

**APPLICATION FOR PLANNING PERMIT**  
**CONSTRUCTION OF A DWELLING**  
**31 STONEY CREEK COURT, NARBETHONG**  
**(LOT 2 PS 22221L)**

This submission is in support of an application for planning permit for the development of a dwelling at 31 Stoney Creek Court, Narbethong.

**1. THE SUBJECT SITE AND SURROUNDS**

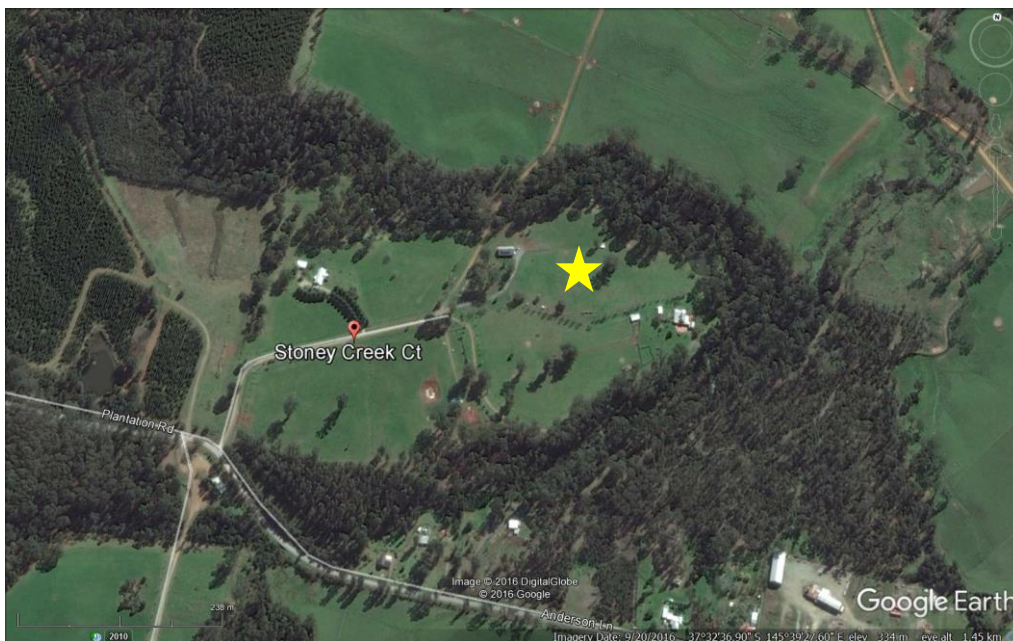
The site is located in the Farm Zone, consists of 3.935 hectares and is currently used for the grazing of horses.

Planning Permit P2012/167 was issued on the 10 October, 2012 for a shed for the storage of agricultural equipment, tractor, mowers etc. for the maintenance and improvements on the site.

The subject site is one of five allotments approved for subdivision in 1991. An Agreement that runs with each of the five titles enables a dwelling to be developed on each of the four smaller allotments in the court (Lots 1- 4) and up to four dwellings on Lot 5. Lot 5 is owned and operated by St. Fillan Farm

The four smaller lots within the subdivision are located within walking distance to the Narbethong Township and are bound to the north, east and south by bands or pockets of native vegetation. See aerial below, subject site marked with a yellow star.

Two of the allotments have established dwellings located towards the boundaries of their properties. In particular Lots 4 and 3 have their dwellings or site for a dwelling right on the boundaries with the adjoining allotments. This enables more land to be utilised for small scale agricultural purposes.



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### **2. PROPOSAL**

The land had been the subject of an earlier application to amend P2012/167 for a change of use from machinery shed to a dwelling; this application was withdrawn by the landowners.

Under this application the proposal is to construct a dwelling where the current shed is located and to utilise the current built form of the shed for the dwelling. The shed is very substantial in design, size and construction materials.

Under the Farm Zone the recommended setback to an adjoining boundary is 5 metres, the setback of the dwelling to the boundary to the south will be 20 metres. The boundary to the south adjoins a laneway to Lot 5 of the subdivision owned by St. Fillan Farm. The laneway is not classified as a road and even if it were the proposal meets the 20 metre setback to a roadway as per the Murrindindi Planning Scheme. The laneway splits Lots 1 and 2 in the subdivision.

The dwelling will be located 30 metres from Stoney Creek. An effluent disposal system has been installed 100 metres from Stoney Creek as required by the original planning permit for subdivision.

The orientation of the dwelling will have its outlook to the north east with its "back" to the laneway with Lot 5. The proposed location for the dwelling will enable the Thomas's to utilise more of their allotment for agricultural purposes and reduces their overall footprint on the land. The layout of the paddocks can be seen on the attached site plan.

Also indicated on the plan is a buffer of trees to be planted along the southern boundary, access lane, with Lot 5 (St. Fillan farm). This will provide screening along this boundary, and although the use of the laneway for both vehicles and cattle is infrequent the buffer will provide a visual separation between the lot and the lane.

### **3. SECTION 173 AGREEMENT**

Each of the five allotments accessed via Stoney Creek Court were approved by subdivision in 1991. Planning permit 80212 (Amended Permit) was issued 12 July 1991.

The permit allows:

*A five (5) lot subdivision and **erection of detached dwellings** in accordance with the endorsed plan.* This was the approval given by Council at the time enabling the subdivision of the land into five allotments and approval of dwellings on each of the allotments subject to a planning permit being obtained from Council.

The planning permit also required the endorsement of a section 173 Agreement.

The Section 173 Agreement at F. states:

*Pursuant to the scheme, nine (9) dwellings may be constructed on all the lands comprising the tenement*

Although the Agreement covenants at *Condition 4*.

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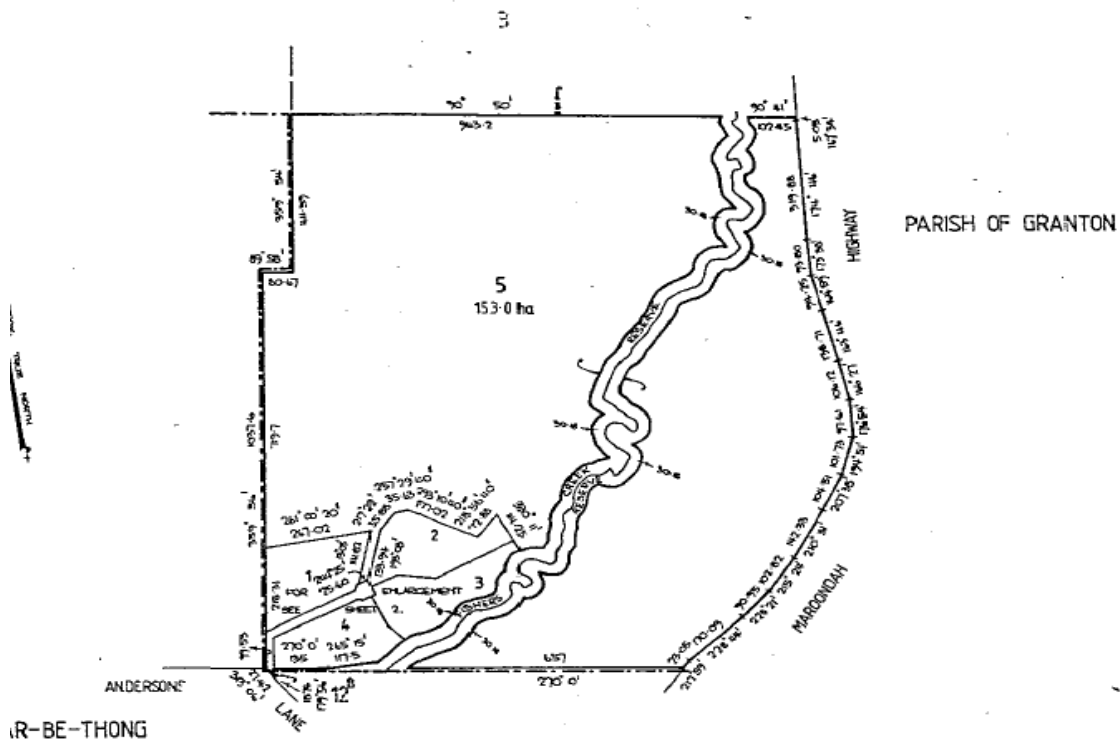
- (i) *The owner shall subdivide the land substantially in accordance with the plan of subdivision attached to this Agreement and marked as Annexure B.*
- (ii) *Upon subdividing the land in accordance with the plan of subdivision attached, the owner or his successors in title shall be entitled to construct one dwelling on each Lots 1, 2, 3 and 4 on the plan of subdivision as permitted by the planning permit.*
- (iii) *In relation to the land which is described as "Lot 5" on the plan of subdivision attached, the owner or his successors on title shall be entitled to construct not more than four dwellings upon the said lot, irrespective of the number of lots into which Lot 5 may be further subdivided.*

In total the permit approved the use of the land for a five lot subdivision with approval for 8 (or 9) dwellings, four of which can be constructed on Lot 5.

