

## Public Land ain't necessarily Public Land

VEAC is, of course, the Victorian Environmental Assessment Council. Over 44 years it has advised government on the protection of Victoria's public land – firstly as the LCC (Land Conservation Council), then as the ECC (Environment Conservation Council) and now as VEAC. It can claim much of the credit for our system of National and State Parks – but it labours under at least one major constraint. The definition of 'public land' in its governing legislation covers only Crown land and freehold vested in state agencies. Municipal land held in freehold is excluded from VEAC's purview. But, as we ask so often, does it matter?

On VEAC's behalf, The Public Land Consultancy sat down with nine representative councils around peri-urban and provincial Victoria, and asked them about public land – not the large-scale National Parks, not the remote Reserved Forests, but the local-amenity, community-use public land that occupies so much of a typical council's field of vision. Based on what they had to say, here are the findings that we reported to VEAC...

**1.** In Victoria, a local council's perspective on public land is likely to be significantly different from the perspective of State government agencies such as VEAC, Parks Victoria and DELWP. These differences reflect the key characteristics of community-use public land: its usage mix, its parcel size, its legal status and governance complexity. Whereas State agencies are almost exclusively focused on Crown land, a council's portfolio of community use public land will include a mixture of Crown and freehold land.

**2.** Councils are fully aware of the benefits realised by their communities from community use reserves, both Crown land and freehold. They welcome this VEAC public land investigation, are willing to participate and offer inputs, and keen to get some recognition of their role in providing and managing public land. Some are convinced that any study of public land must extend beyond Crown land if it is to be comprehensive and therefore meaningful, with 'local significance' being recognised as part of public land categorisation system.



Koondrook Cricket Ground, in the Shire of Gannawarra. Two-thirds of the ground is Crown land, and therefore falls within VEAC's range of vision. One third is freehold, and doesn't. Does it really matter?

**3.** However some council officers, already apprehensive about rate capping, fear that the investigation may result in the unresourced transfer to them of further Crown land. There was also concern that any broadening of the VEAC definition of public land could presage some government intervention in councils' freehold portfolios.

...continued page 4

### Page 2

Professional Certificates in Public Land Governance

*Our three new Certificate packages are being well-subscribed. See who's enrolling and what research they want to undertake...*

### Page 3

Q&A – what powers does a council have over driveways on arterial roads?

*An object lesson in battling through apparently inconsistent bodies of law...*

### Page 5

Our schedule of forthcoming courses

*Whether you're looking for a Professional Certificate or a one-off training course, here's our program through into July 2016*

*The Public Land Consultancy has been providing professional development services across Victoria for 15 years. Our clients include every municipality on the State, and most of the major statutory authorities and government departments.*

*Readers of Terra Publica should not act on the basis of its contents which are not legal advice, are of a general nature, capable of misinterpretation and not applicable in inappropriate cases.*

### The Public Land Consultancy

ABN 69 067 045 520

Principal: David Gabriel-Jones

Email: [terrapublica@publicland.com.au](mailto:terrapublica@publicland.com.au)

27/539 St Kilda Road

Melbourne, VIC 3004

phone: (03) 9534 5128

postal: PO Box 2251

St Kilda West, VIC 3182

mobile 0412 134 243

[www.publicland.com.au](http://www.publicland.com.au)

## Our Professional Certificates – *The Student Interest...*

### Professional Certificate in Road Administration and Governance

*This Certificate course provides a sound understanding of the complex body of legislation and law relating to roads in Victoria*

### Professional Certificate in Land Law for Statutory and Strategic Planners

*This Certificate course provides planning professionals with a sound understanding of the law governing property in Victoria*

### Professional Certificate in Land Law for Environmental Managers

*This Certificate course gives environmental managers a thorough introduction to the way the environment is seen by legislators and the courts*

We already have over 40 prospective students eager to enrol.

They are from Councils (metropolitan and rural), Parks Victoria, DELWP, Dept Treasury & Finance, a Water Authority, a CMA, and one from a private firm...

