at their boundary that is the contentious issue. In practical terms, the issue is whether that can be effectively done by way of a bund, a fence, a buffer zone, or some permutation of them.

Appeal ENV A 0368/04

[16] This is the Trusts' appeal, also against the grant of the 2004 Indoor Arena consent or, alternatively, the amendment of conditions attached to it. While not formally withdrawing the appeal against the grant, Mr Kirkbride's main thrust in his evidence and submissions was to emphasise his frustration at the history we have but sketched in para [10] and to highlight the need for simple, enforceable and enforced conditions to deal with issues of stormwater discharge, screening, light spill and noise in particular. He also pointed to the desirability of having direct avenues of communication with relevant people, and a formal liaison process between the Club and its neighbours to identify and deal with issues in a timely and effective way. The stormwater discharge and landscaping/screening issues have largely been dealt with to his satisfaction as a result of the engagement of expert advisors, and we shall return to the matters still requiring resolution shortly.

Appeal ENV A 0369/04

[17] This is Mr Ward's appeal seeking amendment to some conditions of the 2004 consent about stormwater discharge, use of the Triangle Paddock, and the review process. His concerns about stormwater discharge have, as with Mr Kirkbride, been largely resolved by the expert intervention of Mr Michael Smith, the consultant engineer engaged by the Club. The question over the use of the Triangle Paddock seems to have been a difference of

interpretation of a condition proposed by the Commissioner, and has proved readily resolvable: - see para [13].

Retrospective consent for the Indoor Arena

[18] We have mentioned that development on the site generally, so long as it can come within the rather loose rubric of *Exhibition Centre,* is a discretionary activity. The fact that the building exists does not create a presumption that it should be allowed to remain or to be used. Decisions such as *Workman v Whangarei DC* (A137/98) confirm the view that an applicant should not gain advantage from having proceeded without a consent, and then applying for retrospective approval. In short, there should be no presumption that what exists should remain simply because it would be difficult or expensive to remove it, or some similar reason. The proposal must stand or fall on its own merits when assessed under s104 and Part 2 as a discretionary activity.

[19] In discussing s104 factors we can point to the views we have about effects on the environment, and about the relevant provisions of the District Plan, as set out in paras [28] and [29] and [30] to [35]. It seems more apt to discuss those in full in looking at the non-complying community use proposal, and we need not duplicate that discussion here. It will suffice to say that we think that the adverse effects on the environment of the use of the Events Centre, as a whole, are more than minor, and are contrary to the objectives and policies of the Plan. We recognise that the canine activities carried on within the building itself may not cause such adverse effects, nor will they necessarily be contrary to the Plan. But the building's use is inextricably connected with the large numbers of vehicles, people and dogs which come to the Centre from time to time, and with all the effects they bring.

[20] There is no relevant national policy statement, nor is the New Zealand Coastal Policy Statement relevant. Mr Bhana does identify relevant provisions in the Auckland Regional Policy Statement as being the urban containment provisions under heading 2.6.1. Those provisions require that *urban development*; ie *...development which is not of a rural nature...and includes activities...which are usually provided for in urban areas...* should be confined within Metropolitan limits. Frankly, we are not sure that activities involving hundreds of vehicles, people and dogs would be usually provided for in urban areas, unless

perhaps in an intensely industrialised part of such an area. But given the overall view we have come to the point is not of major significance.

[21] In terms of Part 2 factors, there is nothing relevant in s6, or in s8. Under s7, we should have particular regard to:

> (b) The efficient use and development of natural and physical resources:
>
> (c) The maintenance and enhancement of amenity values:
>
> (f) Maintenance and enhancement of the quality of the environment.

For the reasons discussed elsewhere, there is a tension between the arguments about para (b). On the one hand, there is an argument that the Indoor Arena is an existing physical resource and that it would be *efficient* to use it rather than demolish it. The opposing view is that the Club should not benefit from having built it without an effective consent. In this circumstance, we take the latter view and do not accept the *efficiency* argument.

[22] Similarly, for the reasons discussed elsewhere, the use of the Events Centre generally, and the integral place of the Indoor Arena in that use do not, we think, maintain or enhance either the local amenity values, or the quality of the local environment.

