



**14.3**                                    **PROPOSED DISCONTINUANCE AND SALE OF ROAD  
ABUTTING 26 MOORE STREET, ELWOOD**

**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 commence the statutory procedures pursuant to the *Local Government Act 1989 (Vic)* (**Act**) to consider discontinuing the road abutting 26 Moore Street, Elwood, being part of the land contained in certificate of title volume 11170 folio 096 (**Road**).

**2.    EXECUTIVE SUMMARY**

2.1    The Road is unconstructed and is approximately 26 square metres.

2.2    The Road is enclosed within the property boundary of 26 Moore Street, Elwood and is not available for public use.

2.3    The Road has at all times been incorporated within the property at 26 Moore Street, Elwood and the current fence line at the rear of the property (which runs along the existing Road) has been in place for an extended period of time.

2.4    The Road abuts 24 Moore Street and 26 Moore Street in Elwood. The owners of 24 Moore Street have provided consent to the proposed discontinuance and sale of the Road to the owners of 26 Moore Street, Elwood.

2.5    The Road is not on Council's Register of Public Roads.

2.6    The Road is not registered in Council's name. It is part of the land contained in certificate of title volume 11170 folio 096 registered in the name of Alfred Dean Hodgson. It is known to title and shown on the Plan of Survey as a road and indicated as a right of way on Plan of Subdivision LP 2244.

2.7    The Road is considered a 'road' for the purposes of the Act, on the basis that the Road is known to title as a road and therefore is a 'right of way' (section 3 of the Act).

2.8    The Road is not considered a public highway at common law.

2.9    Council has statutory power to consider discontinuing the Road.

2.10    The owners of 26 Moore Street, Elwood have provided proof in support of their claim that they have accrued rights of adverse possession in the subject Road.

2.11    Where Council is satisfied possessory rights apply, the purchase price for the Road is set at \$7,500 plus GST, to be adjusted annually to Consumer Price Index (CPI), plus Council costs in relation to the proposed discontinuance and sale as per Council's



Discontinuance and Sale of Roads Policy. In this case, it is \$8,000 plus GST plus incidental costs incurred by Council.

- 2.12 The owners of 26 Moore Street, Elwood have agreed to pay Council's costs and disbursements associated with the proposed discontinuance of the Road, together with the purchase price for the transfer of the discontinued Road to them, in accordance with Council's Discontinuance and Sale of Roads Policy for land in the road where adverse possession could be achieved.
- 2.13 Council is now in a position to consider whether to commence the statutory procedures to discontinue and sell the Road.

### 3. RECOMMENDATION

- 3.1 That Council acting under clause 3 of Schedule 10 of the *Local Government Act 1989* (Vic) (**Act**):
  - 3.1.1 resolves that the statutory procedures be commenced to discontinue the road abutting 26 Moore Street, Elwood, being part of the land contained in certificate of title volume 11170 folio 096 (**Road**);
  - 3.1.2 directs that under sections 207A and 223 of the Act public notice of the proposed discontinuance of the Road be given in the Port Phillip Leader newspaper;
  - 3.1.3 resolves that the public notice required to be given under sections 207A and 223 of the Act should state that if the Road is discontinued, Council proposes to sell the Road to the owners of 26 Moore Street, Elwood for \$8,000 plus GST in accordance with Council's Discontinuance and Sale of Roads Policy where adverse possession for land in the road could be achieved, plus other incidental costs in relation to the discontinuance and sale process;
  - 3.1.4 authorises the Chief Executive Officer or delegate to undertake the administrative procedures necessary to enable Council to carry out its functions under section 223 of the Act in relation to this matter;
  - 3.1.5 resolves to hear and consider any submissions received pursuant to section 223 of the Act at a future Council meeting.

