

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 SUBMISSIONS ON BEHALF OF THE COUNCIL

1. PREAMBLE

- 1.1 This Outline of Submissions is made on behalf of the Port Phillip City Council, in its several roles as the Responsible Authority under the Port Phillip Planning Scheme, the relevant Local Government Authority exercising powers under the *Local Government Act 1989*, the Public Land Manager in respect of the Subject Land and the Permit Applicant.
- 1.2 As background there is tendered to the Tribunal copies of Council Officer Reports to the Strategy and Policy Review Committee of 3 November 2004, to the Ordinary Meeting of Council on 22 November 2004, to the Strategy and Policy Review Committee of 7 November 2005 and the Ordinary

Meeting of Council of 28 November 2005 detailing the investigations and consultation associated with the selection of the Subject Land as the site for a skate park.

- 1.3 Of these reports only the supplementary report of 28 November 2005 and the report of 23 April 2007 was before the Tribunal at the directions hearing on 10 August 2007.

2. THE PROPOSAL

- 2.1 The proposal is a skate park and surrounding plaza comprising an inset skate bowl within a three level plaza area paved in part with concrete pavers of a red colour.
- 2.2 The skate bowl and adjoining plaza area will be surrounded by an embankment with inner walls of pre-cast concrete panels and the batter planted with native grasses and shade trees.
- 2.3 A more detailed description of the proposal is to be found in clause 2.2 of the report of Lovell Chen of March 2007 comprising part of the application, it is depicted in the plans and images forming part of the application considered by the Council as the relevant Responsible Authority and is described in section 5 of the witness statement of Andrew Biacsi.

3. PLANNING CONTROLS

- 3.1.1 The Subject Land comprising an area in the order of 1200m² is wholly situated within a Public Park and Recreation zone.

3.1.2 Pursuant to clause 36.02 the purposes of the Public Park and Recreation zone are:

"To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

To recognise areas for public recreation and open space.

To protect and conserve areas of significance where appropriate.

To provide for commercial uses where appropriate."

3.1.3 Pursuant to clause 36.02-1 "Informal outdoor recreation" is a "permit not required" use.

3.1.4 "Informal outdoor recreation" is defined in clause 74 of the Planning Scheme to be:

"Land open to the public and used by non-paying persons for leisure or recreation such as a cycle track, picnic or barbecue area, playground, and walking or jogging track."

3.1.5 The proposed use is to be open to the public and used by non-paying persons for recreation.

3.1.6 Pursuant to clause 36.02-2 a permit is required to construct a building or construct or carry out works but this does not apply to, inter alia:

- "• a building or works carried out by or on behalf of a Public Land Manager ... under the *Local Government Act 1989* ... "

3.1.7 "Public Land Manager" is defined in clause 72 of the Planning Scheme, insofar as here relevant, as follows:

"The ... Municipal Council having responsibility for the care or management of public land. In relation to Crown land reserved under an Act and managed or controlled by a Committee of Management, other than Parks Victoria or a Municipal Council, it means the Minister administering that Act and does not include the Committee of Management."

(underlining added for emphasis)

3.1.8 Albert Park is managed by Parks Victoria.

3.1.9 Pursuant to a Service and Tenancy Agreement [the Lease] entered into between Parks Victoria and the Council dated 14 March 2007, the Council has care and management of the Subject Land, albeit that Parks Victoria retains some care and management functions.

3.1.10 A copy of the Lease was tendered to the Tribunal in respect of the directions hearing on 10 August 2007.

3.2 Tendered to the Tribunal herewith is a copy of the zoning plan affecting the Subject Land, a copy of the zone and Heritage Overlay provisions and of the local policies referred to in this Outline.

3.3.1 The Subject Land is situate within the South Melbourne, Albert Park, Middle Park and part of St Kilda Heritage Precinct HO3.

3.3.2 Pursuant to clause 43.01 the purpose of the Heritage Overlay is as follows:

"To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

To conserve and enhance heritage places natural or cultural significance.