Each Certificate requires students to attend one mandatory unit (6 points) and three optional units (4 points each). The total cost for the 18-point course is \$2000 plus GST.

## Our Professional Certificates – *the Research Paper...*

Students are required to submit a 3000-word report on some aspect of their work related to public land governance. Details of this assignment will be worked through with students on an individual basis.

*The purpose of the exercise is to demonstrate that the student:*

- has acquired sound knowledge of relevant areas of law and policy
- can apply that knowledge to some real-world case or issue
- can assemble and analyse relevant materials from appropriate sources, and
- can write a coherent report of value to some specified readership.

*Formats that the paper may take include:*

- A report for consideration by a Council or Board, with options and an argued recommendation
- A review of some case or issue, examining the way in which it emerged, how it was dealt with, what the outcome was, and retrospectively, what lessons were learned
- A briefing note for a Minister, plus relevant supporting materials, and a draft letter or other document for the Minister's signature, or
- An opinion piece for a professional journal describing some complexity of law or policy, and/or advocating some reform.

*They are already talking about the research papers they want to write...*

- *An analysis of public queries to a Council on road-related matters*
- *The repercussions of a decades-old change in the course of a major river*
- *The use of various types of covenant on freehold land as an alternative to acquiring it as public open space*
- *fencing of unlicensed water frontages; the problems with 'give and take' fences*

*Enquiries*  
Jacqui Talbot  
[jacqui@publicland.com.au](mailto:jacqui@publicland.com.au)

(03) 9534 5128

## Q & A

# Can Council control vehicle crossings on Arterial Roads?

*Question arising in consultancy work for a metropolitan municipality.*

First, let's look at non-arterial roads. The relevant head of power here is section 63 of the *Road Management Act 2004*, which requires a proponent to obtain consent to conduct works in a road reserve. This consent is granted (or refused) by Council in its capacity as Coordinating Road Authority (CRA). It's a decision which must be made in accordance with the *Road Management (Works and Infrastructure) Regulations 2015*.

Depending on the circumstances, the proponent may also need a planning permit, but the two consents are independent. Council as CRA cannot fetter the discretion of Council as Responsible Authority under the *Planning and Environment Act 1987* – or vice versa. If there's a temptation to use the section 63 consent for planning purposes, take note of Clause 18 of the *Road Management (Works and Infrastructure) Regulations 2015*, which prohibits a CRA from issuing a section 63 consent subject to 'a condition relating to visual amenity or aesthetics unless the condition relates to road infrastructure,' or a condition 'that is not reasonably relevant to the conduct of the proposed works.'

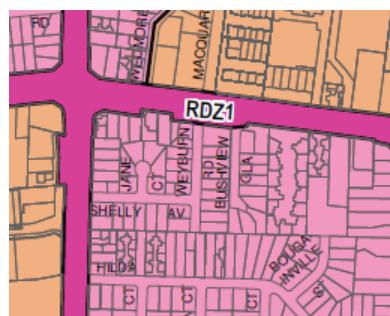
Of course, there are developments that don't need a planning permit. But if they intrude into the road reserve they still need a section 63 permit. Our council has not been entirely cut out of the picture.

When we turn to arterial roads, we find a different relationship between the exercise of authority under the RM Act and the exercise of authority under the P&E Act.

The first thing to note here is that section 63, if it were to apply, would empower VicRoads, not the council – even if the vehicle crossing in question opened onto a service road rather than the through carriageways. But does section 63 apply?

Regulation 17 of the *Road Management (Works and Infrastructure) Regulations 2015* has the effect of exempting driveway works on arterial roads from the requirements of section 63. A strange provision, you may think – surely driveways to properties abutting arterial roads need to come under greater scrutiny, not lesser.

Fortunately, it's not a blanket exemption. It does not apply to 'traffic impact works' – a term which ropes in a very large percentage of the circumstances we're likely to be dealing with.



