

**IN THE MATTER** of the *Planning and Environment Act 1987* [the Act]

and

**IN THE MATTER** of the *Victorian Civil and Administrative Tribunal Act 1998* [the VCAT Act]

and

**IN THE MATTER** of Application for Review No. P1174/2007 by Regal Hotel Pty Ltd & ors [the Objectors] against the decision of the Port Phillip City Council [the Council] to grant a permit for the use and development of part of Albert Park situate at the north-west corner of Lakeside Drive and Fitzroy Street, St Kilda [the Subject Land] for the purpose of a skate park.

**WRITTEN OUTLINE OF ARGUMENT**  
**ON BEHALF OF THE PORT PHILLIP CITY COUNCIL**

**1. PREAMBLE**

- 1.1 This is a rehearing of the Application for Review No. P1174/2007 initially heard by a division of the Tribunal constituted by Deputy President M Baird and Member J Rickards in a hearing between 24 October 2007 and 29 November 2007 [the first hearing].
- 1.2 At the first hearing all the then parties other than Melbourne Cricket Club and Cricket Victoria and the Council were represented by Ms S Brennan, a very experienced member of Counsel in the planning jurisdiction.
- 1.3 The Tribunal gave a decision dated 13 December 2007 [the first decision].

1.4 The first decision was set aside for reasons unassociated with the determination of any of the merits issues raised by the Applicants for Review but on the basis of defects in the Notice initially given of the application and the possible impact on persons who were not parties in the first hearing.

1.5 In the hearing before the Supreme Court on 29 April 2008 the following is recorded in the transcript concerning whether the matter should be remitted to the same division of the Tribunal or a differently constituted division and if a differently constituted division what regard that division could have to the first decision and the evidence and submissions in the first hearing:

15 *HIS HONOUR: What do you say you would be entitled to as a*  
16 *result of the agreed orders, by way of a rehearing?*

17 *MR GARDE: We would be entitled to a — I don't quite follow*  
18 *Your Honour, but a rehearing in conventional terms.*

19 *HIS HONOUR: Well would you? If the only reason why the*  
20 *decision's been set aside is because there was not proper*  
21 *advertising, and it turns out that that was a matter of*  
22 *no consequence, because with proper advertising, not a*  
23 *single additional thing was forthcoming, would you say*  
24 *that that entitles you to a full rehearing, nonetheless*  
25 *of the case?*

26 *MR GARDE: It depends — not necessarily, Your Honour, by reason*  
27 *of that aspect alone. But it depends on what the*  
28 *Tribunal has done, and here we've got, as I'll come to*  
29 *some fundamental propositions stated by the Tribunal with*  
30 *which, from our point of view, we fundamentally disagree,*

31 *and to order that the plaintiffs return to the Tribunal*  
1 *that has already on the record expressed its disagreement*  
2 *with the submissions they principally want to advance,*  
3 *did not conceal them, in our respectful submission, with*  
4 *the principle that justice not only be done, but justice*  
5 *be seen to be done.*

6 *HIS HONOUR: In a sense it sort of throws the issue up into*  
7 *stark relief to posit the situation where there's simply*  
8 *no further correspondence from anybody. You say, would*  
9 *you, you earnt a reconsideration of this decision anyway.*

10 *MR GARDE: We have.*

11 *HIS HONOUR: And - - -*

12 *MR GARDE: It should be done on the merits by people who are*  
13 *perceived as, and are demonstrably independent, to review*  
14 *it. I'm not being critical of the VCAT members, they can*  
15 *only do their best, but I mean it's no joy for them,*  
16 *having published a set of reasons such as this, which*  
17 *essentially rejects the principle submissions that we*  
18 *would put forward.*

19 *HIS HONOUR: This is a very unusual case, because normally*  
20 *decisions are set aside because of some error of law*  
21 *relating to the way in which the issues have been*  
22 *considered, or because of some denial of natural justice*  
23 *to the party concerned, the party who was before the*  
24 *Tribunal and who was complaining to the court, but here*

25 *in effect, you were complaining about a denial of natural*  
26 *justice to third parties, who are not before the court."*

(pp 30 & 31)

"18 *HIS HONOUR: Would your client object to the new panel reading*  
19 *the reasons for decision of the last — — —*

20 *MR GARDE: No, Your Honour, no. Nor reading all or any of the*  
21 *material filed before the previous tribunal, but our*

22 *instructions are very clear here that it needs*

23 *independent members to take a fresh look. Using all the*

24 *economies and conveniences, by all means, but — — —*

25 *HIS HONOUR: Reading the decision would be an economy measure*  
26 *in a sense.*

