

## RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

### VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

#### administrative DIVISION

<b>planning and environment LIST</b>	vcat reference No. P2621/2008
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<b>in the matter of</b>	unChain St Kilda Inc v Port Phillip City Council
<b>BEFORE</b>	Mark Dwyer, Deputy President

<b>Nature of case</b>	Whether decision to approve Development Plan invalid or unlawful
<b>REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE</b>	
<b>Law – issue of interpretation or application</b>	Consideration of principles and cases applying to an application for declarations under s 149B of the <i>Planning and Environment Act</i> 1987; consideration of general administrative law principles of invalidity, relevant and irrelevant considerations, and unreasonableness; meaning of requirement to “consider”; consideration of certainty of conditions and whether met
<b>Application – significant, interesting or unusual development</b>	St Kilda Triangle Development Plan; matter relates to a project that has attracted a high level of public interest

#### Summary

This was an application by unChain St Kilda Inc seeking declarations challenging the validity of the St Kilda Triangle Development Plan approved by Port Phillip City Council. The application is concerned with the validity of certain actions or decisions of the Council in relation to the approval of the Development Plan. It is *not* a review of the planning merits of the St Kilda Triangle project generally. The application by unChain St Kilda was unsuccessful, but the decision is nonetheless highlighted due to public interest with the project.

The decision considers principles of administrative law applying to allegations of a deficiency in public notification of the Development Plan; a deficiency in an instrument of delegation to a Council officer; a failure by the Council to comply with its planning scheme; and the relevance of the Urban Design Framework in the development plan approval process. It also considers alleged *Wednesbury* unreasonableness – i.e. whether no Council could

reasonably have come to a decision to approve the Development Plan.

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### administrative DIVISION

<b>planning and environment LIST</b>	vcat reference No. P2621/2008
<b>CATCHWORDS</b>	
<p><i>Planning and Environment Act 1987 s 149B; Port Phillip Planning Scheme; “St Kilda Triangle” project; application for declaration; nature of application under s 149B - not a review of planning merits of project; whether decision to approve development plan invalid or unlawful; whether August 2008 Development Plan a revised and updated version of October 2007 Development Plan or a separate plan; alleged deficiency in public notification and/or denial of natural justice; alleged deficiency in instrument of delegation to Council officer; alleged failure to comply with planning scheme; relevance of Urban Design Framework in approval process; alleged <i>Wednesbury</i> unreasonableness - whether no Council could reasonably have come to decision to approve development plan.</i></p>	

<b>APPLICANT</b>	unChain St Kilda Inc
<b>FIRST RESPONDENT/ responsible authority</b>	Port Phillip City Council
<b>SECond Respondent</b>	BBC Triangle Investments Pty Ltd
<b>SUBJECT LAND</b>	St Kilda Triangle, ST KILDA VIC 3182
<b>WHERE HELD</b>	55 King Street, Melbourne
<b>BEFORE</b>	Mark Dwyer, Deputy President
<b>HEARING TYPE</b>	Hearing
<b>DATEs OF HEARING</b>	9, 10 and 11 February 2009
<b>DATE OF ORDER</b>	18 May 2009
<b>CITATION</b>	unChain St Kilda Inc v Port Phillip CC & Ors (includes Summary) (Red Dot) [2009] VCAT 833

### Order

- 1 The application for declarations under s 149B of the *Planning and Environment Act 1987* is refused, and the application is dismissed.

Mark Dwyer <b>Deputy President</b>		
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<b>APPEARANCES:</b>	
For unChain St Kilda Inc	Ms Michelle Quigley SC and Mr Jason Kane of Counsel, instructed by Aitken Partners, Solicitors. The applicant called the following witnesses: <ul style="list-style-type: none"> <li>• Mr Peter Holland</li> <li>• Mr Paul Morgan</li> <li>• Mr Don Gazzard</li> </ul>
For the Responsible Authority	Mr Ian Pitt SC and Ms Susan Brennan of Counsel, instructed by Minter Ellison, Solicitors.
For BBC Triangle Investments Pty Ltd	Mr Michael Wright QC with Ms Juliet Forsyth of Counsel, instructed by Mallesons, Solicitors. Mr Wright called the following witness: <ul style="list-style-type: none"> <li>• Mr Jamie Govenlock, Town Planner of Urbis JHD.</li> </ul>

## Reasons

### Introduction

- 1 This is an application by unChain St Kilda Inc (**unChain St Kilda**) seeking declarations challenging the validity of the St Kilda Triangle Development Plan (**Development Plan**) approved by Port Phillip City Council (**Council**). Apart from the Council, the project proponent BBC Triangle Investments Pty Ltd (**BBC**) was joined as a respondent, and also contested the application.
- 2 The St Kilda Triangle project has attracted a high level of publicity and controversy. It must be emphasised at the outset that the application before the Tribunal is concerned with the legal adequacy and validity of certain actions or decisions of the Council in relation to the approval of the Development Plan. It is *not* a review of the planning merits of the Development Plan, nor is it a review of the planning merits of the St Kilda Triangle project generally.

### Background

- 3 By way of brief background:
  - The St Kilda Triangle is an iconic site of approx. 28,700 m<sup>2</sup> bounded by The Esplanade, Cavell Street, and Jacka Boulevard, St Kilda;
  - This site is reserved for public purposes under the *Land (St Kilda Triangle) Act 2006*, with the Council as committee of management;
  - Following community consultation in 2001-02, the Council commissioned and later adopted the *City of Port Phillip St Kilda Foreshore Urban Design Framework 2002 (Urban Design Framework)*. The “St Kilda Foreshore” area covered by the Urban Design Framework includes the St Kilda Triangle site;
  - Through Amendment C36 in July 2004, the *Port Phillip Planning Scheme* was amended to include the Urban Design Framework as an incorporated document in the planning scheme, and to introduce a new local policy ‘*St Kilda Foreshore Area Policy*’. Amendment C36 also included the St Kilda Triangle site in a *Special Use Zone – Schedule 3 (SUZ-3)* with a *Development Plan Overlay – Schedule 1 (DPO-1)*;
  - In or around May 2007, BBC was awarded the tender to redevelop the St Kilda Triangle site;
  - The Council released the *St Kilda Triangle Development Plan, 31 October 2007 (October 2007 Plan)* for public comment on 31

October 2007. unChain St Kilda made a substantial submission in relation to the plan. The Council also sought external planning advice on the plan;

- On 13 December 2007, the Council's Statutory Planning Committee considered an officer report and heard public submissions on the October 2007 Plan, but deferred approval of the plan to a further report and meeting;
- On 7 February 2008, the Council's Statutory Planning Committee again met, considered a further officer report, and made three resolutions (**February 2008 resolutions**). What the Committee and/or the Council determined through the February 2008 resolutions forms part of the subject matter in this proceeding. Essentially, the Council conditionally approved the Development Plan subject to a number of specified changes being made, or at least set the parameters for final approval, and authorised its Manager, City Development to finally approve the Plan subject to these changes;
- Sometime in or before early August 2008, BBC submitted the *St Kilda Triangle Development Plan, 6 August 2008* (**August 2008 Plan**). On 8 August 2008, the Manager, City Development approved the Development Plan following an officer assessment report confirming an opinion that the specified changes had been made. This was later reported in a delegate's report to the Council's Statutory Planning Committee on 8 September 2008.

4 A large component of the hearing was taken up with a detailed presentation of relevant documents, including the key documents, plans, planning scheme provisions, and Council reports referred to above. This was necessary to provide a proper background context for the application. I have also taken further time to fully review these documents in considering my decision. I do not propose to comment on all of this material in these reasons, but I will refer to material I consider of particular relevance or determinative value.

### **the section 149B Application**

#### **Section 149B of the *Planning and Environment Act 1987***

5 Section 149B of the *Planning and Environment Act 1987* provides:

##### **149B General application for declaration**

- (1) 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.
  - (2) On an application under sub-section (1), the Tribunal may make any declaration it thinks appropriate in the circumstances.
  - (3) The Tribunal's power under this section is exercisable only by a presidential member of the Tribunal.
- 6 There was no objection to unChain St Kilda having standing to bring a proceeding under s 149B to challenge the validity of the Development Plan approval, or the validity of the Development Plan itself.
- 7 Although the Tribunal had initially been constituted with myself (a presidential member) and Member Hadjigeorgiou (a town planner), I reconstituted the Tribunal at the commencement of the hearing, and I have heard and determined the application alone.