To conserve and enhance those elements which contribute to the significance of heritage places.

To ensure that development does not adversely affect the significance of heritage places.

To conserve specifically identified heritage places by allowing a use that would otherwise be prohibited if this will demonstrably assist with the conservation of the significance of the heritage place."

3.3.3 Pursuant to clause 43.01-1 a permit is required, inter alia, to construct a building or construct or carry out works.

3.3.4 Pursuant to clause 43.01-4 decision guidelines are specified to be considered as appropriate, of which the more relevant for present purposes are:

- "• The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.
- Any applicable heritage study and any applicable conservation policy.
- Whether the location, bulk, form or appearance of the proposed building will adversely affect the significance of the heritage place.
- Whether the location, bulk, form and appearance of the proposed building is in keeping with the character and appearance of adjacent buildings and the heritage place.
- Whether the proposed works will adversely affect the significance, character or appearance of the heritage place."

3.3.5 The reference to the Schedule to the Heritage Overlay indicates that the Subject Land is not identified in the Heritage Overlay as an Aboriginal heritage place.

4. PROCESSING OF APPLICATION

4.1 The application herein was received by the Statutory Planning section of the Council on the 13th of March 2007 and comprised a letter from Adam Nitschke, the project co-ordinator, Asset Design and Delivery; the application form; the design drawings including a location plan, site analysis, site plan and site sections; some 3D imagery of the proposal; a report from Lovell

Chen incorporating a heritage impact assessment; a copy management plan; a copy of an arboricultural cultural assessment and report on existing site vegetation; a letter of consent from Parks Victoria confirming support for the project; and a letter of support from the Victoria Police Crime Prevention Unit.

- 4.2 It is understood that a copy of the documents forming the application has been previously provided to the Tribunal.
- 4.3 A requirement for notice to be given of the application issued on 15 March 2007 and notices were mailed to 525 properties on that day.
- 4.4 The requirement also required two signs on the Subject Land, which were erected on the 15th of March 2007 and maintained in good order and condition for a period of 14 days thereafter, and notice was published twice in the Leader Newspaper which circulates in the area.
- 4.5 A copy of a draft Cultural Heritage Management Plan was forwarded to Cultural Heritage Solutions Australia Pty Ltd by letter dated 5 April 2007 and by letter dated 11 April 2007 Cultural Heritage Solutions advised that the Boon Wurrung Elders Land Council found the contents of the intended Cultural Heritage Management Plan acceptable.
- 4.6 Notice of the application generated some 355 objections (254 in pro forma) and 34 letters of support.
- 4.7 The application was reported to the Council on 23 April 2007 when the Council resolved to issue a Notice of Decision to Grant a Permit subject to three conditions, including the retention of all existing trees.

- 4.8 A copy of the Council Officer's Report of 23 April 2007 has previously been provided to the Tribunal.
- 4.9 A Notice of Decision was issued on 24 April 2007.
- 4.10 Several Applications for Review were lodged against that Notice of Decision.
- 4.11 The grounds raised in the Applications for Review seek to canvass issues other than issues relating to the purpose of the Heritage Overlay, and include grounds relating to the use.

5. PLANNING POLICY

5.1 Pursuant to clause 11.01 Responsible Authorities are required to take into account and give effect to the State level planning policy and to balance conflicting objectives in favour of net community benefit and sustainable development.

5.2 Pursuant to clause 12.05-2 it is strategy:

"To provide an easily recognisable sense of place and cultural identity.

To ensure development responds and contributes to the existing sense of place and cultural identity.

To ensure development responds and contributes to the existing sense of place and cultural identity.

To protect heritage places and values by supporting the identification, conservation, protection and management of

cultural heritage and conserving places of indigenous and non-indigenous cultural heritage while encouraging appropriate new development that respects established heritage values."

5.3 It is an Objective for open space:

"To ensure that urban open space provides for nature conservation, recreation and play, formal and informal sports, social interaction and peace and solitude."

