

FROM MAIDEN GULLY TO DEVILBEND

No, this story's not about Victorian place names. If it were, the headline would read 'Heart Morass, Naringaningalook, and The Pope's Eye.'

Maiden Gully is an urban growth area near Bendigo, and the subject of a recent landmark decision by the Victorian Civil and Administrative Tribunal. VCAT is of the view that, to satisfy the 'Net Gain' criteria for urban subdivisions, native vegetation offsets must be located on public land.

For the public land manager, will this be a burden or a boon? As Barnaby McIlrath writes in a separate article, it could lead to pressures to revegetate public land at the expense of other uses, such as recreation. Another analysis might forecast a resurgent program of rehabilitating degraded landscapes – such as Devilbend on the Mornington Peninsula.



The government's decision to retain the Devilbend Reservoir and bring it under the *Crown Land (Reserves) Act* raises several issues of public policy – not least the disposal of surplus land by corporatised agencies such as Melbourne Water, VicTrack and VicRoads.

Revegetation at Devilbend will cost anything between \$10000 and \$26000 per hectare, and take perhaps 50 years. It's a case of join up the dots. Sure, Devilbend isn't in the same bio-region as Maiden Gully, but there's plenty of urban subdivision happening on the Mornington Peninsula. Seems the new Devilbend Trust may have available to it a plentiful source of funding for revegetation – thanks to VCAT. ■

A Net Gain for Public Land?

by Barnaby McIlrath, Maddocks

A recent VCAT decision is essential reading for those who contribute to, or make decisions regarding the management of public land.

The case is *Villawood Properties v Greater Bendigo City Council* [2005] VCAT 2703, handed down on 20 December 2005 by Deputy President Helen Gibson and Senior Member Margaret Baird.

The land in question is zoned Residential 1 (R1Z) with a Vegetation Protection Overlay (VPO).

The case considers how urban subdivisions should achieve a 'Net Gain' in the extent and quality of native vegetation. This is a particularly important planning question given the extent of clearing which traditionally follows the creation of residential lots, and the intrusion of urban subdivisions into scarce biodiversity habitat.

There is one particular aspect of the decision that will attract the attention of public land managers. In considering how a Net Gain should be achieved, the Tribunal discussed at length the extent to which vegetation should be retained on newly created residential lots.

As a starting point the Tribunal endorsed the approach of the Council and DSE in assuming that in reality 100 per cent of the vegetation retained on the newly created residential lots would end up being removed by their future occupants – even if the plan of subdivision or the planning permit nominated vegetation on the lots for retention. In this regard the decision reduces the extent to which a subdivider can minimise or avoid losses for the purposes of assessing the extent of replacement planting or protection of other vegetation required under the Native Vegetation Framework.

Vegetation will have to be protected or replanted on land other than the lots themselves in order to achieve that balance. So, who should provide the land for these purposes?

We consider that if there is significant vegetation on the site that should or can be retained, this should be reflected in the design of the subdivision and such vegetation should be included in public open space or other types of land holding where its retention and ongoing management is assured.
[VCAT para 75]

From a public land manager's point of view, there is a risk that this aspect of the decision could be interpreted as expressing an expectation that councils and other public authorities are willing to set aside public open

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A Net Gain for Public Land?

space and reserves for the purposes of conservation, at the expense of other strategic planning objectives for public land. Such an eventuality may represent a substantial burden on public land managers which warrants further discussion.

Where there is a lack of active public open space such as football fields or recreation reserves, the approach endorsed by the Tribunal may mean that future subdivisions will set aside vegetated areas at the expense of recreational opportunities.

Underlying the Tribunal's decision is a view that it is not appropriate, or realistic, for private land owners to be subject to the management requirements associated with the NV Framework in the long term. Yet, there is nothing in the NV Framework which suggests that responsibility for setting aside land for the purposes of achieving a Net Gain is the preserve of public land managers. On the contrary, the NV Framework expressly states that it '*necessarily focuses on private land where the critical issues of the past clearing and fragmentation exist*'.

It might be argued that the policy objectives of a Council in determining how public open space (including monetary contributions) should be used are primarily governed by the *Subdivision Act 1988* rather than the *Planning and Environment Act 1987*.

There are certainly limits which constrain how far the Tribunal is entitled to intrude into the realm of public land management in the absence of relevant planning scheme provisions.

