



LATROBE CITY COUNCIL

**AGENDA FOR THE
SPECIAL COUNCIL MEETING**

**TO BE HELD IN NAMBUR WARIGA MEETING ROOM
CORPORATE HEADQUARTERS, MORWELL
AT 5:00 PM ON
17 NOVEMBER 2014**

SM450



Latrobe Community **Vision**

"In 2026 the Latrobe Valley is a liveable and sustainable region with collaborative and inclusive community leadership."

Council **Mission**

Latrobe City continues to implement the values, corporate directions and partnerships necessary to bring reality to the Latrobe's 2026 community vision for a liveable and sustainable region with collaborative and inclusive community leadership.

Council **Values**

Latrobe City Council's values describe how it is committed to achieving the Latrobe 2026 community vision through:

- Providing responsive, sustainable and community focused services;
- Planning strategically and acting responsibly;
- Accountability, transparency and honesty;
- Listening to and working with the community; and
- Respect, fairness and equity.

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1. OPENING PRAYER

Our Father in Heaven, hallowed be your Name, your kingdom come, your will be done on earth as in Heaven. Give us today our daily bread. Forgive us our sins as we forgive those who sin against us. Save us from the time of trial and deliver us from evil. For the kingdom, the power, and the glory are yours now and forever.

2. ACKNOWLEDGEMENT OF THE TRADITIONAL OWNERS OF THE LAND

We respectfully acknowledge that we are meeting here today on the traditional land of the Braiakaulung people of the Gunnai/Kurnai Clan and pay our respect to their past and present elders

3. APOLOGIES AND LEAVE OF ABSENCE

4. DECLARATION OF CONFLICT OF INTEREST

5. PUBLIC QUESTION TIME

OFFICE OF THE CHIEF EXECUTIVE

6. OFFICE OF THE CHIEF EXECUTIVE

**6.1 PROPOSED PUBLIC HIGHWAY DECLARATION - DEAKIN LANE,
TRARALGON**

Executive Manager

Office of the Chief Executive

For Decision

PURPOSE

The purpose of this report is to further consider the status of Deakin Lane, Traralgon, and seek Council's approval to commence the statutory process to declare it a public highway.

EXECUTIVE SUMMARY

Council has obtained an independent barristers opinion regarding the status of Deakin Lane, Traralgon. That opinion supports Council's previous position that the laneway is a public highway at common law and a road for the purposes of the *Local Government Act 1989* and the *Road Management Act 2004*.

To reaffirm the status of Deakin Lane it will be necessary for Council to undertake the statutory process to formally declare it a public highway pursuant to Section 204 of the *Local Government Act 1989* by giving public notice of the proposal and inviting comment.

RECOMMENDATION

- 1. That Council gives public notice of its intention to declare Deakin Lane, Traralgon, a public highway pursuant to Section 204 of the Local Government Act 1989.**
- 2. That Council considers any submissions received in relation to the proposed declaration of Deakin Lane, Traralgon, as a public highway at a Special Council meeting to be held on Thursday 18 December 2014.**
- 3. That all adjoining property owners be advised of Councils intention to commence the statutory process to declare Deakin Lane, Traralgon, a public highway pursuant to Section 204 of the Local Government Act 1989 and invited to make a submission.**

DECLARATION OF INTEREST

No officer declared an interest under the *Local Government Act 1989* in the preparation of this report.

STRATEGIC FRAMEWORK

This report is consistent with Latrobe 2026: The Community Vision for Latrobe Valley and the Latrobe City Council Plan 2013-2017.

Latrobe 2026: The Community Vision for Latrobe Valley

Strategic Objectives - Governance

In 2026, Latrobe Valley has a reputation for conscientious leadership and governance, strengthened by an informed and engaged community, committed to enriching local decision making.

Latrobe City Council Plan 2013 - 2017

Theme and Objectives

Theme 3: Efficient, effective and accountable governance

Theme 4: Advocacy for and consultation with our community

BACKGROUND

Deakin Lane is contained in Certificate of Title Volume 10246 Folio 309, being Road R1 on LP 41285, and the registered proprietors are shown as Stefano, Concetta, Gino and Damiano Tripodi (the Tripodi family).

Since December 2012 the status of Deakin Lane, Traralgon, has been the subject of a number of reports to Council, particularly in light of the removal of access to the rear of 3 Church Street due to the erection of a fence and gates across the laneway by the Tripodi family, owners of 2 Deakin Street.

Deakin Lane provides access to off-street parking at the rear of 3 Church Street, owned by Parody Glade Pty Ltd. This car park was a requirement of Planning Permit 93/745/PO issued by the former City of Traralgon on 7 September 1993 and an amended plan that was endorsed on 10 May 1994.

The owners of 1 Church Street, Petroleum Property Holdings Pty Ltd, also have an entitlement to use Deakin Lane as this property is one of the four lots created on LP 41285 which also created the laneway.

