



**14.3** 119 NEVILLE STREET, MIDDLE PARK - REMOVAL OF LAND  
PARCEL FROM THE ROAD REGISTER

**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 R1991 (**Land**) abutting 119 Neville Street, Middle Park (**119 Neville Street**) from Council's Register of Public Roads (**Register**).

**2. EXECUTIVE SUMMARY**

- 2.1 The Land is approximately 0.91 metres wide with an area of approximately 16.5 square metres.
- 2.2 The Land has primarily been used as a pedestrian thoroughfare between Neville Street and the backyard of the property at 272 Richardson Street. It also abuts the property at 270 Richardson but there is no evidence of use by that property.
- 2.3 It is shown as a "passage-way easement" as part of the land in Certificate of Title volume 7224 folio 704 (119 Neville Street), in favour of 272 Richardson Street.
- 2.4 It was therefore considered a road under section 3(1) of the Local Government Act 1989 (**LGA**) and included on the Register in 2004 when it was first gazetted.
- 2.5 The inclusion of a road on the Register means that it "vests" in Council. Council's interest in the Land supersedes all other interests, including the rights of the Owner.
- 2.6 By virtue of its inclusion on the Register, the Land is considered a "public road" under the Road Management Act 2004 (Vic) (**RMA**).
- 2.7 The owner of 119 Neville Street (**Owner**) approached Council with an enquiry as to the status of the land.
- 2.8 The Owner was advised that the Land was included on the Register and that in order to have it removed he would have to apply to have the road discontinued and purchase it at market value, in accordance with Council's Discontinuance and Sale of Roads Policy 2011 (**Policy**).
- 2.9 However, a further detailed review of the site has now been undertaken, including specialist legal advice to support an officer recommendation about how to proceed.
- 2.10 There are circumstances in this matter that, when combined, provide a unique case that justified Officers seeking this advice, including the additional burden of the passage-way easement on the Land, its inclusion in the Owner's certificate of title and its inclusion on the Register.
- 2.11 On completion of a comprehensive review of the relevant facts and circumstances, both historical and current, Officers propose that Council considers removing the Land from the Register on the basis that the Land is not reasonably required for public use for the reasons set out in the body of the report.



### 3. RECOMMENDATION

That Council:

- 3.1 Notes that the land abutting 119 Neville Street, Middle Park, also known as R1991 on Council's Register of Public Roads (Register), being part of the land in Certificate of Title volume 7224 folio 704, (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 (as opposed to a private laneway) and accepted by the public as a right of way by way of historical public use (as opposed to use by the adjoining owners only).
- 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, which is burdened by a passage-way easement, should not have been put 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 Acting under section 17(4) of the Road Management Act 2004 (Vic), resolves that the land abutting 119 Neville Street, Middle Park, also known as R1991 on the Register, being part of the land in Certificate of Title volume 7224 folio 704, be removed from the Register on the basis that the Land is not reasonably required for general public use, as:
  - 3.4.1 The Land is not a thoroughfare and has never been used for general public use, having been fully fenced within the physical boundary of 119 Neville Street, and only being required to provide access to one neighbour as a passageway easement marked on the certificate of title for 119 Neville Street.
  - 3.4.2 The Land is not constructed as a road and is not maintained by Council as a road. It does not connect roadways as it is a dead end and is not wide enough for vehicles to pass through.
- 3.5 Authorises the removal of the Land from the Register and Council's IntraMaps application

### 4. KEY POINTS/ISSUES

#### Land Description

- 4.1 The Land is approximately 0.91 metres wide with an area of approximately 16.5 square metres.
- 4.2 The Land, shown delineated by the red arrow on the Locality Plan in Attachment 1, abuts the following properties at:
  - 270 Richardson Street, Middle Park
  - 272 Richardson Street, Middle Park(together, the **Adjoining Properties**).
- 4.3 The Land is contained in certificate of title volume 7224 folio 204 and is known to title as "passage-way easement".
- 4.4 The Land is recorded as a road on the Register as Right of Way no. R1991.
- 4.5 As the Land is recorded on the Register, it is considered a "public road" for the purposes of the RMA.



- 4.6 The Land is a fully constructed footpath and is surrounded by fences approximately 1.8 metres on the east and west sides.
- 4.7 A gate to the south side has been erected by the Owner and is unlocked.
- 4.8 The Land has been used primarily as pedestrian access to the adjoining property at 272 Richardson Street via a gate at the north end.

