

# Discontinuance of Roads and Reserves Policy

2022

**Responsible Directorate:** Chief Financial Office

**Authorised By:** Council

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**BOROONDARA**  
*City of Harmony*

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## 1 Introduction

The Council owns or controls property as custodian on behalf of the community. The Council is committed to the responsible management of Council's assets and resources.

### 1.1 Purpose

This policy sets out Council's approach to the discontinuance and disposal of roads and reserves.

This policy documents how the discontinuance and disposal of roads that are *no longer reasonably required for access* or for reserves that are no longer reasonably required for the purpose they were originally set aside for, or no longer required for any other public purpose, will be handled in a transparent and equitable manner. The roads and reserves to be dealt with under this Policy can be located at the front, rear, side, above, below or within adjoining properties.

### 1.2 Scope

This policy applies to all roads, reserves and other similar land as defined below:

- "Road" is as defined in Section 3 of the *Local Government Act 1989*.
- "Reserve" means land reserved on title for which Council has the power to deal with under section 24A of the *Subdivision Act 1988*, but does not include reserves set aside for recreational purposes or public open space.

These roads and reserves include, but are not limited to:

- Vehicular or pedestrian roads and rights of way, easements of way, streets or footpaths.
- Constructed trafficable roads, where part of those roads may be no longer reasonably required for public use.
- Roads or reserves that have a demonstrated historical occupation.
- Drainage or sewerage reserves and other similar land.
- Revenge strips.

### 1.3 Corporate framework

The Policy supports Council's Mission and Vision as it is consistent with the *Boroondara Council Plan 2021-31*:

Theme 7: Leadership and Governance, Strategic objective 7 - *Ensure decisions are financially and socially responsible through transparent and ethical processes.*

## 2 Background

### 2.1 Context

It is estimated that there are up to 2000 roads not part of the formal road network in the municipality, estimated at over 100 kilometres in length or 40 hectares in area. Of these, approximately 30 per cent are constructed (paved) and 70 per cent unconstructed.

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, eventually only roads and reserves remained. A parent title may be, and on occasion has been sold, however, public access rights remain.

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

Roads or reserves enclosed within abutting properties for more than 15 years may be claimed by adverse possession however the road or reserve status is not removed unless occupation of more than 30 years can be established. 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.

Council does not condone unauthorised occupation of land. When Council becomes aware of unauthorised occupation of roads and reserves Council will act to ensure that unauthorised occupation is not rewarded or encouraged.

### **1) Occupation of Council titled land**

Where Council becomes aware of the occupation of a road or a reserve on Council titled land, it will first determine whether the road or reserve is reasonably required.

- a) If the road or reserve is no longer reasonably required:
  - (i) Council will seek to discontinue the road or reserve and negotiate the sale of the land in line with Principles 1 or 2 under section 4.2.8 of this Policy. In some instances, Principles 4 or 5 may be appropriate; and
  - (ii) If the land is not sold Council will ordinarily seek to restore occupied land to Council control.
- b) If the road or reserve is reasonably required, Council will order the occupiers to vacate the land.

### **2) Occupation of non-Council titled land (e.g. still in the name of the original subdivider)**

Where Council becomes aware of the occupation of a road or reserve on non-Council titled land, it will first determine whether the road or reserve is reasonably required.

- a) If the road or reserve is no longer reasonably required:
  - (i) Council will seek to discontinue the road or reserve and negotiate the sale of the land in line with Principles 1, 3, 4 or 5 under section 4.2.8 of the Policy;
  - (ii) Council will take title to any unsold land; and
  - (iii) For land that Council has taken title, Council will consider ordering the occupier to vacate the land. If a request to vacate is not complied with,

legal advice shall be sought as to how to achieve restoration of the occupied land to Council control.

- b) If the road or reserve is reasonably required, Council will consider ordering the occupier to vacate the land. If an order to vacate is not complied with, advice shall be sought as to how to achieve legal restoration of the occupied land to Council control.
- c) If the road or reserve is considered minor, provides little amenity benefit, is not used, or required as a thoroughfare or access to surrounding properties and is of little monetary value, Council may take no action.