At a meeting held on 16 December 2013 Council resolved:

- 1. That Council gives public notice of its intention to declare Deakin Lane, Traralgon, a public highway pursuant to Section 204 of the Local Government Act 1989.*
- 2. That Council considers any submissions in relation to the proposed declaration of Deakin Lane, Traralgon, as a public highway at the Ordinary Council Meeting to be held on Monday 17 February 2014.*
- 3. That all adjoining property owners be advised of Councils intention to commence the statutory process to declare Deakin Lane, Traralgon, a public highway pursuant to Section 204 of the Local Government Act 1989 and invited to make a submission.*

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4. *That McDonough & Co, acting on behalf of Parody Glade Pty Ltd, be advised accordingly.*

In response to public notices and correspondence, 3 written submissions and 50 form letters were received.

Following discussions between the Acting Chief Executive Officer, Mr Gino Tripodi, representing the Tripodi family, and the Director of Parody Glade Pty Ltd, and subject to Council endorsement, the following way forward was proposed:

- Council, the Tripodi family and Parody Glade Pty Ltd (the parties) agree to engage an independent barrister in order to obtain a non-binding legal opinion regarding the status of Deakin Lane.
- Costs of the independent barrister up to a total cost of \$10,000 would be split between the parties (Council \$5,000, Tripodi family \$2,500 and Parody Glade Pty Ltd \$2,500) with Council covering all costs greater than \$10,000.
- The legal opinion obtained from the independent barrister is non-binding on the parties and the respective parties may take further legal action or withdraw from the proposal at any time.

Council considered this proposal and the submissions received at its meeting held on 3 March 2014 and resolve the following:

1. *That Council notes the written submissions received in relation to a proposal to declare Deakin Lane a public highway.*
2. *That Council resolves to support the proposal that Council, Mr Gino Tripodi and Parody Glade Pty Ltd (the parties) agree to engage an independent barrister in order to obtain a non-binding legal opinion regarding the status of Deakin Lane.*
3. *That the costs of the independent barrister up to a total cost of \$10,000 be split between the parties on the following basis, Council \$5,000, Tripodi family \$2,500 and Parody Glade \$2,500 with Council covering all costs greater than \$10,000.*
4. *Council acknowledges that the legal opinion obtained from the independent barrister is non-binding on the parties and the respective parties may take further legal action or withdraw from the proposal at any time.*
5. *Those persons who submitted a written submission and property owners adjoining Deakin Lane be advised of the above Council decisions.*

In light of this resolution both the Tripodi family and Parody Glade Pty Ltd, via their respective legal representatives, were provided with a list of barristers qualified to consider this matter and were requested to provide their preferred choices.

As a result, all parties agreed upon Graeme Peake Q.C as the preferred barrister to consider the status of Deakin Lane. It should be noted that both the Tripodi family and Parody Glade Pty Ltd subsequently withdrew

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from contributing to the costs of obtaining this opinion however both were still afforded the opportunity to provide input.

On 22 July 2014 the Acting Chief Executive Officer took part in an onsite meeting with representatives of the Tripodi family and the Office of the Victorian Ombudsman to discuss this matter. As a result the Deputy Ombudsman recommended that Council continue to obtain an opinion from Graeme Peake Q.C prior to finalising its decision and that the Tripodi family be given the opportunity to provide information as part of this process.

A final opinion was received from Graeme Peake Q.C on 1 October 2014, a copy of which is attached to this report, reaffirming that Deakin Lane is a public highway at common law and a road for the purposes of both the *Local Government Act 1989* and *Road Management Act 2004*.

On 7 October 2014 the Tripodi family provided additional information for consideration in the form of a signed statement by a former owner of the land indicating that up until the road was utilised by Parody Glade Pty Ltd to gain access to the rear of 3 Church Street there was no use by the public.

Council provided this additional information, via Maddocks Lawyers, for consideration and Graeme Peake Q.C subsequently provided a supplementary opinion dated 14 October 2014, attached to this report, stating that this additional information does not change the previous opinion that Deakin Lane is a public highway.

The Tripodi family, Parody Glade Pty Ltd and the Deputy Ombudsman have been provided with copies of each of these opinions, via their respective legal representatives, and were informed that a report would be presented to Council seeking approval to commence the statutory process to declare Deakin Lane a public highway.

KEY POINTS/ISSUES

Legal advice has confirmed that Deakin Lane is a public highway at common law and a road for the purposes of the *Local Government Act 1989* and the *Road Management Act 2004*. As a result of this the land vests in Council and it therefore has care and management of the road.

One of the points put forward by the Tripodi family during the previous consideration of this matter was the absence of a formal declaration of the road as a public highway by Council.

In his opinion dated 1 October 2014 Graeme Peake Q.C suggests that, to remove any doubt as to its status as a public highway, Council can undertake the statutory process to formally declare Deakin Lane a public highway pursuant to Section 204 of the *Local Government Act 1989*:

- (1) A Council may, by notice published in the Victoria Government Gazette, declare a road in its municipal district to be a public highway for the purposes of this Act.

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- (2) A Council may, by resolution, declare a road that is reasonably required for public use to be open to public traffic.
- (3) A road does not become a public highway by virtue of a Council resolution made under sub-section (2).

