

8.2 PROPOSED DECLARATION OF PUBLIC HIGHWAY - PART WANDONG AVENUE

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Attachments: 1. Outline of the Road and the Land
2. Extension Beyond Southern Title Boundary

SUMMARY

The northern section of Wandong Avenue adjacent to Rail Street is located on land which, on the Certificate of Title, is in private ownership forming part of a lot which is land left over from a 1903 subdivision. The land can be declared by Council for public use for the purposes of a road.

The land under the constructed road vests in Council under legislation, however the ownership and management of the land on both sides of the road needs to be resolved to secure the land for future municipal and public use.

The transfer to Council ownership on title of the land currently vested in private ownership would provide opportunity for future road expansion and improvements, pedestrian infrastructure and would include land which has been developed for community use as part of the Wandong Community Hall.

Previous Council reports of 15 October 2018 and 18 February 2019 discussed these issues around Wandong Road and the surrounding land and the proposed declaration of the road to be a public highway. The subsequent resolutions of those two meetings were as follows:

15 October 2018**THAT Council:**

1. Propose to declare the northern section of Wandong Avenue, Wandong (adjacent to Rail Street), and as shown on Attachment 1 of this report, as a public highway.
2. Authorise the giving of Public Notice under Section 223 of the *Local Government Act 1989* of the intention to declare the section of Wandong Avenue, as shown on Attachment 1, a public highway under Section 204(1) of the *Local Government Act 1989*. The Public Notice would be published in a local newspaper and on Council's website.
3. In accordance with Section 223 of the *Local Government Act 1989*, receive written submissions and hear from submitters at a meeting of the Community Questions and Hearings Committee.

PROPOSED DECLARATION OF PUBLIC HIGHWAY - PART WANDONG AVENUE (CONT.)

18 February 2019

THAT Council:

1. Determine that the area shown in Attachment 1 of this report, being the northern section of Wandong Avenue adjacent to Rail Street, is reasonably required for public use, both for immediate vehicle and pedestrian use and to allow for future planning for public, Council and utility uses and services.
2. Authorise the giving of public notice to give effect to Recommendation 1, by the publication of a notice of declaration of public highway under section 204(1) of the *Local Government Act 1989* of the area shown in Attachment 1 of this report in the *Victoria Government Gazette*.
3. After the giving of public notice, authorise the preparation of a title Plan for the land declared as public highway and application by Council to become the registered proprietor of the land declared as public highway, as shown in Attachment 1 of this report.

Since the Council Meeting of 18 February 2019, it has come to light that Officers inadvertently did not provide all parties the opportunity to be heard in accordance with Section 223 of the *Local Government Act 1989* and that a new resolution on the matter of declaring Part Wandong Road a Public Highway will be required after submitters have been heard at the next Community Questions and Hearings Committee in May. Council must reconsider the matter afresh without an existing resolution in place. A new resolution will be formed following the Community Questions and Hearings Committee meeting.

As it stands the current Council resolution cannot be acted upon without having provided procedural fairness as is required by the Act, requiring Council to consider the proposal anew.

This report discusses this matter as outlined above and proposes a way forward to ensure that the submissions are treated in accordance with the Act and Council can advance to make a new resolution once they have considered all submissions, written and verbal.

RECOMMENDATION

THAT Council:

1. Reconsider the decision made at the Ordinary Council Meeting of 18 February 2019, Item 2, which gives effect to the declaration of public highway of part of Wandong Avenue (as shown in Attachment 1), noting that Council cannot proceed with the resolution having not fulfilled its requirements under the *Local Government Act 1989* to provide opportunity for submitters to be heard in accordance with section 223 of the *Local Government Act 1989*.
2. Officers invite the submitter and all other objectors who wished to be heard in support of their submission made in regards to the proposed declaration of

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public highway of part Wandong Avenue to the meeting of the Community Questions and Hearing Committee meeting scheduled for Monday 13 May 2019.

3. Hear the submitters at the Community Questions and Hearings Committee and report back to Council with a full representation of the submitter's views and concerns.
4. Officers prepare a report for the Ordinary Council meeting 20 May 2019 which makes recommendations in relation to the proposed declaration of public highway of part Wandong Avenue, as shown in Attachment 1, and which takes into consideration the submission to and report from the Community Questions and Hearings Committee.

BACKGROUND

This report refers specifically to a small section of Wandong Avenue adjacent to Rail Street. On title, the land under the section of Wandong Road and to the north and south of the constructed road is part of Lot 1 on Title Plan 81118W, Volume 02997 Folio 282. This land is one of a number of lots in this Certificate of Title.