5.4 Pursuant to clause 15.11-1 it is an Objective:

"To assist the conservation of places that have natural, environmental, aesthetic, historic, cultural, scientific or social significance or other special value important for scientific and research purposes, as a means of understanding our past, as well as maintaining and enhancing Victoria's image and making a contribution to the economic and cultural growth of the State."

5.5 Clause 15-11-2 requires, inter alia, Responsible Authorities:

"To identify, conserve and protect places of natural or cultural value from inappropriate development."

5.6 Pursuant to clause 21.04 in the Municipal Strategic Statement [MSS] it is policy:

"To ensure that all significant heritage places receive adequate protection from unsympathetic alterations as well as offering a

range of facilities tailored to meet the recreational needs of the local community."

5.7 Pursuant to clause 21.04-4 for the South Melbourne, Albert Park and Middle Park areas the Council's vision includes:

"Albert Park Reserve continues to provide a range of recreational and sporting activities set within an attractive parkland setting that are accessible to the local and wider community."

5.8 Within the MSS in clause 21.05-5 it is an Objective, inter alia:

- "• To retain, protect and enhance places and areas of identified historical, architectural, cultural, social, scientific or environmental significance."

and

- "• To encourage new development that is sympathetic and respectful to heritage places."

with strategies including:

- "• Encourage all heritage places in the Heritage Overlay to be restored, recycled and/or renovated in a sympathetic manner that will enhance the heritage value of the place.
- Carry out development in public spaces that are consistent with the identified heritage characteristics of Port Phillip's heritage places."

and to refer to the relevant Statement of Significance in the Port Phillip Heritage Review to assess all applications within Heritage Overlay areas.

- 5.9 The local policy on heritage is to be found in clause 22.04.
- 5.10 Pursuant to clause 22.04-1 the policy basis recognises the protection of the large number of heritage places that do not have heritage significance in their own right but are collectively part of the significance of these areas.
- 5.11 The Objectives under clause 22.04-3 include:
- "• To encourage all new development and redevelopment of significant and contributory places to be respectfully and harmoniously integrated with the surrounding character.
 - To promote design excellence which clearly and positively supports the ongoing heritage significance of the Heritage Overlay.
 - To ensure new buildings and additions complement existing heritage characteristics."
- 5.12 A policy in clause 22.04-4 encourages a contextual design approach for alterations and/or additions to a heritage place or for new development where new development sits comfortably and harmoniously with the site and within the streetscape and does not diminish, detract from or compete with the significance of the heritage place.

5.13 Contemporary architecture and innovative design is recognised as an important part of a contextual approach.

6. **ABORIGINAL HERITAGE**

6.1 Following the coming into operation of the *Aboriginal Heritage Act* 2006 [the *Aboriginal Heritage Act*] and the *Aboriginal Heritage Regulations* 2007 [the *Regulations*] there are requirements for a Cultural Heritage Management Plan for an activity within a park.

6.2 Pursuant to Regulation 76 of the *Regulations* a Cultural Heritage Management Plan is not required for an activity, if before the commencement date, a decision maker received an application for a statutory authorisation for that activity.

6.3 Pursuant to the *Regulations* "statutory authorisation" has the same meaning as in section 50 of the *Aboriginal Heritage Act*.

6.4 "Statutory authorisation" is defined in the *Aboriginal Heritage Act* in a way which includes a permit under the Act to use or develop land for all or part of an activity.

6.5 The Application for Planning Permit herein was received by the Council on 13 March 2007 and is clearly an Application for Permit under the Act to develop specified land.

