

## **2 VARIATION OF A COVENANT, 54 ROSEBERY STREET, LANG LANG**

FILE REFERENCE INT1726644

RESPONSIBLE GENERAL MANAGER Andrew Paxton

AUTHOR Isla English

### **RECOMMENDATION**

That a Refusal to Grant Planning Permit T160760 be issued for Variation of a Restrictive Covenant at 54 Rosebery Street, Lang Lang for reasons outlined in this report.

### **Attachments**

- |   |   |         |
|---|---|---------|
| 1 | Locality plan                                       | 1 Page  |
| 2 | Development plans                                   | 4 Pages |
| 3 | Letters of objection circulated to councillors only | 4 Pages |

### **EXECUTIVE SUMMARY:**

APPLICATION NO.:	T160760
APPLICANT:	LMK Building Services – Lukas Kelly
LAND:	54 Roseberry Street, Lang Lang Vic 3984
PROPOSAL:	Variation of a restricted covenant
PLANNING CONTROLS:	Neighbourhood Residential Zone Schedule 1 No overlay
NOTIFICATION AND OBJECTIONS:	The application was advertised in accordance with Section 51 1)(cb) and 52 1AA(a&b) of the Planning and Environment Act 1987 by sending notices to the owners and occupiers of adjoining land. Placing a sign on site and placing a notice in the Pakenham Gazette newspaper. Four objections have been received to date.
KEY PLANNING CONSIDERATIONS:	Section 60 (2) of the Planning and Environment (Amendment) Act 1987
RECOMMENDATION:	Refusal.

### **BACKGROUND:**

An application was received by Council to allow the building of a dwelling outside a registered building envelope. The dwelling has already commenced and was brought to Council's attention when adjoining land owners contacted Council's building department in regards to the change in setback. An application could not be supported under the Building process due to the covenant on the land. The applicant submitted a formal planning permit application

### **SUBJECT SITE**

The site is located on the south west corner of Roseberry Street and Rupert Street Lang Lang.

A crossover is located on the northwest corner of the allotment facing onto Roseberry Street. There are no easements registered on the title. The lot is 697.5m<sup>2</sup> in area and the topography of the land is relatively flat with no vegetation on the site.

The site currently contains a partially constructed dwelling which is located 4m from the Roseberry Street frontage.

The main characteristics of the surrounding area are:

- Land located in a recently approved residential subdivision.
- The dwellings along the Roseberry Street all meet their registered front setback as required under the covenant.
- The allotment is located within the developing White Hill estate, and is providing a new residential development at the end of Rupert Street and McDonald Track

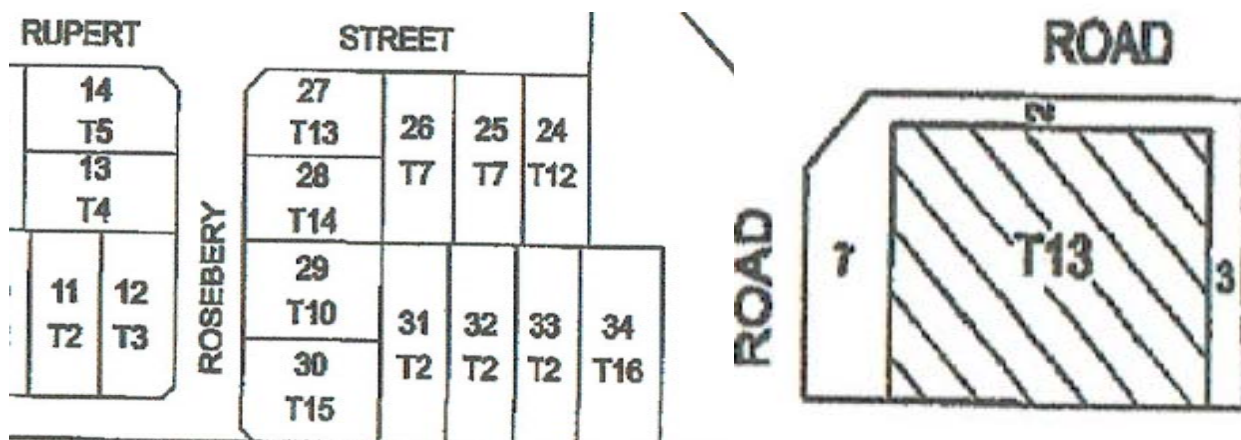
## PROPOSAL

There are two registered covenants and one Section 173 agreement registered to the land (Lot 27). Registered title PS711861F states –

*The registered proprietors for the time being of a lots in this plan of subdivision shall not without the written consent of the Cardinia Shire Council, construct or allow to be constructed any building on the respective lot –*

- Outside the area shown hatched on this plans; and*
- That exceeds 50% site coverage of the respective lot*

This restrictions affecting each of the lots 1 to 34 (both inclusive) will expire two years after the issue of a certificate of occupancy for a dwelling on the respective lot.



