

# ADVERSE POSSESSION OF COUNCIL LAND

## *A Report for the Municipal Association of Victoria*



*The Boulevard, Ivanhoe – a public road becomes private property*

## The Public Land Consultancy January 2004

The Public Land Consultancy  
Principal: David Gabriel-Jones  
*Master of Public Policy (Hons)(Melb)*  
*Dip Civil Engineering (RMIT)*

57/151 Fitzroy Street  
St Kilda, VIC 3182  
phone: (03) 9534 5128  
mobile: 0412 134 243

postal: PO Box 2251  
St Kilda West, VIC 3182  
facsimile: (03) 9534 5128  
[DGJ@publicland.com.au](mailto:DGJ@publicland.com.au)

*in association with*  
McKean & Park  
Lawyers and Consultants  
Melbourne

## **1. INTRODUCTION**

### **1.1 PURPOSE**

The purpose of this report is to assist the Municipal Association of Victoria (MAV) to pursue its objective of protecting council land from 'adverse possession' claims.

### **1.2 CLIENT'S BRIEF**

This report was commissioned by the MAV in December 2003.

Appendix 1 consists of the relevant exchange of letters between the MAV and the Public Land Consultancy.

### **1.3 CONSULTATION**

Organisations and people consulted are listed in Appendix 3.

A particular acknowledgement is due to Sue Lowther of Monash City Council and Jeanette Kringle of Banyule City Council.

## **2 BACKGROUND**

### **2.1 HISTORY**

The earliest correspondence sighted on this issue is dated March 2000 – although we note that Land Registry's file goes back to 1997.

In March 2000, Mr David Conran, CEO of the City of Monash wrote to Ms Prue Digby, Executive Director of Local Government Victoria, urging the government to protect 'community land owned by municipalities.'

Ms Digby replied (3 August 2000) advising that the Attorney-General had given in-principle support to a the proposal, subject to resolution of 'technical issues.' The letter implied that the Minister for Local Government also supported the proposal, and flagged legislative change in the Autumn 2001 Parliamentary Session.

On 22 January 2001, Mr John Watson, Director Governance and Legislation, Local Government Victoria advised Mr Conran that a discussion paper was in the course of preparation for public comment, following which further action would be decided.

In March 2002, with no discussion paper and no draft legislation forthcoming, the Eastern Region Mayors wrote to the Minister for Local Government and the Attorney General.

In August 2002 the Minister for Local Government, in a letter to the Mayor of Banyule, advised that inter-departmental discussions had floundered on "the concerns of Land

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Victoria, which may be exposed to risk if it does not recognise a particular property as municipal land.” He had asked his Department to expedite resolution of the matter.

Between August 2002 and September 2003, a series of representations from various councils failed to obtain progress. Government responses repeated the reference to ‘unresolved technical issues.’

In September 2003, the CEO of the Municipal Association of Victoria, Rob Spence, asked all Victorian councils for information on the impacts of adverse possession.

In December 2003, the MAV commissioned this report.

### 2.2 ADVERSE POSSESSION

The doctrine of adverse possession is a part of common law rather than statutory law.

*Adverse possession is the occupation of land inconsistent with the rights of the true or documentary owner. Such adverse possession entitles the occupier's possession to be protected against all who cannot show a better title; and, if the occupier remains in possession for a sufficient period of time, the occupier's possession is protected against the true owner who is barred or deprived of his right of action to recover his property, and consequently, the occupier becomes the owner (Park and Williamson<sup>1</sup>).*

Possessory interests may be claimed in circumstances bordering on the predatory and fraudulent through to circumstances which are benign and reasonable (eg concluding a terms purchase where the vendor cannot be located). Adverse possession has been portrayed as a useful tool for rationalising title to accord with occupancy, and for bringing abandoned land back into productive use.

