CAMPBELLTOWN CITY COUNCIL

Confidential Item

For Council meeting to be held on

Tuesday 16 July 2024 at 7:00 pm

Refer Item 11.10

Confidential Item

11.10 Yongala Street, Tranmere - Drainage Easement

Manager Infrastructure Services, Wade DellaTorre's Report

Purpose of Report

For Council to consider the extinguishment of a drainage easement at 1 Yongala Street, Tranmere.

Strategic Plan Link

Focus Area 1.4.4 Promote community safety and respond to concerns

Focus Area 3.2.2 Identify and prioritise flood mitigation

Previous Council/Committee Resolution

Nil.

Background

Following the sale of 1 Yongala Street, Tranmere Staff were approached by the new owner of the property seeking approval to install a drainage pipe to accommodate the developments stormwater discharge, through the existing easement over properties 2 and 4 Orange Grove, ultimately discharging directly into the Third Creek Reserve. Refer to Figure 1 below.



Figure 1. Locality Map

Upon investigation into the establishment of the easement it was determined that the easement was created in Deposited Plan 3392 in 1925, refer to Figure 2. The easement was made in favour of Council however, the purpose of the easement (eg drainage), could not be confirmed through a historical certificate of title search with the Lands Titles Office (LTO).

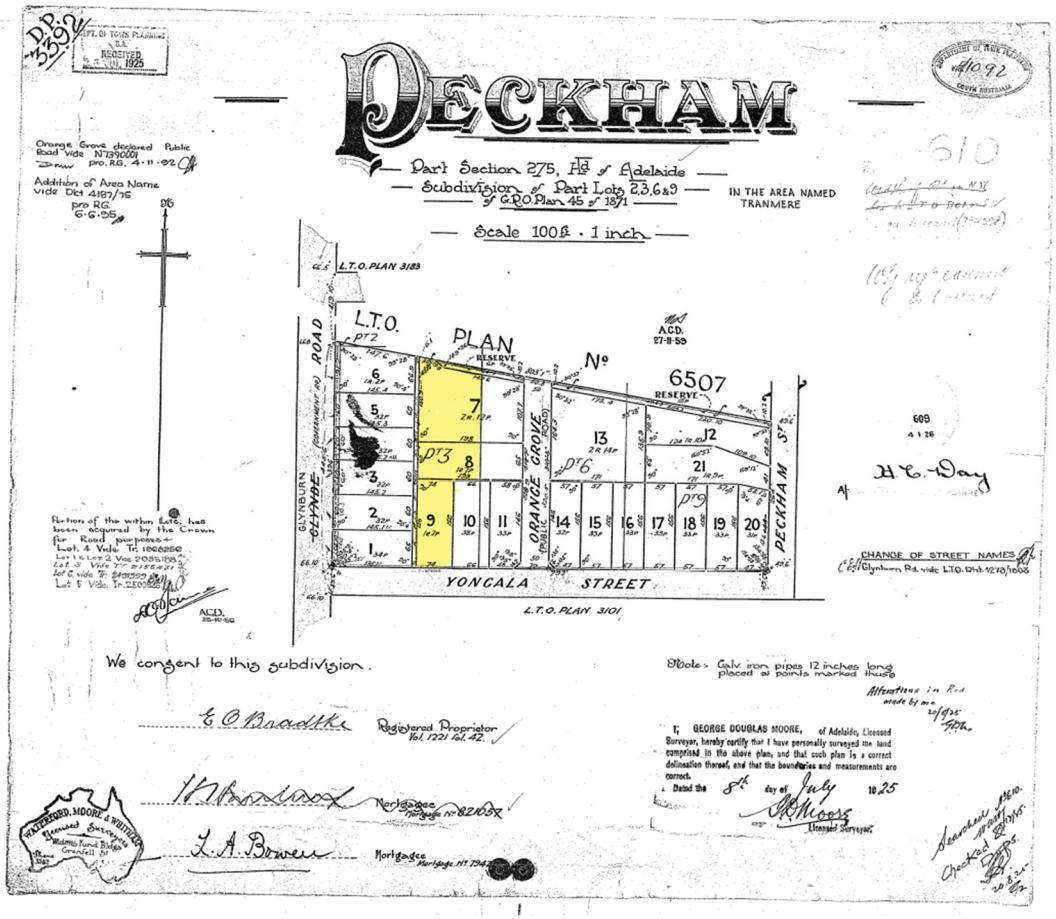


Figure 2. Deposited Plan 3392

The existing easement facilitates an informal drain directing minor surface flows towards Third Creek. In consultation with residents, it appears historically that there was a more formal drain, however over time this has been filled, with very little use or for the need to control additional storm water surface flows from the relevant properties, please refer to Figure 3 below.



