

Bring On The VISIGOTHS

Why are cities in Australia so different from those in Europe? Here, we had no Visigoths to keep out (or Vandals or Vikings or other assorted barbarians). No need for city walls, gates, ramparts and moats.

We didn't need to squeeze ourselves into our urban environments, to maximize land efficiencies, to create the multiple-function public spaces which so typify and define European urban form – and hence European urban life. In America, Manhattan alone is a walled city – walled in by its encircling rivers – and it's Manhattan's public places that make it uniquely a quasi-European city.



Tango dancers, Las Ramblas, Barcelona

So what? Perhaps we don't want to be French, or Spanish, or Italian – or Manhattanian. Perhaps we're happy being suburban (*i.e.*, less than urban). But is this a happiness we can afford? Wallowing in the residual culture of *terra nullius* Australians continue to squander space as if it is an infinite resource; as if, like water, fuel, or food it will last forever. So wrong.

Melbourne will never become Copenhagen, or Milan, or Lyons – but we could improve our act. To date, our bleak high-rise apartment blocks and our pathetic efforts at 'medium density' detached housing have served only to tarnish the concept of urban (as against sub-urban) cities. Here's the bit we have yet to grasp: if Melbourne's liveability is to survive and flourish, it must be led by public land.

Public places should not be the residual negative bits left over between the private, 'positive' bits; they should be at the very heart of urban design. Let's look to Europe for some illustrations...

Las Ramblas is the main drag in Barcelona – but you could hardly call it a road. It's alive with all manner of street vendors and entertainers; you might even see the invisible man. Three factors in combination make it work: its physical form, its commerce (both monetary and social), and its governance regime, shaped by the *Ajuntament*, or council. Las Ramblas is the Sunday market on St Kilda Esplanade, writ large, and doing business twenty-four seven.



The Brunswick Centre, Bloomsbury

London's **Brunswick Centre** is, believe it or not, public housing. It always had architectural presence, but until recently, was commercially dead and socially ghettoised – an urban failure to equal the worst of Melbourne's Housing Commission legacy. Now, a collaboration of private and public investment has transformed it into a model of liveability, enlivening the whole precinct; the beneficiaries including its own council-subsidised tenants.

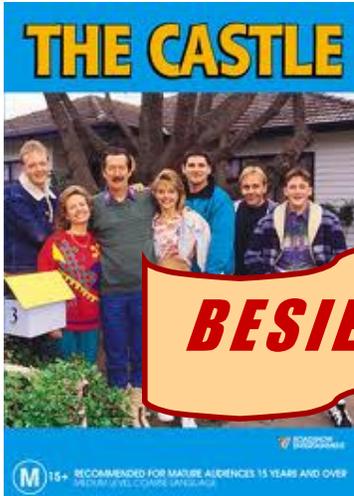


Neal's Yard, Covent Garden

Neal's Yard was an abandoned off-shoot of Covent Garden flower market, now recycled as London's Hippy Central. Why does it work? Our three themes again: physical form, commercial vitality and the right set of governance arrangements. Melbourne measures up well – in the form of our CBD laneways.

Above all, it's population density that makes urban public places (and therefore cities) work. Barcelona is ten times as dense as Melbourne. Perhaps we need a pro-high density lobby group to counter Save our Suburbs. Let's call ourselves the Visigoths. ♦

Our Training Course Program for February to Easter 2011 ... Page 4



When can a council intervene in private land rights? The Australian constitution requires the Commonwealth (but not the states or municipalities) to use compulsory acquisition only for such purposes as may be authorised by statute, and then only on just terms.

Councils have many powers allowing them to intervene in private land rights – quite possibly contrary to the interests of individual land-holders. One such intervention is the discontinuation of an abutting road under Schedule 10 of the **Local Government Act**. This may not be as total an intervention as full compulsory acquisition – but it is nevertheless an intrusion into rights guaranteed by title, possibly impacting on a property's amenity, limiting its future development options and resulting in a considerable devaluation. The metaphoric castle could remain unassailed, but be utterly besieged.

In many Acts the Victorian Parliament has sought to ensure reasonable outcomes by prescribing limits, processes, and considerations for decision-makers, and by setting up avenues of independent review or appeal. In the case of LG Act discontinuations, Parliament has set no constraints other than exhibition under section 223 – in the apparent belief that if a council hears public submissions then reasonable outcomes will ensue.

What considerations should inform a council's deliberations as it considers these submissions? Here (and in the Q&A on page 3) we turn to some other Acts for guidance...