The restriction provides for a 7m front setback (Roseberry Road), 2m off the secondary street frontage (Rupert Street), 3m to the rear setback.

The dwelling partially built has been constructed 4m off the front setback (Rosebery Road), 6m of the secondary street frontage (Rupert Street), 10m of the rear property boundary and 1.2m off the adjoining property setback.

The breach to the covenant which has resulted in this retrospect application is the difference between 7m and 4m from the front boundary.

## **PLANNING SCHEME PROVISIONS**

### **State Planning Policy Framework (SPPF)**

The relevant clauses of the SPPF are:

- Clause 10.04- Integrated decision making

### **Local Planning Policy Framework (LPPF)**

The relevant clauses of the LPPF are:

- Clause 21.02-2 Rural townships
- Clause 21.07-4 Lang Lang

### **Relevant Particular/ General Provisions and relevant incorporated or reference documents**

The relevant provisions/ documents are:

- Clause 52.02 Easements, restrictions and reserves
- Clause 65 Decision Guidelines
- Lang Lang township strategy

### **Zone**

The land is subject to the Neighbourhood Residential Zone Schedule 1

### **Overlays**

The land is not subject to any overlays.

### **PLANNING PERMIT TRIGGERS**

Under Clause 52.02 of the Cardinia Planning Scheme a permit is required before a person proceeds under Section 23 of the Subdivision Act 1988 to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant.

### **Legislative requirements**

#### *Planning and Environment Act 1987*

Section 60 (2) of the Planning and Environment Act 1987 provides that:

The responsible authority must not grant a permit which allows the removal or variation of a restriction (within the meaning of the Subdivision Act 1988) unless it is satisfied that the owner of any land benefited by the restriction...will be unlikely to suffer –

- (a) Financial loss; or
- (b) Loss of amenity; or
- (c) Loss arising from change in the character of the neighbourhood; or

(d) Any other material detriment –

as a consequence of the removal or variation of the restriction.

## **PUBLIC NOTIFICATION**

The application was advertised in accordance with Section 52(1) (cb) and 52 1AA (a &b) of the Planning and Environment Act 1987. This included notices on site, notices to adjoining properties and burdened land owners to the covenants and a notice in the newspaper.

At the end of the advertising period, three objections were received.

Issues of highlighted include:

- Visual amenity
- Streetscape compromised
- Principles of approved building design guidelines - rural environment and canopy trees
- Interferes with the visibility whilst driving on the roads and the adjoining round-about.
- Creates an untidiness to the streetscape, as its protruding further than the other houses in the street.

## **REFERRALS**

The application was not required to be referred.

## **DISCUSSION**

### **State and Local Planning Policy Framework and Decision Guidelines**

The State and Local Planning Policy Framework connects the importance of proper planning for road networks and car parking. As clearly indicated in Clause 10.04 of the Cardinia Planning Scheme, development must achieve a balance of a range of policies in the planning scheme in favour of net community benefit and sustainable development for the benefit of present and future generations. The challenge is therefore to provide a high quality, responsive approval that will integrate suitably with the surrounding properties

*Clause 65 'Decision Guidelines' require the Responsible Authority, among other things, to consider:*

- The purpose of the zone, overlay or other provision.
- Any matter required to be considered in the zone, overlay or other provision.
- The orderly planning of the area.
- The effect on the amenity of the area.

The partially constructed dwelling in its location has a significant impact on the amenity of the area.

### *Clause 52.02 02 Easements, restrictions and reserves*

There is limited prescriptive decision guidelines provided in Clause 52.02 of the Cardinia Planning Scheme. The only guideline is that the interest of affected people must be considered. Therefore, in order for Council to make a determination on the application, the impact on affected people must be considered. This results in an assessment against the relevant decision guidelines of Clause 52.02, being:

- Strict requirements apply to the granting of a planning permit to remove or vary a registered restrictive covenant. These are set out in sections 60(2) and (5) of the Act.

