

SUBMISSION TO THE SELECT COMMITTEE ON PUBLIC LAND DEVELOPMENT

From Unchain St Kilda

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THE ST KILDA TRIANGLE

**Department of the Legislative Council
Parliament House – East Melbourne 3002.**

1. Introduction

In September 2007 Unchain St Kilda made a submission on the St Kilda Triangle to the Public Land Inquiry of the Legislative Council (Submission No 112). On 25 January it made a supplementary submission. This submission builds on those earlier submissions.

Unchain St Kilda is a loose coalition of people who live, work and visit St Kilda, brought together by our concerns about the proposed development on the St Kilda Triangle Crown land. We called ourselves Unchain St Kilda because, if this development goes ahead in its current form, St Kilda's public foreshore will be 'locked up' by multi-national and local chains for 99 years. Uninterrupted, magical vistas of the Palais, Luna Park, beach and sea will disappear from the Upper Esplanade forever. (For further information see www.unchainstkilda.org).

Submissions from the Council and the developer, BBC consortium will comprehensively summarise the components of the Triangle proposal. I do not propose to repeat these. I acknowledge that there may be significant public benefits in

the proposal. I also acknowledge that there have been non-trivial changes to the original development proposal. However this submission will focus on problems in the Development Plan as approved by Port Phillip Council.

Despite changes to the original proposal, fundamental problems remain:

- There will be a massive retail complex on the St Kilda foreshore. The approved plan is for 19,000 square metres of retail comprising about 160 shops including a full-line supermarket. By comparison there are 160 shops presently in the whole of Acland Street. The proposal is the equivalent of putting the Altona Gate or Rosebud Plaza shopping centre on the Triangle site. This is a reduction from the 24,738 square metres for retail, including a gymnasium, in the original proposal.
- The approved Development Plan is for four nightclubs with a capacity of 3000 patrons, a tavern with a capacity of 900 and additional alcohol venues at the Palais and various restaurants.
- New buildings will still cover the whole area between Jacka Boulevard and Upper Esplanade, blocking views to the beach and sea from the Upper Esplanade and overwhelming the heritage Palais Theatre

What a lost opportunity for a truly landmark civic place!

2. Process and Public Opinion

In 2001 the Council commissioned the preparation of the St Kilda Urban Design Framework Plan (UDF). The UDF identified opportunities for improvement and integrated management of the foreshore. In July 2004, the UDF was approved by the Minister for Planning and incorporated into the Port Phillip Planning Scheme along with site specific planning controls to allow for the development of the Triangle Site as an entertainment and leisure precinct, with significant public spaces. The site is subject to a Development Plan Overlay which incorporates the UDF. This requires that a development plan must be prepared to the satisfaction of the responsible authority. Any subsequent permit must generally be in accordance with the development plan. The permit is exempt from the normal third-party review rights at VCAT.

Council established the St Kilda's Edge Committee chaired by its CEO David Spokes, to oversee delivery of the St Kilda's Edge projects including the redevelopment of the Triangle Site. In May 2007 the Council selected BBC consortium comprising Babcock and Brown and its subsidiary Citta Property Group and signed a development agreement for the Triangle. BBC submitted a development plan for approval by Council. At its meeting on 13 December 2007 the Council foreshadowed some amendments to the proposal and deferred the matter until 24 January, later extended to 7 February 2008. At that meeting Councillors voted 4 to 2 to approve an amended Development Plan subject to various changes being made to the satisfaction of a council officer.

There is widespread community opposition to this development. Furthermore there are significant concerns that the process has not been transparent and that it provides limited opportunities for effective community input.

More than 6000 submissions were sent to Council opposing the proposed Development Plan in December. In addition there was a petition sent to Council in February signed by more than 6000 people. At the Council meeting in December over 900 people attended with an overwhelming majority opposed to the proposal. More than 2500 people marched from the Palais to the Council meeting in February to ask Council to reject the proposed Development Plan.

What was the problem?

3. That the Development Plan does not comply with the UDF

The St Kilda Foreshore Urban Design Framework promised the community a vision for the St Kilda Triangle. The BBC development plan does not comply with the UDF in two important ways: the nature of the uses and the scale of the uses proposed. The UDF lays down several urban design principles for the foreshore. It then sets out 6 key objectives and identifies 15 opportunities. The Triangle site is Opportunity 9.

Entertainment and culture are at the core of the vision in the UDF. It sees an opportunity for *‘A new public space to the west of a reinvigorated Palais Theatre, supported by a variety of indoor and outdoor entertainment and cultural venues envisaged in a new contemporary building’*. The UDF states; *‘It is imperative that public benefits are maximized by private investment in facilities that maintain the traditional cultural use of this site’*. On built form it states; *‘The land west of the Palais needs to be kept relatively open to preserve views from the Upper Esplanade’*.

The UDF proposes to: *‘Construct a new building at the rear of Palais Theatre to provide for backstage facilities. 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’*.

A substantial retail component as proposed by the BBC consortium was never envisaged for the site. At most the UDF envisaged a mix of uses including some retailing that is complementary to the core entertainment and cultural outcomes. Instead what is proposed includes the equivalent of a sub-regional shopping mall. The high level of ordinary retail and commercial uses proposed for the site is a wasted opportunity.

Unchain St Kilda commissioned a report from Professor Roz Hansen on whether the Development Plan complies with the UDF. Hansen Partnership is a leading planning consultancy, with a particular expertise in St Kilda. Professor Hansen herself was the project manager for the St Kilda Foreshore and Environs Strategy, the Port Phillip

Review of Height and Development Controls, and a member of the consultant team who undertook the 20th Century Architectural Study for St Kilda.

Professor Hansen's report is attached as Appendix One. It examined the plan in detail and concluded that: *'It is our opinion that the degree of new built form proposed on the Triangle site is not consistent with the opportunity statement in the UDF ... There are several aspects of the Development Plan (as altered by the recent changes of mid January 2008) which comply with the intent of the UDF as it relates to the St Kilda Triangle site. However the fundamental flaw in the Plan remains – that is the loss of sequential views of the beach and foreshore from the Upper Esplanade which we consider are significant and special to St Kilda.'*

The proponent's cross sections do not maintain existing views and vistas from the Esplanade to the beach/foreshore. The Plan requires the public to enter the site from the Upper Esplanade and walk to the southern edge of the grassy slopes to view the sand, water's edge etc. This is tantamount to a 'privatisation' of public views.

Various view lines shown on pages 50 and 51 of the Development Plan demonstrate this loss of view and even with the more recent changes to the Plan it is evident that this loss of significant views from the Upper Esplanade will not be overcome. Further modifications to the Development Plan are needed to address the loss of existing views and vistas from the Upper Esplanade. It may mean less floorspace and a different massing, layout and bulk to what is proposed but in this case the economic viability of this project for the developer is not the primary planning consideration'.

4. That the Development Plan does not conform to Special Use Zone.

The Triangle site has a special tailor made zoning as Special Use Zone Schedule 3 (SUZ3). The SUZ3 lays down nine purposes, the first being: *'To implement the incorporated Document 'St Kilda 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'.* It is important to note that the Triangle site does not have a Business Zoning to permit the intensive retail development envisaged.

