



13.2 73 SMITH STREET AND 202 NELSON ROAD, SOUTH MELBOURNE - REMOVAL OF LAND PARCEL FROM THE ROAD REGISTER AND INTRAMAPS

EXECUTIVE MEMBER: CHRIS CARROLL, GENERAL MANAGER, CUSTOMER, OPERATIONS AND INFRASTRUCTURE

PREPARED BY: BRIDGETTE KENNEDY, TEAM LEADER PROPERTY OPERATIONS

1. PURPOSE

- 1.1 The purpose of this report is to seek approval from Councillors on the proposed removal of land parcel R2515 (Land) abutting 73 Smith Street, South Melbourne (73 Smith Street) and 202 Nelson Road, South Melbourne (202 Nelson Road) from Council's Register of Public Roads (Register) and Council's IntraMaps application.

2. EXECUTIVE SUMMARY

- 2.1 The Land is approximately 2.74 metres wide and 16.1 metres long. It has an area of approximately 44 square metres.
- 2.2 The Land, located between 73 Smith Street and 202 Nelson Road, comprises parts of land contained in the property titles of 73 Smith Street and 202 Nelson Road. It has a minimal abuttal to the property at 204 Nelson Road, South Melbourne (204 Nelson Road).
- 2.3 The Land is subject to private carriageway easements marked E-1 on the title to 202 Nelson Road, in favour of 73 Smith Street and 204 Nelson Road; and marked E-1 on the title to 73 Smith Street, in favour of 202 Nelson Road. The Land is not separately titled.
- 2.4 By virtue of its inclusion on the Register, the Land is considered a 'public road' under the Road Management Act 2004 (Vic) (RMA).
- 2.5 As the Land is a 'public road' under the RMA, it is considered a 'road' by definition under section 3(1) of the Local Government Act 1989 (Vic) (LGA).
- 2.6 As it is a 'road' under the LGA, Council has statutory powers over it.
- 2.7 There has been considerable correspondence between Council and the respective owners of 73 Smith St, 202 Nelson Road and 204 Nelson Road, and their respective legal representatives, regarding the status of the Land, its use, the presence of gates across the Land, and its recording on the Register dating back to at least April 2020.
- 2.8 A further detailed review of the Land status has consequently been undertaken to support a recommendation on how to proceed due to the varied information that has been provided during the course of the matter.
- 2.9 On completion of a comprehensive review of the relevant facts and circumstances, Officers now recommend that Council considers removing the Land from the Register and Council's IntraMaps application (Proposal) on the basis that the Land is not reasonably required for public use and has been included on the Register in error, for the reasons set out in the body of the report.



3. RECOMMENDATION

That Council:

- 3.1 Notes that the land that comprises parts of land contained in the property titles of 73 Smith Street and 202 Nelson Road, South Melbourne, also known as R2515 (Land) on Council's Register of Public Roads (Register), was listed on the Register when Council gazetted its road management plan which included a copy of the Register in December 2004.
- 3.2 Notes that by virtue of its inclusion on the Register, the Land is considered a 'public road' under the Road Management Act 2004 (Vic) (RMA). Being a 'public road' under the RMA, it is a 'road' by definition under section 3(1) the Local Government Act 1989 (Vic) (LGA). As it is a 'road' under the LGA, Council has statutory powers over it.
- 3.3 Notes that the Land does not meet the common law test for being a 'public highway' as it cannot be shown that the Land is reasonably required for public use nor was it expressly dedicated to the public for use as a right of way (as opposed to a private laneway) and accepted by the public as a right of way by way of historical public use. Consequently, the Land cannot be discontinued and sold.
- 3.4 Notes that unlike other situations where a road, once discontinued, would then be sold by Council, in this case it is considered that the Land, which is burdened by a private carriage-way easement, should not have been included on the Register in the first place.
- 3.5 Acting under section 17(4) of the RMA, resolves that the Land be removed from the Register on the basis that it is not reasonably required for public use, as:
 - 3.5.1 The Land does not meet the common law test for being a 'public highway';
 - 3.5.2 The Land is not a thoroughfare for the public, having been fenced within the property boundaries of 73 Smith Street and 202 Nelson Road, South Melbourne for a considerable period of time, and only being required to provide access to the abutting neighbours subject to private carriageway easements marked on the certificates of title of 73 Smith Street and 202 Nelson Road, South Melbourne;
 - 3.5.3 The Land is not constructed as a road and not maintained by Council as a road. It does not connect roadways as it is a dead end and not wide enough for vehicles to pass through.
- 3.6 Authorises the removal of the Land from the Register and Council's IntraMaps application.