This power is subject to Section 223 of the Local Government Act 1989 which requires Council “publish a public notice stating that submissions in respect of the matter specified in the public notice will be considered in accordance with this section”.

As stated previously, Council has already commenced this statutory process by giving public notice and inviting submissions however, given that this was undertaken almost twelve months ago, it would be prudent to undertake the process again.

At common law, an owner or occupier of land adjoining a public highway (road) has a right to access the road from their land. As Deakin Lane is a public highway the road remains open for the public to use regardless of who owns the land underneath and the land vests in Council.

Schedules 10 and 11 of the *Local Government Act 1989* provide Council with the powers to maintain public access to a road. Clause 5 of schedule 11 provides;

“A Council may –

- (a) move any thing that encroaches on or obstructs the free use of a road or that reduces the breadth, or confines the limits, of a road (including any thing placed on a road under clause 9, 10 or 11);
- (b) require any person responsible for, or in control of, the thing to move it.”

Council can use its power under the *Local Government Act 1989* to remove any obstruction, such as the fence and gates erected by the Tripodi family, that encroaches on or restricts access to a road.

To do so Council would need to write to the Tripodi family requesting that the fence and gates be removed with a reasonable time frame. If the Tripodi family refuse to do so the fence and gates can be removed by Council and impounded and they would then be required to pay any costs incurred by Council as part of this process to have the impounded fencing released.

Prior to undertaking such enforcement action it is recommended that Council to finalise the statutory process to formally declare Deakin Lane a public highway and place a notice in the Victoria Government Gazette to this effect.

RISK IMPLICATIONS

Risk has been considered as part of this report and it is considered to be consistent with the Risk Management framework.

Given that a large majority of laneways in Traralgon are comprised of pieces of land in private ownership making an exception in the case of Deakin Lane would set a costly precedent for any similar actions in the future.

Parody Glade Pty Ltd have indicated that they are looking to Council to take action to restore access to the rear of their property in an expedient manner given that they have been denied access since June 2013.

Should Deakin Lane not be reopened to the public Parody Glade Pty Ltd have indicated that they will pursue it further with the Victorian Ombudsman and the Local Government Inspectorate as well as taking legal action against Council for failing to resolve this matter.

FINANCIAL AND RESOURCES IMPLICATIONS

The cost of undertaking the statutory process to declare Deakin Lane a public highway are minimal being the cost of public notices in the Latrobe Valley Express and a notice in the Victoria Government Gazette.

Council may incur future costs associated with the physical removal of the gates and fence though these would be recoverable from the Tripodi family. If either affected party initiated legal proceedings additional legal costs would become payable.

As Deakin Lane is a public highway the land vests in Council "*free of all mortgages, charges, leases and sub-leases*" and, as such, there is no obligation for Council to pay compensation to the Tripodi family as part of this process.

INTERNAL/EXTERNAL CONSULTATION*Engagement Method Used:*

Public comment on the proposed declaration of Deakin Lane as a public highway will be sought via the following methods:

- Public notices in the Latrobe Valley Express
- Letters to adjoining property owners including the Tripodi family and Parody Glade Pty Ltd.
- Notice displayed at the Corporate Headquarters and Traralgon Service Centre.
- Details placed on the Latrobe City Council website.

Details of Community Consultation / Results of Engagement:

In accordance with Section 223 of the Local Government Act 1989 any submissions that are received regarding this matter will be referred for consideration at a Special Council meeting to be held on 18 December 2014.

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Council may now resolve to either:

- Commence the statutory process to declare Deakin Lane, Traralgon, a public highway pursuant to Section 206 and Schedule 10 Clause 3 of the *Local Government Act 1989*.
- Resolve not to undertake the statutory process to declare Deakin Lane, Traralgon, a public highway and take no further action regarding the fence and gates erected across the laneway and the rear of 3 Church Street, Traralgon.
- Rely on the independent legal opinion provided by Graeme Peake Q.C that Deakin Lane is a public highway at common law and request that the Tripodi family remove the fence and gates to restore public access.

CONCLUSION

The opinion obtained from Graeme Peake Q.C has reaffirmed Council's position that Deakin Lane, Traralgon, is a public highway at common law and a road for the purposes of the *Local Government Act 1989* and the *Road Management Act 2004*.

To remove any remaining doubts as to its status it would be appropriate for Council to now undertake the statutory process to declare it a public highway pursuant to Section 204 of the *Local Government Act 1989* by giving public notice and inviting submissions.

SUPPORTING DOCUMENTS

NIL

Attachments

1. Attachment One: Original opinion provided by Graeme Peake Q.C dated 1st October 2014
2. Attachment Two: Supplementary opinion provided by Graeme Peake Q.C dated 14th October 2014.

