It's Only a Flesh Wound: The VCAT Challenge

unChain St Kilda

May 2009

Summary

Our legal challenge to the Triangle proposal has been lost. The VCAT handed down its decision on 18 May 2009. Our case was brought against the Port Phillip Council, which had approved the Plan in August 2008. The developer, Babcock Brown Citta, was permitted to join the action.

For the full decision see *unChain St Kilda Inc v Port Phillip CC* (2009) VCAT 833 available at

www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2009/833.html

Our VCAT application is only one step in the process - so even though the action has been lost, the judgement points a way forward. Our VCAT application only challenged the Council's procedures: the issue was whether they were unlawful or unreasonable. Our application did not involve a challenge to the merits of the Council's decision and the VCAT decision in no way endorsed the Council's decision on these grounds.

The VCAT decision made it clear that the concerns raised by the community will be considered by the Council at the next stage: of issuing planning permits. The Developer, in its submissions to VCAT, agreed with this proposition. It is at this stage that the Council must consider the merits of the Triangle plan: whether there are too many shops and too many licensed venues.

Therefore there is still a significant opportunity for the Council, in response to its community, to improve the Triangle development through the planning permit process and the Liquor licensing requirements.

Thus we will not be challenging the decision, and as far as UCSK is concerned the legal challenge ends with the VCAT decision.

The next steps are:
1. The Planning and Liquor permits
2. The FOI application for full disclosure of the Development Agreement
3. The Ombudsman's inquiry into the tendering process for the St Kilda Triangle.

The Background

In 2001 the Council prepared the Foreshore Urban Development Framework, which identified opportunities for improvement of the foreshore including the St Kilda Triangle. In May 2007 the Council selected BBC consortium comprising Babcock and Brown and its subsidiary, Citta Property Group, to develop the Triangle. In

August 2008 the Council approved a Development Plan despite substantial community opposition.

unChain St Kilda brought a legal challenge against this Council decision. Although a new council had was elected in November 2008, it felt obliged to vigorously argue in VCAT that the decision of the former council was legally correct.

Major issues include:

- A massive retail complex on the St Kilda foreshore comprising about 160 shops (19,00 sqm), other retail, a gym etc.
- The problems associated with four nightclubs with a capacity of 3000 patrons, a tavern for 900 patrons and numerous other licensed venues.
- New buildings will still block views to the beach and sea and overwhelm the heritage Palais Theatre

The Legal Challenge

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.

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. 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 knew we faced 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'.

We unsuccessfully argued that there were five different grounds on which the Plan was legally invalid: These were
(1) Invalid Approval: No Notice of the August 2008 Plan
(2) Denial of Natural Justice
(3) Unlawful Approval (No Delegation)
(4) Failure to Comply with Requirements of the Port Phillip Planning Scheme
(5) The approval of the Plan was unreasonable

The VCAT decision is only one step in the long process of development of the Triangle. The decision does not conclude that the Council made the right decision on the planning merits in approving the Triangle Development Plan. It also does not represent ultimate approval of the Plan. Some selected quotes from the decision are:

I am not required to determine that the Development Plan is consistent with the Urban Design Framework. It may or may not be, but that is a 'merits' issue falling outside the scope of this proceeding. I am simply satisfied that the Council considered the issue, as it was bound to do.

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It is arguable that, read in conjunction with the Activity Centre Strategy Implementation Plan, there may be little or no strategic planning policy support at present for a large retail use (including a supermarket) within the St Kilda Triangle site. This is however a 'merits' issue that I am not called upon to decide here.

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I am also not convinced that the approval of the Development Plan necessarily carries with it the approval of the retail component. Certainly, the conceptual built form to house a proposed retail use has been generally endorsed. However, the Development Plan is itself only a framework document required by the Development Plan Overlay prior to any planning permit being considered or granted under the zone controls. As I have mentioned, the zone control is the Special Use Zone. A shop is a Section 2 use in the SUZ-3 and the retail 'use' still requires a planning permit. As I understand the SUZ-3 controls, a planning permit is also required for the final form of the buildings and works. Many of the 'relevant considerations' that unChain St Kilda say were lacking in the consideration of the Development Plan are more correctly relevant considerations in the subsequent planning permit processes.

