Christchurch City Council
Legal Services Unit

- Opinion -

Date: **17 May 2001**

From: **LEGAL SERVICES MANAGER**

To: **THE COUNCIL**

STREET RACING
BYLAW CONTROL

1. INTRODUCTION

As a result of public concern regarding street racing the City Services Committee is recommending the Council make a bylaw to control this activity.

The proposed bylaw is intended to:

(a) in clause 68A, prohibit (with named exceptions) motor vehicles weighing less than 3,500Kg using certain public roads in Christchurch on Friday, Saturday and Sunday nights between 9pm and 5am, and in the evening of public holidays. The bylaw would apply to cars and motorcycles, and not to trucks and is based upon bylaws made by the Manukau City Council and the Auckland City Council;

(b) in clause 68B, prohibit the pouring of liquids on road in relation to street racing.

2. OPINION

In my opinion, the City Council does have the legal power to make a bylaw of the type proposed which prohibits motor vehicles under 3,500Kg on public roads for certain times of the day, and controls the pouring of liquids on roads.

3. BACKGROUND

I have been furnished with copies of reports to the Manukau City Council regarding the street racing issue and I will refer to these further below when discussing practical issues.

It is clear from reading the papers I have been supplied, that street racing is a serious problem in Auckland and Christchurch. Particularly with modern technology, those participating in street racing are able to move around a city very quickly and regroup after being moved on by the Police from a particular area of a city.

In New Zealand impoundment would clearly need statutory authority. If the Council makes a bylaw of the type proposed, there is only a maximum fine of $500 and there can be no power of impoundment through such a bylaw. Impoundment for breach of this bylaw would require specific statutory authority.

4. PROPOSED BYLAW

Turning to the proposed bylaw, it is well established in New Zealand that any bylaw must satisfy 4 legal requirements:

(a) An Act of Parliament must give the Council the power to make the bylaw for the purpose intended by the Council;
(b) The bylaw is certain. In other words, a person reading the bylaw knows what it is that they are not allowed to do;
(c) The bylaw is reasonable;
(d) The bylaw is not repugnant to the general laws of New Zealand, ie, that there is not an Act of Parliament or Regulation which expressly or impliedly authorises the activity which the Council seeks to prohibit or regulate.

I will discuss each of these in further detail below.

It has also been well established by the Courts in New Zealand over many years, that if a council wishes to *"prohibit"* an activity totally, then it must be specifically empowered to do so by Parliament. So that the empowering provision specifically authorises the Council to *"prohibit"* the named activity.

It is also well established that where a council is given a power to *"regulate"* an activity, that can authorise a prohibition in part, but does not authorise a total prohibition. Here, a partial prohibition is what is being sought with the proposed bylaw.

The Courts also give particular consideration to bylaws which prohibit or limit traditional common law rights.

The roads proposed to be the subject of the bylaw are legal roads owned by the City Council. The City Council's ownership of legal roads is subject to the public's right to pass and repass along those roads, both by motor vehicles and pedestrians, at all hours of the day and night, subject to limitations authorised by statute. So, in the present context, the Council is in effect, seeking to restrict an existing common law right vested in the public of Christchurch.

(a) POWER TO MAKE A BYLAW

(i) Transport Act 1962

The Council's principal power to make bylaws controlling motor vehicles on public roads is found in section 72 of the Transport Act 1974. That section contains a number of bylaw-making powers, and of relevance for present purposes are the following:

"*(1) Subject to the provisions of this Act or of any other enactment in respect of any of the matters referred to in this subsection, any Minister of the Crown in respect of any roads under his control, or any local authority in respect of any roads under its control, may from time to time make bylaws for any of the following purposes….*

(f) Prohibiting any specified class of heavy traffic that has caused or is likely to cause serious damage to any road unless the cost of reinstating or strengthening the road, as estimated by the said Minister or the local authority, as the case may be, is previously paid:

(i) Prohibiting or restricting absolutely or conditionally any specified class of traffic (whether heavy traffic or not), or any specified motor vehicle or class of motor vehicle <u>which by reason of its size or nature or the nature of the goods carried</u> is unsuitable for use on any road or roads specified in the bylaw:

(k) Prohibiting or restricting, subject to the erection of the prescribed signs, <u>the stopping, standing, or parking</u> of vehicles on any road; limiting the stopping, standing, or parking of vehicles on any road to vehicles of any specified class or description; limiting the period of time that vehicles may park on any part of the road where parking is limited to such vehicles; and providing that a vehicle used for the time being for any specified purpose shall be deemed for the purposes of the bylaw to be of such class or description as is specified in the bylaw, notwithstanding that the vehicle may belong to any other class or description for any other purpose:

(kc) Prohibiting or restricting, subject to the erection of the prescribed signs, <u>the parking of heavy motor vehicles</u>, or any specified class or description of heavy motor vehicles, on any specified road during such hours or exceeding such period as may be specified."

