IN THE TOWN PLANNING APPEAL BOARD

Town Planning Appeal No. 7 of 2004

Between

Amberley Company Limited (Appellant)

and

Town Planning Board (Respondent)

Date of Hearing: 1 & 2 June 2005

Date of Decision: 29 July 2005

Composition of the Appeal Board:
Mr Edward Chan King-sang, SC, JP (Chairman)
Mr Eugene Fung Pui-cheung
Mr Richard Ho Kam-wing
Mr Patrick Lau Hing-tat
Mr Leung Wo-ping, JP

DECISION

1. This is an appeal against the decision of the Town Planning Board made on 2 April 2004 whereby the Town Planning Board confirmed the decision to refuse to grant planning permission to use the land affected by the application as practice

ground or driving range for golf. The lots affected by the application are : Lots 228, 229, 231-235, 237-241, 243-250, 252-259, 261-273, 275-279, 283-288 & 290-292 all in DD 247 at Ho Chung, Sai Kung, New Territories. These lots are hereinafter collectively referred to as the "land". Since at least May 2003, there were works on the land for the purpose of converting it for use as a driving range for practising golf. In fact, the range covered not just the land but also some Government land as well.

2. On 15 May 2003, the Planning Department received a complaint that there was large scale of leveling work at the land. The Planning Department sent its staff to inspect the land on 18 July 2003. The staff discovered that the land had been converted to a driving range for practising golf although he did not see any actual operation or activity on that occasion. A warning letter was issued on 23 July 2003 against the unauthorized use. In response on or about 14 October 2003, the appellant applied to the Town Planning Board for permission to use the land as a golf driving range for a term of 3 years. The appellant was not the owner of the land but the owner was prepared to support the application.

3. The application was considered by the Rural and New Town Planning Committee on 5 December 2003. The Committee decided to reject the application.

4. On 6 January 2004, the appellant applied for a review of the decision of the Committee. The appellant revised their application such that the application was for permission to use the land as a driving range for a period of one year instead of three. The Town Planning Board considered the appellant's application on 2 April 2004. The decision of the Board was to uphold the decision of the Committee and to reject the revised application. The appellant was notified of the decision on 22 April 2004. On 15 June 2004, the appellant gave notice to appeal against the decision of the Town Planning Board to this Appeal Board.

5. We heard the appeal on 1 and 2 June 2005. The proceeding was conducted in Chinese. All presiding members of this Appeal Board are bilingual.

However, with the consent of the parties, and with a view of expediting the time for giving our written decision, we decided that our decision would be written in English and the parties were informed that they could obtain a copy of the Chinese translation of the decision from the secretariat to this Appeal Board.

6. The majority part of the land (about 93%) was zoned for the purpose of Green Belt and the remaining 7% of the land was zoned for the purpose of Recreation. The Recreation zoning part was at the south eastern tip of the land consisting of part of lots 288, 291 and 292 only. This was the part nearest to the Shing Fung Film Studio (成豐片場). We would like to mention that on 2 July 2004 and 1 April 2005, there were draft revisions to the Ho Chung Outline Zoning Plan. However, the revisions did not affect the land in question at all.

7. We note that under the Notes to the relevant plan S/SK-HC/5 applicable at the time of the appellant's application and also under the most up to date draft plan S/SK-HC/7, Golf Course was listed under Column 2 of the Schedule of Recreation use. Also under the Notes to the plan S/SK-HC/5, Barbecue Spot was listed under Column 2 of Green Belt use and column 1 of Recreation use. There was a change in the Notes to the draft plan S/SK-HC/7 in that now Barbecue Spot was listed also under Column 1 of Green Belt use. We considered that the use of the land as driving range is akin to the use for the purpose of golf course, and even in relation to the land zoned for Recreation purpose, it is necessary to obtain the permission of the Town Planning Board. However, as only a very small part of the land was zoned for Recreation use and that nearly all the facilities for the operation of the driving range were on the part of the land zoned as Green Belt, in effect permission from the Town Planning Board for use as driving range would be required and that the maximum period which the Town Planning Board may allow for such use was only 3 years.