[23] Although all of those views are against the retrospective consent, they are not individually, or even collectively, decisive. They all go to inform a decision under s5: - the purpose of the RMA, which is of course the promotion of the sustainable management of resources. In turn, sustainable management means the use and development of resources in a way *...which enables people and communities to provide for their ...social...wellbeing* while...*avoiding, remedying or mitigating any adverse effects of activities on the environment.* Such a decision can be arrived at by balancing the *for and against* factors and, in this case, asking whether the more significant adverse effects on amenity and the environment can be mitigated by conditions.

[24] We have to say that the generous spirited attitude of the appellant neighbours has helped persuade us that the adverse effects can be so mitigated. But that decision was a finely balanced one, and the Club will have to accept some restrictions on the use of the Centre as the price of being able to legitimise the use of the Indoor Arena.

Community use of the Indoor Arena

[25] As a working definition of community use (or activities) we shall adopt that jointly suggested as a condition by the planner witnesses after they had conferred: ie

> ...any organised community activities such as display, exhibition, education, sports, recreation, worship, culture and deliberation. The definition does not include any functions such as a wedding reception, birthday party, or family celebrations of a private nature.

Mr Greer indicated that each centre of the Club, which is a nation-wide organisation, is expected to be financially self-sufficient and the Events Centre is expected to be at least fiscally neutral so far as the Club's overall finances are concerned. To that end, the Club wishes to be able to offer it for hire for suitable events, simply as a revenue raising operation. For the 1993 year for instance (although again probably without the blessing of a consent) the venue was let on 10 occasions for events involving between 50 and 1300 people. Revenue raised was $10,500.

[26] The appellants' core position is that using the Events Centre for community activities exacerbates the already over-intensive use of a rural site, heightening the likelihood of unacceptable adverse effects. Ms Simons did offer an olive branch, suggesting that if over the next three or four years the Club demonstrates that it has its house in order, complies with conditions and generally proves itself a better neighbour than it has been, the issue of community use could be re-examined on its merits at a later time. We noted that suggestion as part of what we consider to be a generous spirited attitude, but it did not form part of our decision making process. We shall return to expectations of compliance later.

[27] As already mentioned, it is common ground that use for community activities would be a non-complying activity. That requires the Court to be satisfied, in terms of s104D, that either its effects on the environment would be minor or that the activity is not contrary to the objectives and policies of the District Plan.

[28] We think we can deal with both of these thresholds relatively briefly. There can be little doubt that the effects of the use of the Events Centre for its core purpose of showing and training dogs has effects on the relevant environment that are more than minor. In 2003, the greatest number of dogs present for an All Breeds Show was about 600, but there is mention of up to 900 being present on other occasions. Parking requirements have been assessed on

the basis that some 280 vehicles could be present at any one time. In 2003 shows were held on 12 days during the year. There are however other weekly events, including obedience classes, which can involve up to 100 people and dogs. We think it is self-evident that the presence of up to hundreds of people, and up to hundreds of dogs, on a relatively confined site for hours at a time cannot but have significant effects on local amenity values. *Amenity values* are (see s2 RMA):

> ...those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

We recognise of course that the rural environment is not always silent, or even quiet. Activities involving machinery and animals can be noisy. But it is an environment that is sparsely populated and, by and large, unpleasantly noisy activities are relatively transient. This rural environment has also to deal with the fairly constant noise of aircraft operating from the nearby Aerodrome. But the sheer intensity of this human and canine activity is of a different order altogether from truly *rural* activities and must inevitably produce, as its neighbours maintain, a significant adverse impact on the qualities and characteristics of the area which gave it its pleasantness, its aesthetic coherence, and its recreational attributes.

[29] Adding still more intensive human activity to that, even if the additional activity will lack the canine component, would be cumulative upon what exists at present, and that is already more than minor. It follows therefore that the proposal could not pass the first threshold.

[30] In terms of the objectives and policies of the Plan, we have come to agree with Mr Burn, the Council's consultant planner, and Mr Bhana, that an analysis of the relevant provisions leads to a conclusion that the community use proposal is contrary to them. Mr Burn identifies relevant Plan Provisions. As an issue the Plan contains the following:

> 4.7.5 Amenity
>
> Within the context of further development in the District, the retention of local amenity is paramount. The amenity of Papakura District is made up of a range of attributes which creates for the community the special features of Papakura. Air quality, water quality, noise, the landscape, cultural attributes, traffic, views and local visual standards are all factors which contribute to the creation of amenity. Resource management strategies need to examine these features.

[31] Part 6 of the Plan contains the Objectives and Policies for rural areas:

6.1.1 Objectives

6.1.1a To retain the rural character of Papakura.