Upon reading these statutory powers, in my opinion, none of them authorise the Council to make a bylaw of the type proposed.

Paragraph (f) is specifically limited to *"heavy traffic"* use of public roads. Heavy traffic is defined as meaning the use of a heavy motor vehicle which in turn is defined to mean a motor vehicle the gross laden weight of which exceeds 3,500Kg.

Paragraph (i) applies to all motor vehicle (whether heavy traffic or not) but *"…which by reason of its size or nature or the nature of the goods carried is unsuitable for use on any road or roads specified in the bylaw."*

In my opinion, those words would not be broad enough to encompass the problem of illegal street racing. There is nothing to my knowledge regarding the size of the motor vehicles engaged in illegal street racing, or the nature of the goods that they carry, which makes them unsuitable for use on public roads.

Paragraph (k) has a clear power of prohibition, but only in relation to the *"stopping, standing or parking of vehicles on any road…"* It does not apply to the passage of vehicles along the roads themselves.

Consequently, in my opinion, none of the bylaw-making powers in section 72 of the Transport Act confer upon the Council the power to make a bylaw, which in effect prohibits vehicular passage along public roads in Christchurch at certain times of the day.

(ii) Local Government Act 1974

The Local Government Act 1974 also has 2 provisions which could be relevant in the present situation and those are section 684(1)(13) and (30) which provide that the Council may make bylaws:

> *"(13) Concerning roads and cycle tracks and the use thereof, and the construction of anything upon, over, or under a road or cycle track:*
>
> *(30) Regulating the use of any reserve, recreation ground, or other land, and any public building or public place vested in the council or under the control of the Council."*

In my opinion, paragraph (13) is available in the present situation in relation to clause 68B but not 68A. Paragraph (13) is not available with clause 68A as it is a power to make bylaws *"concerning"* roads and it is not available to prohibit in part, as is being proposed with clause 68A.

Paragraph (30) contains a regulating power and in my opinion does authorise the Council to make clause 68A. As I noted above, the Courts have established that the power to *"regulate"* does authorise prohibition in part which is proposed here. The roads are a *"public place vested in the Council"* and under the control of the Council (ss 315 and 316, Local Government Act).

(b) CERTAINTY

The law requires that the bylaw must be certain to a reader and I do not envisage any difficulties in the present situation with the proposed bylaw which achieves that requirement.

However, I do believe that if the Council was to proceed with making this bylaw, then part of the bylaw should be that the Council erect signs on the prohibited roads so as to clearly identify for users of those roads, the times when vehicle use is prohibited.

If the Council does not erect such signs, there is a real risk that the Courts will not convict on any prosecutions brought under the bylaw for the reason that vehicle users were unaware of the prohibition.

For this reason I have included a reference to signage in the draft bylaw.

(c) REASONABLENESS

All bylaws made by the Council must be legally reasonable. In the Supreme Court judgment of **McCarthy v Madden (1914) 33NZLR 1251** the Court set out the principles that determine whether a bylaw is reasonable or unreasonable. If a bylaw is held to be unreasonable then it is legally invalid.

The Court stated in part:

> *"The question whether a bylaw is reasonable or unreasonable being essentially one of fact, it is not possible to define in advance any test which will be conclusive upon the validity or invalidity of any particular bylaw. Certain general principles may, however, we think, be deduced from the decided cases, or necessarily result from the principles so deduced, which will aid in arriving at a just conclusion of such cases. These are, we think as follows:*
>
> *(a) …a bylaw is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by qualification or an exception which some Judges think ought to there. In matters which mainly and directly concern the people of the locality in which the bylaw is to take effect, the people of that locality, who have the right to choose those whom they think best fitted to represent them on their local government bodies, may be trusted to understand their own requirements better than Judges…*
>
> *(d) The reasonableness or unreasonableness of a bylaw can be ascertained only by relation to the surrounding facts, including the nature and condition of the locality in which it is take effect, the evil, danger or inconvenience which it is designed or it professes to be designed to remedy, and whether or not public or private rights are unnecessarily or unjustly invaded.*
>
> *(g) Any bylaw which destroys or unnecessarily bridges or interferes with a public right without producing a corresponding benefit to the inhabitants of the locality over which it has jurisdiction, must necessarily be unreasonable. Such benefit must be real and not merely fanciful, and, though it need not necessarily be commensurate with the inconvenience or loss which it may cause to persons who are not inhabitants of the locality, it must be such as to justify in the eyes of reasonable men the interference with the public right."*