Condition 9 of the planning permit refers to building envelopes as shown on endorsed plans but these have not been located. The condition also refers to waste disposal areas to be greater than 100 metres from Stoney or Fisher Creeks.

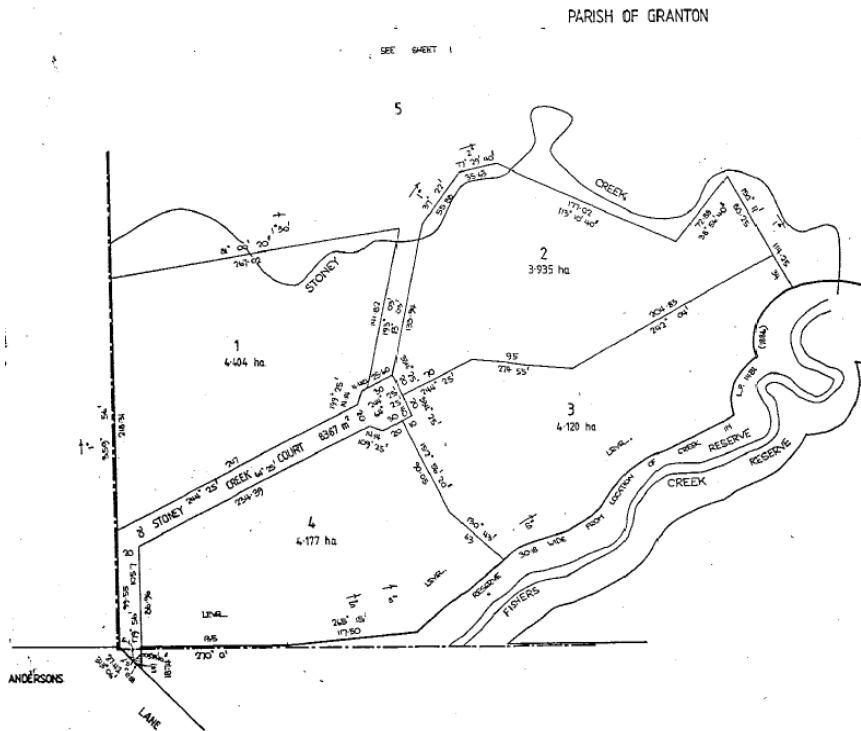
It can be concluded that the subdivision and agreement have established the preferred future character of the area as being of a semi-residential nature.

**4. FIVE LOT SUBDIVISION PLAN APPROVED IN 1991**



**Planning Permit Application for a dwelling - 31 Stoney Creek Court, Narbethong**

**STONEY CREEK COURT SHOWING FOUR SMALLER ALLOTMENTS AND ACCESS LANE TO LOT 5**



**5. PREVIOUS VCAT DECISION RELATING TO STONEY CREEK COURT**

***Trinity Holdings Pty. Ltd. v Murrindindi SC (2006) VCAT 2659 (21 December, 2006)***

The applicants for the VCAT case above were Trinity Holdings Pty.Ltd.; Wayne Bissett and John and Judith Boyce.

The permit allowed the use and development of a dwelling and shed at 16 Stoney Creek Court, Narbethong to be used for domestic purposes and associated agricultural equipment subject to the conditions set out in the Responsible Authority Notice of Decision to Grant a Permit.

The appeal was brought about as the applicants for 16 Stoney Creek Court wanted to use their site and Stoney Creek Court for large vehicles, such as log trucks.

The Tribunal directed that a permit be issued for 16 Stoney Creek Court, Narbethong subject to a number of permit conditions and the inclusion of conditions that related to traffic issues in Stoney Creek Court. The VCAT finding also gave weight to the Section 173 Agreement that covers the five allotments and stated:

- 14 *Having conducted a site inspection since the most recent hearing for the first time, it has become clear to me that the Stoney Creek Court properties (notwithstanding the zoning of Farming Zone) in reality are situated on the outskirts of Narbethong, and hence have a semi-residential feel to them. For example, the subject land is in within walking distance of the main shops in Narbethong.*

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34 *When the Farming zoning is weighed up against the 173 Agreement, I am satisfied that it is appropriate that I give priority to the 173 Agreement (being the more detailed and specific planning control applicable here). Accordingly, while I may well have had major “strategic policy” concerns in the absence of the 173 Agreement, I rely on the 173 Agreement in accepting that there is an adequate level of strategic policy support for a dwelling per se being constructed on the subject land.*

The Tribunal also discussed Stoney Creek Court and its use by heavy vehicles (albeit the tribunal was focused at the time on log trucks). Clauses 42 - 46 of the Tribunal finding discuss traffic safety issues associated with Stoney Creek Court and its use by heavy vehicles.

The tribunal refers to the use of the road for domestic and agricultural purposes but discusses the safety aspects of Stoney Creek Court and its intersection with Andersons Road, the blind corner along its length and the fact that the court is a relative narrow gravel road.

**6. STONEY CREEK COURT AND INTERNAL ACCESS WAY TO LOT 5**

Condition 8 of the original planning approval for subdivision enabled the creation of Stoney Creek Court. The Court has a reserve width of 20 metres and the service road constructed to a 5.5 metre width with a court bowl with a minimum radius of 12.5 meters to provide access to all five allotments. The court bowl is a narrow all-weather gravel road.

The Access lane to the larger Lot 5 and St. Fillan Farm is bound to the north by Lot 2 and to the South by Lot 1. This laneway is approximately 133.94 metres in length and 25.6 metres in width before it opens out into Lot 5. The access lane has a small bridge (approx.3.800 wide, measured from the inside railing) that crosses over Stoney Creek. The lane way has a locked gate at the point of entry off Stoney Creek Court and a buffer of riparian vegetation that is located along the Creek line.

The riparian zone provides an excellent buffer between the broader farming activities on St. Fillan farm and the four lot subdivision in the Court itself.

The access lane is used periodically for vehicular access to Lot 5 and to graze cattle but once grazed out cattle do not remain for very long in the small area of the laneway. This is not an issue for the owners of Lot 2 and causes no concern to them as they are intending to have more livestock on their own property in the very near future.

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**7. OBJECTION TO P2012/167**

A submission objecting to the earlier application for a change of use from a shed to a dwelling (P2012/167) since withdrawn was received from Michael Kudelka, Director, Noonameena Estate Pty. Ltd. for St Fillan farm. St. Fillan farm owns and operates Lot 5 as part of its overall farming establishment. We would like address his earlier concerns.

Mr. Kudelka objected to the application for the shed conversion as follows:

*.....the access lane is the only commercial entrance and transport point for the property. This area is accessed for all commercial deliveries and sales with heavy equipment and large double-b transport trucks transiting with such products as fertilisers, fuels, hazardous materials, bulk gas, chemicals, machinery, cattle and livestock through this pace directly alongside the proposed residential development.*

*We also heavily graze our laneways and all pasture and bush areas of St, Fillan Farm and this area is no exception. It has existing fences and gates that allow such to be grazed by cattle and we do so regularly.*

*The exiting bridge at this entrance is engineered for heavy duty commercial traffic and is used for such.*

The landowners of Lot 2 Mr. and Mrs. Thomas are committed to the Narbethong area. They have spent many hours clearing their land of blackberries and other pest plants and are looking forward to living there.

