



13.1 12 LITTLE TRIBE STREET, SOUTH MELBOURNE AND 12-14 DUKE STREET, ST KILDA - REMOVAL OF LAND FROM THE ROAD REGISTER

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

PREPARED BY: ROD PRINGLE, HEAD OF PROPERTY AND WORKPLACE OPERATIONS

LYANN SERRANO, PROPERTY ADVISOR

1. PURPOSE

1.1 The purpose of this report is to seek Council's approval to consider removing the following land parcels from Council's Register of Public Roads (**Register**), pursuant to section 17(4) of the *Road Management Act 2004* (Vic) (**RMA**):

- Land parcel R2489 (adjacent to 12 Little Tribe Street, South Melbourne); and
- Land parcel R3457 (adjacent to 12-14 Duke Street, St Kilda).

2. EXECUTIVE SUMMARY

- 2.1 Land parcel R2489 (**Tribe Land**) abutting 12 Little Tribe, South Melbourne (**12 Little Tribe**) is 1.04 metres wide with an area of approximately 20 square metres and forms part of the property at 12 Little Tribe.
- 2.2 Land parcel R3457 (**Duke Land**) abutting 12-14 Duke Street, St Kilda (**12-14 Duke**) is 0.92 metre wide with an area of approximately 38 square metres and forms part of the property at 12-14 Duke.
- 2.3 Both Tribe Land and Duke Land are included on the Register.
- 2.4 By virtue of their inclusion on the Register, they are considered 'public roads' under the RMA.
- 2.5 As they are 'public roads' under the RMA, they are 'roads' pursuant to the *Local Government Act 1989* (Vic) (**LGA**).
- 2.6 And as they are 'roads' under the LGA, Council has statutory powers over them.
- 2.7 The owner of 12 Little Tribe (**Tribe Owner**) approached Council initially to apply for a planning permit to do renovations on the property.
- 2.8 The owner of 12-14 Duke (**Duke Owner**) approached Council initially to apply for a planning permit to demolish and redevelop the property.
- 2.9 The Tribe Owner and the Duke Owner were advised that the Tribe Land and Duke Land were included on the Register and that in order to have them removed they would have to apply to have them discontinued and purchase at market value, in accordance with Council's Discontinuance and Sale of Roads Policy (**Policy**).
- 2.10 The Tribe Owner and Duke Owner have both disputed Council's position and have since been liaising with Council officers (**Officers**) to determine how the matter can be resolved.
- 2.11 A review of the matter has been undertaken, including legal advice to support an officer recommendation on how to proceed.



- 2.12 It has been established that at the time of placing the Tribe Land and Duke Land on the Register:
- they were not reasonably required for general public use as they were enclosed within the boundaries of the respective properties; neither of them was dedicated as a 'road' on any current or historic titles nor encumbered by any carriageway easements or other rights of way; and
 - they were not public highways at common law i.e. they were not expressly dedicated to the public for use as rights of way and were not accepted by the public as rights of way.
- 2.13 Given that the Tribe Land and Duke Land do not meet the common law test for becoming a 'public highway', they cannot be discontinued and sold.
- 2.14 As there is no evidence that the Tribe Land and Duke Land became public highways at common law and that they were 'reasonably required for general public use' prior to their inclusion on the Register, Officers recommend that Council considers their removal from the Register (**Proposal**) as they are no longer reasonably required for general public use, pursuant to section 17(4) of the RMA.

Once removed from the Register, the Tribe Land will revert to the Tribe Owner and the Duke Land will revert to the Duke Owner.

3. RECOMMENDATION

That Council:

- 3.1 Notes that the land parcel R2489 (Tribe Land) abutting 12 Little Tribe Street, South Melbourne (12 Little Tribe) forms part of 12 Little Tribe contained in Certificate of Title volume 6972 folio 214 but is listed on Council's Register of Public Roads (Register).
- 3.2 Notes that the land parcel R3457 (Duke Land) abutting 12-14 Duke Street, St Kilda (12-14 Duke) forms part of 12-14 Duke Street contained in Certificate of Title volume 3476 folio 091 but is listed on the Register.
- 3.3 Notes that although neither Tribe Land nor Duke Land is known to title as a 'road', by virtue of their inclusion on the Register, they are considered 'public roads' under the *Road Management Act 2004* (Vic) (RMA). As they are 'public roads' under the RMA, they are 'roads' under the *Local Government Act 1989* (Vic) (LGA). And as they are 'roads' under the LGA, Council has statutory powers over them.
- 3.4 Notes that at the time of placing the Tribe Land and Duke Land on the Register, it has been established that:
- they were not reasonably required for general public use as they were enclosed within the boundaries of the respective properties; neither of them was dedicated as a 'road' on any current or historic titles nor encumbered by any carriageway easements or other rights of way; and
 - they were not public highways at common law i.e. they were not expressly dedicated to the public for use as rights of way and were not accepted by the public as rights of way.
- 3.5 Acting under section 17(4) of the RMA, resolves that the Tribe Land and Duke Land listed on the Register as R2489 and R3457 respectively, be removed from the Register

as they are no longer reasonably required for general public use, for the reasons set out in the above item 3.4.

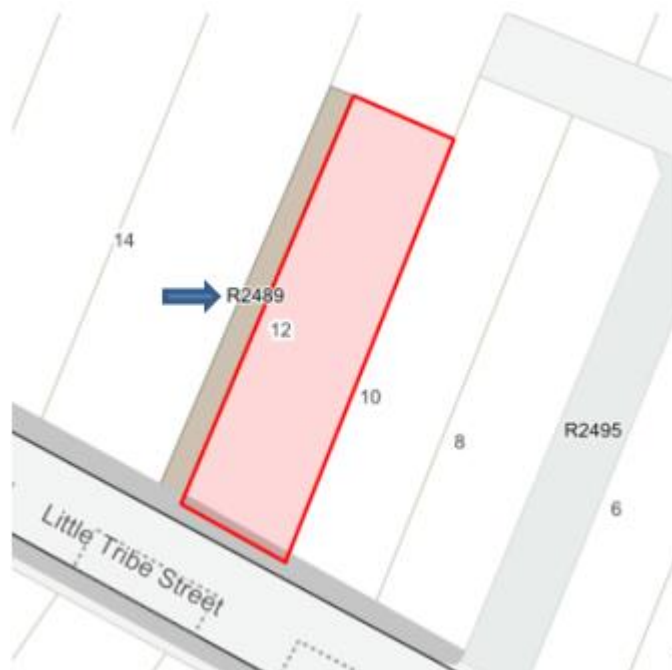
- 3.6 Authorises the removal of the Tribe Land and Duke Land from the Register and Council's Intramaps application.
- 3.7 Notes that unlike other situations where a road, once discontinued, would then be sold by Council, in this case it is considered that the Tribe Land and Duke Land should not have been included on the Register in the first place. As they do not meet the common law test for being a 'public highway', they cannot be discontinued and sold.
- 3.8 Notes that once removed from the Register, the Tribe Land will revert to the Tribe Owner and the Duke Land will revert to the Duke Owner.

4. KEY POINTS/ISSUES

12 Little Tribe

Land Description:

- 4.1 The Tribe Land is 1.04 metres wide with an area of approximately 20 square metres.
- 4.2 It is noted as R2489 on Council Intramaps, as shown on the image below.



- 4.3 It also abuts the following properties at:
 - 14 Little Tribe Street; and
 - 25 Tribe Street, South Melbourne.

There is no evidence of any historical use of the Tribe Land by these properties.

- 4.4 It is fully fenced and gated within the boundary of 12 Little Tribe and is partly built over by the dwelling, as shown on the photos below.



- 4.5 It is included in Certificate of Title volume 6972 folio 214, shown on Title Plan TP681102C and forms part of 12 Little Tribe, as per Attachment 1.
- 4.6 It is neither dedicated as a road on any current or historic titles nor encumbered by any carriageway easements or other rights of way.
- 4.7 But it is recorded as a road on the Register as Right of Way no. R2489.