27 *MR GARDE: Yes, we don't suggest they go into with their eyes*  
28 *closed or anything of that sort. No they go into it*

29 *inevitably with the knowledge that the matter it was*

30 *being looked at by the tribunal before and that the*

31 *matter had been to this court and been remitted, and so*

1 *they would know all that but nonetheless, independent*

2 *people, VCAT members, capable of forming an independent*

3 *judgment and not being embarrassed by the fact that*

4 *various views had previously been expressed by them."*

(pp 37 & 38)

"22 *HER HONOUR: Yes and you've indicated in open court that you'd*  
23 *have no objection to the new Tribunal differently*  
24 *constituted reading and having regard to the decision of*  
25 *the prior Tribunal?*  
26 *MR GARDE: No, the material before the new Tribunal will*  
27 *inevitably include the decision of the previous Tribunal.*  
28 *That doesn't alter its legal responsibility but - — —*  
29 *HIS HONOUR: No it has to make up its own mind."*

(p75)

- 1.6 The Council accepts and adopts the findings of the first decision in its entirety.
- 1.7 In particular the Council contends that:
  - 1.7.1 The proper categorisation of the proposal is "informal outdoor recreation" for the reasons advanced at the earlier hearing and the reasons given by the Tribunal in the first decision (21-28).
  - 1.7.2 The proposal is consistent with the local and regional functions served by Albert Park and the mix of active and passive facilities that are available to the community (38).
  - 1.7.3 The proposal will provide a better located and well structured facility when compared with the existing facility (38).
  - 1.7.4 The proposal will maintain the distinctly parkland setting of this corner of the Park (42).

- 1.7.5 The proposal will be of relatively low profile and appear as another recreational facility that is reasonably expected in a regional or local park (42).
  - 1.7.6 The proposal will increase visitation to Albert Park at off-peak times by expanding the availability and diversity of recreation facilities on offer (43).
  - 1.7.7 The proposal is acceptable to Parks Victoria (45-46).
  - 1.7.8 The site is acceptable in relation to siting/design criteria in terms of access to toilets, shade (subject to condition), signage, lighting and fencing (47-52).
  - 1.7.9 There is no data or reliable evidence directly linking those attending a skate park with damage to schools or other facilities or that problems are a necessary consequence of skate park facilities being located near sporting fields or primary schools (54-56).
  - 1.7.10 There is no evidence establishing a higher level of anti-social behaviour from the proposal than other facilities and activities in and adjacent to Albert Park (60).
  - 1.7.11 The proposal is appropriate under heritage considerations (67-80).
  - 1.7.12 There will be no unacceptable amenity impacts (82-83).
- 1.8 There is no evidence to be called on behalf of the Applicants for Review other than the evidence led and tested in the first hearing.

- 1.9 In this hearing whilst there are additional parties no new issue has been raised by them and no evidence is to be called on behalf of the parties joined.
- 2.1 The rights conferred by Parks Victoria on those using playing fields at Albert Park for organised sport are subject to the Planning Scheme and are only lawful subject to the grant of a planning permit and in accordance with the conditions of any planning permit granted.
- 2.2 There is no known planning permit for the use of the Ian Johnson oval for the purposes of an educational facility or for organised sport at any level.
- 2.3 The Council contends that the use of Albert Park by some parties is no basis for refusing the provision of facilities for use by other members of the community for their chosen recreation.
- 2.4 The Council relies on the Written Outline of Submissions made on its behalf (other than 7.1.5 to 7.1.14) and the Written Outline of Submissions in Reply on behalf of the Council together with all of the documents tendered at the first hearing.
- 2.5 In addition to the advice of Heggies Australia Pty Ltd of 24 October 2005 the Council also relies on the evidence of Mr R Burton that there will be no unacceptable acoustic impacts from the proposed use and development.
- 2.6 In addition to the submissions and evidence at the first hearing the Council relies on the evidence of Mr Govenlock and Ms Cooper which supports the conclusion of the Tribunal in the first decision that the proposal is one appropriate for land zoned for public recreation and open space and indeed, it

is submitted, there cannot be a more appropriate zone for a proposal for outdoor recreation than land zoned for public recreation and open space.

2.7 Council also relies on the transcript of the proceedings on 24 to 27 October 2007 to the extent that the Applicants for Review have had it transcribed and which therefore, pursuant to the directions of the Tribunal, will be on the Tribunal's file.

3. **CONCLUSION**

3.1 The decision under review should be varied in accordance with the first decision.

27 October 2008  
08040786



**Ian Pitt SC**  
**of Best Hooper**  
**Solicitors on behalf of the Port Phillip City Council**

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