

2 AMENDMENT TO PLANNING PERMIT T170301-1 INCLUDING THE RELOCATION OF THE DWELLING AT 18 BOTTOMLEY DRIVE, EMERALD

FILE REFERENCE INT1993344

RESPONSIBLE GENERAL MANAGER Tracey Parker

AUTHOR Tracey Parker

RECOMMENDATION

That a Refusal to Grant Planning Permit T170301-1 be issued for Amendment to the Permit including the relocation of the dwelling at 18 Bottomley Drive Emerald, on the following grounds:

- The proposal is inconsistent with the Planning Policy Framework including Clause 13.05-1S Noise Abatement Clause 13.06-1S Air Quality Management, Clause 14.01-1S Protection of Agricultural Land, Clause 14.01-1R Protection of Agricultural Land – Metropolitan Melbourne in that the proposed relocation of the dwelling will result in conflicts with the existing agricultural operations of a broiler farm and will unreasonably impact on this existing use.
- The proposal is inconsistent with the Local Planning Policy Framework in particular and Clause 21.04-2 Agriculture.
- The proposed has not provided sufficient information to provide a rationale for the relocation of the dwelling, with some information provided of poor or questionable quality and information submitted does not clarify uncertainties in relation to the proposal.
- The proposal is inconsistent with the orderly and proper planning of the area.

Attachments

1	Locality Map	1 Page
2	Development Plans	8 Pages
3	Copy of Objections - Circulated to Councillors only	11 Pages

EXECUTIVE SUMMARY:

APPLICATION NO.: T170301 - 1

APPLICANT: Ms Maria Lewis

LAND: 18 Bottomley Drive, Emerald VIC 3782

PROPOSAL: Amendment to the planning permit to relocate the dwelling, Planning Permit T170301 allowed the Use and development of the land for a dwelling and earthworks

PLANNING CONTROLS: Green Wedge A Zone Schedule 1
Bushfire Management Overlay,
Environmental Significance Overlay Schedule 1

NOTIFICATION & OBJECTIONS:

The application has been advertised pursuant to Section 52 of the Planning and Environment Act 1987 by sending notices to adjoining land owners.

2 objections have been received to date

KEY PLANNING CONSIDERATIONS:

Proximity of the dwelling to neighbouring broiler farms.
Access arrangements, information provided

RECOMMENDATION: Refusal

BACKGROUND:

An application for a planning permit on the subject site (T160048) for a dwelling and an outbuilding to be used as a horse training facility was refused by Council at the Town Planning Meeting on 4 July 2016. This application included a dwelling within the separation distance of the broiler farm with one of the grounds of refusal clearly stating this as a reason for this refusal.

Council Officers met with the current applicant for T170301 prior to their purchasing of the property and before the original planning permit application was lodged, Council Officers detailed the previous refusal, the refusal by VCAT of the neighbouring property of the broiler farm and the potential difficulties in gaining a planning permit for this subject site.

The initial application was lodged by the applicant with the dwelling within the separation distance (approximately 110 metres from the broiler farm) and the officers throughout the process of the application clearly indicated that the location of the dwelling within close proximity of the broiler farm would not be supported. This assessment was further supported by the EPA in comments and recommendations that were provided to Council. The applicant was advised of the officer's position, and amended the permit application to provide the dwelling outside the separation distance with a minimum 229 metres from broiler sheds. Supporting documentation, including a Bushfire Management Statement in the location was lodged with no objection from the CFA subject to some minor changes to the bushfire management plan which will result in a minor relocation of the dwelling to include defendable space on the subject site which was included as permit conditions. The permit is still active and subject to the endorsement of plans to comply with condition 1 and CFA conditions a dwelling can be constructed on the site.

An amendment to the permit was initially submitted at the end of 2018 for this application although was lodged without an associated fee, as such, was not a complete application subject to the requirement of the Planning and Environment Act 1987. With discussion with the applicant Council agreed to waive the amendment fees.

SUBJECT SITE

The site is located on the south east side of Bottomley Drive Emerald. A crossover is located on the southern end Bottomley Road frontage with the south boundary of the site also abutting Dallas Street which at present is not constructed to the subject property.

The land is developed with a shed in the southern portion of the site and predominately clear of vegetation with some scattered trees including both native and planted vegetation. The topography of the land is undulating with steeper slope located in the east section of the site.

The main characteristics of the surrounding area are:

North West:

Bottomley Drive abuts the site to the north west, abutting this road is an existing broiler farm with two broiler sheds. A VCAT decision at 9 Bottomley Drive saw the tribunal refuse an application to use and develop the land for a house as the dwelling would be located within the separation distance set out in the Broiler Code of Practice.

