



## 13 Feb 2010 - MP in Supreme Court over fence



Former Norwood Mayor, Vini Ciccarello and her neighbor Haydn Bunton, are in dispute over the fence line between their properties. Picture: Dean Martin Source: Sunday Mail (SA)



Dr Bunton's property on the left and Ms Ciccarello's contested driveway next door. Picture: Dean Martin Source: Sunday Mail (SA)

## Background

- Dr Bunton inherited property from grandparents
- Potential purchaser checks frontage and discovers that the distance between fences is approximately 2' short on title
- Identification survey commissioned that concluded that the common fence between the Bunton and Ciccarello properties encroached approximately 2' into the Bunton land
- Encroached property comprised a concrete driveway and garden
- Contract for sale entered into on condition that the 2' be 'recovered'

## Magistrates Court

- Dr Bunton commenced action in the Magistrate's Court in January 2009 seeking:
  - That the dividing fence between the properties be removed
  - That the dividing fence be erected on the certified common boundary
  - That in the alternative, compensation be ordered for the loss of occupation of the land
  - Payment for loss or damage as a consequence of the termination of a contract for the sale of the property
  - In addition damages of \$40,000

## Magistrates Court November 2009

- Ms Ciccarello filed a counter claim seeking:
  - A declaration that the driveway/plinths are encroachments within the definition of encroachment contained in Section 2 of the *Encroachments Act 1944*
  - An order for transfer of portion of land and
    - a) That the defendant (Ciccarello) pay the costs of Transfer
    - b) If circumstances required an order for payment of compensation to the plaintiff (Bunton)

## Magistrates Court November 2009

- Both parties accepted an identification survey that indicated the fence encroached as determining the correct boundary between the properties.
- The survey showed the fence encroached into the Bunton's property by 0.69cm at the Queen Street frontage and 0.51cm at the rear, an area of approximately 23 square metres
- The fence was relatively recent and replaced an old galvanised iron fence that according to evidence presented had been in place since at least the 1950's.
- Statements made that other fences on Queen Street were not on the boundary by similar amounts

## Magistrates Court November 2009

- Magistrate dismissed Mr Bunton's action
- There is no mechanism under the Fences Act to transfer land or to make an order that finally determines the rights of the use of the land, the order is only binding on the parties
- Section 12 of the Fences Act empowers the Magistrates Court to make a finding determination or order in relation to a fence including the line of the fence and to order:

*'The amount of any compensation (if any) to be paid for the loss of occupation of land as a result of the erection of a fence otherwise upon the boundary of contiguous land'*

- Magistrate accepted that the current fence was an adequate fence and should not be replaced, there was no award of compensation

## Magistrates Court November 2009

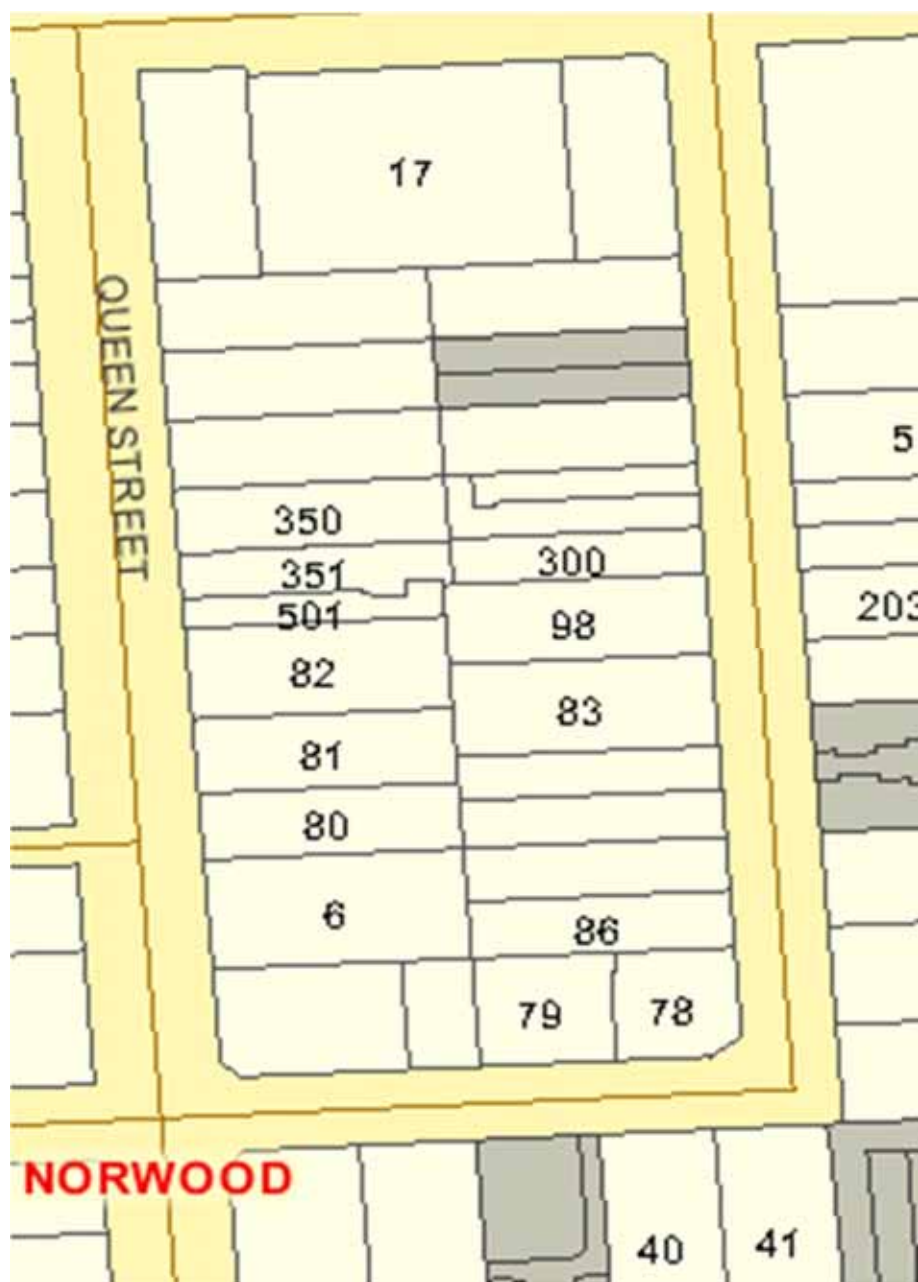
- Portion of the encroaching property was a concrete driveway.
- The *Encroachments Act* recognises that a concrete driveway is a building for the purposes of the Act .
- Where there is an encroachment the Act empowers the Court to order:
  - Payment of compensation
  - Transfer of land to the encroaching owner
  - Removal of the encroachment
- The Court may grant or refuse to grant relief
- The minimum compensation where an encroachment is not intentional is the unimproved capital value of the land, in other cases, three times the unimproved capital value

## Magistrates Court November 2009

- The Magistrate noted previous actions where the Supreme Court ordered the transfer of land without an order for compensation in cases where neither party had was at fault
- The Magistrate ordered that the land under the concrete driveway be transferred to Ms Ciccarello and that no compensation be paid to Mr Bunton for any loss of use of the encroached land. Ms Ciccarello required to meet all costs associated with the transfer
- The resultant boundary would follow the edge of the concrete driveway east from Queen Street, then run south along the end of the driveway until it intersected the original property boundary. This would introduce a step of around 0.5 metre however the fence was to remain in its current position.