Limitation statutes date back to Charles II. They prevent a legal owner from recovering land possessed by a trespasser, and extinguish title after a specified period of dispossession. Once the title of the dispossessed owner is extinguished, the person in possession obtains title by virtue of the fact that no other person has better title to the land. Such person has a right to evict any further trespasser, including the former legal owner.

In Victoria, the rights of the dispossessed owner are extinguished after fifteen years, unless that person was ‘under a disability’ (ie was a minor, or of unsound mind) in which case the owner has up to a further fifteen years in which to challenge the trespasser.

If there is no action brought to recover the land, then the possessor has an estate in fee simple in absolute possession. Subsequent dealings at Land Registry merely serve to record this change of proprietorship: they do not cause the change to occur.

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<sup>1</sup> MALCOLM PARK AND IAN WILLIAMSON, Department of Geomatics, The University of Melbourne *Australian cadastres: the role of adverse possession of part parcels* - in Survey Journal October 1998

## 2.3 RELEVANT STATUTORY LAW

Those Acts of Parliament which touch on adverse possession tend only to set out procedures for its administration and prescribe limitations to its application.

It is worthwhile, however, to run through the various relevant Acts, because it is only through amendments to this body of statutory law that municipal land may be protected.

### 2.3.1 The Transfer of Land Act 1958

The Transfer of Land Act applies to most of the freehold land in Victoria

Part V (sections 60 to 62) deals with 'possessory interests' of land which is under the operation of the Act. It specifies the procedures to be followed by the applicant and by the Registrar.

It does not define the criteria by which a person may claim to have acquired a possessory interest – this is the province of the common law – but it requires the Registrar to be "satisfied that the applicant has acquired a title by possession to the land." For this purpose, the Registrar relies on extensive and detailed evidence which must be provided by the applicant, the applicant's surveyor, the applicant's solicitor, the municipal rate collector and disinterested witness(es).

The Act requires the Registrar to inform the relevant council after the transfer has been completed – apparently in order to allow the rates database to be updated.

Several other provisions relating to the issue of titles may be relevant to documenting a council's landholdings or bringing land under the proprietorship of a council. They include:-

Section 27B(8) which allows issue of a title where the land is already registered in council's name

Section 54 which relates to the issue of certificates of title in respect of lands vested in an acquiring authority

Section 59 which relates to registration of land disposed of through the operation of statute.

Section 106 which specifies Powers of the Registrar – including the power to, "in respect of any instrument, dealing or plan lodged with the Registrar under any Act, require the consent of the council of the municipality in the municipal district of which the land is situated before registering the instrument dealing or plan."

### 2.3.2 The Property Law Act 1958

This Act deals with 'general law' or 'old law' land which has not yet been brought into the Torrens system. It is possible to claim adverse possession of general law land, but such claims will be used by Land Registry as an opportunity for bringing the land under the Transfer of Land Act.

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This process relies on certificates lodged by the applicant's legal representative – supported by documentary evidence – disclosing any easements or other encumbrances over, claims upon, or interests in the land.

### 2.3.3 The Limitation of Actions Act 1958

This Act, administered by the Attorney General, is headed “*An Act to consolidate the Law relating to the Limitation of Time for commencing Actions and Arbitrations.*”

Its main purpose is to prescribe time limits for the initiation of certain types of civil action. Sections 8 to 20, which deal with adverse possession, impose restrictions on actions brought by aggrieved landowners against offending tenants, mortgagees and trespassers.

Sections 7 and 7A are exceptions to the general run of the Act – indeed they contradict the Act's own heading (quoted above), and impose restrictions on the would-be offender rather than on the person bringing action to remedy the offence.

Section 7 prevents adverse possession against the Crown. For these purposes, Councils are not the Crown, because the *Interpretation of Legislation Act 1984* defines ‘the Crown’ as ‘the Crown in the right of Victoria.’

Section 7A prevents adverse possession against VicTrack. 7A was inserted into the Act in 1993, when VicTrack was corporatised and would otherwise have lost the protection afforded by section 7. With both section 7 and 7A the protection is retrospective: they not only prevent future claims, but undo any possessory interest purportedly obtained in the past.

