

# Road Discontinuance Policy

May 2023



*Lifestyle capital of Victoria*



## Contents

1 Purpose and Intent .....	3
2 Scope .....	3
3 Definitions.....	4
4 Authorisation .....	4
5 Policy.....	5
5.1 Background .....	5
5.2 Principles.....	5
5.3 Governance Statement .....	6
5.4 Initial Investigation .....	7
5.5 Engagement .....	7
5.6 Valuation of the Land.....	7
5.7 Prioritisation .....	8
5.8 Price and Costs.....	8
5.9 Adverse Possession.....	9
5.10 Conditional Agreements .....	9
5.11 Sale Conditions .....	9
5.12 Terms Payment .....	10
6 Roles and Responsibilities.....	10
7 Policy non-compliance.....	10
8 Administrative Matters.....	10
9 Related Documents .....	11
10 Implementation of the Policy .....	11
10.1 Financial implications.....	11
11 Document History.....	11

## 1 Purpose and Intent

Frankston City Council (Council) owns or controls property for the benefit of the community. Council is committed to the responsible management of its assets and resources.

This policy details Council's approach to the discontinuance and disposal of roads.

This policy documents how the discontinuance and disposal of roads that are *no longer reasonably required for public use and access*, will be processed in a transparent and equitable manner.

The Policy supports the guiding values of the Property Strategy including:

- financial stability
- legal and statutory compliance
- consistent and transparent management

The Policy supports Council's Mission and Vision as it is consistent with the Frankston Council Plan and Budget 2021-2025: Theme 6: Progressive and Engaged City, Initiatives, Ensure sustainable financial management and strategic allocation of resources to deliver planned infrastructure and services.

## 2 Scope

This policy applies to all roads as defined below:

- "Road" is defined in Section 3 of the *Local Government (Act) 1989*. The term "road" includes but is not limited to, a right of way, street, easement of way or footpath.

These roads include but are not limited to:

- Vehicular or pedestrian roads and rights of way
- Constructed trafficable roads, where part of those roads may be no longer reasonably required for public use
- Unconstructed roads

This policy does not relate to:

- the closure of roads to traffic under Schedule 11 of the Act
- the sale and disposal of assets that are not roads
- ad hoc permits over roads
- projections over roads, including aerial encroachments
- licencing of land
- roads closed pursuant to the *Major Transport Projects Facilitation Act*

### 3 Definitions

In this policy the following words have the following meanings:

**“Council”** means Frankston City Council

**“discontinuance”** means the exercise of power under clause 3 of Schedule 10 of the *Local Government Act 1989* with respect to a road and the vesting and removal of the status under 24A of the *Subdivision Act 1988*

**“encroachment”** means an intrusion onto another’s property rights by building or occupation

**“Market Value”** means the value as determined by a qualified valuer taking into account:

- The land area and dimensions of the land
- The highest and best potential use of the land
- Increase in value to any abutting property as a result of the transfer of the extra land - as a before and after valuation

**“obstruction”** means the placement of a fence, gate, equipment or any other matter or material to prevent unlawful access to a road

**“road”** has the same meaning as set out in Section 3(1) of the *Local Government Act 1989* and includes but is not limited to, a right of way, street, easement of way or footpath.

### 4 Authorisation

This Policy is managed by the Procurement, Property and Risk Department, and is approved by Frankston City’s Mayor and Council’s Chief Executive Officer (CEO):

-----

Mayor, Frankston City

-----

CEO, Frankston City Council

in accordance with Frankston City Council resolution at its Ordinary Council meeting of xxxx.

## 5 Policy

### 5.1 Background

Council receives applications from property owners seeking to discontinue roads that appear unused, with a view to purchasing the land once the road status has been removed. These are generally from adjoining property owners.

Council has authority under the relevant provisions of the *Local Government Act 1989* (“the Act”) to discontinue a road where Council forms the opinion that the road is no longer reasonably required for public use. Council must be satisfied that the public no longer reasonably require use of the road before deciding to approve a road discontinuance proposal. Roads proposed for discontinuance must first be removed from the public road register.

Unconstructed roads typically arise from earlier private subdivisions of broad acres into house blocks and the creation of access roads from the original title. When individual house blocks were sold and removed from the parent title, roads and reserves remained, with public access rights remaining. They also commonly arise from former night cart lanes that are no longer in use, and where the land has been fenced in with the adjoining property.

Under section 7B of the *Limitations of Actions Act 1958*, a person cannot claim land by adverse possession in respect of Council titled land, this includes roads. Not all road or reserve property is held in Council name.