4. KEY POINTS/ISSUES

- 4.1 The Land is approximately 2.74 metres wide and 16.1 metres long. It has an area of approximately 44 square metres.



- 4.2 The Land, located between 73 Smith Street and 202 Nelson Road, comprises parts of land contained in the following certificates of title:
- Volume 10024 Folio 466, being the land hatched in red on the plan below that is part of 202 Nelson Road; and
 - Volume 10613 Folio 956, being the land hatched in blue on the plan below that is part of 73 Smith Street.



- 4.3 The Land has a minimal abuttal to the property at 204 Nelson Road which is outlined in yellow on the above photo.
- 4.4 The Land is subject to private carriageway easements:
- marked E-1 on the title to 202 Nelson Road, in favour of 204 Nelson Road and 73 Smith Street; and
 - marked E-1 on the title to 73 Smith Street, in favour of 202 Nelson Road.
- 4.5 The Land is currently listed on the Register as Right of Way R2515.
- 4.6 By virtue of its inclusion on the Register, the Land is considered a 'public road' for the purposes of the RMA.
- 4.7 Given that the Land is a 'public road' under RMA, it is considered a 'road' by definition under section 3(1) of the LGA.
- 4.8 As the Land is a 'road' under the LGA, Council has statutory powers over it.

- 4.9 The Land has been enclosed within the property boundaries of 73 Smith Street and 202 Nelson Road, as per the succeeding photo. The gates/fences seem to have been in place for an extended period of time.



- 4.10 It also appears that part of the residence at 202 Nelson Road has been constructed on that part of the Land at the side of 202 Nelson Road, as per the following image.



Construction of residence
at 202 Nelson Road over
part of 'laneway' /
carriageway easement

4.11 Below is an image of the existing gate/fence at the rear of 204 Nelson Road.



Background



- 4.12 There has been considerable correspondence between Council and the respective owners of 73 Smith St, 202 Nelson Road and 204 Nelson Road, and their respective legal representatives, regarding the status of the Land, its use, the presence of gates across the Land, and its recording on the Register dating back to at least April 2020.
- 4.13 Council engaged with the respective owners regarding possible discontinuance and sale in accordance with the Road Discontinuance and Sale of Roads Policy, however, the respective owners have questioned the appropriateness of the Land being included on the Register.
- 4.14 In December 2020, there was a change of ownership of 204 Nelson Road. That owner contacted Council in April 2021 seeking guidance regarding access to the “carriageway easement’ over the neighbouring property to facilitate access for some proposed building works.
- 4.15 Following that enquiry, Officers subsequently undertook a detailed review of the matter.

Findings

- 4.16 Officers have investigated the historical status of the Land and have determined that the Land was included on the Register in 2004 when Council resolved to adopt its road management plan incorporating the Register, where the Land was listed, at its meeting on 22 November 2004.
- 4.17 Council gazetted its road management plan on 16 December 2004, which included a copy of the Register where the Land was listed.
- 4.18 While the Land is currently listed on the Register, Council’s Assets Team have confirmed that it was not previously seen/referred to in the old South Melbourne Laneway Maps Inventory which predated the Register.
- 4.19 Previous legal advice from Council’s lawyers regarding a similar matter has indicated that in considering whether the Land was validly added to the Register, Council needs to consider whether:
- it made a decision at the time of placing the Land on the Register that the Land is ‘reasonably required for public use’; and
 - it was open to Council to make that decision based on factual circumstances.
- 4.20 The creation of private carriageway easements over the Land is not, of itself, evidence that the Land was required for public use as a private carriageway easement is usually for the benefit of a neighbouring property owner, not the public at large.
- 4.21 If Council established that the Land was a ‘public highway’ at the time of the decision, then it would be open to Council to decide to include the Land on the Register.
- 4.22 In order to satisfy the common law test for being a ‘public highway’, it must be established that the Land:
- was expressly dedicated to the public for use as a right of way (i.e. it was offered to the public as a road for public use); and
 - was accepted by the public as a right of way by way of historical public use.
- 4.23 The Land cannot be considered a ‘public highway’ as it does not satisfy the test as private use by a neighbour or neighbours does not constitute ‘public use’.