These sections do not specify the type of land involved: it may be Crown land, Torrens title freehold, or general law freehold.

### 2.3.4 The Subdivision Act 1988

This Act provides for the subdivision of freehold land into lots, reserves, roads and common property.

Under the current Act, councils firstly certify Plans of Subdivision, and following completion of works issue certificates of compliance. The Registrar of Titles may then register a Plan of Subdivision, create folios for the lots created in it, and issue titles for those lots.

Upon registration, land set aside as a reserve vests in the council; land set aside as a road vests in the Council and becomes a public highway.

The Registrar must create a folio of the Register under the Transfer of Land Act 1958 for each lot; and each reserve.

When land set aside as a road vests in a Council, the Council is deemed to be its registered proprietor; but the Registrar need not create a folio of the register or produce a certificate of title for the land.

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Prior to 1988, provisions relating to subdivisions were found in the Local Government Act and some other Acts. Plans could be registered without having first been certified by Council. Section 24A of the Subdivision Act 1988 provides for a council to vest in itself land “set aside or set aside as a reserve” on such a “registered but not certified” plan.

There is no equivalent to 24A for roads.

### 2.3.5 The proposed Road Management Act 2004

The September 2003 draft of this Bill makes only a passing reference to adverse possession of roads, but this may be strengthened before the Bill reaches Parliament. See letter from The Public Land Consultancy to VicRoads, attached as Appendix 3.

### 2.3.6 The Local Government Act 1989

The LG Act 1989 has the effect of bringing many roads within the scope of ‘council land,’ but leaves them unregistered as such at Land Registry.

Section 203 says that a ‘public highway vests in fee simple’ in council – with the exception of roads declared under the Transport Act, roads on Crown land, and roads which council has by agreement passed to VicRoads.

Section 204 gives council power to declare a road to be a public highway. This, together with section 203, provides a route for causing a road unambiguously to become council-owned freehold. It does not, however, result in any corresponding registration at land Registry.

### 2.3.7 The Land Act 1958, the Transport Act 1983, and the Rail Corporations Act 1993

These three Acts, which deal with Crown land, Roads and Railway lands respectively, do not touch on the matter of adverse possession.

### 3 OPTIONS

#### 3.1 CONCEPTUAL CATEGORIES OF COUNCIL LAND

For our purposes, there are four categories of council land:

- A. Land for which council is the registered proprietor. This includes subdivisional lots, reserves created after 1988, and older reserves which have been vested in council under section 24A or earlier equivalent legislation.
- B. Pre-1988 reserves, for which the original landowner is still the registered proprietor.
- C. Roads, which already 'vest in fee simple' in council, but for which a previous landowner is still the registered proprietor.
- D. Council-managed land which is Crown land such as government roads and Crown reserves

Category D is not of concern here, because as land owned by the Crown it is already protected from adverse possession.

Three options have emerged for protecting council land categories A, B and C.

#### 3.2 THE COMPREHENSIVE PROTECTION OPTION

Comprehensive protection would apply to categories A, B and C of council land. This is clearly the best option for municipalities and is favoured by those which we consulted.

This option would work if Land Registry had some way of recognising land as being council land, other than by reliance on its own records.

Our proposal is for the relevant council, rather than Land Registry, to determine whether land subject to a claim is council land or not. The applicant would be required to obtain certification from council that the subject land was not 'council land.'

At our meeting of 20 January 2004 with the Registrar of Titles and officers of Land Registry, it was stated that Land Registry would have "no technical problem with council certification." The Registrar stated that Land Registry did not support or object to any particular option.