They have no concerns with St. Fillan Farm and the current use of the access way. Cattle do graze in the laneway but not for very long due to the limited amount of feed it can produce. See photographs below of access lane to Lot 5.

Vehicle movements along the access lane have been intermittent and limited to daylight hours with no activity occurring during the evening.

The Section 173 Agreement that runs with the five property titles in the court enables the construction of a dwelling on each of the allotments with up to 5 dwellings to be developed on Lot 5.

The allotments in Stoney Creek Court could be described as having a *semi-residential feel to them. For example, the subject land is in within walking distance of the main shops in Narbethong (14. Trinity Holdings Pty. Ltd. v Murrindindi SC (2006) VCAT 2659 (21 December, 2006)*

The VCAT decision also discusses the suitability of Stoney Creek Court for use by heavy vehicles due to the residential nature within the court, the standard of the road, poor visibility and sightlines.

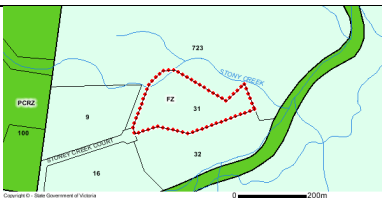
**Planning Permit Application for a dwelling - 31 Stoney Creek Court, Narbethong**

**6. LETTERS OF SUPPORT FROM ADJOINING LANDOWNERS IN STONEY CREEK COURT**

Letters of support for the application have been provided by two of the adjoining landowners

- Gary Gresham, Director of Trinity Holdings Pty. Ltd.,
- Katherina Shamai

**7. ASSESSMENT AGAINST MURRINDINDI PLANNING SCHEME**


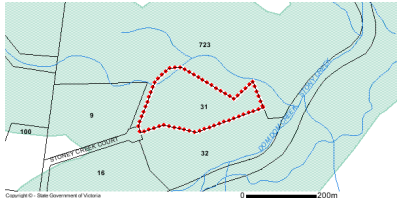
PLANNING CONSIDERATIONS	OBJECTIVES	COMPLIANCE
<p><b>21.03-2 Agriculture</b></p>	<p>Objective 1: Agricultural production, growth and diversity:</p> <ul style="list-style-type: none"> <li>• Support and grow agriculture as one of the Shire’s principal economic activities.</li> </ul> <p>Objective 2: Rural and agricultural land use and development:</p> <ul style="list-style-type: none"> <li>• Protect rural land for productive agricultural uses and compatible rural uses</li> </ul>	<p>The subject land is one of a five lot subdivision approved in 1991. A Section 173 Agreement covers the five allotments and provides that a dwelling can be constructed on each lot. The small Court and subdivision pattern are aligned with semi-residential development.</p> <p>The area is within walking distance to Narbethong Township</p> <p>Larger agricultural areas are buffered by large pockets of native vegetation and riparian zones. More discussion below</p>
<p><b>Farm Zone</b></p>	<p><b>Purpose</b></p> <p>To implement the SPPF and the LPPF, including the MSS and local planning policies.</p> <ul style="list-style-type: none"> <li>• To provide for the use of land for agriculture.</li> <li>• To encourage the retention of productive agricultural land.</li> <li>• To ensure that non-agricultural uses, including dwellings, do not adversely affect the use of land for agriculture.</li> <li>• To encourage the retention of employment and population to support rural communities.</li> </ul>	 <p>The Section 173 Agreement provided that each of the five allotments in the subdivision have development rights for a dwelling or in the case of Lot 5 more than one dwelling.</p> <p>The court has been described as a semi-residential area in VCAT decision of <i>Trinity Holdings Pty. Ltd. v Murrindindi SC (2006) VCAT 2659 (21</i></p>

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	<ul style="list-style-type: none"> <li>To encourage use and development of land based on comprehensive and sustainable land management practices and infrastructure provision</li> </ul>	<i>December, 2006)</i>
<b>Farm Zone Schedule</b>	<p>Requirements for use of land for a dwelling:</p> <ul style="list-style-type: none"> <li>Minimum setback from a dwelling not in the same ownership (metres). 100 metres</li> <li>Minimum setback from a boundary (metres). 5 metres</li> <li>Setback from road – 20 metres</li> </ul>	<p>Complies</p> <p>Complies</p> <p>Complies</p>
<b>Clause 35.07-02 Use of land for a dwelling</b>	<p>A lot used for a dwelling must meet the following requirements:</p> <ul style="list-style-type: none"> <li>Access to the dwelling must be provided via an all-weather road with dimensions adequate to accommodate emergency vehicles.</li> <li>The dwelling must be connected to a reticulated sewerage system or if not available, the waste water must be treated and retained on-site in accordance with the State Environment Protection Policy (Waters of Victoria) under the Environment Protection Act 1970.</li> <li>The dwelling must be connected to a reticulated potable water supply or have an alternative potable water supply with adequate storage for domestic use as well as for fire fighting purposes.</li> <li>The dwelling must be connected to a reticulated electricity supply or have an alternative energy</li> </ul>	<p>Complies</p> <p>Access has been established through Stoney Creek Court which is an all-weather gravel court</p> <p>A septic tank permit has been issued for the site and is installed</p> <p>Rainwater tanks will be connected to the dwelling. A Bushfire Management Statement is included that addresses storage for firefighting purposes.</p> <p>The site is connected to reticulated electricity supplies.</p>
<b>SECTION 173 AGREEMENT</b>	<p>Runs with Title in support of the subdivision and smaller allotments and enables development rights for</p>	<p>Complies</p> <p>See information provided on Section 173 Agreement below</p>



**Planning Permit Application for a dwelling - 31 Stoney Creek Court, Narbethong**

	all five allotments	
<b>Bushfire Management Statement</b>	<ul style="list-style-type: none"> <li>To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.</li> <li>To ensure that the development of land prioritises the protection of human life and strengthens community resilience to bushfire.</li> <li>To identify areas where the bushfire hazard warrants bushfire protection measures to be implemented.</li> <li>To ensure development is only permitted where the risk to life and property from bushfire can be reduced to an acceptable level</li> </ul>	<p>Complies</p>  <p>A full Bushfire Management Statement has been prepared by Heather Moss and is included with this application</p>
<b>Aboriginal Cultural Heritage Sensitivity</b>	Protect areas of Aboriginal Cultural Heritage	<p>Complies</p>  <p>The application is exempt as the proposal is for one only dwelling</p>

**8. CONCLUSION**

The application for a dwelling complies with the Section 173 Agreement, relevant Farm Zone Clauses and Schedule, and the BMO standards of the Murrindindi Planning Scheme as above.

When Mr. and Mrs. Thomas purchased Lot 2 in the small court their belief was that the preferred future character and use was established by Planning Permit 80212 and the Section 173 Agreement, although clearly a farming area by zoning but in reality having a semi- residential flavour.

Their neighbours on the other three small allotments would generally have the same conclusion.

**Planning Permit Application for a dwelling - 31 Stoney Creek Court, Narbethong**

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End of Stoney Creek Court showing access to Lots 2, 3 and 5



Access lane into Lot 5 – Dwelling location where the existing shed is to the right of photo