6.1

Proposed Public Highway Declaration - Deakin Lane, Traralgon

- 1 Attachment One: Original opinion provided by Graeme
Peake Q.C dated 1st October 2014..... 13**
- 2 Attachment Two: Supplementary opinion provided by
Graeme Peake Q.C dated 14th October 2014. 27**

**STATUS OF LAND SHOWN AS “ROAD” ON
PLAN OF SUBDIVISION 41285 - DEAKIN LANE TRARALGON**

MEMORANDUM OF ADVICE

Instructions

1. I have been instructed by Latrobe City Council to provide a legal opinion as to the status of the land shown as “Road” on Plan of Subdivision 41285. I will refer to this land as “road R1”, as that is how it is described in certificate of title Volume 10246 Folio 309.
2. In preparing this advice I have had regard to all of the documents enclosed with my instructing solicitor’s Memorandum to Counsel dated 29 August 2014 together with:
 - (1) Supplementary observations on behalf of registered proprietors of road R1 prepared by John R Morrow, solicitor;
 - (2) Opinion prepared by Peter G Willis dated 15 March 2013 and supplementary opinion dated 22 April 2013;
 - (3) the questions posed by me to Latrobe City Council set out in an email dated 5 September 2014 and the answers provided to those questions in an email of the same date.
3. As I am instructed on behalf of Latrobe City Council I have not had regard to any other material presented by or on behalf of any other person who claims an interest in or a right over the laneway.

Facts

4. The facts on which I have based my advice are set out below.
5. Land now known as 2 Deakin Street, Traralgon was subdivided into four lots and a road by Plan of Subdivision LP41285 in or about 1957. The plan of subdivision created three lots fronting Deakin Street (“the Tripodi Land”) ; one lot fronting

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Princes Street and a L-shaped road varying in width commencing at Deakin Street, extending to the east boundary of the land and then along the east boundary to its north boundary as shown on the plan of subdivision.

6. Parody Glade Pty Ltd is the registered proprietor of land known as 3 Church Street, Traralgon, having a frontage to Church Street and sharing a common boundary with road R1.
7. On 7 September 1993, the City of Traralgon granted Planning Permit No. 93/745/PO, permitting the development and use of 3 Church Street for the purpose of office/showroom. The endorsed plans show six car parking spaces to be accessed from road R1. The plan depicts road R1 where it lies between the Tripodi Land and 3 Church Street as being 4.270 metres wide. The plan requires the car parking spaces to be set back 1.73 metres from road R1 to create an effective width of 6 metres and the permit conditions require the setback of 1.73 metres to be transferred to the Council. I understand that this land has not been transferred, but the owner has indicated that it is willing to do so.
8. In or about 1993 Parody Glade as the owner of 3 Church Street constructed the office-showroom and the car parking area as far as the western boundary of 3 Church Street.
9. It appears that the Tripodi Land and road R1 remained in the same title (Volume 8156 Folio 271) until the Tripodi Land and road R1 was purchased by Stefano Tripodi, Concetta Tripodi, Gino Tripodi and Damiano Tripodi ("the Tripodis"). Instrument of Transfer U146141P was registered on 26 March 1996.
10. I have been provided with a title search of lot 1, LP41285, Certificate of Title Volume 10243 Folio 238 and road R1", LP41285 Volume 10246 Folio 309. I have not been instructed with copies of the Certificates of Title for lots 2 and 3. I assume that they were transferred to the Tripodis on the same date.
11. The separate title to road R1 was issued on 26 June 1995.
12. I am instructed by Latrobe Shire Council that Mr Leo DiFabrizio, a director of Parody Glade Pty Ltd says that he approached the Tripodis proposing that his company and the Tripodis equally share the cost of constructing the whole of road R1. This was

rejected. He then proposed that the Tripodis contribute 25% of the cost of construction. This was rejected. Parody Glade Pty Ltd or an associated company constructed the whole of road R1 at its own cost in or about 2001. Presumably this was done with the express or implied consent of the Tripodis.

13. I assume that between the date on which the Tripodis purchased the land and the more recent events of erecting fences and gates referred to below, the Tripodis have not taken any steps to prevent the use of road R1 for the purpose of enabling vehicles to access the car park at the rear of 3 Church Street or to prevent the owner of lot 4 accessing land fronting Princes Street via an existing gate.
14. By letter dated 30 May 2012 the Tripodis proposed to the Council that it discontinue the laneway and “transfer full ownership to us ...”. The letter went on to say “the laneway will be left as an access laneway, servicing our needs”.
15. An Officer’s Report dated 17 December 2012 was prepared in response to this request. The Officer’s Report notes that:-
 - (1) Deakin Lane is fully constructed with a width of 4 metres and a length of 48 metres;
 - (2) Deakin Lane is not listed on the Register of Public Roads;
 - (3) Deakin Lane provides access to a car park at the rear of 3 Church Street and an inwards goods delivery door at the rear of 72 Princes Street;
 - (4) Council has drainage assets located within the road.¹
16. The Council resolved to give public notice of its intention to consider the placement of permanent barriers over Deakin Lane and to consider any submissions lodged in response to this proposal.
17. A report to Council dated 18 February 2013 observes:-
 - (1) the laneway is listed on the Register of Public Roads – Appendix 4 – Roads not maintained by Latrobe City Council;²

¹ I have subsequently been instructed that a 225mm stormwater pipe running through the entirety of the laneway was constructed by the Council sometime before 1999.