Then there's planning consent. Remember that under every planning scheme arterial roads are zoned RDZ1. So every abutting development which needs a planning permit is referred to VicRoads as a 'determining' Referral Authority.

What about abutting developments that don't need a planning permit? The final piece of the puzzle is Clause 52.29 of the planning scheme. A planning permit is required for any access to an arterial road, and any subdivision adjacent to an arterial road – even if the adjacent development or subdivision is otherwise exempt.

*That's right: Council is exercising some control over road-related works in its capacity as Responsible Authority under the P&E Act, not as Responsible Road Authority under the RM Act. And VicRoads is exercising its power as Referral Authority under the P&E Act, not as Controlling Road Authority. ■*

## Interpreting Clause 52.29

What's meant by the phrase 'Create or alter access to a road zoned RDZ1'?

VCAT considered this question in April 2015. The case\* involved a major development in Frankston, where access was via a 3 metre wide laneway which in turn opened onto the Nepean Highway.

The clause applies to land 'adjacent to' a road zoned RDZ1. VicRoads contended that the lane was integral to the property being developed, and

therefore the development should be regarded as being 'adjacent to' the Highway.

However, Deputy President Gibson found there is no justification for interpreting 'adjacent to' as applying to access onto the RDZ1 road via some intermediate road. Such an interpretation would lead to 'considerable uncertainty.'

Interestingly, VCAT found that the phrase 'create or alter' encompasses not only the creation of, alteration to or removal of an access, but also any change to land use which may increase or decrease the volume, frequency or type of traffic. ■

\* Peninsula Blue Developments Pty Ltd v Frankston CC [2015] VCAT 571 (28 April 2015)

*Continued from page 1*

**4.** Whereas State agencies operate within relevant Crown land governance systems, councils and their communities find themselves operating within an amalgam of Crown land and freehold governance systems, which often seem unduly complex and even irrational. Many councils cited cases of facilities which occupy a mix of Crown land and council freehold.

## Statewide Assessment of Public Land

*VEAC has been asked to investigate and provide:*

1. *an assessment of the current system of public land categories, including options for changing or consolidating the existing categories*
2. *an assessment of the current reservation status of public land.*
3. *an inventory of the types of values on public land.*

For full details of the VEAC investigation, [click here](#)

**5.** Councils generally have good information systems, and many council officers are aware of the complications arising from their mixed Crown land/freehold portfolio. However, user groups and the broader community do not distinguish Crown land from freehold and find the complexities of governance arbitrary and pointless.

**6.** The broader community also sees the local council as the first point of contact when seeking advice or providing feedback on the management of either Crown land or freehold ‘community use’ reserves, irrespective of whether that council has any formal management role.

**7.** In relation to the Crown land reserves segment of their portfolios, councils find themselves having to meet contemporary needs through what is essentially a 19th Century governance system. The portfolio of Crown land reserves often predates the local government entity now responsible for its management. It remains a vitally important legacy for most Victorian municipalities but suffers from certain deficiencies: it does not reflect 21st Century population distribution, and it is not responsive to changing community values and activity patterns. Councils find themselves needing to augment, rationalise or reconfigure their inherited portfolios of community use land.

**8.** The administrative systems of the *Crown Land (Reserves) Act* do not lend themselves to this task. The Act predates modern approaches to (for instance), land use decision-making, balancing conservation and commercialisation, the making and enforcement of regulations, and accountability.

**9.** Much of the apparatus of the *Crown Land (Reserves) Act 1978* is seen as cumbersome, or even incompatible with sound management. The Act’s perceived deficiencies include inappropriate or overly-restrictive gazetted reserve purposes, overly-bureaucratic approval processes for works and tenures, and the survival of archaic and opaque regulations.