8. There were 5 main grounds given by the Town Planning Board for rejecting the appellant's application :

(a) The proposed golf driving range was not in line with the planning intention of the Green Belt zone which was intended to define the limit of development by natural features. There was a general presumption against development in this zone. There was insufficient justification for departure of the planning intention in this case even on a temporary basis.

(b) The golf driving range did not comply with the Town Planning Board Guidelines for Application for Development within Green Belt Zone under Section 16 of the Town Planning Ordinance (TPB PG-No. 10) in that it involved extensive clearance of vegetation.

(c) There was insufficient information in the submission to demonstrate that the development would not pose risk of pollution to the adjoining stream course and water gathering grounds.

(d) There was insufficient information in the submission to demonstrate that the reliability of the electricity supply in Sai Kung district and safety of people in the vicinity would not be jeopardized by the operation of the golf driving range.

(e) The approval of the change of use would give rise to a bad precedent.

9. Before us the appellant's representative, Ms. Kan, contended that the appellant had not erected any large structure and had not caused any change to the green effect of the land in any major way. The land was originally abandoned agricultural land and there was no cultivation on the land at all. Before the appellant operated on the land, the land was full of wild grass and rubbish. It was contended

that there was no major removal of the trees and the appellant would continue to maintain the trees on the land. The appellant also contended that there was no evidence of any actual water pollution resulting from its operation. It was contended that before the appellant's operation on the land, the hygiene of the land was bad with mosquito breeding everywhere. In fact, after the appellant's operation on the land, the hygiene had improved. The appellant also contended that since December 2003, China Light and Power had made alteration to the poles for the overhead cables. Also, it was suggested that the appellant had acted in accordance with the advice of the power company to segregate the area affected by the power cable from the other operation area. There was never any accident involving the power cables. Also, it was contended that the appellant's operation would generate rates income for the Government and was thus beneficial to the public. It was also contended that the appellant had continued their operation during the difficult time of the SARS epidemic even though the operation was at a loss. The appellant had thus sacrificed for the sake of keeping the employees employed.

10. The appellant further submitted that the use of the land as driving range was a temporary use only. The appellant had another site nearby at 88 Ho Chung Road. This was the site where the appellant used to operate. The appellant had already obtained a short term tenancy in respect of this old site and the tenancy would commence on 15 August 2005. It was anticipated that certain building work was required to be done to the site before the same could be used for the appellant's operation and consent for the commencement of work will not be granted until after 15 August 2005.

11. We have heard evidence from Ms. Wong Oi Yee of the Planning Department, Mr. Chow Yam Wai of the Electrical and Mechanical Services Department and also Mr. Pak Chi Wa of the China Light and Power Company Ltd. and also Mr. Tong Woon Ming of the Water Supplies Department. The appellant did not call any evidence before us and was content for us to decide the appeal on the basis of the submission, the materials before us as well as the evidence called by the

respondent.

12. We do not propose to set out the evidence adduced before us in details. Suffice is for us to say that from the evidence of Ms. Wong and also from the aerial photos taken on 15 August 2002 and also on 31 May 2003, we are satisfied that there was a large scale cutting of trees and vegetation on the land for the purpose of the appellant's operation. While we accept the submission that the land was probably left unattended before the appellant had their operation, we are not convinced that the land then was in any state that would pose any threat to public health or hygiene.

13. Also, we are convinced that in order to make the land suitable for a driving range, the appellant had caused large scale leveling and refilling of the land. In fact the refilling of the land at the post for overhead cables was such that China Light and Power would have to raise the height of the poles in order to maintain a safe clearance between the ground and the overhead cables.

14. In the course of the application for the planning permission, the appellant represented that the toilets to be installed at the land would be chemical toilets and would not cause any pollution. Also, it had been represented that no food would be sold on the land. The representation turned out to be false in that the toilets now installed at the land were fitted with septic tank and that the appellant had also operated a barbecue spot on the land.