Tribe Owner's Initial Approach to Council:

- 4.8 The Tribe Owner initially approached Council to apply for a planning permit for renovations to the property.
- 4.9 The Tribe Owner was advised that the Tribe Land was included on the Register and that in order to have it removed he would have to apply to have the Tribe Land discontinued and purchase at market value, in accordance with the Policy.
- 4.10 The Tribe Owner has objected to the Tribe Land being included on the Register for the following reasons:
- It is included in the Tribe Owner's Certificate of Title.
 - It has been gated and partially built over for at least 40 years, with exclusive use by both current and previous owners of 12 Little Tribe; and that it is neither required nor has ever been required for general public use or access to any other premises – this has been confirmed by way of a petition letter from the Tribe Owner and the owners of 2, 3, 4, 5, 6, 11, 13 and 20 Little Tribe, South Melbourne (**Petition Letter**).
- 4.11 The Tribe Owner has since been liaising with Officers to determine how the matter can be resolved.
- 4.12 A review of the matter has been undertaken, including legal advice to support an officer recommendation on how to proceed.

12-14 Duke Street

Land Description:

- 4.13 The Duke Land is 0.92 metre wide with an area of approximately 38 square metres.
- 4.14 It is noted as R3457 on Council Intramaps, as shown on the image below.



- 4.15 It is a dead-end and is narrow, so it has never been well suited for pedestrian access. It does not abut any other properties.
- 4.16 It is contained within the boundary of 12-14 Duke, as shown on the photos below, taken before and after the demolition of the dwellings.





- 4.17 It is part of the land contained in Certificate of Title volume 3476 folio 091 (part of Lot 1 on Title Plan TP668871B) and forms part of 12-14 Duke, as per Attachment 2.
- 4.18 It is neither dedicated as a road on any current or historic titles nor encumbered by any carriageway easements or other rights of way.
- 4.19 But it is recorded as a road on the Register as Right of Way no. R3457.

Duke Owner's Initial Approach to Council

- 4.20 The Duke Owner approached Council initially to lodge a planning permit. The permit was issued on 22 January 2020 for the redevelopment of 12-14 Duke (Planning Permit 1128/2017) which allows for the demolition of existing buildings and construction of a two-storey building with eight dwellings above a basement accommodating 16 car spaces.
- 4.21 Historically 12-14 Duke was divided into 5 lots and the Duke Land ran between two dwellings and was partially built over. The five lots have now been consolidated into two lots and all improvements have been demolished pending redevelopment.
- 4.22 The Duke Owner was advised that the Duke Land was included on the Register and that in order to have it removed he would have to apply to have the Duke Land discontinued and purchase at market value, in accordance the Policy.
- 4.23 The Duke Owner has objected to the Duke Land being included on the Register for the following reasons:
- It is included in the Duke Owner's Certificate of Title.
 - It has been gated and fenced within the boundaries of 12-14 Duke for many years, evidenced by the fact that the dwelling was partly built over it.
- 4.24 The Duke Owner has since been liaising with Officers to determine how the matter can be resolved.



- 4.25 A review of the matter has been undertaken, including legal advice to support an officer recommendation on how to proceed.

Legal Status of Tribe Land and Duke Land

- 4.26 Officers have merged the legal status description and recommendation for the Tribe Land and Duke Land due to their similar historical and current circumstances.
- 4.27 Section 3(1) of the LGA provides that a road includes:
- (a) a street; and
 - (b) a right of way; and
 - (c) any land reserved or proclaimed as a street or road under the Crown Land (Reserves) Act 1978 or the Land Act 1958; and
 - (ca) a public road under the RMA; and
 - (d) a passage; and
 - (e) a cul de sac; and
 - (f) a by-pass; and
 - (g) a bridge or ford; and
 - (h) a footpath, bicycle path or nature strip; and
 - (i) any culvert or kerbing or other land or works forming part of the road.
- 4.28 Officers have investigated the historical status of the Tribe Land and Duke Land and have determined that they were added to the Register in 2004.
- 4.29 By virtue of their inclusion on the Register, the Tribe Land and Duke Land are considered 'public roads' under the RMA.
- 4.30 As they are 'public roads' under the RMA, they are 'roads' under the LGA.
- 4.31 And as they are 'roads' under the LGA, Council has statutory powers over them.
- 4.32 The "key issue" is whether the Tribe Land and Duke Land were validly added to the Register.
- 4.33 Legal advice has indicated that in considering whether the Tribe Land and Duke Land were validly added to the Register, Council needs to consider whether:
- it made a decision at the time of placing the Tribe Land and Duke Land on the Register that the Tribe Land and Duke Land are 'reasonably required for public use' pursuant to section 17(3) of the RMA; and
 - it was open to Council to make that decision based on factual circumstances.
- 4.34 The Tribe Land and Duke Land are not considered to have been 'reasonably required for public use' when they were added to the Register as they were enclosed within the boundaries of 12 Little Tribe and 12-14 Duke; neither of them was dedicated as a 'road' on any current or historic titles nor encumbered by any carriageway easements or other rights of way.
- 4.35 If Council established that the Tribe Land and Duke Land were public highways at common law at the time of its decision, then it would be open to Council to decide to include the Tribe Land and Duke Land on the Register.
- 4.36 To be a 'public highway at common law', it must be established that the Tribe Land and Duke Land:



- were expressly dedicated to the public for use as rights of way (i.e. that they were offered to the public as a road for general public use); and
- were accepted by the public as rights of way by way of historical public use.

4.37 It is considered that the Tribe Land and Duke Land were not public highways at common law prior to their inclusion on the Register as they do not satisfy either limb of the test.

4.38 As Officers cannot find evidence that the Tribe Land and Duke Land were 'reasonably required for public use' and that they became public highways at common law prior to their inclusion on the Register, it would be prudent for Council to consider their removal from the Register, having regard to the risks to Council of an incorrect listing on the Register adversely affecting the Tribe Owner and Duke Owner, respectively.

4.39 Officers have been advised that whilst there is no statutory prohibition on the removal of the Tribe Land and Duke Land being completed under delegation, recent case law indicates that the prudent approach for removal be completed by way of a Council resolution pursuant to section 17(4) of the RMA.

Recommendation for Tribe Land and Duke Land:

4.40 Considering the above, Officers recommend the following:

- Make a determination that the Tribe Land and Duke Land are no longer reasonably required for general public use; and
- Proceed to make the decision for removal of the Tribe Land and Duke Land from the Register pursuant to section 17(4) of the RMA by way of a Council resolution.

4.41 Unlike other situations where land, once discontinued as a road, would then be sold by Council, in this case it is considered that the Tribe Land and Duke Land should not have been put on the Register in the first place. As they do not meet the common law test for being a 'public highway', they cannot be discontinued and sold.

4.42 Once removed from the Register, the Tribe Land will revert to the Tribe Owner and the Duke Land will revert to the Duke Owner.

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 There are no gas, electricity, water, sewerage or telecommunications assets to be impacted by the Proposal as the Proposal does not alter the Tribe Land's and Duke Land's current physical status.

5.3 The Petition Letter has provided evidence that the Tribe Land has been gated and partially built over for at least 40 years, with exclusive use by both current and previous owners of 12 Little Tribe; and that the Tribe Land is neither required nor has ever been required for general public use or access to any other premises.

5.4 As the Duke Land is situated within the property at 12-14 Duke and is not abutting any other property, no other property owners are affected by the Proposal.

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 the inclusion of the Tribe Land and Duke Land on



the Register that they were 'reasonably required for public use' and that they became public highways at common law.

- 6.2 It would therefore be prudent for Council to consider removal of the Tribe Land and Duke Land from the Register, having regard to the risks to Council of an incorrect listing on the Register adversely affecting the Tribe Owner and Duke Owner, respectively.

7. FINANCIAL IMPACT

- 7.1 If the Tribe Land and Duke Land could be considered roads capable of being discontinued, and the respective owners applied to have them discontinued and purchase at market value, in accordance with the Policy, the estimated market value is \$174,000 plus GST for the Tribe Land and \$52,000 for the Duke Land. These estimates are based on the Capital Improved Values of the Tribe Land and Duke Land effective 1 July 2020.

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 both Tribe Land and Duke Land are currently contained within the boundaries of 12 Little Tribe and 12-14 Duke, respectively, and provide no general public access.

10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

- 10.1 The Proposal aligns with **Strategic Direction 5 – Well Governed Port Phillip** 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 Tribe Land and Duke Land from the Register under section 17(4) of the RMA on the basis that they are no longer reasonably required for public use, for the reasons set out in this report.

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

11.2 COMMUNICATION

11.2.1 The Tribe Owner and Duke Owner will be notified of the outcome of the 20 October 2021 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

1. Title Plan - 12 Little Tribe St South Melbourne  [Download](#)
2. Title Plan - 12-14 Duke Street St Kilda  [Download](#)