Roads enclosed within abutting properties for more than 15 years may be claimed by adverse possession. However, the road status is not removed unless occupation of more than 30 years can be established, if not held in Council’s name<sup>1</sup>. The original property owner is precluded from reclaiming ownership. Due to the cost of claiming adverse possession, and time involved, sale by Council can be a cost effective means of acquiring ownership by interested parties, without relying on expensive and time consuming legal processes.

### 5.2 Principles

As part of the road network, rights of way and laneways were developed to satisfy an historical need and were documented in early plans of subdivision. In most cases this land is still required for access or other strategic purposes, in these cases Council will ensure the land remains open and available to the public and is kept free of encroachment.

---

<sup>1</sup> Please note this is a Common Law position



Council will retain public ownership of roads where:

- they continue to add character to the public realm;
- they have a future strategic purpose or there may be future opportunity to activate the road;
- it may improve the walkability and permeability of the public realm;
- they improve the amenity of the area;
- they provide options for improved environmental outcomes;
- balances are required between competing needs (private vs public ownership);
- the historical element of the road continues to be celebrated.

The Council may support the discontinuance and sale of a road for reasons including the following:

- the road is not required for public access;
- it may result in amenity improvement, particularly where the land becomes a haven for anti-social behaviour, or a dumped rubbish location;
- it may result in a safer and more secure neighbourhood by reducing access points to properties;
- it may result in a better use of land;
- Council, on behalf of the community, may obtain a fair and equitable return on land that was originally set aside for a public purpose;
- Council will reduce its maintenance burden;
- it may rectify an anomaly which will result in greater certainty of property ownership and associated rights;
- the land has no strategic value to Council;
- the road has no heritage value;
- the road is not required to maintain the urban character of the area;
- the road is not required for access to other premises

### 5.3 Governance Statement

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 interests of the wider community
1. Where Council has undertaken the statutory procedures for road discontinuance and considered any submissions received, it may decide to proceed with road

discontinuance and sale for all or any part of the subject road or may reject the proposal in its entirety.

## 5.4 Initial Investigation

As part of the process for consideration of road discontinuances, initial investigation will be undertaken prior to making a recommendation on whether to refer the matter to Council.

In some cases this investigation may include informal consultation with relevant property owners. If this process raises concerns the Manager Procurement, Property and Risk will decide:

- to accept the concerns and take no further action in respect of investigation of a road discontinuance process; or
- that the concerns can be appropriately addressed or have insufficient merit and therefore the investigation can continue, and if appropriate referred to Council for consideration

## 5.5 Engagement

Following the completion of the initial investigation a recommendation may be made to Council to consider commencing a formal road discontinuance process under *Local Government Act 1989* (Clause 3, Schedule 10).

If a formal process is commenced, Community engagement with affected property owners (generally abutting properties) will be undertaken in accordance with Council's Community Engagement Plan.

## 5.6 Valuation of the Land

Where it is proposed that land is to be sold as a result of road discontinuance the following will apply:

- The land will be valued by Council's appointed Valuer at the current market value determined on a before and after basis of methodology. The value of the land is determined by assessing the value of the property before the land is acquired, and the value of the property after the land is acquired.
- The valuations under this policy will reflect the additional value of the subject parcel of land will add to the value of the existing property of the potential purchaser and will take into consideration the market value of the land within the immediate locale having regard to the location of the subject land and characteristics including whether the land:
  - Is incapable of being developed in its own right given the small land area;

- Is only marketable to the adjoining owners;
- Is long and narrow;
- Is encumbered with an easement; and/or
- Will facilitate future development (e.g. Private open space).

## 5.7 Prioritisation

Priority order will be given to road discontinuances that are required for Council use/benefit or to address an inherent risk issue. Discontinuance facilitates the removal of obligations on Council under the *Road Management Act 2004* and in certain circumstances can provide additional land for community use by creating further public open space.

Council frequently receives requests for road discontinuances from persons wishing to develop their land and maximise their return by including adjacent road reserves. This of itself does not constitute justification for a discontinuance. Depending on the nature of the proposed development there may be sufficient cause to consider a discontinuance in line with Council's 'Draft Occupations of Council Land for Private and Commercial Purposes' Policy. Unless such development achieves an overarching Council strategic objective such requests will be given lower priority.

## 5.8 Price and Costs

Where it is proposed that the land is to be sold after a road discontinuance, the following will apply:

- The Manager Procurement, Property and Risk may consider that the land to be sold will increase the value of the purchasers' land holding by facilitating the potential for future development. In these circumstances the purchase price will be determined by negotiation between Council and the purchaser, with Council seeking to maximise the financial return for the land being sold.
- In addition to the price, the purchaser will be required to meet all costs including surveying and conveyancing.
- Council may, at its discretion, transfer the land at less than the market valuation if it deems the land transfer will serve some "public purpose". This includes situations where an inherent risk is present in respect of the land.
- Where there is two or more abutting property owners seeking to purchase the same land Council will decide on the allocation of the land.



