



Supreme Court of Victoria
Proceeding SCI 2017 01459

MAY 2017

6 Dunraven Avenue, Toorak
Modification to Restrictive Covenant

EXPERT EVIDENCE

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Expert Evidence | Strategic Advice | Development Approvals

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Contents

1	INTRODUCTION	4
1.1	Overview	4
1.1.1	Witness statement	4
1.2	Background.....	5
1.2.1	The Land	5
1.2.2	The Covenant.....	5
1.2.3	The Application.....	6
1.2.4	The Property Law Act 1958	6
1.2.5	Beneficiaries land	6
1.3	Relevant planning considerations	7
1.3.1	Planning application	7
2	BACKGROUND	9
2.1	The Plaintiffs' Land.....	9
2.2	Immediate abuttals and nearby properties	12
2.2.1	North.....	12
2.2.2	East	14
2.2.3	South.....	16
2.2.4	West	16
2.3	Surrounding neighbourhood	18
2.3.1	Development in the Covenanted Area	18
2.3.2	Modifications to covenants	19
3	THE PROPOSED MODIFICATION TO THE COVENANT.....	22
4	ASSESSMENT OF INJURY TO THE PERSON ENTITLED TO THE BENEFIT.....	23
4.1	Overview	23
4.2	Development permitted by the Covenant	24
4.3	The potential injuries that might be incurred by beneficiaries.....	25
4.4	Residential standards and injury	25
4.4.1	Overshadowing	26
4.4.2	Overlooking.....	27
4.4.3	Building bulk and height.....	27
4.4.4	Site coverage	28
4.4.5	Activity and traffic.....	28

4.5	Change to character	28
4.5.1	The character	29
4.5.2	Assessment	30
4.6	Precedent.....	31
5	<u>CONCLUSIONS</u>	<u>32</u>

Attachments

- 1 Development Plans
- 2 Witness Statement
- 3 Curriculum vitae
- 4 Certificate of Title
- 5 Covenant
- 6 Shadow analysis
- 7 Dunraven Avenue: Existing development of unburdened land

1 INTRODUCTION

1.1 Overview

- 1 This report provides an independent review of the merits of a proposal to modify the restrictive covenant applying to land at 6 Dunraven Avenue, Toorak (**Land**) (Figure 1).
- 2 I have been instructed by Planning & Property Partners Pty Ltd on behalf of the Plaintiffs, Mr Frank Gang-Ming Lin and Ms Angela Yang, to prepare a report assessing whether the proposed modification of the covenant, would meet the criteria in Section 84(1) of the *Property Law Act 1958* (**Act**).
- 3 In preparing this advice I have inspected the Land and its environs and reviewed the following documents:
 - The Originating Motion in Supreme Court Proceeding SCI 2017 01459;
 - The Affidavit and exhibits of Mr Tyrone Emmet Rath dated 21 April 2017 (**Rath Affidavit**);
 - The relevant provisions of the *Stonnington Planning Scheme*; and
 - Concept development plans (**Development Plans**) prepared by CATT Architects dated November 2016, illustrating a proposed two-storey dwelling (**Attachment 1**).
- 4 For the sake of brevity, this report relies upon the statements of fact expressed in the Rath Affidavit and / or as referenced in this report.

1.1.1 Witness statement

- 5 A Witness Statement is included at **Attachment 2** and a curriculum vitae is set out at **Attachment 3**.