## Supreme Court March 2011

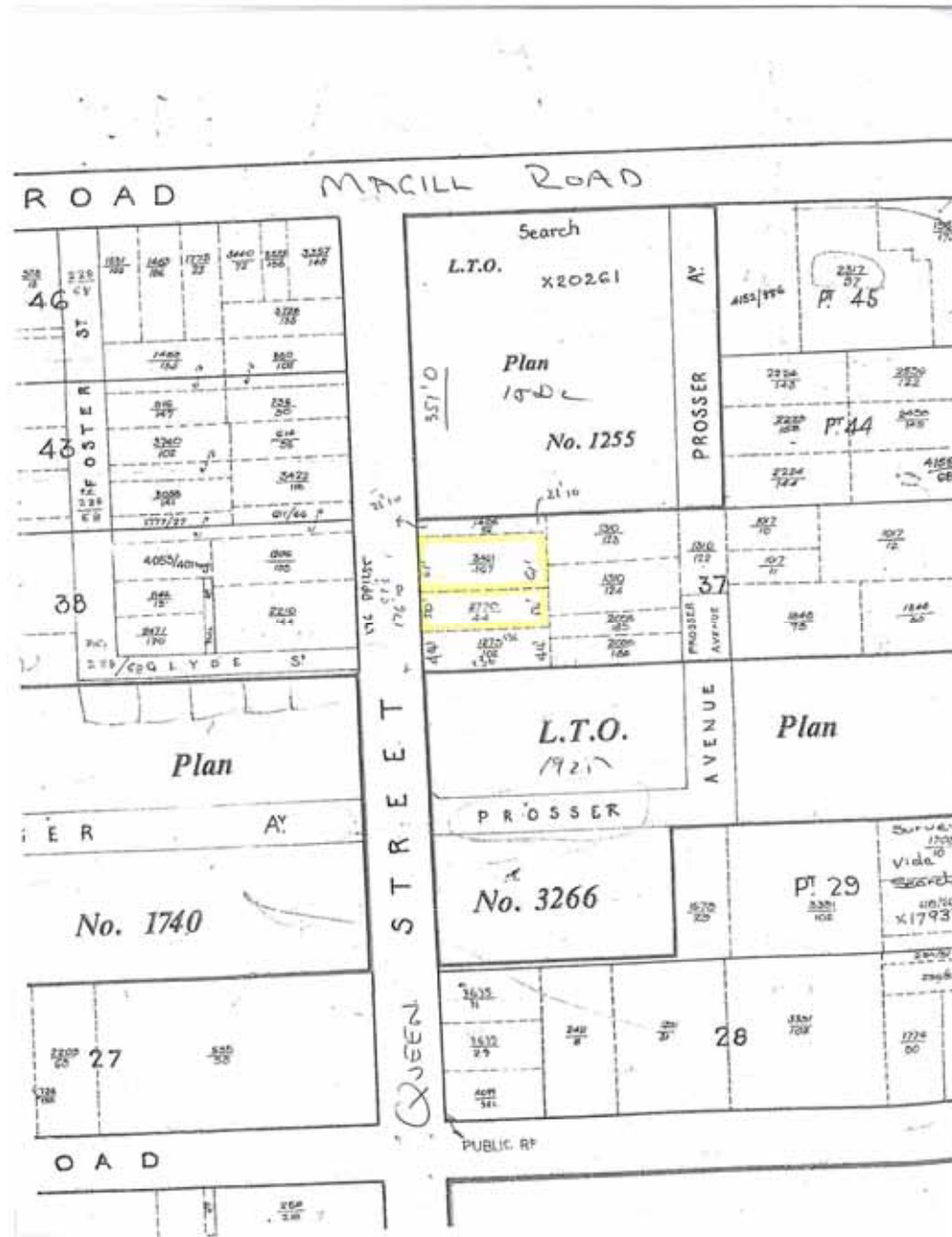
- Appeal by Mr Bunton to the Supreme Court against decision of the Magistrate that the encroached land be transferred without compensation
- Judge noted reference to evidence of other boundary problems in Queen Street presented before the Magistrate and questioned whether it had been considered if the area should be treated as a Confused Boundary Area and dealt with under the Survey Act
- Parties agreed that advice be sought from the Surveyor-General



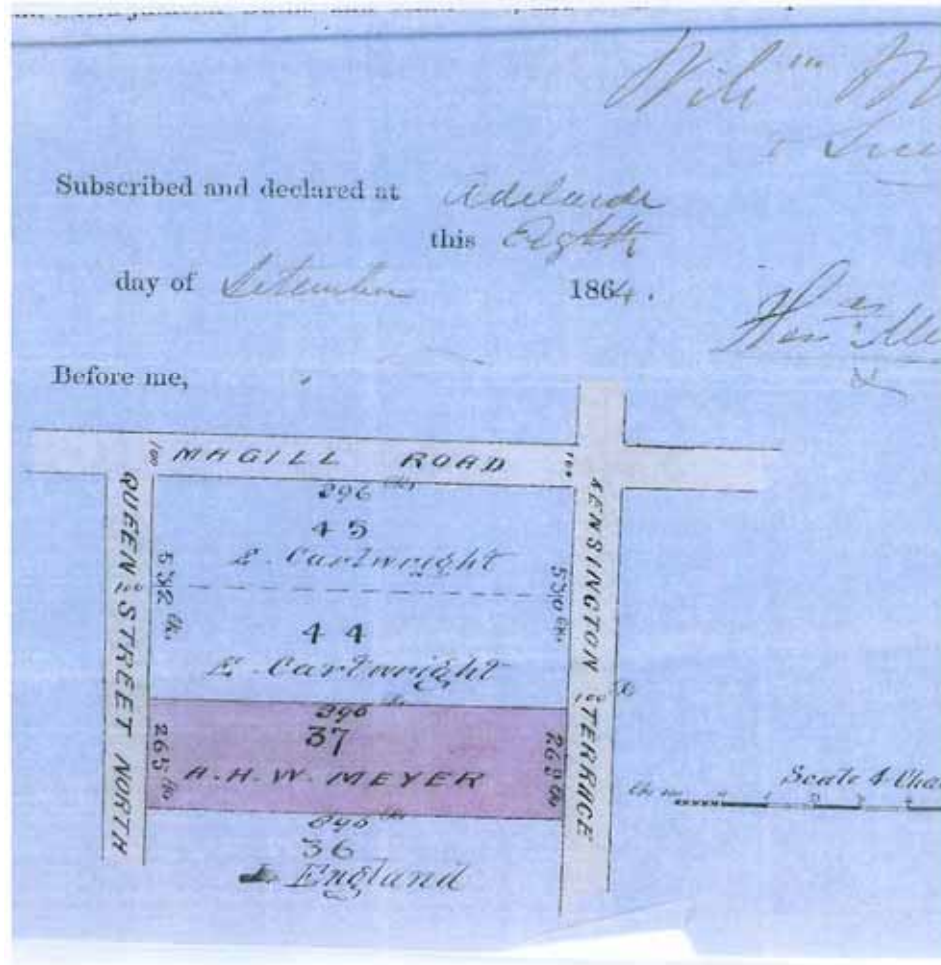




# PLOT



APPLICATION 5094 1864



TR79966 1877

136  
132  
4 206



Queen St North



30'