6.1.1b To avoid, mitigate and remedy any adverse effects of rural activities on the natural and physical environment.

6.1.1c To conserve and enhance the natural and physical resources of the rural area.

Policy 6.1.2a in particular states:

> The Council will, in making any decision on an application for resource consent, give consideration to the question of whether and to what extent approval of the application would adversely affect the rural character of the particular area which is the subject of the application. Applications may be declined if the Council considers that the essential elements of the rural character of the particular area would be adversely affected to a significant extent if the application was approved. In implementing its policy the Council will have regard to the guidelines set out in Section 8.29 of the Plan.

[32] The relevant guidelines in Section 8.29 are the following:

- A much lower density of rural living.
- Fewer structures, and structures (apart from houses) are generally related to farming activities eg barns, greenhouses, implement sheds.
- Commercial production of crops and animals.
- An absence of formed or sealed footpaths and kerbing and channelling.
- Land is used for grazing, crops, forestry or left in bush.
- Rural style open fences rather than solid urban fences.
- Presence of rural animals – sheep, cattle, horses, goats, pigs, working dogs.
- Rural smells eg silage, sprays, animals.
- Houses and structures generally set back from the road.
- Rank grass verges on roads.
- Rural noises, eg from machinery (tractors, pumps, harvesting equipment) and animals.
- Landscape is expansive and managed accordingly (eg mechanised hedge trimming, spraying, cultivating, harvesting, etc).

[33] Objective 6.1.15 and its supporting Policies provide more specific tests for the location of activities in rural zones as follows:

6.1.15 Activities seeking to become established in the rural zones must demonstrate that they can either achieve sustainable primary production or will result in the efficient use and development of the rural land resource and cannot locate in an urban area.

Policies

6.1.16a Activities locating in the rural area should not:

(i) Give rise to adverse effects inconsistent with those arising from typical rural activities; and

(ii) Significantly affect the potential of the land to be returned to rural production unless it can be demonstrated that the activity will result in a use of the land that is as efficient or more efficient than would have been the case if it was used for rural productive purposes.

6.1.16b Activities locating in the rural area should provide information about alternative locations (including locations in urban areas) that have been considered.

[34] There are also Objectives and Policies concerned with effects of design and appearance of buildings on the amenity of the rural landscape. Objective 6.7.4.1 reads:

> To ensure an acceptable minimum standard of design and external appearance of buildings and land in the rural area.

Supporting Policies are these:

6.7.4.2a Buildings which are grossly out of character with other properties in the rural area or which would detract from the amenities thereof should not be constructed.

6.7.4.2b The appearance of buildings and surrounds should be maintained in such condition so as not to detract significantly from the amenities of the rural area.

[35] We agree with Mr Burn's summary view that the general thrust of those Objectives and Policies seeks to exclude from the rural zone *non-rural* activities except where sufficient justification is provided for locating them within the zone. He considers, and we agree, that the addition of community use is contrary to (ie in conflict with) those objectives and policies.

[36] That being so, the proposal for community use cannot pass the second s104D threshold either, and therefore cannot be given consent as a non-complying activity.

[37] We think it will be obvious, from the reasons traversed in discussing the retrospective consent for the Indoor Arena, that had it been able to pass either threshold we would not, in any event, have approved community use in the exercise of our discretion under s104 and Part 2.

The relevance of a history of non-compliance

[38] There seem to be two related issues to be addressed here. The first is the de facto existence of the Indoor Arena, built in purported reliance on a lapsed consent which, in any event, authorised a building a little over half its size. At para [18] we have mentioned the absence of any presumption that an unconsented existing activity should have any de facto right to continue.

[39] Secondly, a consent authority should not assume that an applicant will not comply with the terms of a consent, and decline a consent for that reason: - see eg *Barry v Auckland CC* (1975) 5 NZTPA 312 and *Holm v Auckland CC* [1998] NZRMA 193. But that is not to say that a history of non-compliance, or poor compliance, is irrelevant in the process. It can be taken account of for some purposes: - see eg *New Zealand Suncern Construction Ltd v Auckland CC* [1997] NZRMA 419. It is legitimate, we think, to have regard to such a history in considering conditions which might be attached to a consent under s108 to at least mitigate adverse effects. The conditions must meet the tests in *Newbury DC v Secretary of State for the Environment* [1981] AC 578; ie they should be imposed for a resource management purpose, not an ulterior purpose; they must fairly and reasonably relate to the development authorised by the consent; and they must not be *unreasonable*. Subject to that, useful conditions generally, and especially where past compliance has been poor, will be specific, clear, and accurately worded so that compliance can be readily ascertained (not least by the applicant itself) without reliance on the discretion or subjective judgement of any individual or group.