South:

The properties abutting the south boundary include a number of rural residential properties with frontage to Mary Street. These are developed with dwellings generally well separated from the common boundary with a hedge located along the common boundary and open grazing area also abutting the site.

East:

The land to the east includes a rural residential property with a dwelling located to the south east of the common property with a creek and vegetation located long the common boundary.

PROPOSAL

The following is summary of the proposed amendment to the existing Planning Permit T170301 issued on 23 July 2018;

Substantial changes to plans:

- The proposed amendment is essentially a request to relocate the dwelling. The plans in which this permit was assessed showed the dwelling 229 metres from the adjoining broiler farm, condition 1 of the permit specifies that the plans must be generally in accordance with plans submitted. The amended plans show a separation to 110 metres from the broiler farm.
- The second substantial change to the submitted plan that is not generally in accordance with the permit relates to the access to the site. The proposed amendment includes access from Dallas Street an unmade road on the southern boundary of the site.

Change to conditions:

The third amendment relates to the Bushfire Management Statement associated with Condition 17 of the permit.

Condition 1 d) states that amended plans are to show the requirement of this condition. This condition states that an amended bushfire management plan to be submitted generally in accordance with Practical Ecology's BMP titled 18 Bottomley Drive Emerald (*date 27/02/2018, Version 1*).

A new bushfire management statement and bushfire management plan has been submitted therefore the amendment requests the deletion or alteration of this condition to replace the

previous bushfire management plan. This plan shows the relocated dwelling, revised defendable space and BAL rating and revised access way.

PLANNING SCHEME PROVISIONS

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PLANNING PERMIT TRIGGERS

The proposal for use and development of the land for a dwelling requires a planning permit under the following clauses of the Cardinia Planning Scheme:

- Pursuant to Clause 35.05-1 of Green Wedge A Zone, a planning permit is required to use the land for a dwelling.
- Pursuant to Clause 35.05-1 of Green Wedge A Zone, a planning permit is required for buildings and works associated with a Section 2 Use (dwelling and outbuilding) and earthworks.
- Pursuant to Clause 44.06-1 of Bushfire Management Overlay, a permit is required for buildings and works associated with 'accommodation'.

PUBLIC NOTIFICATION

The application has been advertised as per Section 52 of the Planning and Environment Act 1987, by sending notices to the owners and occupiers of adjoining land.

Council has received two (2) objections to date. The key issues that were raised in the objections are:

- Proposal does not meet the separation distance required from the broiler farm and is not supported by the EPA and is inconsistent with a similar application heard by VCAT.
- Impact of the existing broiler farm on the proposed sensitive use (dwelling) due to separation distance provided, potential odour complaints from the new residents and impact on the continuation of the broiler farm.
- Consistency with previous decisions of Council

REFERRALS

CFA

The application was referred to CFA as a statutory referral and the CFA requested additional information in relation to the bushfire management statement (BMS) in support of the application. The applicant provided two revised bushfire management statements which were re-referred to the CFA although Council officers were concerned about their content. The CFA requested additional information for a second time at 25 October 2019, this advice was provided to the applicant. Subsequent to this advice the applicant submitted a revised BMS to the referral authority directly.

At this stage the CFA have not provided a formal response as all the additional information has not been provided to the CFA.

EPA

The application was referred to the EPA for comment. The EPA was not satisfied that the separation distance provided is sufficient in that the proposal encroaches upon an existing land use with adverse amenity impacts.

The EPA advised that appropriate weight should be given to protecting existing broiler farm operations and it is within Council's discretion to refuse an application for a new use or development if Council considers that it would adversely impact the existing broiler farms capacity to operate in accordance with existing approvals or existing use rights.

DISCUSSION

The proposal has been assessed against all relevant Clauses of Cardinia Planning Scheme and determined that the amendment is inappropriate for the site.

Site Constraints

A critical site constraint for this property is the location of an established broiler farm at 19 Bottomley Drive. A fundamental element of good planning is to avoid incompatible land uses in close proximity to each other. These elements are reinforced in Clause 13.05-1S Noise Abatement and Clause 13.06-1S Air Quality Management of the Cardinia Planning Scheme.

The broiler farm located at 19 Bottomley Drive opposite the subject site has been established with a planning permit, P887, being issued on 18 December 1973, thus can lawfully continue to operate as a broiler farm. Under the Green Wedge A Zone the current broiler farm which is over 10,000

birds is prohibited, although the existing agricultural use should be protected in terms which is established in the Planning Policy Framework of the Cardinia Planning scheme at Clause 14.01-1S Protection of Agricultural Land, Clause 14.01-1R Protection of Agricultural Land – Metropolitan Melbourne and Local Planning Policy Framework at Clause 21.04-2 Agriculture.