### 4. KEY POINTS/ISSUES

- 4.1 The Road is shown as lot 1 on the title plan TP 954330T attached as Attachment 1 (**Title Plan**) to this report.
- 4.2 The road abuts 26 Moore Street, Elwood, which is owned by Elisa Anne de Wit and Mathew Paul John Windebank (**Owners**).
- 4.3 The Road is not registered in Council's name. It is part of the land contained in certificate of title volume 11170 folio 096 registered in the name of Alfred Dean Hodgson. It is known to title and shown on the Plan of Survey as a road and indicated as a right of way on Plan of Subdivision LP 2244, as per Attachment 2.

# ORDINARY MEETING OF COUNCIL

## 18 JULY 2018



- 4.4 The Road is not on Council's Register of Public Roads therefore it is not known as a public road.
- 4.5 There is also no known evidence that the Road is a public highway at common law through dedication of the land in the road as road and an acceptance of it by the public as road.
- 4.6 As the Road is neither considered to be a public road nor a public highway and the Road is not registered in Council's name, the Road is not protected from adverse possession. This is a legal means of acquiring the land through long term exclusive and continuous possession.
- 4.7 The Road however is deemed a 'road' for the purposes of the Act, on the basis that the Road is known to title as a road and therefore is a 'right of way' (section 3 of the Act).
- 4.8 Council has statutory power to consider discontinuing the Road.
- 4.9 If the Road is discontinued, it will vest in Council which will enable Council to sell the Road.
- 4.10 The Road does not include the land in C/T 2127/233 shown as unencumbered land in the ownership of The Standard Mutual Building Society of 60 Queen Street, Melbourne 27/02/1889, as per the Plan of Survey.
- 4.11 The Owners have a choice to either claim adverse possession and submit an application to Land Use Victoria or ask Council to use its powers of discontinuance and sale.
- 4.12 The Owners have opted to request Council to undertake the process of discontinuance and sale for the Road (**Proposal**).
- 4.13 The Road shown highlighted in yellow on the locality plan attached as Attachment 3 (**Locality Plan**), also abuts the property at 24 Moore Street, Elwood (**Adjoining Property**). The Adjoining Property is shown delineated in red on the Locality Plan.
- 4.14 The Owners have sought the written consent of the owners of the Adjoining Property. The owners of the Adjoining Property have consented to the Proposal.
- 4.15 The Owners have recently provided the following proof in support of their claim that they have accrued rights of adverse possession in the Road:
  - 4.15.1 Letter dated 7 May 2009 from the occupants of 24 Moore Street, Elwood, asserting that the Road has been enclosed within the Owners' property for at least 50 years;
  - 4.15.2 Various photographs of the Road taken by the Owners in 2008 which, amongst other things, show that the Road contains well established vegetation which appears to be many years old;
  - 4.15.3 Transfers of land under which Council transferred other parts of the land contained in certificate of title volume 11170 folio 096 (**Parent Title**) to



surrounding landowners for less than the market value consideration. The Owners assert that these transfers evidence that Council acknowledges that the Parent Title is capable of being adversely possessed.

4.16 It is considered that the Road is not reasonably required for general public use as the Road is enclosed within the Owners' land and is not available for public use.

4.17 A site inspection of the road has been conducted by Kirkpatrick and Webber Land Surveyors on 7 February 2018. The site inspection notes that:

4.17.1 the Road is unconstructed;

4.17.2 the Road is enclosed within the fenced boundaries of the Owners' land;

4.17.3 a shed has been constructed over the Road;

4.17.4 the Road is not open and is not available for public use.

A copy of the site inspection report and photos are attached as Attachments 4 and 5 respectively to this report.

4.18 Where Council is satisfied possessory rights apply, the purchase price is fixed at \$7,500 plus GST, to be adjusted annually to CPI, plus other Council costs incurred in the proposed discontinuance and sale, as per Council's Discontinuance and Sale of Roads Policy.

4.19 The Owners have established possessory rights and accordingly will be offered \$8,000 plus GST (CPI adjusted), plus other Council costs incurred in the proposed Road discontinuance and sale, as per Council solicitors letter to the Owners dated 21 August 2017.

