Golf balls over fences – your legal responsibility

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Much has been written by us and others about the increasing land squeeze being felt in the golf industry. Many courses, if not already locked by residential housing, are seeing new developments on their boundaries as developers seek to benefit from the ever decreasing supply of land that has some extra features (pre existing golf views). The already foreseeable problem is that golfers have been hitting balls in unintended directions since the game was first invented. The increasing addition of residential housing on course borders has therefore heightened firstly the nuisance factor and then more recently the legal interaction between the two.

One could contend, and we are aware that clubs have contended, that given the golf course was there before any development, it should be land buyer/developer beware. Many general managers know some of their border residents well, firstly via complaints and then via unwritten agreements that they will tend to their roof repairs on a needs basis. Whilst in many cases this has pacified the parties involved, a decision handed down in August '05 by Justice Morris of the Victorian Civil and Administrative Tribunal (VCAT) has put clubs on notice as to the legal responsibilities they have should this need become too regular, if they contest planning conditions/requirements, or if clubs object to developments based on heightened safety issues.

The case in question stars the Cranbourne Country Club and Camden Green Pty Ltd, a residential developer, with supporting roles played by course designers Mike Clayton and Phil Ryan. The following paragraphs summarise the key parts of the findings and the directions stated by Justice Morris. (Should you be interested full case details are available at www.vcat.vic.gov.au)

The VCAT case arose from an application by Camden Green to Casey City Council seeking a planning permit for the development of 550 residential lots on a former market garden that borders the Par 5 5th hole of the Cranbourne course. The club, despite knowing that a potential problem with this hole could arise if the market was to be some day redeveloped, did not object to the permit and Camden Green was eventually successful with their application. The permit granted though contained a condition that "the owner will construct a fence along the western boundary of the site abutting the Club. The fence must be constructed in such a manner and of such materials as to prevent golf balls from the Club causing a danger to local residents and users of the roads and parks abutting the eastern boundary of the golf course."

It is here that the actual VCAT case started. The Club bought two proceedings to the tribunal, the first being around safety and whether the fence would actually prevent danger. The second sought an amendment to the permit allowing a better solution than an unsightly looking fence and it is this issue that will be focused on as many clubs are currently dealing with border solutions. Justice Morris found that the original permit assumed that a park would be built abutting the problem area, effectively minimising the potential height of the required fence. It had since been determined however that the park may not be placed in that area. As a consequence the fence could be up to 18 metres or higher in parts to be totally effective. The club contended that this was outside of the "reasonable" fence requirement as originally permitted with evidence provided by Messer's Clayton and Ryan suggesting that the better solution was re-alignment of the hole.

In making his decision the judge was required to consider what is fair in terms of golf ball nuisance? The judge referred to New South Wales Court of Appeal case Campbelltown Golf Club Limited v Winton. In that case the judge commented:

"…What was required was that the golf course should so adjust its activities as not to interfere unreasonably with the peaceable enjoyment by residents of their land. At the same time, the residents, bordering as they did a golf course, had to accept the fact that the game of golf was going to be played on land adjoining their properties and that it could be expected that from time to time some golf balls might come on to their land.

But what they were not bound to accept was the situation such as was suffered by the respondents in which their property was peppered with golf balls on a daily basis thus posing a threat, not only to the respondent's property but also to their physical safety..."

In light of this reference, and the fact that no party desired a fence, the judge determined that instead of the fence, Camden Green should pay for the cost of the hole re-alignment, capping the cost at $130k.

You'd think a win-win situation for everyone, but the key message for golf clubs stems from what happened next. In addition to the 5th hole re-alignment, the Club wanted Camden Green to also be responsible for the works necessary to the 6th and 7th holes caused by the 5th hole re-alignment. As is often the case when course designers and committees get together, there were significant differences of opinion as to how to best effect the changes, considering safety and course integrity. VCAT found that it was the Club's responsibility to work this out as they weren't the "master course designer", providing that with any solution the external perimeter remained safe. Following this, it was therefore not unreasonable for the Club to be responsible for these costs which by the way had been estimated at $150k to $250k.

There are two key points to be taken from this case. Firstly, clubs may get some assistance with re-design requirements if new developments are proposed adjoining course borders, HOWEVER any consequential design issues and costs incurred after the primary issue is addressed will become their own.

The second point is that the court has stated that the nuisance caused by golf balls going over fences is a club's responsibility. This statement has been supported by another recent VCAT decision in Dyson v Baw Baw, 20 September 2005. In this case the local Council had originally included a clause in a permit that removed all liability from a golf club for stray golf balls entering a property that was to be developed. The judge stated the clause "tends toward a situation that is seeking to relieve the Club of its primary responsibility to ensure that the risks posed are acceptable." The judge directed that the original permit be amended with the removal of the clause from the permit and concluded that "the proximity of the golf course to residential lots means that the Club will need to review the risks associated with its activities and take measures it deems appropriate to minimise risk and liability."

Clearly, the "we were here first" stance will not wash and it is not land buyer/developer beware. The legal view now being taken is that the onus lies with clubs to remedy any safety issues being caused.

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