

unChain St Kilda Legal Action: An Update

The Appeal to VCAT, our FOI applications and the Ombudsman's Inquiry into the Triangle Tender

Introduction

Our legal challenge to the Triangle proposal was heard at VCAT from Monday 11 February to Wednesday 13 February. The decision was reserved and we expect it to be handed down in six to twelve weeks.

The case was brought against the Port Phillip Council, which had approved the Development Plan in August 2008. The developer, a consortium of Babcock and Brown and its subsidiary, Citta Properties, was permitted to join the action. Our legal team consisted of Michelle Quigley SC and Jason Kane with Aitkins as our solicitors. The submission by our team and the submissions by the lawyers for the Council and the developer are on our website.

The Background

In 2001 the Council, following extensive community consultation, prepared the St Kilda Foreshore Urban Development Framework (UDF), which identified opportunities for improvement of the foreshore including the St Kilda Triangle. In July 2004, the UDF was approved by the Minister for Planning and incorporated into the Port Phillip Planning Scheme. This included site-specific planning controls for the development of the Triangle Site as an entertainment and cultural precinct, with significant public spaces and protection of views (Special Use Zone 3, Development Plan Overlay).

Under the provisions of the Planning Scheme, a selected developer is required to submit a Development Plan to be approved by the Council. If approved the next step is for the developer to get planning permits for the various buildings, which have to be in accordance with the approved Development Plan. These permit applications are exempt from the normal third-party appeal rights at VCAT.

In May 2007 the Council selected BBC consortium comprising Babcock and Brown and its subsidiary, Citta Property Group, to develop the Triangle. The Council, the State Government and the developer signed a Development Agreement. BBC then submitted a Development Plan for approval by Council. At its meeting on 13 December 2007 the Council foreshadowed some amendments to the proposed Plan and deferred the matter until 24 January, later extended to 7 February 2008. At that meeting a motion to reject the proposal was defeated by 4 to 2. The majority voted to require further work on certain changes and authorized the City Development Manager to approve a Plan subject to various changes being made. In August 2008 the City Development Manager purported to approve a Development Plan.

In 2001 the UDF had promised the community that the Triangle would be developed as an entertainment and cultural precinct. Despite non-trivial changes to the original proposal, we believe that fundamental problems remain with the Development Plan purportedly approved by Council in 2008. For the duration of its 99-year lease the developer will control 47,300 sqm of Gross Lettable Space on Crown Land. This proposed complex is significantly greater than Altona Gate (28,652 sqm, Westfield Geelong (35,866 sqm) or Brimbak Central (39,505 sqm). Major issues include:

- A massive retail complex on the St Kilda foreshore comprising about 160 shops (19,00 sqm), other retail, a gym etc. By comparison there are about 160 shops presently in the whole of Acland St.
- The problems associated with four nightclubs with a capacity of 3000 patrons, a tavern for 900 patrons and numerous licensed venues such as restaurants and bars.
- New buildings will still cover the whole area between Jacka Boulevard and Upper Esplanade, blocking views to the beach and sea from the Upper Esplanade and overwhelming the heritage Palais Theatre

unChain St Kilda maintains that the vision for the St Kilda Triangle promised in the Urban Development Framework has been betrayed. Although Council elections in November 2008 saw the community elect five new councillors, the Council cannot simply repeal the decisions of the former Council. The developer has contractual rights under the Development Agreement and an approved Development Plan.

We cannot assume that the global economic crisis will render the Triangle project economically unviable. Babcock and Brown, a failed investment bank and a key component of the developer consortium, is in the process of liquidating its assets. Babcock and Brown will presumably attempt to sell their interest in the project to another developer if they have a valid Development Plan.

Therefore unChain St Kilda decided to mount a legal challenge. We raised a substantial amount of money, especially through the sale of Mirka Mora and Greg Irvine prints. (Anyone interested in purchasing a signed numbered print of these wonderful paintings can do so through our website). Our ultimate aim is to ensure that the St Kilda Triangle is developed as a cultural and entertainment precinct as we were promised in the UDF.

unChain St Kilda brought its legal challenge against the Council decision in August 2008 to approve the Development Plan. Although a new Council had been elected in November 2008, it felt obliged to vigorously argue in VCAT that the decision of the former Council was legally correct. So the battle-lines were drawn up – unChain St Kilda against the Council and the developer of the Triangle.

The Legal Challenge at VCAT

This was not a normal planning appeal at VCAT. In a ‘normal’ challenge to a Council planning decision, the applicant can argue on the ‘merits’. The applicant

can bring up matters such as application of Council policy, impact on residential amenity, impact on views, impact of traffic etc. The aim in a normal hearing is to persuade VCAT to make a different decision on the merits of the developer's proposal.

