

# Legal and Planning Issues Concerning Gulf Harbour Golf Course

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Legal Team

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The purpose of this communication is to keep the Whangaparaoa Community up to date with all key legal and planning issues impacting the Gulf Harbour Golf Course and the wider Whangaparaoa Community.

The legal and planning team has considered a wide range of legal options taking into account all the relevant issues applicable to the closure of the Gulf Harbour Country Club and golf course together with the 2023 Resource Consent application by the developer and owner of the golf course.

## 1) The Owner/Developer Involved

The ultimate owner of the golf club land is a property developer called Greg Olliver.

Greg Olliver was banned by the Companies from being a director of NZ companies for 4 years which was subsequently reduced to 3 years on appeal.

Olliver is the sole shareholder in the first of these 4 companies, called "The Pheonix Trust Limited" (TPTL). This company is in turn the sole shareholder of the following 3 companies:

### a) The Legal Owner of the Golf Course: Long River Investment Corporation Ltd

The shares in this company were acquired by TPTL in July 2021 for, we believe, around \$24 million.

The land has a first, a second, and a third mortgage registered over it.

The first mortgage with a priority amount of \$78.67 million plus interest was provided by an American Private Equity Company called 1543 Capital operating out of Greenwich Connecticut USA.

The second and third mortgages are to NZ based companies.

By setting up a separate land-owning company, the developer seeks to insulate the land from creditor claims (other than the mortgage holders) such as club members and staff owed repayment of fees or wages etc.

It is however possible that this corporate structure could be legally challenged and KWGS is investigating this possibility further.

b) **The Operator of the Golf Course and Country Club: GHCC 2016 Ltd.**

This is the company that Gulf Harbour Golf and Country Club Members paid fees to and employed the staff.

It is understood to have numerous unpaid creditors including Golf Club members who have claims for fee reimbursement following the closure of the Golf Course and Country Club earlier this year and staff who are owed wages and other entitlements.

We believe it is likely to be insolvent and has been for some time.

The sole director of GHCC 2016 Limited and indeed all four companies involved with the golf course, is Wayne Bailey of Christchurch, a long-time business associate of Greg Olliver.

Bailey was suspended in May this year by the NZ Institute of Accountants for four years and fined \$63,299 for misconduct and breaches of the Institutes Rules.

He was previously censured by the Institute for other breaches of its rules in 2013 and fined over \$18,000.

We have written to Bailey on several occasions to seek his assurances that GHCC is solvent and will repay creditors.

He has refused to respond.

If the company is insolvent and continues to trade as it currently is, Bailey as sole director is likely to be personally liable for some, if not all, the company's debts incurred during the period of insolvency.

We have been assisting GHCC members to recover pre-paid fees by way of the Disputes Tribunal.

Tribunal decisions have been received in many cases and all have been in favour of the club member.

In several cases, the Disputes Tribunal has also found Bailey personally liable.

Bailey's approach has been to promise payment on various designated future dates.

In all cases so far, those dates have come and gone, and no payments have been made.

KWGS will continue to support GHCC members and staff in recovering debts owed by GHCC 2016 Ltd and Bailey personally.

c) **The Equipment Company: Gulf Harbour Equipment Ltd**

This company owned or leased the plant and equipment needed to maintain the golf course and country club. Again, this separates any owned assets from the operating company that owes money to creditors.

## **2) The Encumbrance.**

In 2006 the then owner of the Golf Course wished to set aside some of the land (not part of the actual golf course itself but adjacent land) for small lot residential development.

In order to obtain Council (originally Rodney District Council) approval for the applicable zoning change the owner agreed to enter into an encumbrance for 999 years whereby the golf course land could only ever be used as a golf course or country club.

In this respect the Council was effectively acting as the representative of the community and should always act in the best interests of the community.

People buying or building homes in the area did so happy in the knowledge that this encumbrance existed and ensured that the green open spaces associated with the golf course remained so, essentially in perpetuity.

Obviously, the golf course was a real positive in terms of property values.

The two parties to the encumbrance were the Council and whoever owned the land at any time. This is termed “running with the land” and binds all future owners.

The encumbrance also supported the original Precinct Plan for the whole Gulf Harbour development of what was then Hobbs Farm.

The whole rationale for the development was that it would encompass a world class marina and world class golf course.