In Victoria, compulsory acquisitions of private property (including acquisitions of interests in property) are normally governed by the **Land Acquisition and Compensation Act 1986** (the LACA). This Act enunciates (at section 1) the principle that acquisitions are to be made solely for public purposes. In this respect Australian law is distinctly different from the American law of 'eminent domain,' which sanctions compulsory acquisitions for the end benefit of private

parties. The LACA also includes extensive and detailed provisions for the provision of compensation.

The **Planning and Environment Act 1987** (P&E Act) certainly provides for interventions into private property rights – but not interventions of a form which would interfere with existing values as distinct from prospective or speculative values. A rezoning by planning scheme amendment may well curtail some future development or prospective use of the land, but cannot require the demolition of legally constructed works or revoke pre-existing usage rights (P&E Act, section 6(3)).

One exception is the use of a planning scheme amendment to insert a road closure overlay (RXO) into a planning scheme and thus cause the discontinuation of a road. This could indeed result in the devaluation of a property and the extinguishment of pre-existing usage rights – but here Parliament has ensured (sec 98(1)) that the owners of the devalued property are entitled to independently-assessed compensation. It is also noteworthy that use of the P&E Act to discontinue a road involves avenues of review and appeal independent of appeal to the initial decision-maker.

The **Subdivision Act 1988** also allows those public authorities with powers of compulsory acquisition to intervene in private property, without the owner's consent, through subdivisions made under section 35 of that Act – but lots created in such subdivisions still need to be acquired by the authority in question, if necessary under the LACA with full compensation.

The **Land Act 1958** allows the Department of Sustainability & Environment (DSE) to discontinue a government road – but here again Parliament has ensured that this power is not used to the detriment of abutting land owners. The road in question must be literally unused (not merely declared to be unused) and all abutting owners must give their consent. They would not, of course, approve a discontinuation which they believed to be contrary to their interests, so this provision may be seen, like the others discussed, as allowing discontinuations only with due compensation.

The **Road Management Act 2004** (RM Act) also includes provisions for councils (acting as Road Authorities) to discontinue roads. The provisions of the RM Act are clearly modelled on the corresponding provisions of the LG Act, with an interesting variation: section 12 allows the prescription by regulation of certain classes of road which may be discontinued without the normal exhibition and consideration of submissions. The Road Management (General) Regulations 2005 sets out these prescribed classes of road, but expressly excludes roads whose discontinuation would deny existing access to any land. In other words, if a road provides access to land, the normal processes of consultation cannot be bypassed.

Parliament's message is surely clear: amongst the many and varied considerations which weigh upon a discontinuation proposal, access to private property should be high on the list. Any council which chooses to render its citizens' properties landlocked can expect to be challenged under administrative law, or (perhaps worse) become the butt of a comedy movie. ♦

Q
&
A

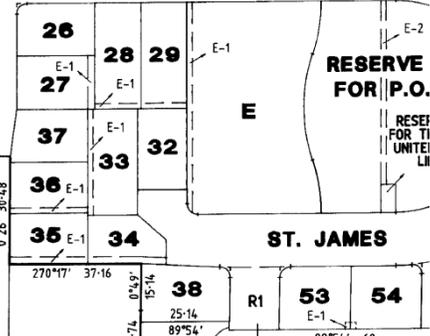
Q: A neighbour wants to discontinue a road abutting both our properties. What rights do I have?

Question asked by landowner faced with a disastrous loss of access to her property.

A: You either have the right to veto the idea altogether, or rights to be heard, or rights of appeal, or no power whatsoever.

Or to get compensation, or not to get compensation. Or to be told what will happen to the land in the discontinued road, or be kept in ignorance. It all depends which agency is being called on to do your neighbour's bidding ...

	Department of Sustainability & Environment (DSE)	Council as local government	Council as planning authority
<i>What powers does that agency have?</i>	Land Act 1958	Local Government Act 1989	Planning & Environment Act 1987
	Section 349 (in this case the road must be a government road, and unused)	Schedule 10 (in this case the road may be either used or unused)	Planning Scheme Amendment (PSA) to insert a Road Closure Overlay (RXO)
<i>Must they listen to my concerns?</i>	Yes – because if your consent is withheld, the proposal can't proceed	Yes (sec 223, LG Act)	Yes – any person affected by a PSA can make a submission
<i>Need they take any notice of my concerns?</i>	Yes – implicit in your right of veto	No – having heard your submission, Council can then ignore you	Probably – because if they don't, you'll take the matter to a panel hearing
<i>Do I have any rights of independent review or appeal?</i>	No – but not really an issue, because you have power of veto anyway	No. Bad luck.	Yes – unresolved submissions go to an independent Planning Panel
<i>Must they tell me what will happen to the land?</i>	Yes – implicit in your right of veto	Not necessarily. We know of one case where the council either doesn't know, doesn't care, or is keeping it secret...	Probably – this should be clear from the materials supporting the PSA
<i>Will I get compensation for the devaluation of my property?</i>	Yes – implicit in your right of veto	No. Bad luck.	Yes – Compensation must be provided – sec 98(1) P&E Act