Records of the land title indicate that the various lots along Wandong Avenue were created in 1902 and started to be sold off by the owner from 1903 onwards. Upon the death of the owner, the remaining land was then bequeathed to the owner's legal personal representatives in 1926. There appears to have been no sales activity on the title since the transfer to the representatives.

The land under the section of Wandong Avenue adjacent to Rail Street (opposite the Wandong Community Hall) has been used as a public highway for a significant period of time, likely well before its construction around 1970, and is approximately 50m in length. Given the length of time that the road has been used and accepted by the public as a road, the road is considered to be reasonably required for general public use and is also considered to be a public highway at common law.

This section of road, along with the balance of Wandong Avenue, is listed on Council's Register of Public Roads. Therefore, under the *Road Management Act 2004*, the road vests in the municipal council of the municipal district in which the road is located. This is regardless of Council not being the registered proprietor on title.

An approximation of the area of land under discussion in this report is shown in Attachment 1. Wandong Road (constructed) is referred to as the Road and the land to the north and south of the constructed road as the Land.

ISSUES AND DISCUSSION

In consideration of the expected growth around Wandong and subsequent increase in vehicle and pedestrian traffic, it is prudent to plan for future infrastructure demands by an application to transfer all the Land to Council. The transference of all the Land will also resolve speculation around the Road finishing boundaries (along both sides of this section of constructed road).

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The inclusion of the land in the road title will provide scope to allow for future widening of the road, intersection controls and a footpath on the southern side of Wandong Avenue down to Rail Street where the bus stop is located. The southern side of Wandong Avenue has the space for a graduated all abilities footpath between Wandong Avenue and Rail Street.

The land to the south of Wandong Avenue would also allow for a safer and wider pedestrian path to be constructed away from the thoroughfare of the Road and, if considered of community benefit, potential for seating to be placed in this area.

The development of the Wandong Community Hall has over time resulted in the hall grounds and infrastructure expanding beyond the boundary of Council owned land. Attachment 2 shows the expansion beyond the legal boundary. The transfer of the land would allow the opportunity for a realignment of boundaries between the land and the title on which the Wandong Community Hall is located, thereby correcting this anomaly of the hall and surrounds expanding beyond the title boundary.

The neighboring properties at 17 Wandong Avenue and 23 Rail Street have incorporated part of the southern section of the land along Wandong Avenue into their private yards resulting in action by Council officers to clarify the correct position of property boundaries, fencing and occupation of the land.

Should Council wish to plan for future use and infrastructure on the land adjacent to Wandong Avenue for footpaths, kerb and channel, road widening etc., it is in Council's best interest to pursue the transfer of the whole of the land into a road title.

This may be achieved by the declaration of the land and road as a public highway under section 204(1) of the *Local Government Act 1989*, subject to the support of Council and the undertaking of the required statutory processes. Conditional on the outcome of the statutory processes and subsequent support of Council, an application can be made to the titles office for registration of a certificate of title for the road in Council's name. The application would be made under section 54 of the *Transfer of Land Act 1958*.

Subsequently, enforcement action may be needed to require the two adjacent landowners to remove the fencing which has been erected on the Land. The enforcement action to remove the fence can be taken under the *Road Management Act 2004*, the *Local Government Act 1989* and Council's Local Law 1. Council can also recover the costs of having to remove the fence, should the fence not be removed when notice is given to do so.

CONSULTATION

In order to enable the application to transfer the land encompassing the road to Council and have the title registered in Council's ownership, a number of statutory processes must be undertaken.

Certain decisions of Council are required to be considered according to the formal process under section 223 of the *Local Government Act 1989*. These include the proposed declaration of a public highway.

PROPOSED DECLARATION OF PUBLIC HIGHWAY - PART WANDONG AVENUE (CONT.)

In accordance with the resolution carried at the Council Meeting of 15 October 2018, Public Notice was given in the North Central Review on Tuesday 30 October 2018, inviting submission up to Friday 30 November 2018. Written submissions would be received and submitters able to present to a meeting of the Community Questions and Hearings Committee (the Committee) if they so wished.

Whilst not required by the Section 223 process, in the interests of transparency letters were also sent to adjacent land owners and occupiers advising of the proposal and the public notice.

Council has established the Community Questions and Hearings Committee to hear and report to Council on submissions received by Council under section 223 of the *Local Government Act 1989*. In this instance, the submissions are in relation to the proposed declaration of public highway under section 204(1) of the *Local Government Act 1989*.