**Planning Permit Application for a dwelling - 31 Stoney Creek Court, Narbethong**

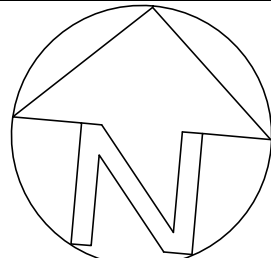
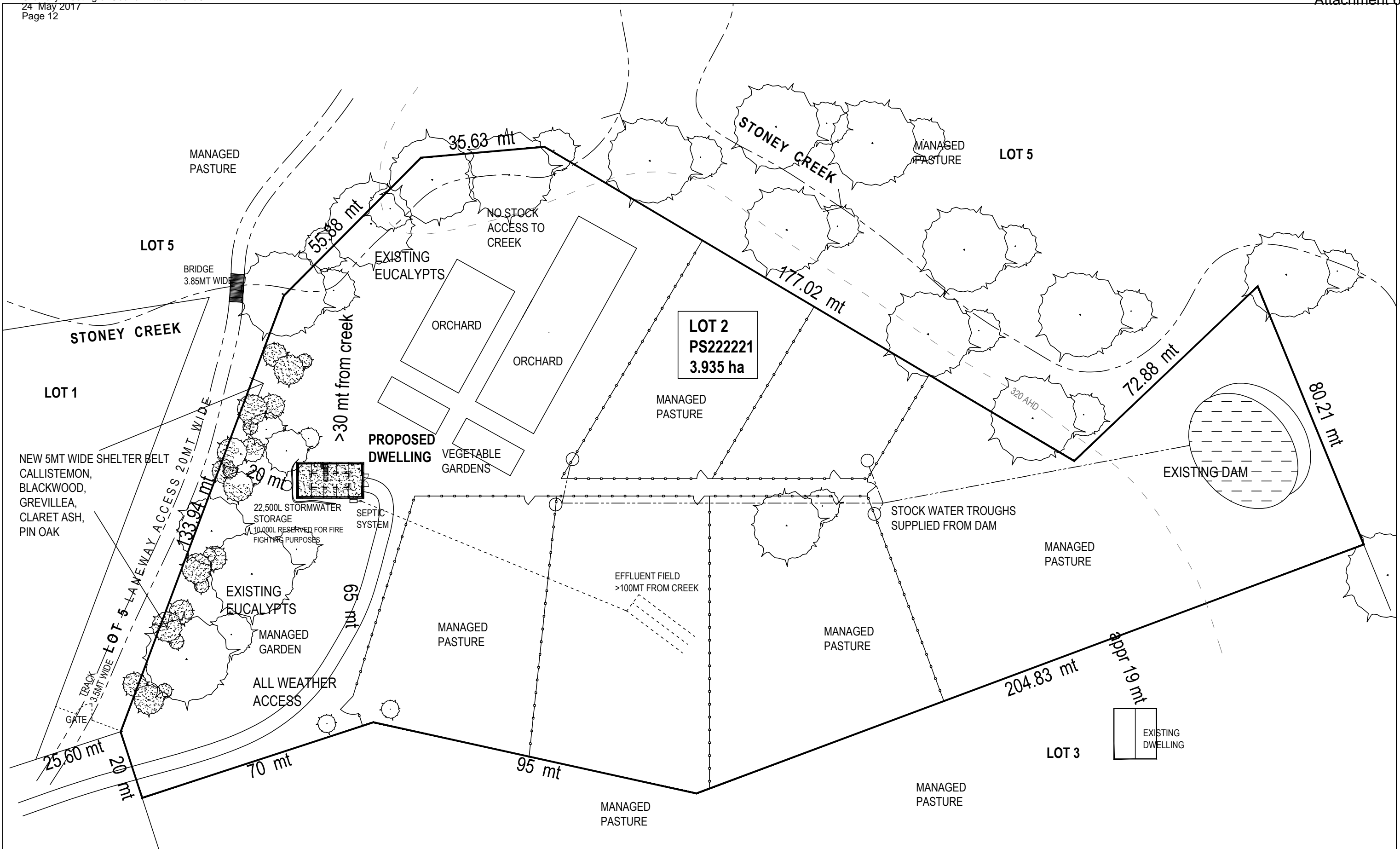
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Locked gate at entrance to access lane – Lot 5



Bridge crossing Stoney Creek along Lot 5 lane way. Cattle grazing in laneway. Boundary fence with subject site in foreground





**SITE PLAN**

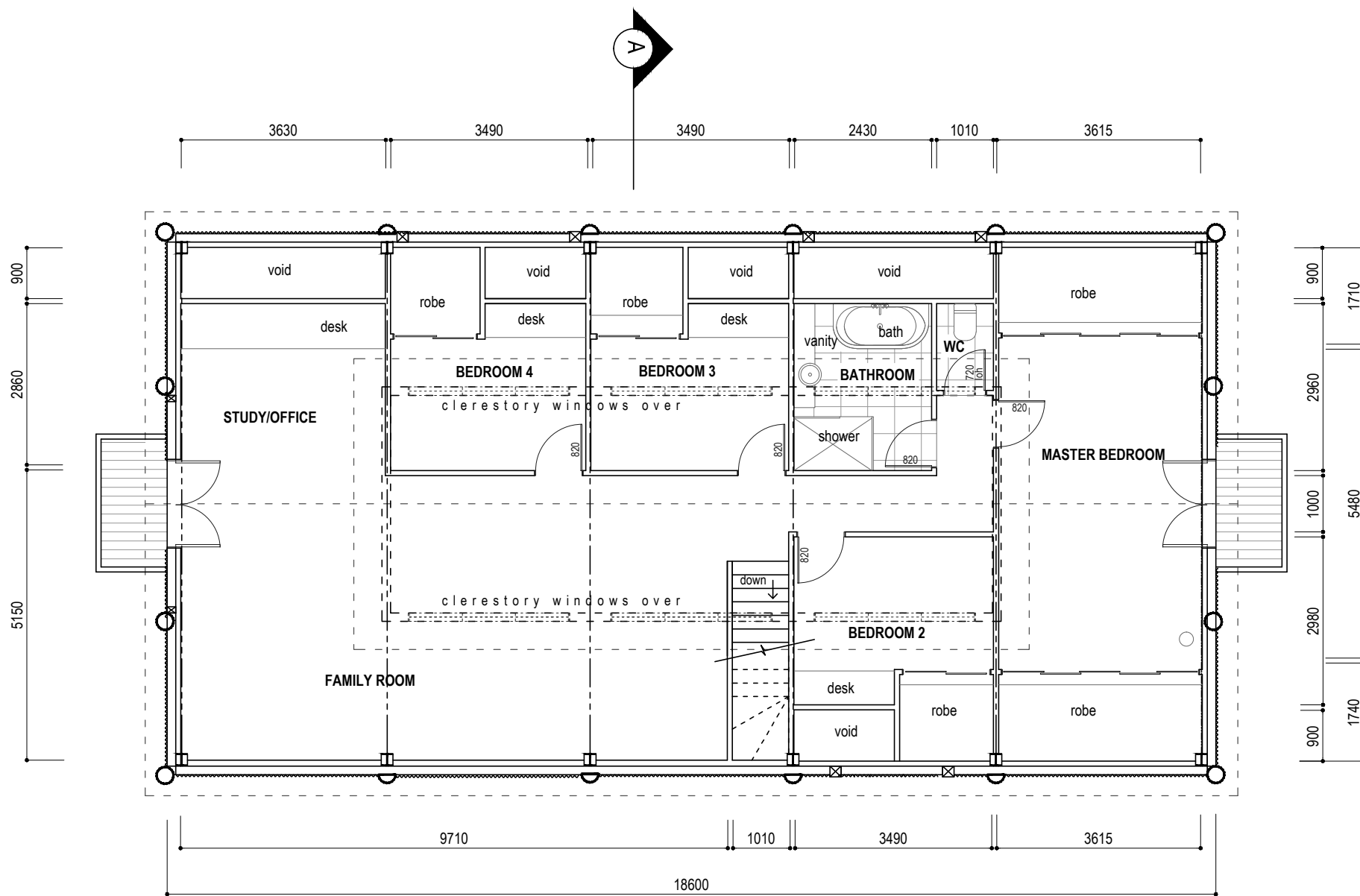
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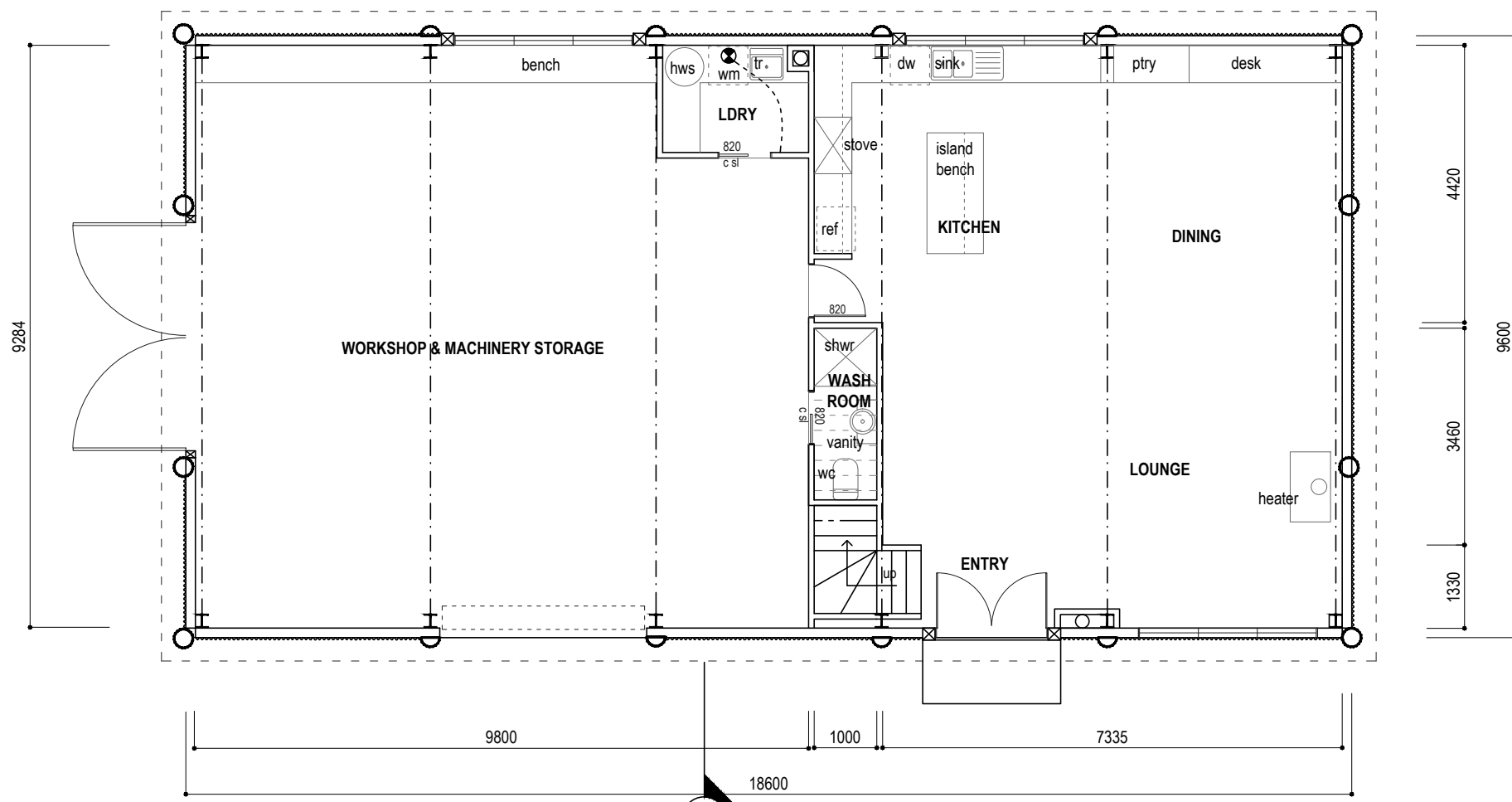
HEATHER MOSS  
 REG BP DP-AD202  
 PH 03 5774 7459  
 MOB 0438 516 774  
 EMAIL vudesign@activ8.net.au