6.6 The commencement of the *Aboriginal Heritage Act* was the 28th of May 2007.

- 6.7 It follows that the subject application is exempt from the requirement for a Cultural Heritage Management Plan under the Aboriginal Heritage and the Regulations thereunder.
- 6.8 Additionally pursuant to Regulation 29 "a park" is an area of cultural heritage significance.
- 6.9 "Park" is defined in the Regulations to have the same meaning as in the *National Parks Act 1975* [the National Parks Act].
- 6.10 Pursuant to section 3.1 of the National Parks Act "park" is defined as follows:
- "Park means a national park, State park, marine national park, marine sanctuary or land by reason of section 17A of 18, as a park for the purposes of this Act."
- 6.11 Section 17A relates to wilderness parks which are specified in Schedule 2A and section 18 relates to parks specified in Schedule 3.
- 6.12 Albert Park is not listed in either Schedule 2A or 3 of the National Parks Act.
- 6.13 National parks and State parks under section 17 of the National Parks Act are the areas of land specified in Schedule 2B to that Act and Albert Park is not listed in either of those schedules.
- 6.14 Accordingly for this reason also the subject proposal is not subject to a requirement for a Cultural Heritage Management Plan pursuant to the Aboriginal Heritage Act.

6.15 Notwithstanding the absence of any statutory obligation to obtain approval of a Cultural Heritage Management Plan, a draft of the such a plan has been prepared and that plan is acceptable to the relevant Aboriginal community.

7. OUTLINE OF SUBMISSIONS

7.1.1 By notice dated 1 August 2007 these Applications for Review were listed for directions for up to 30 minutes to consider the Objectors' request "seeking a prompt final hearing" of the application for a declaration that the Council was not a Public Land Manager under the relevant provisions of the *Crown Land Reserves Act* and other matters including that the consideration of the permit application should be remitted to the Council. A copy of that notice is tendered to the Tribunal.

7.1.2 No notice was given of a prompt final hearing of the Declaration application.

7.1.3 A limited range of material was before the Tribunal on 10 August 2007 relating to the extent of the Council's responsibilities for care and management of the skate park site comprising the Lease and the Officer's Report of 23 April 2007.

7.1.4 It was submitted on behalf of the Council that to argue the issues raised by the Application for Declaration, other than that a finding that the Council's decision was invalid would not deprive the Tribunal of jurisdiction, would take more than an hour.

7.1.5 In its decision of 17 August 2007 the Tribunal said:

"11. ... However, in the absence of broader argument or a view from Parks Victoria, the declaration I have made is limited to a finding on the material before me that the Council is not a public land manager in relation to this specific permit application."

7.1.6 There was not before the Tribunal on 10 August 2007 details of the maintenance and management plan required by the Lease. A copy of that plan is tendered to the Tribunal.

7.1.7 It is common ground that there may be more than one Public Land Manager for one parcel of public land. In *Central Highlands Water & anor v Ballarat City Council & ors (No. 1)* 2006 VCAT 1297 the Tribunal constituted by the then President Justice Stuart Morris (as he then was) said:

"7. The expression "a public land manager" means any public land manager. There can be, at one and the same time, more than one public land manager that is responsible for the care and management of land. The City of Ballarat is a public land manager in respect of the land; and may be described as the primary carer and manager of the land; but this does not mean that there cannot be another public land manager. The planning scheme contemplates the possibility that more than one authority might be a public land manager in respect of the same land. There are several reasons for such a

conclusion. First, the use of the word "a" rather than the word "the" in clause 36.02-1 is significant. Second, the context of the expression indicates that the activities of more than one authority may be embraced. Third, various Acts are referred to clause 36.02-1: this indicates that different responsibilities may arise in relation to public land, many of which will be concurrent."

- 7.1.8 It is important that it is not all lessees who can be a Public Land Manager, only Ministers, government departments, public authorities and Municipal Councils.
- 7.1.9 Section 17(2) of the *Crown Land (Reserves) Act 1978* contains provisions for licences, agreements to operate services and facilities and tenancy agreements.
- 7.1.10 The Agreement between Parks Victoria and the Council is a tenancy agreement.
- 7.1.11 Pursuant to clause 38 of the Lease the Council is entitled to quiet enjoyment of the premises during the term without interruption by the landlord.
- 7.1.12 It is submitted that this is, as a matter of law, a right to exclusive possession and as such the Service and Tenancy Agreement constitutes a Lease. Kitto J in *Claude Neon Ltd v MMBW* [1969] 20 LGRA 1 at 516 said:

"The law as to the difference between a lease, which confers an interest in land, and a licence, which does not, was considered

by this Court in *Radaich v Smith*, and I need do no more here than say that the inquiry must be whether the substance and effect of the documents in question was to grant the appellants a right of exclusive possession of any part of the Corner Hotel building."

