

STRATEGY AND POLICY REVIEW COMMITTEE

1 JUNE 2009

GOVERNANCE AND COMPLIANCE

A16	PROPOSED DISCONTINUANCE AND SALE OF A SECTION OF RIGHT OF WAY NO. R1229 REAR 5 LITTLE FINLAY STREET, ALBERT PARK.
LOCATION/ADDRESS:	REAR 5 LITTLE FINLAY STREET, ALBERT PARK
EXECUTIVE DIRECTOR:	SALLY CALDER, EXECUTIVE DIRECTOR, ORGANISATION, SYSTEMS & SUPPORT
PREPARED BY:	TOULA KOTSABOUIKIS, PROPERTY & VALUATIONS
FILE NO.:	3350/003-01 & 34/14/059-01
ATTACHMENTS:	SITE PLAN & PHOTOGRAPH

1. EXECUTIVE SUMMARY

The owners of 3 Little Finlay Street, Albert Park, have requested that Council discontinue a section of the road at the rear of 5 Little Finlay Street, Albert Park and sell the land to them. In these circumstances, Council is required to consider whether the road is reasonably required as a road for public use.

There are three feasible options in this case and they are described as follows;

- Discontinue the portion of road and sell to the abutting owner at a price of \$1,100 per square metre (recommended option)
- Discontinue the portion of road and sell to the abutting owner at market value (\$1,800 - \$2,000 per square metre)
- Decide that the road is required as a road for public use

The recommendation covers the first two options. That is, to commence the procedures for formal public consultation as set out in the Local Government Act 1989, and to allow for a decision to be made at a later date with the benefit of input from interested parties.

2. RECOMMENDATION

That the Strategy and Policy Review Committee recommend that Council resolve to:

- 2.1 Form the opinion that the road at the rear of 5 Little Finlay Street, Albert Park as shown on the plan attached to this report is not reasonably required as a road for public use.
- 2.2 discontinue the road and the land from the road be sold to abutting owners.
- 2.3 direct that under Section 206 and Schedule 10 Clause 3 of the Local Government Act 1989, statutory procedures be commenced to discontinue the road and that under Section 207A (a) and Section 223 of that Act, public

notice of the proposed discontinuance be given in the Port Phillip Leader and that Council's Strategy and Policy Review Committee be appointed to hear and consider any submissions received in response to the public notice at an appropriate time and date.

3. DISCUSSION

GENERAL

It is common for Council to consider a discontinuance and sale proposal for roads or laneways which are no longer required for access by the public or abutting property owners. By removing small public spaces the following benefits may result;

- Improved amenity – where the space becomes a haven for anti-social behaviour or is used to dump rubbish
- Improved security and safety – as access to properties is reduced
- Cost savings – as Council's maintenance responsibility is transferred with the land

In other situations it may become apparent that abutting owners are occupying the road or have encroached into the air space. In these circumstances Council can take action to discontinue the road and sell the land to maintain the status quo or to remove obstructions to maintain access.

RIGHT OF WAY NO R1229

Proposal

The entirety of right of way no R1229 appears as an "easement" on the title to the property at 3 Little Finlay Street, Albert Park, and as a "road" on titles for the abutting properties.

The portion directly behind 3 Little Finlay Street, Albert Park, is being purchased following a resolution of Council made at its meeting on 23 June, 2008. The Council decision, of course, followed negotiation and due process.

The proposal concerns another portion of the right of way behind the adjacent property at 5 Little Finlay Street. This portion also appears to be part of 3 Little Finlay Street as it is enclosed by a gate that has been in position for many years. The land comprises 11 square metres in area.

The proposal is contentious as there is likely to be an objector and because it is proposed to sell the land at less than market value which is contrary to current policy.

Alleged misunderstanding

The owners of 3 Finlay Street purchased the property in the early part of 2008 and sought to purchase the right of way at the rear at the same time. They claim that it was their belief that they were going to purchase the right of way as fenced (including the portion subject to the current proposal).

There is nothing in the Council records to indicate that there was a misunderstanding or that any of the documentation was misleading. However, the proponents appear to

be genuine and were undertaking a home purchase at the time which may have preoccupied their thoughts and caused them to overlook detail.

OPTIONS

There are three options for consideration as outlined below;

Option 1

This is the recommended option.