PROPOSED  
 AT  
 FOR

**DWELLING & FARM SHED**  
**31 STONEY CREEK COURT**  
**NARBETHONG 3778**  
**P & D THOMAS**

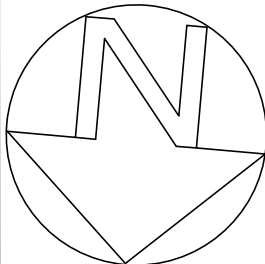


UPPER LEVEL



GROUND LEVEL

FLOOR PLAN



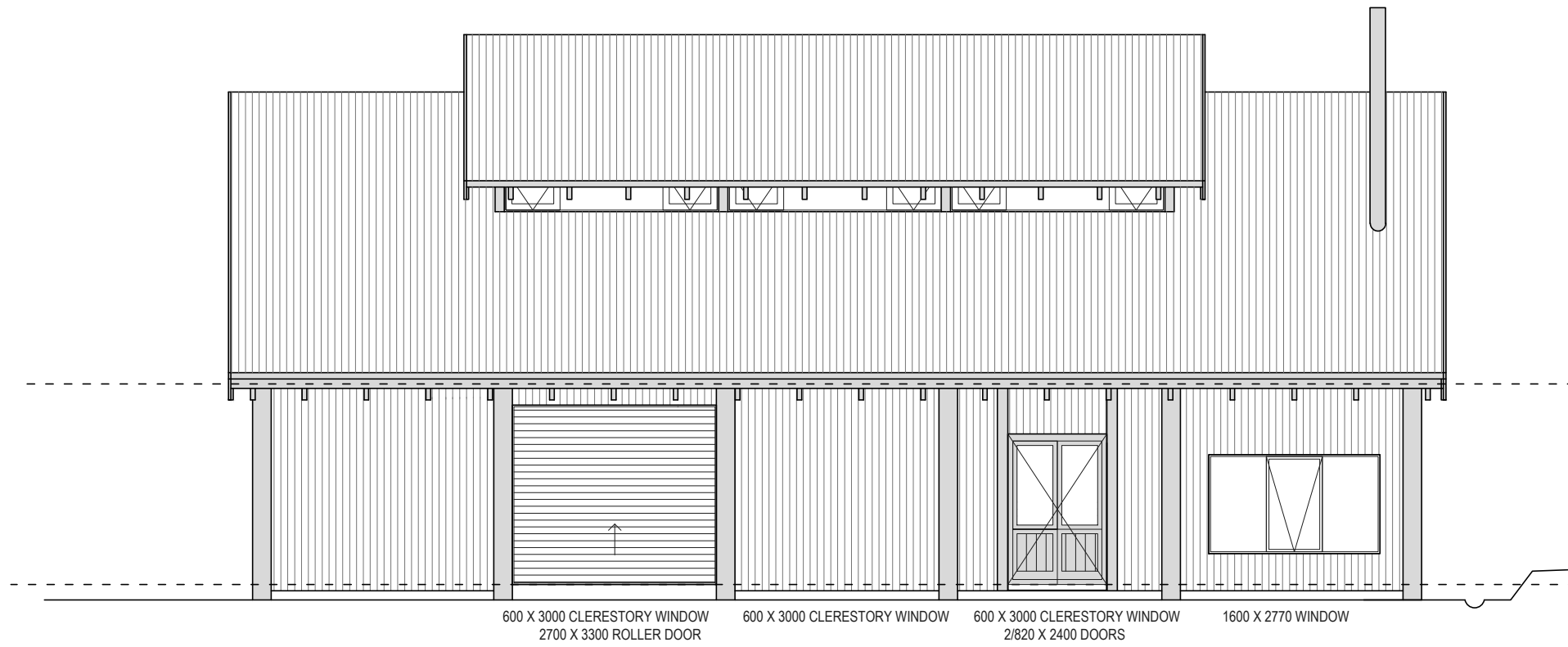
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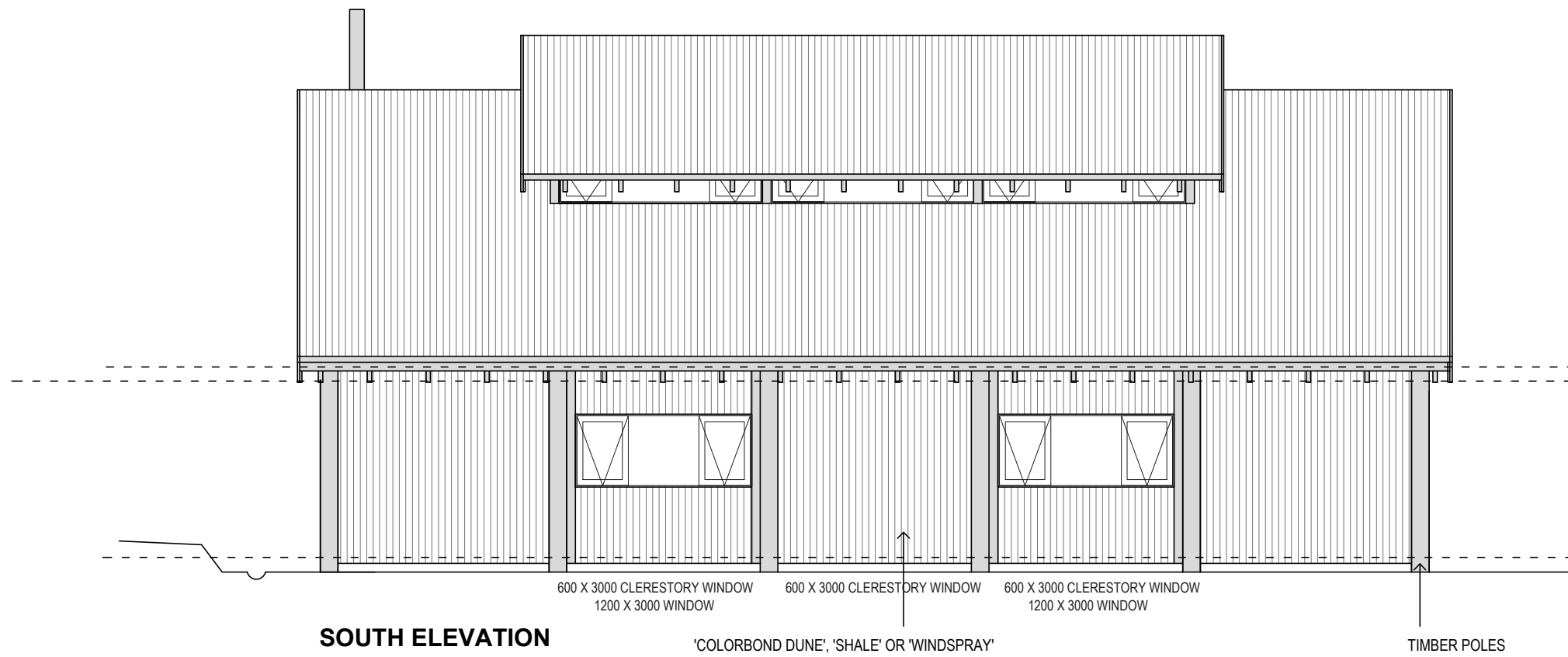
**VIEWPOINT DESIGN**  
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**P & D THOMAS**