Noise attenuation on the eastern boundary

[40] Mr Neville Hegley for the Club, and Mr Nigel Lloyd for Mr and Mrs Herring, are both experienced acoustic engineers. Before the hearing they conferred and were able to agree on a good deal about noise issues, including appropriate standards and conditions. We see no reason to differ from those conclusions as the parties were content with them as being reasonable compromises, if not necessarily their preferred positions. The principal outstanding issue is the means of noise attenuation at the Herrings' boundary, particularly near the house and front garden. The problem, and we accept Mrs Herring's evidence on the point, is that the noise of people and particularly dogs in the Obedience Area is a major and intolerable intrusion on their amenity. The draft conditions offer a choice between the Club

erecting along the boundary either a 2m high close boarded fence or a 2m high earth bund. We pause to note that the bund option could not be *on* the boundary. It would have to be set back to leave room for the existing drainage swale along that boundary, and also to allow for its 2:1 slopes. Of the two, the Club would prefer to erect the fence. The Herrings would prefer the bund. They fear that the fence on the boundary would be oppressive and overbearing. Better still, in Mrs Herring's view, would be a 50m buffer zone along the boundary from which dogs would be excluded altogether. She says that occasional experience over the years has shown that to be effective in attenuating the nuisance noise of barking dogs, to the extent that if it was in place she believes that neither a fence nor a bund would be necessary.

[41] As to the effectiveness of the fence or the bund, the acoustics engineers agree that the Herrings' house would be better protected by a fence at the boundary because *...the best acoustic performance is achieved if any barrier is close to the source or receiver position.* For the balance of the Herrings' property beyond the house there would probably be little to choose between the two solutions.

[42] After the hearing, the parties have conferred about possible conditions, and Ms Ash's closing submissions contained a most helpful annotated and revised set. These again offer the options (depending on the view we adopt) of a fence or a bund. They also offer options for a buffer area. The Club proposes a buffer area which would be a semi-circle of 50m measured from the façade of the Herrings' house from which dogs, spectators and tents would be excluded. The Herrings, as mentioned, propose a 50m buffer zone along the boundary between the new carpark and the road. Having seen the site for ourselves, we doubt that the Herrings' suggestion of a 50m buffer zone from the boundary is practical. That would take the *no use* line back so close to the east wall of the Indoor Arena as to create real difficulties for its reasonable use.

[43] Nor do we think that the Club's proposal of the 50m semi-circle from the Herrings' house will be effective in providing a reasonable degree of amenity for their property.

[44] Referring back to what we have said about the desirability of clear and unarguable conditions, we think that a clear demarcation between the Club's activities and the Herring

property is the only way to ensure a workable long-term solution. At the risk of appearing over-prescriptive, we think that there is a better solution than either of those proposed.

[45] As between a fence and a bund, there is an element of subjective preference and no one *right* answer, and there is an overlap between noise attenuation and visual separation. Ms Rachel de Lambert, who was called for the Club and who was the only expert landscape witness, considered that neither a bund nor a fence were appropriate but, if forced to choose between them, preferred a fence extending approximately two thirds along the Obedience Area boundary, finishing short of the road boundary. As an aside, we note that the Harrison Grierson Consultants landscaping plan of May 2002 provided for a bund running along the eastern boundary, so the suggestion is not novel. We have noted the Herrings' preference for a bund. Given what they have put up with for a long time, that preference should be given considerable weight. We note also the wish to have a thick understory of vegetation along the boundary to block views into the Obedience Area. A 2m high bund with well-vegetated slopes and top will provide that. To provide an effective long term solution we think that a band of high trees on the Club side of the bund is required to assist the noise and visual separation and to soften the appearance of the bund, which may be somewhat out of place on this flat terrain. To clear the swale and to allow for its 2:1 slopes the toe of the bund on the Club side will be at least 12m from the Herrings' boundary. At least an 8m depth would be required for an effective band of trees, and the combined depth of swale, bund and planting should be fenced out from the balance of the Club's site. The fence should be post and wire with dog-proof mesh. There would therefore be, effectively, a buffer zone of some 20m or a little more from the boundary containing both a planted bund and a band of trees. The 2m bund should run from the new carpark bund to a point opposite the *dogleg* in the boundary line between the two properties, approximately 25m from the road boundary. The bund should taper out at that point at the same 2:1 slope, and the fencing should join the Herring boundary fence to *seal off* the bund and planting at that point. Coincidentally, that area of 20m or so would be very much in line with the portion of the site to the east of the Indoor Arena that Mr Greer says the Club has *roped off* during show days to prevent visitors parking close to the Herrings' boundary: - see para 5.3 and Annexure A of his rebuttal evidence. With the new availability of the Triangle Paddock for dog related events, we expect that the loss of an area of about that width from the new carpark bund to the road frontage for obedience and ancillary activities will not be significant.