- Section 60 (2) applies to restrictive covenants created on or after 25 June 1991 and Section 60 (5) applies to restrictive covenants created before 25 June 1991

Section 60 (2) applies to the assessment of this application.

*Clause 60 (2) of the above mentioned Act states:*

The responsible authority must not grant a permit which allows the removal or variation of a restriction (within the meaning of the Subdivision Act 1988) unless it is satisfied that the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer:

- (a) financial loss; or
- (b) loss of amenity; or
- (c) loss arising from change to the character of the neighbourhood; or
- (d) any other material detriment as a consequence of the removal or variation of the restriction.

Often with the variation or the removal of covenants the Responsible Authority is obliged to refuse the application where the removal or variation of a covenant is opposed by a beneficiary of the covenant.

Although as established in a VCAT decision *Derring Lane Pty Ltd v Glen Eira CC* (2 August 2006) the Responsible Authority is not obliged to refuse the application solely based on objections by beneficiaries, provided it is satisfied that the requirements of Section 60(2) of the Planning and Environment (Amendment) Act 1987 have been met.

The following is an assessment against those criteria provided on Section 60(2) of the Planning and Environment Act:

- **Financial Loss:** The objector has not identified financial loss as a ground of objection and Council cannot consider the balance of probabilities that the proposed variation of the covenant is likely or unlikely to cause financial loss to any benefitting owners. It is considered that there is no impact to the beneficiaries under this criteria.
- **Loss of Amenity:** The objectors noted loss of amenity as their main issue with the location of the dwelling in its present position. Phrases such as Visual amenity; Streetscape compromised; Principles of approved building design guidelines - rural environment and canopy trees; Interferes with the visibility whilst driving on the roads and the adjoining round-about and Makes the street look untidy, as its protruding further than the other houses in the street - have been used by the objectors for reasons for their concerns. It is considered that Council cannot discount that the proposal may cause a loss of amenity to the objectors therefore can consider that objectors may be inconvenienced by this criteria.
- **Loss Arising from Change to the Character of the Neighbourhood:** The objector has noted that position of the dwelling compromises the streetscape and another objector states the street looks untidy. Allowing the approval of this dwelling outside the registered building envelope is not considered minor in nature and has a dominant effect on the developing streetscape and is not in accordance with the approved Lang Lang township strategy. It is considered that Council cannot discount that the proposal may cause a loss arising from change to the character of the neighbourhood therefore can consider that objectors may be inconvenienced by this criteria.

- Any other Material Detriment: It is acknowledged that this property and other surrounding allotments were purchased with the covenant in place. Covenants provide a level of certainty for purchasers in the estate in regards to development expectations and a certain level of standards in regards to housing development. An objection from a beneficiary to the variation of the building envelope has identified that the covenant was put there for a reason and should not be removed. Detriment is noted in VCAT case McBride v Stonnington CC 26 October 2005 as 'loss, damage or injury'. Whilst the objector has not specifically identified how building outside the registered building envelope will cause loss, Council cannot determine that there will be no loss for the objector as a result of the removal of the restriction and must therefore refuse the application.

Given the above, Council officers are not satisfied that the proposed variation of the covenant is unlikely to result in loss of amenity, loss arising from change to the character of the neighbourhood or any other material detriment. Therefore, it is considered that under clause 60 (2) Council should not support the variation.

## CONCLUSION

As a result of receiving an objection to the proposal from a beneficiary, Council cannot determine that the beneficiary is unlikely to suffer under the criteria's set out in Section 60 (2) of the Planning and Environment Act 1987 as a consequence of the variation of the restriction.