### **3) Continued occupation of land**

For any land, Council titled or non-Council titled, that has been deemed not reasonably required and the occupier continues to occupy the land, the occupier will be responsible for the continued maintenance of the land including but not limited to all fencing, vegetation and structures on the land

#### **2.2 Policy environment**

As part of the road network, roads and reserves were developed to satisfy a historical need and were documented in early plans of subdivision. In most cases this land is still required for access or other strategic purposes and as such Council will ensure the land remains open and available to the public and is kept free of any encroachment or obstruction.

Council will retain public ownership of roads and reserves where it determines a need exists, for example;

- the land is still required for public access;
- the land continues to add character to the public realm;
- the land has a future strategic purpose or there may be a future opportunity to activate the road or reserve;
- the land may improve the walkability and permeability of the public realm;
- the land may be suitable for indented parking;
- the land may be identified as offering an opportunity for an enhanced tree canopy;
- the land improves the amenity of the area;
- the land provides options for improved environmental outcomes;
- balances are required between competing needs (private vs public ownership); or
- the historical element of the road or reserve continues to be celebrated.

The Council may support the discontinuance and sale of a road or reserve for reasons including the following;

- the road or reserve is not required for general public use;
- it may result in amenity improvements particularly where the land becomes a haven for anti-social behaviour or a place to dump rubbish;
- 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 or reserve has no heritage value;
- the road or reserve is not required to maintain the urban character of the area;  
or
- the road or reserve is not reasonably required for access to other premises.

### **3 Methodology**

A typical road or reserve discontinuance includes the procedural steps outlined in Appendix 1 (roads) and Appendix 2 (reserves).

#### **3.1 Consultation**

Under this policy consultation will be undertaken about specific land parcels with all internal and external stakeholders in line with Council's *Community Engagement Policy* prior to any road or reserve being recommended for a discontinuance.

The relevant Ward Councillor will also be kept informed.

### **4 Policy statement**

#### **4.1 Policy Aims**

Through this policy, Council seeks to provide a consistent and efficient process for the discontinuance and sale of roads and reserves, and a high-quality customer service to all those affected. Council will work towards this outcome by providing the community with clear direction about the circumstances in which roads and reserves will be discontinued. The policy recognises the land falling within its ambit can often be a burden to Council and abutting neighbours. The pricing mechanism is designed to strike a balance between achieving a fair financial return for the community and incentivising transfer of the land into private ownership.

The policy also acknowledges that in many instances Council does not have title to the land, has never incurred any costs or taken responsibility for maintenance and may have gained advantage through placement of an asset in the land at no rental or purchase cost to Council. In some cases abutting residents will have improved the presentation of the land to the streetscape at their expense, often unaware the land is not on their title.

Council supports the following aims:

- To discontinue and dispose of roads and reserves no longer required by the public or Council, subject to appropriate consultation and adequate commercial return.
- Not to discontinue and sell any road or reserve adjoining public open space unless extenuating circumstances exist. Fencing along the open space proportion of any road or reserve abutting open space will generally be removed.
- Not to discontinue a road or reserve with heritage value.
- Where a road or reserve is no longer reasonably required for any public purpose, Council's preference is to discontinue and dispose of the entire road or reserve at one time rather than engage in a series of individual transactions over a period of time.
- Council will take title to land from a discontinued road or reserve that remains unsold.
- Council will consider ordering the occupiers of a discontinued road or reserve to vacate the land. If a request to vacate is not complied with, legal advice shall be sought as to how to achieve restoration of the occupied land to Council control.
- To pursue a fair balance between maximising a financial return for land disposed of while also applying a pricing mechanism designed to make a sale attractive to prospective purchasers.

## **4.2 Discontinuance Conditions**

### **4.2.1 Conditions of Sale**

The sale price will be in accordance with Council's Principles outlined under 4.2.8 Valuation of Land of the policy.

Council reserves the right to place any easement, covenant or other condition deemed required on the land to be sold.

The title to the land from the discontinued road or reserve must, within 12 months of the transfer, and at the purchasers' expense, be consolidated with the title of the purchaser's main property, except where the purchasers' property is subject to an Owners Corporation. Should the purchasers' property be subject to an Owners Corporation then approval of the purchase must be provided by the Owners Corporation.

