



ORDINARY MEETING OF COUNCIL 21 MARCH 2018

14.3 PROPOSED DISCONTINUANCE AND SALE OF ROAD AT THE REAR OF 47 FAWKNER STREET, ST KILDA

EXECUTIVE MEMBER: CHRIS CARROLL, GENERAL MANAGER CUSTOMER AND CORPORATE SERVICES

PREPARED BY: LYANN SERRANO, PROPERTY ADVISOR

1. PURPOSE

- 1.1 To seek Council's approval to complete the statutory procedures pursuant to the *Local Government Act 1989 (Vic) (Act)* and finalise the discontinuance and sale of road at the rear of 47 Fawkner Street, St Kilda, being part of the land contained in book 52 number 004 (**Road**).

2. EXECUTIVE SUMMARY

- 2.1 The Road approximately 32 square metres is at the rear of 47 Fawkner Street, St Kilda.
- 2.2 The Road is not on Council's Register of Public Roads but is shown as a 'right of way' on the general law search contained in Attachment 1 to this report. It is shown highlighted in yellow on the locality plan in Attachment 2.
- 2.3 On 6 December 2017, Council resolved to commence the statutory procedures to discontinue the Road pursuant to the Act.
- 2.4 In accordance with sections 207A and 223 of the Act, a public notice was published in the Port Phillip Leader newspaper on 16 January 2018. The notice invited submissions and advised that if the Road is discontinued, it will be sold by private treaty to the Owner of 47 Fawkner Street St Kilda (the Owner). In addition, it advised that any submissions received would be heard at a future Council meeting.
- 2.5 No submissions were received in response to the public notice.
- 2.6 It is considered that the Road is not required for public use as:
- the Road is enclosed within the fenced boundaries of the Owner's land;
 - the Road is not available for public use and
 - there is no evidence that the Road is used for public access purposes.
- 2.7 Council is now in a position to complete the statutory procedures and make a final decision.



3. RECOMMENDATION

That Council:

- 3.1 Resolves that, having followed all the required statutory procedures pursuant to sections 207A and 233 of the *Local Government Act 1989 (Vic)* (Act) pursuant to its powers under clause 3 of Schedule 10 of the Act, and having considered that there are no submissions received in response to the public notice, it discontinues the Road.
- 3.2 Is of the opinion that the Road is not reasonably required for public access as:
 - 3.2.1 the Road is enclosed within the fenced boundaries of 47 Fawkner Street, St Kilda;
 - 3.2.2 the Road is not available for public use and
 - 3.2.3 there is no evidence that the Road is used for public access purposes.
- 3.3 Directs that a notice pursuant to the provisions of Clause 3 (a) of Schedule 10 of the Act is published in the Government Gazette.
- 3.4 Directs that, once discontinued, the Road is transferred to the registered proprietor of 47 Fawkner Street, St Kilda (Owner) for \$7,500 plus GST (adjusted annually to Consumer Price Index from the date of Council's Discontinuance and Sale of Roads Policy) plus Council's costs incurred in the discontinuance and sale process.
- 3.5 Directs that the common seal of Council is affixed to any transfer of the Road and any other documents required to be signed in connection with the discontinuance of the Road and its subsequent transfer to the adjoining Owner.
- 3.6 Directs that any easements, rights or interests required to be created or saved over the Road by any authority be done so and not be affected by the discontinuance and sale.
- 3.7 Directs that the adjoining Owner be required to consolidate the title to the Road with the title to the Owner's respective property within 12 months of the date of transfer of the discontinued Road.

4. KEY POINTS/ISSUES

- 4.1 The Road is at the rear of 47 Fawkner Street, St Kilda.
- 4.2 The Road is approximately 32 square metres.
- 4.3 The Road is unconstructed and enclosed within the fenced boundaries of the Owner's land.
- 4.4 The Road is not available for public use.
- 4.5 There is no evidence that the Road is used for public access purposes.