It is recommended that a Refusal to Grant Planning Permit T1607601 be issued for Variation of a Restrictive Covenant at 54 Rosebery Street, Lang Lang on the following grounds:

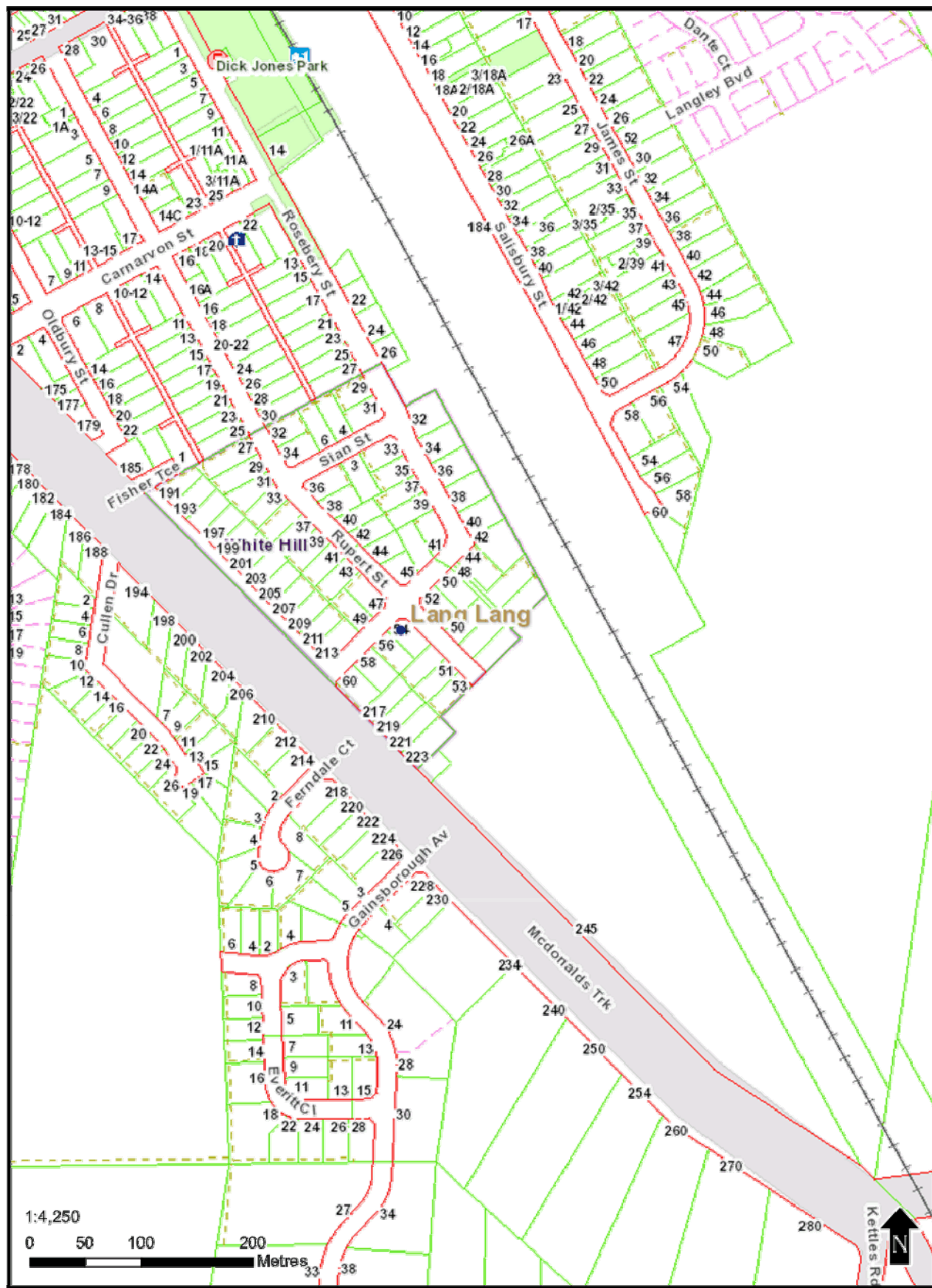
1. The proposal fails to meet the requirements of Section 60(2) of the Planning and Environment Act 1987, as the Responsible Authority is not satisfied that the owner of any land benefitted by the restriction will be unlikely to suffer loss of amenity, loss arising from the change in neighbourhood character or any other material detriment as a consequence of variation to the restriction.

and

In light of the above refusal, that after the days to appeal such decision is exhausted that Council takes steps to enforce the Cardinia Planning Scheme including but not limited to seeking an enforcement order with VCAT to remove the dwelling from the subject land.