**NORTH ELEVATION**



**SOUTH ELEVATION**

**NOTES**

ALL WORK TO COMPLY WITH REQUIREMENTS OF NCC, TIMBER FRAMING  
 MANUAL & MURRINDINDI SHIRE  
 CHECK ALL DIMENSIONS BEFORE COMMENCEMENT  
 DO NOT SCALE OFF DRAWING  
 TERMITE PROTECTION TO COMPLY WITH AS3660.1  
 PHYSICAL BARRIER OR APPROVED SPRAY BY LICENCED CONTRACTOR  
 SMOKE DETECTORS TO BE INSTALLED TO AS3786  
 INTERCONNECTED & HARD-WIRED WITH BATTERY BACK-UP

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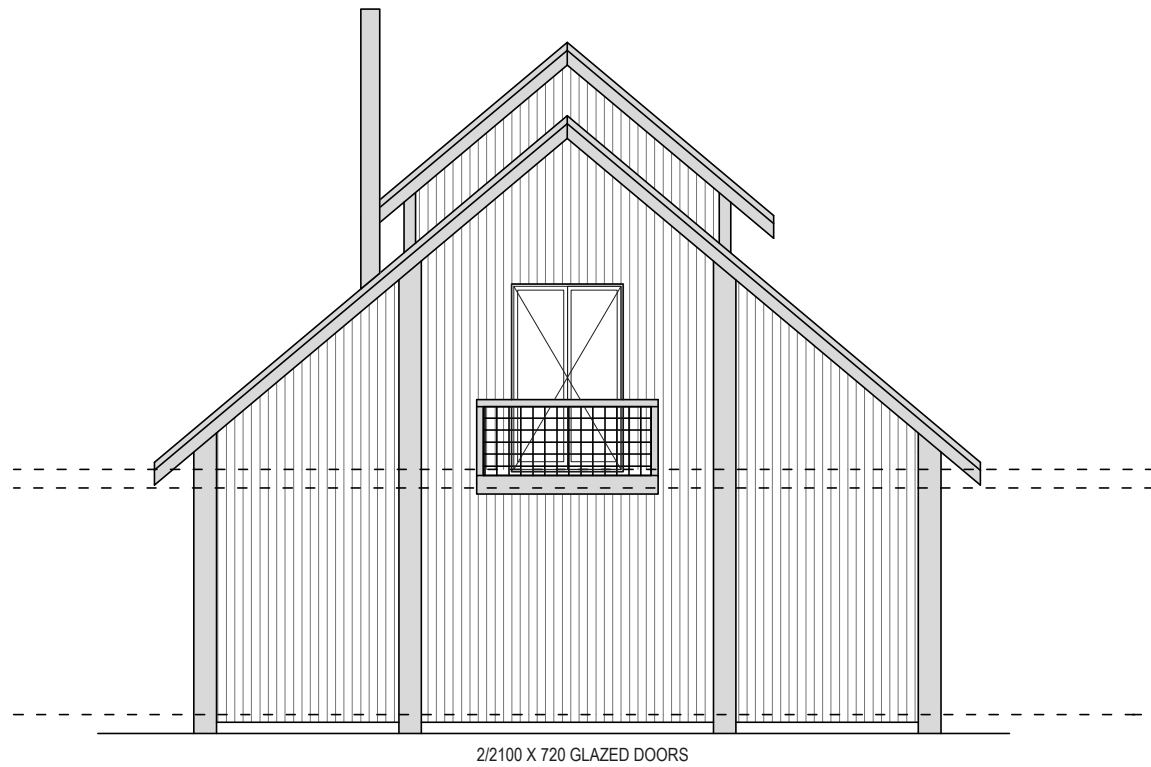
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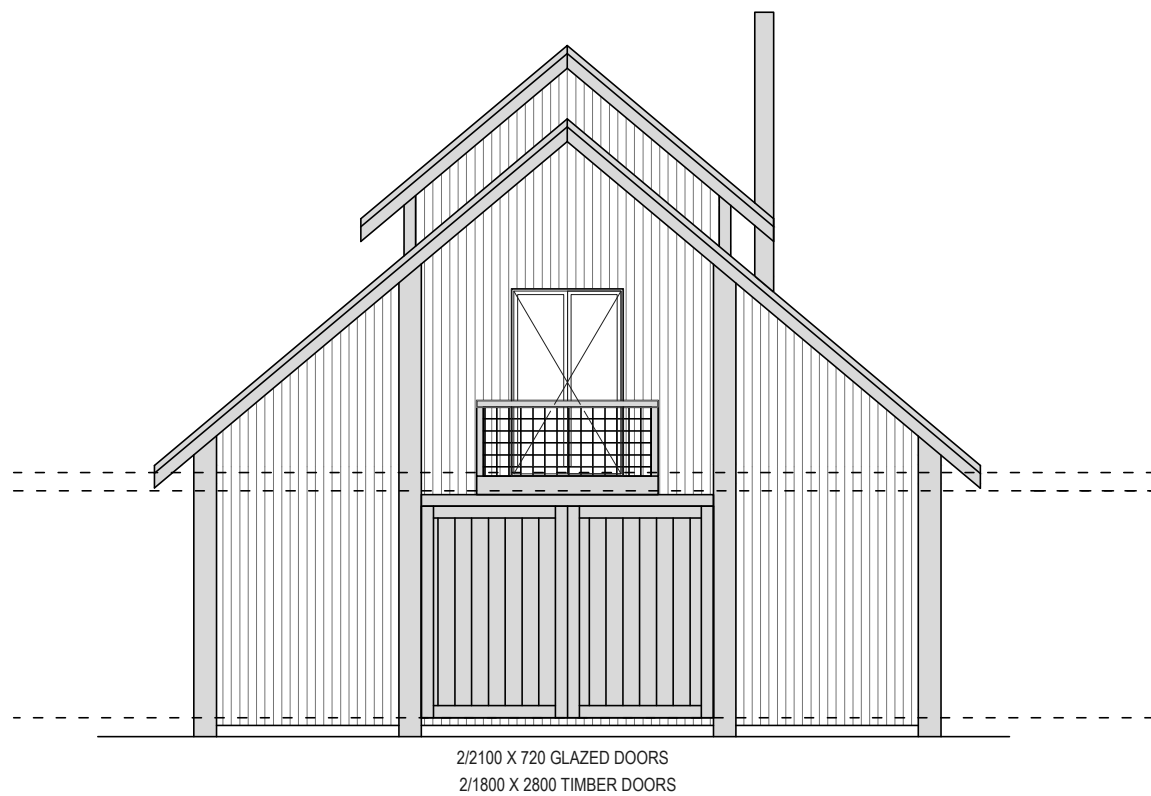
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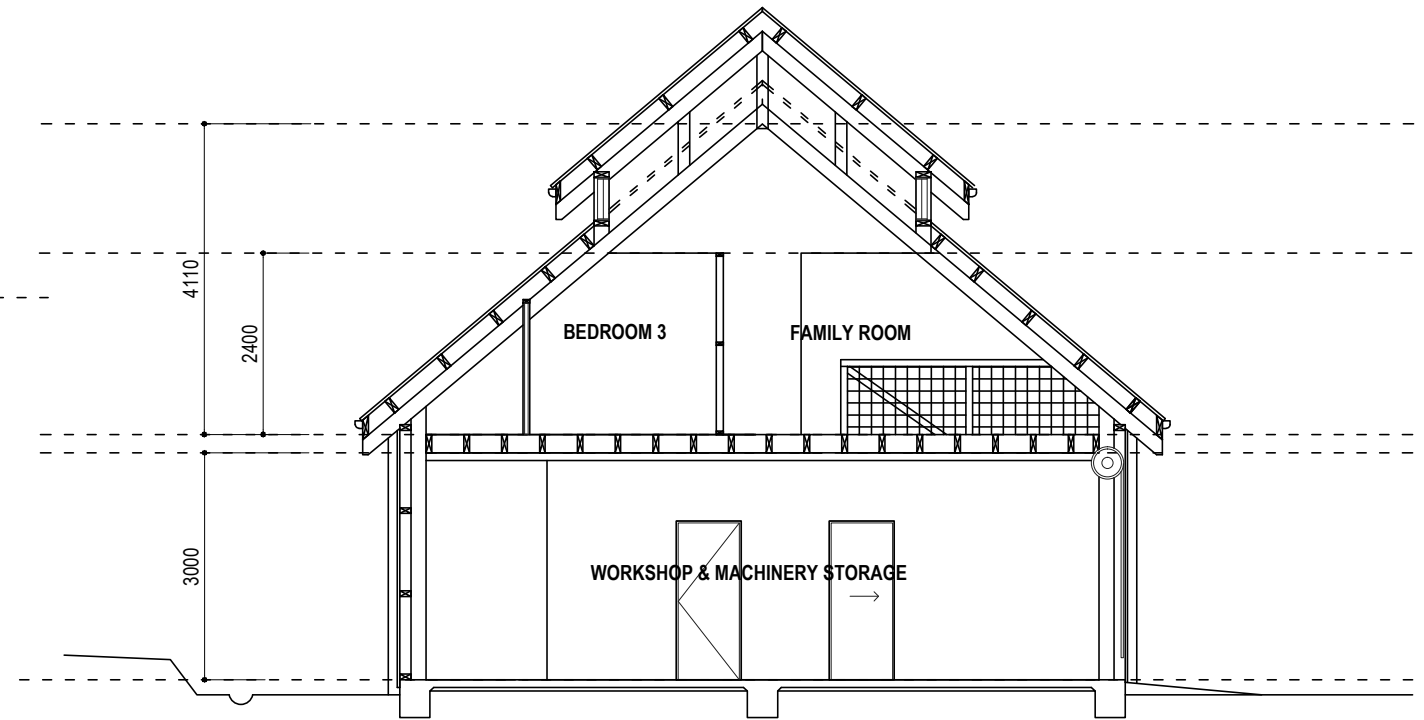
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**WEST ELEVATION**