136  
544  
544  
5984  
520  
54

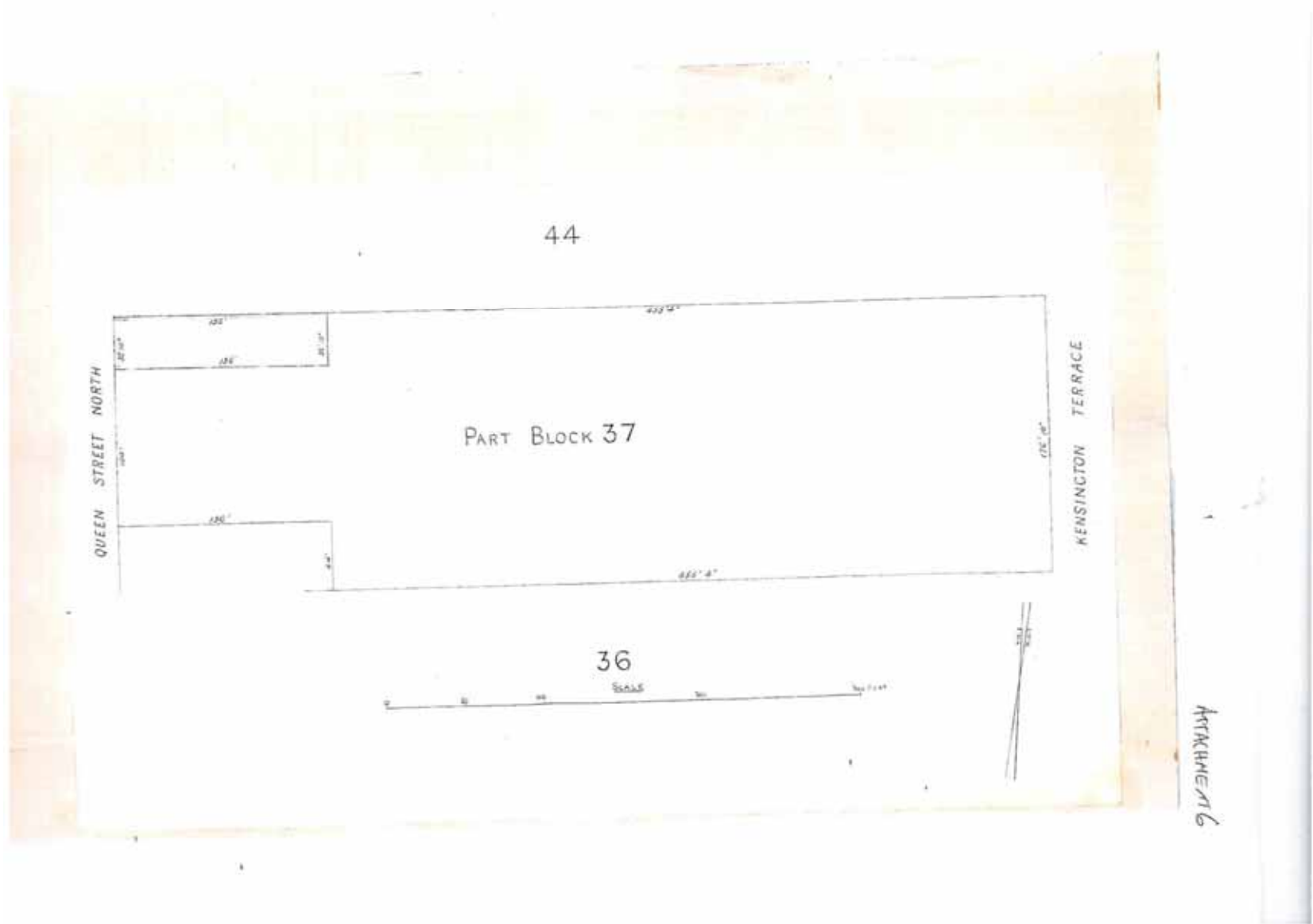
22/

2 - 1 - 21  
22  
2 0 39

In consideration of relationships and  
In consideration of the sum of Five shillings  
paid to me by Maria Elizabeth  
Augusta Meyer of Norwood Spinster

the receipt of which sum I hereby acknowledge

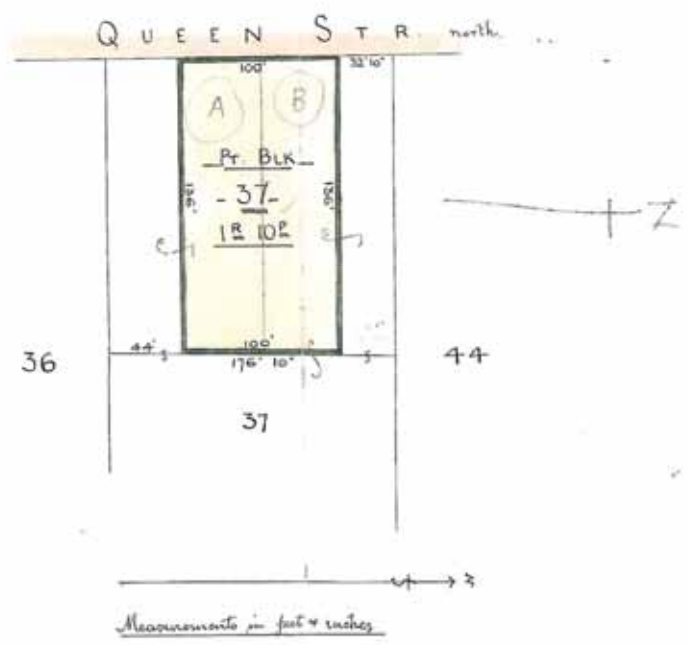
Tr 355121 1900



1907

ATTACHMENT 7

NORWOOD



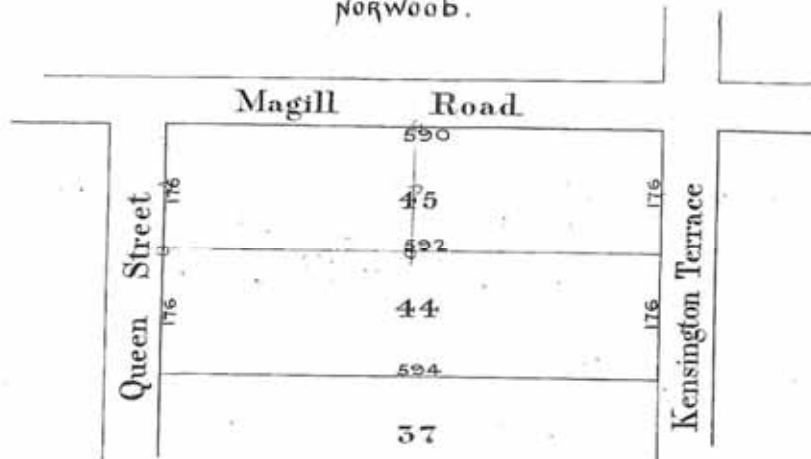
1882

A-12803

15476  
2

Attachment 2

Plan  
OF ALLOTMENTS 44 & 45  
PART OF SECTION 277 SURVEY B  
NORWOOD.