## 54 Rosebery Rd, Lang Lang

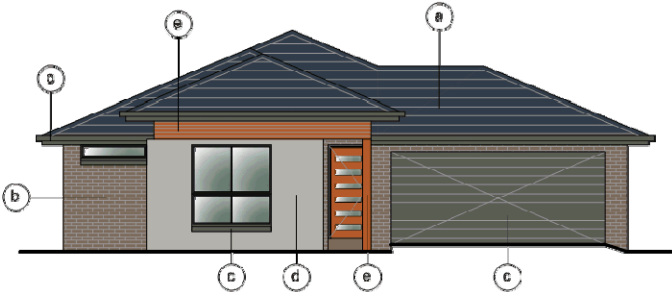





**COLOUR & MATERIALS SCHEDULE**

a) Boral Roof Tile 'Macquarie Twilight'  
b) Face Brickwork: Boral 'Glenferri'  
c) Gutters, Downpipes, Fascia, Garage Doors & Window Frames: COLORBOND 'Woodland Grey'  
d) Render: Colorbond 'Dune'  
e) Timber Slat, Feature Post, Entry Door: Stained in 'Merbau'

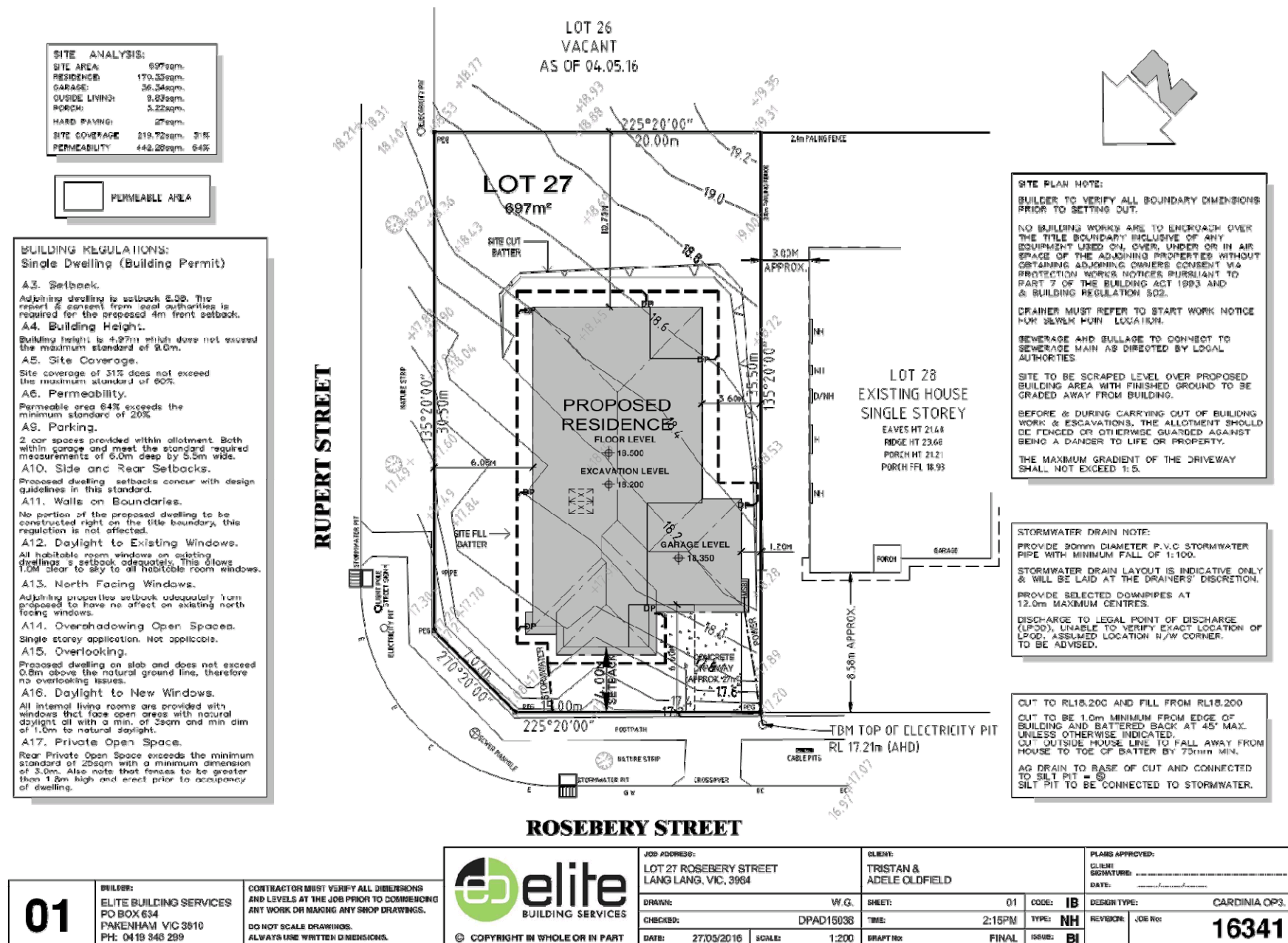
**PLEASE NOTE:**  
All colours are AutoCAD derived and only indicative of the manufacturers product.  
Please refer to manufacturer specification for exact colour match.  
Where colour and manufacturers' specified not available, a similar match is to be substituted



