

Status of a Stream: Who Owns the Creek?

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ABSTRACT

Shrimpton's Creek, which flows through and from the major drainage catchment in the Local Government Area of Ryde, is approximately five kilometres long. For such a short watercourse it is startling to encounter such diversity and divergence when dealing with the question of who owns the bed of the creek. In determining the status of the bed of any creek, one must begin with the original Crown Grants of the subject lands. First Crown Grants in 1798, 1799 and 1803 covered the first four kilometres of Shrimpton's Creek, and were Old System Title. The Second Crown Grants in 1887 covered the final kilometre of Shrimpton's Creek, and were Torrens Title. In the First Crown Grants no mention was even made of Shrimpton's Creek, so the whole of the bed of the creek was alienated from the Crown as Old System Land. In the Second Crown Grants two different events occurred: Some Portions were granted having a natural boundary of either bank of Shrimpton's Creek with the bed remaining as un-alienated Crown Land, and some Portions were granted with Shrimpton's Creek being fully contained within the Portion as alienated Torrens Titled Land. Problems began when Primary Application surveys and Subdivision surveys adopted, as a natural boundary, either bank or centreline of Shrimpton's Creek. Some surveys adopted a right line boundary beside the creek and retained the whole of the bed of the creek within one land parcel. At various stages along Shrimpton's Creek the flow is contained in concrete drainage pipe, concrete culvert, not-so-natural watercourse, open channel, concrete channel in Drainage Easement (built adjacent to the site of the original natural watercourse) and natural watercourse, to its destination at the Lane Cove River. This paper describes how City of Ryde can right these uncertainties now that the situation of tenure has been made clear.

KEYWORDS: *Crown Grant, Primary Application, natural boundary, subdivision.*

1 INTRODUCTION

Shrimpton's Creek flows through and from the largest stormwater catchment area within the Local Government Area (LGA) of the City of Ryde (Figure 1). It is about 5 km in length, running roughly from south to north and falling about 50 m (i.e. a grade of 1%). It is non-tidal and named after one of Ryde's original Grantees, Richard Shrimpton.

In 2018, Roads and Maritime Services (RMS) approached City of Ryde, with the intention of acquiring part of the bed of Shrimpton's Creek, to enable road widening. Before proceeding with the widening of Waterloo Road, where it crosses Shrimpton's Creek, it is necessary to resolve the status of the land which contains the bed of Shrimpton's Creek. Does the bed even belong to Council?



Figure 1: Up Shrimpt' Creek.

Originally, the land containing the bed of this part of Shrimpton's Creek was granted by the Crown, in Old System Title, to William Kent Junior in 1803 (Figure 2). This grant was situated adjoining the Field of Mars Common and comprised 570 acres.

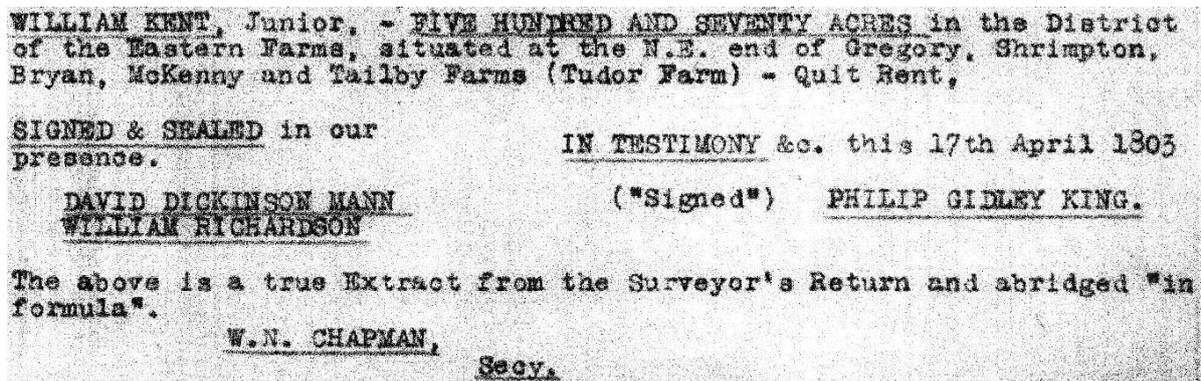


Figure 2: Extract of William Kent Junior's 570 acre grant in 1803.

The first 4 km of Shrimpton's Creek pass through land which was similarly alienated from the Crown in *Old System Title*, between the years 1798 and 1803. In these First Grants (Figure 3), no mention was made of the watercourse which was to become known as Shrimpton's Creek. In 1887, the Crown subdivided the Field of Mars Common (some background information on this area can be found, e.g., in de Belin, 2017), creating several new portions which were duly granted and alienated from the Crown in *Torrens Title* (Figure 4). Some of these new portions had Shrimpton's Creek forming a natural boundary between portions, and some showed Shrimpton's Creek being fully contained within each portion. About 1 km of creek was involved, extending from William Kent Junior's grant, to where the creek flows finally into the Lane Cove River. Waterloo Road and Herring Road were created during 1887 as part of this Crown subdivision and abutted William Kent Junior's grant: Waterloo Road on the north and Herring Road on the west.

In order to determine the status of the bed of any creek, one must begin with the original Crown Grants of the subject lands. In this case there are three scenarios:

- Alienated Crown Land in Old System Title.
- Alienated Crown Land in Torrens Title.
- Un-alienated Crown Land, which may carry a presumption of title *ad medium filum aqua*.

natural boundary (Figure 5 & 6). Old System Deed No. 127 Book 1 was a conveyance from Wentworth, and described Lot 3 being bounded “on a third side by Shrimpton’s Creek”. Subsequent conveyances of this lot carried a description which stated “to Shrimpton’s Creek” and then bounded “by Shrimpton’s Creek”.

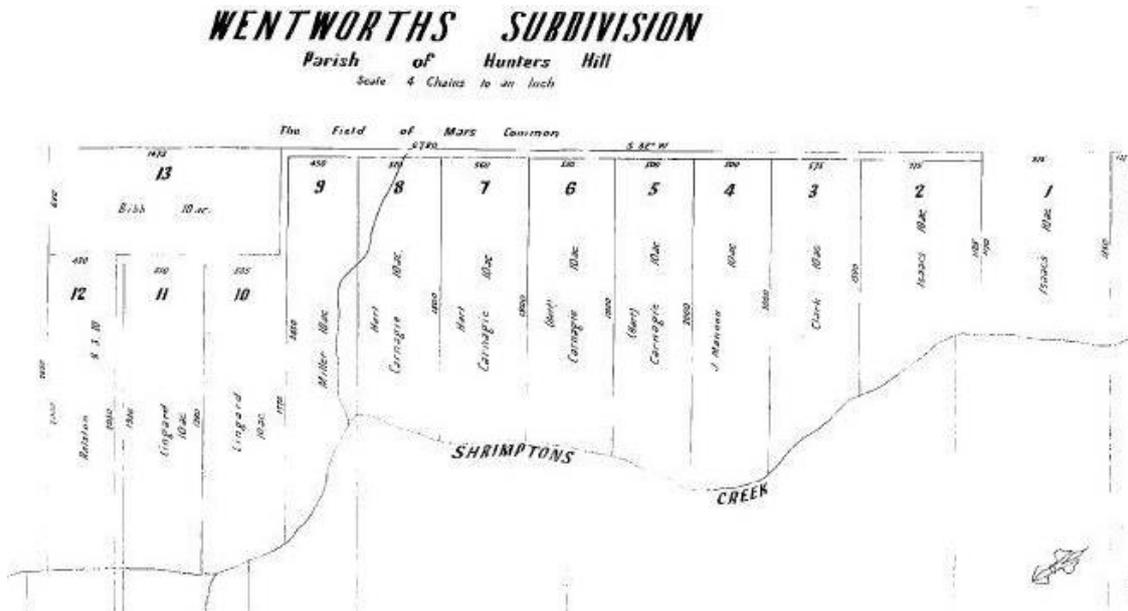


Figure 5: Roll Plan 504 (DP111206), circa 1836.