### **Grounds under s 149B**

- 8 The s 149B application was amended prior to the hearing. Ultimately, the grounds contend that the Development Plan approval is invalid by reason of one or more of the following (as paraphrased by me):

#### **Ground 1: Invalid Approval (No Notice of August 2008 Plan)**

unChain St Kilda essentially contend that the Development Plan was not validly approved because the August 2008 Plan was not advertised or displayed for public comment as required by clause 3 of DPO-1.

#### **Ground 2: Denial of Natural Justice**

unChain St Kilda essentially contend that the failure to provide public notification of the August 2008 Plan to enable comment from the public, including unChain St Kilda, is a denial of natural justice.

#### **Ground 3: Unlawful Approval (No Delegation)**

unChain St Kilda essentially contend that the Council's Manager, City Development lacked lawful or sufficient delegation to approve the Development Plan.

#### **Ground 4: Failure to Comply with Requirements of the Port Phillip Planning Scheme**

unChain St Kilda essentially contend that:

- in purporting to conditionally approve the October 2007 Plan in February 2008, the Council misdirected itself in the proper application of the SUZ-3 and the Urban Design Framework;
- the Council made an ineffective approval because the changes it requested were so vague that they were void for uncertainty;
- the changes requested by the Council have not been achieved in material respects in the August 2008 Plan; and/or
- there has been no valid approval of the Development Plan because the Council failed to properly consider the consistency of either the October 2007 Plan or the August 2008 Plan with the Port Phillip Planning Scheme and, in particular, with the Urban Design

Framework.

### **Ground 5: Unreasonableness**

unChain St Kilda essentially contend that the decision to approve the Development Plan was so unreasonable that no Council acting reasonably could have reached such a decision, having regard to the Urban Design Framework, the purposes of the SUZ-3 and the decision guidelines in the DPO-1 (i.e. an assertion of ‘Wednesbury unreasonableness’).

### **Limits on s 149B**

- 9 Before turning to consider each of the specific grounds, I note that all parties made submissions on the limits of the power capable of being exercised by me under s 149B of the *Planning and Environment Act* 1987. There was no significant divergence of opinion, and I simply note for the record the principles established in other proceedings:
- An application for a declaration is in the nature of a judicial review of administrative action. The same principles that operate in relation to judicial review by a court should apply when the Tribunal is exercising a similar power;
  - When reviewing administrative action, the Tribunal does not engage in a review of the underlying merits of the decision. It is not standing in the shoes of the decision maker and determining what the ‘preferable decision’ might be or ought to have been. The Tribunal is considering the legal adequacy and validity of the decision made, by reference to established administrative law criteria.
- 10 It is also common ground that the jurisdiction to make a declaration should be interpreted broadly, and the power to make a declaration under s 149B is discretionary.

### **Ground 1: Invalid Approval? (No Notice of August 2008 Plan)**

#### **Background**

- 11 unChain St Kilda essentially contended that the Development Plan was not validly approved because the August 2008 Plan was not advertised or displayed for public comment as required by clause 3 of DPO-1.
- 12 The Development Plan Overlay is found at cl 43.04 of the Port Phillip Planning Scheme. There is no express notification requirement in the common provisions of the Overlay. However, Schedule 1 of the Development Plan Overlay (i.e. DPO-1) is headed ‘*The Triangle Site – St Kilda*’ and contains provisions specific to this site. Clause 3.0 of DPO-1

includes the following:

*Notification*

...

Before deciding to approve a Development Plan, the Responsible Authority must:

- Advertise and display the plan for public comment for no less than 28 days and must consider any public comments received.

- 13 It is common ground that the October 2007 Plan was advertised and displayed for public comment in accordance with cl. 3.0 of DPO-1. It is also common ground that the August 2008 Plan was not separately advertised or displayed for public comment. The issue is whether separate advertising or display of the August 2008 Plan was in fact required, as alleged.

**Two separate plans, or two versions of the one Development Plan?**

- 14 As part of its argument for this Ground 1, unChain St Kilda contended that the October 2007 Plan and the August 2008 Plan were separate development plans, with both having to separately comply with cl 3.0 of DPO-1, and both therefore requiring separate advertising and display for public comment. It contended that there is an implicit concession to this effect in the August 2008 Plan where that document states (at p 47):

Following the initial Development Plan submission in October 2007, BBC have refined the design ...

- 15 I do not agree with this contention. A simple comparison of the October 2007 Plan and the August 2008 Plan demonstrate that the latter is simply a revised and updated version of the former. They are both successive iterations of the one Development Plan.
- 16 unChain St Kilda also attempted to show that the August 2008 Plan was a ‘transformation’ of the earlier plan, and attempted to highlight several differences (e.g. to built form, public view lines, impact on iconic landmarks, floor area etc). However, I agree with BBC that it is necessary to look at the similarities, as well as the differences, in order to ascertain whether the latter plan is a separate plan or, in reality, a revised version of the earlier plan. In particular:
- Both plans are titled “*St Kilda Triangle Development Plan*”. The dates (31 October 2007 and 6 August 2008) serve to distinguish the versions of the Development Plan, rather than being indicative of separate plans;
  - Both versions are in very similar format; one is 128 pages and the other 129 pages; both have similar contents in a similar order, and a similar urban context and master planning analysis. Indeed, the

wording of many sections is identical as between the plans, save for the changes required by Council conditions;

- Both versions show a ‘similar’ overall development, including the refurbishment of the Palais, open space and pedestrian linkages, entertainment venues, restaurants, a retail component including a supermarket, the Linden II gallery, the William Angliss Institute etc.

- 17 The only material differences between the two versions of the Development Plan is that the latter responds to the Council’s February 2008 resolutions by showing the changes required by the Council. Whilst some changes on the August 2008 Plan, considered separately, might appear significant (e.g. deletion of the proposed ‘Pearl’ building), they are, in context, simply the modifications and revisions to the earlier version of the Development Plan that implement the Council’s required changes. All of the changes to built form, public view lines, impact on iconic landmarks, floor area etc that unChain St Kilda now suggests represent a transformation of the plan are in fact part of that response to the February 2008 resolutions. Indeed, many of the changes reflect, and can be sourced to, unChain St Kilda’s own objection and submission to the Council on the earlier version of the plan.
- 18 It follows that the August 2008 Plan was not a separate Development Plan. It was not therefore a new Development Plan for the purpose of cl 3.0 of DPO-1 that triggered a new and separate requirement for notice under that clause.

#### **Requirement for notice of August 2008 Plan?**

- 19 A question still arises as to whether further notice was required under cl 3.0 of DPO-1 even in relation to a subsequent version of the same plan.
- 20 As indicated, the first version of the Development Plan (i.e. the October 2007 Plan) was the subject of public notice, and unChain St Kilda made a substantial submission in response to that notice. By reference to the Council officer reports that preceded the 13 December 2007 and 7 February 2008 Statutory Planning Committee meetings, it is clear that the Council considered the public submissions received, including the submission from unChain St Kilda.
- 21 These procedures complied with the notification and consultation requirements for the Development Plan in cl 3.0 of DPO-1. The feedback from this process informed the February 2008 resolutions, and led to the resolutions endorsing the Development Plan and authorising the Manager, City Development to finally approve the plan subject to specified changes. There is nothing that can be necessarily implied from the wording of cl 3.0 of DPO-1 (or, for that matter, from the February

2008 resolutions) that required a further round of public notice and submissions on any subsequent version of the plan encapsulating those specified changes. One process of public notice was sufficient to comply with the DPO-1 requirement for the Development Plan.

