

8.1 ACQUISITION OF PART 452 -454 WAVERLEY ROAD MOUNT WAVERLEY

Submitting Councillors: Rebecca Paterson & Josh Fergeus

MOTION

That Council:

1. *Notes that Council has considered the following four options regarding the land;*
 - a) *communicate with the current owners and agents CBRE, asserting the public highway status of the existing shared path, Council's rights under the existing S173 agreement and the unregistered easement rights in the current location of the path, and offering to consider an agreed alternative location for the shared path subject to registration of Council's interest.*
 - b) *compulsory purchase part of the land. This includes the land abutting the creek (non-developable land) and nominally up to 15 metres from the top of bank.*
 - c) *compulsory purchase the whole of the land (excluding the Betty Court) for the purposes of public open space.*
 - d) *submit an expression of interest to CBRE prior to 16 September 2020 and negotiate a purchase of the land if nominated as preferred proponent.*
2. *Resolves to compulsorily purchase part of the the land as identified in option b above, this includes the land abutting the creek and nominally up to 15m from top of bank, (with an objective of limiting the amount of funds required by Council to acquire the land while also ensuring that the width of the land to be acquired is fit for purpose for a modern and safe shared pedestrian and bicycle path). The compulsory purchase would be subject to a completion of a satisfactory plan being undertaken by a land surveyor and a valuation assessment being undertaken by a land valuer.*
3. *Notes that Council has not yet obtained valuation advice or a land survey, but directs the CEO to proceed with the acquisition of the site irrespective of a land valuation not having been received acknowledging that there will be additional unquantifiable costs due to the compulsory purchase process in addition to Councils valuation which is to be obtained. This may include costs for a valuation dispute and a legal challenge, the existing owner's legal costs, our own legal costs to arrive at an agreed compensation figure.*
4. *Authorises the CEO to take all necessary steps to immediately compulsory acquire part of 452-454 Waverley Road, Mount Waverley, (as described in point 2) being part of the land advertised for sale as per point 1 b above) required for public open space pursuant to Council's powers under the Land Acquisition and Compensation Act 1986.*
5. *Notes that once the compulsory purchase process commences with the service of a Notice of Acquisition, Council will own the land & compensation as determined under the LACA must be paid.*
6. *Once Council has compulsory purchased the land, Council publically announces the land acquisition (excluding financials which remain confidential) through a media*

release, providing information on its website and writing to key stakeholders and interested parties.

INTRODUCTION

CBRE has advertised 452-454 Waverley Road, Mount Waverley for sale by expression of interest process closing at 2pm on 16 September 2020.

The whole property is approximately 9,600m² of vacant land subject to a concrete bike path constructed by Council, and abuts the alignment of Scotchmans Creek.

The Property has been the subject of several planning permits over the last 15 years and is subject to a section 173 agreement requiring a creation of easement to be allowed in Council's favour over a shared pathway for use by the public.

DISCUSSION

As the Property is publicly available for sale, Council has four options to secure its shared pathway rights over the land. These options include;

- a) communicate with the current owners and agents CBRE, asserting the public highway status of the existing shared path, Council's rights under the existing S173 agreement and the unregistered easement rights in the current location of the path, and offering to consider an agreed alternative location for the shared path subject to registration of Council's interest.*
- b) compulsory purchase part of the land. This includes the land abutting the creek and nominally up to 15m from the top of bank.*
- c) compulsory purchase the whole of the land (excluding the Betty Court) for the purposes of public open space.*
- d) submit an expression of interest to CBRE prior to 16 September 2020 and negotiate a purchase of the land if nominated as preferred proponent.*

If the principal objective is to secure the whole of the Property (excluding Betty Court), Council's best position is to immediately compulsorily acquire that land. This is because the power to acquire without a public acquisition overly (which usually takes around 18 months to achieve) only exists while the Property is on the market.

If Council attempts to negotiate the purchase of the land by agreement with the owner, it is exposed to the risk that the owner may take the Property off the market at any time, thereby removing the power of immediate compulsory acquisition. Nevertheless, Council may prefer to attempt to negotiate the acquisition of the land, knowing that the ultimate power of compulsory acquisition may be removed without notice to Council.

However, if Council's principal objective is to ensure that a shared pathway is available for public use, then it is likely that such objective can be achieved by relying on its unregistered easement

rights (which can be protected by a caveat) or asserting or declaring the shared path to be a public highway.

In such case, Council may wish to conduct negotiations for the purchase of the Property subject to asserting its rights to an easement or public highway.

Council is entitled to compulsorily acquire the whole or part of the Property (as shown in Appendix 1), or an easement over part of the Property, without having first reserved the land by way of a public acquisition overlay or served a notice of intention to acquire the land.

This entitlement, set out in section 7(1) (a) of the *Land Acquisition and Compensation Act 1986 (LACA)*, means that Council could act immediately to acquire such interest in the Property (e.g., freehold or easement) as it desires. In considering whether to exercise power under the LACA, Council should have regard to the following issues:

- The land must be acquired for a public purpose, which in this case would be public open space. Council may not be entitled to compulsorily acquire that part of the Property known as 1 Betty Court, approximately 1,150m² (unless it is required for public open space), as it has been held by courts that on-sale is not a valid public purpose, even where the balance of the land acquired is required for a public purpose;
- if Council does not acquire 1 Betty Court, it will be obliged to pay a significant severance claim to the owner (in addition to market value of part of the Property that is compulsorily acquired) on the basis that 1 Betty Court may have been the desired route for access to a development on the land. In this regard, it may be worthwhile considering the relative cost of acquiring 1 Betty Court for public open space;
- the location and value of the shared path/carriageway easement/public highway will need to be resolved in the calculation of compensation to the owner; and
- total compensation payable to the owner is likely to be significantly greater than the price paid for the Property on the open market.

FINANCIAL IMPACT

Council's assessment of the compulsory purchase of the land abutting the creek and nominally up to 15 metres from the top of bank is not known at this stage.

Council will be responsible for a number of unknown costs due to the compulsory purchase process and in addition to Council's own valuation. This may include costs for a valuation dispute and a legal challenge, the existing owner's legal costs, our own legal costs to arrive at an agreed settlement figure.

The final purchase price inclusive of all associated costs outlined is unknown and that Council's valuers can only provide their fair assessment of what the acquisition valuation may be.

This purchase may be partly funded by Council's Open space reserve. Council holds a \$4.6m open space contribution from the Glen subdivision and expecting a \$3m open space contribution from The M City subdivision approval. The balance would need to be taken from Council operation budget or other reserves, such as the development reserve.

CONCLUSION

I ask that Council endorse the compulsory purchase of part of 452-454 Waverley Road, Mount Waverley (excluding Betty Court) to formalise an area of land for public open space.