Figure 3. Current day photo 2 Orange Grove (left) and (right) historical photo, approximately 35 years ago, 4 Orange Grove, children in a formalised drain.

Within the easement on allotment 2 Orange Grove are old sheds, refer to Figure 4 below. Additionally, 4 Orange Grove is under development with approved stormwater management directly to Third Creek and Orange Grove.



Figure 4. Small shed structures within 2 Orange Grove, photo taken at boundary intersection with 1 Yongala Street looking north.

Discussion

Staff's initial discussions with the current owner of 1 Yongala Street commenced in January 2023, while he was considering purchasing the property, regarding using the easement to discharge storm water without having to install a pump and sump arrangement as part of any development.

After the property had been secured in April 2023, Staff investigated the option of facilitating this gravity-based option by first consulting with the owners of 2 and 4 Orange Grove. This investigation was under the basis of no financial cost to Council and with the support of directly impacted residents.

The residents of 2 and 4 Orange Grove were long term occupants of their properties and were not supportive of any new drainage infrastructure being constructed within the easement and had no use of the easement. Following this, Staff considered options for a sealed system within 1 Yongala Street's internal drainage system, discharging the development via internal storm water onto Yongala Street, however this was not possible. With all options considered Staff required the development of 1 Yongala Street to dispose of their storm water through a pump sump arrangement.

Staff sought legal advice through Norman Waterhouse on Council's rights and responsibilities in relation to the said easement and received the following response in November 2023:

- *Nature of easement*

  The easement is recorded on the attached certificate of title. It simply states that the easement is for the Council's benefit but does not state what purpose the easement is for. The easement was created as a result of Transfer 944996. We contacted Land Services SA in relation to that transfer to try and obtain further details about it. Unfortunately, we were advised that instrument 944996, which created the easement, is 'Not on File'. This basically means it exists but is not able to be located.

  We also attach a copy of the original Deposited Plan that created the subdivision. You can see the easement on the DP, but the notes contained in it are not legible.

  We nonetheless expect the easement referred to is a drainage easement to the Council (ie an easement in gross).

- *Use of easement*

  In our view:

  1. *The owner of 1 Yongala is not entitled to use the easement for private drainage infrastructure and Council cannot grant the owner the use of the easement for that purpose.*

  2. *The only lawful use of the easement would be if the Council intended to use it for drainage purposes. You have advised us that the Council has no intention to do so, and likely will never have a need to do so.*

  3. *The only potential way the owner of 1 Yongala could use the easement is if the infrastructure to be installed in it was intended to be owned by Council after it is installed (ie it will become public infrastructure, part of Council's stormwater management system and Council's responsibility to maintain). In such a circumstance the Council may be able to authorise the owner of 1 Yongala to do the works as Council's agent. However, in circumstances where the Council obtains no benefit from doing so, we think it would be inappropriate (at the least) for the Council to facilitate this. This is particularly so because doing so would be solely for the private benefit of the owner of 1 Yongala and would allow that owner to circumvent the usual process that would need to occur to drain infrastructure over private land.*

4. *If the owner of 1 Yongala maintains an intention to use 2 and 4 Orange Grove for drainage purposes, the owner will need to negotiate a private easement with the owners of 2 and 4 Orange Grove.*

With this advice further solidifying the position of the development requiring an internal pump and sump drainage arrangement, the owner sought compensation from Council. This matter was referred to the Local Government Mutual Liability Scheme and rejected in March 2024.