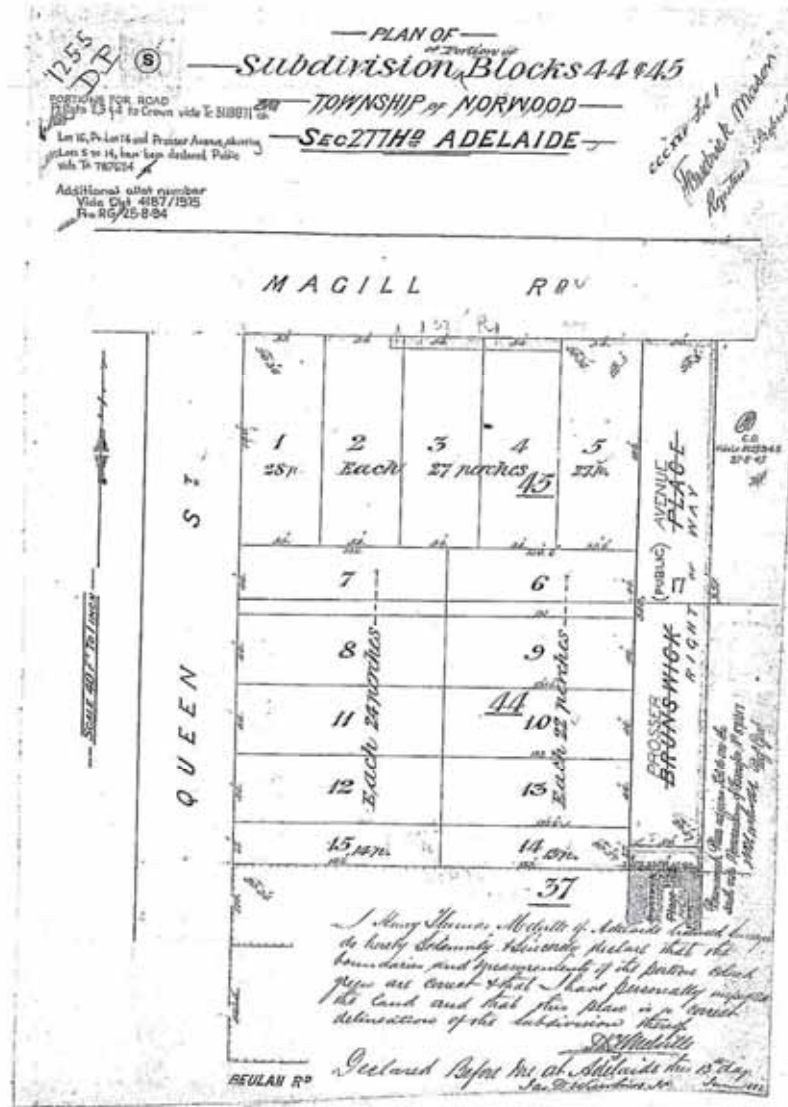
Scale 100 feet to one inch

I Arthur Henry Smith Licensed Surveyor of Adelaide do hereby solemnly and sincerely declare that the boundaries and measurements shown on plan are correct and I make this declaration to be the same to be true.

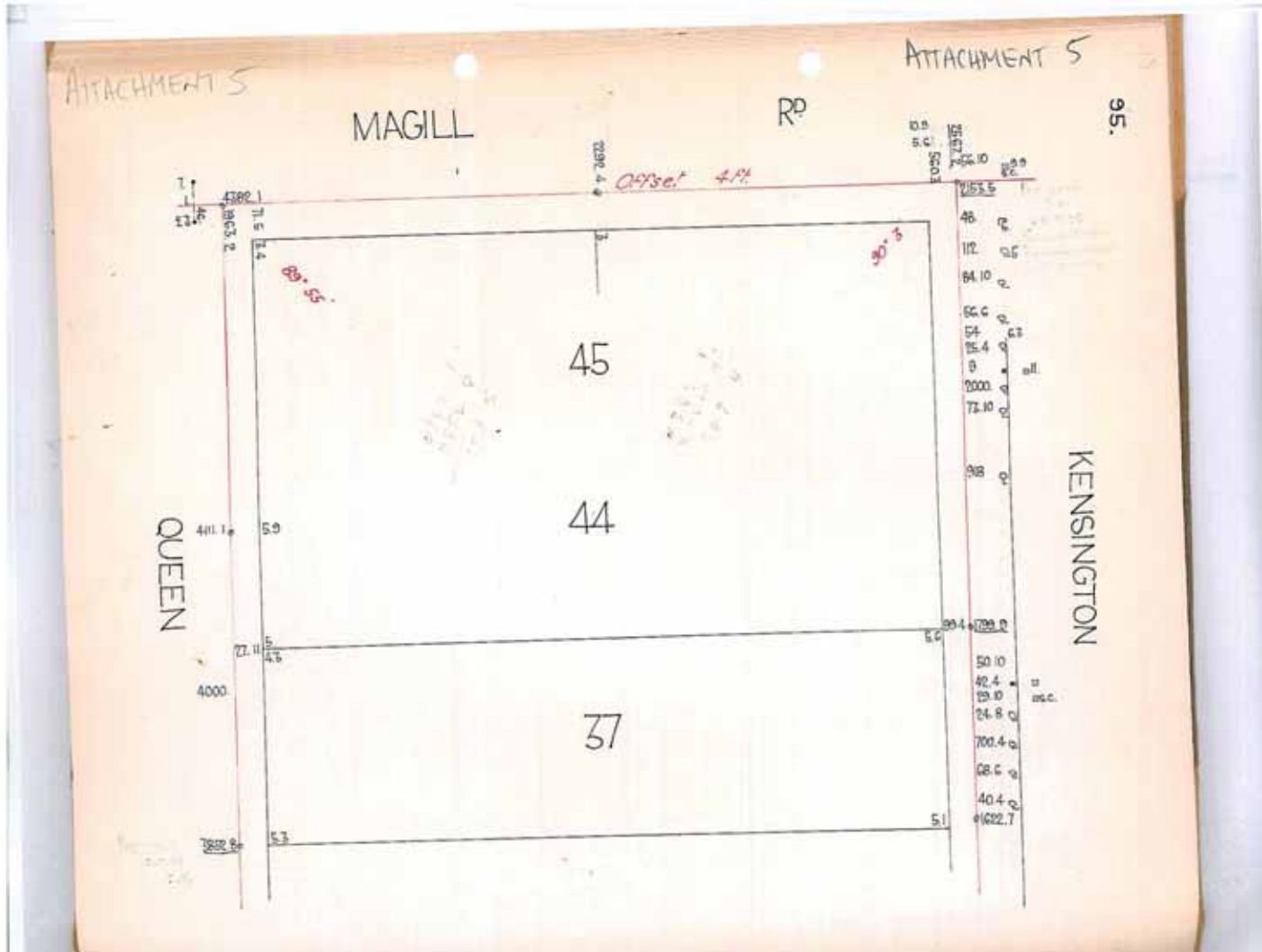
Declared before me this 11th day of October 1896.  
J. H. [Signature] J.P.