The Hansen report concludes that the Development Plan does not conform to the SUZ3. The Report states:

'In this regard it has already been concluded by our assessment that the Development Plan does not achieve the following purposes of the SUZ3 or demonstrate that these purposes have been realised:

- Implementation of the UDF noting that even though aspects of the UDF will be met there are other important elements of the framework which will not be met and you (sic) could be by way of a re-design;*
- Clear evidence to demonstrate that the proposed retail activities totalling approx. 25,000 sq.m will be vital to the continued viability of the Palais Theatre noting that the theatre historically survived for many years without retail activities on the site and often theatres of this nature are attracting clientele during the evenings who may not necessarily be the shoppers purchasing goods at a supermarket etc also on the site. The economic*

synergies between the retail and the theatre are unclear and potentially tenuous;

- *Lack of detail about what is proposed in terms of the conservation and refurbishment of the Palais Theatre and as to the more detailed appearance and form of the new buildings on the site making the assessment of development being respectful very difficult to assess and also whether such new development will complement and contribute to the established architectural themes of St Kilda;*
- *The height, siting and design (in broad conceptual form only) of the new development on the Triangle site will not protect and enhance the following important views and vistas ,,,*

5. That the Development Plan does not comply with the Development Plan Overlay Schedule 1

The Triangle site is subject to a Development Plan Overlay (DPO) which incorporates the UDF. This requires that a Development Plan must be prepared to the satisfaction of the responsible authority. Any subsequent permit must generally be in accordance with the development plan. The purpose of the DPO is ‘to provide a framework to achieve the Purpose set out in’ SUZ3. There are various requirements for the Development Plan which are set out in Clause 3. Clause 4 sets out the Decision Guidelines which the Council must consider when assessing a proposed Development. The Council must ‘consider consistency with the Incorporated Document – St Kilda Foreshore Urban Design Framework, 2002’ including matters such as refurbishment of the Palais, works that support existing attractions and environmental assets, improved pedestrian and visual connections and the impact on existing view lines.

The Hansen report found that the proponent has not provided all of the necessary information sought in the DPO1. It concluded that ‘We are of the opinion that the Development Plan does not fully comply with the DPO1 requirements etc. Also the St Kilda Foreshore UDF is an incorporated document for the overlay and this too is not fully complied with so therefore the Development Plan is incomplete and inadequate and should not be approved until such time as the requirements under the SUZ3 and DPO1 are met’.

The Hansen report considered an earlier proposed Development Plan. Subsequent to this report, additional items of non-compliance have arisen. The Development Plan conditionally approved by Council at its 7 February meeting provided for an ‘increased built form to the Nolan building sited so that it does not result in any increase in the shadow on the Foreshore at 11 am at the winter solstice’. This is in direct conflict with the Development Plan Overlay which states the responsible authority must consider ‘the height,, siting and design of new development avoids any further overshadowing after 10 am of the foreshore reserve (defined by the western curb of the Jacka Boulevard) at the winter equinox’. The change permits the developer to construct a building at the back of the Palais that is one or two stories higher than permitted in the Development Plan Overlay.

6. The Problem: the St Kilda's Edge Committee

As discussed above, the approved Development Plan does not comply with the UDF and other state and local planning instruments. It is submitted that this is because the Council set up a flawed process without appropriate community input, Chinese walls, independent reviews and checks and balances.

Council has to wear two hats. On the one hand it is a co-proponent of the Triangle proposal, having worked with the BBC consortium through the gestation of the project. It is also the responsible authority for the planning approvals required. This places the Council in the invidious position of being a judge in its own cause. *Quis ipsos custodes custodiet?*

In 2004 Council set up the St Kilda's Edge Committee (SKE) to coordinate the 20 year foreshore program including undertaking the Tender process on behalf of the council for the Triangle site. In 2005 the state government authorised the City of Port Phillip to undertake the tender process. The SKE Committee was established under s.86 of the Local Government Act. The Council CEO, David Spokes, was the chair of the SKE Committee and the mayor and ward councillors were also members.

In 2007 the SKE Edge Committee recommended the BBC Consortium proposal and Council accepted that recommendation. In May 2007 the State, the council and BBC consortium entered into a Development Agreement. This provides for the design, construction, maintenance, finance and operation of the Triangle project. This Agreement has not been made public so it is unclear what liability the Council has if it does not approve the project as the responsible authority under the various planning rules. The CEO and individual councillors have given conflicting public statements on whether the Development Agreement fetters Council's discretion to reject the proposed Development Plan.

In its planning role, Council delegated responsibility to its Statutory Planning Committee on which all seven councillors sat. If the Council in its 'proponent' role had gone off the rails, could the Council in its 'planning' role save the day? The answer is no – because of the structure that Council had adopted.

The key to this is the role of the CEO. A member of the SKE Committee has said that it was originally intended to have an independent chair of the SKE Committee. However the Council CEO David Spokes walked into the first meeting of the SKE Committee and appointed himself Chairman. Once that happened there were no effective checks and balances to see that the vision of the UDF was implemented. It is not surprising that the report David Spokes as CEO presented to the December Council meeting approved the proposal which David Spokes as Chair of the SKE Committee had recommended.

It is also not surprising that the reports by junior officers to Council for its December meeting did not raise significant concerns. It would not be a career advancing move to publicly oppose the CEO. The public of course had no knowledge of the internal workings of the SKE Committee. The unsuccessful tenderers had such knowledge but

could not publicly complain about the process because they had signed confidentiality undertakings. The councillors who had been members of the SKE Committee could not be expected to take a different attitude in their new role on the Council's Planning Committee. As for the 'independent' councillors, they would have to rely for contrary expert advice on independent experts but none had been commissioned for their assistance by the CEO (aside from the Matrix report with its limited terms of reference discussed below).

This was a disaster waiting to happen because the Council had failed to insure that there were effective checks and balances on the SKE Committee.

7. The Result: the SKE Committee encouraged tenderers to exceed the UDF

The CEO has claimed that 'throughout the tender process a guiding assessment criteria was the BBC's proposal's compliance with the UDF' (Spokes, Background Report on the St Kilda Triangle Site, 13 December 2007 at 2.21). This is misleading because the SKE Committee encouraged tenderers not to be limited by the UDF.

The early statements from the St Kilda's Edge Committee promised an entertainment and cultural centre at the Triangle with modest retail. (These have now been removed from the Council's website but have been preserved on the Unchain St Kilda website). In St Kilda's Edge: Triangle Site 2004 the SKE Committee said: *'What is the triangle site vision? A reinvigorated public entertainment and cultural space including a reinvigorated Palais Theatre and a new neighbouring public plaza ("piazza"). Potential uses include a dance and music venue, cinema, galleries, a bar or nightclub, reception and conference facilities and some retail ... Will there be significant retail created on the triangle site? The broad vision is to provide significant new areas of open space with entertainment and cultural uses. It is envisaged that these will be supported by some related retail uses but that these would not be significant ... Do we need another shopping plaza? We have defined the word 'plaza' as being more like a "piazza" – i.e. think open space, and people walking and enjoying the sunshine and great views – definitely not wall-to-wall retail'.*

What happened? Why, when and how did the SKE Committee abandon this vision? In early 2004, the Council commissioned Spiller Gibbons Swan to provide an Economic Impact Assessment on the suite of St Kilda's Edge projects. This report, which Council has refused to release, claimed that there would be significant benefits to the Victorian and Melbourne economies. Presumably based on this report, the SKE Committee took it upon itself to depart from the UDF. It evaluated proposals based on 'which bid best met the UDF *and other objectives*' (my italics). (Spokes at 2.9). These 'other objectives' were to seek proposals which 'maximised the financial and commercial benefits to the community'. (Spokes at 2.6). Spokes also says 'The UDF is an aspirational document. It was conceived primarily with urban design matters rather than commercial realities in mind' (Spokes at 3.7). However this maximization of financial benefits is a consideration beyond the St Kilda Triangle Act and the UDF.

There were 15 expressions of interest. The Council has not revealed any details but it is believed that the SKE Committee, chaired by CEO Spokes, encouraged tenderers to exceed the UDF. I am aware that at least some of the bidders who were not short listed submitted proposals which complied with the UDF. For example the Palace Entertainment Complex submitted a bid through Jackson Architecture which preserved the grassy slopes, had a modest building around the Palais and a modest new building at the Western end of the Triangle. It contained a hotel, a carpark-plaza and a restaurant/café with significant open space.

The two unsuccessful short listed tenders were St Kilda Creative Hub and R-Corporation with John Van Handel. Both originally proposed \$70-\$80 million entertainment centres with modest retail components. One was specifically told that no supermarket would be permitted. Both original proposals appear to have been in conformity with the UDF. Both were instructed by the SKE committee to present significantly larger proposals which were ultimately rejected as too big!