- 22 unChain St Kilda contended that s 35 of the *Interpretation of Legislation Act* 1984 should be read in conjunction with the objectives of the planning framework in the *Planning and Environment Act* 1987 and the DPO-1. It argued that this necessarily leads to a view that, in this case, public participation rights should be liberally construed to include a right under cl 3.0 of DPO-1 to receive further notice and make a further submission on the later version of the Development Plan prior to its 'final' approval by the Council.
- 23 I do not agree with this view. First, cl 3.0 of DPO-1 simply does not say this. Secondly, as I have found, the Development Plan finally approved is simply a revised version of the same Development Plan that had already been the subject of an extensive public consultation process under cl 3.0 of DPO-1. Thirdly, for reasons I will elaborate on under Ground 2, the rights of public participation under the *Planning and Environment Act* 1987 and DPO are liberal but finite.
- 24 unChain St Kilda may not like the fact that it had no further role in the Development Plan approval process, and that some of its initial objections and submissions had not been supported by the Council or required to be included in the revised version of the Development Plan. However, with the public consultation required by cl 3.0 of DPO-1 having been undertaken extensively in the period from October 2007 until February 2008, the Council was entitled to facilitate the final approval of the Development Plan through its own internal processes. That is the Council's statutory role as the responsible authority having ultimate responsibility for the administration of its planning scheme. As I have indicated, there was in my view no transformation of the Development Plan, nor any material change outside of the specified changes embodied in the Council's February 2008 resolutions, that might have warranted a further round of public notice.

#### **Amendment to Development Plan**

- 25 For completion, I note that cl 3.0 of DPO-1 also includes the following:

The development plan can be amended to the satisfaction of the Responsible Authority. If the amendments are considered by the Responsible Authority to be significant in nature, then the amendment is subject to the advertising and public display requirements included in this schedule.

- 26 The changes arising between iterations of the Development Plan in its

initial approval phase do not in my view trigger the operation of this provision. These changes were not amendments to a plan, in the sense of being significant amendments ‘after the event’ to an approved or final development plan. Rather, they were changes required by the Council in the course of the statutory approval process, in order to achieve that approval and to create the final Development Plan required by the Development Plan Overlay.

- 27 With the St Kilda Triangle Development Plan now finally approved, any amendment to the approved Plan in the future would however require a further round of public notice if the Council considers the amendments to be significant.

### **Conclusion on Ground 1**

- 28 It follows from the above that unChain St Kilda fails in establishing its first ground. The Council properly complied with its obligations under cl 3.0 of DPO-1 in its notification of the Development Plan.

## **Ground 2: Denial of Natural Justice?**

### **Background**

- 29 unChain St Kilda essentially contended that the failure to provide public notification of the August 2008 Plan to enable further comment from the public, including unChain St Kilda, is a denial of natural justice.
- 30 This is somewhat related to Ground 1. However, even if further notice of the August 2008 Plan was not strictly required under cl 3.0 of DPO-1 (as I have found), unChain St Kilda contended that the further notice and opportunity to make a further submission was nonetheless required under established administrative law principles of natural justice and procedural fairness.
- 31 unChain St Kilda initially relied upon the accepted principle that there is now a strong presumption under Australian law that an administrative or executive decision-maker, as the repository of a statutory power, owes a duty to accord procedural fairness to any person affected or likely to be affected by the decision, unless there is a clear contrary legislative intent.
- 32 This statement of principle is uncontroversial. However, issues arise as to whether unChain St Kilda is a sufficiently “affected” person to trigger the presumption in this case and, even so, if there is a contrary legislative intent evident here.

### **Is unChain St Kilda an ‘affected’ person?**

- 33 I agree with BBC that there is at least some doubt that unChain St Kilda is sufficiently “affected” by the Council’s decision (in the sense of its legal standing) to even trigger the presumption of additional rights to procedural fairness, in relation to public notice of the Development Plan. It has been considered that representative or interest groups may not necessarily enjoy the application of the rules of natural justice or the principles of procedural fairness (whether by way of the doctrine of legitimate expectations or otherwise) where the substantive decision does not directly and specially affect the rights, interests, or substantive expectations of particular individuals. The approval of a broad Development Plan for the St Kilda Triangle arguably does not ‘directly and specially’ affect individual rights or interests.
- 34 However, I am prepared to give unChain St Kilda the benefit of the doubt on this preliminary issue. Whilst it is a representative group, it has been given clear standing in its initial objections and submissions to the Council on the Development Plan itself, and has participated in the process in that capacity through a series of Council meetings and community forums. The decision it is essentially contesting is a decision to approve a Development Plan, which is a conceptual framework document for a large development site rather than an individual permit application for buildings and works that might more directly affect individual rights and interests. However, the plan has been prepared at a level of specificity where broader community-level response was sought and received, and that community-level participation is therefore relevant to the question of who may be “affected” for the purpose of legal standing to raise an issue of natural justice or procedural fairness. It also appears that some individuals whose interests are potentially more directly or specially affected have subrogated the representation of their interests to unChain St Kilda on their behalf.
- 35 I do not need to decide this issue finally in this case. Even if unChain St Kilda survives this threshold test of being ‘affected’ (as I believe it does), it still fails in any event in its more substantive argument under this Ground 2.

### **Is there a clear contrary legislative intention to additional natural justice requirements?**

- 36 The key to any presumption of natural justice, as it applies in this case, is in the last phrase of the principle outlined above – i.e. the presumption applies “*unless there is a clear contrary legislative intent*”. It is necessary to examine the particular statutory power under challenge, in its statutory context, to determine the extent and/or content of natural

justice in a particular case, and to identify whether the presumption to accord procedural fairness has been rebutted.

- 37 First, in a broad statutory context, I note that the *Planning and Environment Act 1987* and VPP-based planning schemes (including the Port Phillip Planning Scheme) set out a very clear framework for when public notice of a proposed use or development, or a proposed planning instrument, must be given. In most instances, the rights to third party notice in Victoria are quite liberal by comparison with other Australian states, but equally those rights are regulated and finite, and most often occur once-only within a given planning process.
- 38 Secondly, in a very specific regulatory context under the Port Phillip Planning Scheme, the DPO-1 for the St Kilda Triangle site sets out a very clear notification requirement as to when notice is required to be given of the Development Plan under challenge in this proceeding.
- 39 It is not necessary to resolve finally in this case whether the *Planning and Environment Act 1987* as a whole provides a code that rebuts a presumption that there is some requirement, over and above the notification provisions of the Act, to observe the rules of natural justice, although others have expressed such a view. I am satisfied that the Act, the Port Phillip Planning Scheme, and the very specific notification requirements in the DPO-1, *in combination*, represent a comprehensive scheme for public notice of the Development Plan for the St Kilda Triangle site. I note also that notification requirements under DPO schedules are relatively rare, so the drafters of this clause appear to have made a conscious decision to set out a clear arrangement for public notice for *this* Development Plan. This scheme for public notice clearly rebuts, in my view, any presumption that there is some additional principle of natural justice or procedural fairness requiring further notice beyond this scheme. I agree with BBC that there is no warrant evident from the material to vary or supplement this scheme of public notice under the DPO-1.
- 40 Here, there was a requirement for the St Kilda Triangle Development Plan to be displayed for public comment, and that occurred. The public had an opportunity to participate in the approval process for the St Kilda Triangle Development Plan, and did so. Indeed, unChain St Kilda and others were given a ‘hearing’ at a special meeting of the Council’s Statutory Planning Committee as part of the Council’s responsibility under cl 3.0 of DPO-1 to consider public submissions made in response to the public notice. I believe it is drawing a long bow for unChain St Kilda to now suggest that the principles of natural justice should be applied in this case, over and above the notification scheme already existing in the DPO-1, to require further notice and submission rights on

a successive version of the same Development Plan. This is particularly the case where that later version of the Development Plan was simply responding to the initial notice and submissions and the Council's February 2008 resolutions. To endorse such a view would potentially create a statutory planning process that would never end.

## **Conclusion on Ground 2**

- 41 It follows that unChain St Kilda fails in establishing its second ground. The Council had no additional duty arising from the principles of natural justice (over and above the DPO-1 requirement under the Port Phillip Planning Scheme) to give further public notice of the later version of the Development Plan. Even if unChain St Kilda is affected by the decision, there was no denial of natural justice to it in the circumstances of this case.

