



13.2 27 BLANCHE STREET, ST KILDA – REMOVAL OF LAND FROM ROAD REGISTER, CONVERSION OF LAND TITLE AND ADVERSE POSSESSION CLAIM

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

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

1. PURPOSE

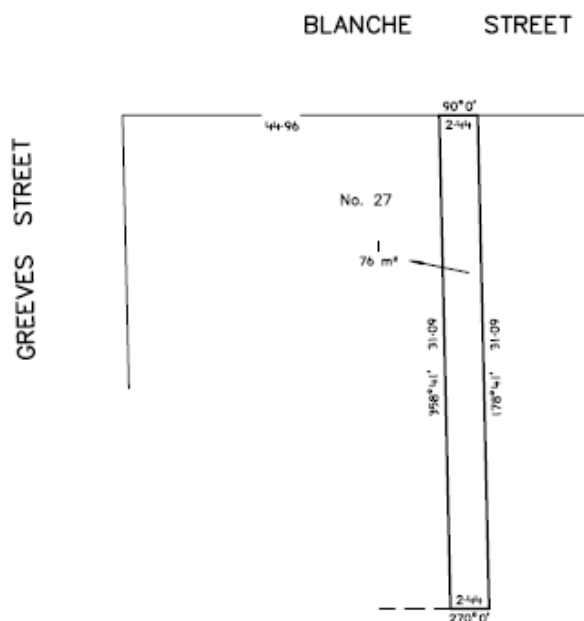
1.1 The purpose of this report is to seek approval from Councillors on the proposed removal of land parcel R3504 (Land) from Council's Register of Public Roads (Register), conversion of the title from General Law Land to the Torrens Title System and for Council to raise no objection to the adjoining owners claim for adverse possession of the Land.

2. EXECUTIVE SUMMARY

2.1 The Land is approximately 2.4 metres wide with an area of approximately 76 square metres and adjoins 27 Blanche Street, St Kilda.

2.2 The Land is included on the Register as R3504.

2.3 The Land marked "1" on the excerpt below, is registered in the name of the Council of the Borough of Saint Kilda in Book 179 Number 197. The land remains in the old form of title being General Law Land (GLL).



2.4 The Land is fully enclosed within the boundary fencing of the property at 27 Blanche Street, St Kilda (Adjoining Property), and is exclusively used by the owners of the Adjoining Property (Owners) as shown in Attachment 1.



- 2.5 The Owners initially approached Council in 2009 seeking to adversely possess the Land.
- 2.6 Officers advised the Owners that the Land was included on the Register and they would need to apply to have the road discontinued.
- 2.7 The negotiations pursued an outcome whereby the road would be discontinued and purchased by the Owners at the “adverse possession” rate of \$7,500 (indexed to CPI) in accordance with the Discontinuance and Sale of Roads Policy (2011) (Policy).
- 2.8 Officers have sought advice in respect of the status of the Land. It is concluded that the Land does not meet the common law test for “public highway” and therefore cannot be discontinued.
- 2.9 Given that the Land does not meet the common law test for a “public highway,” it is proposed that the Land will be removed from the Register. It is likely that the Owners will pursue adverse possession of the Land via an application to Land Victoria (aka the Titles Office). If this occurs, it is proposed that Council will not oppose adverse possession given that the Land has been entirely contained within the boundary of the adjoining property since the mid 1960’s.

3. RECOMMENDATION

That Council:

- 3.1 Notes that the land abutting 27 Blanche Street, St Kilda, also known as R3504 on Council’s Register of Public Roads (Register) and registered in the name of the Council of the Borough of Saint Kilda in General Law Land Book 179 Number 197 (Land) was included in the Register in 2004 when the Register was first gazetted.
- 3.2 Notes that the Land does not meet the common law test for “public highway” as it cannot be argued that the Land is reasonably required for public use nor was it expressly dedicated to the public use as a right of way and accepted by the public as a right of way by way of historical public use.
- 3.3 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 should not have been included on the Register in the first place. If the Land is not considered as a road under the common law test, it cannot be discontinued and sold.
- 3.4 Notes that the Owners initially approached Council in 2009 seeking to adversely possess the Land but did not pursue this in part due to officers advising them that the Land was included on the Register.
- 3.5 Acting under section 17(4) of the Road Management Act 2004 (Vic), resolves that the land abutting 27 Blanche Street, St Kilda, also known as R3504 on the Register, and registered in the name of the Council of the Borough of Saint Kilda in General Law Land Book 179 Number 197, be removed from the Register on the basis that the Land is not reasonably required for general public use, as:
 - 3.5.1 The Land is not a thoroughfare and has never been used for general public use, having been fully fenced within the physical boundary of 27 Blanche Street; and
 - 3.5.2 The Land is not constructed as a road and is not maintained by Council as a road.

3.6 Authorises:

- 3.6.1 the removal of the Land from the Register and Council's IntraMaps application;
- 3.6.2 officers making an application to Land Victoria to have the title converted from General Law Land to the Torrens Title System; and
- 3.6.3 no objection to the Owners claim for adverse possession of the Land when Land Victoria seeks submissions from all parties affected.

4. KEY POINTS/ISSUES

Background:

- 4.1 The Land is approximately 2.4 metres wide with an area of approximately 76 square metres and adjoins 27 Blanche Street, St Kilda.
- 4.2 The Land is included on the Register as R3504.
- 4.3 The Land is registered in the name the Council of the Borough of Saint Kilda in Book 179 Number 197. The land is GLL.
- 4.4 The Land, shown highlighted in purple on the Locality Plan in Attachment 1 is fully enclosed within the boundary of the Adjoining Property (highlighted in red). It abuts the property at 29 Blanche Street (highlighted in green).
- 4.5 The Land (highlighted in red in the excerpt below) includes a paved driveway, vegetation and a portion of the Adjoining Property's dwelling.



- 4.6 The Owners initially approached Council seeking to adversely possess the Land.
- 4.7 The Owners have provided three statutory declarations from the residents of 36, 47 and 29 Blanche Street that confirm that the Land has been fully enclosed within the boundary fencing of the Adjoining Property since "early to mid-1960's", 1983, and 1993 respectively.



- 4.8 Officers advised the Owners that the Land was included on the Register and they would need to apply to have the road discontinued.
- 4.9 Negotiations with the Owners pursued an outcome whereby the road would be discontinued and purchased by the Owners in accordance with the Policy.

Legal Status of the Land:

- 4.10 Officers have investigated the historical status of the Land and have determined that the Land was added to the Register in 2004.
- 4.11 Officers have recently sought advice regarding land with similar circumstances to the Land.
- 4.12 In determining the status of the Land, consideration must be given to its unique historical and current circumstances.
- 4.13 There are several factors that indicate that the Land may have not been validly included on the Register in 2004 and 2020 including:
- for the Land to have been validly included on the Register, it would require a declaration under section 204 of the Local Government Act 1989 (LGA). We have not been able to confirm existence of this declaration; and
 - the Land does not meet the common law test for “public highway” as it cannot be argued that the Land is reasonably required for public use, nor was it expressly dedicated to the public for use as a right of way and accepted by the public as a right of way by way of historical public use.
- 4.14 In summary, the “key issue” is whether the Land was validly added to the Register in 2004 and again in 2020.
- 4.15 Officers have also sought advice regarding the correct process for having the Land removed from the Register. Whilst there is no statutory prohibition on the removal being completed under delegation, recent case law indicates that the prudent approach is for the removal to be completed by way of Council resolution pursuant to section 17(4) of the Road Management Act 2004 (RMA).
- 4.16 Unlike other situations where land, once discontinued as a road, would then be sold by Council in accordance with the Policy, in this case it is considered that the Land should not have been put on the Register in the first place. Therefore, the road cannot be discontinued and sold to the Owners under the Policy.
- 4.17 Once removed from the Register, the Land will revert to the registered proprietor, being the Council of the Borough of Saint Kilda.
- 4.18 Therefore, the previously proposed approach for this matter is no longer viable as it does not fall within the parameters of the Policy.