It is not clear why the SKE Committee took it upon themselves to jettison the UDF. One possibility is that it was persuaded, perhaps by the Spiller Gibbons Swan report, to adopt a new vision for the Triangle site – not as part of a foreshore cultural-entertainment precinct but as part of a major new retail centre sweeping along Fitzroy Street through the Triangle site and into Acland Street. Another possibility is that the SKE Committee realized that if it ‘maximised the financial and commercial benefits’ of the Triangle site, the Council would be a major beneficiary as it would receive substantially greater rate and rent revenues. But there are two factors which clearly pushed for a greater commercial component: the refusal of the state government to commit any funds for the restoration of the Palais and the council’s mismanagement of the tender process.

The refusal of the state government to subsidise the restoration of the Palais meant that the rest of the project had to generate additional returns to cover this cost. The figure given by the developers has been \$20 million although there has been no independent verification of this. A government promise to subsidise the restoration may have generated a range of bids with more emphasis on culture and entertainment and less on retail and commercial. This would represent a modest investment in making Melbourne more ‘livable’. It is well established that the cultural and creative life of a city is a significant contributor to the character and success of a city.

The second factor pushing for an inappropriate development of the Triangle site was Council mismanagement of the tender process. In particular tenderers were not able to get access to the Palais and the Palace to assess their restoration potential and costings. Therefore tenderers, asked to buy a ‘pig in a poke’, submitted bids which contained a margin for error for restoration. The reason that tenderers were unable to gain access was Council mismanagement. The lessees of the Palais and the Palace claimed that they had ongoing rights over the properties and refused to permit entry to tenderers. Council ought to have foreseen this as a similar legal claim had arisen in the earlier redevelopment of the Stoke House on the St Kilda foreshore. Moreover I understand that Council had legal advice warning it of this possible problem but the Council chose to ignore it.

The SKE Committee is a black box. What went in was a vision of an entertainment and cultural precinct. What came out was a completely different precinct, one dominated by a shopping mall and destination drinking venues. It is submitted that the Select Committee should use its investigatory powers to shine a light into this black box. It could invite the other tenderers to make submissions to try to establish how this process ran off the rails. An alternative suggested below is that the Select Committee could refer this and other related matters to the Ombudsman for further investigation.

8. That the Council has wilfully blinded itself to an analysis that the Development Plan does not conform to the UDF by refusing to commission an independent report

Council has refused to commission an independent expert analysis of the proposition that the BBC development plan exceeds the UDF and the related planning instruments. The Council commissioned Mr Clarke of Matrix Planning to assess the written submissions on the development plan outlining the weight that the responsible authority ought to give them. It was not the role of Matrix to provide a comprehensive assessment of the development plan including a comprehensive net community benefit assessment of the proposal. The Matrix report concluded that there was considerable merit in submissions that the retail component and the scale of the proposal did not conform with the UDF.

On the retail component, the Matrix Report says:

'a substantial retail component is not envisaged for the site although a mix of uses including retailing that is complementary to the core entertainment and cultural outcomes is encouraged. There may well be benefits of including a substantial retail component in the proposal if it can be shown to assist with the viability of cultural entertainment and recreational uses. However, that outcome is not set out under the Urban Design Framework incorporated into the planning scheme, in the Local Planning Policy Framework or in the zone purposes or DPOI decision guidelines. We therefore consider that submissions which claim that the development plan conflicts with the stated vision for the St Kilda Triangle have considerable merit.

On the question of scale, the Matrix Report also concluded that there was merit in submissions that the proposal will cause loss of iconic landmarks and important views at odds with the vision contemplated by the UDF.

It would be expected that following these findings, the Council would commission an independent report into whether the development plan fails to conform to the UDF. However it refused to do so and largely ignored or misrepresented the Matrix Report. Because the Council failed to do so, Unchain St Kilda and the Esplanade Alliance commissioned the independent report by Roz Hansen discussed above. This was made available to Council before its meeting on 7 February. I am sure that the councillors would have given an identical report by Professor Hansen considerably more weight had it been commissioned by the Council itself rather than Unchain St Kilda.

9. That the retail component is not justified by any other government or council policy

In her report, Professor Hansen also considered the current policy framework which guides and directs the overall strategic intent of future use and development of the Triangle Site. This involves a consideration of the Council's Municipal Strategic Statement and local planning policies such as the Retail Centres Policy for Port Phillip and the St Kilda Foreshore Area Policy.

The Council's Municipal Strategic Statement does not identify the St Kilda Triangle as being part of a retail centre. The MSS addresses the St Kilda Neighbourhood in Cl.21.05. The MSS supports the 'renewal of the St Kilda Triangle Site to offer a range of cultural, tourism and recreational facilities, and establish the site as a principal activity node within the St Kilda Foreshore area.' In her report Professor Roz Hansen says: *'The MSS does not anticipate or recommend that these two retail centres (Acland St and Fitzroy St) have a third retail centre (refer to the Commercial Land Use Framework Plan in Cl.21.05) between them and yet, the current Development Plan for the Triangle Site is proposing approx. 25,000 sq.m of new retail floorspace. If it is intended that a third retail centre be created on land between these two existing centres and that the boundaries of the St Kilda Major Activity Centre need to be properly defined in the context of the Triangle site, then it is our opinion that the MSS and the relevant local planning policies would need to be amended via the normal planning scheme amendment process'*.

Professor Hansen also considered Local Planning Policies. She states: *'The Retail Centres Policy for Port Phillip City is articulated in more detail in Clause 22.02. It applies to all land within the B1Z, B2Z, B3Z and B5Z in the identified retail centres. The Triangle Site is within a Special Use Zone and hence is not zoned to be part of the retail centres hierarchy for the City of Port Phillip or to be affected by the retail centres policy. Accordingly, the discussion in the letter of advice by Urbis to the Citta Property Group dated 30 November 2007 claiming, on page 2, that the Triangle site is an important part of the St Kilda Major Activity Centre is unfounded and certainly not supported within the MSS and LPPF of the Port Phillip Planning Scheme ... In our opinion the purpose of the current SUZ3 for the Triangle site does not encourage a retail node on this site as one of the major land uses nor are retail uses per se considered to be uses which would support the continued viability of the Palais Theatre ... It is emphasized that the Retail Centres Policy in Cl.22.02 does confirm the role and functions of the Acland and Fitzroy Streets centres as the two key retail centres for this part of the St Kilda Foreshore. This does not imply, in our opinion, that there cannot or should not be any retail activity on the Triangle Site. Rather, the site does not form part of the retail hierarchy and hence the amount of retail use should not be one of the major uses on the site as is presently proposed in the Development Plan'*.

The St Kilda Foreshore Area policy builds on the MSS and the UDF. It establishes the strategic direction for revitalisation of public land within the St Kilda Foreshore area. It states that its objective is 'to reposition St Kilda for the future based on its threefold seaside residential, leisure and entertainment, and marine recreational roles'. (Cl 22.10-2) A substantial amount of retail as proposed in the Development Plan for the

Triangle is well outside this threefold role. Professor Hansen says: *‘the strategic land use directions for the Triangle site as articulated in the St Kilda Foreshore Area Policy focus primarily on culture, entertainment and leisure and not shopping, drinking and eating per se. It is acknowledged that shopping is for many people today a social/leisure activity – but the foreshore policy is anchored by the primary role that the foreshore has and continues to play, namely as a beach/ recreational destination rather than a shopping or dining destination. Clearly developments along the St Kilda foreshore have enabled the conversion of buildings once associated with the seaside recreational role to restaurants, cafés, health spa centres etc. But the main reason why people still flock to this part of metro Melbourne is outdoor recreation and leisure pursuits with the restaurants etc adding to the experience of being beside the beach and the Bay.’*

Professor Hansens’s conclusion is damning. She states: *‘In our opinion there has been a ‘manipulation’ of policy intent by some parties, including the developer for the Triangle site, to justify the substantial retail floorspace component and yet there is very little, if any policy support, especially at the local level, to justify 25,000 sq.m of retail on this strategically significant site. Based on our assessment of the relevant planning policies contained in the Port Phillip Planning Scheme we are of the opinion that there is no substantive support in the existing planning policy framework for an activity centre for retail uses of this scale and nature on the St Kilda Triangle Site’.*

10. That the Council is retrospectively amending the Planning Rules

Council has implicitly recognized the validity of Professor Hansens’s analysis of the failure of the Triangle proposal to comply with the planning rules.

