

1.4 CARPARK ADJOINING 12 TO 22 ATHERTON ROAD, 13 CHESTER STREET, 6 STATION STREET AND 2 TO 4 STATION STREET, OAKLEIGH

Responsible Director: Peter Panagakos

RECOMMENDATION*That Council:*

1. *Acting under section 204(1) of the Local Government Act 1989 (Vic) ("the Act") resolves to commence the statutory procedures to declare the whole of the land identified as Road R1 on plan of subdivision LP55139 in certificate of title volume 8389 folio 645 ('Road'), shown shaded in Attachment 1 to this report, to be a public highway for the purposes of the Act ("the Proposal").*
2. *In accordance with section 207A of the Act, pursuant to section 223 of the Act directs that public notice of the Proposal is given by:*
 - a. *publishing the notice in a daily newspaper and on Council's website; and*
 - b. *providing a copy of the public notice to all adjoining property owners,**from 14 November 2022, inviting submissions on the Proposal.*
3. *Authorises Council's Chief Executive Officer or her delegate to undertake the administrative procedures necessary to enable Council to carry out its functions under section 223 of the Act in relation to the Proposal.*
4. *Appoints a Committee of Council, comprising of the Mayor and Oakleigh Ward Councillors, to meet to consider the submissions received by the closing date for submissions specified in the public notice referred to in item 2 above, and to hear and consider any submitters requesting to be heard in accordance with section 223 of the Act at 6:00pm on 14 February 2023 at the Monash City Council Civic Centre, 293 Springvale Road Glen Waverley, or such other date and time determined by the Chief Executive Officer or her delegate.*
5. *Notes that, following the meeting referred to in point 4 above and consideration of any submissions, the Committee of Council will provide a report to Council on its proceedings, including a summary*

of the submissions and the hearing of any submitters, to inform Council's decision on whether or not to proceed with the Proposal.

INTRODUCTION

The purpose of this paper is to update Council on the status of land at the rear of 12-18 Atherton Road Oakleigh and to propose a way forward.

BACKGROUND

Council has been involved in a longstanding dispute with the owner of a laneway and carparking area situated at the rear of 12-18 Atherton Road, Oakleigh. In this report Officers refer to the whole of the land comprising the laneway and carparking areas as the "Carpark" as highlighted in Attachment 1.

Land Status:

- The Carpark is described on Certificate of Title Volume 8389 Folio 645, (Attachment 2).
- The Carpark was originally created and identified as 'Road R1' on the original plan of subdivision No. LP55139 dated 8 March 1962 (Attachment 3).
- Council records indicate that Council constructed the Carpark.
- The Carpark is a public road listed as 'Laneway 224' on the Register of Public Roads and Council has maintained the Carpark as a public road for many years.
- The Carpark is set apart for easements of right of way and drainage.
- The Carpark has historically been open to the public and is used by owners and occupiers of the adjoining lots daily.
- The land comprising the Carpark was purchased in January 1989 by the owner of 16-18 Atherton Rd which is a lot adjoining the Carpark – Landjimea Nominees Pty Ltd (The Registered Proprietor).

DISCUSSION

Council's management of public spaces, including roads, but must meet current service needs and community expectations.

Land was often set aside through the subdivision process for a particular purpose, such as access or drainage. These parcels of land are expected to be accessible to the public.

Current Status

The ownership and management of the Carpark has long been the subject of ongoing disagreement with the Registered Proprietor.

The disagreement concerns whether the Carpark is:

- private land exclusively owned by the Registered Proprietor – in which case the Registered Proprietor is entitled to exclusive occupation and could erect whatever barriers it sees fit to prevent others from accessing the Carpark; or
- a road which is open to the public as of right – in which case the Registered Proprietor could not prevent access to the Carpark and Council has statutory powers, duties and functions to manage the Carpark (including the power to remove barriers/obstructions).

The Registered Proprietor asserts that it has good title to the Carpark and is therefore entitled to exclusive occupation. The most recent issues regarding access to the Carpark began in December 2021 when, in purported reliance on its ownership rights, the Registered Proprietor erected barriers in the Carpark to prevent access to it. This resulted in the adjoining property owners at 2-4 Station St, 12 Atherton Rd, 12A Atherton Rd, and 14A Atherton Rd seeking Council assistance to access the land and the rear of their properties.

Council has long, and consistently, asserted that the Carpark must be publicly accessible on the basis that it is a “road” under the Local Government Act 1989 (“the Act”) and a “road” and a “public road” for the purposes of the Road Management Act 2004. Accordingly, Council removed the barriers that the Registered Proprietor installed to prevent access to the Carpark as part of the ongoing dispute with the Registered Proprietor regarding access to, and management of, the Carpark.

The Registered Proprietor asserts that the Carpark is not a road or a public road and that Council has no role to play in the management of the Carpark. On that basis, the Registered Proprietor asserts that Council did not have the power to remove the barriers or to continue managing the Carpark.