**EAST ELEVATION**



**SECTION A-A**

STEEL PORTAL FRAME  
 CONCRETE RAFT SLAB  
 BUSHFIRE RESISTANT TIMBER POLES  
 'COLORBOND' STEEL ROOF AND WALL CLADDING IN MUTED COLORS  
 ('DUNE', 'SHALE' OR 'WINDSPRAY')  
 BUSHFIRE RESISTANT TIMBER DOORS  
 ALUMINIUM FRAMED WINDOWS

**NOTES**

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### STONEY CREEK COURT

Stoney Creek Court bowl with access to Lots commencing from the left Lot 5, Lot 2 and Lot 3



Entrance to subject site (Lot 2)





Shed in background of subject site, access way to Lot 5 to the left



Access to St. Fillan Farm



Access lane from inside Lot 2 and dwelling on Lot 1 in background



Access lane in foreground – trees planted along boundary with Lot 1



Access lane and bridge into Lot 5 taken from subject site



Sandy Creek and vegetation buffer zone to Lot 5



View towards the East down Lot 2 – shed to the right



Rear of existing shed facing west towards boundary with Lot 5 access lane



West elevation of the shed which has its orientation to the East



View towards the East and neighbouring house on Lot 3. Lot 3 dwelling located on boundary with the subject site



Internal access road on subject site



Access off Stoney Creek Court, neighbours dwelling in the background



Lot 4 off Stoney Creek Road (dwelling site on boundary with Lot 3)



Lot 1 and boundary buffer of trees







**Ellen Hogan & Associates**  
**Land Development Service**  
**P.O. Box 658**  
**Mansfield Vic 3722**

15 March 2017

Planning Department  
 Murrindindi Shire Council  
 PO Box 138  
 ALEXANDRA 3714

Attention Melissa Crane

Dear Melissa

**PLANNING PERMIT APPLICATION NO. 2017/33**  
**CONSTRUCTION AND USE OF A DWELLING**  
**31 STONEY CREEK COURT, NARBETHONG**

Further to our original submission and your letter of the 7 March, 2017 I submit the following information as requested under Section 54(1) of the Planning and Environment Act, 1987.

Dwellings in the Farm Zone Decision guidelines	Response
<p>How the dwelling has been designed and sited to:</p> <ul style="list-style-type: none"> <li>Address the impact on the land and neighbour properties in terms of ongoing and future agricultural activity.</li> <li>Address the impact on native vegetation</li> <li>Address the impact on water courses and drainage lines</li> </ul>	<p>The dwelling location meets all the relevant setback requirements stipulated under the Schedule to the Farm Zone. The future use of the general area has been determined as semi-residential, particular in the immediate location of the four lot subdivision, the Section 173 Agreement that runs with each title, the size of the allotments and deliberations by previous VCAT decisions. As per our original submission the site is buffered from broad acre farming land by vegetation buffers. Lot 5, which can have a number of dwellings constructed on it, has a long battle axe access lane approved as part of the subdivision. This laneway is used to graze cattle, albeit very short term and St. Fillan farm vehicles, although it is understood that the main entrance to St. Fillan Farm is off the Maroondah Highway. The proposed location of the dwelling on neighbouring properties in terms of ongoing and future agricultural activity will be minimal. Four of the allotments are also only small in area.</p> <p>There will be no impact on native vegetation. No vegetation is to be removed under this proposal.</p> <p>No impact to water courses and drainage lines. Setbacks appropriate for effluent and development. Setbacks are in accordance with subdivision permit</p>

<ul style="list-style-type: none"> <li>Address the impact on the rural landscape</li> </ul>	<p>and current relevant standards. Rainwater tanks to capture stormwater runoff and for firefighting purposes</p> <p>Rural landscape will not be impacted upon under this proposal as the subdivision is located in an area which is not visible from the broader landscape or major highways.</p>
<p>Whether the dwelling will adversely affect the operation and expansion of adjoining and nearby agricultural uses</p>	<p>The dwelling will not adversely affect the agricultural operation and expansion of St. Fillan Farm due to the buffer zone between the farm itself and the small four lot subdivision approved for semi-residential purposes.</p> <p>The four lot subdivision has an agreement that enables a dwelling to be built on each of the five allotments with up to 4 on Lot 5.</p>
<p>Whether the dwelling will be adversely affected by agricultural activities on adjacent and nearby land due to dust, noise, odour, use of chemicals and farm machinery, traffic and hours of operation</p>	<p>The current activities on St. Fillan Farm are not considered intensive agriculture or permitted for such under the Murrindindi Planning Scheme. If such a future use were to occur or be applied for then consideration would have to be given to the four landowners in the subdivision approved by the earlier planning permit.</p> <p>The riparian buffer of trees along the creek border between the subject site with Lot 5 provides an excellent buffer from the broad scale farm activities that occur on the site.</p>
<p>How the land is managed and what the land is being used for, considering:</p> <ul style="list-style-type: none"> <li>The type of agricultural activity being undertaken currently and what is proposed for the future</li> <li>Methods of pest plant and animal control</li> </ul>	<p>The subject site is currently used to graze horses but agricultural activities will expand once the dwelling is established. The current layout of the site and paddocks provides more area for the landowners to maximise their land for small scale agricultural purposes. At the time of subdivision the type of small scale agricultural activity must have been envisaged and considered.</p> <p>The landowners have removed all pest plants from their site and will continue to do so.</p>

With our initial application we submitted aerial photographs, a written submission, site plans and photographs to assist Council.