However, according to the requirements of the Victorian Boiler Code 2009, the broiler farm would not be able to expand due to the inability of meeting the separation distances. The refusal of the sensitive use, in this case the proposed dwelling, is due to the potential impacts that the broiler farm operation, such as odour, noise, traffic movement and so forth can have on the proposed sensitive use.

The Victorian Code for Broiler Farms 2009 (plus amendments 2018) advises that Responsible Authorities should consider the impacts of existing broiler farm emissions when deciding on applications for proposed sensitive land use developments and ensure the separation distance is as large as reasonably possible. The applicant has questioned the use of the code of practice and has noted that it does not restrict where the house can be located. It is noted that Chapter 11 of the code titled 'Strategic and Land Use Planning Considerations' states;

When considering land use and development applications...that will permit the establishment of dwellings and other sensitive uses nearby an existing broiler farm, responsible authorities should consider the impacts of broiler farm emissions on potential future sensitive uses and restrict their encroachment into the separation distances required under this code.

...

They can be used as a guide to identify the locations where a future sensitive use may be adversely impacted by broiler farm emissions.

The applicant has not supplied any evidence that would support the reduced separation (i.e. odour emissions or noise report) to allow officers to fully assess that the reduced separation distances would address amenity concerns relating to the conflicting uses.

The EPA in its consideration of the initial application stated the following:

Not only does the Code seek to manage the introduction of new broiler farm operations, but the Code further seeks to ensure that existing broiler farm operations are safeguarded from the encroachment of sensitive uses.

In addition, as detailed below a number of VCAT cases have established that the separation distances in the code are an appropriate guide for the need to separate sensitive uses from established broiler farms as such is considered an appropriate guide for competing land uses.

The code provides a formula to calculate the separation distance based on the bird numbers. The proposed dwelling at 18 Bottomley Drive should, according to the Victorian Code for Broiler Farms, provide a separation distance of 229 metres from the 52,000 capacity bird broiler farm at 19 Bottomley Drive. This has been calculated based on a formula established in the code that includes the farm capacity. Council officers estimated floor area of the broiler shed calculated from the aerial photos and the maximum capacity of 21.5 birds per square metre specified in the broiler code to establish the bird numbers. This distance was the basis of site plans that were submitted with the initial application when officers supported the application, which the applicant is seeking to alter.

The proposed amendment will result in a separation distance for the proposed dwelling of approximately 110 metres from the closest broiler shed which is considerably less and not

considered to be as 'large as reasonably possible' as directed the Code of Practice. This concept is to ensure minimal conflict between the uses and satisfy Clause 13.05-1S Noise Abatement and Clause 13.06-1S Air Quality Management. The applicant has provided limited evidence of how at this location these amenity concerns would be abated other than the existing broiler farm has had limited complaints. Although this is accepted this may be due to the good operations of the broiler farm although reduced distance to just over 100 metres from the shed may alter this situation and future occupants of the proposed dwelling may be impacted by the broiler farm operations.

In the consideration of this application are the proximity of this sensitive land use (dwelling) to an existing broiler farm, and whether the applicant has made sufficient effort to locate the dwelling as far as possible away from the farm combined with providing enough information to fully assess the application to satisfy officers that there will be no conflict between the uses (i.e. odour and/or noise report).

While it is acknowledged that a large portion of the subject site is within the separation distance of the neighbouring broiler farm, there is the potential to locate a dwelling in the north-eastern corner and south-eastern corners of the lot, which would result in it being outside of the separation distance and a distance from the broiler farm to ensure the ongoing operations of the farm are not detrimentally impacted and the amenity of future occupants are not impacted.

Council officers agree that siting the dwelling outside the separation area may result in higher costs to build, however it can be achieved and throughout the planning process Council has indicated that support would be more forthcoming if one of these locations were selected.

The initial comments from the EPA with the application stated the following:

EPA considers the current separation distance of approximately 100 metres proposed to be insufficient to mitigate possible adverse impacts due to the proximity of the broiler farm.

It is EPA's view that the existing dwellings do not warrant disregarding the restrictions and recommendations of the Code, and it is EPA's understanding that the existing dwellings are not as close as the proposed dwelling to the broiler sheds. It is also EPA's understanding that many of the existing dwellings have a significant vegetation separation that could assist in reducing odour impacts.