- 4.24 There are other factors that indicate that the Land may not have been validly included on the Register namely:
- the Land does not connect roadways as it is a dead end and not wide enough for vehicles to pass through;
 - the Land is not constructed as a road and is not maintained by Council; and
 - merely meeting the definition of a 'road' under section 3(1) of the LGA is not sufficient reason for the Land to be retained on the Register if, in reality, the current circumstances of the Land mean that it is not reasonably required for public use.
- 4.25 As there is no evidence that the Land became a 'public highway' and that it was reasonably required for public use prior to its inclusion on the Register, Officers recommend that Council:
- makes a determination that the Land is not reasonably required for public use;
 - proceeds to make the decision for removal of the Land from the Register pursuant to section 17(4) of the RMA and Council's IntraMaps application.
- 4.26 Unlike other situations where land, once discontinued as a road, would then be sold by Council, in this case it is considered that the Land should not have been included on the Register in the first instance. As the Land is not considered as a road under the common law test, it cannot be discontinued and sold. Therefore, once the Land is removed from the Register, it will revert to the Owner and remain burdened by the carriageway easement.

5. CONSULTATION AND STAKEHOLDERS

- 5.1 Relevant Council departments have been notified by way of internal referral and have indicated that they have no objection to the Proposal.
- 5.2 External utility suppliers have not been consulted as the Proposal will not alter the physical status of the Land. The existing carriageway easements will remain recorded on the respective certificates of title.

6. LEGAL AND RISK IMPLICATIONS

- 6.1 Council does not have any record or evidence relating to the factual circumstances the decision was based on at the date of its inclusion on the Register that the Land was 'reasonably required for public use'.
- 6.2 It would therefore be prudent for Council to consider removal of the Land from the Register, having regard to the risk to Council of an incorrect listing on the Register adversely affecting the abutting property owners.
- 6.3 Any issue regarding access and use of the Land will be a private matter as between the respective adjoining owners to be determined in accordance with the easements recorded on the respective certificates of title.

7. FINANCIAL IMPACT

- 7.1 If the Land were a road capable of being discontinued and sold, and the abutting owners applied to have it discontinued and purchase at market value, in accordance with the Council's Discontinuance Policy, the estimated market value would be



approximately \$486,588 plus GST. This is based on the current Capital Improved Value of 73 Smith Street.

7.2 But as noted above, unlike other situations where land, once discontinued as a road, would then be sold by Council, in this case it is considered that the Land, which is burdened by a private carriage-way easement, should not have been included on the Register. As the Land does not meet the common law test for being a 'public highway', it cannot be discontinued and sold.

7.3 Legal costs incurred by Council to date are approximately \$11,000.

8. ENVIRONMENTAL IMPACT

8.1 The Proposal has no detrimental environmental impact.

9. COMMUNITY IMPACT

9.1 The Proposal has no detrimental community impact as the Land is currently contained within the property boundaries of 73 Smith Street and 202 Nelson Road and provides no access to the public.

10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

10.1 The Proposal aligns with the Strategic Direction **Well-Governed** in the Council Plan 2021-31: A City that is a leading local government authority, where our community and our organisation are in a better place as a result of our collective efforts.

11. IMPLEMENTATION STRATEGY

11.1 TIMELINE

11.1.1 Council can resolve to remove the Land from the Register under section 17(4) of the RMA, as the Land is not reasonably required for public use, for the reasons set out in this report.

11.1.2 If approved, the Land will be removed from the Register and the change reflected in Council's IntraMaps application.

11.2 COMMUNICATION

11.2.1 The abutting property owners will be notified of the outcome of the 20 July 2022 Council meeting.

12. OFFICER DIRECT OR INDIRECT INTEREST

12.1 No officers involved in the preparation of this report have any material or general interest in the matter.

ATTACHMENTS

Nil

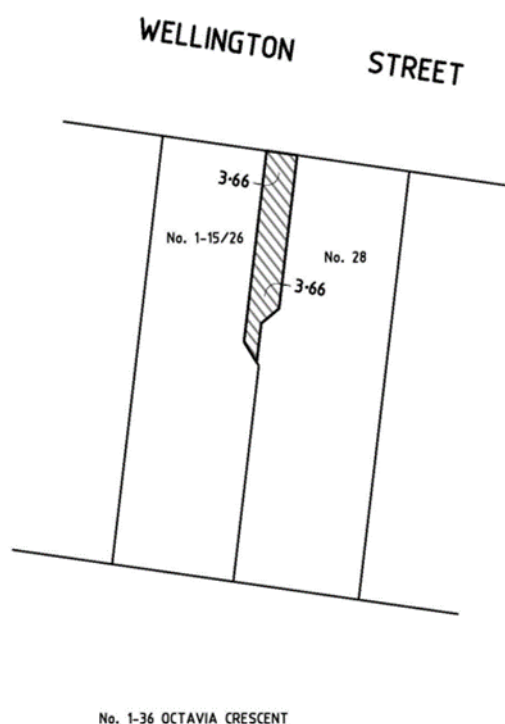
13.3 PROPOSED DISCONTINUANCE AND SALE OF ROAD
ABUTTING 26 AND 28 WELLINGTON STREET ST KILDA