## **Ground 3: Unlawful Approval? (No Delegation)**

### **Background**

- 42 unChain St Kilda essentially contended that the Council's Manager, City Development lacked lawful or sufficient delegation to approve the Development Plan.
- 43 The February 2008 resolutions made at the Council meeting on 7 February 2008 were as follows:
- 1.1 That the Statutory Planning Committee note that key outcomes envisaged by the Planning Scheme and Urban Design Framework are achieved by the submitted proposal including:  
  
[8 matters are then set out including the provision of cultural and entertainment uses, improved pedestrian access, preserving the Palais etc]
  - 1.2 That the Statutory Planning Committee notes that, on balance, the submitted Development Plan achieves a high level of compliance with the Planning Scheme and St Kilda UDF but also notes that further work is required with respect to the following matters in order to make the submitted Development Plan suitable for approval:  
  
[11 matters are then set out including reduction of the Linden building to improve view lines, reduced patron numbers in certain entertainment venues, introduction of "caps" to various land uses, improvement of ESD credentials for the proposal etc]
  - 1.3 That the Statutory Planning Committee, being the Responsible Authority, having caused the application to be exhibited and having

received and noted the submissions, authorises the Manager, City Development to approve the St Kilda Triangle Development Plan 31 October 2007 subject to the following changes first being made:

[60 matters are then set out within 10 specified sections of the plan, including several detailed design changes within the masterplan]

- 44 It is noted that these are resolutions of the Council's Statutory Planning Committee although, in the third resolution, the Committee purports to step beyond its Committee function to assume its role as responsible authority. The drafting of this third resolution is inelegant at best, as it is the Council (rather than the Committee) that is the responsible authority under the *Planning and Environment Act 1987*. However, it was common ground that the Committee comprised all of the Councillors and thus effectively had the same membership as the Council, and unChain St Kilda did not seek to exploit this anomaly. I therefore perceive that the third resolution evidences an intention by the Responsible Authority (i.e. effectively the Council) to demonstrate compliance with the requirements of cl 3.0 of DPO-1, and to facilitate the authorisation to the Manager, City Development.

### **Conditional Approval**

- 45 Clause 3.0 of DPO-1 includes the following:

The Responsible Authority may condition the approval of the Development Plan.

- 46 It was common ground between all parties that the February 2008 resolutions represented a "conditional approval" of the Development Plan, subject to compliance with the conditions set out in the third resolution to be confirmed by the Manager, City Development. This was also the view of the three witnesses called by unChain St Kilda who were present at the meeting on 7 February 2008.
- 47 unChain St Kilda did not contest that the Statutory Planning Committee had delegated authority to conditionally approve the plan. I also agree with the Council's contention that that the Committee (or the Council as responsible authority) was not required to settle every last detail of the conditions before its conditional approval, with administrative tasks being capable of being attended to by Council officers on its behalf.
- 48 If it is accepted that there was a conditional approval of the Development Plan in the February 2008 resolutions, then it follows that the Development Plan was *approved*, albeit conditionally, on 7 February 2008. No further or final approval was therefore necessary. In such event, the third resolution, authorising the Manager, City Development to "approve" the plan subject to changes is curiously worded. However, it would seem (in practical terms) to evidence an intent by the Council to

authorise its Manager to co-ordinate and check compliance with the conditions, and then to implement the Council's prior approval by endorsing the revised version of the plan with that approval.

- 49 On this reasoning, unChain St Kilda fails at the first hurdle on this Ground 3, as the Manager, City Development did not actually approve the Development Plan in August 2008. That had already occurred through the Committee's conditional approval in February 2008.

### **Delegation**

- 50 Despite this finding, I have nonetheless considered the more substantive argument raised by unChain St Kilda, namely the sufficiency (if any) of the delegation held by the Manager, City Development to approve the Development Plan.
- 51 Section 188 of the *Planning and Environment Act 1987* and s 98 of the *Local Government Act 1989* both provide power for a Council to delegate its powers, discretions or functions (subject to exceptions) to a Council officer. It is common ground that these provisions would enable the Council to delegate power to its Manager, City Development to approve the Development Plan. The contention of unChain St Kilda is that no such delegation exists, or that any delegation is vague and uncertain. However, I consider that this contention fails at three levels.
- 52 First, the third resolution itself provides a clear authorisation to the Manager, City Development, and it is possible that it may either be characterised as a delegation or is tantamount to a delegation;
- 53 Secondly, there is in any event an Instrument of Delegation. I do not agree with unChain St Kilda that the February 2008 resolution had to expressly refer to the specific power or delegation it was relying upon. The Council provided me with a document entitled "*Port Phillip City Council Instrument of Delegation to Members of Council Staff by the Council*" dated 23 April 2007. This Instrument is extremely broad, and I agree with the Council and BBC's initial analysis of it, specifically:
- Under the Development Plan Overlay in clause 43.04-1 of the Port Phillip Planning Scheme, a Development Plan must be prepared and approved "*to the satisfaction of the responsible authority*" (i.e. in this case the Council). This is the source of the power to approve the Development Plan for which a delegation must be shown;
  - The Instrument delegates specific powers under the *Planning and Environment Act 1987* to groups of officers. The Manager, City Development is, amongst other things, a Group A officer and a Group 6 officer;

- As a Group A officer, the Manager, City Development has delegated power under s 6(2)(h) of the *Planning and Environment Act 1987*, which is expressed in the Instrument of Delegation to be the “*power to say that a specified thing has been done to the satisfaction of Council*”.
- This section of the Instrument therefore provides a sufficient basis for the Manager, City Development, as delegate of the Council, to form the view that the Development Plan had been prepared to the Council’s satisfaction and could be approved.

54 The Council and BBC also referred me to another section of the Instrument. As a Group 6 officer, the Manager, City Development also has delegated power under s 14 of the *Planning and Environment Act 1987*, which is expressed in the Instrument to be the power to “*carry out duties of the Responsible Authority*”. I am less convinced that this more general provision (and its reference to duties under s 14) contemplates the approval of a Development Plan under delegation. It is however unnecessary to rely upon it.

55 Thirdly, I do not agree with unChain St Kilda that the Instrument of Delegation is so vague and obscure that it is incapable of any definite or precise meaning. I do not agree that there needs to be found in the Instrument some specific wording that delegates to a nominated officer an express power “to approve a Development Plan” or words to that effect. That would be helpful, but it is not required. The Instrument is perhaps poorly worded, but I consider that its intent is clear, in giving a Group A officer such as the Manager, City Development the delegated power to approve a Development Plan to the responsible authority’s satisfaction.

### **Conclusion on Ground 3**

56 It follows that unChain St Kilda fails in establishing its third ground. The Council had approved the Development Plan on 7 February 2008. Even if the Manager, City Development required a formal delegation in order to implement that “conditional approval” through a “final approval” of the revised version of the Development Plan in August 2008, I am satisfied that the Instrument of Delegation dated 23 April 2007 provides such a delegation.

### **Ground 4: Failure to comply with requirements of the Port Phillip Planning Scheme?**

## Background

- 57 unChain St Kilda essentially contended that:
- in purporting to conditionally approve the October 2007 Plan in February 2008, the Council misdirected itself in the proper application of the SUZ-3 and the Urban Design Framework;
  - the Council made an ineffective approval because the changes it requested were so vague that they were void for uncertainty;
  - the changes requested by the Council have not been achieved in material respects in the August 2008 Plan; and/or
  - there has been no valid approval of the Development Plan because the Council failed to properly consider the consistency of either the October 2007 Plan or the August 2008 Plan with the Port Phillip Planning Scheme and, in particular, with the Urban Design Framework.
- 58 I made a preliminary ruling at the hearing, following objection from unChain St Kilda, to admit a witness statement and to hear evidence from Mr Jamie Govenlock of Urbis, on behalf of BBC, on the issues raised in this ground, subject to reserving my view on the weight and/or relevance that should ultimately be attached to that evidence. I have subsequently formed a view that Mr Govenlock's broader opinion evidence should be disregarded in the circumstances of this case. I have however had some regard (in combination with the submissions and evidence of others) to Mr Govenlock's evidence on the factual issue of whether the conditions imposed by the Council have been met in the final version of the Development Plan .