² How it is that the road was not on the Register of Public Roads as at 17 December 2012 but was on that register at 18 February 2013 remains unexplained.

- (2) the Tripodis consider it would be appropriate to discontinue the road and to transfer it back to them for a nominal consideration to be retained as a private access laneway;
 - (3) officers believe it is now the Tripodis' stated intention to prevent adjoining property owners and the general public having continued use of the lane by erecting a boundary fence at the rear of their property and gates across the front of the lane;³
 - (4) officers have formed the opinion that Deakin Lane has acquired the status of a public highway at common law;
 - (5) in September 1999, the Council received a letter from the owner of 3 Church Street concerning the unmade east-west section of Deakin Lane;
 - (6) Latrobe Regional Development Group⁴ has fully funded the construction cost of road R1.
18. This report recommended that the Council resolve that it is of the opinion that Deakin Lane is a public highway and is reasonably required as a road for public use and that the Council not discontinue the road or place permanent barriers across it. The Council resolved to defer the item for one month.
19. An Officer's report of 18 March 2013 stated that the Tripodis had advised that additional information will be provided that is likely to have a major impact on the final outcome of this matter. The information was not available at 18 March 2013. Further consideration of the matter was deferred to 22 April 2013.
20. Prior to the adjourned meeting on 22 April 2013 the Council received:
- (1) letter dated 14 December 2012 concerning a proposed development at 5-7 Church Street;
 - (2) email dated 20 December 2012 indicating the Tripodis' intent to fence off the car park at rear 3 Church Street from road R1;

³ Whilst the Tripodis subsequently disclaimed this intention, as set out below, that is the action that they have now taken.

⁴ I am instructed that Parody Glade Pty Ltd is one of the companies forming this group.

- (3) letter dated 17 January 2013 prepared by John Morrow, barrister and solicitor, regarding the Tripodis' legal rights;
- (4) email dated 18 March 2013 summarising legal advice obtained by the Tripodis.

The Council also sought and obtained legal advice from David Gabriel-Jones of The Public Land Consultancy.

- 21. Consideration of the matter was again deferred.
- 22. Subsequently on 22 April 2013 the Council was provided with a "Supplementary Opinion" dated 22 April 2013 by Mr G Willis.⁶
- 23. On 3 May 2013 Gino Tripodi emailed Mr Paul Buckley.
- 24. On 31 May 2013, Mr Morrow, on behalf of the Tripodis, wrote to the Victorian Ombudsman and to the Honourable Jeanette Powell, then Minister for Local Government.
- 25. In May 2013, persons unknown, but presumably the Tripodis, erected a temporary fence on the boundary between the subject land and 3 Church Street preventing access to the car park at 3 Church Street.
- 26. On 3 June 2013 the Council resolved to further defer consideration of this matter pending the outcome of the Ombudsman's investigation.
- 27. As a consequence of the erection of the temporary fence there was an exchange of correspondence between the Tripodis, their solicitor, the Council and the Council's solicitors.
- 28. By letter dated 4 July 2013, the Council alleged that the Tripodis had taken steps for what appears to be preparation for the erection of a permanent fence in place of the temporary fence. This was denied in a letter from Mr Morrow dated 5 July 2013. However, shortly thereafter, a permanent fence was constructed in the location of the former temporary fence.

⁶ I have subsequently been provided with a copy of Mr Willis' original Opinion dated 15 March 2013.

29. Between 5 July 2013 and 9 October 2013 there was further correspondence between the solicitors for the Council and Mr Morrow. By letter dated 14 October 2013 Mr Morrow confirmed that the Ombudsman's enquiry was concluded and that there would be no investigation.
30. By resolution on 16 December 2013 the Council resolved to give public notice of its intention to declare Deakin Lane a public highway pursuant to section 204 of the *Local Government Act 1989* ("LGA") and to consider any submissions lodged in relation to that proposal at its meeting of 17 February 2014.
31. Subsequent to this resolution, persons unknown, but presumably the Tripodis, erected two substantial steel gates across the entrance of Deakin Lane which were observed to be locked with a chain and padlock.
32. In response to the public notice, three written submissions and 15 form letters were received, including a submission from McDonough & Co, Solicitors, on behalf of Parody Glade Pty Ltd, a joint submission from S & C Tripodi and a submission from G Tripodi.
33. At its meeting on 17 February 2014 the Council resolved to defer consideration of the matter to its next meeting.
34. At the Council's meeting of 3 March 2014, it resolved that certain arrangements be made for obtaining joint legal advice. I am instructed that ultimately these arrangements were rejected by the Tripodis and Parody Glade Pty Ltd.

The Law of Public Highways

35. At the outset it is important to identify that there are two separate questions to be considered.
36. The first question is whether or not road R1 is a public highway at common law? The second question is whether road R1 is a road as defined in the LGA and can therefore be declared to be a public highway by resolution under section 204?