Figure 6: Shrimpton’s Creek in full flow.

Similar subdivision occurred on the opposite side of Shrimpton’s Creek, and the first Primary Application occurred on this opposite side. In 1864, Real Property Application (RPA) 195 (DP21) was initiated (Figure 7), followed in 1896 by RPA 9553 (DP59553). Note that DP21 shows both banks of Shrimpton’s Creek together with a red line drawn up to the creek centreline (survey boundary?) and a green edging along the creek bank (limit of RPA).

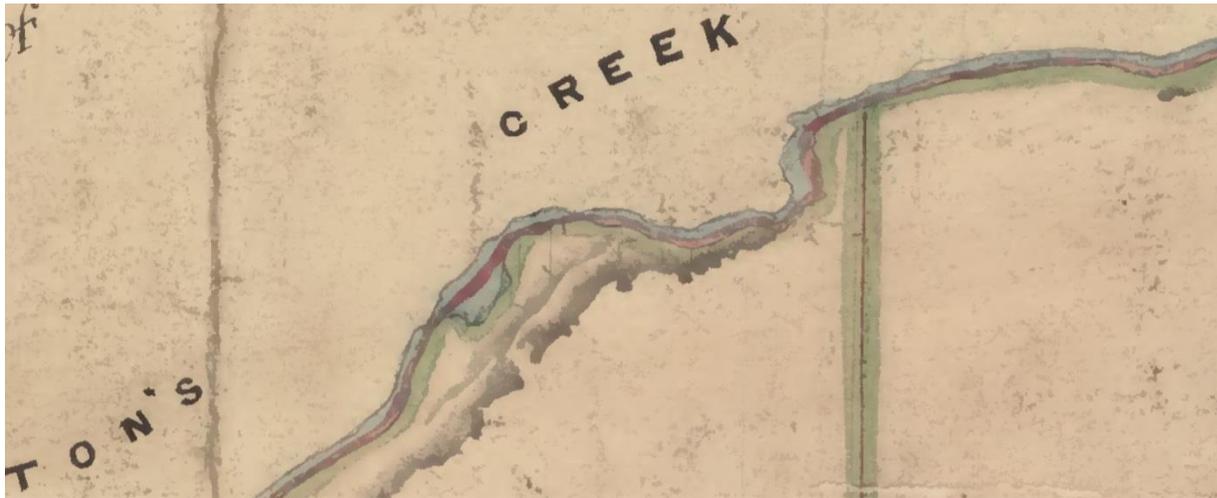


Figure 7: Detail from DP21 (1864) showing, by green edging, the limit of the RPA 195.

As a result of RPA 9553, Certificate of Title Volume 1193 Folio 91 was created with Joseph Cox shown as the proprietor of the land. This Certificate of Title contained a metes and bounds description together with a title diagram. The metes and bounds description described the side boundary as running “to Shrimpton’s Creek” and the next boundary as being “bounded by that creek”. The title diagram shows the land edged in red and a single line depicting Shrimpton’s Creek (Figure 8). “To the creek” has exactly the same meaning as “to the bank” when it comes to a bound or abuttal. Clearly, “to the centre of a creek” means to the centreline of the bed of the creek, which is the centreline between banks.

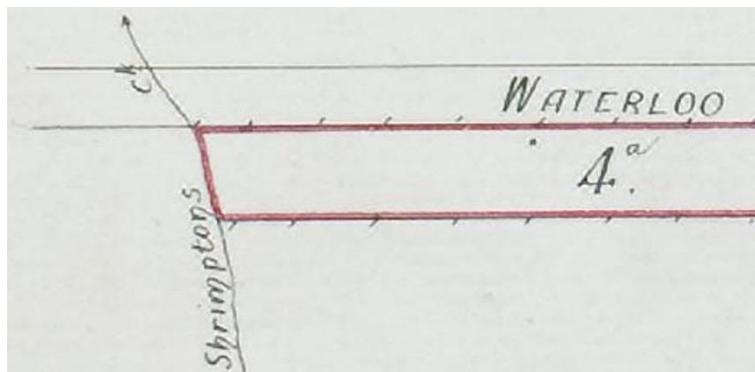


Figure 8: Detail of title diagram on Volume 1193 Folio 91, showing red edging abutting Shrimpton’s Creek.

Back on the Herring Road side of Shrimpton’s Creek, RPA 8143 (DP58143) was initiated in 1891. As a result of this RPA, which covers Lots 1 and 2 in Roll Plan 504, Certificate of Title Volume 996 Folio 53 was created with Charles Krust shown as the registered proprietor of the land.

This Certificate of Title contained a metes and bounds description together with a title diagram. The metes and bounds description described one side boundary as running “to Shrimpton’s Creek” and the next boundary as being “bounded by that creek”. The title diagram showed the land edged in red and a single line depicting Shrimpton’s Creek (Figure 9).

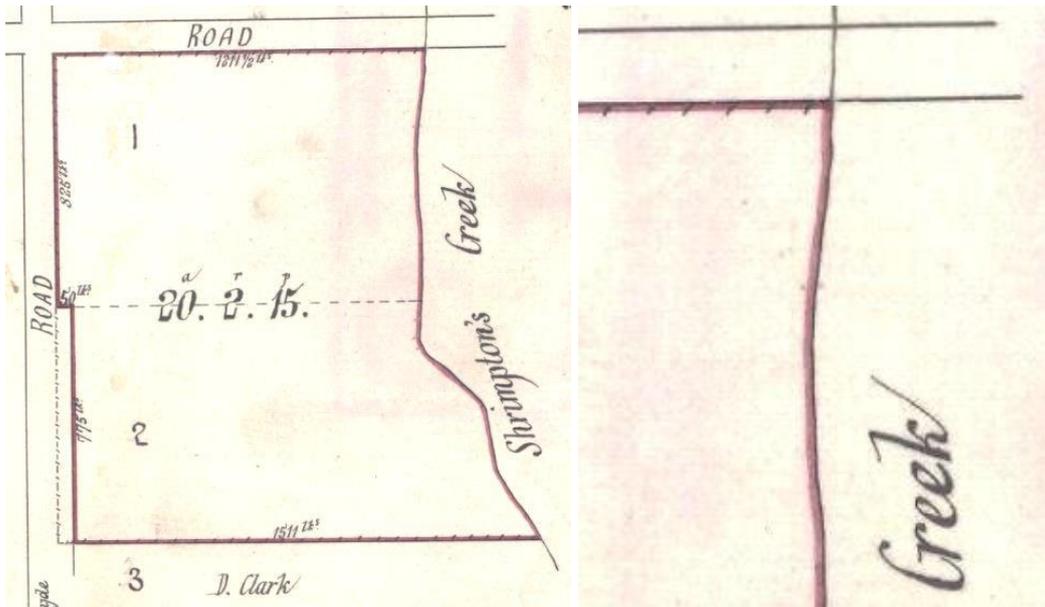


Figure 9: Detail of title diagram on Volume 996 Folio 53, showing red edging abutting Shrimpton's Creek.