### The planning scheme framework for the St Kilda Triangle site

- 59 Before turning to the specific sub-grounds, it is useful to say something about the specific planning scheme framework for a Development Plan for the St Kilda Triangle site. In summary:
- Clause 3.0 of DPO-1 states that:
    - The purpose of the Development Plan is to ensure that the future use and development of the land occurs in an integrated manner, to provide certainty as to the scale and form of development of the land, and to provide a framework to achieve the Purpose set out in Schedule 3 to Clause 37.01 [i.e. in SUZ-3]
  - The purpose of that zone (i.e. in SUZ-3) for the St Kilda Triangle site refers to 9 matters. Four of these that are relevant are:
    - To implement the Incorporated Document '*St Kilda Foreshore Urban Design Framework, 2002*', which envisages the integrated renewal of The Triangle Site to provide a variety of public spaces, and

entertainment and cultural venues.

- To facilitate new buildings and complementary land uses which support the continued viability of the Palais Theatre.
- To maximise public accessibility and use of the land through the creation of versatile public space to support a variety of activities ...
- To ensure that the height, siting and design of new development protects and enhances important views and vistas ...

The five purposes I have not mentioned are all related to design or development. None refer to ‘use’. There are only the two indirect references to ‘use’ in the purposes highlighted above.

- There is no requirement under the SUZ-3 itself for the approval of a Development Plan. That requirement arises only under the DPO-1.
- Clause 3.0 of DPO-1 sets out 12 requirements for what must be specified and included in the Development Plan for the St Kilda Triangle site. These include site shape and orientation, easements, site levels, subdivision sequencing, detailed design principles, building envelopes, a heritage assessment, shadow diagrams etc. It is apparent that these are primarily design and development matters. The only criterion relating to ‘use’ is that the Development Plan must show “the proposed use and activity of each part of the land ...”.
- Clause 4.0 of DPO-1 provides that, in assessing a Development Plan, the responsible authority *must* consider 13 specified matters. These are therefore the mandatory considerations. Three of these that are relevant are:
  - Consistency with the Incorporated Document – ‘*St Kilda Foreshore Urban Design Framework, 2002*’, including but not limited to: [8 matters are then set out including retention and refurbishment of the Palais, pedestrian and visual connections, impact on view lines, provision of public spaces etc].
  - The purpose of the zone and any relevant local planning policy.
  - The potential of the development plan to achieve integrated use and development of the land.

The ten criteria I have not mentioned do not refer to ‘use’. Again, there is only an indirect reference to ‘use’ in the third criterion above.

- 60 What follows from this is that the Development Plan, as its name suggests, is primarily concerned with ‘development’ and matters of built form – e.g. the broad design and development issues affecting the site. It is not a document intended to dictate ‘use’, although it may show the proposed uses as a means of demonstrating the necessary future integration of development and use. This is consistent with the way

overlay controls, such as the Development Plan Overlay, operate under the Victorian planning system. Matters relating to the ‘use’ of land are primarily dealt with under zone controls. For the St Kilda Triangle site, the zone control is the Special Use Zone (i.e. the SUZ-3). The SUZ-3 indeed contains a Table of Uses in cl 1.0. I note for example that, in this Table, a ‘shop’ is a discretionary Section 2 use, requiring a permit, with no floor space restriction specified.

### **The Urban Design Framework**

61 The planning scheme provisions above clearly refer to the Urban Design Framework, and the Urban Design Framework is an incorporated document under the Port Phillip Planning Scheme. The status and importance of this document formed a central pillar to the arguments of unChain St Kilda in this proceeding. I was taken at length through the document, leading to the conclusion by unChain St Kilda that:

What is notable about the content and direction set in the UDF for the Triangle site is that nowhere does it countenance, promote or encourage any significant retail focus or floorspace or office component. Rather, it specifically notes that that *some* retail and commercial uses which support the primary *uses* of cultural, leisure, entertainment and open space consistent with the historical uses of the site may be appropriate.

62 In my opinion, it is hardly surprising that the Urban Design Framework does not deal squarely with any proposed retail or commercial use. The quote above serves to demonstrate, to my mind, that unChain St Kilda has misconceived the nature and purpose of the Urban Design Framework and its role in the evolutionary planning for the St Kilda Triangle site. In particular:

- The Urban Design Framework covers a much broader area of the St Kilda Foreshore. Only some parts of the UDF relate directly to the St Kilda Triangle site.
- The Urban Design Framework, as its name suggests, is intended to deal primarily with matters of urban design and built form, and to provide a framework. This is apparent from the introductory paragraphs on page 1 of the UDF under the heading “What is an Urban Design Framework?” By way of example:

An urban design framework deals with the physical form of a place – the design of buildings and spaces, traffic access, landscape themes and ecological processes...

An urban design framework makes beginnings, it does not make endings.

- Upon careful analysis of this Urban Design Framework, insofar as it relates to the St Kilda Triangle site, it is primarily dealing with matters of spatial context, built form, and design principles. This is

most readily apparent in the specific section on opportunities and proposals for the St Kilda Triangle site. This section sets out specific design principles, discusses whether a western building is a good idea, and discusses building heights and car parking. There are then 11 proposals, including the following:

- Construct a new building at the rear of Palais Theatre ...  
Preferred supporting uses for this building would relate strongly to the precinct's cultural and entertainment heritage, and could comprise dance and entertainment venues, cinemas, galleries, a bar or nightclub. Other possible uses may include a small hotel, reception and conference centre, restaurant, artists' studios or retail.
- Create a predominant new public plaza west of Palais Theatre, incorporating some structures for shops, studios and activities to front it ...
- Replace the Palace Entertainment Complex building with an improved, contemporary building ...  
Any new building(s) should ... provide for cultural and entertainment uses, such as a dance venue, cinema, ice skating rink, and artists' studios, craft shops and gallery space ...

The 8 proposals I have not referred to relate to design and development matters, and not 'use'. Use is only referred to in the three proposals highlighted above.

- 63 Whilst the Urban Design Framework clearly makes some comments in relation to future or proposed land use activities, and unChain St Kilda has understandably focussed on these, these generalised comments must be read having regard to the context and purpose of the UDF. Like the Development Plan, the Urban Design Framework is not a document intended to dictate 'use'.

### **Council misdirection on SUZ and UDF?**

- 64 unChain St Kilda's first and fourth sub-grounds are that, in purporting to conditionally approve the Development Plan, the Council misdirected itself in the proper application of the SUZ-3 and the Urban Design Framework. It also alleged that there has been no valid approval of the Development Plan because the Council failed to properly consider the consistency of either the October 2007 Plan or the August 2008 Plan with the Port Phillip Planning Scheme and, in particular, with the Urban Design Framework. In its particulars, unChain St Kilda contended that the Council failed to apply the tests set out in the UDF and SUZ-3 "which require the subject site to be used primarily for a variety of public spaces, entertainment and cultural venues that maximise the public benefit".
- 65 It will be apparent from the foregoing discussion that I consider it is

unChain St Kilda that has misconceived the status and relevance of the SUZ-3 and the Urban Design Framework in relation to the approval of the Development Plan. The SUZ-3 has a limited statutory role in the approval of the Development Plan under DPO-1, and neither the SUZ-3 or the UDF 'require' a particular land use outcome.

- 66 Furthermore, the decision guidelines only require the Council to "consider" the consistency of the Development Plan with the Urban Design Framework. I agree with the Council and BBC that to "consider" is not necessarily "to adopt or follow", or "to give effect to". It has been held that it is open to a Council to properly consider relevant policies - to turn its mind to them and, acting in good faith and without regard to irrelevant matters, to reach a decision that is contrary to one or more of them.
- 67 Indeed, a Council must often balance competing or seemingly conflicting decision guidelines, planning scheme provisions and policies when "considering" them. I note that, in this case, one of the evaluation reports before the Council noted that it was evident that not all design principles in the UDF and SUZ-3 could be achieved "*as some are mutually exclusive*".
- 68 I am satisfied that the Council did "consider" the consistency of the Development Plan with the Urban Design Framework, as was required under cl 4.0 of DPO-1. I was taken to a number of specific examples of this, drawn from various evaluation and officer reports before the Council, and Council agenda items and minutes. These included (but are not limited to) the following:
- Report by Jim Holdsworth, Convenor of the Design Review Committee, entitled '*Evaluation of St Kilda Triangle Development Plan, 31 October 2007 against St Kilda Foreshore Urban Design Framework and Schedule 3 to the Special Use Zone in the Port Phillip Planning Scheme*' (27 November 2007);
  - Report by Matrix Planning Australia (December 2007);
  - Report by Council CEO entitled '*Background report to the St Kilda Triangle Site*', and detailed Council officer report (both contained in agenda for Statutory Planning Committee, 13 December 2007);
  - Report of the Design Review Committee (18 January 2008);
  - Report by SGS Economics & Planning entitled '*Triangle Site Development, Economic and Community Impact Assessment*' (January 2008);
  - Detailed Council officer report contained in agenda for Statutory Planning Committee, 7 February 2008.
- 69 unChain St Kilda produced no contrary evidence to these very specific examples. These examples demonstrate to my mind a very detailed

consideration, in particular, of the Urban Design Framework. All of this material was before the Council's Statutory Planning Committee (at relevant times) when it resolved on both 13 December 2007 and 7 February 2008 that "*key outcomes envisaged by the Planning Scheme and Urban Design Framework are achieved by the submitted proposal*".