We were not able to mount a 'normal' challenge to the Council's decision because of the special planning rules that applied to this site. Our challenge was brought under s 149B of the *Planning and Environment Act*. We sought a declaration that the Council's approval of the Triangle Development Plan was invalid.

Section 149B of the *Planning and Environment Act* provides: 'A person may apply to the Tribunal for a declaration concerning-

- (a) any matter which may be the subject of an application to the Tribunal under this Act; or
- (b) anything done by a responsible authority under this Act'.

A section 149B application requires us to show that the Council's decision was legally invalid. This involves application of the principles of administrative law, not an analysis of whether the Council made the right decision on the merits.

A fundamental point to note is that we face a 'high hurdle' in proving our case. VCAT has said in an earlier case that 'the hurdle faced by a person arguing that a planning permit was not open is a high one ... because planning decisions are so broadly based that it will be very difficult to say that no responsible authority, acting rationally, could have made the decision in question'. It is also important to be aware that the remedies are discretionary, so if VCAT finds that there has only been a minor breach, it may decide not to make an award in our favour.

We argued that there were five different grounds on which the Plan was legally invalid:

- (1) Invalid Approval: Public Participation obligations
- (2) Unlawful Approval: Delegation to Mr Borg
- (3) Denial of Natural Justice
- (4) Irrelevant/Relevant Considerations
- (5) The approval of the Plan was unreasonable

(1) Invalid Approval: Public Participation obligations

The Development Plan Overlay requires that before deciding to approve a Development Plan, the Council must give an opportunity for public participation. It must advertise and display the proposed Plan for public comment for no less than 28 days and must consider any public comments received.

The Council displayed the proposed Development Plan lodged in October 2007. However it did not advertise or display the August 2008 Development Plan which was the one it purported to approve. Amongst other things, we argued that this was a breach of the mandatory process requirements and therefore the approval in August was invalid.

We had employed Victoria's leading planning consultant, Professor Roz Hansen, to examine the 2007 Plan. We submitted her report to Council before the February meeting and it may have been a factor in persuading some councillors to vote against the proposals. Professor Hansen said about the 2007 Plan: *'In our opinion there has been a 'manipulation' of policy intent by some parties, including the developer for the Triangle site, to justify the substantial retail floorspace component and yet there is very little, if any policy support, especially at the local level, to justify 25,000 sq.m of retail on this strategically significant site. Based on our assessment of the relevant planning policies contained in the Port Phillip Planning Scheme we are of the opinion that there is no substantive support in the existing planning policy framework for an activity centre for retail uses of this scale and nature on the St Kilda Triangle Site'*.

There were 55 changes between the 2007 and the 2008 Plan and we maintain that the public should have been given the opportunity to view and consider the 2008 Plan, to commission other expert reports, and to have our informed responses considered by Council. We were denied the opportunity to put such an informed response to Council. .

(2) Unlawful Approval: Delegation to Mr Borg

In our opinion, the Council's delegation to Mr Borg, Manager City Development, which enabled him to approve the August 2008 Plan was inappropriate and invalid. An important issue here is that only the Council has the power under the planning rules to approve a development plan and that this important power can and should not be delegated.

Council argued that Mr Borg was validly authorised to act for it either by the resolution in February 2008 or by an Instrument of Delegation in April 2007 entitled *Port Phillip City Council Instrument of Delegation to members of Council Staff by the Council*. This ground raised various technical legal arguments. One was whether the resolution in February 2008 by the Council's Statutory Planning Committee was unlawful because the Committee did not have the power to delegate approval to an officer. Another was whether the Council's 2007 Instrument of Delegation was too general and uncertain to give Mr Borg the power to approve a Development Plan.

(3) Denial of Natural Justice

Our third ground was that the Council failed to observe the rules of natural justice. This involved in part the failure to comply with the public notification requirements discussed above. Our argument is that the Council failed in its obligation to act with procedural fairness in not giving us an opportunity to present an informed submission on the 2008 Plan.

(4) Irrelevant/Relevant Considerations

A fundamental principle of administrative law is that a decision maker must not ignore relevant considerations and must not take into account irrelevant considerations. The key issue we argued here is that the Council failed to have

regard to the purposes of the UDF, the DPO and the Special Use Zone in permitting a major retail centre on the site and loss of important views.

(5) The approval of the Plan was unreasonable

Our next ground was that the Council decision was unreasonable. The test here in administrative law is the 'Wednesbury' test: that the decision is unreasonable if no reasonable Council could have formed it.

Our argument was that no reasonable Council could have approved a Development Plan with a major retail component, an over-provision of licensed premises and such a destruction of views. An examination of the UDF and the Planning Scheme shows that the Council's decision was devoid of 'plausible justification'.

What will happen if we win?