The normal planning situation is to establish the various planning rules and then to assess a proposed development against them. The Port Phillip Council wants to reverse this for the Triangle site. The last recorded instance of a responsible authority behaving in this manner is to be found in the well-respected law journal ‘Alice’s Adventures in Wonderland’.

Let the jury consider their verdict,’ the King said, for about the twentieth time that day.

‘No, no!’ said the Queen. ‘Sentence first--verdict afterwards.’

‘Stuff and nonsense!’ said Alice loudly. ‘The idea of having the sentence first!’

‘Hold your tongue!’ said the Queen, turning purple.

‘I won’t!’ said Alice.

‘Off with her head!’ the Queen shouted at the top of her voice. Nobody moved.

The Queen of Hearts wanted sentence first, verdict afterwards. Port Phillip Council wants to approve the Development Plan first and then afterwards to change the planning rules with which the Plan fails to comply. At the Council meeting of 25 February 2008, the Council considered changing the Melbourne 2030 designation of St Kilda as a Major Activity Centre to a Principal Activity Centre to justify integrating the 3 centres (Acland St, Fitzroy St and the Triangle site) as suggested by the SGS reports. It passed a new policy “Integrated Planning for the St Kilda Activity

Centre'. The next steps may be to change the Municipal Strategic Statement and the zoning for the Triangle.

11. That the Council has wilfully blinded itself to other defects with the Development Plan

Councillors should not simply rely on the submissions of the proponent and Council's own officers in assessing the proposal. The Councillors should have insisted that their decision be informed by a range of independent expert reports that would normally be expected in a significant development like this one.

An appropriate benchmark is the range of expert reports required by Whitehorse Council for the Box Hill shopping centre redevelopment. Indeed it would be expected that the Triangle proposal would have a higher level of independent reports considering:

- The Triangle site is public land
- The Port Phillip Council has a dual role: both as proponent and statutory planning authority
- The normal appeal rights to VCAT have been abolished for the Triangle site
- The Port Phillip Council's track record indicates that it lacks the expertise to deal with foreshore developments (Sea Baths) or supermarket-driven retail (St Kilda station and Acland Courtyard).

As discussed briefly below Unchain St Kilda has commissioned some of the independent expert reports that the Council should have required for a project of this importance. However, given the entrenched attitude of Councillors and the CEO, Unchain St Kilda does not expect the Port Phillip Council will pay attention to them. These reports are available for the Select Committee to examine. More detailed information can be found at our website, www.unchainstkilda.org.

12. A comprehensive and genuinely independent economic analysis

The Matrix report accepted the Unchain St Kilda submission that the Development Plan submitted in December 2007 did not include a thorough economic impact assessment on existing retail centres. Following this, the Council engaged a consultant to carry out an economic impact assessment. However this was neither independent not comprehensive. The Council engaged Spiller Gibbons Swan (SGS), the same consultants who may have encouraged the Council to select a developer proposing a project outside the vision of the UDF. Furthermore there were very restricted terms of reference. The Council was prepared to consider that assessment primarily in relation to tenancy mix rather than the extent of the commercial tenancies, the viability of the project and its alternatives and the externalities involved in the project.

Unchain St Kilda commissioned an independent expert report from Tim Nott, an experienced economic analyst. He concluded that the January 2008 SGS report does not use the established method for measuring impacts and its results are misleading.

Tim Nott estimates that the real impact of the Triangle development on the existing centres of Fitzroy Street and Acland Street is likely to be significant. The new development would probably generate a loss of between 10% and 30% of retail turnover in these neighbouring centres with consequent shop closures and loss of community function. The report by Tim Nott has been previously supplied to the Select Committee.

13. A comprehensive social analysis

The Council should have ensured that an independent and complete social impact assessment was carried out by a qualified expert. The Spiller Gibbons Swan report of January 2008 also undertook a social cost benefit cost analysis. This estimates a positive benefit-cost ratio for the development. However, Tim Nott reviewed this study and found that the assessment of benefits is highly contentious and, in some cases, so subjective as to be meaningless. He concludes that the finding of net community benefit is not proven.

14. A heritage analysis by an independent expert

The Palais Theatre is registered under the provisions of the *Heritage Act* 1995 as Heritage Place H0947. The National Trust and the Matrix report raised concerns about the impact of the proposal on the freestanding nature of the Palais. The proposal conflicts with the principles of the Australia ICOMOS Charter for the Conservation of Places of Cultural Significance (the Burra Charter).

The Council however has refused to commission an independent report on this important issue. Therefore Unchain St Kilda has commissioned the most eminent heritage architect in Australia, Clive Lucas, to consider and report on the heritage position. This report has also previously been supplied to the Select Committee. I also attach as Appendix 2 a more detailed analysis of the unsatisfactory heritage aspects of the Development Plan. This analysis has been prepared by Don Gazzard, LFRAIA, an experienced architect, planner and heritage consultant.

Clive Lucas reports that:

'The scheme proposed has the effect of burying the theatre and killing its stand alone quality and destroying the historic road pattern and the sense of the Upper and Lower Esplanades and their associated landscaping. Both these features should be being preserved not destroyed. Development should be restricted to the triangle site and not extended out over the Lower Esplanade. Similarly it should be modelled in such a way that it does not destroy the stand alone quality of the theatre including its side walls which should not be built over, above the height of the ground floor plinth. The policies for the Conservation Plan, as written, do not address the significances which the rest of the plan has recognized. So far as I can see there has been no conservation planning done on the historic esplanade and this seems to me a tragedy. The scheme as proposed is clearly not in the interests of St. Kilda or this particular facet of Victoria's heritage.'

15. An independent examination of the environmental and sustainability aspects of the proposal

Council has refused to engage an appropriately qualified and independent sustainability consultant. On behalf of Unchain St Kilda, Dr Geoff Parr-Smith, an experienced environmental consultant has identified a number of defects in the sustainability section of the developer's submission. Furthermore a highly qualified specialist in urban horticulture, Danielle Ryan-Gledhill from the Burnley Campus of Melbourne University believes that the vertical green walls proposed for the Green building is not a practical or appropriate technique for this windy and exposed marine location and has concerns about the ongoing management of the public open space. In addition there is the issue of climate change and its impact on sea levels. Since the Triangle Act provides for 99-year leases, surely a reasonable council would require some expert independent advice on the long term sustainability aspects of the proposal.

16. An independent urban design report

Council refused to engage an independent and appropriately qualified urban design consultant to assess the development. The independent report from Matrix Consulting identified a number of urban design problems with the BBC proposal. Rather than engaging independent advisors, the Council simply referred these issue back to a sub-committee of the St Kilda Edge committee with the BBC consortium determining the composition and influencing the recommendations of that sub-committee. The members of the Design Review Committee are independent but the DRC operates to facilitate the developer's plan, not to independently assess it. Furthermore the DRC reported back to council that it had not obtained sufficient evidence to make an informed decision on viewlines. Council ignored this.

17. An independent traffic and parking study

The Council has not engaged independent consultants to assess traffic and parking issues. Unchain St Kilda commissioned leading traffic consultants O'Brien Traffic to review the developer's traffic study. This review concluded that there was a shortfall of nearly 600 car parking spaces and identified a number of serious traffic concerns.

18. Council has failed to consult with the Police and the liquor licensing authorities on whether it is appropriate to establish a nightclub precinct at the Triangle site.