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In relation to the approval of the St Kilda Triangle Development Plan, the debate before the Council was vigorous and controversial. From the material I have discussed in other parts of these reasons, it will be apparent that I have formed the view that there was a basis upon which the Council could have approved the Development Plan, albeit a decision that some other Councils may not have preferred or reached on the same material. Even if the decision is a poor decision in strategic planning terms, as unChain St Kilda contends, that is not sufficient to invalidate the decision under the principle of Wednesbury unreasonableness. I also note again that I do not consider that the Development Plan itself finally dictates the 'use' of the land, given the planning permits for 'use' still required to be obtained by BBC for any retail component. I am satisfied that the decision reached by the Council to approve the Development Plan was at least open to the Council on the material before it, in particular having regard to matters it was required to consider under the DPO-1.

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What next?

There are three important stages in the future:

First the permit process. The VCAT decision made it clear that the concerns raised by the community should be considered by the Council at the next stage: of issuing planning permits. The Developer's submission to VCAT agreed with this proposition. The Developer's submission to VCAT was made by Mr Wright, an eminent QC. He said '*the approval of a development plan does not authorise actual development of the land. In most cases (including this case) a planning permit will still be required before any development can be carried out, and depending upon the zone controls a land use permit may also be required. For example, in this case a land use permit is required to use any part of the land for retail purposes, so any debate as to whether that use is appropriate, or as to the amount of retail floor space that should be permitted, is premature. Those questions will be considered if and when a planning permit is applied for'*.

Let us assume that, despite Babcock & Brown's financial haemorrhaging, the Developer wants to continue with its Triangle proposal. Even though the VCAT action has been lost, there is still a substantial opportunity for the Council and the community to improve the Triangle development through the planning permit process and the Liquor licensing requirements. It is at this stage that the Council can transparently and honestly consider the planning merits of the Triangle proposal.

Second the FOI process: There are many questions still to be resolved concerning the Triangle. Some of these relate to the financial collapse of Babcock & Brown and the impact of the global financial crisis generally. What if Babcock and Brown want to sell their interest to a new player or to simply delay any decisions until the economy recovers? Is the Developer free to transfer its interest to a third party? What controls, if any, does Council have? 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 force full public disclosure of this Development Agreement.

Third the Ombudsman inquiry: A major problem with our VCAT application was that we were not in a position to prove that the Council acted unreasonably or took into account irrelevant considerations. 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? The final report of the Select Committee on Public Land Development, released in September 2008, outlines government mismanagement of a number of key sites. In relation to the St Kilda Triangle development, the committee found there was considerable basis for community concerns with respect to inappropriate use of valuable public land. 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 investigation should cast light into the decision-making process that we as outsiders were able to raise as concerns but not to establish through an examination of the council documents and officers.

The Long Term

A longer term consideration is the role of planning instruments like the UDF. These documents are viewed quite differently by planning lawyers and members of the community. The promises in these documents may not be fulfilled. As the

VCAT decision states:

> *local planning policies and planning scheme provisions do not always lend themselves to only one interpretation. Despite some level of flexibility being desirable to facilitate good planning outcomes, many local planning policies and planning scheme provisions operating in Victoria at present contain too many of what might be best described as 'weasel words'*[1] *that are uncertain of any specific outcome, or open to quite different interpretations, or are capable of being weighted and balanced in very different ways. The Port Phillip Planning Scheme (in particular its local planning policy framework, the DPO-1 and the incorporated Urban Design Framework) contains several such provisions. It is for this reason that the hurdle facing a person alleging that a planning decision is not reasonably open has been held to be a very high one*[2]*. Planning schemes, and the decisions made by reference to them, are often so broadly based that it will be very difficult to say that no responsible authority, acting reasonably, could have made the decision.*

Contact:

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[1] Borrowing the reference from Don Watson's book "*Death Sentences: How Cliches, Weasel Words and Management-Speak Are Strangling Public Language*" (2005).

[2] Following *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 39, at [25] per Morris P.