In this option it is proposed to discontinue the road and sell the land for the same price that applied to the land at the rear of 3 Little Finlay Street. The proposed purchase price is \$12,100 which equates to \$1,100 per square metre.

Option 2

Council could decide that discontinuance and sale should only proceed on the basis that full market value is paid for the land. Market value has been assessed within the range of \$19,800 (\$1,800 per sq m) to \$22,000 (\$2,000 per sq m).

If this option is preferred officers can provide a supplementary report to the ordinary meeting later in the month.

Option 3

The third option is to abandon the process and enforce removal of the existing gates which enclose the land. The portion of road may then become a source of amenity and security/safety concerns.

Recommended Option

In general the Council policy for discontinuance and sale allows for sales at market value but the price can be reduced to a flat fee of \$5,000 plus costs where there is clear evidence of a case for adverse possession.

As the right of way has been enclosed for many years it is possible that possessory rights have been established and the land could be acquired by the owners of 3 Little Finlay Street through an adverse possession application. Any such application could be contested and would likely fail if Council could prove that the land is a “public highway”. “Public highway” status is established by a Council declaration or is otherwise documented or can be proven at common law by dedication and acceptance (Council construction is an example of this).

The discontinuance and sale of the right of way at the rear of 3 Finlay Street was negotiated at a price of \$1,100 which is approximately midway between market value and the adverse possession price. This negotiation was based on the contestable strength of the case. It could be considered that Council obtained a good outcome.

There are stronger grounds to assert that the portion of right of way to the rear of 5 Little Finlay Street, is a “public highway” as it is constructed in bluestone almost certainly by Council.

Recommended option

It appears that the land is not reasonably required for public use as it has not been used for this purpose for many years and therefore one of the discontinuance and sale options is preferred.

The recommended option takes into account the claim that there has been a misunderstanding and a balance between the two purchases.

3.3 CONSULTATION AND STAKEHOLDERS

Council will consult with the community through a “Public Notice” inviting submissions to be published in the local newspaper in accordance with the statutory procedures.

All abutting owners will be advised of the proposal by letter and invited to make a submission. Consent was previously granted by the owner of 18 Merton Place, Albert Park.

The owner of 5 Little Finlay Street, Albert Park declared to the proponent (neighbour) that there is no objection in principle providing that compensation of \$3,000.00 for the loss of amenity.

Service Authorities will be consulted to ascertain any requirements for easements.

POLICY IMPLICATIONS

This proposal for discontinuance and sale will be undertaken accordance with the powers, functions and statutory process set out in the Local Government Act 1989.

The administrative procedures and sale negotiation are undertaken in accordance with Council policy for the discontinuance and sale of roads but the special circumstances in this case are reflected in the proposed sale price.

FINANCE / RESOURCE IMPLICATIONS

Council's costs are to be borne by the applicant.

Income derived from the sale will be transferred to Council's general reserves.

LEGAL & RISK IMPLICATIONS

By complying with legislation and making reasonable conditions for servicing authorities, there are no legal or risk implications associated with the proposal.

If Council decides to refuse the proposal, it would be duty bound to open the road for public access and thereby create a small public space that could lead to amenity and safety problems. There is also risk that the applicant could make an application to the Land Registry for adverse possession at which point Council would need to consider whether or not to contest the claim.

IMPLEMENTATION STRATEGY

The following is the sequence of actions if the proposal is ultimately approved.

- The applicant will be required to provide 10% deposit on the purchase price.
- A Public Notice will invite submissions from interested persons within 28 days of the date it is published.
- A report will be prepared for Council's Strategy and Policy Review Committee when the committee will hear and consider any submissions received. Council will make the final decision on the proposal.
- A surveyor will be engaged to prepare a title plan, consolidation plan and gazettal plan.
- A notice will be published in the Victorian Government Gazette to formally discontinue the road.
- Lawyers will be engaged to carry out conveyancing, collect the settlement costs and ensure that consolidation is completed.

The above can be accomplished within 12 months.

COMMUNICATION

Communication will be in accordance with the statutory procedures which invite submissions and ensure that each submitter will;

- Be given an opportunity to be heard in person
- Have their views considered, and
- Be told of Council's decision and the reasons for it

In addition to the statutory procedures, abutting owners will be advised of the proposal by letter and invited to participate in the decision making process.