Both RPA 8143 and RPA 9553 faced each other across Shrimpton's Creek, with the creek being shown as an abutting natural feature *between* the two parcels of land. However, the Deed of Conveyance to Wentworth, and the succession of conveyances from Wentworth (where Shrimpton's Creek was shown as a natural boundary) carried a presumption that title extended to the creek centreline. This presumption was not applied at the time of Primary Application, so the RPA terminated at the bank of the creek. The presumption still rests with the Old System Title, which was not fully exhausted by the RPA. Any lot created by subdivision of the RPA carries *no* presumption! Associated with this is the concept that consolidated parcels and new created lots, which straddle Shrimpton's Creek, eliminate the natural boundary and effectively annul any future claim *ad medium filum aqua*.

Using dimensions shown on the plans associated with the RPAs, and subsequent Deposited Plans (DPs) throughout the next 150 years, it is possible to accurately plot the location of the banks of Shrimpton's Creek. After plotting, there is a space of about 6 metres between banks. DP378926 (1951) states "*bank*" as being a natural boundary for its Lot B, and DP406801 (1955) (Figure 10) states "*bank and boundary*" as being a natural boundary for the subdivision of Lot B, and proceeds to show the western bank of "Shrimpton's Creek".

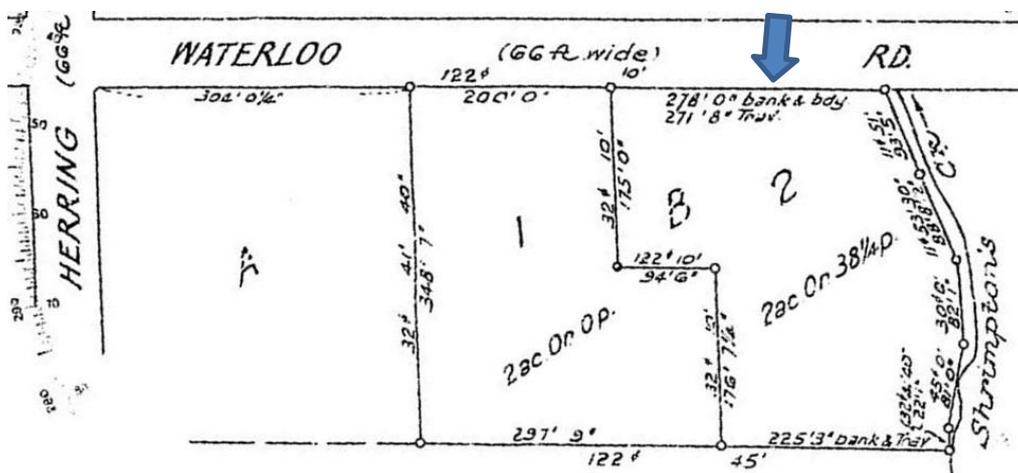


Figure 10: Detail of DP406801 (1955), showing the bank of Shrimpton's Creek as boundary.

DP577398 in 1974 (Figure 11), which is a subdivision of Torrens Titled land, states “creek” as natural lot boundary and proceeds to show both banks, with “Shrimpton’s Creek” written between.

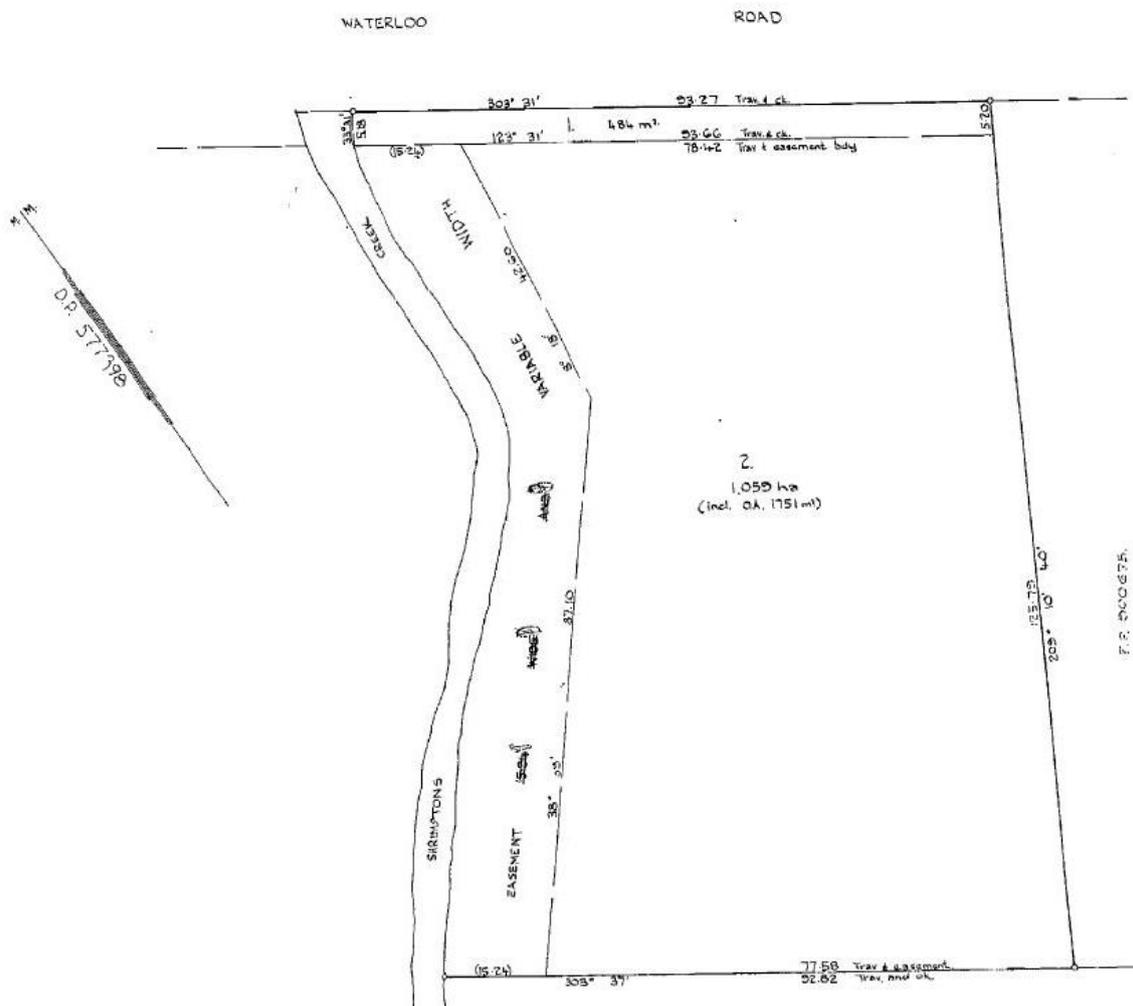


Figure 11: Detail of DP577398 (1974) showing Lot 1 abutting Shrimpton’s Creek.

It is quite clear that each of the Torrens Titles created in the above DPs has ownership to its respective *bank* of Shrimpton’s Creek, and therefore *no ownership of any part of the bed*.

DP1046092 in 2002 (Figure 12) is a subdivision in stratum and forms the basis of the current Certificates of Title. A title enquiry for Lot 10, which covers the bed of Shrimpton’s Creek, elicits a confusing message: “Computer Folio not created. Unconvertable Old System land” – unconvertable because there is no discernible prior whole parcel of land.

What is clear though, is that City of Ryde is *not the owner of the bed* next to Waterloo Road. However, it could be: by making successful “adverse possession” claims against each of the two Old System titles which have remnants left after their respective Primary Applications – BK 433 No. 612 which was the subject of RPA 9553 (1896) and BK 6 No. 736 which was the subject of RPA 8143 (1888). With this problem of tenure and status identified and resolved at Waterloo Road, the question then becomes: What happens elsewhere along Shrimpton’s Creek?