Unless the management objectives for public open space are constrained by the relevant planning scheme, it is difficult to see how the Tribunal can impose restrictions which affect how such land should be used, particularly in the absence of consent from the relevant authority in which the public land is vested. ■

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Next
Presentation
Tues 31
January

Land Law for Managers of Parks, Gardens and Reserves

A One-day Professional Development Course

Presented by Dr Geoff Parr-Smith

COURSE CONTENT

Land Status in Victoria

Crown land, freehold land, National Parks, Crown reserves, reserves on freehold land, road reserves, an introduction to Native Title

Legislation governing Parks, Gardens and Reserves

A closer look at the National Parks Act, the Crown Land (Reserves) Act, the Subdivision Act and the Road Management Act

Control and Management of Parks, Gardens and Reserves

Commonwealth and State 'National Parks,' the various roles of municipalities, Parks Victoria and DSE, the various avenues for community involvement

Commercial and Private use of Parks, Gardens and Reserves

Leases and Licences, Permits and Agreements, Contracts and Management Agreements

Controls over the Use and Development of Parks, Gardens and Reserves

Planning Schemes, the Coastal Management Act, Management Plans, Native Title and Heritage controls

Regulating Behaviour and Activities

Local Laws, Regulations under various Acts, legal controls over car parking, dogs, camping, litter etc

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Q & A

We've heard there's a way of getting title to the land in a Government Road at no cost. Is that true?

Question asked on behalf of the developer of a country-club / golf course.

There's no such thing as free land, but there certainly are smart ways of acquiring it. First, let's look at the dumb way.

If you have government roads running through your landholdings, and you want to reconfigure the road layout, you could get the existing roads closed, then purchase the land from the government, and see your money disappear into the Consolidated Fund.

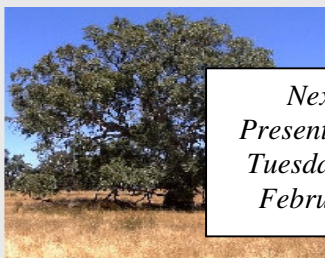
Then you would have to set aside land for new roads, and see it become council property when the plan of subdivision is registered. In the end, the net result will have been a subsidy from the purchasers of lots in your development to the state government.

The smart approach is to use the road deviation processes hidden in the Local Government Act.

The land in the discontinued government roads ceases to be Crown land and becomes council owned freehold, so you then negotiate with the council rather than the Department of Treasury and Finance.

We don't expect a council to hand the land over to you for nothing, but there are valid arguments you could put for it being sold to you at less than full valuation.

This is a strategy which needs the approval of both DSE and the council, so the key to success is going to be good planning. If your new road layout is better than the existing (for instance, in terms of traffic management and vegetation retention) then there's every chance that the value of the land in the old roads can be retained, in one form or another, on-site. ■



*Next
Presentation
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*Presented on behalf of
The Public Land Consultancy by the
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- *How the Catchment and Land Protection Act 1994 assigns responsibility for Weeds*
- *How the Commonwealth exercises authority through the Environment Protection and Biodiversity Control Act 1999*
- *How the National Parks Act 1975 and the Crown Land (Reserves) Act 1978 protect Crown land of high environmental significance*
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- *Making a municipal Local Law to protect garden trees*
- *Bringing / defending a negligence action resulting from death or injury caused by a dangerous tree*

Professional Development Courses February – March 2006

Land Law for Managers of Parks, Gardens and Reserves	Tuesday 31 January	Darebin Arts Centre Cnr Bell St & Plenty Road Preston <i>Presenter: Dr Geoff Parr-Smith</i>
 Vegetation and the Law	Tuesday 21 February	Tudor Motel Whitehorse Road, Box Hill
	Tuesday 28 February	CAE 253 Flinders Lane, Melbourne
	Thursday 9 March	Bell Motor Inn Bell St, Preston <i>Presenter: Brendan Sydes Principal Solicitor, The Environment Defenders Office</i>
Crown Land Law, Policy and Practice	Thursday 2 February	Maddocks 140 William Street, Melbourne <i>Presenter: David Gabriel-Jones</i>
Land Law for Managers of Roads Streets and Lanes	Thursday 9 February	CAE 253 Flinders Lane, Melbourne <i>Presenter: David Gabriel-Jones</i>
Land Law for Managers of Rivers, Lakes and Catchments	Thursday 2 March	Maddocks 140 William Street, Melbourne <i>Presenter: David Gabriel-Jones</i>
Land Law for Coastal Authorities	Thursday 16 February	Deakin University Geelong <i>Presenter: David Gabriel-Jones</i>

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