4.20 If the Road is discontinued and sold to the Owners, Council will require the Owners to consolidate the title to the discontinued Road with the title to the Owners' land within 12 months of the date of the transfer of the Road to the Owners, at the Owners' expense.

## 5. CONSULTATION AND STAKEHOLDERS

5.1 The following statutory authorities have been advised of the proposed discontinuance of the Road and have been asked to respond to the question of whether they have any existing assets in the Road, which should be saved under section 207C of the Act:

a) Council;

b) Melbourne Water;

c) South East Water;

d) Optus;

e) United Energy;



- f) Multinet;
- g) CitiPower;
- h) Telstra.

- 5.2 Council, Melbourne Water and South East Water have advised that they have no assets in or above the Road and have no objection to the proposed discontinuance of the Road.
- 5.3 Optus has advised that it has no assets in or above the Road.
- 5.4 United Energy has advised that it has an underground service cable in the Road but has no objection to the proposed discontinuance of the Road.
- 5.5 Multinet and CitiPower have advised that they have no objection to the to the proposed discontinuance of the Road.
- 5.6 Telstra has advised that it has assets in the near vicinity of the Road, but would not object to the proposed discontinuance of the Road provided the Owners call 'Dial Before You Dig' before carrying out works in the vicinity of the Road.
- 5.7 Relevant Council departments have been notified by way of internal referral. There have been no objections to the Proposal.

## **6. LEGAL AND RISK IMPLICATIONS**

- 6.1 The Road is not available for public use.
- 6.2 There is no evidence that the Road was ever used for public access purposes.
- 6.3 The Road is not considered a public highway at common law.
- 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.

## **7. FINANCIAL IMPACT**

- 7.1 Under Council's Discontinuance and Sale of Roads Policy where adverse possession of the land in the road could be achieved, Council can sell the land in the road for \$7,500 plus GST, to be adjusted to CPI annually from the date of the policy, plus other costs incidental to the discontinuance and sale process.
- 7.2 The Owners have agreed to pay \$8,000 plus GST (CPI adjusted) for the Road plus other Council costs and disbursements incidental to the discontinuance and sale of road 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 of the Road will enable the land in the Road to be re-purposed.
- 9.3 If Council resolves to discontinue and sell the Road, proceeds from the sale 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 proposed discontinuance of roads aligns with the Strategic Direction 6 Our Commitment to You in the Council Plan 2017-27 through supporting:
  - 10.1.1 transparent governance and an actively engaged community and
  - 10.1.2 a financially sustainable, high performing, well-governed organisation that puts the community first.

**11. IMPLEMENTATION STRATEGY**

**11.1 TIMELINE**

- 11.1.1 A surveyor will be engaged to prepare a title plan, consolidation plan and a gazettal plan for the land.
- 11.1.2 The public notice will invite submissions from interested persons within 28 days of publication date. The notice will be published in the Port Phillip Leader newspaper on 31 July 2018.
- 11.1.3 Any submissions received may be heard and considered at a future Council meeting.
- 11.1.4 After hearing any submissions made, Council must determine whether the Road is not reasonably required as a road for public use, in order to decide whether it should be discontinued.

**11.2 COMMUNICATION**

- 11.2.1 The Road is unconstructed and has at all times been enclosed within the property boundary of 26 Moore, St Elwood.
- 11.2.2 The Road is not considered a public highway at common law and is neither on Council's Register of Public Roads nor registered in Council's name.
- 11.2.3 The Road is however identified on title as a road and is therefore a 'right of way'.



11.2.4 Council has statutory power to consider discontinuing the Road.

11.2.5 Any interested person will be given the opportunity to make a submission and to be heard in person and have their views considered.

## **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:** 20/13/24

**ATTACHMENTS**

1. Title Plan
2. Title Search, Plan of Subdivision and Plan of Survey
3. Locality Plan
4. Site Inspection Report
5. Site Inspection Photos