## 4.2.2 Costs and GST

### 1) Costs

In addition to the purchase price, the purchaser of the land shall be responsible for payment of their own conveyancing costs, and for all costs associated with the creation and lodgement of any easements, covenants or other conditions over the land deemed necessary.

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-useable materials remain the property of the Council and the cost of recovery is to be apportioned to the purchasers.
- Any new or replacement drainage, and other associated costs are to be apportioned equally to those abutting owners involved in the road or reserve discontinuance and sale.
- Any required fencing or special conditions relating to special or unique 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 or reserve to adjoining owners.

### 2) GST

In accordance with the provisions of the GST Act 1999, the sale of discontinued roads and reserves will generally attract GST. This obligates Council to ensure that the sale price of such land is GST inclusive. Council's lawyers will assess in each sale instance the GST status of such sale.

## 4.2.3 Division of Land

The division of unoccupied roads and reserves will be on an equal share basis to adjoining property owners. Unless exceptional circumstances apply, Council will provide all abutting owners with first opportunity to purchase land from a discontinued road or reserve adjoining their property before seeking offers from other parties.

If an adjoining property owner is not interested in purchasing part of the land adjoining their property, the "full" area may be offered to other adjoining property owners for purchase.

In the event the property owners cannot agree upon the proposed subdivision and sharing of the land to be sold, the land will be sold on the open market to the highest bidder above the reserve price in accordance with the methods available under the *Local Government Act 2020*.

Roads and reserves that have been occupied for less than 15 years (insufficient time to accrue possessory rights) may be divided as though the land were unoccupied.



Roads and reserves that have been exclusively occupied for more than 15 years (so as to accrue possessory rights) will be offered to the occupier in the first instance.

#### **4.2.4 Gazetting a Notice of Discontinuance**

Gazetting of a notice of discontinuance frees the land from all private and public rights and encumbrances except for certain rights and powers of the public authorities.

Unless the subject road is on Crown land, the gazetting vests ownership of the land in Council, and Council can subsequently sell the land or retain it for municipal purposes.

The discontinuance of a road or reserve is viewed as a significant action because of the potential negative impacts a loss of a legal right of way or light and air rights can cause.

#### **4.2.5 Conditional Agreements**

If a road or reserve is to be discontinued and the 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.

#### **4.2.6 Sale of land previously discontinued**

If Council intends to sell land from a previously discontinued road or reserve which was not sold at the time of the discontinuance, it will comply with the requirements of section 114 of the *Local Government Act 2020* including a community engagement process in accordance with its Community Engagement Policy.

#### **4.2.7 Title to unsold land**

##### **1) Roads**

The discontinuance and sale of a road does not normally involve a plan of subdivision. The land 'vests' in Council on the date that the discontinuance is published in the Government Gazette.

A Title Plan is used to allocate/divide the land when transfers reach Land Use Victoria and to record easements 'saved' as part of the discontinuance process.

Council will take title to all unsold discontinued sections of road. Once Council becomes the registered proprietor (Council titled land) occupiers are no longer able to claim the land by adverse possession.

##### **2) Reserves**

The discontinuance and sale of a reserve or similar land normally involves a plan of subdivision under section 24A of the *Subdivision Act 1988*.

Upon registration of the plan of subdivision at Land Use Victoria, Council will become the registered proprietor of all Lots in the subdivision (Council titled land), and occupiers will no longer be able to claim the land by adverse possession.

#### **4.2.8 Valuation of Land**

The following principles apply when determining the sale price of land from a discontinued road or reserve. The application of these principles is subject to a Council resolution when considering a proposal to discontinue a road or reserve and to sell land.

##### **Principle 1**

Council will offer land from a discontinued road or reserve to the abutting property owners for purchase at the current market value, as determined by Council's contract valuers where the abutting owners have agreed to the proposed subdivision and sharing of the land. The valuations under this policy will reflect the additional value the subject parcel of land will add to the value of the existing property of the potential acquirer and will take into consideration the market value of 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, and/or;
- Is encumbered with an easement.