This will be the most difficult option to implement. It will require:

- (a) development of a comprehensive definition of what constitutes 'council land'
- (b) development of regulations governing councils' handling of requests for certification
- (c) development of appeal and review processes to deal with cases where the applicant is aggrieved with a council's decision
- (d) amendments to two Acts:
  - The *Limitation of Actions Act 1958* – to define and exempt council land
  - The *Transfer of Land Act 1958* – to allow the Registrar of Titles to accept possessory applications only if accompanied by council certification.

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### 3.3 The Limited Protection Option

The limited-protection option would apply only to land category A above.

This will be the easier option to implement. There would be no problem in defining the land to be protected. Land Registry would have no difficulty in recognising that a claim related to council land.

Legislation would be required to amend only the Limitation of Actions Act 1958.

This is the option favoured by Local Government Victoria. LGV has suggested that councils should actively vest reserves in themselves (ie transfer land from category B to category A) using section 24A of the Subdivision Act 1958.

Our estimates (see Appendix 4) are that use of 24A would cost Victorian municipalities something in the order of \$2.5 to \$5 million. Until this process had been completed, any land not yet processed would remain vulnerable to claims.

This option would not protect category C land – ie roads.

### 3.4 Protection for Roads

A third option for protecting some (but not all) roads is emerging through the proposed Road Management Bill 2004. See correspondence to VicRoads attached as Appendix 3.

This option raises several issues:

- (a) Not all roads will be protected. It must be recognised that not all roads are 'public highways' and not all public highways will become 'public roads' for the purposes of the Act.
- (b) Land Registry may not be able to recognise a claim as relating to a road. This option may run into the same technical problems as have delayed the wider protection against adverse possession
- (c) VicRoads may not pursue this reform. There are other more pressing reasons for finalising the Road Management Bill, and VicRoads may not wish to burden the drafting and approval processes with this matter.

This option could be implemented in conjunction with either of the two options discussed above, or could be implemented even if neither of the other options proceeded. The resulting scenarios are tabulated below.

### 3.5 NULL OPTION

The "do nothing" option need not be discussed here, but should be recognised as a benchmark for the purposes of any Benefit-Cost evaluation.

When tested against the null option, some of the costs and benefits of the other options may not be as substantial as may otherwise appear, because they would have been incurred anyway.

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### 3.6 SUMMARY OF PROTECTION OPTIONS

Table 1  
**Protection for Council Land under different legislative scenarios**

Scenario	Land group:-	<b>A</b>	<b>B</b>	<b>C</b>
Status quo		<i>No</i>	<i>No</i>	<i>No</i>
No change to LofA Act Protection of roads through RM Act		<i>No</i>	<i>No</i>	<i>Some</i>
Limited Protection through LofA Act No protection through RM Act		<i>Yes</i>	<i>No</i>	<i>No</i>
Limited Protection through LofA Act Protection of roads through RM Act		<i>Yes</i>	<i>No</i>	<i>Some</i>
Full Protection through LofA Act No Protection through RM Act		<i>Yes</i>	<i>Yes</i>	<i>Yes</i>
Full protection through LofA Act Protection of roads through RM Act		<i>Yes</i>	<i>Yes</i>	<i>Yes; some doubly-protected</i>

## **4 ISSUES and RESPONSES**

### **4.1 THE PUBLIC INTEREST**

The common law of adverse possession deals with the competing rights of private parties – the nominal owner and the trespasser in possession. It is not a body of law which seeks to protect or even recognise the public interest.

In the course of our consultations, the view was put that rights of claimants may be prejudiced because councils would be accorded greater rights than other private land-owners.

The response is clearly to emphasise councils' role as protector of the public interest. The proposal is little more than an extension of the well-accepted principle that Crown land should be protected from squatters.