[Signature]  
Licensed Surveyor

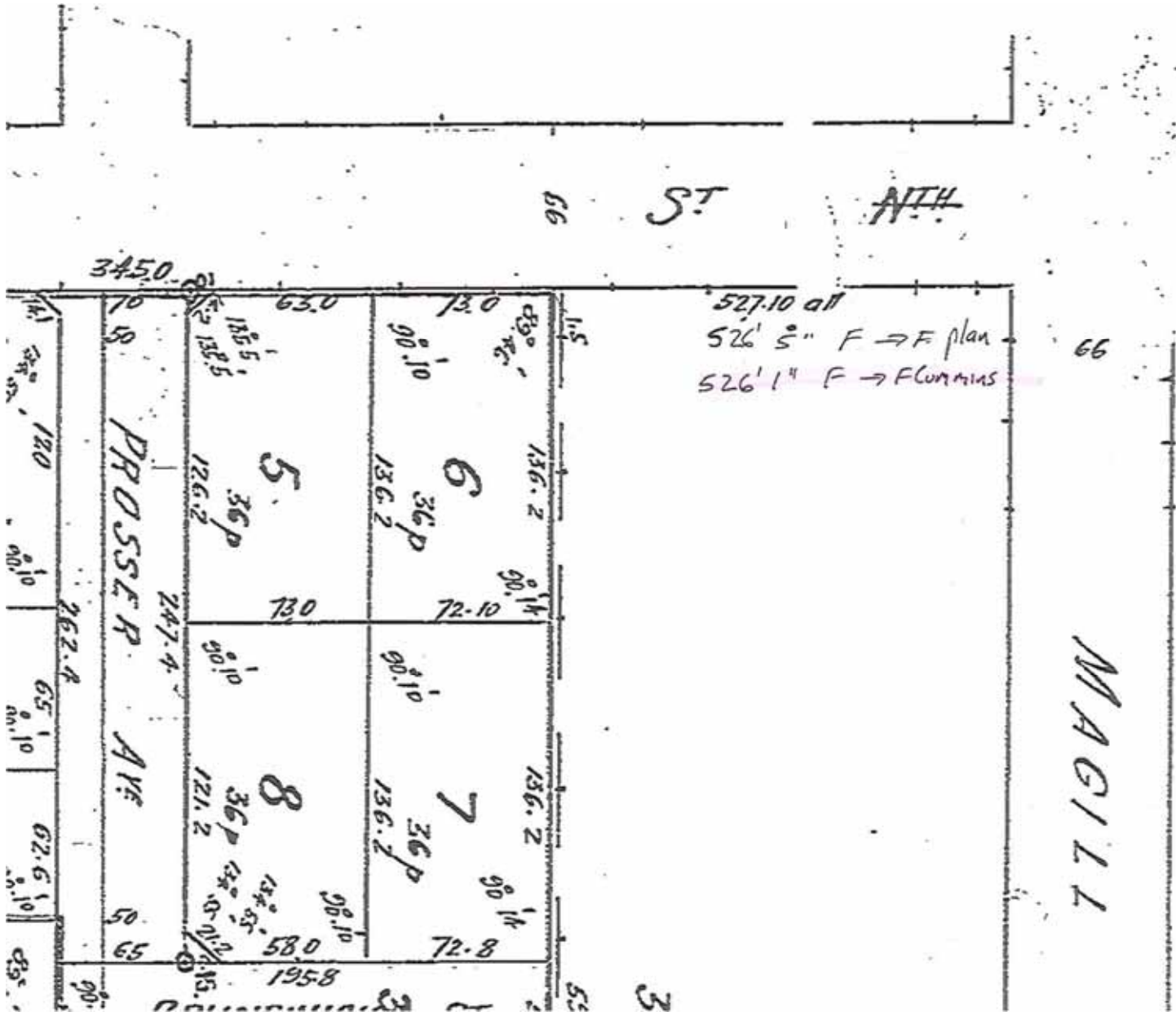
ATTACHMENT 4



# Cummins Alignment 1882

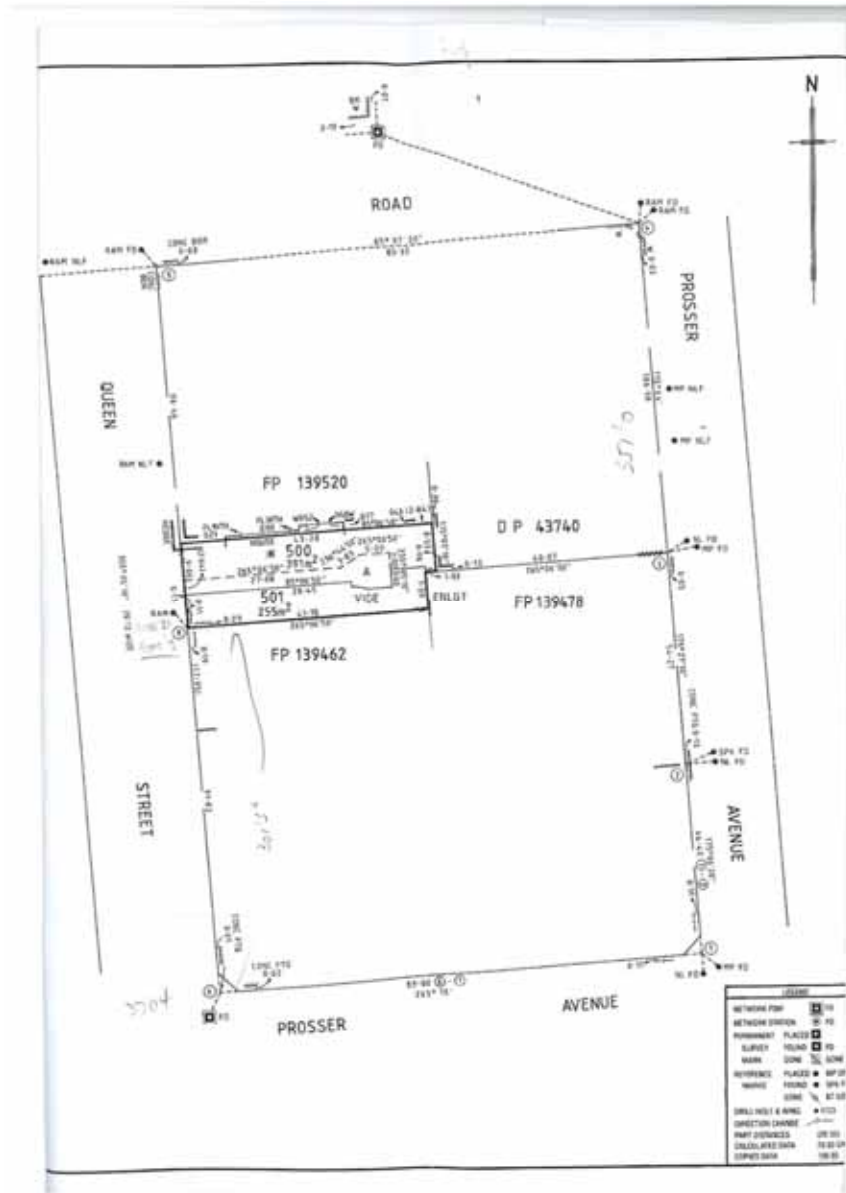


1925



DP 3266  
1925

1995



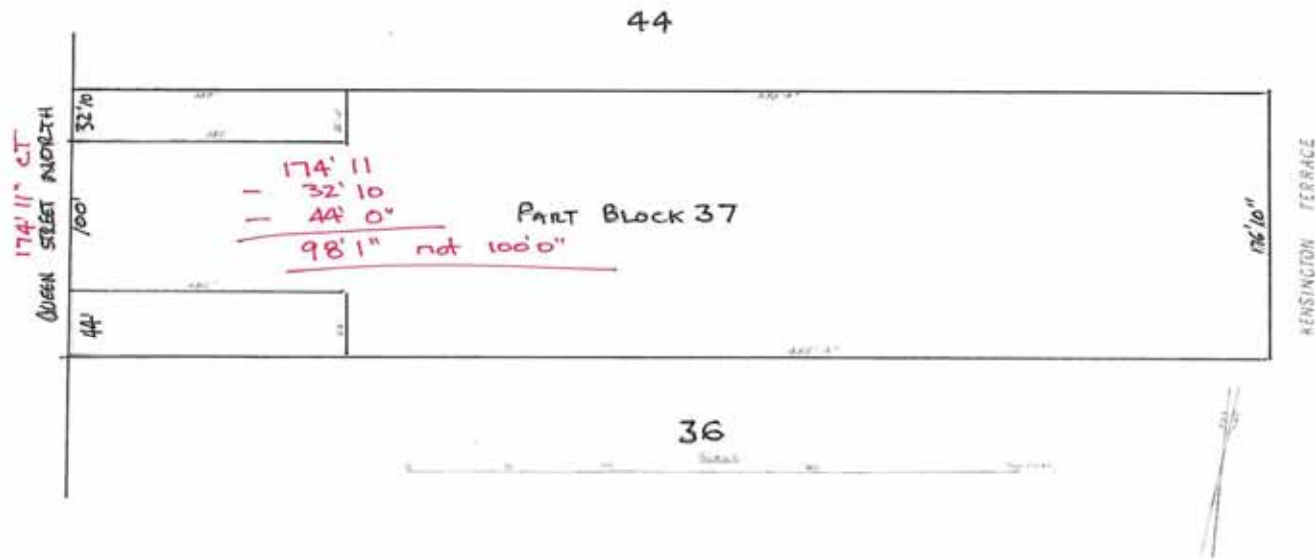