EXECUTIVE MEMBER: CHRIS CARROLL, GENERAL MANAGER, CUSTOMER,
OPERATIONS AND INFRASTRUCTURE

PREPARED BY: LYANN SERRANO, PROPERTY ADVISOR
BRIDGETTE KENNEDY, TEAM LEADER PROPERTY OPERATIONS

1. PURPOSE

- 1.1 This report seeks Council's approval to consider whether the road abutting 26 and 28 Wellington Street, St Kilda, known as laneway R3723 being the land contained in Memorial Book 22 Number 809 and Memorial Book 298 Number 450 (**Road**), shown as lot 1 on the title plan attached as Attachment 1 (**Title Plan**) to this report, and shown hatched on the screenshot below, should be discontinued pursuant to the *Local Government Act 1989 (Vic)* (**Act**) and sold to Homes Victoria, the owner of the adjoining property (**Adjoining Owner**) at 28 Wellington Street, St Kilda (**28 Wellington Street**) for a nominal amount of \$1 plus legal fees.



2. EXECUTIVE SUMMARY

- 2.1 The Road is approximately 79 square metres and located between 26 and 28 Wellington Street, St Kilda.



- 2.2 The Road is shown on title as a 'road' in the two general law searches attached to this report as Attachment 2 (**Old Law Conveyances**).
- 2.3 The Road is laneway R3723 which is listed on Council's Register of Public Roads (**Register**).
- 2.4 The Road is constructed in concrete and used for pedestrian access to several units at 28 Wellington Street as well as vehicle access to several car spaces at the rear of that property. The abutting property at 26 Wellington Street, St Kilda (**26 Wellington Street**) does not currently use the Road for access.
- 2.5 The Road:
 - 2.5.1 does not provide vehicular or pedestrian access to any property other than that of the Adjoining Owner; and
 - 2.5.2 is not required for public access to adjoining properties.
- 2.6 St Kilda Community Housing Ltd (**St Kilda Community Housing**), with the support of Council and the Adjoining Owner, aims to develop a 26-unit (previously noted as 24) Common Ground facility at 28 Wellington Street, on land owned by the Adjoining Owner. This facility will provide supported housing to accommodate persons listed on the Port Phillip By-Name List, who are homeless and sleeping rough in Port Phillip.
- 2.7 On 2 September 2020, Council endorsed the development of this 26-unit Common Ground facility by committing \$4 million in capital funding from the In Our Backyard Reserve and contributing the Road at a nominal amount to provide space for access and car parking required by the development.
- 2.8 A previous market valuation of \$4,620 (inclusive of GST) per square metre for unencumbered land in the Road and \$935 (inclusive of GST) per square metre for encumbered land in the Road has been obtained. This translates to \$364,980 (inclusive of GST) unencumbered and \$73,865 (inclusive of GST) encumbered.
- 2.9 The land in the Road will be encumbered as recent advice from South East Water has indicated that an easement covering a private spoon drain (regulated by the Victorian Building Authority) is envisaged to be created (but in favour of a property and not South East Water), subject to final agreement with the relevant parties and authorities. The consultants acting on behalf of St Kilda Community Housing are, however, of the view that the creation of the appropriate easement can occur once a new title is created i.e. upon consolidation of the titles to the Road (once discontinued) and 28 Wellington Street.
- 2.10 At its meeting on 6 April 2022, Council resolved to:
 - remove the Road from the Register; and
 - commence the statutory procedures and give notice pursuant to sections 207A and 223 of the Act of its intention to discontinue and sell the Road to the Adjoining Owner for a nominal amount of \$1 plus legal fees.
- 2.11 Council did not receive any submissions in response to the public notice.
- 2.12 Officers recommend that Council discontinues the Road and sells it to the Adjoining Owner, for a nominal amount of \$1 plus legal fees as the Road is considered to not be reasonably required for public use, for the reasons set out in the report.



