

**AMENDMENT C25 TO THE  
KINGSTON PLANNING SCHEME**

BETWEEN

**KINGSTON CITY COUNCIL**

Planning Authority

AND

**CHICQUITA PTY LTD**

Land Owner

AND

**FRIENDS OF CHICQUITA PARK RESIDENTS' GROUP and ORS**

Submitters

**SUBMISSION ON BEHALF OF THE  
FRIENDS OF CHICQUITA PARK RESIDENTS' GROUP**

**INTRODUCTION**

1. These submissions are made on behalf of the Friends of Chicquita Park Residents' Group ("the Group"), a non-political, community organization comprised of several hundred residents, established for the purpose of ensuring that the contribution made by Chicquita Park ("the land") to the community as an open space resource containing ecologically significant vegetation is preserved.
2. This case is concerned with determining the nature and extent of planning controls to be permanently applied to the land.
3. The primary submission of the Group is that the proposed suite of controls is inappropriate and that the future zoning of the land ought to facilitate its use as public recreation resource.

4. This Panel has been appointed to consider the submissions referred to it pursuant to the provisions contained in Part 3, Division 1 of the *Planning and Environment Act 1987* (“the Act”).
5. Pursuant to section 25(2) of the Act, this Panel may make any recommendation it thinks fit.
6. In its consideration of the submissions that have been referred to it, this Panel is required, as a matter of principle, to take into account the objectives of planning in Victoria as set out in section 4(1) of the Act (see section 4(2)(e) of the Act).

## **Background**

7. The use and development of the land has never been regulated by planning controls owing to the fact that the land was, until recently, in Commonwealth ownership. For that time the land remained in what might be described as a planning vacuum – not because it was in the interests of orderly and proper town planning to be so, but instead as a direct result of the peculiar arrangement created by the federal Constitution.
8. This case concerns what planning controls should be applied to Commonwealth land once the provisions of the Constitution no longer preclude the operation of planning laws.
9. The answer to that question must always be determined by what is in the interests of orderly and proper planning. The question must be determined by sound strategic planning.
10. The decision of the Minister to include the land within a Residential 1 Zone and subject to additional overlay controls was not a result of sound strategic planning supported by thorough analysis and study.
11. This is evident by virtue of the fact that the decision was expressly interim in nature.

12. An analysis of the process, background and circumstances in which the Minister was asked to make, and ultimately made the decision to apply the current zoning as an interim measure warrants some consideration.
13. The absence of thorough analysis to justify the rezoning in strategic planning terms is self evident upon even a cursory examination of the proposed amendment against the current planning policy framework.
14. It is therefore impossible to assert that the this Panel's inquiry is in any way assisted by the fact of the current zoning having regard to the:
  - circumstances in which the current zoning came about; and
  - absence of sound strategic planning reasons justifying the proposed zoning in this case.
15. It is proposed to deal with each matter in turn.

### **The Minister's Decision**

16. It is irrelevant to this Panel's consideration of the proposed amendment that
  - the land is currently in private ownership; and
  - the Minister decided, on the advice of the Council, to apply the current zoning as an interim control.
17. The relevant background is disclosed by a selection of documents and correspondence emanating from the Council, State and Federal Governments:
  - 15 September 1999 letter from the Department of Defence to the Council;
  - 26 March 2001 Minutes of Ordinary Meeting of the Council;
  - 23 April 2001 Minutes of Ordinary Meeting of the Council;
  - 10 May 2001 letter from the Council to the Department of Defence;
  - 29 May 2001 letter from the Department of Defence to the Council;
  - 23 August 2001 letter from the Department of Defence to the Mayor of the Council;
  - 29 October 2001 Minutes of Ordinary Meeting of the Council;

- 30 November 2001 letter from the Department of Infrastructure to the Council;
- 3 December 2001 letter from the Council to Minister for Planning;
- 10 December 2001 Minutes of Ordinary Meeting of the Council;
- 21 December 2001 letter from the Council to Department of Infrastructure;
- 24 December 2001 letter from the Department of Infrastructure to the Department of Defence;
- 16 January 2002 letter from the Department of Defence to the Department of Infrastructure; and
- 13 March 2002 letter from the Council to the Minister for Planning.

18. From this correspondence it is evident that:

- the Council was concerned as to the future planning of the land from the moment that the Commonwealth indicated its position that the land was surplus to its needs;
- the Council's primary objective was to acquire the land and continue its use as a public park;
- the Commonwealth was intent upon selling the land for the best price that it could obtain in the market, guided by valuations prepared on its behalf.

19. The difficulty that arises in cases of this type is that planning controls are not able to be applied to the land until the point in time when ownership passes from the Commonwealth to some other person.