## Error in data

Application 5092 shows Block 37 frontage to Queen St as 265 links or 174'11"

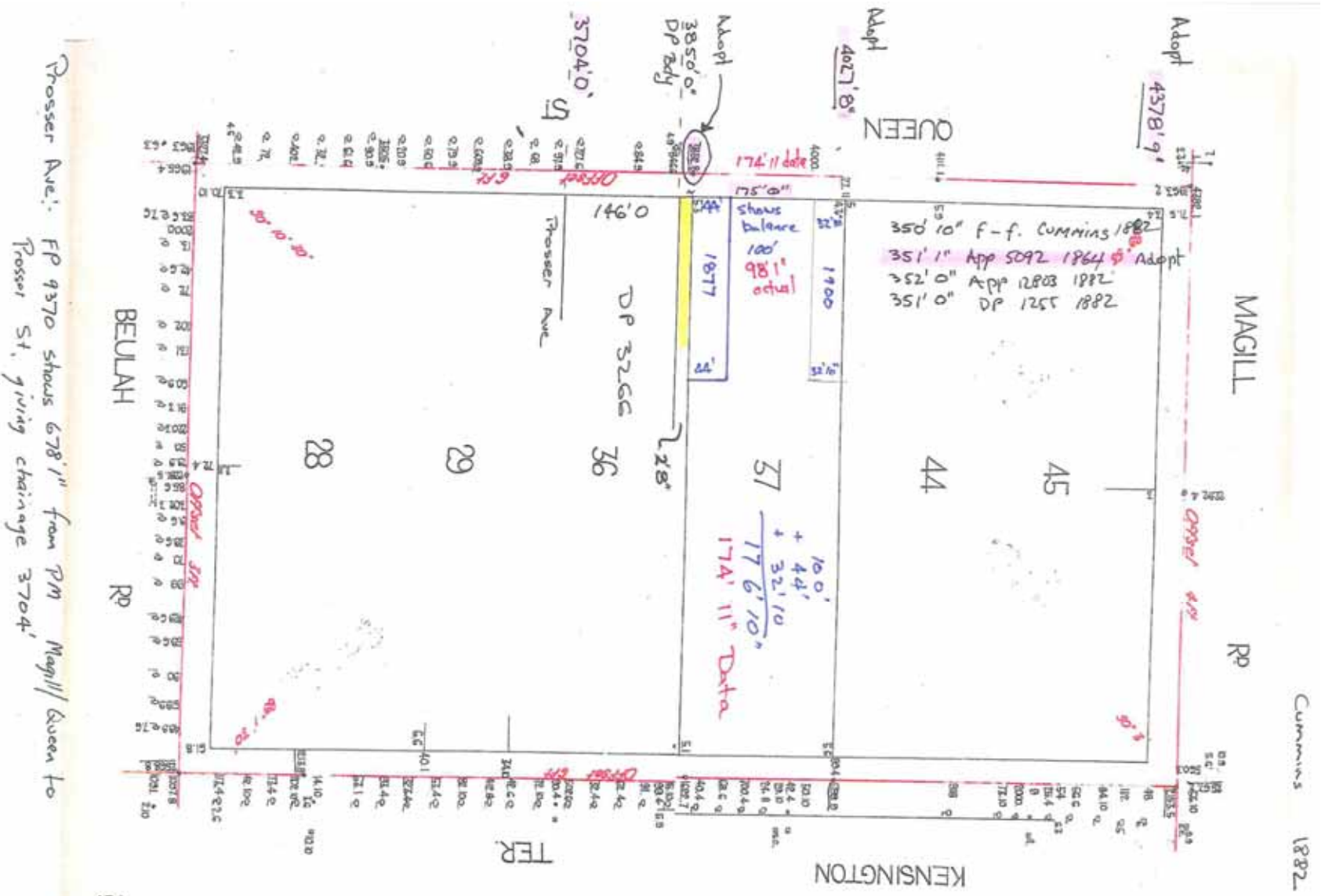
Tr 79966 takes 44' from south

Tr 355121 takes 32'10" from north

Balance frontage to Queen Street= 98'1" - transfer shows 100'