New Training Course

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A one-day introduction for staff of councils, statutory authorities and utilities

Presenter: Dr David Mitchell
Senior Lecturer, RMIT University

Enquiries – lesley@publicland.com.au

Our Training Course Program February to Easter 2011

<p style="text-align: center;">Native Title and Aboriginal Heritage</p> <p style="text-align: center;"><i>Presenter – David Yarrow, Victorian Bar</i></p> <ul style="list-style-type: none"> • Wed 16 Feb • Tues 22 March • Wed 6 April 	<p style="text-align: center;">Land Information and Its Interpretation</p> <p style="text-align: center;"><i>Presenter – Jeremy Pearce, Licensed Surveyor</i></p> <ul style="list-style-type: none"> • Tues 1 Feb • Wed 2 March • Tues 8 March – Traralgon • Mon 28 March – Wangaratta • Mon 4 April 				
<p style="text-align: center;">Leases and Licences of Public Land</p> <p style="text-align: center;"><i>Presenter – Karen Hayes, Property Manager</i></p> <ul style="list-style-type: none"> • Tues 8 Feb • Tues 1 March • Tues 5 April 	<p style="text-align: center;">Environmental Law - a Strategic Overview</p> <p style="text-align: center;"><i>Presenter –Brendan Sydes, Principal Solicitor, EDO</i></p> <ul style="list-style-type: none"> • Thurs 10 Feb • Thurs 10 March • Thurs 14 April 				
<p style="text-align: center;">Land Law, Roads and Streets</p> <p style="text-align: center;"><i>Presenter – Andrew Walker, Victorian Bar</i></p> <ul style="list-style-type: none"> • Wed 2 Feb • Mon 14 Feb • Fri 18 March • Mon 11 April 	<p style="text-align: center;">Crown Land Law</p> <p style="text-align: center;"><i>Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</i></p> <ul style="list-style-type: none"> • Thurs 3 Feb • Fri 4 March 				
<p style="text-align: center;">Public Land for Urban Planners</p> <p style="text-align: center;"><i>Presenter – David Gabriel-Jones</i></p> <ul style="list-style-type: none"> • Tues 12 April 	<p style="text-align: center;">Planning Law - a Strategic Overview</p> <p style="text-align: center;"><i>Presenter – Andrew Walker, Victorian Bar</i></p> <ul style="list-style-type: none"> • Thurs 3 March 				
<p style="text-align: center;">Land Law for Service Utilities</p> <p style="text-align: center;"><i>Presenter – Astrid Di Carlo, Russell Kennedy</i></p> <ul style="list-style-type: none"> • Tues 22 Feb • Thurs 24 March • Tues 19 April 	<table style="width: 100%; border: none;"> <tr> <td style="text-align: center; vertical-align: top;"> <p>Riparian Land Law</p> <ul style="list-style-type: none"> • Mon 7 March </td> <td style="text-align: center; vertical-align: top;"> <p>Coastal Land Law</p> <ul style="list-style-type: none"> • Fri 8 April </td> </tr> <tr> <td colspan="2" style="text-align: center;"> <p><i>Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</i></p> </td> </tr> </table>	<p>Riparian Land Law</p> <ul style="list-style-type: none"> • Mon 7 March 	<p>Coastal Land Law</p> <ul style="list-style-type: none"> • Fri 8 April 	<p><i>Presenter – David Gabriel-Jones Principal, The Public Land Consultancy</i></p>	
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<p>PLUS TWO NEW COURSES WE'LL BE ADDING TO OUR LIST...</p>					
<p style="text-align: center;">The Law and Risk Management</p> <p style="text-align: center;"><i>Presenter – to be announced</i></p> <ul style="list-style-type: none"> • Tues 29 March • Mon 18 April 	<p style="text-align: center;">The Law and Subdivisions</p> <p style="text-align: center;"><i>Presenter, David Mitchell, RMIT</i></p> <ul style="list-style-type: none"> • Thurs 31 March • Wed 20 April 				
<p>For details of all these courses: www.publicland.com.au > professional development</p> <p>Most scheduled courses are at the Law Institute of Victoria, Melbourne. <i>(We will also run courses anywhere in Victoria, provided we have the numbers...)</i></p> <p>Enquiries and Registrations: Lesley Simons – lesley@publicland.com.au – phone 9534 5128</p> <p>Cost: \$495 including GST, course notes, working lunch. <i>Discounts for course hosts.</i></p> <p>All Courses are of one-day duration; 9:00 a.m. to 4:30 p.m.</p>					