One possibility is that the VCAT will decide that the Council has invalidly approved the plan or denied us natural justice because it failed to give us an opportunity to present an informed submission on the 2008 Plan. This could be remedied by the developer re-submitting the Plan and the Council giving us the required 28-day period to make submissions. In this case we would commission another expert analysis from Professor Roz Hansen and perhaps other experts. We would welcome the opportunity to argue on the 'merits' of the Plan. The new Council would have to give both us and the Developer a fair hearing.

Another possibility is that VCAT could decide that no reasonable Council could have approved a Development Plan with this amount of retail. Presumably in this situation there would be no possibility of simply re-submitting the 2008 Plan. However the Developer may have a contractual right under the Development Agreement to submit a revised plan. Alternatively the Developer may then decide to abandon the project. In this case we would lobby the Council to re-start the process for the Triangle with a system of checks and balances to ensure that the site is developed as a cultural and entertainment centre as we were promised in the UDF. Hopefully our local member of Parliament, Martin Foley, would see this as an opportunity to champion a redevelopment of the Triangle site in accordance with the UDF.

An unlikely but theoretical possibility is that the State Government may decide to 'call in' the Triangle project. The State Government may try to argue that it is necessary for it to take over the approval of the Triangle project in order to kick-start projects to get over the current economic crisis. We would first mount a strong political argument. Whatever goes onto this iconic site will carry a 99-year lease. We should not condemn the next four generations to a sub-standard development just to assist in our temporary economic hard times. In any case it is pure fantasy to hope that Babcock and Brown would be able to participate in an immediate start-up of the current project. We would also consider legal action, and Council may consider the same. The St Kilda Triangle Act provides that the Port Phillip Council is the committee of management and that it is the body that grants leases for the approved development of the Triangle. Our essential legal argument would be that the State Government can only take over

the project if it changes the St Kilda Triangle Act. This would require the consent of the Legislative Council. unChain St Kilda in 2008 successfully campaigned to stop the government changing the Local Government Act to curtail the free speech of councillors and Council candidates. We would mount a similar campaign to stop the government trampling on the rights of the local community by taking over the Triangle project. Remember that the Liberals and the Greens have control of the Upper House so we would have a realistic opportunity to stop this government changing the Triangle Act if it attempted to do so.

What will happen if we lose?

First we will have a drink. Then we will continue.

Let us assume that, despite Babcock and Brown's financial haemorrhaging, the Developer wants to continue. A range of options is available to the community, either directly or indirectly (via the Council), to influence the proposed development.

What is the position if Babcock and Brown want to sell their interest to a new player or to simply delay any decisions until the economy recovers? Such questions depend on what is in the contract between the developer, the Council and the State Government. For this reason we have mounted a vigorous Freedom of Information application to secure public disclosure of the contract.

The Freedom of Information Application

The secret Development Agreement was signed in May 2007. On 13 December 2007 in his Background Report on the St Kilda Triangle site when the Council was considering planning approval of the Development Plan, CEO David Spokes said (at para 2.20): *It is intended to make public those sections of the Development Agreement which are not commercial in confidence by mid 2008.* There is no reason why Council should be allowed to break this commitment that its CEO made to the community.

Without attempting to be comprehensive, these are some of the provisions in the Development Agreement that the public ought to be able to assess:

- Will the land still remain Crown land once the development is complete? Has Citta negotiated to own some of it as part of the development? Industry practice is for development companies build like this only if they get some land ownership.
- Has the Council fettered its discretion in its planning role? Are there financial or other penalties if Council does not approve the proposed Development Plan or substantially amends it?
- Can the agreement be terminated? And if so, how?
- What are the consequences if the Developer or its parent company is insolvent?
- What security does the Council hold?
- What performance requirements and performance bonds are included? Can the developer simply sit on the land for years?

- What provisions are there to permit changes to the Development Plan? Are there measures to prevent a farce like the construction of the Sea Baths building where changes made in secret were not disclosed until the building was half built?
- What financial obligations are imposed on the Council and its ratepayers?
- What benefits, if any, does the Council receive?
- What controls does Council have over tenancy mix?
- What controls does Council have over unsatisfactory tenants?
- What controls does Council have to ensure that the level of works delivered is to the level agreed in the project documentation?
- What are the provisions regarding site security? The proposed plan involves a 900 patron tavern and 4 nightclubs with 3000 capacity. A major community concern is the controls over the alcohol fuelled anti-social behaviour.
- What provisions are there about responsibility for cleaning, waste management and landscape management?
- It has been claimed as a major justification for the alienation of this public land that the Development Agreement provides community benefits totalling approximately \$65 million. Unchain St Kilda analysis on the limited information publicly available indicates that the benefits are claimed f grossly overstated. Disclosure of the Development Agreement would enable a more accurate assessment of the community benefits of the project.
- What provisions are there to ensure that the open space and buildings including the Palais are maintained at an appropriate level? Could the Triangle site over the 99 year lease become an embarrassing eyesore like the South Pacific complex ultimately razed to enable the current Sea Baths building to be constructed.
- Is the Developer free to transfer its interest to a third party? What controls, if any, does Council have?
- What is the process for dispute resolution?
- What are the provisions regarding responsibility for site contamination?
- What are the provisions regarding construction and delivery risk?
- Once construction of the Project is completed, the Council will grant a Lease to BBC. The Lease requires BBC to pay annual lease and option payments throughout the initial 50 year lease and the 3 options totalling 49 years. How have these amounts been struck? What provisions are there for review?
- What is the position at the end of the lease regarding improvements? Will we be in a position like the Palais lease where the former lessee claims it has rights to various improvements?