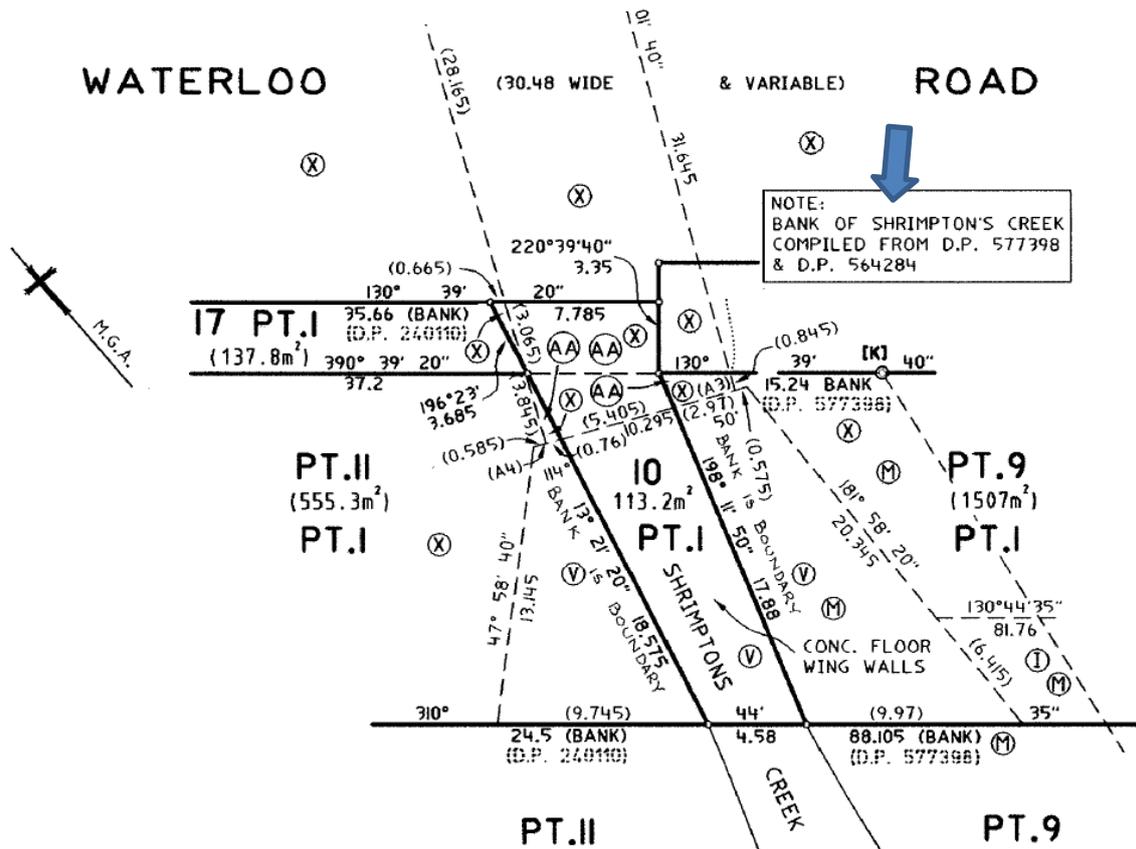


Figure 12: Detail from DP1046092 (2002) showing lots abutting Shrimpton's Creek.

3 SHRIMPTON'S CREEK IN SECTIONS

A look at the whole of Shrimpton's Creek with regard to ownership of the bed of the creek uncovers a veritable hotchpotch of situations and outcomes. Conveniently, the creek is crossed by several suburban and main roads, which effectively break the 5 km length of Shrimpton's Creek into eight readily identifiable sections. A general overview of each section of Shrimpton's Creek will identify most of the riparian issues with regard to ownership of the bed of a creek, and which issues need to be resolved by Council with respect to current and future works along the creek, such as pathways, cycleways, lighting, creek crossings, clearing, gross pollution traps, stormwater management and site regrading or watercourse diversion.

3.1 Section 1 (Headwater): Blaxland Road to North Road

Section 1 of Shrimpton's Creek (Figure 13) is within part of Thomas Winston's and George Needham's Old System Grants (1798), which made no mention of any watercourse. RPA 13451, in 1904, converted the whole of this land to Torrens Title.

Residential subdivisions, in 1913 and 1918, were influenced by a small natural watercourse so created a general "Right to Drain Water", which ran adjacent to right line lot rear boundaries, effectively acting as inter-allotment drainage. The creek in section 1 has been fully contained in stormwater pipes from that time.

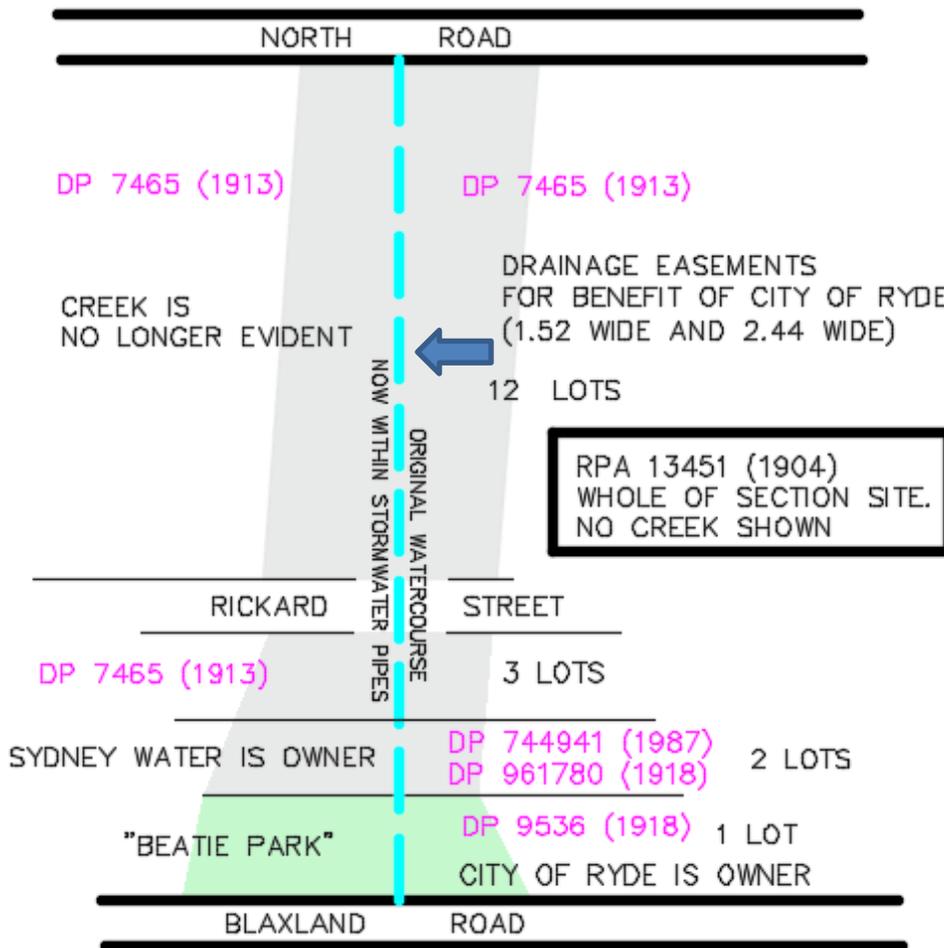


Figure 13: Schematic diagram of section 1 of Shrimpton's Creek.

The green shading indicates *land owned by the City of Ryde*, while the grey shading indicates land owned privately or by the State of NSW. Pipe upgrades to 900 mm diameter occurred in the 1970s and new “Easements to Drain Water” were created over each lot for the benefit of the City of Ryde. The bed of the creek no longer exists in this section and was not used as a natural boundary for any of the lots.