## 5.9 Adverse Possession

The Manager Procurement, Property and Risk may consider that the land could be acquired by adverse possession. The purchaser must therefore demonstrate to the Manager Procurement, Property and Risk that an adverse possession claim can be established.

In these cases, to ensure equitable treatment of potential claimants and in consideration of the costs and timing of otherwise making a formal application to Land Use Victoria, Council may consider undertaking a discontinuance.

## 5.10 Conditional Agreements

If a road is to be discontinued and land sold, the statutory discontinuance procedures will only be commenced once a Conditional Agreement in the form of an Offer to Purchase has been secured from the intended purchaser/s.

## 5.11 Sale Conditions

The Council reserves the right to place any easement or covenant on the land to be sold.

The portion of land being purchased must be consolidated with the remainder of the purchaser's property, and the purchaser must meet all the costs associated with consolidation.

Where there are two or more abutting owners seeking to purchase the same land Council will decide on the allocation of the land. The existence of underground services and any necessary easement rights will influence Council's decision.

Where the sale of the land contains infrastructure:

- Any costs of relocating the assets of any service authority are to be borne by the purchaser of the land.
- Any bluestone pitchers or other re-usable materials, if required by Council, will be removed and the costs of recovery apportioned to the purchasers. Alternatively if materials are desired by the purchaser, they will be transferred at the time of sale for their current market value.
- Any new or replacement drainage, and other associated costs are to be apportioned equally to those abutting owners involved in the road discontinuance and sale.
- Any required fencing or special conditions in respect of fencing requirements shall be costs borne by the purchaser. This would be particularly relevant in ensuring that overland drainage flow is not restricted in any way as a direct result of the discontinuance and sale of a road to adjoining owners.

Council will only discontinue and sell unused sections of road to abutting property owners. Generally, all abutting owners will be given an equal opportunity to purchase such land. Accordingly officers will seek to divide the land equally. However Council will acknowledge and give preferential allocation rights to abutting property owners who can demonstrate exclusive occupation of the land (i.e. occupation that could otherwise give rise to an adverse possession claim).

The full purchase price will be paid to Council at the time of settlement.

## 5.12 Terms Payment

In special circumstances the terms may be extended to allow equal payments over a period of time, not exceeding 12 months. In relation to terms payments, an additional service charge will be assessed to cover any administration costs. The transfer of land will not be processed until the purchase price plus any costs or additional amounts are paid in full.

## 6 Roles and Responsibilities

Manager Procurement, Property and Risk or other nominated officer has the responsibility for the review, management and implementation of this policy.

## 7 Policy non-compliance

Non-compliance with this Policy has the potential to result in the following;

- a decision to discontinue could be set aside/overtaken
- public uncertainty regarding Council responsibilities
- reputational damage

## 8 Administrative Matters

Council's CEO is authorised to make any reasonable administrative amendments to this Road Discontinuance Policy from time to time where the amendment is limited to an administrative nature and does not affect the substance of this Road Discontinuance Policy. For Instance, Council's CEO may authorise administrative amendments to:

- Address or amend any clerical errors, mistakes or omissions; or
- Insert a correction.

Any other matters in this Road Discontinuance Policy must only be amended by Council Resolution.

## 9 Related Documents

### Legislation

*Local Government Act 1989*

*Local Government Act 2020*

*Road Management Act 2004*

*Limitation of Actions Act 1958*

*Transfer of Land Act 1958*

*Planning and Environment Act 1987*

*Subdivision Act 1988*

### Policy

Frankston City Council Property Strategy 2021 - 2025

Community Engagement Policy 2021

## 10 Implementation of the Policy

This Policy will be communicated by one or more of the following methods:

- Frankston City Council Website
- Provision of access to a copy of the policy to all stakeholders
- Emails
- References in procedures

### 10.1 Financial implications

This policy aims to provide Council with a more relevant pricing guidance to facilitate the disposal of roads that are no longer required for public access thus generating once off income for Council.

Each sale of a discontinued road will release proceeds for Council and incur a small level of legal and conveyancing costs. If an individual purchaser cannot meet these costs, Council will not proceed with the transaction.

Please refer to Section 5.12 regarding Terms Payments.

## 11 Document History

It is anticipated this policy will be reviewed within 5 years unless arising circumstances require a review sooner or later than this

Date approved	Change Type	Version	Next Review Date
TBC - 2023	Original	1	TBC - 2028