37. If the road is a public roadway at common law then nothing further needs to be done. In *Templestowe Developments Pty Ltd & Ors v City of Booroondara*,⁷ the Court reviewed the common law regarding public highways.
38. The Court commenced by quoting the following definition of a public highway:-
- “At common law a highway was created when a competent landowner manifested an intention to dedicate land as a public road, and there was an acceptance by the public of the proffered dedication.”*⁸
39. It is then necessary to consider what constitutes dedication by a landowner and acceptance by the public.
40. The authorities on the principles of dedication and acceptance can be summarised as follows:
- (1) in Victoria, prior to the commencement of the *Subdivision Act 1988*, the mere registration of a plan of subdivision is not of itself evidence of dedication of the road to the public;⁹
 - (2) any Act which unequivocally indicates an intention on the part of the owner to abandon to the public a right of passage over the road will be effectual as dedication;¹⁰
 - (3) the setting aside of a road on a plan of subdivision provides some evidence of intention to dedicate but further evidence is required;¹¹
 - (4) other indications that the owner intended to dedicate the land may include leaving the road with an opening to a public road without bar or gate;¹²
 - (5) a highway does not need to be a thoroughfare;¹³
 - (6) it is ultimately a question of fact to be determined having regard to all of the circumstances as to whether the owner of the land has demonstrated an intention to dedicate the land to the public;

⁷ [1997] 1 VR 504.

⁸ See *Permanent Trustee Co of New South Wales Limited v Campbelltown* (1960) 105 CLR 401 at 420-3.

⁹ See *Fleming v City of Oakleigh* [1934] VLR 263; *Templestowe Developments Pty Ltd v City of Booroondara* [1997] 1 VR504.

¹⁰ *Ibid*, page 518.

¹¹ *Ibid*, page 519.

¹² *Fleming* *supra*, at page 266; *Newington v Windeyer* [1985] 3 NSWLR.

¹³ *Templestowe Developments* *supra*, page 519.

- (7) the offer to dedicate can be withdrawn by the owner at any time before it has been accepted by the public;
- (8) once the public has accepted the dedication the land is a public highway;
- (9) whether or not the dedication has been accepted is again a question of fact;
- (10) the fact that the road is included in a certificate of title registered in the name of a proprietor does not prevent the land referred to in the certificate of title, if it is a public highway, from vesting in the relevant municipality as the indefeasibility provisions set out in section 42 of the *Transfer of Land Act 1958* are overridden by statutory and public rights.¹⁴

Applying the facts to the law of public highways

41. Whilst it is ultimately a question of fact to be determined by the Court, in my opinion, the road R1 is a public highway at common law. Accordingly it is vested in the Council. It follows that the registered proprietors of the land are not the owners of the fee simple and are unable to deal with the land.
42. As I understand it, the facts are not in dispute and are recited above.
43. Relevantly:
 - (1) road R1 is shown on LP418285;
 - (2) the road is accessible from a public road being Deakin Street;
 - (3) at least one property abutting road R1, but outside LP41285, has physical access to road R1;
 - (4) the buildings that have been constructed on lots 1 – 3 appear from the photographs provided to me to have “respected” road R1, in that the photos suggest (although I have not been provided with a survey plan) that the building is generally built close to the south boundary of lot 3 and on the east boundary of lots 1-3, thus keeping road R1 clear and trafficable;
 - (5) since approximately 1993 the car park at the rear of 3 Church Street has been accessed via road R1 apparently without interference or complaint from the registered proprietors until recent events;

¹⁴ See *Calabro v Bayside City Council & Anor* [1999] VSC 509.

- (6) the Council has constructed a drain within road R1 apparently without dissent from the registered proprietors;
 - (7) in or about 2001, some six years after the Tripodis became the registered proprietors, Parody Glade Pty Ltd or companies associated with it treated with the Tripodis regarding the cost of constructing road R1 and ultimately constructed at its own expense, apparently without dissent from the registered proprietors;
 - (8) road R1 has been used by a segment of the public to access the car park at the rear of 3 Church Street since approximately 1993 until recently, without dissent.
44. In my opinion, these facts are sufficient to demonstrate that the original owner of the land at the time of subdivision intended to dedicate road R1 to the public. Specifically, the road was set aside in the plan of subdivision, the road was kept clear of buildings, the road was physically able to be accessed, the road had a connection to a public road.
45. In my opinion, whilst there is no evidence of acceptance before approximately 1993, there is evidence of acceptance at that time by the owner of 3 Church Street, constructing a development that relied on access via road R1 to a car park constructed at the rear of 3 Church Street. There is no evidence that the owner of the land withdrew the dedication of the road prior to that date.
46. Accordingly, based on the facts with which I have been instructed, in my opinion, road R1 became a public highway on the acceptance of the dedication thereof by user commencing in or about 1993. There may have been earlier events that amount to acceptance prior to 1993, however I have not been instructed with any evidence of any earlier events that could amount to acceptance of the dedication by the public.
47. An inference as to dedication can also be drawn from the extent of public use that has occurred without dissent from the registered proprietor. In this case it appears that:
- (1) the former registered proprietor did not object to or lodge an appeal in relation to the grant of the planning permit for 3 Church Street;
 - (2) the Tripodis' acquiesced in the construction of the laneway in 2001;

- (3) the Tripodis' have until recent times accepted the use of road R1 by persons accessing the car park.