- 70 In making this finding, 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.

### **Failure to take into account relevant considerations?**

- 71 In its written submission, unChain St Kilda suggests that the Council failed to have regard to a number of other relevant considerations. Several of these are encapsulated by the discussion above. Another addresses the failure to give further public notice, which I have also already addressed. The others relate primarily to matters in the local planning policy framework in cl 21 of the Port Phillip Planning Scheme – for example, the *Retail Land Use Framework Plan*, the *Commercial Land Use Framework Plan*, the *Activity Centre Strategy Implementation Plan*, and the *St Kilda Foreshore Area Policy*.
- 72 Following objection by the Council and BBC, unChain St Kilda agreed that its submissions should be read as being generally confined to the matters in its amended statement of grounds. These grounds and particulars had not raised a failure to have regard to relevant local policies such as those referred to above, so I will address this issue only briefly.
- 73 As indicated earlier, one of the decision guidelines in cl 4.0 of DPO-1 is to consider "any relevant local planning policy". The contention of unChain St Kilda is that the Council misdirected itself by failing to have regard to these specific local policies in approving 'a very large retail component' as part of the Development Plan. In summary, I am of the view that:
- unChain St Kilda provided no direct evidence that the Council failed to at least "consider" its local policy framework when approving the Development Plan. Several of the evaluation and officer reports, and Council agenda items and minutes, referred to earlier contain references that suggest the Council did broadly consider these issues and, in particular, considered the proposed retail component;
  - The *St Kilda Foreshore Area Policy* does not purport to deal with

retail use. Key matters in this policy are similar to those in the Urban Design Framework (which the policy seeks, in part, to implement) and have been considered;

- Nothing can really be drawn from the *Retail Land Use Framework Plan* in cl 21-05-10 of the Port Phillip Planning Scheme, other than that the St Kilda Triangle site is not in a retail centre on that plan. 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. A similar comment applies to the *Commercial Land Use Framework Plan*.

74 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.

75 I readily appreciate that there may be no third party rights in the future permit processes if the proposed development is consistent with the Development Plan, and this lies at the heart of the concerns of unChain St Kilda. However, this is simply a reflection of the exemptions existing in the Port Phillip Planning Scheme, and the way in which the Development Plan Overlay operates within the Victorian planning system. Much as unChain St Kilda may wish otherwise, these are not matters open to administrative review in this proceeding.

#### **Irrelevant considerations?**

76 I have mentioned earlier that the SUZ-3 has a limited statutory role in the approval of the Development Plan under DPO-1, and no approval of the Development Plan is required under the Special Use Zone. However, as also indicated earlier, cl 4.0 of DPO-1 provides that, in assessing a Development Plan, the responsible authority must consider 13 specified matters, including the *purpose* of the zone (i.e. SUZ-3).

- 77 As is apparent from the discussion above, unChain St Kilda dwelt primarily (and almost exclusively) on the first of the SUZ-3 purposes - namely the implementation of the Urban Design Framework which envisages the integrated renewal of the Triangle site to provide a variety of public spaces, and entertainment and cultural venues. This formed a key part of the argument that the Council had misdirected itself on the proper application of the SUZ-3, and/or that the Council had taken into account irrelevant considerations in giving undue weight to (and supporting) the retail and commercial components of the proposed development.
- 78 There are however eight other purposes stated for the SUZ-3, setting out a variety of objectives for the St Kilda Triangle site. None of these purposes are stated to be paramount to the others, and it is a central tenet of planning decision making in Victoria that responsible authorities must integrate relevant policies and balance conflicting objectives in favour of net community benefit and sustainable development.
- 79 One of the other eight purposes of the SUZ-3 is to “*facilitate new buildings and complementary land uses which supports the continued viability of the Palais Theatre*”. Both the Council and BBC submitted that this purpose reflected the possibility that a level of commercial development was required to cross-subsidise the public open space, entertainment and cultural facilities, including in particular the refurbishment of the Palais Theatre.
- 80 Within the confines of my jurisdiction in this proceeding, it is not for me to express a view on the planning merits as to how this purpose might be applied or weighted, in combination with the other purposes of the SUZ-3 and the other decision guidelines in DPO-1. The extent to which commercial cross-subsidies might affect the achievement of other strategic planning objectives for redevelopment of a major site are a vexed issue in planning, and obviously lie at the heart of the concerns of unChain St Kilda in this proceeding. It is ultimately a matter for an integrated and balanced consideration by the Council.
- 81 However, I am satisfied that this purpose in the SUZ-3 did provide the Council with at least some basis for considering a retail and commercial component within the Development Plan framework. The report by Matrix Planning Australia for the Council (referred to above) had also noted this possible justification for the retail and commercial components. I also note again that ‘shop’ is a permitted use in the zone, and planning permits are still required under the SUZ-3 for any final development or use for such a purpose. I do not therefore consider that the Council took into account irrelevant considerations or misdirected itself on this issue, given its requirement to at least consider

complementary land uses that support the continued viability of the Palais Theatre.

### **Certainty of Conditions**

- 82 In its second sub-ground, unChain St Kilda contends that the Council made an ineffective approval because the changes it requested in the February 2008 resolutions were so vague that they were void for uncertainty.
- 83 As indicated, the Council's third resolution on 7 February 2008 had set out 60 required changes within 10 specified sections of the Development Plan. In its amended statement of claim, unChain St Kilda had not pleaded any specific changes that it suggested were vague and uncertain, but attempted to demonstrate this in oral submissions by reference to a number of changes listed in the third resolution. To my mind, the demonstration proved manifestly unsuccessful. unChain St Kilda later supplemented these submissions with a 'Comparative Table' provided by its counsel. That Table only deals with 15 of the 60 conditions, and still makes only generalised assertions such as "lacks specificity", "not properly demonstrated", "unclear and vague" etc rather than providing any further detail.
- 84 In my view, many changes are of sufficient certainty by simple reference to the third resolution itself. Some simply required a clearly identifiable item to be deleted. Examples include the following:
- 2b) the building east of the toilets deleted and replaced with additional open space.
  - 2f) removal of any solid upstand to the Yellow Brick Road handrail when viewed from the Upper Esplanade and the Grassy Slopes to maximise the transparency of the balustrade.

I do not agree with unChain St Kilda that these are vague and uncertain as to outcome, particularly in the context of a broad Development Plan where a planning permit is still required for final buildings and works. In relation to the second of these conditions, an explanation for the condition can also be sourced to a report of the Council's Design Review Committee which is itself discussed and referenced in a Council officer report.

- 85 There are others that are perhaps less clear by reference to the third resolution alone. For example:
- 2a) the height and roof form of the "Linden" building revised to improve the view from the Upper Esplanade to the Palais facade and the Luna Park entrance (maximum RL 16.5).

For these sorts of examples, unChain St Kilda rhetorically enquired: How high? How revised? To what effect? Its contention was that the

condition lacked specificity and further investigation was required, this being another step in the process that vitiated the ability of the Council to conditionally approve the plan at that time with any certainty of outcome.