3.2 Section 2 (Natural Boundary): North Road to Quarry Road

Section 2 of Shrimpton's Creek (Figure 14) is within George Needham's Old System Grant (1798). RPA 22056 (in 1919) converted the whole of this land to Torrens Title. Residential subdivisions occurred in 1954 and 1956 on either side of Shrimpton's Creek, with centreline of the “small watercourse” being designated as a natural boundary between lots. As in section 1, the whole of the creek in section 2 is contained in an underground stormwater drainage system consisting of a single pipe, followed by twin pipes, followed by a concrete culvert.

All evidence of the original watercourse has been obliterated by drainage works and site regrading (Figure 15). The bed of the creek no longer exists. However, the creek was used as a bound to lots in the first subdivisions, so any re-instatement of these lot boundaries has to rely upon the dimensions denoted in the subdivisions.

City of Ryde does have the benefit of a “Drainage Easement” within DP7017380 (1982), created at the time of construction of the concrete culvert. Note that near this Drainage

Easement the original natural boundary no longer exists but has been replaced by a right line boundary a short distance away. Apart from the fact that Drainage Easements, for the benefit of Council, have never been created over any of the other lots along the pipeline, the question of ownership of the bed of the creek is in no doubt. *City of Ryde owns no land* within section 2 of the creek.

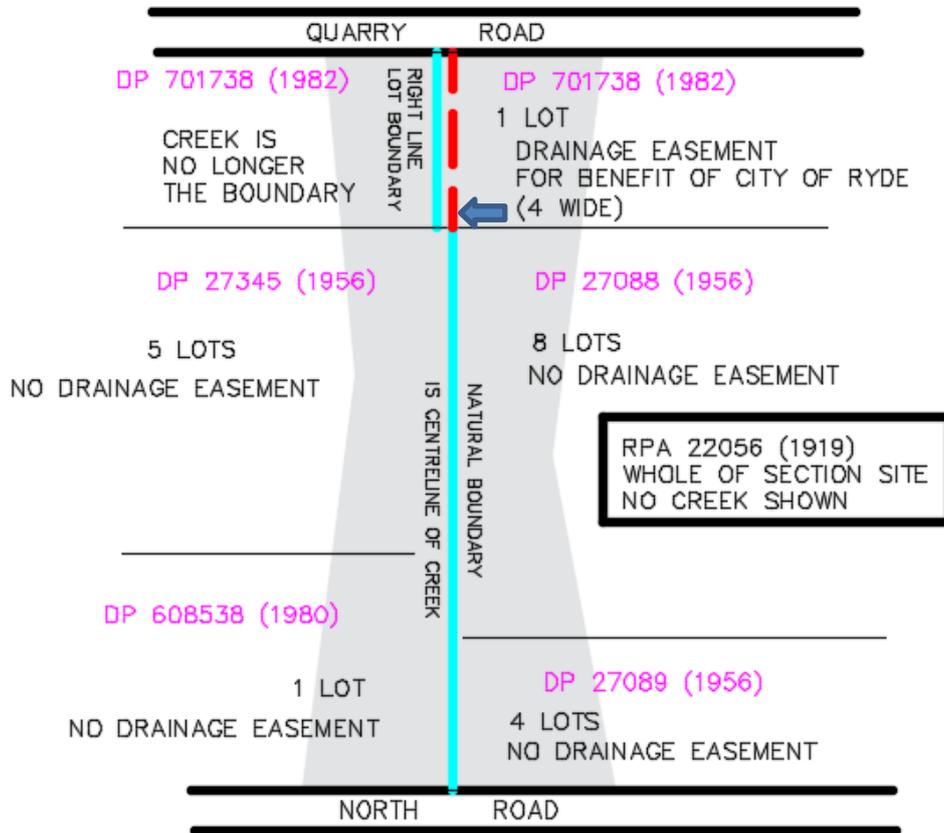


Figure 14: Schematic diagram of section 2 of Shrimpton's Creek.



Figure 15: Rear fenced line, indicating where Shrimpton's Creek originally flowed.

3.3 Section 3 (Santa Rosa Park): Quarry Road to Bridge Road

Section 3 of Shrimpton's Creek (Figure 16) is within Richard Shrimpton's Old System Grant (1799), which made no mention of any watercourse. A series of RPAs, from 1922 through to 1961, duly converted the land (including the bed of the creek) to Torrens Title.

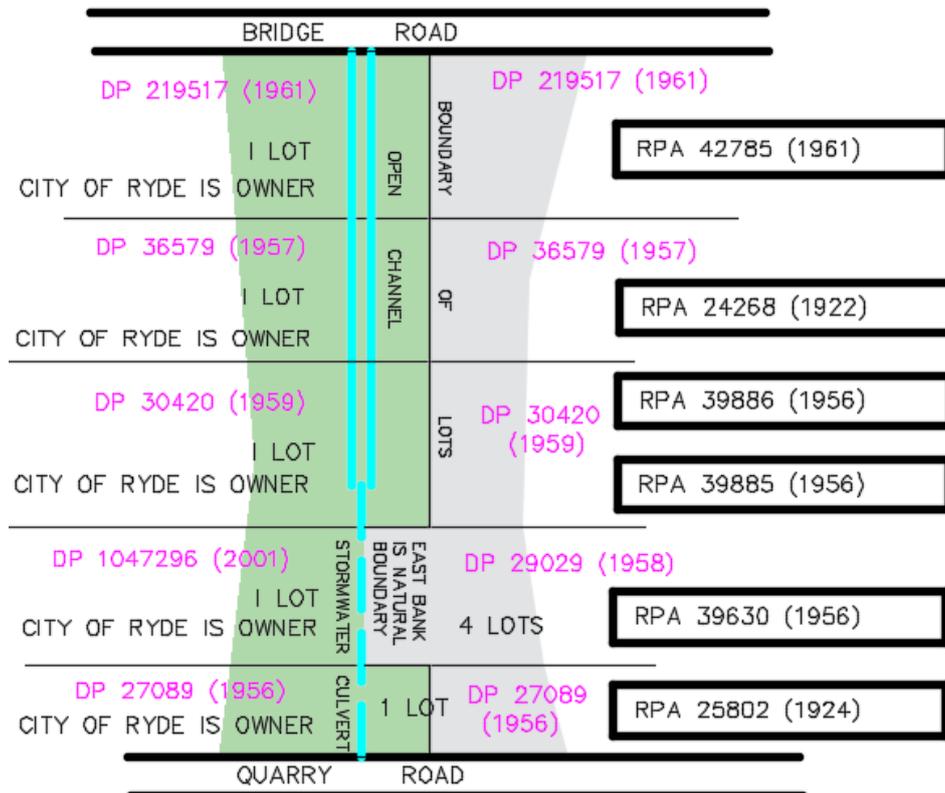


Figure 16: Schematic diagram of section 3 of Shrimpton's Creek.

Each subsequent residential subdivision of these RPAs created a different scenario:

- 1) DP12918 (1924) showed a proposed Drainage Easement through Lot 4.
- 2) DP29029 (1958) included four lots with a natural rear boundary delineated by the east bank of Shrimpton's Creek. The culvert system through Santa Rosa Park was constructed at some distance from the original watercourse. Therefore, the original bed and east bank of the creek (up to the ending of the culvert) have been obliterated. Any of these lots with a natural boundary must be re-instated using the dimensions as denoted in the first subdivision.
- 3) DP30420 (1959) included 3 lots having right line rear boundaries near the creek with no mention of any creek bank or creek. At this point Shrimpton's Creek emerges from its underground system and continues downstream as an open channel (Figure 17).



Figure 17: Shrimpton's Creek emerging from its underground system.

