

## PLANS, PROTESTS & PUBLIC LAND



*Community plantings,  
Merri Creek,  
North Fitzroy*

It's almost inevitable: plans for public land require public consultation, consultation quickly becomes controversy, and controversy soon becomes protest.

This sequence, seemingly entrenched within our democratic system, is well-known to VEAC, fresh from its investigations of Victoria's Otways and Redgum regions.

Over the next two years, we can expect to see the same sequence run its course in Melbourne, where VEAC (that's the Victorian Environment Assessment Council) will be investigating public land in 29 metropolitan municipalities.

In the Melbourne suburbs there's plenty of public land. Measured in hectares it might not add up to a new National Park, but in terms of value conflicts, intensity of usage, and perimeter impacts it must be bigger than anything VEAC has looked at yet. We could list a hundred dormant hot-spots – from Akoonah Park in Berwick to Campbells Cove on the Werribee South foreshore – each one a likely subject for some good old-fashioned consultation/controversy/ protest.

Wherever it may be, public land attracts plans – but in the suburbs VEAC will encounter past plans on a huge scale. Consider, for instance, Melbourne's creeks: here they'll find Melbourne Water's 'Corridors of Green' (1999), Parks Victoria's 'Linking People and Spaces' (2002), and the Port Phillip & Westernport Catchment Management Authority's 'Living Links' (2006) – not to mention the 29 Municipal Strategic Statements, many of which have something to say on the subject. These past plans sometimes suffer from lack of funding, or government support, or statutory backing. What's required now is something more than yet another layer of vision, but a clear set of recommendations on land status and governance.

There's at least one rural phenomenon which we hope VEAC brings to Melbourne – and that's formal community participation in land management. The further you go from Melbourne, the more likely you are to find voluntary Landcare groups and Committees of Management taking responsibility for the local creek frontage, flora reserve, or roadside bushland.

Melbourne people surely have the same enthusiasm, resources and skills as country Victorians – so why not develop policies and administrative systems to utilise them? Perhaps we could give Melbournians something better to do than protest against the plan to ban 2 a.m. nightclub-crawling. ■

*The Public Land Consultancy welcomes New Clients*



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END OF FINANCIAL YEAR SPECIALS

*See page 4*

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## Q & A x 4

### Q We need Governor-in-Council approval to vary our lease. Where do we write to him?

Question asked on behalf of a tenant holding a statutory lease

As we all know, the Governor is his Excellency Professor David de Kretser, gentleman and scholar, of Government House Drive, King's Domain – but what is the Governor in Council?

Well, it's the Governor acting on the advice of the Executive Council – which is, in practical terms, the thing better known as State Cabinet. A quorum of two ministers and the Governor is sufficient for the EC to meet, which it does about once a week at the Old Treasury Building, Spring Street, Melbourne.

The Governor in Council (or GinC) is empowered to do many things under no fewer than 250 Acts of the Victorian Parliament. These are mainly land-related Acts ranging from the *Jeparit Land Act* 1922, under which the GinC may charge £1 per annum rental for the site of the Jeparit Fire Station, to the *Royal Children's Hospital (Land) Act* 2007 under which he may effect the re-reservation of a substantial slab of Royal Park.

So how do we get our proposed lease variation into the Old Treasury Building? There is a Clerk of the Executive Council, who works out of the Department of Premier and Cabinet, 1 Treasury Place, East Melbourne – but he compiles the Executive Council agenda only from items submitted by Ministers. Items relating to administration of the *Crown Land (Reserves) Act* 1978 must come to the Executive Council via the Minister for Environment and Climate Change; matters relating to the *Victorian Urban Development Authority Act* 2003 must come via the Minister for Major Projects, and so forth.

So to vary your lease, you will need to go through the Department or Statutory Authority which issued it. That body can make recommendations to its Minister, who can put items up to the Clerk of the Executive Council, who can get them into the Old Treasury Building where, in accordance with constitutional convention, they will be duly signed off by his Excellency, Professor de Kretser. ■

### Q How do we create easements over old freehold roads?

# 2

Question relating to a \$ 7 million suburban retail development

Roads created on freehold land prior to 1988 appear, on paper title, to be the property of the original landowner – even though by statute they vest in fee simple in the relevant municipality. As Justice Balmford said in the Calabro case (see *Terra Publica*, Jan-Feb 2007) “I do not wish to suggest that this is a satisfactory situation.”

One consequence of this less-than-satisfactory situation is that it is virtually impossible to register an easement over a road. Until now, this wasn't really a problem: service utilities just put their water mains and electricity cables into the ground anyway. But recently, it seems that at least one privatised service utility has taken to insisting that access to its infrastructure must be guaranteed through an easement on title – even though the land is a road. No easement, no infrastructure: go redesign your \$ 7 million shopping centre.