3. RECOMMENDATION

That Council having considered that there were no submissions in response to the public notice regarding Council's proposal to discontinue and sell the road abutting 26 and 28 Wellington Street, St Kilda, known as laneway R3723, being the land contained in Memorial Book 22 Number 809 and Memorial Book 298 Number 450 (Road):

- 3.1 resolves to discontinue the Road as it considers that the Road is not reasonably required for public use for the reasons set out in the report;
- 3.2 resolves to sell the discontinued Road to Homes Victoria, the owner of the adjoining property (Adjoining Owner) at 28 Wellington Street, St Kilda for a nominal amount of \$1 plus legal fees;
- 3.3 directs that a notice pursuant to clause 3 of Schedule 10 of the *Local Government Act 1989 (Vic)* is published in the *Victoria Government Gazette*;
- 3.4 directs that the Chief Executive Officer or delegate signs an authorisation allowing Council's solicitors to execute transfer documents and any other documents required to be signed on Council's behalf in connection with the transfer of the discontinued Road to the Adjoining Owner;
- 3.5 directs that any easements, rights or interests required to be created or saved over the Road by any public authority be done so and not affected by the discontinuance and sale of the Road; and
- 3.6 directs that the Adjoining Owner be required to consolidate the title to the discontinued Road with the title to the Adjoining Owner's property within 12 months of the date of the transfer of the discontinued Road.

4. KEY POINTS/ISSUES

Background

- 4.1 As part of the road network, rights of way and laneways were developed to satisfy a historical need and were documented in early plans of subdivision.
- 4.2 In most cases a road is still required for access or other strategic purposes and should remain open to the public, however, Council may support the discontinuance (permanent closure) of a road within its municipality if it is considered in the best interest of the community.
- 4.3 Unless the subject road is on Crown land, the land vests in Council and Council can subsequently sell the land from the discontinued road or retain it for municipal purposes.
- 4.4 If the land is subsequently sold, it is generally sold at current market value for land in that location unless exceptional circumstances deem a discounted price appropriate.
- 4.5 Any discontinuance and sale of a road is to be carried out according to the provisions of clause 3 of Schedule 10 of the Act and Council's Discontinuance and Sale of Roads Policy (**Policy**).



Road

- 4.6 The Road has an area of approximately 79 square meters and is shown as lot '1' on the Title Plan.
- 4.7 The Road abuts 26 Wellington Street and 28 Wellington Street.
- 4.8 The Road is shown on title as a road in Memorial Book 22 Number 809 and Memorial Book 298 Number 450, as per the Old Law Conveyances.
- 4.9 The Road is laneway R3723 which is listed on the Register.
- 4.10 Council has statutory power to consider discontinuing the Road.
- 4.11 If the Road is discontinued, the land will vest in Council free of road status.

Site Inspection

- 4.12 A site inspection of the Road was conducted by Macquarie Local Government Lawyers on 3 November 2021. The inspection noted the following:
 - 4.12.1 the Road is open and available for use for both vehicle and pedestrian traffic;
 - 4.12.2 the Road is constructed in concrete;
 - 4.12.3 the Road comprises the first half of the driveway at 28 Wellington Street and has in the past been used for pedestrian access to the 12 rooming house rooms and associated facilities on site together with vehicle access to the car spaces at the rear of that site;
 - 4.12.4 the abutting property at 26 Wellington Street does not currently use the Road for access as vehicles enter an underground garage from a driveway within the property, as shown in the photograph of the Road in Attachment 3; and
 - 4.12.5 there is no evidence that the Road is used for a public purpose.

Proposal

- 4.13 St Kilda Community Housing, with the support of Council and the Adjoining Owner, aims to develop a 26-unit Common Ground facility at 28 Wellington Street, for the provision of supported housing to accommodate persons listed on the Port Phillip By-Name List, who are homeless and sleeping rough in Port Phillip.
- 4.14 St Kilda Community Housing has requested that Council considers the possible discontinuance and sale of the Road (**Proposal**) to allow for the land to be incorporated into the proposed development.
- 4.15 If the Road is discontinued, the Road will vest in Council.
- 4.16 Once the Road is discontinued, it will be Council's intention to sell the Road to Adjoining Owner.

Consolidation

- 4.17 It will be necessary for the Adjoining Owner to consolidate the title to the discontinued Road with its existing property title as part of the development.