- 4) DP36579 (1957) included one lot which contained the whole of the bed of the creek together with the land adjacent to each bank.
- 5) DP219517 (1963) included one lot, as above, albeit with a site adjustment to Shrimpton's Creek, making a straight deviation of the open channel to enable the creation of three additional residential lots in the subdivision (Figure 18).

In section 3 of Shrimpton's Creek, *all of the bed is owned by City of Ryde.*



Figure 18: A short section of Shrimpton's Creek, re-directed and straightened during land subdivision.

3.4 Section 4 (Flinders Park): Bridge Road to Kent Road

Section 4 of Shrimpton's Creek (Figure 19) is within Kent's Old System Grant (1803), which made no mention of any watercourse. A series of RPAs from 1908 through to 1961 duly converted part of the land to Torrens Title.

The other part remained as Old System land, to be subdivided, in 1957, into multiple Old System residential lots, with those abutting Shrimpton's Creek showing ownership to a natural boundary being the "centreline of creek". From the mid 1970s, these Old System residential lots became the subject of Part IVA action which ultimately converted them all to Torrens Title, with ownership to the centreline of the creek. Directly opposite these titles, on the other side of Shrimpton's Creek, the RPAs in 1908 and 1956 likewise extended to a natural boundary being the "centreline of creek". The remaining RPAs abutted the east or west bank of the creek, leaving the bed of Shrimpton's Creek (shown unshaded in Figure 19) still in Old System Title from the preceding deeds.

Subdivision of these RPAs created lots which therefore had a natural boundary: being the *east or west bank* (Figure 20). In section 4, City of Ryde *owns half the bed* of Shrimpton's Creek in one part, *owns the whole of the bed* in another part, and *owns land to the bank* of the creek in all other parts. Likewise, half of the bed of Shrimpton's Creek in one part, and land to the bank of the creek in other parts, are in private ownership.

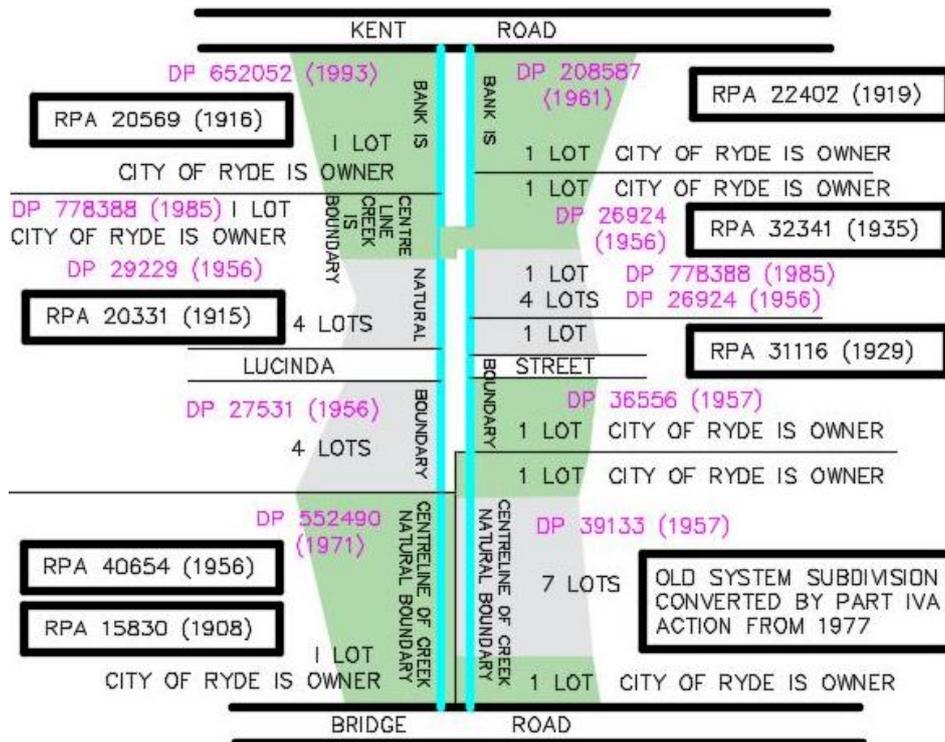


Figure 19: Schematic diagram of section 4 of Shrimpton's Creek.

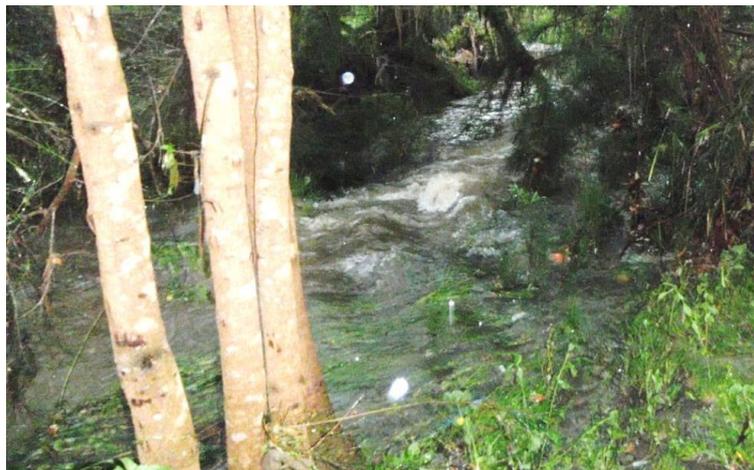


Figure 20: Shrimpton's Creek running full.

3.5 Section 5 (Els Hall Park): Kent Road to Epping Road

Section 5 of Shrimpton's Creek (Figure 21) is within Kent's Old System Grant (1803). A series of RPAs, from 1864 through to 1961, duly converted most of the land to Torrens Title with lots having a natural boundary being the *bank of creek*. One part remained as Old System land, to be subdivided in 1960 into several Old System lots, with the lot abutting Shrimpton's Creek having a natural boundary being the *bank*.

From the mid 1970s, these Old System lots became the subject of Part IVA action to ultimately convert them to Torrens Title. One Lot in this 1960 subdivision, which is owned by City of Ryde, has a Certificate of Title which still carries a notice of Qualification. The bed of Shrimpton's Creek remains in the remnant Old System Title deeds current at the time of Primary Application.

Four parcels of land are owned by City of Ryde and three owned by RMS with one other parcel being owned by the State of NSW, yet under control and management by City of Ryde. Section 5 of the creek ends at the major highway, Epping Road, which bridges Shrimpton's Creek by way of a huge culvert (Figure 22).

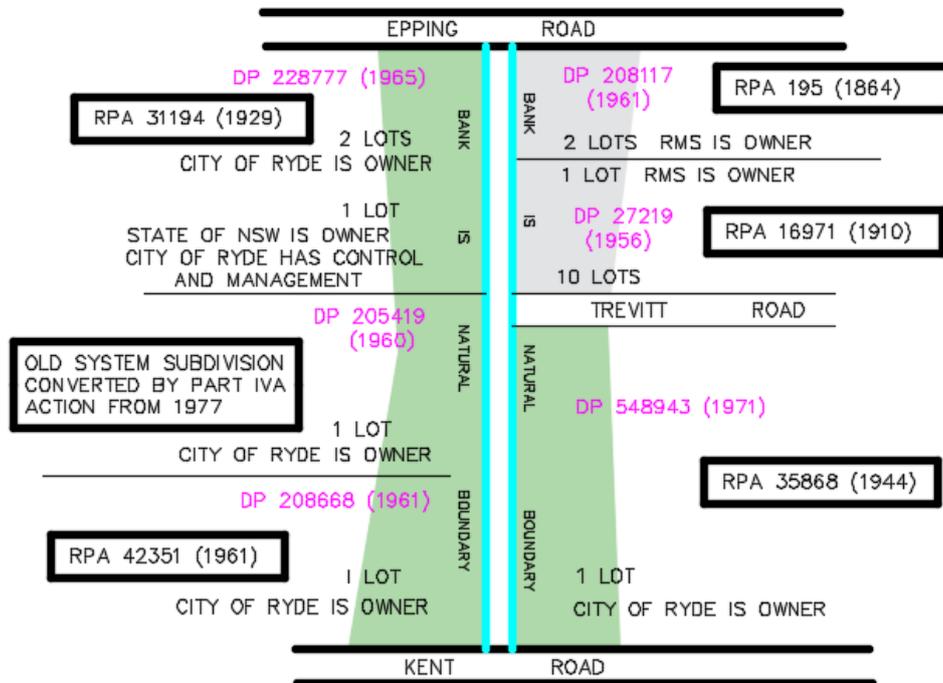


Figure 21: Schematic diagram of section 5 of Shrimpton's Creek.