### **4.2 DEFINITION OF 'COUNCIL LAND'**

We recognise the following types of land in which councils have some interest or involvement. (This list is an expansion of categories A, B and C proposed earlier)

- Freehold lots where council is the registered proprietor
- Freehold lots where a previous council is registered proprietor
- Reserves on plans of subdivision which are not in council's name but which could be brought into council's name using section 24A of the Subdivision Act
- Reserves which are in council's name but for which a title has not issued
- Reserves created as 'common property' for the benefit of lot-owners
- Easements over freehold land in favour of council, or for some council-managed purpose
- 'Public Roads' which are on the (proposed) Road Register
- Roads which are 'Public Highways' by virtue of a documented instrument, but which are not 'Public Roads' for the purposes of the (proposed) Road Management Act
- Roads which may be public highways but this could only be determined by a court
- Roads in old subdivisions which have never become public highways

There may be other categories of council land not included above.

The issue will be to

- (a) determine which of the above are to be protected, and
- (b) find a workable legal definition suitable for inclusion in an Act of Parliament

### **4.3 IDENTIFICATION OF UNREGISTERED COUNCIL INTERESTS**

This is the principal 'technical issue' referred to in correspondence from Ministers as an unresolved impediment – not only to legislation, but even to a discussion paper.

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Not all land vesting in a council is recorded as such at Land Registry. In particular, reserves created in subdivisions prior to 1988, and roads created in subdivisions will often remain registered in the name of the original subdivider. In these circumstances, Land Registry would be unable to form a view on whether an adverse possession application related to 'council land' or not.

There are two responses to this issue, corresponding to the two principal options for legislative reform.

First – limit the protection to land registered in the name of council. This would be clear-cut and would eliminate the risk to Land Registry.

It would not protect unregistered council land such as many pre-1988 reserves and subdivisional roads. Reserves could be brought into councils' name (at a cost – see below) and hence protected, through the process set out in section 24A of the Subdivision Act 1988. For roads, however, there is no equivalent process within existing legislation: subdivisional roads which are public highways already vest in council, but there is no ready mechanism for erasing the previous owner's name from the title.

Second – shift the onus of determining whether or not land is council land from Land Registry to the council itself. A claimant would be required to submit to Land Registry documentation from the council certifying that the land was not council land.

There would be strong incentives for councils to get such a determination right: a municipality which wrongly claimed land to be council land would face appeal and review proceedings (see below); a council which failed to identify its own land would run the risk of losing it. Research into the status of reserves and roads need occur only on a case-by-case basis, as and when adverse possession claims were made. As councils improve their asset databases and GIS's, this task will prove easier to undertake.

### 4.4 ESTATE MANAGEMENT

A further view which may to prevail in some quarters, although not expressly stated, is that councils should be more active in identifying their property assets and preventing encroachments. They should also be actively transferring old reserves into their name through the use of section 24A.

The response here is, of course, related to resources and priorities. Best value for ratepayers' funds is unlikely to be had through conducting repeat periodic surveys of reserve boundaries, nor through a mass state-wide transfer of reserves under section 24A.

The better strategy is to deal with encroachments as and when they are detected – and they will come to councils' attention more rapidly through improved GIS systems and satellite imagery.

### 4.5 BENEFITS AND COSTS

Any proposal such as this should be supported by a Benefit-Cost study.

## ADVERSE POSSESSION OF COUNCIL LAND

Costs and benefits may be incurred not only by municipalities but also by government – particularly Land Registry

Costs to a municipality should be recognised to include amenity costs and dollar costs:

### Amenity costs

- Loss of public open space in reserves
- Loss of land set aside for roads, imposing constraints on future road development
- Loss of land intended for some public use, resulting in sub-optimal design

### Dollar costs

- The value of the land lost
- The cost of re-acquiring replacement land
- The cost of pursuing legal action against claimants
- The cost of preventative strategies

One cost which has been partly quantified is the cost of bringing old reserves into council's name through the use of section 24A, Subdivision Act 1988. Data supplied by the City of Banyule are attached as appendix 4. Based on this data, it would appear that the state-wide cost of using section 24A to vest unregistered reserves in councils could be in the order of \$2.5 - 5 million.

The processing of large volumes of section 24A applications must also impose costs on Land Registry.