7.1.13 Pursuant to Part 10 of the Lease the Council is responsible for care and management of the Subject Land.

7.1.14 Further obligations of the Council in relation to care and management of the Subject Land are contained in Schedule 9 of the Lease.

7.1.15 The categorisation of Public Land Manager is an analysis to be undertaken irrespective of whether the Council is both the permit applicant and also the Responsible Authority.

7.1.16 For these reasons the Council continues to maintain that it is Public Land Manager for the Subject Land.

7.2.1 It is the Council's contention that, irrespective of its status as a Public Land Manager, the proposed use is an "informal outdoor recreation" facility.

7.2.2 The Tribunal has previously considered the proper categorisation of a skate park. The Tribunal held in *Maroondah Residents & Ratepayers Association Inc v Maroondah CC* [2005] VCAT 386:

"Ambit of Discretion

8. It is necessary to address is the ambit of discretion in this Application. The proposal was characterised by the

Council for the purposes of the Planning Scheme as “leisure and recreation”. That definition as set out at Clause 74 of the Scheme is “*Land used for leisure, recreation, or sport*”. The definition includes “minor sports and recreation facility” which is:

Land used for leisure, recreation, or sport, without substantial provision for spectators, and which is usually open to non-paying spectators.

9. Mr Rantino referred me to my discussion of the definition of a skate park in *St Mary's School v Greater Shepparton City Council* [2004] VCAT 1440. In that case, I categorised a skate park/BMX bike facility as "informal outdoor recreation". That definition as set out at Clause 74 is:

Land open to the public and used by non-paying persons for leisure and recreation, such as a cycle track, picnic or barbecue area, playground, and walking or jogging track.

10. As I said in *St Mary's School* while a skate park is not specified in the definition of informal outdoor recreation, the facilities that are cited such as a cycle track or playground could be likened to a skate park in so far as a structure or "furniture" is erected and provide a facility upon which people can freely and casually

play or recreate with no payment. While some seating may be available for spectators, that is a small adjunct to the facility and occasional organised events/training would also be ancillary.

11. The definition used by the Council for its assessment of the current proposal, ie. "leisure and recreation", is broader than "informal outdoor recreation". I do not think that the categorisation is plainly wrong although the more specific would be preferred and I think that informal outdoor recreation is more apt than minor sports and recreation facility. In *St Mary's School*, I observed that different categorisations of use had been adopted in different proceedings before the Tribunal and the current case again shows that there can be differences in interpretation as these facilities do not always readily fit into a Planning Scheme definition.
12. The relevance is that "informal outdoor recreation" is a Section 1 use whereas "leisure and recreation facility" is a Section 2 use for which a permit is required. If the former categorisation was adopted, then some of the matters that are of concern to the Association may not be within the ambit of my discretion to consider. That would be because the use of Staley Gardens for a skate park would not be open to debate, only issues relating to

buildings and works for which a permit would be required."

13. For the purpose of this review I will rely on the definition adopted by the Council given that its position is arguable and mindful that the proposal was advertised and assessed as a "leisure and recreation facility". In doing so, I am taking a similar approach as in *St Mary's School* where I adopted a "not overly legalistic" position thereby enabling the School's concerns relating to buildings and works to be considered. Thus, I will make findings on all issues raised in the Association's submission both in terms of the use of the land and the development of the proposed facility."