In April 2024, the owner of 1 Yongala Street, through his conveyancer, asked if Council would agree to the request for the extinguishment of the easement and consent to the registration of documentation to do so. With the extended history Council sought further legal advice through Norman Waterhouse who recommended that:

> *'this advice be considered confidential and that the public be excluded from attendance during the discussion of this item pursuant to Section 90(3)(h) of the LG Act.'*

In terms of legal risks associated with extinguishing the easement, we consider there are the following risks:

1. *Future reliance on the easement:*

   In relation to this risk, you have advised that the Council has no present (or foreseeable future) intent to need to use this easement as part of your drainage network.

   You have suggested that as a result of development in the locality, that there may be pressure put on the Council to allow the easement to be used for future developments. In our view, there is an expectation that future developments will be able to manage their own stormwater and drain it in accordance with Council's requirements. This would ordinarily be determined as part of assessment against the Planning Rules or Building Rules.

   As previously advised, the only way this easement could be relied on for future development purposes is if infrastructure is installed in it that is intended to become part of the Council's stormwater system. Given the parties properties fronting Glynburn Road do not have lawful access to this easement, we do not think future development of those properties could rely on it. The only other parties who could foreseeably rely on it would be 2 & 4 Orange Grove.
   Their intentions however will however become clear if you sought to extinguish the entire easement as they would need to consent to it. If they do agree to extinguish it, they cannot reasonably complain about the inability to use it in the future.

2. *Current reliance on the easement. As we understand it, there is no current reliance on this easement. We say that as:*

   a. *There is no physical stormwater infrastructure in the easement.*

   b. *The easement has a number of physical barriers that prevent it from functioning as intended, including a tool shed and ancillary structures on private properties.*

c. We do not understand any of the properties fronting Glynburn Road rely on it for drainage purposes, nor do they have property rights that would allow them to. You have provided two examples of recent development authorisations that do not rely on the easement but instead drain to Glynburn Road.

d. We understand that the outcome of recent negotiations with 1 Yongala Avenue is such that they cannot use the easement.

Therefore the only party that may currently rely on the easement is one of the properties that front Glynburn Road and only to the extent of minor surface drainage. However you do not have knowledge of that occurring and unless a development authorisation allowed them to use it, or they have a property right to do so [which for the reasons expressed earlier we do not expect to be the case], we do not think they could lawfully rely on it.

3. Drainage issues caused by development of 1 Yongala

You have expressed concern that the development of 1 Yongala may cause drainage issues in the rear yards of the properties fronting Glynburn Road. We do not think the Council should be held responsible in such circumstances due to the presence of the easement. We say that as the expectation is that 1 Yongala should be able to manage its own stormwater and that it (not the Council) should be held responsible if it is the cause of drainage issues on those properties. Putting it differently, we do not think the existence (or non-existence) of the easement would be relevant for the resolution of that issue given it does not presently appear to be used for that purpose and that there is no lawful ability for it to be used.

A final consideration is that for so long as the easement remains registered, there may continue to be pressure put on the Council for it to be utilised. If it gets extinguished, that pressure goes away and drainage for future development will occur in the usual course, without the easement potentially complicating that.

In line with the legal advice and given that there has been no formalised drain within the easement and no need or demand for a drain, Council supports the removal of the easement within 1 Yongala Street, 2 and 4 Orange Grove.

Social Implications

There are no social implications in relation to this report.

Environmental / Climate Change Implications

There are no environmental / climate change implications in relation to this report.

Asset Management Implications

As there is no existing infrastructure within the easement there are no asset management implications in relation to this report.

Governance / Risk Management

Council sought legal advice to ensure there were no associated risks with the removal of the drainage easement.

Community Engagement

While there has been no broad consultation, Staff have been in consultation with the owners of properties facilitating the said drainage easement encumbrance; 1 Yongala Street, 2 and 4 Orange Grove.

Regional Implications

There are no regional implications in relation to this report.

Economic Development Implications

There are no economic development implications in relation to this report.

Financial Implications

There are no financial implications in relation to this report.

Recommendation

That Council support the extinguishment of the existing easement over 1 Yongala Street, 2 and 4 Orange Grove, Tranmere at no cost to Council.