A major item of community concern has been the part of the Development Proposal involving a significant nightclub and drinking precinct. The original proposal has been reduced to four nightclubs with a capacity of 3000 patrons, a tavern with a capacity of 900 with alcohol also served at the Palais and various restaurants.

Premier Brumby and Police Commissioner Christine Nixon have recognised the significant problems associated with nightclubs and other licensed venues. Many

people are concerned that the major problems associated with the King Street and Chapel Street nightclub precincts will be repeated in St Kilda were the proposed Triangle precinct added to the existing clubs in Fitzroy Street.

It would be expected that the Council would engage in extensive consultation with the Police and the liquor licensing authorities on whether it is appropriate to establish a nightclub precinct at the Triangle site. This has not occurred. The limited consultation to date has focused on developing management plans to deal with the problems rather than considering whether we should create the problems in the first place.

In her report, Professor Roz Hansen says:

The SUZ3 and DPO1 do not identify the proposed number and scale of licensed premises appropriate for the Triangle site. However it is clear that the purposes sought for this strategically important site are for a variety of cultural, entertainment and leisure activities as well as public spaces. The land use mix can include other uses considered to be complementary land uses but they must be uses which support the continued viability of the Palais Theatre. In this regard we are somewhat cynical as to whether 25,000 sq.m of retail activity is vital to the viability of the theatre.

As to licensed premises the Development Plan includes approx. 11,000 sq.m of potentially licensed activities additional to a liquor licence for the Palais Theatre and for the Nolan hotel. Many of the issues pertaining to licensed premises relate to managerial and supervision practices of the operators of these venues to ensure that patrons do not become a public nuisance. Also the provision of licensed premises in this location needs to be balanced with the existing licensed premises in the locality, the views of the Victorian Police force and other more expert than us on this issue of 'how much is too much'.

However it is evident to us that the intent of the planning scheme as it relates to the Triangle site is not to over provide for licensed premises. The site should be a family friendly place with a mix of uses which are complementary to the site's foreshore, beach locale and enjoyment of culture and entertainment without the social problems associated with drunkenness. In this regard it may be prudent to limit the number and scale of licensed premises and to ensure that they are located on the site in such a manner that does not encourage problems for other activities on or close to the site.

There is substantial expert evidence that creation of a new nightclub precinct at the Triangle site would produce major social problems and is not consistent with the intent of the planning scheme. Unchain St Kilda in its submissions to Port Phillip Council drew attention to this wealth of evidence. However Council officers did not draw this to the attention of councillors nor did they commission any expert evidence. Effectively Council has wilfully blinded itself on this issue.

On the issue of the problems of a nightclub precinct, the Spiller Gibbons Swan report of January 2008 for council states:

The Triangle site development could possibly generate additional crime due to the concentration of bars and nightclubs ...In the lower end estimate it could be assumed that the presence of these additional 3,100 patrons in St Kilda will not generate any additional crime relative to the base rate. That is, any additional crime in St Kilda associated with the Triangle site development will be 'transferred' from another part

of Melbourne. So there is no net cost tot the Victorian community ...At the other end of the spectrum, the 3100 patrons could be viewed as 'quasi residents of Port Phillip with the same crime victimisation rates as currently recorded in the municipality ... The final estimate is therefore the mid point of the upper and lower estimates which equates to \$215,000 per year. (at p 59-60)

This is a nonsense estimate. Regarding the 'lower', estimate, the research discussed below clearly demonstrates that a high density of licensed premises does lead to an increase in total alcohol-related harm. There is no justification in assuming no total increase in harm as it is merely transferred from other parts of Melbourne. The SGS report seems to be ignorant of this research. Regarding the upper estimate, the measure of alcohol-related harm is the harm done by the nightclub patrons to other patrons and to the residents in the community. The SGS estimate ignores the harm done to non-patrons. The SGS estimate ignores the concerns that residents will be bashed, their property will be vandalised, their sleep interrupted, their tyres slashed, their parks littered, their property devalued etc etc.

The most accessible research in Victoria on the problems of nightclub precincts is found in the 2006 report of the Drugs and Prevention Committee of the Victorian Parliament.¹ The Inquiry found that 'A high density of licensed venues concentrated in one area can lead to problems other than simply the agreeable nature of the district. Assaults, violence and other forms of crime are not insignificant factors'. (Inquiry into Strategies to Reduce Harmful Alcohol Consumption p. 465).

US researchers who specialise in this field have noted that there is now general agreement that outlet density is related, at least in part, to levels of alcohol consumption and alcohol-related harm. The leading researcher in density-related research is P. J. Gruenewald.² Areas with greater densities of bars have been found to have more assaults (Roncek and Maier, 1991; Scribner et al., 1995; Gorman et al., 2001; Lipton and Gruenewald, 2002) and higher rates of child maltreatment (Freisthler, 2004) (in Freisthler & Gruenewald 2005, p.294). For example a study, which in the Los Angeles area, showed that each additional liquor outlet was associated with an additional 3.4 assaults per year (Scribner, MacKinnon & Dwyer 1995). Another study found a strong geographic association between the distribution of alcohol outlets and homicide rates in New Orleans. (Scribner et al, 1999).

The Alcohol and other Drugs Council of Australia (ADCA) has reviewed the international and Australian academic and research literature on the relationship

¹ Parliament of Victoria, Drugs and Prevention Committee , Inquiry into Strategies to Reduce Harmful Alcohol Consumption — Final Report' (2006).

² Gruenewald, PJ, Ponicki, WB & Holder, HD 1993, 'The relationship of outlet densities to alcohol consumption: A time series cross-sectional analysis', *Alcoholism: Clinical and Experimental Research*, vol. 17, no. 1,

Stockwell, t., PJ Gruenewald, JW Toumbourou & W Loxley (eds), *Preventing harmful substance use: The evidence base for policy and practice*, John Wiley and Sons Ltd, Chichester, England,

Stockwell, T & Gruenewald, P 2001, 'Controls on the physical availability of alcohol', in N Heather, TJ Peters & T Stockwell (eds), *International handbook of alcohol dependence and problems*, J Wiley and Sons, Chichester,

Stockwell, T, Gruenewald, PJ, Toumbourou, JW & Loxley, W (eds) 2005a, *Preventing harmful substance use: The evidence base for policy and practice*, John Wiley and Sons Ltd, Chichester, England.

between the density of outlets and alcohol-related harms.³ While there is less extensive density-related research in Australia, the ADCA concluded that such studies establish a similar relationship between density and alcohol-related problems. The studies include Stevenson, Lind and Weatherburn (1999), Donnelly and Briscoe (2005) and the NSW Bureau of Crime Statistics and Research (BOCSAR).⁴

The Australian Drug Foundation contends that the density of liquor licences is an influence on alcohol consumption and harm. The ADF is concerned that there a problem with our system of liquor licensing is that there is no way of limiting the density of licensed premises through hearings before the director of liquor licensing and appeals to VCAT. (Geoff Munro ADF, *Inquiry into Strategies to Reduce Harmful Alcohol Consumption* p. 699)

Similarly the public health body VicHealth supports a reduction in the density of liquor outlets. It believes this is important ‘particularly where there are a number of late night venues operating in the same vicinity’. (*Inquiry into Strategies to Reduce Harmful Alcohol Consumption* p.700)

Not all licensed premises create the same level of problems. Research has established that the consumption of alcohol in restaurants and social clubs doesn’t generate as many alcohol-related problems as the consumption of alcohol in pubs, hotels, nightclubs and bars (Stockwell, Somerford and Lang 1992; Lang et al 1992). The *Inquiry into Strategies to Reduce Harmful Alcohol Consumption* concluded that ‘ a street that has a high density of licensed cafes and restaurants, such as Brunswick Street in Melbourne, may produce less alcohol-related harm (particularly violence) than a street with three or four nightclubs or hotels’. (*Inquiry into Strategies to Reduce Harmful Alcohol Consumption* p. 690)

Dr Tanya Chikritzhs of the National Drug Research Institute (NDRI) stated to the Committee: ‘If we are talking about the licensed drinking environment, not all licensed premises are equal. Something that has been recognised in Victoria, I think for a while, more than other states, is a concentration on having licences that join food and alcohol together; that is, a greater concentration of restaurants and cafe licences rather than the drinking barn atmosphere of taverns, hotels and nightclubs. There is a continuum of riskiness with licensed premises. Restaurants and cafes are down the bottom. Social clubs are somewhere in the middle and taverns, hotels and nightclubs are at the top end. Of course, it varies between different types of licensed premises. One way to influence overall levels of consumption and related harms is to encourage

³ Alcohol and other Drugs Council of Australia (ADCA) 2004, Submission to the Productivity Commission Inquiry into National Competition Policy Arrangements, June, ADCA, Canberra.