The most recent discussions with the Registered Proprietor since December 2021 are ongoing, but the parties have been unable to come to an acceptable resolution which maintains community amenity and preserves public access to the Carpark. Owners and occupiers of neighbouring properties adjacent to the Carpark have, for a number of years, complained to Council about inappropriate parking and restricted access to the Carpark. These complaints have escalated in recent months following the Registered Proprietor’s efforts to exclude them from accessing it.

In recognition of the long established use of the Carpark by vehicular traffic and Council’s historical management of the land as a public road, it is considered that the area under discussion and shown in Attachment 1 of this Report is reasonably required for public use. The proposal to declare the whole of the land shown in Attachment 1 to be a public highway would secure ongoing use

of the Carpark by the public and provide certainty for Council's future management of the Carpark.

This will remove any doubt as to the status of the Carpark, which will enable Council to address issues associated with access to the Carpark and to administer and enforce parking restrictions in the Carpark to see to its proper and efficient use.

Section 204(1) of the Act allows Council to declare a road to be a "public highway" for the purposes of the Act. A public highway is a road which is open to the public for traffic as of right, irrespective of whether the road is in fact open to traffic.

In accordance with section 207A(c) of the Act, before declaring a road to be a public highway Council must undertake a public consultation process in accordance with section 223 of the Act.

Section 223 of the Act sets out a public submission process which requires Council to invite surrounding property owners and the community to provide input regarding the proposal to declare the Carpark to be a road which is open for public use. All submitters must be given an opportunity to be heard upon request. Council must consider all of the submissions that it receives before deciding to make the declaration.

If, after considering all of the submissions, Council declares the Carpark to be a public highway, the Registered Proprietor would be unable to restrict access to any part of the Carpark and Council would be able to actively care for and manage the Carpark with clarity, for Council and for the community, as to Council's powers, duties and functions in relation to the Carpark.

POLICY IMPLICATIONS

There are no Policy Implications associated with this Report. Any actions on behalf of Council must be discharged in accordance with legislation.

CONSULTATION

In accordance with section 223 of the Act, a public notice of the Proposal will be published in a daily newspaper and on Council's website. Notices will also be sent to the owners and occupiers of the properties adjoining the Carpark to ensure that they are given an opportunity to be heard.

The public notice will invite submissions on the Proposal and submitters may request to be heard by a Committee of Council before a decision is made.

A Committee comprising the Mayor and Oakleigh Ward Councillors will be convened to consider the outcome of the public notice and to hear any submitters who requested to be heard and consider their submissions. The Committee will report back to Council with a recommendation for decision on the Proposal.

HUMAN RIGHTS CONSIDERATIONS

The Proposal engages the right not to be deprived of property, other than in accordance with law (see section 20 of the Charter of Human Rights and Responsibilities Act 2006).

Given that Council will be exercising its statutory powers under section 204(1) of the Act, in accordance with the requirements of the Act, officers do not consider that the Proposal represents an impermissible burden on that right.

GENDER EQUITY ASSESSMENT

A Gender Impact Assessment has not been undertaken for this matter.

FINANCIAL IMPLICATIONS

If, conditional on compliance with the statutory processes and a further report to Council, Council declares the Carpark to be a public highway, the declaration would be published in the Government Gazette. The publication of a Gazette notice can be undertaken within the current officer resource and at a cost of less than \$100. A surveyor would need to be engaged to create the new title plan for the land to be declared as public highway and this should be less than \$2,000.

It is not expected that any notable change will be made to Council's financial commitments in connection with the maintenance of the Carpark, since Council is already responsible for its maintenance.

CONCLUSION

Officers recommend that Council commences the statutory process under the provisions of section 204(1), 207A(c) and 223 of the Local Government Act 1989 to declare the land - which is identified as Road R1 on title and is used as a carpark – as a public highway to formalise the status of the Carpark and finally resolve any ongoing uncertainty regarding the matter.

Attachment 1 – Subject Land



Carpark adjoining 12 to 22 Atherton Road, 13 Chester Street, 6 Station Street and 2 to 4 Station Street, Oakleigh

Attachment 2 - Certificate of Title

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The Victorian Government acknowledges the Traditional Owners of Victoria and pays respects to their ongoing connection to their Country, History and Culture. The Victorian Government extends this respect to their Elders, past, present and emerging.

REGISTER SEARCH STATEMENT (Title Search) Transfer of Land Act 1958

VOLUME 08389 FOLIO 645

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LAND DESCRIPTION

Road R1 on Plan of Subdivision 055139.
PARENT TITLE Volume 08347 Folio 931
Created by instrument B404577 17/04/1962

REGISTERED PROPRIETOR

Estate Fee Simple
Sole Proprietor
LANDJIMEA NOMINEES PTY LTD of 15 RILEY STREET OAKLEIGH SOUTH
P139632A 19/04/1989

ENCUMBRANCES, CAVEATS AND NOTICES

Any encumbrances created by Section 98 Transfer of Land Act 1958 or Section 24 Subdivision Act 1988 and any other encumbrances shown or entered on the plan or imaged folio set out under DIAGRAM LOCATION below.

DIAGRAM LOCATION

SEE LP055139 FOR FURTHER DETAILS AND BOUNDARIES

ACTIVITY IN THE LAST 125 DAYS

NIL

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