The Law Relating to Roads

48. If land is a "road" as defined in the *Local Government Act 1989*, a council may declare the road to be a public highway or to be open to the public under section 204 LGA.
49. Land can be a "road" for the purpose of the LGA, without being a public highway.
50. Section 3 of the LGA includes the following definition:

"Road includes –

- (a) a street; and*
- (b) a right of way; and*
- (c) ...; and*
- (ca) ...; and*
- (d) a passage; and*
- (e) a cul de sac; and*
- (f) a by-pass; and*
- (g) a bridge or ford; and*
- (h) a footpath, bicycle path or nature strip; and*
- (i) any culvert or kerbing or other land or works forming part of the road."*

51. The definition of "road" is inclusive. Accordingly, anything that is a road at common law is included within the definition. The individual types of roads included in the definition are largely unhelpful as the various terms used are not themselves defined and therefore have their natural or usual meaning. The substantive purpose of the definition appears to be one of the convenience of drafting rather than one that expands the common law notion of a road.¹⁵
52. In *Templestowe Developments Pty Ltd*,¹⁶ the facts involved an area of grassed land described in the certificate of title as "a road on plan of subdivision No. 8144". The Council advertised an intention to discontinue the road and retain it for municipal purposes. The registered proprietor challenged the power of the Council to

¹⁵ (c) and (ca) clearly expand the common law notion of a road but are not relevant to this advice.

¹⁶ *Supra*.

discontinue the road. The public had no access to the road which was apparently fenced as part of the garden of an adjoining lot.

53. The plaintiffs argued that the land was not a “road” within the definition in the *Local Government Act 1989*, as it was in force in 1993.¹⁷ The Court held:

- (1) the road did not need to be a public road to come within the definition;
- (2) the definition included roads that were shown on a plan of subdivision or on title but did not exist on the ground (“paper roads”);
- (3) a road delineated on a plan of subdivision is a road for the purpose of the Local Government Act even though it is neither formed nor set out on the ground.

54. The Court held that the disputed land was a road but not a public highway for the purposes of the LGA.

55. In *Bass Coast Shire Council v King*,¹⁸ the Court considered the status of a road on Crown land that did not exist on the ground. Whilst that case is primarily concerned with the question of dedication to the public in the case of Crown lands reserved for the purpose of a road, the Court also made some pertinent comments regarding the ownership of “private roads”.

56. The Court firstly held that it is not relevant whether the road assumes the physical characteristics of a road. Accordingly, a road that does not exist on the ground can still be a road. Conversely, something that looks like a road on the ground is not necessarily a road for the purpose of the Act.

57. On the facts of this case, road R1, as at the current date, is:

- (1) identified as a road on LP41285;
- (2) identified as “road R1” in Certificate of Title Volume 10246 Folio 309;
- (3) set out as a road on the ground.

¹⁷ There have been no material changes to the definition subsequent to the amendments made by Act No. 125/1993.

¹⁸ [1997] 2 VR 1.

58. In my opinion, the reference to “E-2” on the plan of subdivision is of no relevance. If one had access to the original plan of subdivision it would show road R1 coloured brown. For the purpose of digitised titles a colour conversion has been added to the original plan of subdivision whereby “brown = E-2”.
59. Having regard to the three above factors, in my opinion, road R1 is a road within the definition of that term in section 3 of the LGA.
60. It then follows that Latrobe Shire Council has the power to declare the road to be a public highway or to be open to the public pursuant to section 204 of the Act.

Other matters

61. In my opinion, the fact that a person is shown in title as the registered proprietor is irrelevant to the rights of the registered proprietor, if the land in question is a road within the meaning of the LGA. This matter was made clear in the Court’s decision in *Calabro v Bayside City Council*.¹⁹ What underlies the Court’s decision in that case is that the indefeasibility provisions of the *Transfer of Land Act 1958* set out at section 42 of that Act are subject to section 42(2) which makes the title subject to any public rights of way and any easements howsoever acquired subsisting over or upon or affecting the land.

Conclusion

62. For the foregoing reasons, I advise:
- (1) In my opinion road R1 shown on LP41285 is a public highway.
 - (2) Road R1 shown on LP41285 is a road for the purposes of the *Local Government Act 1989*.
 - (3) Road R1 being a public highway, it is a road as defined in the *Road Management Act 2004*.
 - (4) Even if there were insufficient evidence of acceptance to constitute the road as a public highway at common law, the road is nevertheless a road within the meaning of the *Local Government Act 1989*. If there is any remaining doubt as to whether the road is a public highway at common law, a council has the

¹⁹ *Supra*.