**10.** One sub-set of Crown land reserves, although part of a community’s civic fabric, does not fall within the purview of the relevant council. These are reserves managed by Local CoM appointed by the Minister and directly accountable to DELWP. These committees will generally still approach councils for funding and other assistance in the first instance. Councils expressed mixed views on them: some provide them with (for instance) maintenance grants and insurance cover; others regard them as specialist interest groups acting as volunteer agents for the State and provide little or no assistance.

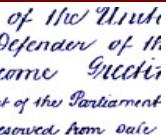
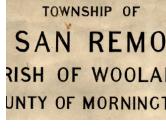
**11.** The relationship between councils and their communities, insofar as it affects public land governance and management, is in need of analysis and review. To date, volunteers have been at the core of Crown land management – whether as Local CoM, or as some other form of entity answerable to the local council. While voluntary inputs are welcomed, past forms of management regime may no longer be appropriate for either the land or the volunteers themselves.

**12.** A further community-related problem arises in the course of councils’ attempts to rationalise land holdings. A number of councils reported that attempts to improve efficiencies through the closure or amalgamation of redundant facilities had been frustrated by localised opposition. This problem is exacerbated in cases where the land in question is Crown land, and the proceeds of its sale cannot be recycled back into the relevant ‘community of interest’. ■

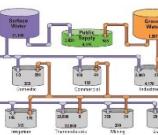
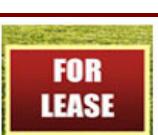
*VEAC has circulated our report to all Council CEOs, asking for comments by 15 February 2016.*

*At our end, Grant Arnold would also like to hear from you... [grant@publicland.com.au](mailto:grant@publicland.com.au)*

**Half-day Training Courses***Cost: \$330 including GST, course notes and morning coffee*

	<b>Aboriginal Heritage</b> David Yarrow Thursday 5 May		<b>Managing Volunteers</b> Richard O'Byrne Friday 24 June
	<b>Discontinuation, Closure and Deviation of Roads</b> David Gabriel-Jones Friday 11 March		<b>Rivers and Lakes Governance</b> David Gabriel-Jones Thursday 9 June
	<b>Coastal Governance</b> Richard O'Byrne Tuesday 12 July		<b>Protection of Roads under the RM Act 2004</b> Astrid Di Carlo Thursday 14 April
	<b>Restrictions on Title</b> Astrid Di Carlo Tuesday 21 June		<b>Unused and Little-Used Roads</b> David Gabriel-Jones Wednesday 22 June
	<b>Subdivisions – a Property Law Perspective</b> Grant Arnold Thursday 17 March		<b>Land Information and its Interpretation</b> Scott Jukes, LS Thursday 26 May
	<b>Crown Land Governance</b> David Gabriel-Jones Tuesday 1 March		<b>Encroachments and Utilities in Road Reserves</b> Astrid Di Carlo Wednesday 11 May
	<b>Roads Governance</b> David Gabriel-Jones Thursday 21 April		<b>Enquiries</b> Jacqui Talbot <a href="mailto:jacqui@publicland.com.au">jacqui@publicland.com.au</a> (03) 9534 5128

**Full-day Training Courses***Cost: \$550 including GST, course notes and working lunch.*

	<b>Property Law for Statutory and Strategic Planners</b> Astrid Di Carlo Thursday 18 February		<b>Environmental Law for Public Sector Land Managers</b> Grant Arnold Tuesday 3 May
	<b>Land Law for Service Utilities</b> Astrid Di Carlo Thursday 10 March		<b>Land Law for Managers of Roads, Streets and Lanes</b> David Gabriel-Jones Tuesday 9 February – <b>FULL</b> Tuesday 12 April
	<b>Leases and Licences of Public Land</b> Karen Hayes Tuesday 8 March		<b>Referral Authorities and the Victorian Planning System</b> Grant Arnold Wednesday 18 May

**Enrolments and Enquiries** – Jacqui Talbot – [jacqui@publicland.com.au](mailto:jacqui@publicland.com.au)Unless otherwise noted, all courses are at **Law Institute of Victoria**, 470 Bourke Street Melbourne