It also took into account, that due to infrastructure issues, particularly limited road access, that total housing had to be limited and green spaces maintained.

Encumbrances are an interesting legal creature.

They are effectively a contract between the two initial parties which also binds subsequent landowners.

Because they are a contract, the parties can agree to vary or remove them.

So, it would be possible for the Council (now Auckland City Council following local body amalgamation) and the current owner (Long River Investment Corporation Ltd) to agree to remove or vary the encumbrance.

There is also a provision in the Property Law Act where, in the absence of agreement between the parties, one party may unilaterally apply to the High Court for the encumbrance to be removed or varied.

However, in this particular encumbrance, it is specified that the Council may not exercise the provisions of the Property Law Act, but it does not make the same provision for the landowner.

It is not known why it was set up in this way.

There is also a further interesting provision in the encumbrance which specifies that if the Council gives the landowner approval (which includes a resource consent) for some activity other than a golf course or country club, that will over-ride the encumbrance provisions for the land to be used only for a golf course or country club.

The question is whether a Resource Consent to amalgamate boundaries and issue new titles is “an activity.”

Our planning and legal advice is that it is an “activity”.

Therefore, it is important to ensure that the Council never agrees to any removal or variation of the encumbrance, including issuing a resource consent that has the effect of doing this.

Even if the Council does not agree to vary the encumbrance or issue a resource consent for an alternative activity, the landowner can make a unilateral application to the high court to remove or vary it.

KWGS have reviewed the case law that could apply to such a unilateral application by the landowner and believe that he would have an uphill battle to obtain the High Court’s approval, but a battle there may will be, and we will need to be prepared to fight it.

For so long as the encumbrance remains in place, the Golf Course remains in place and all the negative aspects related to intensive housing development on the golf course land will not happen.

### **3) The Resource Consent Application.**

a) A Resource Consent application was lodged last year with Council on behalf of Long River Investments Corporation and was dated 15 November 2023.

KWGS was not immediately notified by Council, so we only became aware of it several days later.

There are time constraints within which Council has to decide how to handle the application so we moved very quickly to put together a comprehensive justification of why the Council should as a minimum, notify the application thus allowing any individual who may be affected to make submissions as to why the Resource Consent should not be approved.

b) The Resource Consent Application is quite clever in that it presents itself as simply an amalgamation of existing titles and therefore doesn’t require notification.

If approved, the existing nine titles which comprise the golf course, would be amalgamated into two titles, referred to as New Title 1 and New Title 2 in the Application.

New Title 1 would comprise all the land Northwest of Gulf Harbour Drive comprising 37.53 hectares.

New Title 2 would comprise all the land to the Southwest of Gulf Harbour Drive comprising 51.4 hectares.

The Resource Consent Application makes it clear that this is the first step in a proposed development where New Title 1 land will be sold off presumably (although not specifically stated) for residential housing. It is obvious this is the intention as to make the whole scheme work financially, this is a necessity.

New Title 2 would remain as part of a smaller golf course which would have 6 or 7 new holes created on the land owned by Hoppers on the Southwest side of Pinecrest Drive.

The Resource Consent states that a deal has been done with Hoppers to buy their land, but that deal was conditional and is now cancelled, with Hoppers stating they are proceeding with their own consented residential development on the land and will not be revisiting any deal with Olliver.

The KWGS response to the developers Resource Consent application was based on applicable sections of the Resource Management Act and taking into account relevant case law.

In one relevant case the Planning Tribunal held that:

***“Good resource management practice requires that in general all the resource consents required for a project should be carefully identified from the outset, and applications for them all should be made so that they can be considered together or jointly.”***

This statement encapsulates the KWGS position that required zoning changes and other resource consent applications should be produced and consents sought so that all planning issues related to the developer’s proposed project can be considered in detail.

As a minimum KWGS’s position is that this Resource Consent Application must be deferred pending further requested information from the Applicant and before any decision on notifying or non-notifying can be made.

KWGS is now pleased to advise that its efforts to have the Resource Consent notified have been successful although it may be that the application does not proceed due to the Hopper Deal being cancelled as the original rationale for a redeveloped golf course using the Hopper land is no longer available.

Nonetheless, KWGS and its legal and planning team are preparing extensive submissions as to why the Resource Consent application should not be granted.

