

Justice Stuart Morris believes the role of VCAT in determining Melbourne's growth and evolution is overrated.

Speaking at a recent conference on *Melbourne 2030 – From Vision to Reality* he said: "In truth, the key decisions are usually made by others; and the key drivers of growth and how growth manifests itself are economic and social."

This surely is the plight of the whole public-sector planning system. Most planners don't plan, they simply respond reactively to proposals driven by socio-economic forces operating through the private-sector pursuit of personal amenity and commercial gain.

Modern planners must envy the state's early surveyors. They truly were 'town planners' who actually planned towns.

In the nineteenth century the planning sequence was the reverse of that outlined by Stuart Morris. The layout of roads and allotments, the location of civic infrastructure, and the patterns of land use were not determined by private-sector economic and social forces, but by government surveyors. Sure, they occasionally misunderstood their market, and laid out towns that were never taken up by settlers, but by and large they were in tune with the populace which followed them, Parish by Parish, into the Victorian countryside. The typical country town, and much of metropolitan Melbourne, are their enduring monuments.

But now, at last, planners have an opportunity to return to planning. It's an opportunity arising from Melbourne 2030, Transit Cities and Activity Centres – and public land will be at its core.

In most activity centres some forty percent of the land is in public ownership, and in some it's as high as seventy percent. Roads are the biggest contributor to this figure, followed by railways, car parks, reserves and freehold land in municipal or institutional ownership.

Roads and lanes are often poorly configured; alongside every railway station is some weed-infested graffiti-covered wasteland; institutional land-owners like universities and hospitals are forever seeking to expand, contract or rationalise; and at-surface car parks no longer stack up against land economics. It's an environment ripe for intervention by pro-active municipal planners.

Not all the tools for this intervention will be found in the



*This is the Place for  
an Activity Centre*

tool-bag labelled 'Planning Scheme.' Other tools include direct purchase and sale of land, the realignment and discontinuation of roads, reconfiguration of obsolete easements and reserves, and the redevelopment of council infrastructure like car-parks and municipal depots.

Councils' powers are not limited to those listed under the heading 'Planning Authority.' The Road Management Act, the Subdivision Act and the Crown Land (Reserves) Act all provide heads of power under which other, quite powerful, tools can be brought to bear on public land.

And we hope someone's looking at section 193 of the Local Government Act, and section 172 (not to mention whole of Part 9A) of the Planning and Environment Act. If they are, we may soon be in for some good old-fashioned town planning. ■



*Too much bitumen?*

## PUBLIC LAND AND ACTIVITY CENTRES

*Professional Development for  
Strategic and Statutory Planners*

**Thursday 31 March    Novotel, St Kilda**

(course details page 4)

*This one-day course provides a tool-kit for Council staff and consultants involved in the re-configuration of roads and other public land in Melbourne's Activity Centres*

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# "On behalf of the Public Land Manager"

by **Barnaby Chessell**

(Maddocks Lawyers Planning & Environment Team)

A number of provisions of the Victorian Planning Provisions (VPPs) provide exemptions from planning controls to activities which are conducted "by or on behalf of the public land manager."

Prominent examples include exemptions to the requirement to obtain a planning permit in respect of the use of land within the Public Use Zone or the construction of buildings or works within the Public Park and Recreation Zone.

The phrase 'public land manager' is defined in the VPPs as:

The Minister, government department, public authority or 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.

Whilst it is a relatively simple task to determine whether a particular activity is being conducted 'by' the public land manager, the meaning attributed the phrase 'on behalf of' the public land manager is considerably more ambiguous.

The Practice Note issued by the Department of Infrastructure in relation to using public land zones, provides that:

The words *by or on behalf of* should be interpreted with regard to the particular statutory charter of the public land manager under its governing legislation and indicate that the use or development must be undertaken by the public land manager itself or by some other person or entity having a direct representative interest or relationship with the public land manager.

This is essentially consistent with the definition afforded the phrase by the High Court in the case of *Re Ross ex parte A-G for Northern Territory* (1980) 54 ALJR 145 at 149, in which it was observed:

The phrase 'on behalf of' is, as Latham CJ observed in *R v Portus, ex p Federated Clerks' Union of Australia* (1949) 79 CLR 428 at 435, not an expression which has a strict legal meaning, it bears no single and constant significance. Instead it may be used in conjunction with a wide range of relationships, all however in some way concerned with the standing of one person as auxiliary to or representative of another person or thing.

Whether a person can be taken to be acting on behalf of the public land manager, then, turns upon that person's relationship with the public land manager.

The decision of the Victorian Civil and Administrative Tribunal in *Sinclair v Boroondara City Council* [2001] VCAT 2203 aptly demonstrates this principle. In that case, certain persons were engaged by the Boroondara City Council (Council) to facilitate the various activities being conducted on the subject land (being the Camberwell Civic Centre). In particular, Spotless Services Australia Ltd was engaged to be the overall venue manager, pursuant to a written management agreement with Council. Various other persons then on-hired the hall, or particular stalls inside the hall, for the purposes of specific events.