##### **Principle 2**

Council titled land will be offered at market value.

##### **Principle 3**

When a residential property owner can demonstrate exclusive occupation of a non-Council titled road or reserve for 15 years or longer and the purchase price of a parcel of land is substantially higher than the cost of an adjoining owner acquiring the land via an adverse possession claim (where adverse possession claim criteria are satisfied) the purchase price maybe discounted to an amount equal to adverse possession costs (estimated at \$11,000 as at the date of adoption of this policy). This amount will be reviewed annually to ensure it reflects the current costs of an adverse possession claim.

The property owner will have to provide evidence of exclusive occupation to the satisfaction of Council. Evidence of exclusive occupation will include the signing of a statutory declaration together with any other supportive documentation. Council's GIS aerial photograph records may also be used to provide information for this purpose.

##### **Principle 4**

In exceptional circumstances Council may consider a price negotiation on the market value. Exceptional circumstances will be determined by Council in Council's absolute discretion.

##### **Principle 5**

Where abutting landowners cannot agree upon the proposed subdivision and share of the unoccupied land to be sold, the land may be sold as a single unsubdivided lot.

The land will be sold for not less than the set reserve price, using any of the methods available to Council under the *Local Government Act 2020*.

### 4.3 Recovery of Costs

Council will endeavour to recover the costs associated with it undertaking the discontinuance procedures in certain circumstances, including instances where:

- the purchase price of the land, based on market value alone, is insufficient to cover Council's costs.
- where a commercial development or gain is involved.
- in a large or complex project where significant costs are likely to be incurred.

## 5 Implementation and monitoring

### 5.1 Evaluation

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

### 5.2 Accountabilities

For all queries or feedback regarding this policy, please use the contact details for the responsible department below.

Position Title	Contact number	Contact department email
Coordinator Revenue and Property Services	9278 4325	<a href="mailto:revenue@boroondara.vic.gov.au">revenue@boroondara.vic.gov.au</a>

### 5.3 Financial implications

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

Each sale of a discontinued right of way will realise proceeds for council and incur a small level of legal and conveyancing costs. In the event that an individual transaction cannot cover the costs to be incurred, Council will not proceed with the transaction.

Where requested, Council will consider receiving payments for discontinued land by instalments on the condition that the Transfer of Land will not occur until full and final payment has been received.

## 6 References

### 6.1 Related documents

#### Legislation

Limitations of Actions Act 1958

Local Government Act 1989

Local Government Act 2020

Road Management Act 2004

Planning and Environment Act 1987

Subdivision Act 1988

Transfer of Land Act 1958

### Policy

Community Engagement Policy 2021

## **6.2 Definitions**

Council	Indicates reference to the City of Boroondara as a geographical area and also refers to the entity which has the authority to make decisions on behalf of the Boroondara community.
Discontinuance	means the exercise of power under clause 3 of Schedule 10 of the <i>Local Government Act 1989</i> with respect to a road and the vesting and removal of reserve status under section 24A of the <i>Subdivision Act 1988</i> .
Encroachment	means an intrusion on to another's property rights by building or occupation.
Historical occupation	means occupation of land that has come about due to historical anomalies that have arisen when subdivisions have been laid out or streets constructed.
Obstruction	means the placement of a fence, gate, equipment or any other matter or material to prevent lawful access to a road.
Occupied land	Land that is occupied and has been occupied for in excess of 15 years.
Road	means Road as defined in Section 3 of the <i>Local Government Act 1989</i> . These roads include, but are not limited to: <ul style="list-style-type: none"><li>• Vehicular or pedestrian roads and rights of way, easements of way, streets or footpaths.</li><li>• Constructed trafficable roads, where part of those roads may be no longer reasonably required for public use.</li><li>• Roads that have a demonstrated historical occupation.</li></ul>
Reserve	means land reserved on title for which Council has the power to deal with under section 24A of the <i>Subdivision Act 1988</i> , but does not include reserves set aside for recreational purposes or public open space.

These reserves include, but are not limited to:

- Reserves that have a demonstrated historical occupation.
- Drainage or sewerage reserves and other similar land.
- Revenge strips.