Ellen Hogan

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**BARRISTER**

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**MEMORANDUM OF ADVICE**

You have asked me for advice in relation to an application to for a Planning Permit for 31 Stoney Creek Road Narbethong.

**Background**

I am instructed that the land is zoned farm zone.

It benefits from Planning Permit 2012/167 which allows for the erection of a shed but specifically prohibits use of the shed for accommodation<sup>1</sup>.

The property is Lot 2 of a 5 lot subdivision permitted by Planning permit No. 80212 (amended permit) dated 12 July 1991<sup>2</sup>, which allowed a five (5) lot subdivision and erection of detached dwellings in accordance with the endorsed plan (**PP 80212**).

PP 80212 contemplates 4 single dwellings on lots 1-4 and 4 on lot 5; a total of 9 dwellings.

PP 80212 condition 2 states that dwellings are “subject to town planning”.<sup>3</sup>

It has been held that PP 80212 is not permission to erect a dwelling but only relates to subdivision<sup>4</sup>.

A section 173 agreement dated 7 August 1991 enshrines the potential development rights being one dwelling per lot<sup>5</sup> and 4 on lot 5<sup>6</sup>. It does not nominate building envelopes.

It anticipates the possibility of further dwellings<sup>7</sup>.

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<sup>1</sup> Condition 4

<sup>2</sup> The original permit was dated 16 December 1988, which allowed a “four lot subdivision and erection of detached dwellings in accordance with endorsed plans”

<sup>3</sup> I assume the timeline was met re condition 1

<sup>4</sup> *Trinity Holdings Pty Ltd v Murrindindi SC* [2006] VCAT 1899 (**Trinity Holdings Legal Decision**)

<sup>5</sup> Clause 4(ii)

<sup>6</sup> Clause 4 (iii)

<sup>7</sup> Clause 6

## **Building envelopes**

Condition 9 of PP 80212 speaks to building envelopes on the endorsed plan.

I have asked for the endorsed plan but it cannot be located.

There are no building envelopes or other relevant restrictions in the section 173 agreement, on the copy titles or plan of subdivision I originally had in my brief papers.

You have subsequently been provided by Council with a Plan dated 20 June 1988 and “amended 24 October 1988” signed by someone 14 Dec 1988.

This plan is said to be sheet two of two sheets – we don’t have first sheet.

The plan shows Building envelopes and house site availability (hatched) as part of the building envelope. No explanation is given for the difference.

The building envelopes are for 4 lots only.

Council’s letter to you of 19 April which enclosed this sheet two say:

*“In relation to the supporting documents provided with the application, comments in relation to the Section 173 Agreement that runs with the property have been made, in that a dwelling was approved for each allotment, but that a building envelope was not able to be found. A search of council records has shown that a building envelope for a dwelling was considered, and is attached for your information.”*

The word “considered” is interesting.

The plan predates PP 80212 and the section 173 but is not referenced in either. Neither is it apparent that it was endorsed pursuant to either PP 80212 or relates in any way to the section 173 agreement.

Council appears to accept this position – it goes no further than to say these building envelopes were “considered”.

The findings in Trinity Holdings are of great assistance. There, the Tribunal found that:

- Planning permit No. 80212 (as amended) dated 12 July 1991 is now “spent”
- The s.173 agreement dated 7 August 1991 does not impose any binding requirement for any new dwelling on the subject land to be sited within the relevant envelope indicated in the “building envelope plan” attached to the aforementioned planning permit<sup>8</sup>

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<sup>8</sup> Trinity Holdings Pty Ltd v Murrindindi SC [2006] VCAT 1899

Nothing in the plan “considered” but seemingly not endorsed or formalized through the s173 process changes these findings.

### **Right to farm?**

Council and the objector who owns lot 5 are concerned about future residents of lot 2 complaining and the possible future farming use of Lot 5 might be restricted by the proposal.

In my opinion, the land the subject of the subdivision has been clearly marked out for future dwellings since 1988.

Despite PP 80212 being spent (its enforceability ended when the Plan of Subdivision was register)<sup>9</sup>, this is not determinative in this case.

The section 173 remains enforceable and enshrines those aspects of PP 80212 that matter.

Further, there are no nominated building envelopes so there is no control over what areas are better than others for the erection of a dwelling<sup>10</sup>.

The question then becomes what are the relevant amenity expectations of any future residents of the dwelling on lot 2 and how does the s173 temper the objectors “right to farm”.

This is an issue that VCAT has grappled with for a number of years.

In Trinity Holdings the Tribunal put it this way:

*“Turning to the strategic planning issues, there is a tension between the following two factors:*

- on the one hand, despite its location on the edge of Narbethong, the subject land is zoned Farming Zone. I refer here to the objectives of this zone. I am struggling to see that constructing a shed and a dwelling will particularly advance these objectives . . .*
- on the other hand, we have the reality of the 1991 subdivision permit creating the four relatively small lots accessed of Stoney Creek Court, and the associated 173 Agreement. This 173 Agreement expressly contemplates future dwellings being built, in providing that no more than one dwelling can go ahead on each lot.*

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<sup>9</sup> Trinity Holdings Legal Decision

<sup>10</sup> Trinity Holdings Legal Decision

*When the Farming zoning is weighed up against the 173 Agreement, I am satisfied that it is appropriate that I give priority to the 173 Agreement (being the more detailed and specific planning control applicable here). Accordingly, while I may well have had major “strategic policy” concerns in the absence of the 173 Agreement, I rely on the 173 Agreement in accepting that there is an adequate level of strategic policy support for a dwelling per se being constructed on the subject land.<sup>11</sup>*

In this instance, the objector’s “right to farm” must be tempered by where he is i.e. on a lot, part of a subdivision, which has been regarded as suitable for at least 9 dwellings.

Similarly, the amenity of any resident of lot 2 dwelling must be tempered by where they are i.e. in a farming zone and at present next to an operating farm. The proximity to the laneway and the laneway use by the farm is relevant but not determinative in my view.

This balancing exercise is no proper basis upon which to deny a permit for a dwelling in this instance.<sup>12</sup>

Further, while we must plan for the future and take into account the “preferred future character” of the area if you will, this character and use has been established by the PP 80212 and s173 and it is clearly a farming area by zoning but in reality it has a semi- residential flavour.

In such a semi- residential area, an absolute right to farm, even if such a thing existed, is not an appropriate veto on the residential use contemplated by the planning permits back to 1988 and the associated s173 agreement.

As the Tribunal has already found re this subdivision:

*“Having conducted a site inspection since the most recent hearing for the first time, it has become clear to me that the Stoney Creek Court properties (notwithstanding the zoning of Farming Zone) in reality are situated on the outskirts of Narbethong, and hence have a semi-residential feel to them. For example, the subject land is in within walking distance of the main shops in Narbethong”<sup>13</sup>.*

**LOUISE HICKS**

23 April 2017

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<sup>11</sup> At 33 and 34

<sup>12</sup> I assume you need one and it is not as of right. I do not know the size of the lot.

<sup>13</sup> Trinity Holdings Pty Ltd v Murrindindi SC [2006] VCAT 2659 at 14