15. There was a dispute between the parties on whether the appellant's operation would cause pollution to the water course. It has to be remembered that very close to the land is the Ho Chung River which is some 10 meters wide. There was a pumping station down stream pumping the water to the High Island Reservoir. The Water Supplies Department was very concerned about the possibility of water pollution arising from the septic tank. The normal rule of thumb was that the septic tank must be at least 30 metres away from any water course in a water gathering ground. According to Mr. Tong, the distance between the septic tank and the nearest

water course was less than 30 metres and he was not cross examined on this point. Also, the Water Supplies Department had raised concern over the effect of insecticide, fertilizers and other chemicals used on the land for the maintenance of the lawn and also for driving away insects and mosquitoes.

16. The appellant on the other hand contended that there was no evidence of any actual pollution caused by the septic tank. Further, in the final submission the appellant submitted that in fact the septic tank was over 30 metres away from the nearest water course and this would meet the requirement. Also, the appellant contended that they did not use any insecticide, fertilizers or chemicals on the land.

17. The contention of the appellant amounted to say that their operation would not cause any adverse effect on the water course, and we are of the view that it is for the appellant to convince us that permission should be granted to enable them to use the land as driving range notwithstanding that such use is not within the first column of the Schedule of the Notes to the plans. We therefore take the view that it is for the appellant to demonstrate that there was no risk of water pollution. In this respect, although the representative of the appellant in her final submission told us that the septic tank was more than 30 metres away from the water course, we cannot accept that submission as evidence. On this point we accept the evidence of Mr. Tong that the distance was less than 30 metres. The issue of water pollution arising from the septic tank was distinctly raised in the witness statement of Mr. Tong of the Water Supplies Department and the appellant should have adequate notice of the same and should have come prepared with evidence of the distance between the septic tank and the water course. As it is, although we are not satisfied that there was actual pollution caused by the septic tank, we are not satisfied that appellant's septic tank would not cause any water pollution either. We accept that the requirement that the septic tank and the nearest water course should be separated by at least 30 metres is a reliable good practice. In the present case, we consider that the risk of water pollution by the septic tank is always there although the respondent was unable to adduce any evidence of actual pollution.

18. In relation to the possible pollution caused by the use of insecticide, fertilizers or chemicals, there was really no evidence that the appellant had ever used these substances on the land.

19. Since now barbecue spot is one of the uses which are always permitted for land zoned for Green Belt use, we do not consider that the barbecue activities organized by the appellant on the land is a ground for us to refuse the appellant's application.

20. We are also convinced that the land is not suitable for use as a driving range because of the risk of damage to the insulators installed on the top of the poles for the overhead cables. Any damage to such insulator may cause power cut to the Sai Kung area as well as risk of personal injuries to the persons present near the poles.

21. We agree with the views of the Town Planning Board that the use of the land for the purpose of a driving range even on a temporary basis is not in line with the planning intention and that the golf driving range did not comply with the Town Planning Board Guidelines for Application for Development within Green Belt Zone. We consider that there is a risk of water pollution caused by the installation of the septic tank as part of the appellant's driving range operation. We also consider that the land is not suitable to be used for the appellant's operation as a driving range because of the risk of damage to the overhead insulators of the overhead power cables.

22. We also note that in the application for review to the Town Planning Board on 6 January 2004, the appellant only applied for one year permission for the land to be used as a driving range. In fact, one year had passed since 6 January 2004 before this appeal was heard by us. While we appreciate that any decision to dismiss the appeal would cause some disruption to the appellant's operation, in the circumstances of this case, we feel that the appellant had had enough time to prepare for the cessation of their operation.

23. We would also mention that we are thoroughly disappointed with the lackadaisical attitude of the Government towards the protection of the environment. We note that the report of leveling work at the land was received on 15 May 2003 and yet there was no inspection of the site to find out what was going on until over 2 months later. By then the land was leveled and the trees were cut and the driving range was fait accompli.

24. To conclude, our decision is that the appeal is dismissed.

Miss Kan Mei-ha for the Appellant

Ms Jenny Fung of the Department of Justice for the Respondent