20. The fact of private ownership in such a situation cannot, by itself, be a determinant of the appropriate zoning (and therefore the future use and development opportunities) of such land. To suggest so runs counter to the logic and principle that underpins the planning framework in Victoria.

21. The proposition can be tested by extreme example. Had the Commonwealth sold the land to a tannery operator, would the appropriate zone be the Industrial 1 Zone? Of course not. Why then ought the sale of the land to a residential property developer be a factor in determining that the appropriate zone to be applied to the land is the Residential 1 Zone?

22. The suggestion that the characteristics of the purchaser of the Commonwealth's title to land is a relevant factor is to suggest that the Commonwealth has the power to pre-empt the appropriate zoning of the land prior to agreeing to the sale by its selection of the purchaser.
23. The Commonwealth has no such power. Once the land passes from Commonwealth ownership the legislative power of the Victorian government in relation to the land is restored, which includes the exercise of discretion as to the nature of the zoning controls that ought to be applied to the land.
24. The transferee of Commonwealth land enjoys no greater right or expectation to the zoning of its choice:
- by virtue of the fact that prior to the land coming into its possession it was Commonwealth land; or
  - than a proper application of planning principles would admit.
25. The transferee of Commonwealth land buys land in uncertain circumstances. This is a factor that is taken into account in the valuation of the land at the time of sale ( see *Land Valuation and Compensation in Australia* Rost and Collins p.581).
26. At the time of purchase the risks were self evident. The current planning controls were applied to the land on an interim basis, in circumstances where it was acknowledged that the full process would have to be undertaken and that it would involve substantial opposition on the part of the local community.
27. To assume in those circumstances that either there was no risk (or even that the risk was low) that the land would not be zoned residential was to assume that this process, and ultimately this hearing, would be a farcical rubber stamp upon the interim decision. It is abundantly clear that at no time was any such indication given.
28. The fact that the land is now in private ownership does not preclude the application of the Public Park and Conservation Zone, it merely limits the nature of permissible uses on the land.

See:

- clause 36.02; and
- *New Format Planning Scheme – Final Report - April 1999* page 80.

29. The risk of this occurring would have been taken into account at the time of valuation and sale of the land (ie affecting the ultimate purchase price) and is a compelling reason for giving no weight whatsoever to the fact that the land is now owned by a private entity.

30. In coming to a conclusion about the proposed amendment it is critical that the Panel keeps a clear mind, and is not influenced or swayed by the attempts of the Commonwealth or the owner of the land to preempt the outcome of this process.

31. In arriving at a conclusion as to whether the land should be zoned residential, or for some other purpose, the Panel must keep a keen eye on those matters that are most relevant.

32. In truth, the key factors in determining the appropriate zone for an area in the context of the Victorian planning system are:

- the physical attributes of the land;
- the physical context of the land;
- the planning history of the surrounding area; and
- the strategic planning framework.

### **The land and its context**

33. The land is a large parcel of largely undeveloped land, surrounded by conventional suburban residential development.

34. It is a parcel of land within a suburban context that has remained, by virtue of its Commonwealth ownership, almost entirely untouched.

35. The land is covered by significant flora and inhabited by wildlife. This proposition cannot be disputed, even accepting that there is room for

legitimate debate about the extent and significance of flora and fauna on the land.

36. In this respect the submitters rely upon the evidence called on behalf of the Council.

### **The Planning Policy Framework**

37. Since the introduction of the VPP format planning system, the planning policy framework that is intended to be the primary influence in determining the zoning of land is to be found in the Municipal Strategic Statement ("the MSS").

38. It is, in part, the role of the MSS to give direction by identifying key planning objectives, articulating policy to be employed in order to achieve those objectives and identifying strategic opportunities within the municipality for the achievement of those objectives.

39. Whatever zone is to be applied to the land, it must be justified in terms of the existing MSS (there being no proposal as part of this amendment to alter the existing MSS).

40. The MSS makes no express mention of the land whatsoever.

41. It is noteworthy though that other similarly large sites are specifically identified in the planning scheme as key strategic sites and as opportunities for the achievement of planning policy objectives (see clause 21.04-3).

42. It follows that whatever justification there might be for the proposed zoning in the existing MSS, it must be established by inference from generic statements of principle concerning residential land use and development rather than any express direction.

43. For each statement in the MSS that might be called in aid of the proposed residential zoning of the land, there are other statements that might be used with equal force to justify the retention of the land as public open space.

See and compare clauses:

- 21.04-4;
- 21.05-3 objectives 2 and 3;
- 21.09-3 objectives 3 and 4; and
- 21.11 objective 1 and 3.