Options:

- 4.19 When initiating this matter in 2009 the Owners felt they had a legitimate case to adversely possess the Land but were subsequently advised by Officers that as the Land was on the Register it could not be subject to an adverse possession claim.
- 4.20 However, given the recent advice that the Land was not validly included on the Register the possibility of an adverse possession claim should be reconsidered.
- 4.21 Advice indicates that the Owners have a good case for an adverse possession claim over the Land, and as noted above they have provided statutory declarations from



other property owners in Blanche Street confirming that the Land has been fully enclosed within the boundary fencing of the Adjoining Property as far back as the “early to mid-1960’s”.

- 4.22 Officers have advised the Owners that the Land may not have been correctly included on the Register.
- 4.23 The Owners did not pursue an adverse possession claim after first initiating this matter in 2009 in part due to Council’s advice that the Land was on the Register.
- 4.24 The Owners have indicated that they will pursue an adverse possession claim if the Land is removed from the Register.

Recommendation:

- 4.25 Given the history of the Land being fully enclosed within the boundary of the Adjoining Property since the mid 1960’s, and that previous advice to the Owners has now changed based on updated specialist advice, it is recommended that Council co-operate with the Owners if they pursue an adverse possession claim. Council can assist in this matter by:
 - removing the Land from the Register;
 - making an application to Land Victoria to have the title converted from GLL to the Torrens Title System (this is required to enable the title to be transferred); and
 - raising no objection to the Owners claim for adverse possession of the Land when Land Victoria seeks submissions from all parties affected.

5. CONSULTATION AND STAKEHOLDERS

- 5.1 Council’s Asset Management Team and Melbourne Water have advised that they have no objection to the recommended outcome.
- 5.2 CitiPower, South East Water, Optus and Multinet have advised that they have no assets in the Land and no objection to the recommended outcome.
- 5.3 Telstra has advised that it has assets in the near vicinity of the Land but does not object to the recommended outcome provided that the Owners call “Dial Before You Dig” before carrying out works in the vicinity of the Land.

6. LEGAL AND RISK IMPLICATIONS

- 6.1 Council has sought advice regarding the status of the Land.
- 6.2 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.”

7. FINANCIAL IMPACT

- 7.1 If the Land could be considered a road then as per initial negotiations the Owners would have pursued an outcome whereby the Land would be discontinued and purchased in accordance with the Policy. If the Land is adversely possessed Council will receive no consideration for the transfer of the Land.
- 7.2 Legal costs incurred to date are approximately \$12,000 plus GST.
- 7.3 Council will incur additional legal and administrative charges of approximately \$6,000 plus GST to convert the title from GLL to the Torrens Title System.



8. ENVIRONMENTAL IMPACT

8.1 The Proposal has no detrimental environmental impact.

9. COMMUNITY IMPACT

9.1 The Proposal will have no community impact as it is currently fenced and gated and provides no access to the community.

10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

10.1 The recommendation aligns with the Strategic Direction 5 - Well Governed Port Phillip in the Council Plan 2021-31 supporting 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 general 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.

11.1.3 Officers will initiate the application process to Land Victoria to have the title converted from General Law Land to the Torrens Title System.

11.1.4 It is anticipated that the Owners will make an application to adversely possess the Land after the title has been converted to the Torrens Title System and officers will confirm to Land Victoria that Council has no objection to the Owners application when it seeks responses from affected parties.

11.2 COMMUNICATION

11.2.1 The Owners will be notified of the outcome of the 4 August 2021 Council meeting.

11.2.2 The Owners will be advised that officers will commence the process to have the title converted to Torrens Title System and will be notified when the process is completed.

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.

ATTACHMENTS

1. Attachment 1 - Locality Plan
2. Attachment 2 - Photographs of 27 Blanche Street, St Kilda