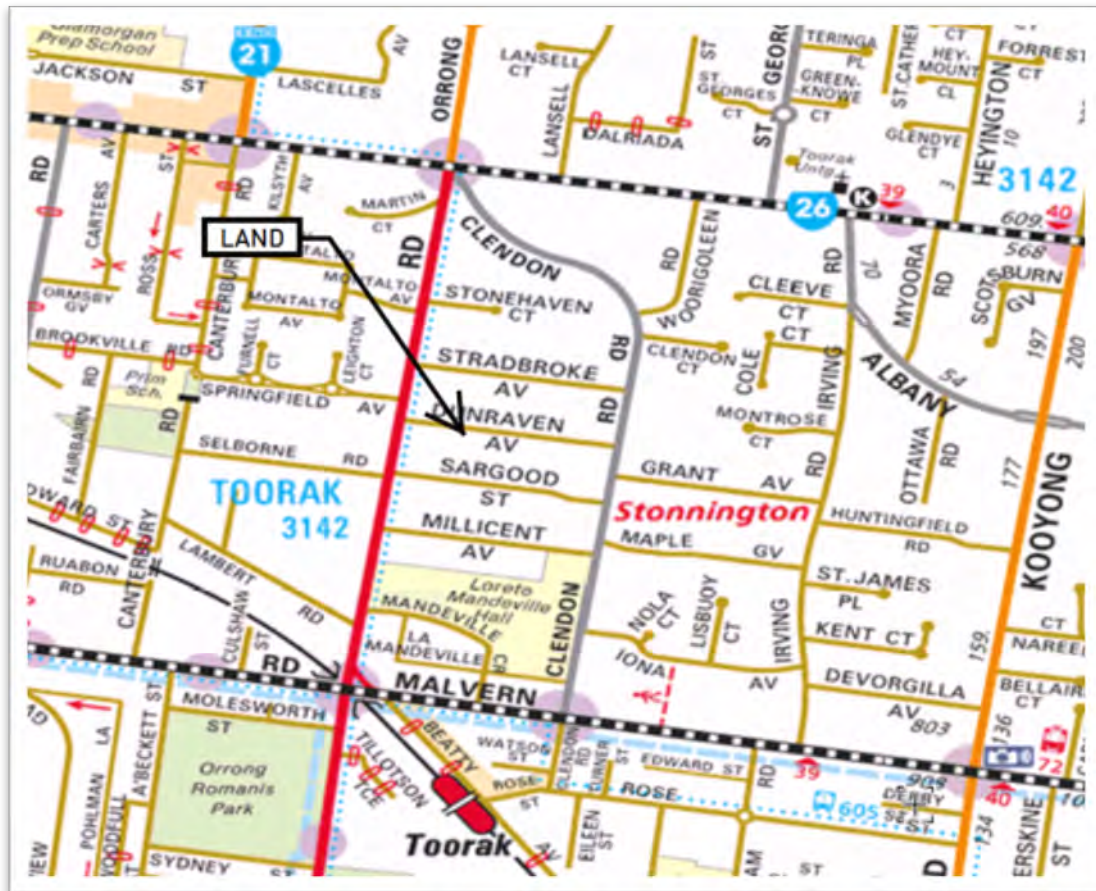


Figure 1: Location plan (street-directory.com.au)

1.2 Background

1.2.1 The Land

- 6 The Land is described on Certificate of Title Volume 04761 Folio 018 as Lot 13 on Plan of Subdivision 009145 (**Attachment 4**) (Figure 2).

1.2.2 The Covenant

- 7 Instrument of Transfer 1124139 dated 20 August 1923 comprises a restrictive covenant (**Covenant**) (**Attachment 5**), which burdens the Land and benefits the lots remaining in Plan of Subdivision 009145 at the time of transfer (**Covenanted Area**) (Figure 2).

- 8 The relevant excerpt from the Covenant is expressed as follows:

"... will not erect on the said land hereby transferred any house or outbuilding which shall contain more than one storey other than a

dwelling house containing attic rooms and that the height of any building erected on the said land shall not exceed twenty-five feet from the ground to the ridge of the roof and further that he she or they will not dig carry away nor remove any marl earth clay gravel or sand from the said land hereby transferred."

9 In essence, the Covenant prohibits:

- The erection of any house or outbuilding with more than one storey other than a dwelling containing attic rooms;
- Any building with an overall height in excess of twenty-five feet measured from the ground to the ridge of the roof; and
- The digging, carrying away or removal of earth.

1.2.3 The Application

10 The Plaintiffs' Application (**Application**) to the Court seeks to modify the Covenant to enable the replacement of the existing dwelling with a two-storey dwelling generally in accordance with the Development Plans (**Attachment 1**).

