

The Elephant and the Excavation

In this edition we look at two parallel, but quite different, stories about private freehold land – which shouldn't be.

Each story involves private entrepreneurial zeal (in one case commendable, in the other highly dubious); each involves land of State significance, and each serves to illustrate a long-standing failure in Victoria's public land policy.

Mount Elephant is one of the most sensational landscape features of the western volcanic plains. As freehold land, its only protection from the scars of quarrying and the blots of McMansions was a Significant Landscape Overlay in the Planning Scheme. With understandable scepticism about this level of protection, the people of Derrinallum, assisted by the Trust for Nature, went out and *bought* the whole mountain.



In one sense, Mount Elephant is now in public ownership – via a private consortium. On the first Sunday of the month you can climb to the crater, check out the spectacular views, and donate towards the mountain's on-going management.

Our second story is about 'Port Leopold' on the Bellarine Peninsula. It's also freehold land, right down to the water's edge – and that's the nub of the problem.

Unbeknown to the City of Greater Geelong, the land-owner has been quietly excavating some 45 hectares, blasting an opening through to Corio Bay and filling in wetlands to make himself a nice little boat harbour.

VCAT has now ordered that works stop until 20 June. The owner says that at the hearing he will

argue that a planning permit was not required; the City will argue that it was, and that he should be forced to restore the entire site.

But the case should never have got to this point. Victoria's coastline should simply not be held in private title. A strip at least 20 metres wide, all the way from South Australia to New South Wales, should be public land.



Left: Mount Elephant, Derrinallum. Above: Port Leopold, Bellarine Peninsula.

We don't have a ready definition of 'Land of State Significance,' but by whatever criteria you adopt, the foreshore of Port Phillip and a near-pristine extinct volcano on the western plains surely qualify.

These examples demonstrate that land of State or Regional significance needs greater protection than a Planning Scheme zoning or Overlay. At the least it needs covenants on title, and in many cases actual re-acquisition as Crown land.

The days are long gone when the state can build a public land portfolio at no cost to Treasury, just by holding back the occasional parcel from alienation, or by designating as Forest or Park some tract which would probably be unsaleable anyway.

The time has surely come when governments must fork out hard cash to covenant or buy back freehold land. We shouldn't have to rely on local citizens' groups to protect assets of state significance from environmental vandals. ■

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ARE YOU STILL EXPOSED TO ADVERSE POSSESSION?

Section 7B of the *Limitations of Actions Act* 1958, which came into operation on 26 November 2004, provides that "council land" cannot be adversely possessed, regardless of the period of possession.

Unfortunately, the definition of council land is restricted to "land of which a council is a registered proprietor under the *Transfer of Land Act* 1958".

Several types of land in a council's portfolio remain unprotected – the first being land which is the subject of an adverse possession application lodged prior to 26 November 2005. Here the only effective strategies are to gather evidence to refute the applicant's claim of 15 years exclusive possession – or evidence that the land was a *public highway*.

A second category is General (Old) Law land. If Councils have such land in their portfolio they should be converting it into Torrens title land under the *Transfer of Land Act* 1958. An application for conversion can be made if Council can establish a chain of title in relation to the land for at least 30 years. The application requires a search of the chain of title, and a solicitor's certificate identifying the land and stating that the Council has good title to the land.

If a Council does not have a chain of title which is at least 30 years old, but has evidence that it has been in possession of the land for at least 15 years, it may be able itself to make an application for conversion by possession. A survey may also be required in support of an application for conversion.

A third category of land still at risk consists of reserves which are still registered in the name of the original subdivider. Where a reserve is not registered in Council's name, Council can seek to vest the land in itself and obtain title to the land pursuant to the process set out in section 24A of the *Subdivision Act* 1988. This requires Council to obtain a planning permit vesting the land in Council and certification of a plan of subdivision.

The fourth category is roads (including lanes) – where a council's strategy will depend on whether or not the road is required for public use.

If a road is no longer required for public use, a Council may seek its discontinuance pursuant to Schedule 10 of the *Local Government Act* 1989, and then transfer title to Council under section 207B of the *Local Government Act* 1989.

For roads which are still required for public use, effective protection becomes more complex.



Council land is now protected from adverse possession – or is it?

Land Registry has confirmed that there is no practical way in which a road in a pre-1988 subdivision can be made "council land" for the purposes of the *Limitation of Actions Act* 1958. In a recent Direction, their Corporate Counsel writes:

I have considered the provisions of schedule 5 of the Road Management Act 2004. I am unable to identify any provision which enables a council to make itself the registered proprietor of a road other than by obtaining transfer from the registered proprietor or by transfer to itself on discontinuance (section 207D Local Government Act).

For many pre-1988 subdivisions, the registered proprietor is likely to be long dead, or long since wound up. In theory, this shouldn't be a problem, because such roads will probably be 'public highways,' against which there can be no adverse possession. Land Registry has no way of knowing whether a road is a public highway, but there are several ways in which a council may establish that a road is a public highway:-

- it may gazette the road as a public highway under section 204(1) of the *Local Government Act* 1989
- it could gather documentary evidence that the road was constructed prior to the repeal of the *Local Government Act* 1958, and satisfied section 587 of that Act
- it could invoke the common law doctrine of dedication and acceptance – but conclusive evidence that this doctrine applies can only be obtained by taking the matter to court.

If you're in any doubt about whether your land is protected, and what strategy to adopt if it's not, then get in touch and we'll help to work it through with you. ■

Q & A

“I own a block of land with no road access. Do I have rights of access across adjacent Crown land?”

Question asked by a property-owner in a near-Melbourne location

Let's start with the nature of 'access.' There's a difference between *practical* access, which would take the form of a physical roadway, and *legal* access, which may take the form of a road reserve or a carriageway easement.

For our property-owner's purposes, we should be working towards *both* physical and legal access, and the former should preferably lie within the latter.

In what sense is the block land-locked? If there's a physical roadway over a neighbour's freehold, then the block has practical access, but maybe not legal. If there's a 'paper road' abutting it, then it has legal access, but maybe not practical. In the first case, an option may be to obtain rights over the neighbour's land; in the second case an option may be to construct a roadway on the road reserve.

There's a temptation for subdividers to maximise their lot-count by using adjacent land for access, but modern certification processes will prevent this from happening unless that adjacent land is already a road.

Nevertheless, you will now and then come across blocks which have no legal access. They may either be lots created in old subdivisions, or original Crown Allotments – and the corresponding practical access, if there is any, may be across other freehold land or adjacent Crown land.

If practical access is across freehold land, our property-owner may be able to claim 'Easement of Long User.' This common-law doctrine holds that, in certain circumstances, an easement can be created 'by prescription' rather than through the statutory processes of the Subdivision Act.

It's also possible that our property-owner may have a claim for 'Easement of Necessity' against whoever created the land-locked block – and this could be either a previous subdivider or the Crown.

In either case, we have moved well out of the realm of statutory law and into common law, so the best advice we can give is: *first* – go and see a licensed surveyor, and *second* – go and see a lawyer. ■

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Applicants should be suitably qualified in environmental or property law and have some experience in adult training. A background in Victorian local government or statutory authorities would be an advantage. The position would suit enterprising self-managing persons seeking sessional work.

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The Public Land Consultancy is available to provide advice on public land matters and will, on request, arrange legal advice for clients from its associate Maddocks, of 140 William Street, Melbourne.