It is recommended that MAV invite government to join in a Benefit-Cost study which includes impacts on municipalities and Land Registry.

The study should compare the comprehensive protection option, the limited protection option, and the null option (ie retaining the status quo).

## 4.6 RETROSPECTIVITY

The key events in the progress of an adverse possession claim are as follows:

- 1 trespasser takes possession
- 2 trespasser completes 15 years possession
- 3 submission of claim to Land Registry
- 4 issue of title in the name of the claimant

There will usually be 15 years between event 1 and 2, but in some circumstances the clock may be put 'on hold' and the elapsed time will exceed 15 years.

There may be many years between events 2 and 3 in the sequence (we are aware of one case of almost 50 years).

There are five scenarios for the application of new legislation. At the date of its proclamation, it may –

- Only apply to prospective cases which have not yet reached event 1
- Halt progress of cases which are between events 1 and 2
- Halt cases which are between events 2 and 3

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Halt cases which are between events 3 and 4  
Overturn transfers which have already progressed to event 4

Attitudes towards retrospectivity will probably hinge on the question of dispossession. If a trespasser has not already acquired the land, then it will be politically acceptable to halt the progress of their claim; if they have already acquired the land, then action against them will be dispossession, and politically more difficult.

It should be noted that there may be different opinions on when the actual change in ownership occurs – whether it occurs at point 2 or at point 3 in the sequence.

It is not considered realistic to achieve scenario (e). It is clearly preferable to pursue scenario (d) rather than scenario (c). It is recommended that legal opinion be sought to support the view that change of ownership occurs at point 4 of the sequence rather than at point 3.

### 4.7 APPEAL AND REVIEW

No reform of this area of law will be acceptable to government unless associated with sound processes for appeal and review.

The Comprehensive Protection option requires a council to determine whether land subject to a claim is or is not 'council land' and to provide a certification for the Registrar.

Unless properly designed, this will be the 'weak link' in this option. The way in which councils handle requests for certification needs to be codified (presumably by Regulations made under the Transfer of Land Act) and there must be clear avenues for appeal and judicial review.

The options here are:

- The Supreme Court
- Victorian Civil and Administrative Tribunal (VCAT)
- Institute of Arbitrators
- The Registrar of Titles

The merits of these alternatives need to be evaluated.

## 5 CONCLUSIONS and RECOMMENDATIONS

We see no reason why the comprehensive protection option should not be pursued. It is significant that Land Registry stated that they had no in-principle objection to it, and that they would have no technical problem with council certification.

More work needs to be done on

- (a) defining “council land”
- (b) developing processes for council certification of adverse possession claims
- (c) developing avenues of appeal and review of council certifications

One way of progressing these matters, and of focussing stakeholder attention on the issue, is to commission the drafting of a Draft Bill and Draft Regulations.

The merits of the options would be better understood by both the municipal sector and the state Government if a Benefit-Cost evaluation were undertaken.

The emerging Road Management Act should be closely monitored for impacts on adverse possession – but it should not be relied on as an alternative to comprehensive protection.

Legal opinion should be sought in support of the view that transfer of ownership occurs (or *should* occur) on registration, rather at the conclusion of the 15-year period.

Our estimates of costs associated with bringing reserves into councils’ name through section 24A of the Subdivision Act (appendix 4) should be verified by checking with a wider sample group of councils

## APPENDICES

1. Terms of Reference
2. Letter to VicRoads
3. Consultation
4. Cost of using section 24A, Subdivision Act

ADVERSE POSSESSION OF COUNCIL LAND

Appendix 1 – Terms of Reference

**THE PUBLIC LAND CONSULTANCY**

ABN 69 067 045 520

Rob Spence  
Chief Executive Officer  
Municipal Association of Victoria

7 November 2003

Dear Rob

**CONSULTANCY ON ADVERSE POSSESSION**

Thank you for inviting us to prepare a report for the MAV on the question of adverse possession of Council freehold land.