11 The Application relies upon Section 84(1)(c) to substantiate the proposed modification to the Covenant.

1.2.4 The Property Law Act 1958

12 The relevant legislation applicable to an application to remove or modify a restrictive covenant is set out at Section 84(1) of the Act.

13 Section 84(1) of the Act provides that the Court may, by order, wholly or partially discharge or modify a covenant if it is satisfied that [inter alia]:

c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction ...

1.2.5 Beneficiaries land

14 In this report the beneficiaries of the Covenant are those properties identified in the Rath Affidavit and illustrated in Figure 3.

15 There are presently fifteen (15) lots with the benefit of the Covenant.

- 16 With the exception of the Land and Lot 5, the Beneficiaries' land comprises the balance of the land within the Covenanted Area.

1.3 Relevant planning considerations

1.3.1 Planning application

- 17 The Rath Affidavit states that in mid 2016 an Application for Planning Permit (No. 0513/16) (**Planning Application**) was lodged with Stonnington City Council on behalf of the Plaintiffs.

- 18 The following relevant matters are noted:

- The Planning Application sought permission to modify the Covenant to enable the development of the Land with a dwelling up to 13 metres in height, in accordance the maximum building height provisions of the *General Residential Zone, Schedule 11*, applicable to the Land and surrounding Covenanted Area¹.
- The Planning Application was advertised in accordance with statutory requirements and a number of objections were received, including six (6) from beneficiaries of the Covenant (Figure 3).
- The grounds for objection to the Planning Application went to the opportunity for greater building height and dwellings on the Land and to the uncertainty of what the permit applicant was seeking to develop.

- 19 Except for the need to secure a planning permit for the modification of the covenant there is no trigger in the *Stonnington Planning Scheme* to require planning approval for the use or development of the Land with a single dwelling provided that it complies with any height restriction.

- 20 The maximum building height limit currently applying to the Land is 13 metres under the relevant provisions of Schedule 11 to the *General Residential Zone*².

¹ It was anticipated that following approval of a modification to the Covenant, a separate development proposal would be pursued.

² The slope of the Land satisfies the requirements of Schedule 11 to the *General Residential Zone*, in so far as it provides that the height of a building must not exceed 13 metres where the slope of the natural ground level at any cross section wider than 8 metres of the site of the building is 2.5 degrees or more.



2 BACKGROUND

2.1 The Plaintiffs' Land

21 Figure 4 and 5 illustrate the attributes and the location of the Land.

22 The Land:

- Is located on the south side of the street and approximately 77 metres east of Orrong Road and approximately 175 metres west of Clendon Road, Toorak;
- Comprises a regularly shaped lot of approximately 634.7 square metres;
- Forms part of a uniform subdivision, including a uniform width and depth of 16.76 metres and 37.87 metres respectively;
- Has a north-south orientation along the long axis of the lot;
- Falls gently, and uniformly with the streetscape, toward the west;
- Includes an easement (6ft wide) along the southern boundary, which provides drainage and sewerage functions for lots on the south side of Dunraven Avenue;
- Includes a number of mature and established trees, particularly along its western and southern boundary that contribute to the vegetated and treed character of the neighbourhood and provide screening the adjoining lots;
- Is developed with an existing single storey detached dwelling, including secluded areas of private open space within the front and rear setbacks (Photo 1); and
- Includes a double vehicle crossing and parking for two vehicles within the setback to Dunraven Avenue, adjacent to the Land's western boundary.