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power to put that matter beyond doubt by adopting the procedure in section
204 LGA 1989.

GRAEME PEAKE

OWEN DIXON CHAMBERS

1 October 2014

[6034362: 13598821_1]

LATROBE SHIRE COUNCIL & DEACON LANE**STATUS OF LAND SHOWN AS "ROAD" ON PLAN OF SUBDIVISION 41285 –
DEACON LANE TRARALGON****SUPPLEMENTARY MEMORANDUM OF ADVICE****Instructions**

- 1 By instructions dated 29 August 2014, I was instructed to advise Latrobe City Council as to the status of Deacon Lane, Traralgon.
- 2 I provided my advice in a memorandum dated 1 October 2014. In that memorandum I advised:
 - (1) In my opinion Road R1 shown on LP41285 is a public highway.
 - (2) Road R1 shown on LP41285 is a road for the purposes of the *Local Government Act 1989*.
 - (3) Road R1 being a public highway, it is a road as defined in the *Road Management Act 2004*.
 - (4) Even if there were insufficient evidence of acceptance to constitute the road as a public highway at common law, the road is nevertheless a road within the meaning of the *Local Government Act 1989*. If there is any remaining doubt as to whether the road is a public highway at common law, a council has the power to put the matter beyond doubt by adopting the procedure in section 204 LGA 1989.
- 3 Subsequent to the provision of my memorandum of advice of 1 October 2014, my instructing solicitors have received a letter dated 7 October 2014 from John Morrow, Barrister and Solicitor, whom I understand acts on behalf of the Tripodi family, which letter enclosed a statement from Mr Alan Witchell.

4 I have now been instructed to consider Mr Witchell's statement and to advise whether it causes me to change any of the opinions expressed above.

Mr Witchell's statements

5 Whilst I do not have the benefit of historical title searches, for the purpose of this memorandum I have assumed that the contents of Mr Witchell's statement are correct. He says that:

- (1) Lots 1, 2, 3 and R1 LP041285 were owned by his family together with the land shown on LP 041285 as "NIS"¹ and used for the purpose of a car dealership from the 1970's to 1993. Mr Witchell does not say anything about the ownership or use of lot 4 on the plan of subdivision.
- (2) He leased² vacant land know as 3 Church Street for parking used cars associated with his car dealership for a period of about 12 months from 1992 to 1993. This would appear to be the land owned by Parody Glade Pty Ltd and in respect of which planning permit 93/245/PO was granted on 7 September 1993.
- (3) At the commencement of the lease and at all times prior to the commencement of the lease that are known to Mr Witchell there was a fence separating the west boundary of 3 Church Street from Road R1 which Mr Witchell removed to allow the movement of vehicles from other parts of the dealership property to 3 Church Street.
- (4) Road R1 was not used by members of the public since the beginning of Mr Witchell's family's business on the land in 1969/1970 up to 1993 and until Road R1 was cleared by Mr Witchell to allow access to 3 Church Street it was partly overgrown with blackberry bushes.

Advice

6 I have considered the statement of Alan Witchell.

7 I have not been instructed with any evidence that the laneway was used by the public prior to the construction of the office-showroom at 3 Church Street. My instructions

¹ Meaning "Not In Subdivision"

² I have not been instructed with a copy of this lease, so its terms are not known.

indicate that the laneway had been used by the occupiers of the office showroom to access the six car spaces shown on the plans endorsed under planning permit 93/245/PO and therefore the rear door of the office showroom (there being no other access to that rear door) since the completion of that development apparently in late 1993. I stated at paragraph 45 of my memorandum of 1 October 2014 that prior to 1993, there was no evidence of acceptance of the dedication of the road by the public and there was no evidence that the owner of the land had withdrawn the dedication of the road prior to that date. This remains the case.

- 8 At paragraph 46 of my previous memorandum I advised that road R1 became a public highway on the acceptance of the dedication thereof by user commencing in or about 1993. This remains the case. There is no evidence of any acceptance of dedication prior to the constructions and use of the car park at 3 Church St.
- 9 Mr Witchell's statement is consistent with the assumptions that I have made for the purpose of my memorandum of 1 October 2014, being that, on the evidence available to me, the road R1 did not become a public highway until after the owner's dedication to the public was accepted by a class of the public, being the persons using the car park at 3 Church Street, in or about 1993.
- 10 I cannot exclude the possibility that further evidence may emerge that amounts to a withdrawal of the apparent dedication of Road R1 to the public constituted by showing the road on the plan of subdivision, keeping the road clear of buildings and not excluding the public from the road. However, I am not instructed with any information that demonstrates any intention on the part of the owner of the land to withdraw the dedication of the land to the public, prior to that dedication being accepted in 1993.

Conclusion

- 11 Accordingly, in my opinion, the statement from Mr Witchell is consistent with the assumptions that I adopted for the purpose of my memorandum of 1 October 2014. Accordingly, this further information does not cause me to alter the opinions that I have previously stated.

4

GRAEME PEAKE

OWEN DIXON CHAMBERS
27 October 2014