In response to the public notice, there were five submissions received, with one objection to the proposal and four responses supporting the proposal. The person making objection requested to be heard at a meeting of the Community Questions and Hearings Committee. Correspondence acknowledging receipt of the objection and advising of the process to book a time to attend the Community Questions and Hearings Committee meeting in support of their submission was mailed to the submitter on 22 November 2018.

Council inadvertently addressed the letter to the submitter to an old residential address, and as such the submitter did not receive the invitation, and therefore did not have the opportunity to attend the meeting as required under section 223 of the *Local Government Act 1989*.

As a result of not receiving the invitation to attend the December meeting of the Committee, the submitter did not receive procedural fairness by being able to make their submission and present their views in person, which should then have been taken into consideration in the subsequent resolutions of Council at the meeting of 18 February 2019.

Prior to the publication of the Public Notice of the declaration of public highway being made in the Victorian Government Gazette, it became known that the submitter who made the objection did not receive the invitation to the December Committee meeting. The gazettal notice has therefore not been published.

It is imperative that, in the interests of fulfilling Council's statutory procedural obligations and to ensure transparency, Council makes a newly considered decision regarding the proposed declaration of public highway after the submitter has had the opportunity to make their submission to the Committee and for the Committee to consider the submission anew.

This will ensure that the matter is considered with impartiality and openness.

FINANCIAL, RESOURCE AND ASSET MANAGEMENT IMPLICATIONS

The application to transfer the title to Council ownership must be undertaken by a legal representative due to the registration and representation requirements of the titles office for the transfer of titles.

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Enforcement action may be able to be completed within existing resources and, should Council need to remove the fence, the costs associated with removing the fence can be recovered under the provisions of the *Local Government Act 1989*.

POLICY AND LEGISLATIVE IMPLICATIONS

The *Local Government Act 1989* and *Road Management Act 2004* contains direction in the form of objectives and functions of Council around promoting and advocating in the best interests of its municipal district.

SUSTAINABILITY IMPLICATIONS (SOCIAL AND ENVIRONMENTAL)

There are no known environmental impacts of the proposal.

There are implied social benefits which would result from the transfer of the road and land as one parcel into Council's ownership. These include the future ability to construct a higher service level of footpath/s and road infrastructure for the community, both for safety reasons and to enable a more 'walking friendly' environment and a prospective pedestrian rest area.

There is also the possibility of being able to align boundaries to reflect the actual footprint of the Wandong Community Hall and secure this land for the community.

CHARTER OF HUMAN RIGHTS IMPLICATIONS

The rights protected in the *Charter of Human Rights and Responsibilities Act 2006* were considered in preparing this report and it's determined that the subject matter does not raise any human rights issues.

OFFICER DECLARATION OF CONFLICT OF INTEREST

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

CONCLUSION

The discrepancy surrounding the ownership and management of the land abutting the northern section of Wandong Avenue has led to conflict and anomalies in the way the land has been used, developed and fenced by various community and private parties.

The declaration of all of the area, being the constructed road and abutting land as shown in Attachment 1, as a public highway would give clarification and certainty for Council to plan and better manage the area for the local community.

To ensure a fair, transparent and compliant process, the error of omission of the opportunity for the submitter to present to the Community Questions and Hearings Committee must be remedied by the submitter being heard at a meeting of the Committee. This must be done without a final resolution in place regarding Council's intention for the land.

A reassessment of the proposal and final resolution for the proposed declaration of public highway, part Wandong Avenue, can be made at a future Council meeting with all parties having been represented and provided with the opportunity to make a direct submission in support of their views.

MITCHELL SHIRE COUNCIL

Council Meeting Attachment

GOVERNANCE AND CORPORATE PERFORMANCE

15 APRIL 2019

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**PROPOSED DECLARATION OF PUBLIC
HIGHWAY - PART WANDONG AVENUE**

Attachment No: 1

Outline of the Road and the Land

Attachment 1
Road and Land outlined in red



MITCHELL SHIRE COUNCIL

Council Meeting Attachment

GOVERNANCE AND CORPORATE PERFORMANCE

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**PROPOSED DECLARATION OF PUBLIC
HIGHWAY - PART WANDONG AVENUE**

Attachment No: 2

Extension Beyond Southern Title Boundary

Area of Wallan Community Hall which has extended out beyond the title boundary of Council owned land (constructed and grounds)