The EPA provided detailed advice in terms of a previous application on the site in 2016 which was refused by Council on a number of grounds including the separation distance from the broiler farm. The amendment was referred to the EPA for comment, their response included;

- *Previous EPA's responses have highlighted the Victorian Code for Broiler Farms 2009 due to proposed sensitive use near a broiler farm.*
- *As previously stated by EPA, not only does the Code seek to manage the introduction of new broiler farm operations, but the Code further seeks to ensure that existing broiler farm operations are safeguarded from the encroachment of sensitive uses.*
- *Therefore, even though the Code applies only to the development or expansion of broiler farms, EPA recommends to Council that they can be used as a guide to identify the locations where a sensitive use may be adversely impacted by broiler farm emissions.*
- *As such, EPA maintains its position that the sensitive use (dwelling) on the site should still be located a minimum of 250 metres from the broiler farm.*

In the case *Holder vs Cardinia Shire Council* in relation to the application for a dwelling at 9 Bottomley Drive the member stated the following:

“The important principle involved is keeping potentially incompatible uses apart. The Code provides guidance on how far apart they should be kept. It is immaterial, having regard to the purpose of the separation, and for that matter of the Code, whether new broiler farms are kept away from existing houses, or new houses kept away from existing broiler farms. The purpose is defeated by establishing new houses in close proximity to broiler farms, just as it would be defeated by establishing new broiler farms in close proximity to existing houses.”

It is considered that the separation distance is a vital element to assess when allowing a sensitive use near a broiler farm. The reason behind this consideration is that a sensitive use, particularly a dwelling near a broiler farm, could raise issues in relation to odour, traffic movements (transporting birds in and out of the site), and appearance. On the other hand, it would also put a burden on the broiler farm to operate in a manner to minimise impacts on the neighbouring dwellings.

In addition to the existing provisions and the reasonable assessment of amenity implications of the development including reverse amenity concerns and the impact on the established agricultural use within the Green Wedge Zone the State Government more particularly DELWP is currently reviewing the state controls with regard to separation distances. This has been prompted by the 5 year implementation plan associated with Plan Melbourne 2017-2050 more particularly Action 98 which states:

Review and update relevant guidelines to inform the location of and separation distances for sensitive uses and, where appropriate, provide planning, building and urban design advice about how air emissions and noise exposure can be reduced.

During the process of review and updates the department has noted that discussion with regard to reverse amenity is under consideration particularly for agricultural uses including broiler farms and likely to be included within the revised provisions. Although this is the consultation phase and no planning scheme amendment has been exhibited this provides support for the importance of separation distances in terms of land use management.

Having considered the aforementioned factors allowing a dwelling in the proposed location would not result in a good planning outcome and the amendment to the permit should be refused.

Bushfire Risk and Management

The applicant has noted that part of the reason for the relocation of the dwelling related to the bushfire impact on the proposed dwelling.

The initial application included a bushfire management statement that indicated that the development of dwelling outside the separation distance of the broiler farm can comply with the approved measure of Clause 53.02 and satisfied the requirements of the Planning Policy Framework particularly, Clause 13.02 Bushfire Planning and the Bushfire Management Overlay.

The applicant has noted that planning authorities must prioritise the protection of human life over all policy considerations. This was the first consideration of the initial application and evidence that was provided supported that compliance with the objectives approved measures of the Cardinia Planning Scheme subject to some minor relocation of the dwelling further north to ensure that the defensible space can be managed on the site which was addressed through permit conditions.

The argument that the dwelling ‘must’ be relocated due to bushfire considerations is not supported and if the initial Bushfire Management Statement along with CFA advice stated that the only location of the dwelling that would ensure compliance with the standards in terms of bushfire

management and the protection of life was locating the dwelling within the separation distance of the broiler farm the application would have been refused. This has been clearly demonstrated and communicated with the applicant through the initial permit process whom amended the application to provide the dwelling outside the separation distance which was supported by the submission of the Bushfire Management Statement in this location.

This is acknowledged as a condition on the permit which was reiterated by the initial referral of the amendment, although it is noted that the applicant has submitted a revised Bushfire Management Statement (BMS) and Bushfire Management Plan (BMP) to demonstrate the compliance of the re-located dwelling with the relevant planning scheme provisions.

Council officers have fundamental concerns with the submitted information which is summarised as:

- *The authoring of the document is not clear and accuracy of the information provided is questioned.*
- *Justification of the proposed location of the dwelling as sought by the Application, as opposed to the location already approved by the Permit, particularly given the motivation for the proposed location was noted by the application related to bushfire risk, yet no expert material has been provided which substantiates or explains that line of thought.*
- *The report references Clause 52.47 with the relevant Clause under the Cardinia Planning Scheme has been changed to Clause 53.02 adding to the questioning of the accuracy of the information.*
- *Inconsistency with regard to the BAL ratings and defendable space throughout the document.*
- *No detail with regard to access from Dallas Street which is currently unconstructed.*

Although these concerns have been expressed to the applicant it was re-referred to CFA on 2 October 2019 and the CFA requested additional information on 25 October 2019 regarding the revised document given a number of conflicting information including:

- *Inconsistency in the BAL rating providing throughout the report*
- *Inconsistency in the defendable space provided throughout the document;*
- *Access from an unmade road.*

Further advice from the CFA was noted that a revised BMS & BMP was assessed due to update information provided by the applicant, also noting that the CFA's view is that a BAL 12.5 with a 33 metre defendable space around the proposed dwelling location would satisfy the requirement of Clause 44.06 and 53.02 and that access from the existing Bottomley Road frontage would be acceptable. The CFA have advised Council officers that the applicant had directly resubmitted a revised BMS and BMP with the BAL rating and defendable space and provided comment about the access arrangements although the revised BMS & BMP and detail with regard to access have not been provided to Council officers as such have not addressed the fundamental concerns with both the information provided with regard to the bushfire risk.

The applicant has been provided with substantial opportunity to provide this information and given the applicants reason for the relocation of the dwelling it was considered vital to ensure full assessment can be undertaken. As such the contention that the dwelling must be relocated due to bushfire risk is not accepted.

Information submitted

As detailed above the proposed amendment has not provided all the required information for a full assessment of the proposal. This application raises a number of issues that would ultimately need to be considered and weighed up on behalf of Council. That will not necessarily be an easy exercise,

it involves consideration of various areas of recognised expertise, potentially including bushfire risk, traffic engineering, native vegetation, and amenity impacts associated with odour, dust and noise.

The material before Council, and the standard of the plans, is not of a standard that Council would normally expect in respect of an application of this nature. Suffice to say, any lack of information, or lack of relevant expert input, does not assist Council in its assessment of the Application.

It is noted that insufficient information has been provided to Council has not been provided which goes to addressing following issues (in addition to that noted above relating to bushfire risk which will be discussed above):

- Any expert material in relation to amenity impacts associated with the neighbouring broiler farm;
- Any material to justify or support the proposed creation of a new driveway, within the subject land, connecting the proposed dwelling directly with the end of Dallas Street which is not constructed to the subject site;
- Any material explaining the nature of any improvement or construction of the existing Dallas Street alignment that would be necessary to facilitate the use of that proposed new driveway, including the impact on any structures that may be currently located within close proximity of the road construction and an indication as to whether the Applicant would accept responsibility for carrying out such construction;
- Any information in relation to vegetation removal that would be involved in any of those works (whether within the subject land or within the existing Dallas Street alignment), or any kind of assessment of such vegetation;
- A plan of the subject site in its entirety, showing all existing structures, as well as the site of the dwelling and driveway, within the context of the site as a whole including setbacks required under condition 1 (a);
- A plan showing the extent and location of any excavation or other earthworks required (noting the slope of the land in the location of the proposed dwelling);
- An indication as to whether any amendment is sought to condition 1(d) of the Permit.

Objector's Concerns

The owners of the broiler farm have placed an objection mentioning the adverse impact of the broiler farm on the proposed dwelling. This is due to the odour generated by the broiler farm. Council considers the proposed separation distance to be insufficient to minimise the impacts generated by the broiler farm.

The applicant has not provided a response to the potential noise and odour impact of the broiler farm on the proposed residential use.