Councillors should be satisfied with the answers to the following questions:

(i) *Is there a danger or inconvenience to the public at large (including adjoining property owners) which needs to be remedied by the making of a bylaw prohibiting vehicular use on the roads for 3 nights a week?*

(ii) *Do Councillors believe that the rights of motor vehicle users to be able to use these roads are unnecessarily or unjustly invaded by the making of such a bylaw?*

(iii) *Is the making of the bylaw unnecessarily interfering with the rights of motor vehicle users without producing a corresponding benefit to the public at large?*

Clearly the proposed bylaw does infringe on existing public rights to use motor vehicles on the named roads on the specified nights.

However, it can be considered that such infringement does have the following benefits:

(a) it controls ongoing damage to the specified roads caused by the street racing activities. The pouring of diesel on roads to spin tyres causes damage to roads and a hazard to other road users;

(b) the Police have advised the Council that the bylaw will make it easier for them to control the offending behaviour;

(c) it minimises the possibility of vigilante action by property owners who are affected by the graffiti and vandalism of their properties. It also minimises the cost to those owners of remedying graffiti and vandalism;

(d) it minimises the dangerous driving that is presently occurring with risk of injury or death.

In my opinion, if Councillors decided to make this bylaw it would be a *"reasonable"* bylaw as that word was considered in **McCarthy v Madden**.

(d) NOT REPUGNANT TO GENERAL LAW

In the present situation there is no other statutory or regulatory provision which authorises street racing on public roads, and which would prevent the Council from making a bylaw of the type proposed.

Accordingly, the proposed bylaw would meet this fourth requirement.

5. NEW ZEALAND BILL OF RIGHTS ACT 1990

The Council must also consider the effect of the New Zealand Bill of Rights Act 1990, and in particular, section 18(1) of that Act which provides:

"(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand."

As I have noted above, the public have a common law right of use of public roads in Christchurch and in my view, that is reflected in section 18.

The proposed bylaw will clearly infringe upon those common law rights of use of public roads.

Section 5 of the 1990 Act contemplates a situation when the freedoms provided for in the Act may be limited. Section 5 provides:

> *"Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

The issue of section 5 of the New Zealand Bill of Rights Act 1990 and local authority bylaws was considered by the District Court in **Waipa District Council v Russo** (1993) DCR97.

In that case the Judge held that for the limitation on the freedom of movement provided in section 18 to be justified under section 5, then:

(a) the limitation on those rights must be *"prescribed by law"*; and

(b) the limitation must be reasonable and one which can be demonstrably justified in a free and democratic society.

I have already commented earlier in relation to the reasonableness of the proposed bylaw and in my opinion, for the reasons set out above, I believe that the Council can reach the view that the proposed bylaw is *"…demonstrably justified in a free and democratic society"* for the purposes of section 5 of the New Zealand Bill of Rights Act 1990.

The Court also held in that case that where bylaw-making powers are provided for in statute, then it can be said that the limitation is *"…prescribed by law"*.

I have expressed the view above that this bylaw is expressly authorised by section 684(1)(30) of the Local Government Act 1974 and for that reason I believe that this aspect of section 5 can also be satisfied with regard to this particular bylaw.

6. PRACTICAL MATTERS

Since the Manukau City Council bylaw was made in 1992, there has been continuing additions of roads to which the bylaw applies. Clearly, as those engaged in street racing become aware of prohibited roads, then they shift to other parts of the district and consequently Manukau City is catching up with adding additional roads to the list. There is no reason to believe Christchurch will be different and this will place ongoing pressure on the Council to continually add streets. While the streets listed in the bylaw are in an industrial subdivision and little used by general traffic at night, having prohibitions in residential streets will give rise to wider access issues.