**COLOURS AND MATERIALS**  
SCALE 1:100

00	BUILDER: ELITE BUILDING SERVICES PO BOX 634 PAKENHAM VIC 3810 PH: 0419 340 299	CONTRACTOR MUST VERIFY ALL DIMENSIONS AND LEVELS AT THE JOB PRIOR TO COMMENCING ANY WORK OR MAKING ANY SHOP DRAWINGS.  DO NOT SCALE DRAWINGS. ALWAYS USE WRITTEN DIMENSIONS.	 © COPYRIGHT IN WHOLE OR IN PART	JOB ADDRESS: LOT 27 ROSEBURY STREET LANG LANG, VIC, 3964	CLIENT: TRISTAN & ADELE OLDFIELD		PLANS APPROVED: CLIENT SIGNATURE: _____ DATE: _____	
				DRAWN: _____ W.G.	SHEET: _____ 00	CODE: <b>IB</b>	DESIGN TYPE: CARDINIA OPS.	
				CHECKED: _____ DPAD15038	TIME: _____ 2:15PM	TYPE: <b>NH</b>	REVISION:	JOB No: <b>16341</b>
				DATE: 27/05/2016	SCALE: 1:100	DRAFT No: _____ FINAL	ISSUED: <b>BI</b>	



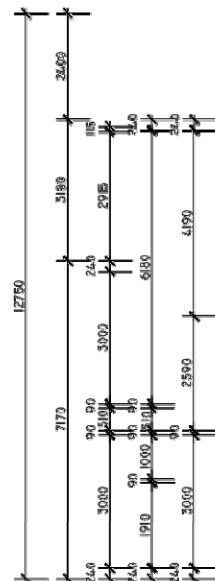


# FLOOR PLAN

SCALE 1:100

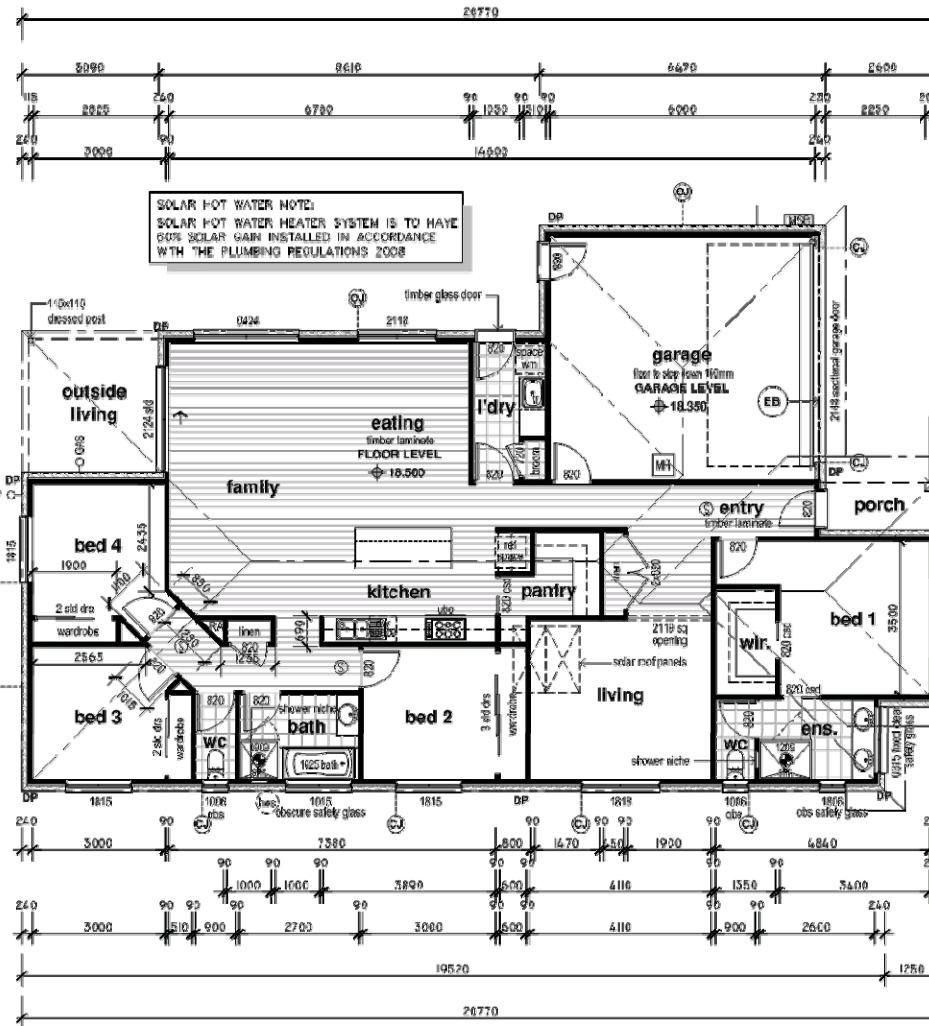
Residence 170.33 sqm  
Garage 36.34 sqm  
Outside Liv. 9.83 sqm  
Porch 8.22 sqm