### **Background**

- 4.9 The matter was initiated when the Owner approached Council with an enquiry as to the status of the land.
- 4.10 The Owner was advised that the Land was included on the Register and that in order to have it removed he would have to apply to have the road discontinued and purchase it at market value, in accordance with the Policy.
- 4.11 The Owner questioned the appropriateness of the Land being included on the Register and Officers subsequently undertook a detailed review of the matter.

### **Findings**

- 4.12 Officers have investigated the historical status of the Land and have determined that the Land was added to the Register in 2004.
- 4.13 In determining the status of the Land, consideration must be given to its unique historical and current circumstances.
- 4.14 There are several factors that indicate that the Land may not have been validly included on the Register which include the following:
  - For the Land to have been included on the Register it would require a declaration under section 204 of the LGA. We have not been able to confirm existence of this declaration.
  - If the Land was validly added to the Register, the easement would have been extinguished at that time.
  - 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 (as opposed to use as a private laneway) and accepted by the public as a right of way by way of historical public use (as opposed to use by the adjoining owners only).
  - Merely meeting the definition of a road under section 3 of the LGA is not sufficient reason for the road to be retained on the Register if, in reality, the current circumstances of the Land mean that it is not “reasonably required for public use”. Use by one adjoining property owner does not constitute “public use”.
- 4.15 The Land is not a thoroughfare and has never been used for general public use. While it is used by one neighbour at the rear of 119 Neville Street that is not enough to satisfy a requirement for public use.
- 4.16 The Land is not constructed as a road and is not maintained by Council as a road. It does not connect roadways as it is a dead end and is not wide enough for vehicles to pass through.



- 4.17 In summary, the “key issue” is whether the Land was validly added to the Register. The creation of a private carriageway easement over the Land is not, of itself, evidence that the Land was required for general public use.
- 4.18 Unlike other situations where a road, once discontinued, would then be sold by Council, in this case it is considered that the Land, which is burdened by a passage-way easement, should not have been put 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. Therefore, once the Land is removed from the Register, it will revert to the Owner and remain burdened by the passage-way easement.
- 4.19 Officers have also considered 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 RMA.
- 4.20 In light of the above, Officers recommend that Council:
- Makes a determination that the Land is not reasonably required for general public use for the reasons set out in this report; and
  - Proceeds to make the decision for removal of the Land from the Register pursuant to section 17(4) of the RMA by way of Council resolution.

## 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 proposed removal of the Land from the Register.
- 5.2 External utility suppliers have not been consulted as the proposed removal of the Land from the Road Register does not alter its physical status. The existing easement on title will remain.

## 6. LEGAL AND RISK IMPLICATIONS

- 6.1 Officers have sought specialised legal opinion from its solicitors 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”.
- 6.3 Under the RMA, Council has the power to remove the Land from the Register, on the basis that it is not reasonably required for general public use, for the reasons set out in this report.

## 7. FINANCIAL IMPACT

- 7.1 If the Land could be considered a road, and the Owner applied to have it discontinued and purchase at market value, in accordance with the Policy, the estimated market value is \$211,859 plus GST. This estimate is based on the current Capital Improved Value of 119 Neville Street effective 1 July 2020.
- 7.2 But as earlier mentioned, unlike other situations where a road, once discontinued, would then be sold by Council, in this case it is considered that the Land, which is burdened by a passage-way easement, should not have been included on the



Register. If the Land is not considered as a road under the common law test, it cannot be discontinued and sold.

7.3 Legal costs incurred to date are approximately \$6,900.

**8. ENVIRONMENTAL IMPACT**

8.1 The proposal has no detrimental environmental implications.

**9. COMMUNITY IMPACT**

9.1 Removal of the Land from the Road Register will have no community impact as it is currently fenced and gated and provides no general community access

**10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY**

10.1 The recommendation aligns with the Strategic Direction 6 Our Commitment to You in the Council Plan 2017-27 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 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.

**11.2 COMMUNICATION**

11.2.1 The Owner will be notified of the outcome of the 2 June 2021 Council meeting.

**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:** 78/12/1991

**ATTACHMENTS** 1. Attachment 1 - Locality Plan