The Manukau City report notes that the policing of the prohibited roads is very labour-intensive for the Police and that while it is effective in the immediate area at the time, it usually results in the activity continuing somewhere else or returning later to the same area on the same night. Creating prohibited streets in effect transfers the problem elsewhere in the city because those involved will find somewhere else to carry out the street racing.

The report concludes that the measures carried out to date, including the proposed bylaw, have had little or not impact on the level of activity occurring, and that existing laws of punishment do little to effectively dissuade offenders from repeatedly participating in illegal street racing activities.

Councillors therefore should also consider the merits of making such a bylaw in light of this information as to its effectiveness from Manukau City Council which has had such a bylaw since 1992.

7. CHANGES TO THE NINTH SCHEDULE

Clause 68A(4) provides the Council may add to, alter or delete the roads listed in the Ninth Schedule by a publicly notified resolution. This is authorised by s.682(b) of the Local Government Act which provides:

> *(b) A bylaw may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the council from time to time by resolution, either generally or for any classes of cases, or in any particular case."*

8. ENFORCEMENT

Enforcement of clause 68A is proposed to be enforced by the Police and clause 68B can be enforced by the Council by way of prosecution or injunction as with other bylaws.

9. NEW SOUTH WALES LEGISLATION

The bylaw will have a maximum fine of $500. This is unlikely on its own to act as a significant deterrent to those involved in street racing activities. Information from the Police in Christchurch states that they had issued some 556 offence notices to the young people involved in street racing in Hornby and that what has been happening is that those fines have not been paid by the people involved. They then are sentenced to periodic detention where they pay off the fines more quickly because periodic detention pays higher daily rates than working at many other jobs.

The Police have suggested that impoundment would be immediately effective although it can result in storage problems in the interim. However, they believe it is a remedy that should be utilised in some instances.

At the present time it is not legally possible to provide for the impoundment of these vehicles through a bylaw. Legal advice to the Police has also been that the Land Transport Act 1998 does not authorise impoundment for this type of offence.

In New South Wales this problem has been addressed by a specific statute, the Traffic Amendment (Street and Illegal Drag Racing) Act 1996. That statute came into force in response to community concerns about the behaviour of groups involved in activities such as street racing and performing burn-outs. The Act authorises the New South Wales Police to confiscate the vehicles of any persons engaged in illegal activity such as street racing. The New South Wales Parliament, during debate on the Bill, acknowledged that confiscation as a punishment appeared somewhat more heavy-handed compared to fines and other measures involved for other road traffic offences. However, that Parliament accepted the argument that individuals involved in this specific activity would be more influenced by the threat of vehicle confiscation than by any other measure, and as a safeguard the Act included a *"sunset"* clause that provided a review of the operation of the Act after 6 months.

That review found no negative effects were produced by the enforcement of the Act and that some 130 vehicles had been impounded in the 6-month period from when the Act came into force. Evidence from the Police suggested that the Act, and its threat of vehicle confiscation, directly led to a reduction of what were regular large gatherings of car enthusiasts engaged in activities prohibited by the Act.

At a meeting in Christchurch with a representative from the Ministry of Transport it was advised that the Ministry would need to be satisfied that existing laws in New Zealand were inadequate before it would support law changes such as the New South Wales legislation. The Ministry is aware of the problem of street racing in large urban areas but more information about numbers of offenders and participants, where they come from, who owns the cars that they use, is required.

One option open to the Council, in addition to making the bylaw, is to make representations to central government, in conjunction with councils such as Auckland City and Manukau City who have similar problems, to endeavour to have a law similar to the New South Wales legislation passed by the New Zealand Parliament.

Certainly with the passing of the Land Transport Act 1998 in New Zealand, there is now precedent for motor vehicles to be impounded for traffic offences. The 1998 Act currently authorises the Police to impound motor vehicles for:

(a) the driver is disqualified;

(b) the driving licence has been suspended or revoked;

(c) the driving licence has expired.

The Act sets out a system for how the vehicles are to be impounded and stored and the rights of appeal the owner of an impounded vehicle has.

It may well be feasible, if accepted by the Government, for an amendment to be made to the Land Transport Act 1998, adding a provision whereby the Police can impound a motor vehicle involved in street racing and other illegal activities, and I would recommend that the Council give consideration to making representations to the Government on this aspect.

Peter Mitchell
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