- 86 I agree however with the Council that it is only if a condition can be given no sensible or ascertainable meaning that it will be void for uncertainty. Ambiguity in the condition alone will not invalidate a condition. Where conditions operate into the future, they cannot be worded to contain every last detail, and an overly technical approach cannot be applied.
- 87 Moreover, the arguable lack of clarity in the short-form wording of some of the conditions is not necessarily an indication that the meaning is not ascertainable or well understood by those required to comply with the condition. Taking the last example a step further, the condition 2a) relating to the revised height of the Linden building provides a maximum RL height limit, so the maximum height of the building is established. The intent is clear – to improve the view. Therefore, although the exact final height may not be established with certainty (other than that it cannot exceed the maximum), any final height below the maximum will still achieve the intent. Furthermore, this condition is sourced from a detailed Council officer report where the basis for the recommended change is expressly discussed at some length. I am satisfied that the basis for compliance with this condition is sufficiently ascertainable, and the condition is not void for uncertainty.

- 88 Another example:

2.8d) Floor area, room numbers and patron numbers for the gymnasium, residential hotel, tavern/hotel and Community uses.

unChain St Kilda submitted that this lacked specificity and was unclear or vague. I agree it is not, on its face, particularly clear, but common sense would suggest it is simply requiring this information to be shown on the final Development Plan. Moreover, when one has regard to the Council officer report, the meaning and basis for the condition is readily ascertainable. This information had been shown in the traffic analysis as a basis for determining car parking requirements, and the Council simply wanted that information transferred to the relevant section of the Development Plan itself.

- 89 I have referred to just a few examples. However, I have reviewed and assessed all of the 60 conditions in the third resolution, assisted in part by unChain St Kilda's 'Comparative Table' referred to above, and also a 'Table of Issues' provided by the Council that cross-references several of the conditions to discussion in Council documents and where further

detail is provided. Despite unChain St Kilda's contention to the contrary, I am satisfied that general words used in some of the conditions (such as "widened", "nominal", "similar in height", "raised" etc) are all capable of an ascertainable meaning when considered in context or by reference to other documents, even though actual measurements are not stated in the conditions themselves. This is the very reason, no doubt, that the Council authorised its Manager, City Development to monitor compliance with the conditions, and provide a final sign-off to the Council's satisfaction. Indeed, I am satisfied upon review of all of the conditions that, although some could have perhaps been worded better, all have an ascertainable meaning, and none are void for uncertainty.

### Conditions met?

- 90 In its third sub-ground, unChain St Kilda contended that the changes requested by the Council have not been achieved in material respects, and that the Manager, City Development could not therefore have given final approval to the Development Plan on 8 August 2008.
- 91 In its amended statement of claim, unChain St Kilda refers to 13 conditions that it says are "not properly demonstrated". For one of these conditions – reduction in retail floor area – unChain St Kilda also contended that the change required by the Council is "not achieved". Again, unChain St Kilda attempted to demonstrate this in oral submissions, supplemented by its 'Comparative Table'. Again, the Council responded with its 'Issues Table' that cross-referenced several of the conditions to discussion in particular Council documents, including a Council officer assessment prepared on 6 August 2008 (**Council assessment**) that formed part of the material before the Manager, City Development when he gave the final approval on 8 August 2008. I have also had regard to Appendix E to Mr Govenlock's witness statement on the factual issue of whether particular conditions are met.
- 92 I will again refer to some examples. For example, the first matter raised by unChain St Kilda relates to Condition 2(a) that had required:
- 2a) the height and roof form of the "Linden" building revised to improve the view from the Upper Esplanade to the Palais facade and the Luna Park entrance (maximum RL 16.5).

In its amended statement of claim, unChain St Kilda's 'particulars' allege that:

- a) the reduction in height of the Linden building has not been properly demonstrated.

unChain St Kilda contends that the roof form has not been altered based on 3-D models (at p46 of the Development Plan), and that 'View 1' (at p48) is not the correct position from which to assess the impact. However,

the Council assessment notes that the 'View 1' in the earlier plan had been incorrect. It then notes, in relation to this condition:

Satisfied – Max RL 16.5 shown p40  
Satisfied – Wavy roof removed from all pictures including artistic impression p9, 33 sections at 42, 45, 46, 3-D diagram and from 56, 58 & 60

- 93 From even a cursory review of the Development Plan, the officer assessment is correct. The 3-D model shows the new RL height limit, reduced from 18.5 on the October 2007 Plan to 16.5 on the August 2008 Plan (and in both relevant views at pp45-46). The new RL 16.5 also appears on other sections within the plan (e.g. p40). This is the key demonstration of the reduction in height required by the condition and, by itself, puts paid to the assertion by unChain St Kilda that the reduction in height has not been properly demonstrated. The reduction in height is also noted in the text (at p47).
- 94 The revision of the roof form is also clearly demonstrated. The 3-D model had not shown the originally proposed wavy roof form for the Linden building. However, by comparison of the two versions of the plan, the artistic impressions clearly show the change of roof form from a wavy roof to a flatter roof structure. This appears in 'View 1', but this view is only one of several views used in the Development Plan to demonstrate view lines. 'View 7' (at p56) is the more relevant view for the purposes of Condition 2(a) - i.e. the view from the Upper Esplanade to the Palais facade and the Luna Park entrance. This amended 'View 7' (along with its text) show that the building and its roof line has been altered, and the building mass of the Linden building truncated to maintain pedestrian views along the Upper Esplanade. I am satisfied that this condition is sufficiently demonstrated in the final revised plan.
- 95 As another example, Condition 2.8(c) had required:

2.8c) The minimum and maximum floor areas for the various subgroups of "retail" including "supermarket" and the general locations to which the various retail land uses categories will be directed including a reduction in shop floor space to a maximum total of 19,000sq.m.

In its amended statement of claim, unChain St Kilda's 'particulars' allege that:

- b) the reduction in retail floor area has not been properly demonstrated;
- c) the reduction in retail floor area has not been achieved.

unChain St Kilda contends that the table of land uses (at p73 of the Development Plan) shows a total retail of at least 21,100m<sup>2</sup> (made up of 19,000m<sup>2</sup> of 'shop' use together with a 100m<sup>2</sup> post office and a 2,000m<sup>2</sup> market). It also submitted that there could be a possible maximum retail of 27,700m<sup>2</sup> (if 6,600m<sup>2</sup> of food and drink premises is also included).

However, the Council assessment notes, in relation to this condition:

Satisfied at p73 and major/minor use categories on pages 75-80

- 96 The argument by unChain St Kilda in relation to this condition misconceives the distinction, under Victorian planning law, between a “shop” use and other forms of retail premises – a distinction I expect is well understood by unChain St Kilda’s legal and planning advisers. A “shop” is defined in cl 74 of the Port Phillip Planning Scheme. It includes a “supermarket”, but does not include a “postal agency”, “market” or “food and drink premises”. These other forms of retail premises are separately defined land use terms in cl 74. It follows that these other forms of retail premises are not included in the floor area for “shop” that is required by the condition to be reduced to 19,000m<sup>2</sup>. The condition does not require any reduction in floor space for any of these non-shop retail uses. The condition only requires a reduction in “shop” floor space.
- 97 Condition 2.8(c) requires a reduction in “shop” floor space to a maximum of 19,000m<sup>2</sup>. This is clearly shown in the Table on p73, with a break-up between supermarket (3,600m<sup>2</sup>) and ‘other’ shop uses also shown, as required by the condition. The Table also has a notation that the ‘other’ shop uses are subject to a maximum floor space of 6,600m<sup>2</sup> for fashion shops, this having also been required by a separate Condition 2.8 (j). As the Council assessment notes, the general locations for particular retail uses are shown as major or minor land uses on the plans that follow the Table (pp75-80). For example, a supermarket is shown as a ‘basement’ use on p76.
- 98 I am satisfied that Condition 2.8(c) is substantively complied with. I agree with Mr Govenlock that there is a technical non-compliance with Condition 2.8(c) to the extent that the retail sub-groups, other than “shop”, show only an indicative floor space (eg 100m<sup>2</sup> for post office, 2,000m<sup>2</sup> for market etc) rather than the maximums and minimums for each required under the strict wording of the condition. However, I am satisfied that the condition is met in all material respects. The key ‘maximum’ floor space required by the condition was for “shop” use, and this is clearly shown. The minor non-compliance (in showing only an indicative floor space for some other retail uses) is not a sufficient basis to invalidate the Development Plan, nor did unChain St Kilda claim this. I agree with BBC that a minor deviation will not invalidate the plan where the intent and purpose of the condition is achieved.
- 99 As another example, Condition 2.8(d) had required:
- 2.8d) Floor area, room numbers and patron numbers for the gymnasium, residential hotel, tavern/hotel and Community uses.