Figure 4: Land (nearmap)



Figure 5: Land and surrounds (Covenanted Area shown indicatively) (nearmap)



Photo 1: The Land



Photo 2: The Land and experience of neighbouring property on higher land

2.2 Immediate abuttals and nearby properties

2.2.1 North

- 23 To the immediate north of the Land, **5 Dunraven Avenue** is the only other lot within the Covenanted Area that is not a Beneficiary of the Covenant.
- 24 It is developed with a modern single-storey dwelling over basement level, which is constructed to the side and rear boundaries, and includes areas of private open space to the rear and on both sides of the dwelling (Photo 3).
- 25 Toward the northeast, **7 Dunraven Avenue** is developed with a large two-storey dwelling, including subterranean floor / garage. The existing dwelling is a visually dominant presence in the Dunraven Avenue streetscape (Photo 4).
- 26 Toward the northwest, **3 Dunraven Avenue** is developed with a single storey dwelling, including vehicle access and car parking within the front setback and private open space toward the rear (Photo 5).



Photo 3: 5 Dunraven Avenue



Photo 4: 7 Dunraven Avenue

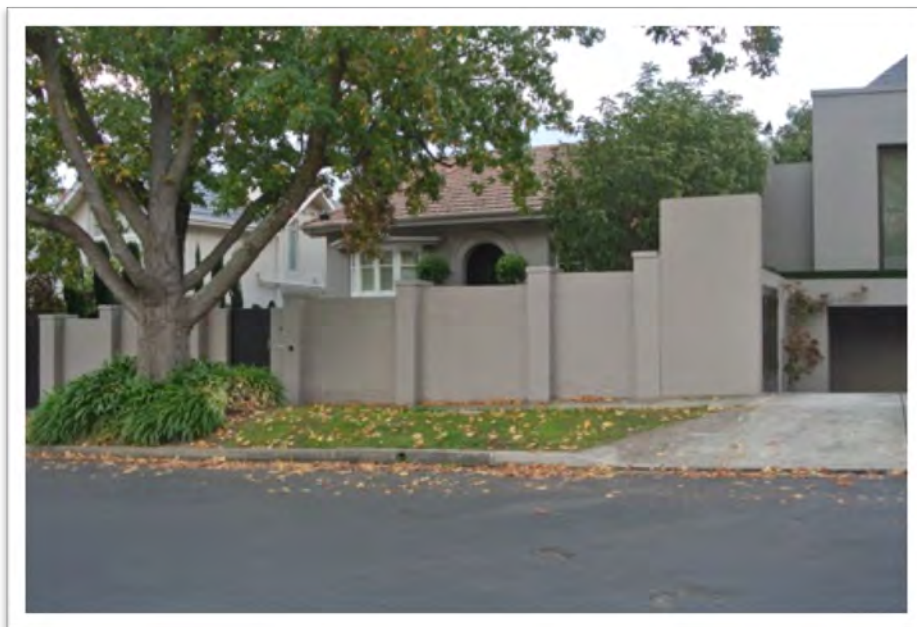


Photo 5: 3 Dunraven Avenue

2.2.2 East

27 The neighbouring properties at 8 and 8A Dunraven Avenue (together formerly Lot 14 of Plan of Subdivision 009145) have recently been developed with a pair of three-storey duplex town houses, with an 'attic' level accommodated within the roof space and made evident by dormer windows (Photo 6).

28 The following relevant matters are noted:

- Topographically, the property sits on higher ground than the Land;
- The existing dwellings are closely aligned with both side boundaries, including the common boundary with the Land;
- Both dwellings include areas of private open space toward the rear; and
- The immediately adjacent dwelling at 8A Dunraven Avenue includes upper level windows, at first and second floor level, with an aspect directly over the Land. The interface to the Land is illustrated in Photo 7 and Photo 8.



Photo 6: 8 & 8A Dunraven Avenue



Photo 7: 8A Dunraven Avenue – Upper level windows / interface to Land



Photo 8: 8A Dunraven Avenue – Upper level windows / interface to Land

2.2.3 South

- 29 Outside the Covenanted Area, the properties at **5 and 7 Sargood Street** adjoin the Land to the south.
- 30 Each is developed with a single dwelling, including rear private open space, which is screened from the Land by existing fencing, trees and vegetation along the common boundary (Photo 9).