As discussed, the task involves:


- Review of submissions to MAV from Councils
- Consultation with Monash and Banyule
- Review of recent investigations by Law Reform Commission and Parliamentary Law reform Committee
- Consultation with Land Registry in DSE and Local Government Victoria in DVC
- Investigation of interstate practice
- Discussion Paper (with policy options) for MAV

We estimate that the consultancy will require 35 hours' work, and on this basis our fee will be ~~XXXXXX~~ plus GST and disbursements.

An outline of the main directions of the report should be ready within a few weeks, and the full report concluded by the end of January 2004.

We look forward to your confirmation of these arrangements.

Yours sincerely,



**David Gabriel-Jones**  
Principal

The Public Land Consultancy  
Principal: David Gabriel-Jones  
Master of Public Policy (Monash/Melb)  
Dip Civil Engineering (RMIT)

57/151 Fitzroy Street  
St Kilda, VIC 3182  
phone: (03) 9534 5128  
mobile: 0412 134 243

postal: PO Box 2251  
St Kilda West, VIC 3182  
facsimile: (03) 9534 5128  
[DGJ@publicland.com.au](mailto:DGJ@publicland.com.au)

in association with  
McKean & Park  
Lawyers and Consultants  
Melbourne

ADVERSE POSSESSION OF COUNCIL LAND

MUNICIPAL ASSOCIATION OF VICTORIA

LEVEL 12 60 COLLINS STREET MELBOURNE  
GPO BOX 4326PF MELBOURNE 3001 DX 492 MELBOURNE  
T 03] 9667 5555 F 03] 9667 5550

9 December 2003

Mr David Gabriel-Jones  
Principal  
The Public Land Consultancy  
PO Box 2251  
ST KILDA WEST 3182

Dear David

**Consultancy on Adverse Possession**

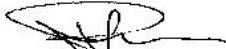
Thank you for providing the brief outlining the tasks involved with the proposed consultancy on adverse possession and the consultancy fees.

I am pleased to confirm the arrangements previously discussed and subsequently outlined in the brief.

To assist us with progressing this issue, it would be appreciated if you could confirm the timeframe for completion of this project. I would be grateful if you could provide this information by 15 December.

If you have any queries about this arrangement please contact Kerry Yu, Policy Adviser, on 9667 5547 or email: [kyu@mav.asn.au](mailto:kyu@mav.asn.au).

Yours sincerely



ROB SPENCE  
Chief Executive Officer



# ADVERSE POSSESSION OF COUNCIL LAND

## Appendix 2 – Letter to VicRoads

Bruce Van Every  
General Manager  
Road System Management  
VicRoads

9 January 2003

Dear Mr Van Every

### THE PROPOSED ROAD MANAGEMENT BILL – ADVERSE POSSESSION

The Public Land Consultancy has been engaged by the Municipal Association of Victoria (MAV) to provide advice on the issue of adverse possession against council land.

There appears to be a level of consensus within government that council land should be protected from adverse possession – as is Crown land and VicTrack land under the current provisions of the Limitation of Actions Act 1958. I understand that the Premier has given carriage of the matter to the Minister for Local Government.

For current purposes, 'council land' falls into three categories:

1. Freehold land held in fee simple by a Council, and for which council is the registered proprietor
2. Reserves created in subdivisions and vested in council, under the Subdivision Act 1988, section 24(2A)
3. Roads on freehold land – which may vest in council either (in the case of newer subdivisions) by virtue of the Subdivision Act section 24(2)(b), or (in the case of older subdivisions) because they have become public highways, and consequently vest in council under the Local Government Act 1989 section 203.

A complication arises because not all council land is recorded as such at Land Registry. In particular, a title search of land in categories 2 and 3 above may disclose the original subdivider to be the registered proprietor.