We applied under the Freedom of Information laws for of the Development Agreement and various other documents. The Developer refused to consent to release of the Agreement so we were forced to take action in VCAT against the Council and the Developer. On 7 November 2008 VCAT ordered the City of Port Phillip to release a redacted Triangle Site Development Agreement. Most of the important provisions were blacked out. Subsequently the Council released some more provisions on 28 January 2009. We are currently negotiating with the

Council for release of all the non-confidential provisions of the Agreement. If we cannot reach agreement, the matter will be heard by VCAT in 8 weeks time.

The Ombudsman's Inquiry into Tendering of the Triangle

How did we get into this mess? Why did the Council and the Developer propose a project so different from the cultural and entertainment precinct we were promised in the Urban Development Framework? To start to find out what happened we made submissions to the Legislative Council Select Committee on Public Land Development.

The final report of the Select Committee on Public Land Development, released 11 September 2008, outlines government mismanagement of a number of key sites where public land is being developed in the face of community opposition. In relation to the St Kilda Triangle development, the committee found there is considerable basis for community concerns with respect to inappropriate use of valuable public land and has recommended the Victorian Ombudsman investigate the probity of the development processes that were followed in the St Kilda Triangle development by the State Government and Port Phillip Council. Our submissions and the Committee's Report are available on our website at www.unchainstkilda.org/reports.html

The Findings of the Select Committee were:

FINDING 5.10: There is significant concern around the process and outcomes of the proposed St Kilda Triangle development. The Committee finds that there is considerable basis for community concerns with respect to inappropriate use of valuable public land.

FINDING 5.11: Evidence put to the Committee strongly suggests that the proposal should be renegotiated by the Government, the Port Phillip Council and developer in consultation with the community with a view to:

- reducing the size and nature of the development and its impact on the local community and amenity; and
- complying with the Urban Design Framework.

FINDING 5.12: Evidence put to the Committee indicates that the development plan as submitted by Citta Property Group does not conform with the St Kilda Urban Design Framework, and as such the Port Phillip Council may have erred in approving the development.

FINDING 5.13

The St Kilda Triangle development process establishes a dangerous precedent for the development of public land in any suburb or regional town in Victoria in a number of ways because of the combination of:

- the social and heritage significance of the site;
- the unique process involving the passing of the *St Kilda Triangle Act*, which confers virtually all responsibility for the site from the State Government to the Port Phillip Council;
- the multiple, conflicting roles of the Council as proponent, planning authority and committee of management;
- the lack of transparency in the tender process;
- the removal of third party appeal rights; and

- the commercialisation of public land.

RECOMMENDATION 5.5: The Committee strongly encourages the Victorian Government to work more closely with the Port Phillip Council, Citta Property Group and the local community within the existing legislative and contractual arrangements, to reach an outcome to the St Kilda Triangle development proposal that best meets community expectations.

RECOMMENDATION 5.6: The Committee recommends that the State Government allocate sufficient public funds to restore and refurbish the heritage Palais Theatre, to decontaminate the site, and to ensure that any development on the St. Kilda Triangle site is primarily for cultural, entertainment, recreation and public open space as promised to the community.

RECOMMENDATION 5.7: The Committee recommends that the Victorian Ombudsman investigate the probity of the St Kilda Triangle development processes that were followed by the State Government and the Port Phillip Council.

Subsequently the Legislative Council has asked the Ombudsman to investigate the St Kilda Triangle development. It is the first time the government watchdog has had such a referral from the Upper House. This was the course of action recommended in our submission (see our website for the submissions. We will be assisting the Ombudsman in his inquiries to try to understand what went wrong and how to prevent recurrences.

Conclusion

If you want more information please contact Peter Holland, secretary unChain St Kilda Inc at hollandp@netspace.net.au. Similarly contact Peter if you are interested in working further with unChain St Kilda. There are many issues in addition to the St Kilda Triangle that the community and the Council are interested in, such as the St Kilda Harbour redevelopment and the jet ski boating zone proposals for the Brooks jetty beach.