In this case, the Tribunal had little difficulty in determining that the use of the Camberwell Civic Centre by Spotless Services Australia Ltd was a use carried out 'on behalf of' the Council. In this regard, the Tribunal noted:

It is common ground between the parties that this land is public land and that the public land manager is the Council. What is done by the municipality to provide and maintain the town hall and civic centre facility is carried out by the public land manager, and the activities of Spotless Services Australia Ltd in managing bookings and other aspects of the management of the town hall and civic centre are carried out on behalf of the public land manager.

Determining whether a use or development is conducted or carried out 'on behalf of' the public land manager is more difficult in circumstances where the party conducting the use or development is not so obviously acting as a 'middle-man' for the public land manager. In such circumstances, it is more likely to be found that the use or development is not being conducted on behalf of the public land manager. ■



## Web-surfing...

- The government's Discussion Paper on an **Indigenous Land Management Framework** (Nov 2004) is at:-  
[www.dse.vic.gov.au](http://www.dse.vic.gov.au) > Land and Water Management > Document Links > Indigenous
- The ACF's **Marine Legislative Review** (March 2005) is at:-  
[www.acfonline.org.au](http://www.acfonline.org.au) > publications > reports > marine legislative review
- **Commencement dates for all Victorian legislation** is on the website of the Chief Parliamentary Counsel :-  
[www.ocpc.vic.gov.au](http://www.ocpc.vic.gov.au) > other documents > Acts Commencement Book
- **Land Tax abolition for caravan parks** is detailed at:-  
[www.vic.gov.au](http://www.vic.gov.au) > Finance, Tax, Economy > Taxation & taxes > Land tax

# Q & A

## What influence can Councils exercise over DSE's Licences for Unused Roads?

(Question asked by a Property Officer in a semi-urban municipality)

There are thousands of Government roads around the state, predominantly in rural areas, which are the subject of Unused Road licences.

These licences are issued by DSE under sections 130 and 138 of the *Land Act* 1958, which authorise agricultural and non-agricultural use respectively.

DSE's generic licence document certainly contains conditions (seven pages of them) but councils may still have their own views about matters such as fencing, protection of vegetation, stocking rates and third-party access.

You may imagine that 'unused' means 'not used' – but that isn't the case. In this context it actually means 'declared by the relevant council to be unused' – which isn't quite the same thing. This involvement of the council is required by section 400 of the *Land Act*, and it's at this point that council is best-placed to negotiate conditions.

Section 400 doesn't expressly provide for council's views to be accepted by either DSE or the prospective licensee – and that's why it becomes a matter for negotiation. If the proposed arrangements are not to Council's satisfaction, then you don't make the section 400 declaration and the licence can't go ahead.

If it's an existing licence, then its variation is possible, but considerably more difficult. Every licence contains a condition requiring the licensee to comply with written directions from the Secretary for DSE regarding grazing and land management practices (we have never heard of this clause being invoked).

For more major changes, the licence may have to be cancelled (by the Minister) and re-issued – and that's where you may come up against political reality.

Many licence-holders believe (erroneously) that they hold a lease for 99 years. If the farm unit has changed hands, the new owners may even imagine they own the land in freehold. It's sometimes difficult to explain that it's not a lease, only a licence, and it contains a clause (to which the licence-holder agreed in writing) allowing its termination at 30 days' notice.

Council may initiate the termination of an Unused Road licence through section 407 of the *Land Act*. This section requires council to form the view that cancellation is "desirable in the public interest." Cancellation is not automatic: the Minister *may* then proceed to cancel the licence. We expect that in advising the Minister, DSE would also want to ascertain the views of the licensee. ■



*One curious misconception about Unused Roads arises from section 402 of the Land Act.*

*This section imposes an obligation on a landowner who abuts a Government road which has been declared to be 'Unused.' If the boundary between the land and the road is unfenced, then such an owner must either build a fence or take out a licence – or risk an accumulating penalty of \$2 per day.*

*The misconception is that there is somehow a corresponding obligation on the Minister to grant such a landowner a licence – that the licence for an Unused Road must be granted to the abutting owner whose land is unfenced rather than to his/her neighbour, whose land is correctly fenced.*

*It's fortunate that this interpretation isn't correct: otherwise we would see landowners around the state tearing down fences in a race to beat their neighbours to the rights over the abutting 'long paddock.' ■*



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#### Enquiries -

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- The consequences of a road being a 'Public Highway'
- Who owns and controls roads and lanes
- How roads can be created, deviated, closed, discontinued
- How roads can be developed and put to commercial use – both at the surface and at other strata
- 'Adverse Possession' of roads and lanes

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- How railway land can be used and developed
- Case study:- Footscray Station

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- The Shopping Mall: freehold land available for public use
- How these spaces can be created, regulated, altered, disposed of, and used for commercial purposes
- "Road-related Areas" and parking lots
- Commercial use of public space: leases licences, permits