- 7.2.3 In the instant case notice of the application was as a skate park and urban plaza not as a "leisure and recreation facility".
- 7.2.4 The decision in the *St Mary's School* case was in respect of a site in the Public Park and Recreation zone and was determined as an "informal outdoor recreation" facility.
- 7.2.5 The planning evidence of Mr P Soding seeks to rely, inter alia, on alleged amenity impacts.
- 7.3.1 It is submitted the decision of the Supreme Court of Victoria in *Sweetvale Pty Ltd & anor v Minister for Planning & anor* (2001) 16 VPR 224, which was upheld by the Court of Appeal, is authority for the proposition that even

where an application requires permission under more than one provision of a Planning Scheme each permission required requires a discreet decision limited to the issues relating to that discretion and if that "... would have a tendency to produce a decision not reflecting all relevant planning considerations, that is what, in my opinion, is plainly dictated by the legislation".

7.3.2 That decision, which focussed on exemptions in the Melbourne Planning Scheme, is analogous to the circumstances here where development permission under the zone provisions are subject to the exception that permission is not required for development undertaken by or on behalf of the Public Land Manager under the *Local Government Act 1989* and the use is as-of-right.

7.3.3 The decision in *Sweetvale* as to the ambit of relevant considerations where permission is required only under the heritage control is consistent with a long line of authority usually founded in the decision of the Full Court Supreme Court of Victoria in *National Trust of Australia (Victoria) v Australian Temperance & General Life Assurance Society Limited* (1976) VR 592 and the cases cited therein which was followed in respect of the current Planning Schemes by the Supreme Court of Victoria in *Shalit & anor v Jackson Clements Burrows Architects Pty Ltd* (2002) 12 VPR 329 where it was held that amenity impacts were irrelevant where permission was only required under a Land Subject to Inundation Overlay.

7.3.4 The National Trust decision has been consistently followed by the Tribunal, for example *Villawood Properties Pty Ltd v Greater Bendigo CC & anor*

(2005) 22 VPR 157 esp para 80 where Deputy President H Gibson and Senior Member M Baird applied the *National Trust* principle in observing that Net Gain considerations are unlikely to be relevant under the Heritage Overlay and the decisions of S Morris J, as he then was, in *Lewand v Hepburn SC* (2004) VCAT 834 and *Victorian Parks Association Inc & anor v Iluka Resources Ltd* [2004] 16 VPR 98 where his Honour said as follows:

"43. The purposes of the Public Conservation and Resource Zone are specified as:

- * to implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and Local Planning Policies;
- * to protect and conserve the natural environment and natural processes for the historic, scientific, landscape, habitat or cultural values;
- * to provide facilities which assist in public education and interpretation of the natural environment with minimal degradation of the natural environment or natural processes;
- * to provide for appropriate resource based uses.

However, as these purposes are the purposes of a zonal control, they are to be interpreted in relation to the land within the zone. They are not purposes in relation to

land outside the zone. The decision guidelines, which are set out at clause 36.03-5 of the schemes, confirm such an approach.

44. Thus, when a permit is sought to construct and use a pipeline within the Public Conservation and Resource Zone it will be necessary to consider whether such development and use will adversely affect the natural environment within the zone and be an appropriate use of land within the zone. But, leaving aside native vegetation issues - which are dealt with subsequently - this was not the real basis of the objectors' concerns. The objectors' concerns were directed, not so much at the land within the Public Conservation and Resource Zone in respect of which the applications were made, but at the protection of the natural environment generally, especially the Wimmera river and lakes system.

45. The objectors relied upon a report of a panel appointed under the Act to consider two planning applications for groundwater bores to supplement the water supply for the town of Clunes. In the course of the panel proceedings, the panel obtained advice from the Victorian Government Solicitor to the effect that, in considering the applications, the planning scheme and Act requires consideration of the impact of the bores on

groundwater reserves. It is not necessary, in this proceeding, to determine whether or not that advice was correct. It is enough to make two observations. First, there is a fundamental difference between constructing bores to obtain water from a natural source and constructing a pipeline to transmit water from a man-made reservoir. And second, the planning controls which are relevant in this case to the construction of a pipeline and pumping station, by a private person, in the Public Resource and Recreation zone do not have as a purpose the control of water flows in the wider river systems.