TOTAL 219.72 sqm



## FLOOR PLAN LEGEND:

- EXHAUST FAN (DISCHARGE TO OUTSIDE AIR)
- SMOKE DETECTOR (INTERCONNECTED)
- DOWNPIPE LOCATION
- MANHOLE (CABLE ACCESS)
- ELECTRICAL METERBOARD (TBO)
- SOLAR HOT WATER SERVICE
- SEAMS TO BE DESIGNED BY ENGINEER, BUT NOT LIMITED TO, AS DETERMINED BY ENGINEERS STRUCTURAL ASSESSMENT.



SOLAR HOT WATER NOTE:  
SOLAR HOT WATER HEATER SYSTEM IS TO HAVE  
60% SOLAR GAIN INSTALLED IN ACCORDANCE  
WITH THE PLUMBING REGULATIONS 2008

WINDOW SIZE NOTE:  
WINDOWS AND DOOR SIZES SHOWN  
ARE NOMINAL. BUILDER TO USE WINDOW  
MANUFACTURERS NEAREST STOCK SIZES.

TIMBER FRAMING NOTE:  
ALL TIMBER FRAMING TO BE IN ACCORDANCE  
WITH BCA 2015 AND COMPLY WITH AS1684 - 2010

VERTICAL CONSTRUCTION JOINTS  
TO BE CONSTRUCTED IN ACCORDANCE  
WITH BCA VOLUME 2 PART 3.3.

02

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CARDINIA OP3.