# Where is Block 37?



Prosser Ave.: FP 9370 shows 678'11" from PM Magill/Queen to Prosser St. giving chainage 3704'

## Magill Road/Queens Street Boundary

- Cummins locates a fence at corner Queen Street/Magill Rd in 1882 being 3'4" from his 4' alignment this calculates at chainage 4378'9"
- B-870 (1963) locates Cummins PM and shows occupation 3'5" from the 4' alignment.
- Distance between fence at south boundary of Block 37 and fence at Magill Road/Queen Street shown by Cummins as 526'1" agrees closely with App 5092 data of 526'

## Magill Road/Queens Street

- In my view evidence supports that occupation at corner of Magill Rd and Queen Street shown on Cummins survey is the boundary of DP 1255
- *Turner v Hubner* considered impact of a Council alignment and concluded that while the alignment boundary should be adopted, the side boundaries remain where they were originally laid.
- Subsequent surveys have accepted a 4' offset from Cummins alignment as the boundary of DP1255 and in my opinion as a consequence resurveys of lots in DP1255 have redefined boundaries fronting Queen Street 8" out of position.

## **BLOCK 37**

- Adopt Magill Road/Queen Street corner at occupation at chainage 4378'9" on Cummins survey as discussed
- Block 37 created in 1839, no dimensions shown on Memorial. Application 5092 shows measurements suggesting boundaries were surveyed and perhaps occupied at the time the land was brought under the Act
- Adopt Cummins chainage to fence at south boundary of block 37 at chainage 3852'8 (agrees with App 5092 distance from Magill Rd)
- Lay application 5092 distance 351'1" south from Magill Road/Queen St occupation to fix northern boundary of Block 37. Chainage calculates as 4027'8". Cummins shows a fence at 4027'11"
- Leaves 175' for Block 37 cf data of 174'11".

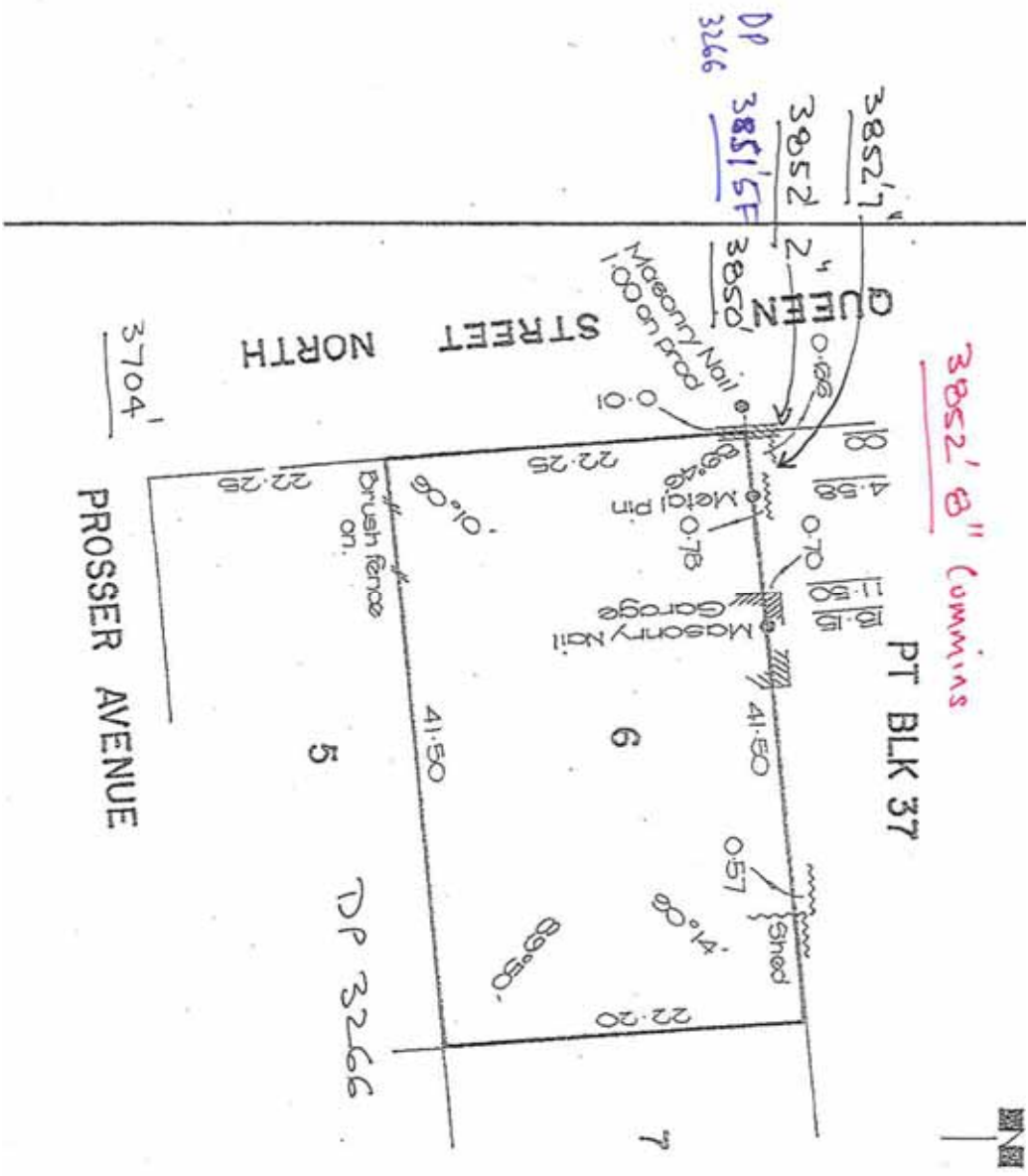
## Prosser Ave and DP 3266

- Prosser Ave create by DP 3266 in 1925. DP did not show a connection to Cummins' PM which was there at that time
- Prosser Ave re-established by A-165 in 1952 and FP9370 in 1979
- Both resurveys connected to Cummins' PM (now gone) at the corner of Queen and Magill adopting it as a 4' tie line

