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**SUPPLEMENTARY SUBMISSION TO THE SELECT COMMITTEE ON
PUBLIC LAND DEVELOPMENT**

From Unchain St Kilda

25 January 2008

THE ST KILDA TRIANGLE

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

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). This is a supplementary submission to update the committee with some issues and matters that have arisen since then.

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.

More than 8000 submissions have been received by Council opposing the proposal. Unchain St Kilda requests that the Public Land Committee

- (a) conducts a full investigation into the St Kilda Triangle
- (b) directs the Port Phillip Council not to make a decision to approve the BBC development plan until the Committee has investigated the matter.

This supplementary submission covers the following:

1. That the Development Plan does not comply with the UDF
2. That the Council encouraged tenderers to exceed the UDF
3. 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
4. That the retail component is not justified by any other government or council policy
5. That the Council has wilfully blinded itself to other defects with the Development Plan
6. A comprehensive and genuinely independent economic analysis
7. A comprehensive social analysis
8. A heritage analysis by an independent expert
9. An independent examination of the environmental and sustainability aspects of the proposal
10. An independent urban design report
11. An independent traffic and parking study
12. 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.
13. That the public benefits of the DP are significantly less than claimed and the Council has unreasonably refused to audit the claimed public benefits of the DP
14. That the Council officers and councillors have prejudged the issue
15. Conduct of Council
16. Contract between Council and Developer
17. That the BBC proposal for the Triangle site is unlawful
18. The Role of State Government

1. 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.

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 initial development proposal was for around 181 tenancies including a full-line supermarket and other retail uses. This proposal was for 24,738 square metres of floor area for retail and a significant amount of restaurants, cinemas and a gymnasium. This is significantly greater than the 160 shops presently in Acland Street. It is the equivalent of putting the Altona Gate or Rosebud Plaza shopping centre on the site. The high level of ordinary retail and commercial uses proposed for the site is a wasted opportunity.

2. That the Council 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.

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. One tenderer has said that it presented a \$70 million proposal to the SKE Committee which conformed with the UDF. It was instructed by the committee to present a significantly larger proposal.

3. 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. 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 DPO1 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 has refused to do so and has largely ignored or misrepresented the Matrix Report. Because the Council has failed to do so, Unchain St Kilda and the Esplanade Alliance have commissioned an independent report by Roz Hansen, an experienced planning consultant. This will be available on 31 January and can be forwarded to the Select Committee.

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

The land is not located in a Business 1 Zone where mainstream retail is normally provided and the provision of retail facilities is not identified in the SUZ3 Purposes.

The Council's Municipal Strategic Statement does not identify the St Kilda Triangle as being part of a retail centre.

5. 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. Can the Council realistically expect its junior officers to oppose a proposal so strongly supported by the CEO? 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 fixed 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.

6. 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 nor comprehensive. The Council engaged Spiller Gibbons Swan (SGS), the same consultants who had 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 is attached.

7. 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.

8. 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 is attached.

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'.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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’.

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

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?*

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'.

15. Conduct of Council

Council has adopted an attitude of 'us verses them' which has produced 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.

16 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 does not approve this development or substantially amends this development?
- If a binding development agreement has been entered into, why was this done in advance of community consultation?

17 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.

18 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. 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.

Conclusion: Request to the Public Land Committee

Unchain St Kilda requests that the Public Land Committee

- (a) conducts a full investigation into the St Kilda Triangle
- (b) directs the Port Phillip Council not to make a decision to approve the BBC development plan until the Committee has investigated the matter.