- 4.6 The Road is not on Council's Register of Public Roads and therefore it is not public road.
- 4.7 The Road is not a public highway through gazettal or construction under old legislation and is not a public highway through a declaration under current legislation. There is also no evidence that the Road is a public highway at common law through dedication of the land as a road and an acceptance by the public as a road.
- 4.8 Given that the Road is neither a public road nor a public highway, the Road does not vest in Council and is considered to be a 'private street'.
- 4.9 As the Road is neither a public road nor a public highway, it is not protected from adverse possession. This is a legal means of acquiring land through long term exclusive and continuous possession.
- 4.10 The Owner has a choice to either claim adverse possession and submit an application to Land Victoria or ask Council to use its powers of discontinuance and sale.
- 4.11 There is no purchase price for acquiring land under adverse possession but the evidence required to prove adverse possession can be onerous and the process can be expensive.
- 4.12 In this case, the Owner has opted to request Council to undertake the process of discontinuance and sale.
- 4.13 As the Road is a right of way on title, it is also a 'road' for the purposes of the Act. This means that the Road qualifies as a road that can be subject to discontinuance and sale.
- 4.14 Upon being discontinued, the Road will vest in Council (pursuant to current legislation) which enables Council to sell the Road.
- 4.15 If the Road is discontinued and sold to the Owner, Council will require the Owner to consolidate the title to the discontinued Road with the title to the Owner's land within 12 months of the date of transfer of the Road to the Owner, at the Owner's expense.
- 4.16 Any easements, rights or interests required to be created or saved over the Road by any authority are to be done so and not to be affected by the discontinuance and sale.

5. CONSULTATION AND STAKEHOLDERS

- 5.1 Council has consulted with the community through a public notice in the Port Phillip Leader on 16 January 2018 inviting submissions in accordance with the statutory procedures described in section 223 of the Act.
- 5.2 In response to the public notice, no submissions were received.



ORDINARY MEETING OF COUNCIL 21 MARCH 2018

- 5.3 Relevant Council departments have been notified by way of internal referral. Service authorities have also been consulted to determine requirements for easements.

6. LEGAL AND RISK IMPLICATIONS

- 6.1 The Road is enclosed within the fenced boundaries of the Owner's land.
- 6.2 The Road is not available for public use.
- 6.3 There is no evidence that the Road is used for public access purposes.
- 6.4 Council has powers to discontinue roads under clause 3 of Schedule 10 of the Act. The definition of a 'road' includes a right of way and a laneway.
- 6.5 The price to be paid by the Owner is in accordance with Council's Discontinuance and Sale of Roads Policy.

7. FINANCIAL IMPACT

- 7.1 Once the Road is discontinued, the Road is transferred to the Owner for \$7,500 plus GST (adjusted annually to Consumer Price Index from the date of Council's Discontinuance and Sale of Roads Policy) plus Council's costs incurred in the discontinuance and sale process.

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 proposed discontinuance and sale of the Road will enable the land in the Road to be re-purposed.
- 9.3 Proceeds from the sale of the Road will go into Council's consolidated revenue to be used for service delivery elsewhere in the organisation.

10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

- 10.1 The process for discontinuance and sale of Council roads aligns with the Strategic Direction 6 Our Commitment to You in the Council Plan 2017-27 through supporting:
- transparent governance and an actively engaged community and



ORDINARY MEETING OF COUNCIL 21 MARCH 2018

- a financially sustainable, high-performing, well-governed organisation that puts the community first.

10.2 The proposal is in accordance with Council's Discontinuance and Sale of Roads Policy.

11. IMPLEMENTATION STRATEGY

TIMELINE

11.1 If the proposal is approved the following events will take place over the next months:

11.1.1 A notice will be published in the Government Gazette to formally discontinue the Road.

11.1.2 Solicitors will prepare the land transfer documents so the Owner can attend to settlement.

COMMUNICATION

11.2 Council may decide to proceed with a road discontinuance and sale for all or any part of the subject road or to reject the proposal in its entirety.

11.3 The abutting owner will be advised of the final Council decision and the reasons for it.

12. OFFICER DIRECT OR INDIRECT INTEREST

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

TRIM FILE NO: 78/13/26

ATTACHMENTS

1. General Law Search Showing the Road as Right of Way
2. Locality Plan