Landscape

[46] An issue of contention before us was that landscape conditions placed on the various consents had never been satisfactorily carried out. As a result there was not, in the view of the neighbours, sufficient screening to mitigate the visual effects of the building and other activities carried out at the site. Together these detracted from the rural environment.

[47] The plan provides, in Section Two - Part 8, Rules that apply throughout the Rural Area including:

> 8.14 (k) the provisions of a landscape plan whether the effects on the landscape of a proposed activity are likely to be significant.

And Section Two, Objectives and Policies provides:

> 6.7.5 Landscape Design
>
> It is a requirement of the Plan that landscaping be carried out in association with various types of development. Good landscaping is one way of enhancing the rural character of development.

[48] We have reviewed the landscape conditions as they have evolved through the various applications and consents. We note that the offer of landscape mitigation was a component in the applications, as it was a component of the consent decisions, both applicant and consent authority giving recognition to the relevance of landscape issues at this site.

[49] The 1986 consent to the Kennel Club's activities gave a clear directive, via a condition, to retain the on-site native vegetation. On the map accompanying the application (Dec 1985 Plan of Lot 1 DP 88397), this covered most of what we described earlier as the Obedience Area. Condition 6 15.7.86 provided:

> That within 3 months of this consent, a detailed landscaping plan shall be submitted for the approval of the City Planner. The plan shall give cognisance to the matters raised in 4.3 of this report and such additional planting as is necessary to screen the car parking and showing areas within three years shall be implemented immediately following construction.

We note that para 4.3 of the Council Planning report had this to say.

> There exists on site a large stand of Manuka, amongst other natives, which contribute to the visual amenity of the site and should be retained.....

> The car park should, (however) be screened from the road, with native trees and shrubs, reinforcing those found on site. Some of the species noted were - Matipo, Cabbage tree, Palms, Rimu, Manuka and Kahikatea. Other suggestions might include Pittosporum varieties, Coprosma, Pseudopanax Pharmium (sic) etc. The lone Kahikatea in the front paddock should be retained.

As noted at para [7] this area was levelled and grassed in 1990 and we assume that the *...large stand of Manuka, amongst other natives...* was felled at that time.

[50] A subsequent (1993) Land Use consent contained Condition (viii):

> That a landscape plan is to be submitted no later than two months after consent is granted. It should effectively screen all outdoor areas used for dog showing and related activities and all buildings as far as practicable, from neighbouring properties and the road. The landscape plan is to be approved by the planner and implemented no later than 3 months after approval , to ....

A 1995 Land Use consent contained the same condition and the 2000 (carpark) Consent had this requirement:

> A detailed landscape plan for the northern and eastern boundaries of the car park, including an implementation and maintenance programme, shall be submitted prior to the construction of the car park and approved....

[51] As to the original vegetative cover which was to be retained, we noted on the site visit that the specimen Kahikatea in the House Paddock is still healthily in situ. As for the rest, nothing remains on site. The bush was described as a *swamp* in a Harrison & Grierson Consultants design to contour and drain the area. There is nothing to show that consent to the removal of this vegetation and the drainage of this area was applied for or granted. It appears that this change lead, at least in part, to the flow-on effect of water being pushed north and eastward to become a storm water nuisance in the following years. The re-contoured area was then able to be used for dog related activities. The evidence, which includes photos, shows that these activities have grown to include camping, parking, hound racing, week-night obedience classes, obedience trials, and have expanded to take place close to the Herrings' boundary. As for the other landscape conditions, it appears that the screening and mitigation plantings have not been adequately carried out.