⁴ Donnelly, N & Briscoe, S 2005, ‘Intelligence-led regulation of licensed premises’, in T Stockwell, PJ Gruenewald, JW Toumbourou & W Loxley (eds), *Preventing harmful substance use: The evidence base for policy and practice*, John Wiley and Sons Ltd, Chichester, England, pp.257–266.

Stevenson, RJ, Lind, B & Weatherburn, D 1999, ‘The relationship between alcohol sales and assault in New South Wales, Australia’, *Addiction*, vol. 94, no. 3, pp.397–410.

Doherty & Roche 2003, *Alcohol and licensed premises: Best practice in policing*, Australasian Centre for Policing, Commonwealth of Australia, SA.

communities to have more of those low-risk types of premises. (Inquiry into Strategies to Reduce Harmful Alcohol Consumption p. 691)

Ms Sue Maclellan, Director of Liquor Licensing Victoria, testified to the Inquiry that ‘There is no evidence to suggest that there are increased harms related to density of licensed premises. There are issues of concern in some areas that the mix of licensed premises may bring a wide range of behaviours that are not appropriate, but it is usually not linked to the drinking of alcohol; it is more the antisocial behaviour...it is seen more as an amenity/council/land use issue’ (Inquiry into Strategies to Reduce Harmful Alcohol Consumption p. 704). This is consistent with the research above that a nightclub precinct with three or four nightclubs and a tavern may produce significantly more violence and other alcohol-related harm than a precinct of small bars, licensed restaurants and other venues catering for a similar number of total patrons.

Professor John Nieuwenhuysen was the architect of Victoria’s liberal licensing laws with his ground-breaking report into the Liquor Control Act in 1986. He has said that his reforms had lifted Melbourne into a European-style city. However he recommends that the government cracks down on booze barns. He says that nightclubs catering for hundreds and even thousands of patrons were unhealthy and against the spirit of his reforms. He says ‘Now the concentration of these clubs down in the CBD and Queen and King streets is obviously leading to anti-social behaviour. Residents are not happy ... the larger establishments, the nightclubs are causing trouble. (*The Herald Sun* 22 Feb 2008). He has also said ‘I was looking to promote a more European, civilized style of drinking, but we seem to have been swept away by a wave of binge drinking. These places that disgorge thousands of people onto the streets are inherently dangerous’ (*The Age* 23 February 2008).

Vic Health CEO Todd Harper has called for a moratorium on liquor licences. The former head of the premier’s drug prevention council, David Murray of the Youth Substance Abuse Service, wants greater curbs on liquor outlets. He agreed with Professor Nieuwenhuysen on the liquor licence problem: “The small café-like bars where people come and sit and eat are not the problem. The problem is the big barns’. (*The Herald Sun* 22 Feb 2008).

The Australian Hotels Association and the Police Association have similar concerns. The former has called for a freeze on new nightclubs and bars in the city centre. The Police Association assistant secretary Bruce McKenzie said that the police force was under siege and increasingly forced to use capsicum spray to quell brawls in the city (*The Age* 23 February 2008).

The problems of nightclub precincts have recently led to special controls. In December 2007 The Minister for Police, Bob Cameron announced 24-hour banning notices from entertainment precincts and police powers to shut licensed venues for 24-hours would begin on New Years Eve. The Director of Liquor Licensing, Sue Maclellan, will declare Melbourne’s CBD and Chapel Street as the first two designated entertainment precincts where the 24-hour banning notices would apply. The Minister for Police, Bob Cameron, said “The designated areas were chosen by the Director of Liquor Licensing, in consultation with the Chief Commissioner, with regard to the level of alcohol related violence and disorder around licensed premises

in each area. These precincts have a history of violence and require a strong response. Everyone should feel safe when they go out at night and not have it ruined by a minority.” It is clearly difficult to control the problems created by nightclub precincts. Why would the Port Phillip Council want to reproduce the disaster of King Street, Queen Street and Chapel Street?

The developers stated in the Information Meeting that they had only just contacted the police! We know the attitude of the police from a previous matter – the possibility of a skate park adjacent to Luna Park. John Hauer, Officer in Charge of the St Kilda Police stated that there are major policing issues with the area including assaults, behavioural street offences, property damage and robberies. They did not consider the area suitable for a skate park and I am sure that they would not consider it suitable for a nightclub precinct.

St Kilda has a history of problematic late night venues. In the late 1980s and early 1990s there were around nine venues with major problems of violence, drugs and drunkenness. Council took vigorous action to close down blood houses such as the George hotel which have now re-opened as completely different venues. Perhaps the worst was the Bojangles nightclub at what is now the St Kilda Sea Baths. This was the infamous site of Chopper Reed’s activities. It was on public land, held on a 50 year lease. It took years of joint council and state government action, and over \$1 million, to resume this lease. Why would the Port Phillip Council countenance a repeat of these problems at the Triangle site?

The Citta development plan for the St Kilda Triangle proposes a nightclub precinct with four nightclubs with a capacity of 3000 patrons, a tavern with a capacity of 900 with alcohol also served at the Palais and various restaurants. This nightclub precinct is not consistent with the nature of the entertainment and cultural precinct promised in the Urban Development Plan. It is also contrary to the expert evidence on the problems created by such precincts. Given that nightclub venues expect to turnover three patrons for each capacity, the nightclub precinct could add 12,000 drunks to the late night revellers from Fitzroy Street and Acland Street venues. The UDF and sound public policy would support a Brunswick Street-by-the-sea not a King Street-by-the-sea at the St Kilda Triangle.

19. That the public benefits of the development plan are significantly less than claimed and the Council has unreasonably refused to audit the claimed public benefits

The Council has simply accepted the BBC claim that there are community benefits totalling approximately \$65 million including refurbishment of the Palais, public open space and community uses. The Council has refused to engage independent experts to audit the nature and the extent of these economic benefits.

Unchain St Kilda analysis concludes that the \$20 million benefit claimed for the Palais is grossly overstated, the public benefit from Linden illusory and the open space benefit exaggerated. The public benefits would be less than half of what has been claimed.

Areas of overstatement of benefit include but are not limited to:

- The failure to deduct from the \$20 million benefit claimed for the Palais (i) the ongoing operating profits which will accrue to the BBC consortium from the operation of the Palais for 99 years; (ii) the considerable costs associated with the improvement and enlarging of the food, beverage and entertainment components of the Palais, all of which are being carried out to generate additional future revenue for the operator;(iii) a portion of the component of these development costs that also apply to the balance of the project (eg for shared services such as lifts, heating/cooling, fire stairs etc). All of these issues have been acknowledged by the BCC consortium.
- The failure to acknowledge that the car park construction, which gives rise to a significant component of the claimed benefit, is not a true community benefit as (i) in part it simply replaces existing car parking which will be lost; and (ii) the whole car park will be run commercially by the BBC consortium and as such represents a private benefit not a public one.

An expert report from Certified Practising Valuer Nicholas Bond from AVA Property suggests that land values of around \$2000 per square meter would apply to the Triangle site. Selling one quarter of the site would pay for the restoration of the Palais. The purchaser could then build a modest low rise development without any nightclubs. His conclusion is that ‘the BBC consortium is getting too good a deal’.