Figure 22: Shrimpton's Creek, with adjacent pedestrian way, running under Epping Road.

3.6 Section 6 (Macquarie Park): Epping Road to Waterloo Road

Section 6 of Shrimpton's Creek (Figure 23) is within Kent's Old System Grant (1803) and includes the initial investigation site for the RMS request. A series of RPAs, from 1864 through to 1963, duly converted most of the land to Torrens Title with lots having a natural boundary being the *bank of creek*. The land containing the bed of Shrimpton's Creek remains in Old System Title. City of Ryde owns three lots, each with a natural boundary being *bank of creek*, and has the benefit of two Drainage Easements (15.24 m wide and variable width, respectively) which lie adjacent to the east bank.

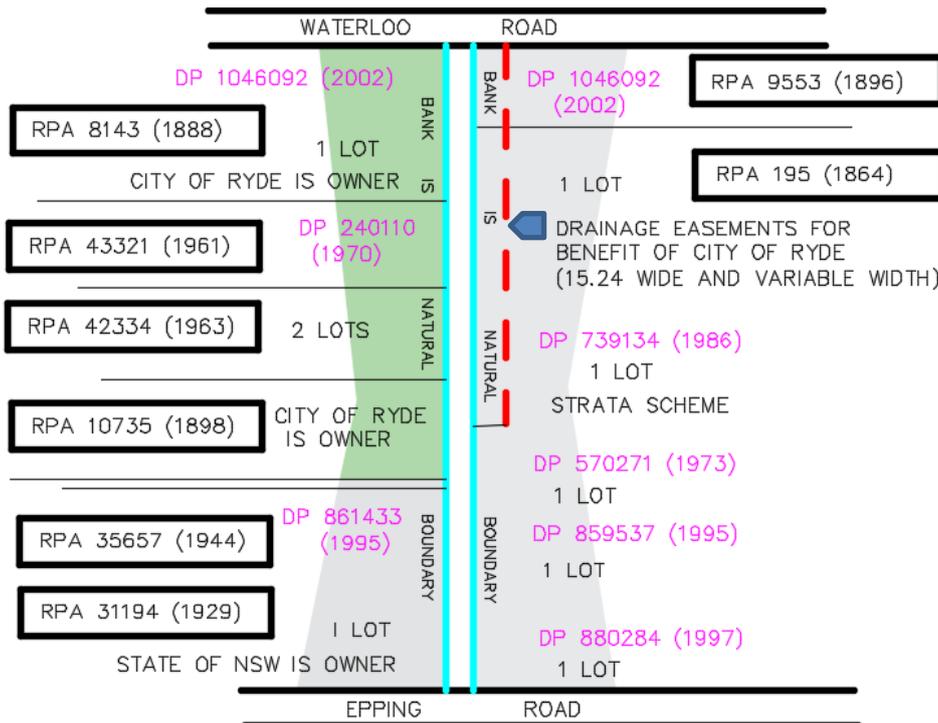


Figure 23: Schematic diagram of section 6 of Shrimpton's Creek.

3.7 Section 7 (Macquarie Centre): Waterloo Road to Talavera Road

Section 7 of Shrimpton's Creek (Figure 24) is covered by six Torrens Title grants (1887) which nominated Shrimpton's Creek as a watercourse and indicated separate and distinct banks. The bed of Shrimpton's Creek, which separated these portions, was not included in the Crown Grants. However, its status eventually changed when one owner acquired all the land on either side of Shrimpton's Creek. Because the Crown Grants occurred prior to 1918, there is a presumption that title *ad medium filum aqua* may apply. Although no direct evidence can be found, it seems that ownership of the bed was acquired by this method. At this point, all of the land was consolidated into one parcel and all reference to a bank as natural boundary ceased.

The huge Macquarie Centre shopping mall was constructed upon this section and Shrimpton's Creek, as an open channel, disappeared. It was replaced by a concrete stormwater culvert, which was constructed within a Drainage Easement sited beside the original watercourse. An overland flow path has been maintained at ground level, underneath the shopping mall. The former bed and banks of Shrimpton's Creek have been obliterated and the land is owned by Macquarie Centre. *City of Ryde owns no land* in this section, but has the benefit of a Drainage Easement, 9 m wide and variable.

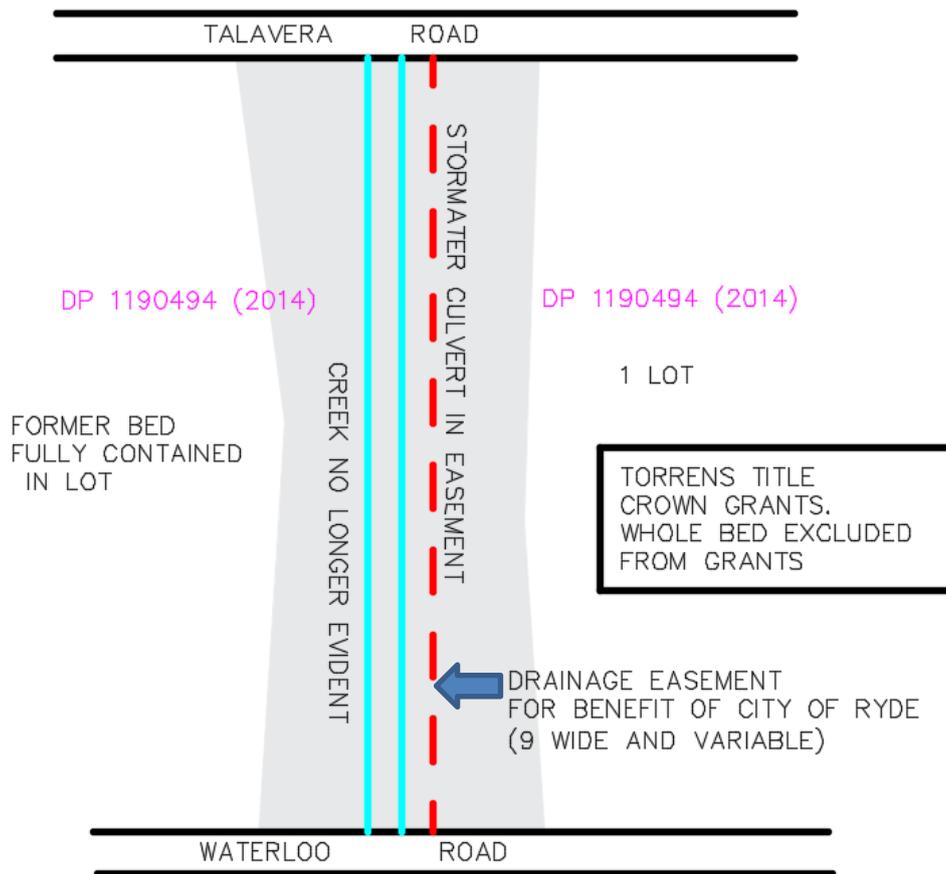


Figure 24: Schematic diagram of section 7 of Shrimpton's Creek.