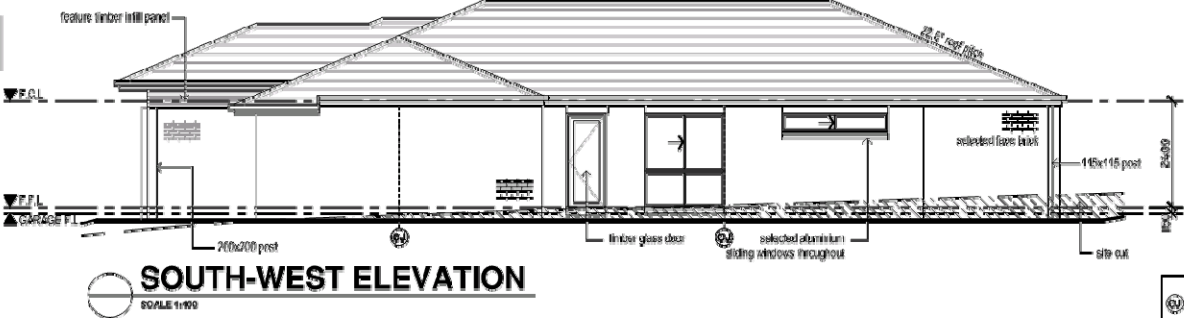
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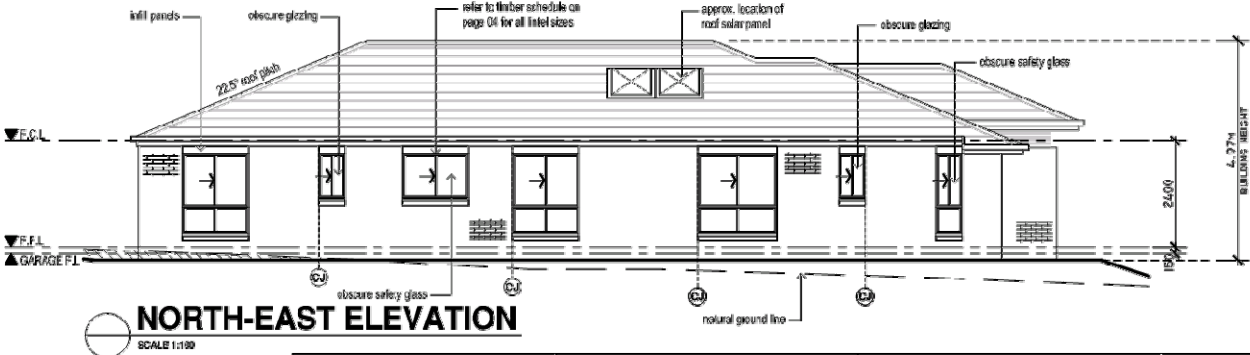
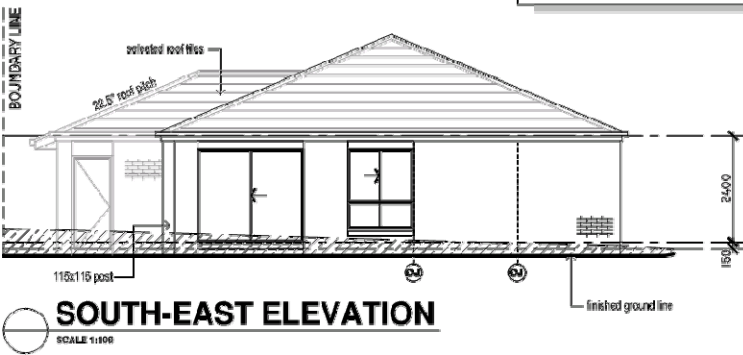
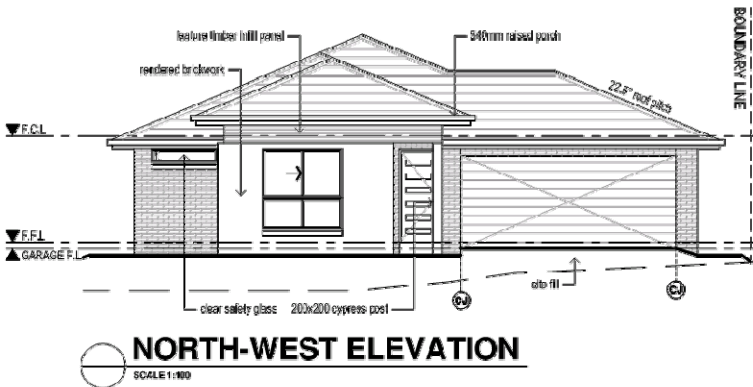
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**VERTICAL CONSTRUCTION JOINTS**  
TO BE CONSTRUCTED IN ACCORDANCE  
WITH BCA VOLUME 2, PART 3.3



03	<b>BUILDER:</b> ELITE BUILDING SERVICES PO BOX 634 PAKENHAM VIC 3810 PH: 0419 348 299	<b>CONTRACTOR MUST VERIFY ALL DIMENSIONS AND LEVELS AT THE JOB PRIOR TO COMMENCING ANY WORK OR MAKING ANY SHOP DRAWINGS. DO NOT SCALE DRAWINGS. ALWAYS USE WRITTEN DIMENSIONS.</b>	 © COPYRIGHT IN WHOLE OR IN PART	<b>JOB ADDRESS:</b> LOT 27 ROSEBURY STREET LANG LANG, VIC, 3984		<b>CLIENT:</b> TRISTAN & ADELE OLDFIELD		<b>PLANS APPROVED:</b> CLIENT SIGNATURE: _____ DATE: _____	
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