20. That the Council officers and councillors have prejudged the issue

The community perception is that there is no independent forum to analyse the merits of the proposal. In particular there is a perception that the Council, led by its CEO and the councillors on the St Kilda Edge Committee, has made up its collective mind in advance to approve the BBC proposal with only minor amendments.

In the recent Supreme Court case of *Winky Pop Pty Ltd & Anor v Hobsons Bay City Council* [2007] VSC 468 the court considered the responsibilities of councillors. In particular the court discussed the issue of prejudgment in the considerations of councillors: whether a fair minded and informed member of the public might entertain a reasonable apprehension a councillor voting on a matter is not open to persuasion but rather has a predetermined fixed view on the subject.

The refusal of Council to commission the range of independent expert reports that would normally be expected for a development of this significance is one example of the Council having collectively prejudged the issue. Another example is the public and private statements by councillors and Council staff. Furthermore after the Council committee meeting of 13 December 2007, the council arranged a number of meetings between it, the BBC consortium and the two community groups, Esplanade Alliance and Unchain St Kilda. Our experience was that this was a futile exercise, or in the words of the Supreme Court ‘a mere ritual, designed to create the illusion of compliance with the statute’.

21. Conduct of Council

The Triangle issue and a similar issue of the skate park in Albert Park have seen inappropriate conduct by officers and councillors. Council has refused to release all relevant information and engaged, at times, in misleading conduct. Leading traders are concerned that they will suffer retribution if they speak out against the BBC consortium's proposal.

It is public knowledge that the Council has threatened Nova radio station with defamation proceedings. It is also public knowledge that it has threatened to complain to the Press Council about the reporting of certain Triangle matters to the Press Council. This is just the tip of the iceberg. I am aware of four leading traders who were subject to regulatory action by Council officers after publicly opposing the Triangle proposal and other similar proposals. This could of course be a co-incidence but the fact that it has happened at least four times suggests that there is a pattern of misconduct and abuse of power. I am also aware that these traders are reluctant to be publicly named. As suggested below it may be more appropriate that the Ombudsman investigate this issue.

22. Contract between Council and Developer

In May 2007 the Council and BBC entered into a Development agreement on the St Kilda Triangle. The Council has refused to make available even the sections of this agreement which are not commercially in confidence. Significant questions arise such as:

- Can the agreement be terminated? And if so, how?
- Are there financial penalties or ongoing obligations upon the Council in the event that Council either did not approve this development or substantially amended this development?
- If a binding development agreement had been entered into, why was this done in advance of any opportunity for community consultation?

23. That the BBC proposal for the Triangle site is unlawful

Unchain St Kilda has legal advice that there are three legal grounds on which the Council is able to reject the BBC proposal .

The first is the St Kilda Triangle Act. The BBC Development Plan is inconsistent with the purposes for which the St Kilda Triangle Land is reserved. Section 7 of the *Land (St Kilda Triangle) Act 2006* reserves the land for 'public purposes'. Use of the site for a shopping centre therefore is not permitted by the Triangle Act and/or the Crown Land Act. If the Council approves a plan which proposes purposes inconsistent with the purposes for which the land is reserved, Council will be acting beyond its lawful power.

The second ground is the definition of the St Kilda Triangle and the legality of building under the Upper Esplanade. The BBC consortium proposal includes retail and other uses under the Upper Esplanade, one of the roads bordering the Triangle site. Amendment CO65 to the Planning Scheme rezones this strip of land to a Special Use Zone 3 and applies the Development Plan Overlay to it. However this strip of land (the Upper Esplanade) is not land covered by the St Kilda Triangle Act. This raises the issues of the powers of the Council, as Committee of Management over the Triangle site, to incorporate this strip of land into the redevelopment of the Triangle without amending the *Land (St Kilda Triangle) Act*. Another issue is that the BBC consortium included this strip of land in its tender. This may mean the tender by BBC failed to meet the tender specifications as it included land that was outside the then specified St Kilda Triangle.

A third ground is that the development plan put forward by the BBC consortium does not conform to the Development Plan Overlay. The DPO incorporates the Urban Design Framework and, as discussed above, the development plan fails to conform to this. Council will be acting beyond its lawful power if it approves a non-conforming development plan.

24. The Role of State Government

The State government has not responded to frequent requests for it to intervene. It has perhaps placed too much faith in the Council's ability to manage a difficult process.

It has been reported that the BBC consortium expects that the government will cover the costs of decontamination of the site at a cost estimated at \$15 million. This has been denied by a spokesperson for the treasurer. (*The Age* 13 February 2008) Clearly any such contribution would be unfair to other tenderers who did not have the luxury of a \$15 million subsidy. It is also unfair to the wider community who did not tender as a \$15 million state subsidy of the refurbishment of the Palais may have permitted an array of more creative entertainment and cultural proposals for the Triangle site.

25. What is to be done?

There is a concern that the Public Land Committee may be seen to be partisan. For example these are comments attributed to our the local member by a resident in an e-mail: *'At a meeting of Save Albert Park on Saturday 9 February Martin Foly was the guest speaker. In response to questions about the ALP policy on public land he made comments about the Select Parliamentary Committee on Public Land Development. He said that the Committee was a "Star Chamber, a roving committee not looking at it (i.e. public land) seriously." He went onto say that MP's had asked for a redefinition of the term public land but the Committee had not complied. I think that he also said that it was a kangaroo court but have no record in writing so can not be sure. I commented to him afterwards I did not agree with his statements'*.

Unchain St Kilda submits that there are various important matters that warrant further investigation. It may be more appropriate for this to be done by an independent body so as to avoid the implications raised above. There are three bodies the Select Committee could consider. These are:

- The Priority Review Panel
- Liquor Licensing Victoria
- The Ombudsman

26. Reference to the Priority Development Panel

One possibility would be for the Minister to refer the Triangle site to the Priority Development Panel. This would allow an independent analysis of the merits of the proposal and commissioning of the range of expert reports that should have informed the decision-making from the beginning.

The state government has ultimate responsibility for the use of the public land at the St Kilda Triangle. Section 12 of the *St Kilda Triangle Act* provides that the Minister must approve leases granted by the committee of management of the St Kilda triangle land. In so doing he or she must be satisfied that ‘the buildings, works or facilities are of such a substantial nature and value as to justify the term of the lease’.

It is suggested that the Committee could recommend to the Minister that in order to inform himself of the ‘nature and value’ of the Triangle proposal, he ask for a report from the Priority Development Panel. The PDP is an advisory committee established by the Minister for Planning under section 151 of the Planning and Environment .

The criteria for projects to be considered for referral as a Priority Development Project are set out below. A project must meet a majority of the following four considerations:

- Be of genuine State or regional significance
- Relate to the planning or development of a Major Activity Centre
- Include development and implementation of an Urban Design Framework
- Be of a scale or level of complexity that requires special management arrangements,

It is suggested that the St Kilda Triangle project demonstrably meets these referral criteria.

27. Reference to the Liquor Licensing authorities

It is possible that the PDP process would concentrate on planning issues and not have expertise to consider the issues around the nightclub precinct. One possibility would be for the Select Committee to request Liquor Licensing Victoria to conduct an informal investigation into the issue of whether it is appropriate to establish a nightclub precinct at the Triangle site. It is one thing for private property such as the former RACV club to turn Melbourne into what the *Age* has called 'alcohol-fuelled

anarchy'. It is quite another matter for public land to do so with the consent of local and state government.

28. Reference to the Ombudsman

It is suggested that the Public Land Committee consider referring the matter of the St Kilda Triangle to the ombudsman for further investigation. This would be in addition to any investigation by the Priority Development Panel. The PDP investigation would be 'forward looking' into the merits of the proposal and what should happen. The Ombudsman inquiry would be backward looking, examining what went wrong with the Triangle process.