44. Indeed, if anything the clauses that might used to justify the retention of the land as public open space are more directly applicable (ie less generic) to the circumstances of this case, and therefore arguably more compelling.

See in particular clauses:

- 21.09-3 objectives 3 and 4; and
- 21.11 objective 1 and 3.

45. The owner of the land in this case contends that the land should be zoned for residential purposes on the basis that the surrounding land is residential in nature and that planning policy calls for greater intensity of residential development.

46. This proposition is overly simplistic.

47. It is accepted that housing policy calls for greater intensity of residential development and greater diversity of supply. The truth is that the subject land does not fall within an area where that greater intensity and diversity is encouraged. The land is not:

- within or adjacent to an activity centre;
- even identified in the proposed Amendment C8 as a residential opportunity site, but instead within an area of Incremental change.

48. To zone the land residential in the context of the current (and seriously entertained) planning framework is to call for more of the same ie. more stock standard residential suburbia.

49. It follows that in the net community benefit equation, such a result could only be said to be of marginal benefit at most.

50. On the other hand there is planning policy recognition that as residential development within established residential areas intensifies, community resources such as public parks and recreation areas will attract greater importance, as will remnant areas of environmental significance.
51. It is true that the land is not included as open space within the framework plan contained at clause 21.09, although this is hardly surprising given that it has been in a planning vacuum until recently. Nonetheless, the condition of the land and its locational and environmental attributes are worthy of consideration in the context of the planning policy objectives set out in clause 21.09 of the planning scheme.
52. Melbourne 2030 recognises, *inter alia*, that “*local public open space is a vital component of the urban fabric*” (Melbourne 2030 p.103) and seeks to “*improve the quality and distribution of local open space and ensure long-term protection of public open space*” (Policy 5.6, Melbourne 2030).
53. The Parklands Code which is incorporated in Melbourne 2030 provides as follows:
- “if a change in land use or in the nature of occupation is to occur that will result in a reduction of open space, the overall network of open space should be protected by way of addition of replacement parkland of equal or greater size or quality* (Melbourne 2030 p.4).
54. These planning policy objectives are augmented by the *Recreation and Open Space Strategy* prepared by the Council.
55. The truth is that the planning policy framework provides no express guidance one way or the other. The inferences that can be drawn from the existing (and seriously entertained) planning framework are at best ambiguous when it comes to support for the proposed amendment, but arguably provide stronger justification for the retention of the land as public open space.

56. The only factual matter outside the planning policy framework that can be raised in support of the case for a Residential 1 Zone is that the land is surrounded by residentially zoned land. By itself this matter is not compelling. On the other hand, the land is a substantial parcel of land, with significant environmental attributes, in a planning policy context that calls for the retention and enhancement of such spaces.
57. The owner is at pains to point out that the prior use of the land for public open space is entirely irrelevant to the consideration of the proposed amendment. In substance, the owner seeks to assert that the use of the land as a public park was always on borrowed time and now it is time for the underlying zoning of the land to be returned.
58. While it might be true to say that the ownership of the land by the Commonwealth prevented the development of the land 25 to 40 years ago as just another part of suburbia, it is wrong to say that that fact is determinative of the zoning that should be applied to the land now.
59. The land has been put to use as a public park for at least 25 years. In that time its use has formed part of the surrounding fabric of the residential neighbourhood that is now relied upon by the owner of the land to justify the proposed residential zoning.
60. The success of the use of the land as a public space over time is a factor that can quite clearly be taken into account in the consideration of whether the land is appropriate to be zoned to facilitate its ongoing use as a public park.
61. The further submissions of members of the Group establishes that the loss of that space will have an enormous impact upon the nature of the area.
62. Evidence of the experience of the land as a public park and the impact of the loss of that space are important in determining the suitability of the land for use as a park. Obviously, if the land is inherently unsuitable for use as a park then the contentions of the Group must fail. The fact is that the evidence establishes that the land has functioned as an excellent park and is a valued community resource.

63. On the question of what should be the zoning of the land, taking into account all the facts of the case, and measuring against the current planning policy framework, the choice is between:

- just another suburban enclave that will make, at best, an incremental contribution to urban consolidation; and
- the formal creation of public open space that has been tried and tested and found to be a valuable community asset with identified environmental significance.

64. There is simply insufficient justification to be found in the current planning framework to support the application of a residential zone at this time. No strategic work has in fact been undertaken to ascertain whether the greater benefit to the community lies in the retention of the land as a public park.

65. In the experience of the community the benefits of the land as a park are very substantial and its loss will be profound.

**ADRIAN J. FINANZIO**

**SHIVANI PILLAI**

**OWEN DIXON CHAMBERS**

Instructed by

Holding Redlich

Solicitors

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