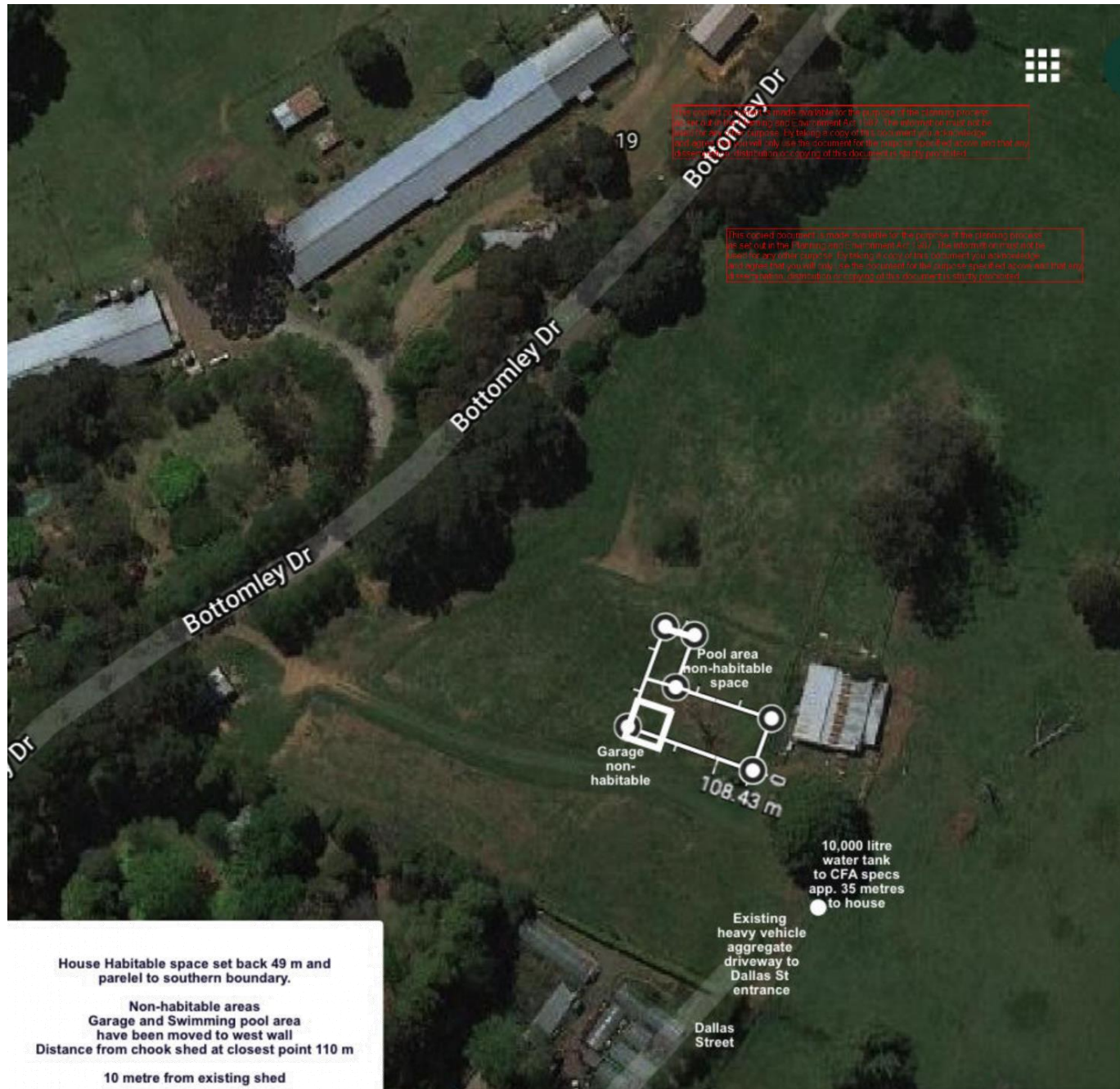
CONCLUSION

In summary the proposed amendment is inconsistent with the orderly and proper planning of the area and should be refused.