#### **4) The Big Picture**

The big picture is that Olliver is clearly driven by a commercial imperative to make as much money as he can.

Shortly after purchasing the shares in Long River, Olliver approached various third parties with a plan to rezone the Golf Course land to residential housing and to sell the land to those parties who would then subdivide the land and build residential houses.

This did not eventuate.

Olliver then attempted to swap the Whangaparaoa Golf Course for the Golf Harbour Golf Course.

This also did not eventuate.

To understand Olliver’s motivation in all this it is necessary to consider the difference in value between what an operating golf course is worth and the value of the same land for residential housing purposes.

This difference is usually very substantial because golf courses do not typically produce large profits.

This does not mean that a well-run golf course is not profitable, rather that it is not a huge profit.

KWGS has undertaken a financial feasibility study which indicates the golf course can be run profitably and that if Olliver says he can't run it profitably then he should sell it to someone who can, rather than destroy the green environment for thousands of people, cause extensive traffic congestion problems for the entire peninsula and reduce property values for many.

If we look at the Gulf Harbour golf course land as a golf course let's assume it's well less than \$20 million.

Developed and sold as residential housing land its likely to be worth more than \$200 million.

Remember that \$78.67 million priority on the golf course land held by the first mortgagee?

Add roughly \$10 million from second and third mortgagees.

That only makes sense if the land has a value related to it being zoned for residential housing.

Three sales ago it reputedly changed hands for around \$6 million. The owner who sold it to Olliver reputedly purchased the land for around \$13 million. So Olliver probably paid way too much.

Effectively what Olliver is proposing to do, and always has, is make millions of dollars in development profits, while existing Gulf Harbour residents lose millions of dollars in lower housing valuations as a result and all residents of the Whangaparaoa Peninsula are subjected to far more traffic congestion and other infrastructure problems than already exists.

From what we can understand, Olliver is doing this largely using other people's money on the basis that he can persuade the Council or ultimately the Environment Court to allow him to develop the golf course land for residential housing.

If he succeeds, he makes millions.

If he fails, the corporate structure he has set up is designed to minimise any personal financial loss.

The vast majority of creditors have been nicely compartmentalised in GHCC 2016 Ltd while the landowner (Long River Investment Corporation) probably few or no creditors other than the three mortgagees.

GHCC 2016 Ltd can be placed in liquidation, all the creditors suffer a loss, but the land is totally protected.

## **5) Public Access to the Golf Course**

In the past, the owners of the golf course have actively prevented general public access to the course which has deprived locals of some magnificent walks overlooking the Hauraki Gulf and its islands.

Many overseas courses have put in place policies that encourage and allow public access to their course at certain times of the day particularly early morning and in the evening.

KWGS believes new owners who are dedicated to keeping the golf course as a golf course would be amenable to such a policy and KWGS would actively support this.

## **6) Latest Developments.**

1) As most will be aware, the Pro Shop, and a few days later, the Club House were both destroyed by fire. It is likely that this was arson, but we await an investigation report.

The Council has commenced demolition of the damaged buildings for safety purposes and will charge the landowner (Long River) for the costs.

If Long River does not pay, then the Council can apply to liquidate Long River in order to recover the debt.

2) KWGS is seeking a formal declaration from the Council that they support the encumbrance in all respects, i.e. that the land must be operated as a Golf Course and Country Club.

3) KWGS has reason to believe that Olliver is seeking approval under the pending Fast Track legislation to develop the Golf Course for residential housing.

This proposed legislation allows three government ministers to by-pass the normal resource consenting process for projects of national or regional significance.

KWGS believes the use of the Golf Course land for residential development falls outside the ambit of the proposed legislation and will be reinforcing this position with all appropriate parties.

4) Recently, an application to liquidate Long River was made by the company previously operating the restaurant at the Country Club. The amount they were owed was around \$20,000, a relatively small sum compared to the overall sums involved.

A settlement was reached only the day before Long River was to be placed in liquidation and we believe the funds for this came from the first mortgagee, suggesting Olliver did not have the funds to pay it and the first mortgagee did not want Long River liquidated.

5) Olliver's residential property in St Heliers is currently up for sale at well less than valuation, likely as a result of pressure from the first mortgagee.

6) The BNZ recently won a judgement against Olliver personally for more than \$1 million.