MEETING THE ORDINANCE CHALLENGE (Reprinted from Racing Promotion Monthly, April, 2000)

As the result of stories in RPM and Workshops legal sessions, promoters are now accustomed to preparing for eventual lawsuits resulting from on-track incidents. But lately, many find themselves facing the reemergence of an old challenge--community officials who attempt to use ordinances, zoning permits and licensing to change how race tracks operate--even to prevent them from operating. By the time promoters call RPM offices, they often face substantial problems, either because they knew the challenge was coming but didn't react, or because they invited problems by the way they operate their track. We offer the best advice we can, but are not attorneys or legal experts and recommend that they do what we did for this story--engage the services of a lawyer specializing in municipal law. We turn to RON BENNETT, NASCAR Northeastern Region Director, Holland (NY) Speedway owner, longtime Workshops participant and practicing municipal-law attorney. Bennett gave these guidelines to promoters.

Don't invite trouble. Operate your race track in a way that minimizes the chance people will find it a nuisance. Muffle cars. End races at a reasonable hour. Don't let haulers drag mud down village streets. Abide by liquor laws. Keep litter under control. Ensure that undesirables don't use your facility as a starting point for other community problems. Don't let fans park illegally on local thoroughfares. Be attentive to neighbors' concerns.

Stay in touch with your community. Even if you face no present threat, engage the services of an attorney and study current ordinances, zoning and licensing, and keep abreast of what changes are afoot. Know what master plans your community has and whether it participates in regional land use plans. Understand your zoning, local ordinances and licensing and where you fit in the scheme of things. Know what is permitted and what isn't permit-ted by your zoning and licensing. If your track is zoned non-conforming, which involves its own unique set of locally derived complications, pay particular attention to what you cannot do.

Have your facts in order. For instance, for noise, engage the services of an engineer and measure the noise your track makes. Compare it to other noise producers--factories, concerts, fairs, highways, etc. Know how noisy you are. Compare your hours of operation to similar businesses. Compare the traffic created by your events. Compare when you finish events to other community

attractions. Do you finish events at roughly the same time as the nearby minor league ball team?

Prepare yourself by knowing whom to call. Bennett suggests promoters forego local business attorneys and personal attorneys and others unfamiliar with municipal law. According to Bennett, attorneys who concentrate in municipal law are more difficult to locate than other attorneys but worth the trouble. Local attorneys, especially in small communities, frequently do not wish to fight the fight, because of allegiances to local leaders and the unwillingness to risk being called upon to champion an unpopular cause in front of friends and neighbors at the town hall. He suggests you identify attorneys serving nearby communities who practice municipal law but who might represent you. They have no professional conflicts in your community.

Suppose you discover that the township will vote next month on a new ordinance that will limit the noise you can make and limit the days and hours your track can operate. What strategies would an attorney use to fight the new rules?

Federal courts, Bennett said, have held that zoning or regulation that limits the use of single purpose facilities--which most race tracks are--can be "a taking," a legal term for condemnation or confiscation of property without due process. Attorneys who defend your track might threaten to sue the township for damages--something no public official wants to face--the prospect that he be in the headlines, accused of attempting to take away a constituent's business or property.

Courts are increasingly aware of arbitrary zoning and regulation. Bennett said federal court findings are strongly on the side of business and property owners, and are unpopular with local public officials who take great pride in traditional local determination. It's a case where promoters should control their own zeal for local determination, because federal cases are their best defense against ill-advised local regulations.

Zoning and local ordinances cannot be "arbitrary and capricious," according to Bennett. What applies to one business or property owner must apply to all the others in the community. This means officials cannot create zoning, ordinances or license stipulations directed at just a race track. For instance, a noise ordinance would have to consider the levels of noise and apply to all sources of noise in the community. He cited a company fighting the issuance of a special

operating permit that denied it the right to operate a third shift at its factory. Since no other community business presently has a third shift, attorneys for the company successfully argued that the denial was arbitrary and capricious--aimed strictly at the factory adding the shift. The law is strict, Bennett said. It prevents public officials from playing to the audience, though they may sometimes try. Proposed zoning, ordinances and regulations must follow sound and accepted principles.

Bennett offered an important lesson in zoning. Zoning, he said, is "inclusive." To an attorney that means that it only talks about what can be done. That means if it doesn't say it, you can't do it. It's a lot like good racing rulebooks. This is especially important for race tracks zoned "non-conforming," which is very common. Promoters of race tracks, or any business on property zoned non-conforming, must be especially careful not to invite problems. Generally, property zoned non-conforming is limited to the use at the time the non-conforming zoning was given--meaning that the freedom to update or make improvements (or change operations) is limited. Buildings and infrastructure on such property--sewer systems, sound systems, barriers, roads and parking lots can be maintained but usually cannot be replaced by new construction. Often, they cannot be enlarged. As long as property owners abide by terms of their zoning, it is secure, and they can be less fearful of challenges, and they can be more easily defended by attorneys representing them. Violating the terms of non-conforming zoning can open a business to the possibility of re-zoning based on the violation, which rarely permits as much freedom as the previous zoning.

He advises holders of non-conforming zoning to, "stay out of the limelight." "Avoid becoming a target," because there is some desire among zoning officials to do away with non-conforming parcels; eventually bringing them into zoning status that fits a conforming category. But while they're out of the limelight, they should continue to keep their eyes peeled. Sharp promoters with non-conforming zoning also work with their attorneys to watch for beneficial opportunities that can come along. Sometimes promoters with good counsel can make the most of the chance and gain more favorable conventional zoning when revisions are made to local zoning.

Because of their fiercely independent nature, many promoters believe that public officials have no business telling them how to conduct their business and operate accordingly. Often, they also believe that since their tracks have been operating for 40 years, newcomer neighbors have no right to determine track

operation. They may be right, but more often than not that doesn't prevent challenges.

Whether their property is zoned, has non-conforming zoning or isn't zoned at all, and whether neighbors just arrived in a new subdivision or have been there for 30 years, it's unrealistic in the year 2000 to believe that a track can operate without its community and neighbors attempting to exercise some discretion in its operation. Many promoters also have the tendency to shoot from the hip and think later. Placing the shoe on the other foot, it can be argued that no dragstrip has the right to operate into the wee hours of the early morning or that no oval track has the right to send mud-flinging haulers down community streets on their way home.