CHMPs and significant ground disturbance: the challenges continue

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A recent Tribunal decision has highlighted the complexities associated with deciding whether significant ground disturbance has occurred, and considers the implications of when direct evidence is led regarding significant ground disturbance.

The decision in *Platinum King Investments Pty Ltd v Manningham CC (Corrected) (Includes Summary) (Red Dot)*[2015] VCAT 1484 (**Platinum King Investments**) serves as a caution to councils and permit applicants against too readily concluding that a cultural heritage management plan (**CHMP**) is not required.

The Tribunal considered the decision in *Azzure Investment Group Pty Ltd v Mornington Peninsula SC (includes Summary) (Red Dot)* [2009] VCAT 1600 (**Azzure**), and determined that the concept of a 'material part' of a site adopted by the Tribunal in Azzure did not apply because there was direct evidence disclosing that significant ground disturbance had not occurred.

Background

Manningham City Council (**Council**) initially considered that the land had been subject to significant ground disturbance after applying the contextual approach. Council relied on the urban context of the subject land and the previous industrial and residential uses, building work, provision of services and demolition works that had been undertaken on the land.

At a practice day hearing, the Tribunal did not accept the position of Council and the permit applicant that the land had been subject to significant ground disturbance. On its own initiative, the Tribunal listed the matter for a preliminary hearing.

Prior to the preliminary hearing, the permit applicant filed expert evidence detailing the results of a soil profile survey which involved digging a number of bore holes. The evidence concluded that about 3020 square metres of the land had been subject to significant ground disturbance but an area of about 212 square metres had not been subject to significant ground disturbance. More specifically, about 105 square metres had not been subject to any significant disturbance, and about 107 square metres had been subject to disturbance, but the cause of that disturbance could not be identified which meant that it had not been subject to significant ground disturbance.

After considering this evidence, Council revised the earlier expressed view and argued that part of the land had not been subject to significant ground disturbance.

The arguments

The permit applicant argued that these two smaller areas should not be regarded as a 'material part' of the land having regard to the Tribunal's approach in the Azzure case. When Deputy President Dwyer applied the contextual approach in Azzure, his assessment was based on contextual information about the development history of the land, as opposed to an assessment based on direct evidence about the level of disturbance. In this context, Deputy President Dwyer considered it was relevant to ask whether a part of a site which had not been subject to significant ground disturbance based on contextual information/evidence (as opposed to direct evidence) was a material part of the land. The permit applicant sought to rely on this reasoning and argued the two disputed areas could be disregarded because they were not a 'material part' of the land.

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Council argued that the Tribunal applied the concept of 'materiality' in Azzure to fill in the evidentiary gaps that arose from the contextual approach and the concept cannot be used to counter direct evidence that significant ground disturbance had not in fact occurred.

The decision

The summary to the Platinum King Investments decision captures the essence of the decision. The Tribunal said:

> The reasons and conclusions in Azzure deal with how a contextual approach might be applied to determining whether small areas of a lot, particularly in an urban context, might be assessed to resolve questions about significant ground disturbance in the absence of definitive evidence. It is also clear that the goal is to determine whether all of the activity area has or has not been subject to significant ground disturbance. It is in this very specific context that the Tribunal in Azzure expressed the view that what is needed to resolve this difficulty in the absence of such evidence is to read a reference to a part of the land in the [*Aboriginal Heritage Regulations 2007*] to mean 'a material part of the land'.
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> The Applicant in this proceeding essentially sought to carry through the concept of 'materiality' into r.6 of the AH Regulations. When taking a purposeful approach to the [*Aboriginal Heritage Act 2006*] and Regulations, I have concluded that there is no such discretion and that this was not the intention of the concept when discussed in Azzure.

Although the Tribunal appears to have unilaterally dismissed the applicability of the 'materiality' concept when there is direct evidence, we suspect there remains some work for this concept to do, particularly if the direct evidence discloses that only a miniscule part of a site has not been subject to significant ground disturbance. We expect that further disputes will likely arise in this space. We will need to wait and see how the Tribunal will apply Azzure and Platinum King Investments in such circumstances.

Without specifically criticising the permit applicant, the Tribunal then made some general observations about the approach adopted by some permit applicants by saying:

> It is becoming increasingly apparent to the Tribunal that the degree of effort and activity expended by some proponents and assessors, for whatever reasons, to pursue an exemption from preparing a CHMP could equally be directed into preparing a CHMP and so avoid delays and frustrations at the review stage.
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> …
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> Under the framework established under s.52 of the AH Act, proponents and assessors are afforded an opportunity early in the preparation of planning applications to assess and weigh up the relative strength of a case for claims about significant ground disturbance. Where there are elements of doubt, particularly about the strength of evidence to be relied upon, it may well be of lesser risk to project timelines and overall expenditure of effort to sponsoring a CHMP at first instance.

The Tribunal also recognised the technical expertise needed to assess the need for a CHMP and the challenges this presents to councils by observing:

> The events leading up to this hearing also highlight a difficulty for responsible authorities, which is that they may not have the necessary expertise to assess and determine whether significant ground disturbance has occurred across an activity area. Indeed, it may well be a burden for councils that they cannot reasonably address.
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> From this view point, expression of frustrations about delays caused by reconsidering assessments of significant ground disturbance and the intention of the AH Act for timely resolution of these matters seemingly being thwarted have some validity. This, I think, is a matter that warrants further attention from the Office of Aboriginal Affairs Victoria for clearer directions about the operation of the regulations and who ultimately is the appropriate authority to decide questions about significant ground disturbance.

We expect that many councils will be keen to see another body, other than the local council, deciding questions about significant ground disturbance and whether a CHMP is required.

Skirmish avoided, but for how long?

The permit applicant also questioned the correctness of *Stanley Pastoral Pty Ltd v Indigo SC (includes Summary) (Red Dot)* [2015] VCAT 36 (**Stanley Pastoral**). The recent decision of Stanley Pastoral stands for the proposition that the Tribunal has no jurisdiction to accept a failure review under section 79 of the *Planning and Environment Act 1987* in circumstances where the responsible authority has not subsequently made a decision and a CHMP is required but has not been prepared. In Stanley Pastoral, this led to that application for review to be struck out for a lack of jurisdiction. The permit application in Platinum King Investments was keen, for obvious reasons, to avoid a similar fate.

In Platinum King Investments, as Council had made a decision to refuse the permit application, even though it had not issued a notice of refusal, the Tribunal was prepared to amend the application for review from a failure application to a refusal application. This avoided the need for complex jurisdictional arguments to be advanced regarding the correctness of Stanley Pastoral. A potential Supreme Court challenge was avoided. We expect this argument will be pursued down the track in other cases.