46. Thus, in my opinion, the objectors concerns are not relevant considerations in the exercise of the discretion to grant a permit for the development or use of land for a pipeline and pumping station within the Public Conservation and Resource Zone of the schemes under consideration."

7.3.5 Similar considerations apply when considering development approval for an as-of-right use.

7.4.1 The only expert evidence before the Tribunal on matters of cultural heritage significance is that of Mr Peter Lovell who also provided a detailed heritage assessment in support of the application.

- 7.4.2 Enquiries have been made as to the availability of Mr Bryce Raworth and Mr John Patrick, highly regarded architectural consultant and heritage landscape consultant respectively, both of whom have advised that they could not appear for the Council because they had a conflict of interest.
- 7.4.3 Neither Mr Raworth nor Mr Patrick are to be called to give evidence on behalf of Objectors and the inference which is to be drawn is that their evidence would not assist the Objectors.
- 7.4.4 The Statement of Significance for Heritage Overlay Area 3 contained in the Port Phillip Heritage Review 2005 is extracted in section 3.1 of the report of Lovell Chen of March 2007 which accompanied and formed part of the Application for Permit.
- 7.4.5 It is significant that the Statement of Significance ascribes no cultural heritage significance to the park itself or to the area within which the Subject Land is situate in particular.
- 7.4.6 The evidence of Mr Lovell is that the City of Port Phillip Heritage Policy Map has graded Albert Park as "non contributory" or "unmapped".
- 7.4.7 Mr Lovell's expert opinion is that the proposed materials draw from structures within the park, will be of limited impact in terms of sense of bulk or visual prominence and softened in visual terms through the proposed mounding and landscaping.
- 7.4.8 Mr Lovell's conclusion is that the proposal is acceptable on cultural heritage grounds.

7.4.9 Council's Planning Officers referred the Lovell Chen report to its independent heritage advisor who advised as follows:

"Following pre-application meetings, site visits, a review of the A3 and A4 drawings and the Lovell Chen submission I have no concerns with the proposed skate park, heritage perspective.

The proposal has no impact on any existing heritage building or fabric and meets the heritage policy objectives."

7.5.1 It is submitted that the evidence of Mr Biacsi on general town planning matters is to be preferred to that of Mr Soding, even if all considerations relating to use and development are open, because it has a far greater depth of analysis, it is independent Mr Biacsi having not acted for the Council in relation to the application or advertising a position in respect of the proposal prior to the Council's decision on the permit application and because Mr Soding has failed to analyse the proposal in accordance with the zone purpose.

7.5.2 In assessing the general town planning merits of this proposal for provision of a community facility in a public park it is relevant that the proposal is the outcome of a rigorous public consultation process, is a decision of the democratically elected representatives of the relevant community and that the application was accompanied by the consent of Parks Victoria and is to be, in part, funded by the State Government and Parks Victoria as to maintain an on-going supportive role.

- 7.5.3 The proposed development is about 100 metres from the centre cricket area of the Ian Johnson oval, which is unfenced but with a low sitting mound at its edge closest to the skate park site, with two arms of the pedestrian/cycle path between the oval and the skate park site.
- 7.5.4 The alignment of the wickets on the Ian Johnson oval is at about 60 degrees from the line of sight to the skate park site.
- 7.5.5 The proposal includes mounding and landscaping.
- 7.5.6 The toilets available for use are public toilets for use by all Park users.
- 7.6 The only expert evidence directly related to recreation facilities is that of Ms Jeavons supporting the proposal.

8. CONCLUSION

- 8.1 For the foregoing reasons and upon the expert heritage evidence before the Tribunal called on behalf of the Council it is submitted that the proposal does not adversely affect any cultural heritage significance of the Subject Land, is generally consistent with the role and function of Albert Park and its future direction as indicated by the support of Parks Victoria, it will have no unacceptable amenity impacts and the development will be an appropriate response to its context and that accordingly the decision of the Council as the relevant Responsible Authority should be affirmed without change.

24 October 2007
07040841

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Solicitors on behalf of the Council

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