[52] We view the attitude towards the environmental directives and the consequential action of the Kennel Club as entirely unsatisfactory. That is not to say that the site does not present

itself as tidy and well cared for. It does. And where there has been sufficient width of land dedicated to vegetation, it appears to offer a healthy, cohesive visual barrier. As an aside, our site visit did show the difficulties of planting in the path of the prevailing wind.

[53] On a more positive note, the neighbours expressed gratitude that the Club's landscape consultant Rachel de Lambert had spoken with them and had demonstrated a willingness to meet their concerns through a landscape plan. However the current landscape plan has provided only a limited planting proposal, particularly centred on the north-eastern car park. We regard this as an opportunity for the Council to audit the landscape plans in relation to:

- visual effects of the building and activities from outside the site
- the provision of rural character through native planting
- screening of the car parking areas

[54] Consequentially a full site landscape plan which remedies present and past shortcomings needs to be supplied and carried out as part of the current consent process. Harrison and Grierson have already done one, as set out in Ms de Lambert's evidence, so that requirement is not onerous. The Council should audit this and, where necessary, require further planting of the site where the previous consents have not been complied with. As a minimum, the following should be covered:

- Planting around the property boundaries, some of which are still very exposed, to minimise the visual impact of the building (as per the 1993 and 1995 Consent conditions). These are to take particular account of the boundaries against the Ward and trusts properties, and the agreements reached with those landowners.
- Which trees are to be removed (now that the pittosporums are growing).
- Planting around the existing metal/grass carpark (as per the 1986 Consent conditions).
- A native planting programme to mitigate the loss of rural character and amenity caused by the removal of the bush (as per the 1986 Consent condition).
- Planting of the approximately 20m *buffer* area along the Herring boundary, including on the bund. On the Club side of the bund the planting should be evergreen, bushy at the lower levels and contain species that will reach a height of at least 9 metres.

[55] In terms of the stand of Kahikatea near the Herring property boundary, they are nearly past their juvenile stage and it would be regrettable to see them all moved. The line-up does look quite artificial however; perhaps half could remain, with the rimu.

[56] In terms of a process to deal with the revision of landscaping conditions, we think it may be convenient to expand the present draft condition 4(a) to include a site-wide plan which reflects the findings and views we have set out. The plan should detail species, numbers and plant sizes for the approval of the Director: Regulatory Services and be provided within two months of the date of the issuing of the consent.

Camping in the House Paddock

[57] From time to time, when there are shows or events extending over consecutive days, numbers of exhibitors camp overnight at the centre, mostly in the House Paddock. They mostly use campervans for accommodation, and the Centre's ablution block is nearby. This activity is not raised in the appeals before us, but its continuation without a consent seems dubious. We expect that the Club will not wish to expose itself to further complaint and will take advice about this point.

Summary of substantive conclusions

[58] For the reasons we have set out, the decisions of the Council:

(a) to grant consent to undertake earthworks to construct a metalled carpark in the north-eastern area of the site;

(b) to grant retrospective consent to the use of the Indoor Arena building for the showing and training of dogs;

(c) to decline consent to the use of the Indoor Arena building for community use;

(d) to grant consent to the use of the Triangle Paddock for dog training, agility and racing

are all confirmed.

Approval of conditions

[59] The revised draft conditions will require reconsideration in light of the views we have expressed; first, about the bund and planting to separate the Club's activities from the Herring

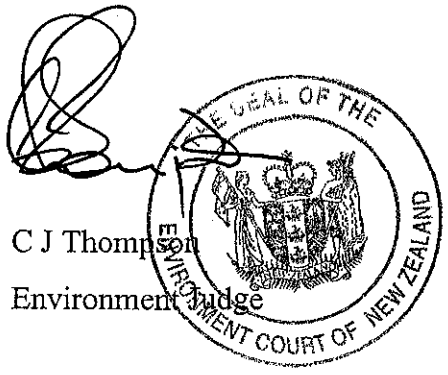
property: - paras [40] to [45] and secondly, about landscaping: - paras [46] to [56]. The issue of racing in the Triangle Paddock should also be checked: - para [13]. We would be grateful if counsel for the Club and the Council could attend to the necessary redrafting and submit the revised conditions to the other parties by Friday 9 December 2005. The revised conditions, together with any further comments the parties may wish to make about them, should be lodged with the Court for approval by Friday 16 December 2005.

Costs

[60] For the moment, costs are reserved.

Dated at Wellington this 28th day of November 2005

For the Court



C J Thompson

Environment Judge