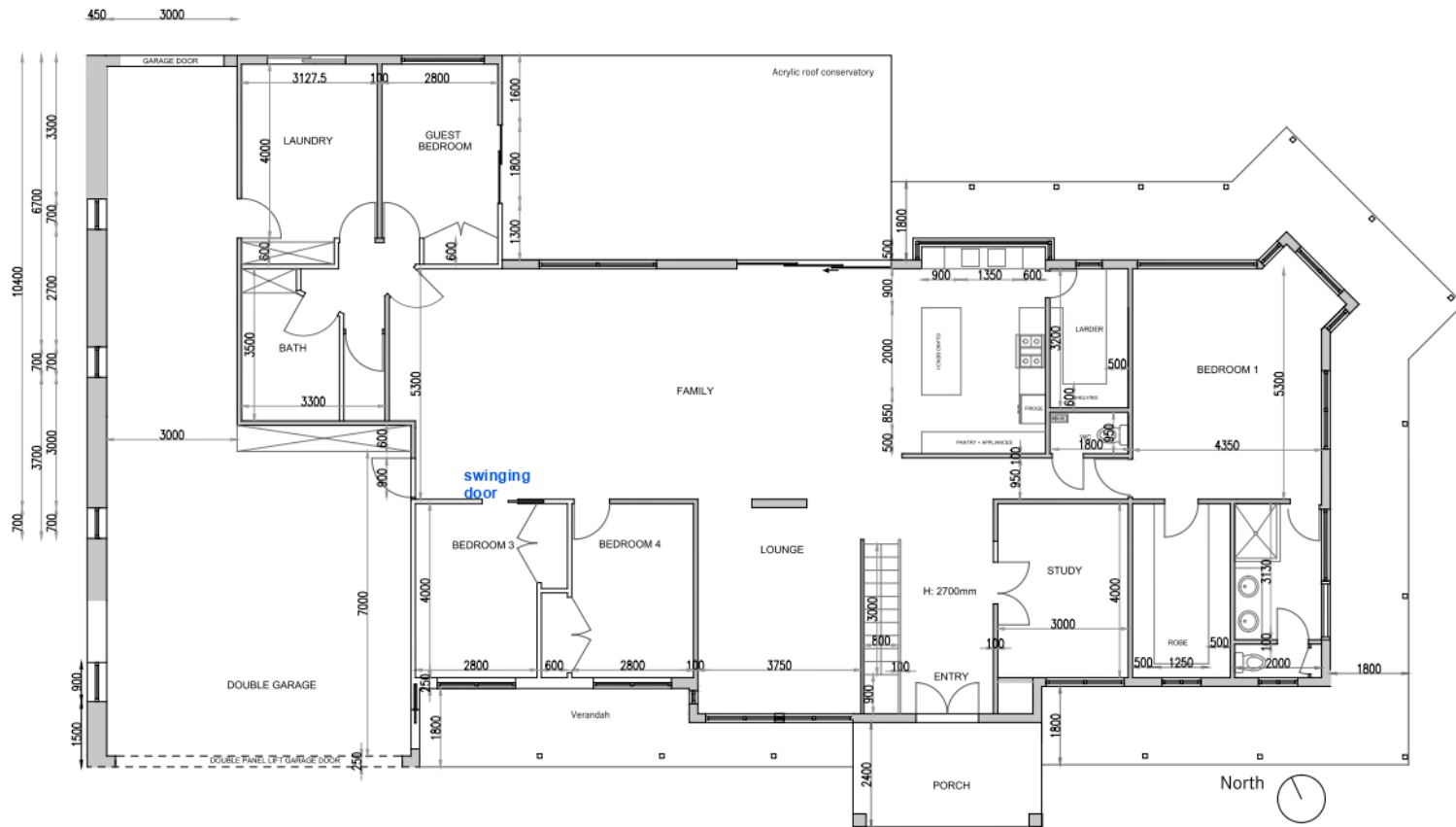
T170301-1 App – Locality Plan



Subject site



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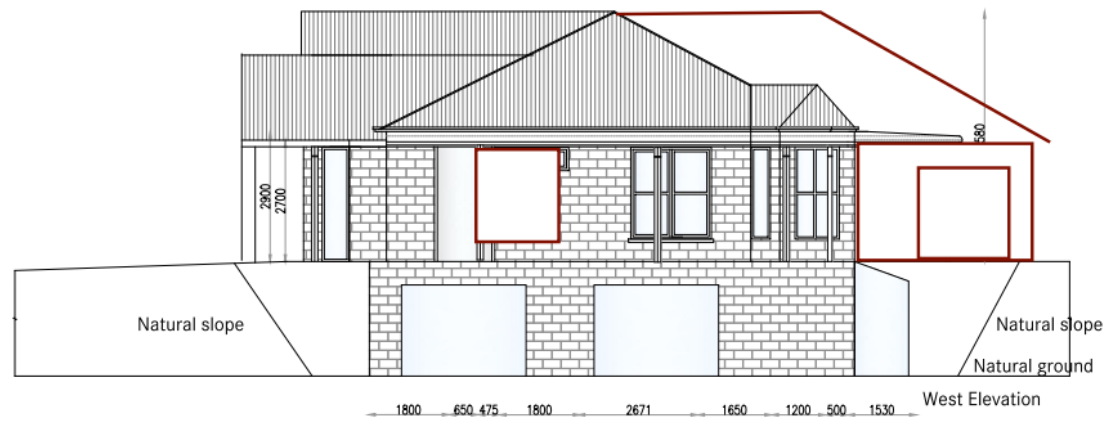
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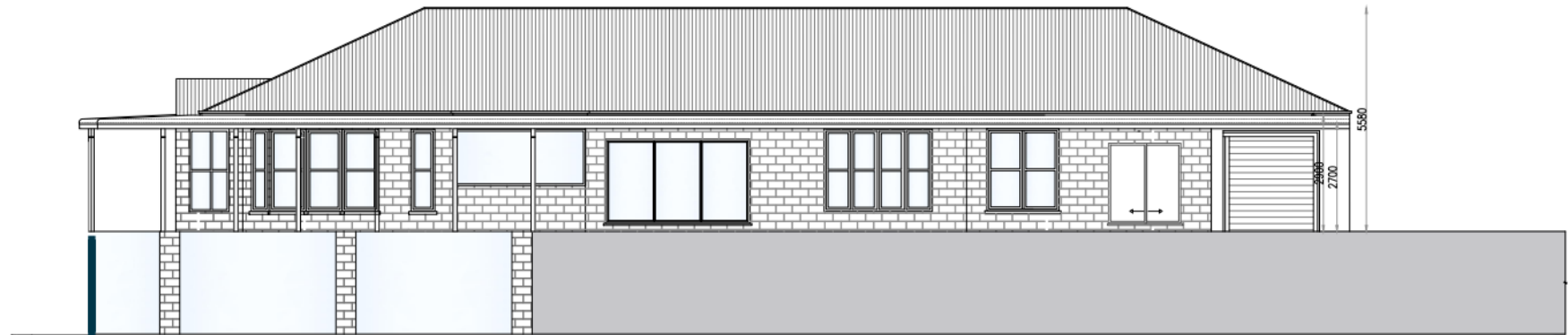