Section 16. of the Ombudsman Act 1973 provides that:

(1) At any time-

(a) the Legislative Council or a committee of the Legislative Council;

(b) the Legislative Assembly or a committee of the Legislative Assembly;

or

*(c) a joint committee of both Houses of Parliament-
may refer to the Ombudsman for investigation and report any matter, other than a matter concerning a judicial proceeding, which that House or committee considers should be investigated by him.*

(2) Where a matter is referred to him pursuant to subsection (1), the Ombudsman shall, notwithstanding anything to the contrary in this Act, forthwith investigate that matter and report thereon.

(3) The Ombudsman shall send his report-

(a) where the matter is referred by the Legislative Council or a committee of the Legislative Council-to the President of the Legislative Council;

(b) where the matter is referred by the Legislative Assembly or a committee of the Legislative Assembly-to the Speaker of the Legislative Assembly;

(c) where the matter is referred by a joint committee of both Houses of Parliament-to the President of the Legislative Council and to the Speaker of the Legislative Assembly.

The Ombudsman can investigate administrative actions taken by any council employee, but not those of a councillor when acting in the role of a councillor or of a council acting as a decisions making body. An "administrative action" includes any action, decision or recommendation by a council staff member. It can also relate to a failure to carry out these functions. This might mean an unreasonable delay, inadequate communication, inflexible policies and procedures, failure to correct errors and the provision of incorrect advice by authorities, or inadequacies in administrative procedures.

The matters the Ombudsman could be asked to investigate include:

- Why did the CEO set up a process through the SKE Committee that lacked appropriate checks and balances?
- Did the SKE Committee encourage tenderers to go beyond the UDF?
- Why did the CEO not commission the array of independent expert reports that would be expected of a project such as this?
- Did the Council officers engage in inappropriate conduct in its treatment of dissenting voices?
- Did the CEO oversee a process that gave the community adequate time to consider and submit on proposals?
- Did council officers withhold information that the community ought to have seen?
- Did the Council act unlawfully in approving the Development Plan

29. Changes to the planning process for public land.

It is suggested that a major role for the Select Committee is to draw lessons from the range of matters it will consider. Unchain St Kilda has experience only with this isolated matter. What lessons are there from the Triangle experience for public lands generally? These are put forward at a general level. It is for the Select Committee to meld these into the lessons it gleans from the other matters it considers.

(1) State Funding: A major problem with the process has been the reluctance of the state government to commit public funding to the restoration of the Palais, a public asset. There have been intermittent requests by the Council and the community for funding but there has been no comprehensive consideration of the merits. Could a more rigorous and systematic process be established for consideration of such matters?

(2) Tender Concept: The tendering process adopted for the Triangle site involves significant costs for tenderers and thus deters smaller architects and designers from participating. An alternative is a competition judged by independent architects and developers which would encourage a wider range of participants and perhaps more creative proposals.

(3) Probity Process: The probity process was overseen by Mr Geoff Walsh of Pitcher Partners. He advised that the tender process was undertaken in accordance with identifies probity principles. Could the probity process be expanded to include a consideration of compliance not just with procedural matters but also with substantive matters such as conformity with the UDF?

(4) Urban Development Framework: A number of matters arise concerning the UDF. Is an UDF merely an 'aspirational' document? What does this mean? Could there be a two stage UDF with a second stage open to public consultation to consider, for example in the Triangle case study, claims that there should be a substantial retail component, discussion of the nightclub precinct issue and requests for state government funding for exciting concepts that would otherwise be uncommercial?

(5) Abolition of appeals to VCAT: This is supposed to promote development after the community has been consulted in the UDF process. It is clearly unfair if the community has its normal appeal rights taken away on the basis of a document the council can see as merely 'aspirational' and therefore can ignore. The importance of the right to appeal to VCAT may not be the actual appeal as the impact on Council behaviour before the appeal. Councillors often made statements about the threat of an appeal to VCAT by the developer but felt no similar pressure from opponents. Had Council to face the need to defend their permit approvals at VCAT, it may not have refused to commission a full range of independent expert reports.

(5) Independent Reports: As discussed above Council commissioned only an extremely limited range of independent reports. Councillors paid little attention to the expert reports commissioned by opponents even though Roz Hansen and Clive Lucas are the leaders in their fields. What is the appropriate mechanism to ensure in advance that councils in a similar position will commission the appropriate range of independent reports to ensure that there is a satisfactory base to inform development of important public land sites?

(6) Structure: A major problem with the St Kilda Triangles site process was the failure to set up a structure with checks and balances. The presence of the CEO and councillors on the SKE Committee meant that in practice Council could not impartially assess the Development Plan proposed. It may be appropriate in some instances to have the CEO involved in the equivalent of the SKE Committee. But in such situations the state government should be careful to ensure that some other set of checks and balances is in place.

(7) Documents: Although we are dealing with a major public asset in the St Kilda Triangle, there are many documents which have not been provided or provided with little time for consideration. For example Council has refused to release the 2004 Spiller Gibbons Swan study on the Economic Impact Assessment of St Kilda's Edge projects and to release the non-confidential parts of the Development Agreement it has signed with the Developer. The FOI process does not allow the community to access such information in time for it to be analysed and used in submissions to the Council. How can the state government ensure that the appropriate range of documents are available and so ensure that the best possible decisions about public land will be made?

(8) Time frames: In both Council meetings on the Triangle site (December 13 and February 7) there was limited opportunity for outsiders to consider matters. In both the formal motions proposed and supporting reports from Council officers were available only a few days before the meetings. Even worse, in both meetings there were substantial changes to the motions as advertised which were not revealed until after the public were given an opportunity to address the Council. The state government should ensure that there is adequate time for the public to make considered submissions on the use of public land.

(9) The state government should consider establishing an Ombudsman for Public Lands either within the Planning or Premier's Departments.

30. The Unchain St Kilda Vision for Success

Unchain St Kilda supports development of the Triangle site based on the original vision promised in the Urban Development Framework. St Kilda is unique. It demands a cultural and architectural response that respects and enhances its unique heritage, location and potential.

The development plan for St Kilda's foreshore crown land must be something residents and Melbournians will feel proud of now and in ten, fifty and one hundred years time. We recommend a consultation with local cultural, arts and entrepreneurial leaders to identify a range of commercial opportunities in the arts for the site. Circus, cabaret, and other performing arts should be considered, as should commercial spaces such as art galleries and others to enliven and enrich Melbourne's visual and performing arts scene. Below we have summarized in nine points our view of what would constitute a successful development of the site, based on vision for the Foreshore contained in the Urban Design Framework. (for more details see www.unchainstkilda.org):

- The Palais to be retained as the free-standing centrepiece of the Triangle site, (recognising that one storey structures may be necessary on its western side and on its southern side for upgraded backstage facilities).
- A cultural precinct: Partner for the Palais with a major cultural facility of national significance
- A seaside fun precinct to expand and complement role of the Palais, continue the traditional role of the site as seaside fun precinct: a sense of fantasy and play, stronger connections to Luna Park and its sense of seaside fun.
- Retail: Complementary role (as promised), not the principal purpose of the development: Concentrate retail where needed to "activate" edges, e.g. along Jacka Blvd
- Hotel: an 'arts hotel' supporting arts and entertainment culture of precinct: A specialised 'arts hotel' catering to the Palais' back-of-house needs, and providing services, venues and facilities to support the arts and entertainment culture of the precinct
- Views and Landmarks: Maintain key views across the site: Grassy slopes retained and a building of significant architectural merit as a proud added feature of the site, its purpose as a cultural destination of national significance mirrored in its design on the western side.
- Public space: Provision of well used, accessible, non-commercial spaces for passive /active public enjoyment
- Environment: Meet the new challenge of climate change; air quality, reduce waste, water and energy conservation
- Traffic and Parking: Embrace alternative, less polluting modes, minimize impact on surrounding areas, meet parking needs on a precinct basis

Appendices

1. Roz Hansen 'St Kilda Triangle Redevelopment: Planning Advice'

2. Don Gazzard 'St Kilda Triangle: Heritage Considerations'