3.8 Section 8 (M2 Motorway): Talavera Road to Lane Cove River

Section 8 of Shrimpton's Creek (Figure 25) is also covered by six Torrens Title grants (1887) which nominated Shrimpton's Creek as a watercourse. The land containing the bed of Shrimpton's Creek was included within these Crown Grants and thus alienated from the Crown. A subdivision in stratum (DP1190961) occurred in 2002, with the subsequent residential apartment buildings being constructed right up to the natural creek bank (Figure 26 & 27).

The M2 Motorway was constructed with a crossover of Shrimpton's Creek (Figure 28). Beyond the M2, Shrimpton's Creek flows through Lane Cove National Park until reaching the Lane Cove River. The bed of Shrimpton's Creek section 8 is wholly owned either privately or by the State of NSW. *City of Ryde has no ownership* of the bed, and no Drainage Easements have been created for its benefit.

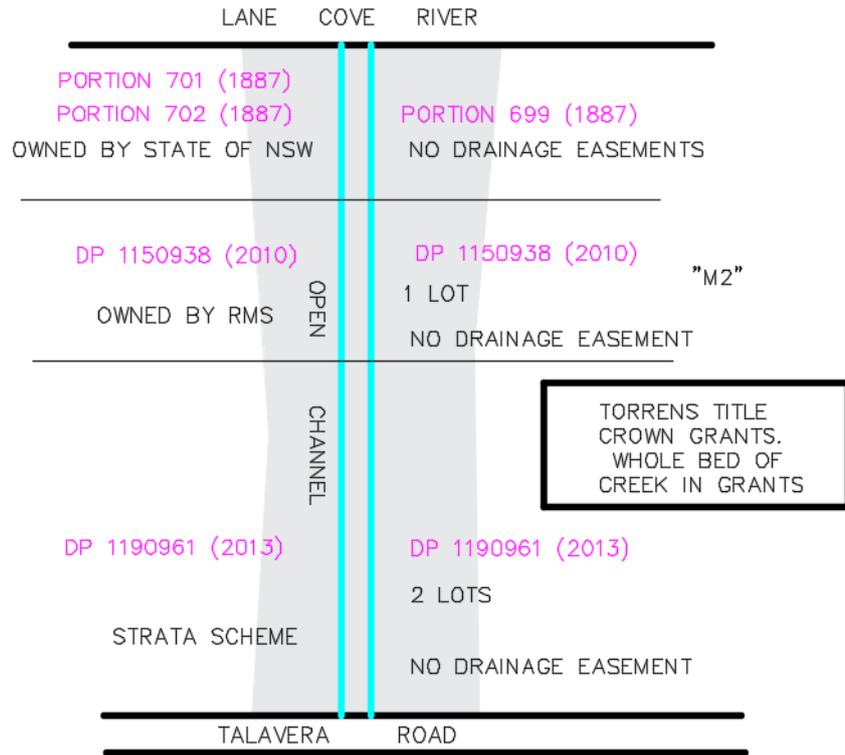


Figure 25: Schematic diagram of section 8 of Shrimpton's Creek.



Figure 26: Recent residential strata development abuts Shrimpton's Creek.



Figure 27: Shrimpton's Creek in full flow to the M2 Motorway.



Figure 28: The M2 Motorway as it crosses Shrimpton's Creek.

4 WHO OWNS THE CREEK?

The question of tenure has now been determined along the entire length of Shrimpton's Creek (Figure 29). As of November 2018, there are 101 titles encompassing or abutting the bed of Shrimpton's Creek.

The land containing the bed of Shrimpton's Creek is comprised in 70 of these titles:

- 10 Torrens Titles owned by City of Ryde.
- 42 Torrens Titles in either private ownership or owned by the State of NSW.
- 18 Old System Titles in private ownership, which form the remnant parts of deeds current at the time of each Primary Application. Research to date strongly suggests that all the Old System Land is remnant from Wentworth's Subdivision (Roll Plan 504), which produced lots that abutted Shrimpton's Creek. The ensuing deeds described each lot as being bounded by the creek.

Where Shrimpton's Creek is traversed by the road system, the land containing the bed of the creek is Public Road and administered by the City of Ryde or, as is the case with the M2 Motorway, the land is owned by RMS.

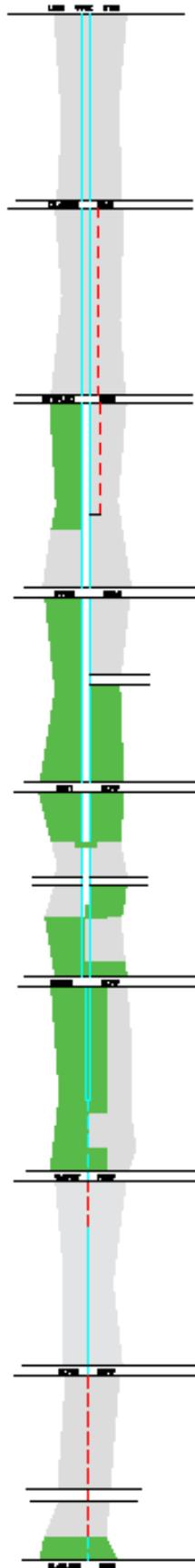


Figure 29: Ownership by City of Ryde (green) along the whole length of Shrimpton's Creek, with section 1 at the bottom end.

5 CONCLUDING REMARKS

What course of action can City of Ryde take with respect to gaining *ownership of* or gaining *rights to* the bed of Shrimpton's Creek? In the case where government agencies, such as National Parks, Department of Housing and RMS, own the whole bed in Torrens Title, the course of action City of Ryde can take is to seek transfer of title at nil compensation, in consideration of a convincing case to Government that the bed of Shrimpton's Creek has a use which is of great benefit to the public.

In the case where others own part of the bed in Old System Title, the course of action City of Ryde can take may include making a claim by Adverse Possession upon the Old System land which was remnant after the first Primary Applications. After all, City of Ryde has been discharging stormwater from the catchment area into Shrimpton's Creek ever since roads and houses have been built. City of Ryde has also undertaken periodic cleaning, clearing and maintenance work.

The question of an owner of Torrens Title land having a claim *ad medium filum aqua* is resolved at the time of Primary Application, so the Torrens Title continues forward with a natural boundary being *bank* or *middle thread*, whichever was decided. At this point, any underlying presumption of ownership *ad medium filum aqua* rests only with the Old System Deed.

In the case where others own part of the bed in Torrens Title, the course of action City of Ryde can take includes resumption or compulsory acquisition, either of which would require considerable compensation. In any eventuality, City of Ryde can seek to gain rights by way of an Easement to Drain Water. This would also be at cost to City of Ryde and would include compensation to the owner for the effect of such an encumbrance on their property. However, the costs would be considerably less than is the case with acquisition.

Does Shrimpton's Creek still follow its original watercourse? Mostly yes. However, investigating the 1943 aerial images, modern aerial images and 150 years of DPs does reveal several places where substantial deviations have occurred.

There are many fascinating anomalies and side issues associated with the points mentioned in this paper, but they will have to wait for another occasion when the story of Shrimpton's Creek can be continued.

REFERENCES

de Belin F. (2017) A cadastre set in stone, *Proceedings of Association of Public Authority Surveyors Conference (APAS2017)*, Shoal Bay, Australia, 20-22 March, 227-245.