North Elevation

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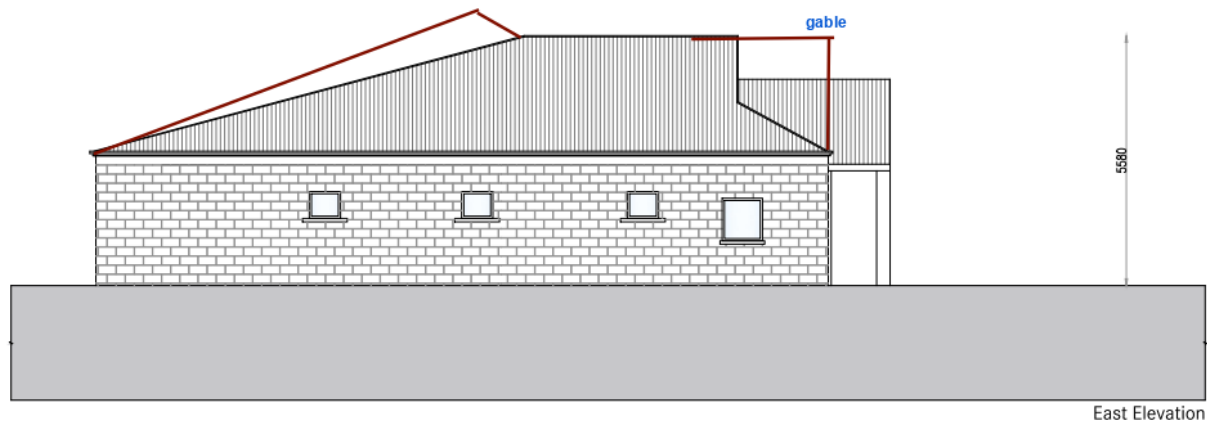


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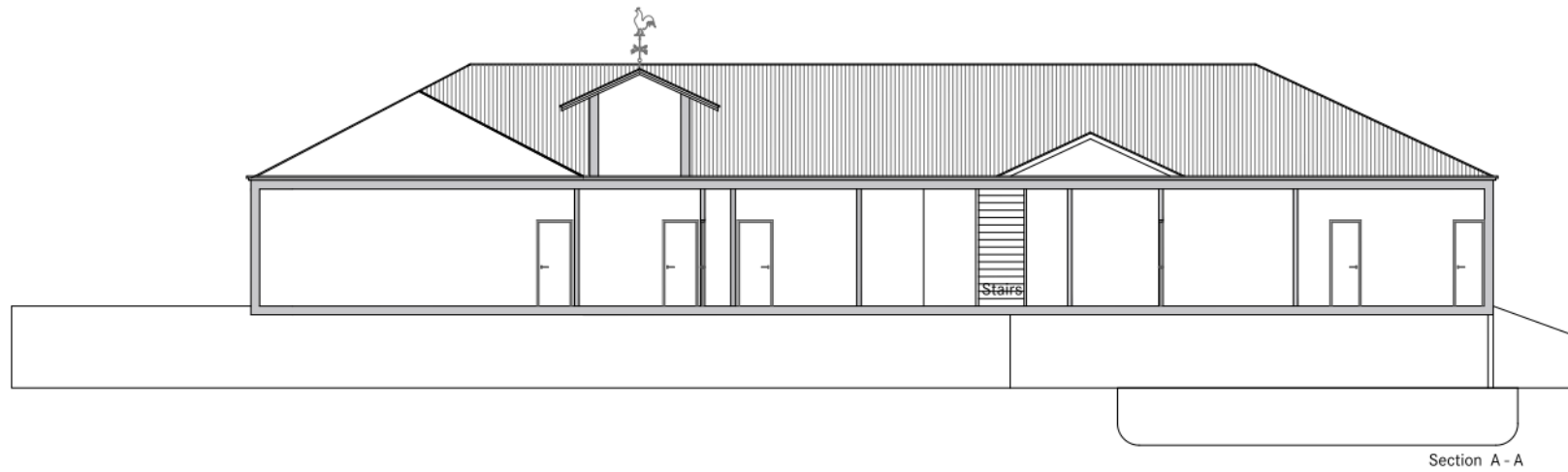


South Elevation

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