5. CONSULTATION AND STAKEHOLDERS

- 5.1 The owners of the 15 units together with the Owners corporation for 26 Wellington Street have been informed of the Proposal. At this stage no objections have been received.
- 5.2 The following statutory authorities have been advised of the Proposal and have been asked to respond to the question of whether they have any existing assets in the Road, which require 'rights' to be 'saved' under section 207C of the Act:
 - Council;
 - South East Water;
 - Melbourne Water;
 - Multinet Gas;
 - CitiPower;
 - Telstra; and
 - Optus.
- 5.3 Council's Asset Management team have advised that Council has no assets in or above the Road and no objection to the Proposal.
- 5.4 Recent advice from South East Water has indicated that an easement covering a private spoon drain (regulated by the Victorian Building Authority) is envisaged to be created (but in favour of a property and not South East Water), subject to final agreement with the relevant parties and authorities. The consultants acting on behalf of St Kilda Community Housing are, however, of the view that the creation of the appropriate easement can occur once a new title is created i.e. upon consolidation of the titles to the Road (once discontinued) and 28 Wellington Street.
- 5.5 The remaining statutory authorities have advised they have no objection to the Proposal as they do not have any assets within the Road.
- 5.6 Council did not receive any submissions to the public notice of the Proposal that was advertised in The Age newspaper on 6 May 2022.
- 5.7 Officers have completed the consultation and notification requirements prescribed under the Act.

6. LEGAL AND RISK IMPLICATIONS

- 6.1 Under clause 3 of Schedule 10 of the Act, Council has the power to discontinue roads located within its municipality and sell the land from that road or retain the land for itself.
- 6.2 The Policy ensures that roads reasonably required for public access remain open to the public and those not reasonably required for public use may be discontinued and sold to the adjoining owner(s), subject to Council approval and statutory requirements.

7. FINANCIAL IMPACT

- 7.1 A recent market valuation of \$4,620 (inclusive of GST) per square metre for unencumbered land in the Road and \$935 (inclusive of GST) per square metre for encumbered land in the Road has been obtained. This translates to \$364,980 (inclusive of GST) unencumbered and \$73,865 (inclusive of GST) encumbered.



- 7.2 The land in the Road will be encumbered as an easement covering a private spoon drain is envisaged to be created, subject to final agreement with the relevant parties and authorities.
- 7.3 On 2 September 2020, Council endorsed the development of this 26-unit Common Ground facility by committing \$4 million in capital funding from the In Our Backyard Reserve and contributing the Road at a nominal amount of \$1 plus legal fees to provide space for access and car parking required by the development.
- 7.4 St Kilda Community Housing, on behalf of the Adjoining Owner, will be paying all legal costs incidental to the Proposal.

8. ENVIRONMENTAL IMPACT

- 8.1 The Proposal has no detrimental environmental implications.

9. COMMUNITY IMPACT

- 9.1 Council will facilitate the discontinuance and sale of roads where appropriate consultation has occurred, legislative requirements have been met and it is considered that road discontinuance and sale is in the best interest of the wider community.
- 9.2 The Proposal will enable the land in the Road to be re-purposed.
- 9.3 The Proposal will support the development of a social housing facility within the municipality for the benefit of the community.

10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

- 10.1 The Proposal aligns with the Strategic Direction **Well Governed Port Phillip** and Inclusive Port Phillip.
- 10.2 The Proposal is in accordance with the In Our Backyard Affordable Housing Policy.

11. IMPLEMENTATION STRATEGY

11.1 TIMELINE

If the Proposal is approved:

- 11.1.1 a notice will be published in the *Victoria Government Gazette* to formally discontinue the Road; and
- 11.1.2 a transfer of the discontinued Road pursuant to section 207D of the Act will be prepared by Council's solicitors.

11.2 COMMUNICATION

- 11.2.1 The public notification process has provided the community with the opportunity to make submissions in respect of the Proposal. Having considered that no submissions were received, Council may now determine whether to discontinue and sell the Road.
- 11.2.2 The Adjoining Owner will be advised of the final Council decision and the reasons for it within 5 days of the Council meeting.

MEETING OF THE PORT PHILLIP CITY COUNCIL

20 JULY 2022



12. OFFICER DIRECT OR INDIRECT INTEREST

12.1 No officers involved in the preparation of this report have any material or general interest in the matter.

ATTACHMENTS

- 1. Title Plan**
- 2. Old Law Conveyances**
- 3. Photo of the Road**