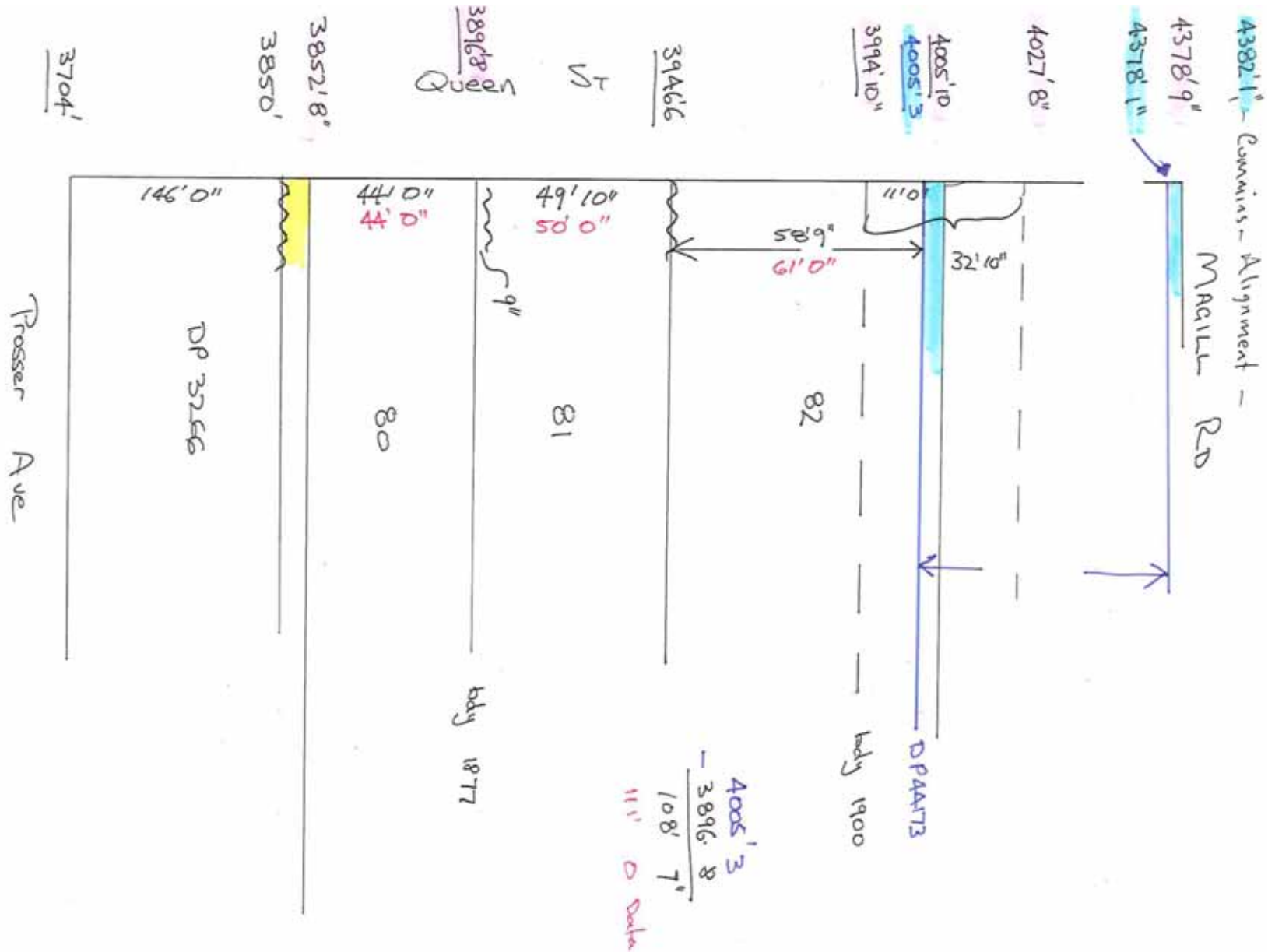
## Prosser Ave and DP 3266

- Distance from PM to Prosser Ave 678'1" from FP 9370
- Chainage of Prosser deduced as 3704' (4382'1 (Cummins chainage of PM) - 678'1")
- Chainage north boundary of DP 3266 determined at 3850' (3704' + 146' plan data)
- Results in a hiatus of 2'8" between north boundary of DP 3266 and Block 37 as shown by Cummins (3852'8" – 3850')

1993



# Where are the boundaries of lots 80, 81 and 82



## **Boundaries of lots 80, 81 and 82**

### **Where do I think the boundaries were originally ?**

- South boundary lot 80 at chainage 3852'8" from Cummins
- North boundary of lot 80, adopt 44' (data) frontage to Queen Street to chainage 3896'8" there is a fence at 3897'5" a 9" encroachment into lot 81 not 3'2" as indicated by identification survey
- North boundary of lot 82 – 11' of the 32'10" transferred from Block 37 in 1900 returned by re-subdivision in 1925 to lot 82 making a frontage of 61'. Chainage of boundary 4005'10" (3994'10" + 11')
- This boundary redefined at 4005'3 by DP44173 which laid DP 1255 data from Magill road, accepting Cummins 4' alignment as defining Magill Rd. Occupation shown on DP at 4006'2"

## Boundaries of lots 80,81 and 82

- CT data for lot 81 + 82 = 111'
- Actual land available =  $4005'3'' - 3896'8'' = 108'7''$  a shortage of  $2'5''$
- Shortage as a consequence of an error of  $1'10''$  on CT and  $7''$  in the position of the boundary between where I determine lot 82 and that defined by DP 44173

## Boundaries of lots 81 and 82

- CT in 1907 showed 100' as the frontage of block 37 to Queen Street. The transfer document called for the land to be divided into two titles, half each, ie 2 titles with a 50' frontage to Queen street. Actual land available 98'2"
- For this to happen the two titles would have a frontage of 49'1" to Queen Street. This would have the boundary between lots 81 and 82 at chainage 3945'9"
- Fence between the two properties is at chainage 3946'6"
- Two options for the boundary, give each 49'1" in which case the fence would be encroaching into lot 82 by 9" or adopt the occupation

## **Boundaries of lots 80,81 and 82**

- I opted to accept the occupation as the best indication of the boundary for the following reasons:
  - The errors in the original data
  - Neither party was physically occupying 50 feet 'title' data
  - The fence had been accepted as the boundary for many years
- Subsequent investigation showed that the two new titles were held in the same ownership and a house erected on lot 81 in 1910 and sold that year. Lot 82 was sold in 1911. It is reasonable I believe to assume that a fence was erected once the two allotments were in different ownership.

## The outcome

- I delivered a report to the parties of my findings that concluded that the boundaries were not confused and in my view the evidence pointed to the fence between lots 81 and 82 being the most likely position of the boundary
- The two parties to the dispute accepted my conclusion.
- The Orders of the Magistrate regarding the fence and encroachment were set aside as both parties accepted that there was no encroachment to deal with.
- After an appeal to the Full Bench of the Supreme Court, Mr Bunton was ordered to pay Ms Cicerello's costs incurred in the Magistrates Court

## Observations

- This dispute was heard in the Magistrates Court, the Supreme Court and then the Full Bench of the Supreme Court. Many thousands of dollars spent by the parties in engaging legal representation – QC's represented the parties in the Supreme Court.
- The basis for the court action was an identification survey the cost of which would be small by comparison.
- The Supreme Court ruled that it was not unreasonable for Ms Ciccarello to rely on Dr Bunton's chosen survey expert.

## Lessons

- Be very cautious when dealing in areas of old cadastre particularly where there is no lodged survey determining boundaries
- Be aware of historical survey and titling records
- Where there is any doubt, go to the source documentation – certificate of title measurements are not always correct
- Consider lodging a certified survey or getting a second opinion before Court action is started. If there is an encroachment the court and R-G will require a certified survey if they order transfer of the encroached land
- Things are not always as they seem so be careful