In its amended statement of claim, unChain St Kilda's 'particulars' allege that:

- d) the room numbers for the residential hotel has not been properly demonstrated;
- e) the patron numbers for the gymnasium, residential hotel, tavern/hotel and community uses have not been properly demonstrated;
- f) the floor area for the gymnasium, residential hotel, tavern/hotel, and community uses have not been properly demonstrated.

100 The intent of the condition is to provide a scale for the size of relevant components of the development by reference to relevant parameters. Not all parameters will be relevant to each component – e.g. room numbers are clearly relevant to the residential hotel, patron numbers to the tavern/hotel etc. In planning terms, these matching parameters are important so that related matters such as car parking requirements can be readily ascertained. This common sense interpretation of the condition (i.e. matching relevant parameters) is implicitly conceded by unChain St Kilda, in contesting only the *room numbers* for the residential hotel in its particular (d) above, and not requiring this information for room numbers (for example) for the gymnasium or tavern/hotel. In my view, the same common sense interpretation must also apply to the other components.

101 Accepting this, the Table at p73 of the Development Plan states that the residential hotel will have “70 rooms approx” and shows an indicative floor area of 2,100m<sup>2</sup>. The gymnasium shows an indicative floor area of 2,000m<sup>2</sup>. The nightclubs show “3,000 patrons max” across “4 venues max” with a 3,300m<sup>2</sup> floor area. The text at Section 2.8 of the Development Plan lists community facilities, including the education centre, gallery/exhibition space, indoor childrens’ playground, dance studio etc. Floor space areas are also shown for each of these in the Table. I disagree with unChain St Kilda that this section of the Development Plan fails to properly demonstrate what is required by the condition. I am satisfied that Condition 2.8(d) is substantively complied with, and its intent and purpose is achieved in all material respects. Given this, to the extent there may be a minor non-compliance (in not technically showing all parameters for all uses), I do not consider that this is a sufficient basis to invalidate the Development Plan.

102 As a final example, Condition 2i) had required:

- 2i) The public viewing level raised by introducing a footpath along the Upper Esplanade within and at the outer edge of the site and at the height of the ‘Grassy Slopes’ as an alternative promenade and viewpoint to the Upper Esplanade.

In its amended statement of claim, unChain St Kilda's 'particulars' allege that this is not properly demonstrated. In its 'Comparative Table' analysis, its initial contention is that the Development Plan (at pp41-43

and 50-51) shows the new footpath higher than the Upper Esplanade and within the site itself. So it does. This is exactly what the condition requires. unChain St Kilda's argument then proceeded that the view line sections show that views to the immediate foreshore from this new footpath will not be possible. This may or may not be the case. From my review of the view lines, it appears that this upper footpath level may only provide views to Port Phillip Bay and the horizon rather than to the foreshore, with views to the foreshore available in this vicinity only from the Yellow Brick Road and other lower viewpoints.

103 However, Condition 2(i) does not require view lines to the foreshore from this new footpath. It simply requires a new footpath and public viewing level to be raised to the level of the Grassy Slopes, as an alternative to the (lower level) Upper Esplanade. The context, found by reference to earlier Council officer reports, is that view lines be 'improved'. By reference to the landscape plan (at p92) and the sections (at pp50-51), this has been achieved. The Council assessment confirms this. I am therefore satisfied that Condition 2(i) is met in the revised Development Plan.

104 I have again referred to just a few examples. However, I have reviewed and assessed all of the 13 conditions in the third resolution that unChain St Kilda contest through its 'particulars' and through the 'Comparative Table' referred to above. Despite each condition having its own issues and nuances, and despite unChain St Kilda's contention to the contrary, I am satisfied that each condition is substantially achieved by the revised Development Plan and this sub-ground is not made out. In reaching this view on the balance of the conditions, I have (as indicated above) also had regard to the 'Table of Issues' provided by the Council that cross-references several of the conditions to the Council assessment where further detail is provided, and to Appendix E to Mr Govenlock's statement where he has undertaken a similar comparative analysis.

#### **Conclusions on Ground 4**

105 It follows that unChain St Kilda fails in establishing its fourth ground. The Council considered relevant decision guidelines under the DPO-1 in approving the Development Plan, including consistency with the Urban Design Framework. It is not for me to determine on the merits whether the Development Plan *is* consistent with the Urban Design Framework, nor is that determinative of whether the Council properly considered the Urban Design Framework. Furthermore, the changes to the Development Plan required by the Council are sufficiently ascertainable in meaning (by reference to the totality of the material before the Council) and not void for uncertainty. I am also satisfied on the evidence and my own review that there has been compliance with those conditions so as to warrant the

Manager, City Development giving final approval and endorsing the Development Plan on 8 August 2008. Any minor non-compliance with conditions does not invalidate the Development Plan given the intent and purpose of each condition has been met.

## **Ground 5 – unreasonableness?**

### **Background**

106 unChain St Kilda contended that the decision to approve the Development Plan is so unreasonable that no Council acting reasonably could have reached such a decision, having regard to the Urban Design Framework, the purposes of the SUZ-3 and the decision guidelines in the DPO-1.

107 This ground therefore essentially raises the principle of ‘*Wednesbury* unreasonableness’. The principle takes its name from an English court decision where it was stated, in part:

It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. ... It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

108 It will be readily apparent from this quote that, although the court acknowledged circumstances where a decision might be invalidated if wholly unreasonable (such that no reasonable Council could have made it), the court equally noted the very clear limitations on the extent of the principle. It was common ground that a challenge based on ‘unreasonableness’ must show more than that the decision is a poor one, or that it is a decision that ought not to be preferred. This ground of invalidity “is reserved for decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them”.

109 Based on the material before me, unChain St Kilda contended in particular that there is a lack of consistency of the Development Plan with the Urban Design Framework, and a lack of clear strategic planning policy support for the scale of the retail and commercial components

given other retail and activity centre policies in the Port Phillip Planning Scheme. It contended that the decision to approve the Development Plan in the face of this is a decision that is devoid of plausible justification, and no reasonable body of persons could have reached such a decision.

- 110 From its involvement in the planning process over several years, and its interpretation of the Port Phillip Planning Scheme, it is apparent that unChain St Kilda had a particular expectation of a planning outcome for the St Kilda Triangle site that has not been realised with this particular Development Plan.
- 111 However, 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’ 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. 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.
- 112 I am satisfied that the Council in this case did “consider” the issues that it was bound to consider under the decision guidelines for the approval of the Development Plan. It clearly included within its consideration a number of internal officer reports and external ‘expert’ assessments, as well as the community objections and submissions received. I have referenced some of this material earlier in these reasons, which included assessments by a Design Review Committee, an assessment against the Urban Design Framework, and consideration of the retail and commercial components.
- 113 In the exercise of planning discretion and in planning decision making generally, it will be common that there is no single decision or outcome that is objectively reasonable to the exclusion of all others. As I have indicated, the decision maker must integrate state and local planning policy and balance conflicting objectives, and there may be differing but still reasonable outcomes. In reaching an integrated and ‘balanced’ outcome, one responsible authority, acting objectively and reasonably, might come to a particular decision. But this does not mean that an alternative decision reached by another responsible authority on the

same material is necessarily or objectively ‘unreasonable’.

- 114 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.
- 115 The Council and BBC essentially argued that the Tribunal should be slow to invalidate a decision of the Council made with its own detailed knowledge of local matters and planning policies, and that there was nothing “overwhelming” or “devoid of any plausible justification” in the Council’s conduct or decision to warrant a finding of *Wednesbury* unreasonableness in this case. Ultimately, I agree with this assessment.

#### **Conclusion on Ground 5**

- 116 It follows that unChain St Kilda fails in establishing its fifth ground.

#### **Conclusion on section 149b application**

- 117 For all of these reasons, unChain St Kilda Inc has not made out any of its five grounds. I therefore dismiss the application for declarations under s 149B of the *Planning and Environment Act 1987*.

Mark Dwyer <b>Deputy President</b>		
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