Revenge strip

Revenge Strip means a small parcel of land or a reserve which has been created by subdivision, generally for the purpose of separating subdivisions and preventing access to public roads and services.

Unoccupied land

Land that is not occupied or occupation of in excess of 15 years cannot be confirmed.

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## **Appendix 1 Road Discontinuance Process Steps**

### **Step 1**

Following either an application from an abutting property owner or an internal enquiry, determine whether or not the road is reasonably required for access.

### **Step 2**

Consult all necessary internal Council departments and external Service Authorities seeking comments on the proposal including any assets within the land or requirements over the land.

### **Step 3**

Obtain a valuation for the land and consult all abutting property owners to establish support or otherwise for the discontinuance of the road and sale of the land.

### **Step 4**

Secure conditional agreements, in the form of an Offer to Purchase, from property owners entitled and interest in purchasing the land.

### **Step 5**

Providing sufficient interest exists, present a report to Council recommending that Council commence the formal procedures under section 206, clause 3 of Schedule 10 of the *Local Government Act 1989*.

### **Step 6**

If the recommendation is adopted, give public notice of Council's intention to discontinue and sell the road in both a newspaper and on Council's website. The public notice will inform interested parties of their right to make a submission to Council on the proposal. In addition, all abutting property owners are to be advised of the proposal in writing and provided with a copy of the public notice.

### **Step 7**

If any submissions are received within 28 day of the public notice, a further report will be presented to Council's Services Special Committee to enable the consideration of any written and/or verbal submissions and for a decision on whether to discontinue and sell the road in full, in part or not to discontinue and sell the road.

### **Step 8**

If no submissions are received, the Chief Executive Officer, or any such other person as the Chief Executive Officer approves, will determine whether to discontinue and sell the road in full, in part or not to discontinue and sell the road.

### **Step 9**

If Council resolves to discontinue and sell the road, place a notice of discontinuance in the Victoria Government Gazette.

### **Step 10**

Sell/Transfer the land to adjoining property owners and Council to take title to any unsold land.

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## Appendix 2 Reserve Discontinuance Process Steps

### Step 1

Following either an application from an abutting property owner or an internal enquiry, determine whether or not the reserve or similar land is reasonably required for the purpose it was originally required for.

### Step 2

Consult all necessary internal Council departments and external Service Authorities seeking comments on the proposal including any assets within the land or requirements over the land.

### Step 3

Obtain a valuation for the land and consult all abutting property owners to establish support or otherwise with a discontinuance of the road and sale of the land.

### Step 4

Secure conditional agreements, in the form of an Offer to Purchase, from property owners entitled and interest in purchasing the land.

### Step 5

Providing sufficient interest exists, present a report to Council recommending that Council commence the formal procedures:

- Part A: Sale of Land Procedures under section 114 of the *Local Government Act 2020*.
- Part B: Subdivision procedures under part 4 of the *Planning & Environment Act 1987* (Vic) and section 24A of the *Subdivision Act 1988* (Vic)

### **PART A: Sale of Land Procedures**

#### Step 6

If the recommendation is adopted, give public notice of Council's intention to sell the land from the reserve in both a newspaper and on Council's website. The public notice will inform interested parties of their right to make a submission to Council on the proposal. In addition, all abutting property owners are to be advised of the proposal in writing and provided with a copy of the public notice.

#### Step 7

If any submissions are received within 28 day of the public notice, a further report will be presented to Council's Services Special Committee to enable the consideration of any written and/or verbal submissions and for a decision on whether or not to sell the land.

#### Step 8

If no submissions are received, the Chief Executive Officer, or any such other person as the Chief Executive Officer approves, will determine whether or not to sell the land.

### **PART B: Subdivision Procedures**

#### Step 9

If Council resolves to sell the land, commence the subdivision procedures including preparation and certification of a plan of subdivision to vest the reserve in Council, remove (discontinue) reserve status from the land and subdivide the land into various lots.

#### Step 10

Once the Pan of Subdivision is registered at Land Use Victoria, sell/transfer the land to the adjoining property owners. Council will retain title to any unsold land.