Recent discussions between Local Government Victoria, Land Registry and ourselves have focussed on the extent of protection to be provided. Our clear preference is for protection for all three categories of council land, but a view held within Land Registry is that any amendment to the Limitation of Actions Act should relate only to the first category.

If this view prevails, then the proposed Road Management Act clearly presents an opportunity for protecting land in category three. Indeed it would seem desirable to prevent adverse possession on roads through the proposed Act regardless of whether or not protection is also provided elsewhere.

The draft Road Management Bill circulated in September 2003 went part way towards achieving this end. Schedule 5 clause (2) provided that adverse possession of public roads cannot result from the operation of clause (1) of the same schedule. It did not, however, address the possibility of adverse possession by routes other than clause (1), nor did it address roads other than public roads.

I understand from Mark Miller of your staff that this area of the draft Bill has undergone some change since September, and that further change may be possible before it is introduced to Parliament. With this in mind, may I propose that consideration be given to a revision of the draft Bill to the following effect:

- *A Public Highway remains such until it is discontinued by some statutory process. This is to apply irrespective of how the Public Highway came into existence, and irrespective of whether it is a Public Road.*
- *There can be no adverse possession against a Public Highway. This is to apply no matter how long the occupation has lasted.*

Your views on this proposal would be welcomed. I am available on 9534 5128 to discuss any aspects of the issue.

Yours sincerely,



David Gabriel-Jones  
Principal

Appendix 3 - Consultation

Consultation

Municipal Association of Victoria

Rob Spence (Chief Executive Officer)  
Kerry Yu  
John Hennessy

City of Banyule:

Doug Owens (Chief Executive Officer)  
Jeanette Kringle (Property Officer)

City of Monash:

David Conran (Chief Executive Officer)  
Sue-Ann Lowther (Property Officer)

City of Greater Geelong

Allan Grant (Manager, Property)

Local Government Victoria, Department for Victorian Communities

John Watson (Director Governance and Legislation)  
Catherine Dineen (Governance and Legislation Analyst)

Land Registry, Department of Sustainability and Environment

Barbara Flett (Registrar of Titles)  
Chris Stafford (Senior Legal Officer)  
Richard Jefferson (Deputy Registrar-General)

VicRoads

Mark Miller (Legislation Officer)

## COSTS OF SECTION 24A, SUBDIVISION ACT

## SECTION 24A

**24A. Reserves and other similar land**

(1) If required or authorised to do so by the planning scheme or a permit, a person or body listed in column 1 of the Table may lodge at the Titles Office for registration a certified plan to do any of the things listed in relation to that person or body in column 2 of the Table in relation to the whole or any part of land referred to in that part of the column.

**TABLE**

<b>Column 1 Person or body</b>	<b>Column 2 Action</b>
<i>A Council</i>	<i>Vest in itself land shown or set aside or set aside as a reserve on a registered but not certified plan.</i>
<i>A Council</i>	<i>Vest in itself land on a registered but not certified plan that is not shown as a lot, common property, road or reserve.</i>
<i>Etc</i>	<i>etc</i>

Cost per reserve of 24A application (provided by City of Banyule):-

<b>Item</b>	<b>Cost (\$)</b>
Land Registry Fee	297
Surveyor's fee (for textual plan, not full survey)	1500
Legal costs	1000
Planning permit application	475
Plan Certification Fee	100
Statutory advertising	500
Mail out	55
<b>Total Outgoings</b>	<b>2917</b>
Staff time and in-house overheads	500 ??
<b>Total cost per reserve</b>	<b>\$ 3400 + / -</b>

Total cost for City of Banyule: \$3400 x 80 reserves = \$272,000

Banyule probably has more 'registered but not certified' reserves than most municipalities. If a typical municipality has only 10 such reserves, the total cost for State would be:

\$3400 x 78 x 10 = 2,652,000 say \$2.5 million

If a typical municipality has 20 such reserves, the total cost for State would be:

\$3400 x 78 x 20 = 5,304,000 say \$5 million.