In the case which gave rise to this question, the registered proprietor of the road was alive in 1873, but (we figured) unlikely to be in a position to lodge documents at Land Victoria today. Not that he would be too cooperative in light of the Calabro case, which renders his interest in the land worthless.

Fortunately, we were able to work with the Legal Examiners at Land Victoria to come up with a solution. Land Victoria will register an easement on title if the title is transferred from the 1873 owner to the municipality. Such a transfer can occur under section 59 of the *Transfer of Land Act* 1958 if there is documentary evidence that the road vests in the Council under statute – and such documentary evidence can be provided by a gazettal of the road as a public highway under section 204(1) of the *Local Government Act* 1989, because public highways are roads for the purposes of the *Road Management Act* 2004, which consequently (under Schedule 5) causes them to vest in fee simple in the relevant council. And (don't forget) the gazettal must be preceded by exhibition, submissions and hearings under section 223 of the *Local Government Act* 1989. Simple.

Note the same problem doesn't occur in relation to new subdivisional roads: section 12(2) of the *Subdivision Act* 1888 causes these roads automatically to become implied easements in favour of service utilities. ■

## Q 3 A recreation reserve is bounded by a creek. Must we pay half the cost of the neighbour's fence?

*Question asked by a Property  
Officer for a large rural municipality*

This question reminds us of the famous Cantonese recipe:- "First, catch your duck..."

Firstly, locate the legal boundary – a task for which you may need to engage a licensed surveyor. If the boundary is not defined by 'metes and bounds' (lengths and bearings) then it may have moved over the years according to the common law doctrine of accretion. Conversely, the creek may have moved, even if the boundary hasn't.

What's more, the neighbour's title document may not tell the full story: if it seems to grant title to the centre of the stream, it must be read in conjunction with section 385 of the *Land Act* 1958, which says that, despite what's on the title, the bed and banks remain Crown land.

The second part of the answer relates to the alignment of the fence in relation to the boundary. In many circumstances, a fence which is not on the title boundary may result, with the effluxion of time, in ownership of the enclosed area being transferred to the occupying party under the doctrine of adverse possession. This will not be the case for many reserves, because the *Limitation of Actions Act* 1958 prevents adverse possession against the Crown and most (but not all) council-owned land. And then there's section 5 of the *Fences Act* 1968, which provides that if (by mutual agreement) a fence is built off-title to avoid a watercourse, it cannot result in transfer through adverse possession.

Finally: who pays for the fence? Under the *Fences Act* 1968, cost of a typical dividing fence is apportioned 50-50 between neighbouring occupiers, but section 31 of the Act exempts unalienated Crown land – which in effect means that if it's a Crown Reserve we're discussing, the neighbouring occupier must pay 100 percent of the costs. ■

## Q 4 Can Crown land be mortgaged?

*Question raised by the Finance  
Manager of a major Melbourne  
sporting complex.*

If you're over the age of five and live in a house, then you'll know that a mortgage is a document in which a borrower (the mortgagor) pledges the title to his or her real property to a lender (the mortgagee) as security for a loan. In the event of default, the lender forecloses and takes possession of the property.

Crown land can't be offered as security – and no lender would accept it. Much as Committees of Management may need cash, they can't raise finance on the strength of their land assets. The same restriction does not apply, however, to their leasehold tenants.

Although Crown land can't be mortgaged, leases over Crown land may be. What's being offered as security isn't the land itself, but the 'leasehold interest' – the unexpired term of the lease. In the event of default, the lender steps in and takes possession of the premises – not in the role of owner, but in the role of lessee. The mortgagee-in-possession is then bound to observe all the requirements of the lease as if they were the tenant.

We can't see the bank manager selling entry tickets at the municipal pool, or uncorking the chardonnay in a seaside restaurant. What happens, of course, is that the mortgagee on-sells the asset (*i.e.* the residue of the lease) to a new operator.

The Crown as owner and the Committee of Management, if there is one, may end up with a tenant of the bank's choosing. To minimise the obvious risks associated with this outcome, Crown leases contain a clause requiring the Minister's consent to any mortgage and any assignment. In an equivalent freehold lease we would expect to find the phrase '*which consent shall not unreasonably be withheld.*' This phrase is missing from Crown leases, but (prudence would dictate) it should be inferred anyway. ■

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From: Training Course Coordinator  
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Good stuff. I'm surprised that anyone can make Crown Land issues even remotely entertaining. Congratulations  
Property Officer, Parks Victoria

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