Photo 9: The Land – Rear boundary (view south)

2.2.4 West

- 31 **4 Dunraven Avenue** abuts the Land toward the west (Photo 10).
- 32 It is developed with a modern two-storey dwelling, which is closely constructed to the side and rear boundaries. The setback to Dunraven Avenue accommodates secluded private open space, including a swimming pool adjacent to vehicle access arrangements, which are located along the western boundary.
- 33 The setback and interface to the Land is screened at the front portion of the property by existing trees and vegetation established along the common boundary (Photo 11). The rear interface with the Land is distinguished by an existing two-storey high, blank wall (Photo 12).



Photo 10: 4 Dunraven Avenue



Photo 11: View south along western setback of existing dwelling to common boundary with 4 Dunraven Avenue

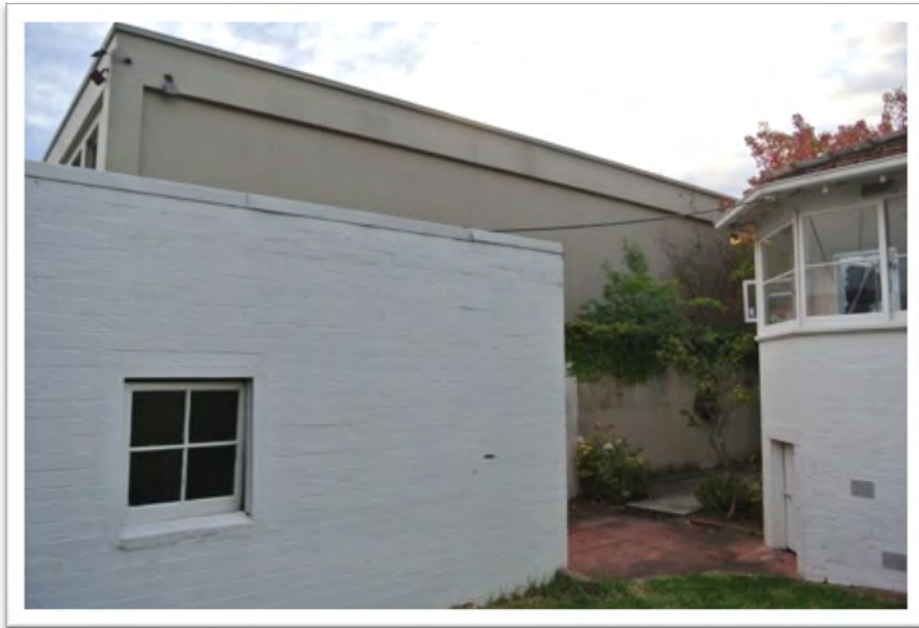


Photo 12: View west from rear of Land to rear of neighbouring dwelling at 4 Dunraven Avenue

2.3 Surrounding neighbourhood

- 34 The pattern and intensity of surrounding residential land use and development, within and outside the Covenanted Area and on both sides of Dunraven Avenue is distinguished by a mix of generously proportioned, one, two and three-storey homes, incorporating a variety of styles and including the occasional basement level as well as examples of multi-dwellings (Figure 6).
- 35 Dunraven Avenue is an attractively presented tree-lined street that rises steadily from Orrong Road toward the north and serves a locate access function between Orrong Road and Clendon Road, further toward the north.
- 36 The street has no heritage significance.
- 37 Orrong Road is a classified *Secondary State arterial road*. It provides a busy and heavily trafficked environment.

2.3.1 Development in the Covenanted Area

- 38 The proximity to public transport (including fixed rail services), convenient access to Melbourne CBD, public open space and recreation facilities, as well as the amenity and prosperity of the area are key attractors for living and working in or close to Toorak.

- 39 The above influences may be held to have supported the redevelopment and / or renewal of multiple properties in Dunraven, including the recent development of 8 and 8A Dunraven Avenue with multi-dwellings (refer section 2.2.2 above), immediately adjacent to the Land.

2.3.2 Modifications to covenants

- 40 I am instructed that at least six (6) restrictive covenants applying to properties within the Covenanted Area have been modified and / or removed via applications to the Court.
- 41 I have reviewed the covenant contained in instrument of transfer 1134023. That restrictive covenant has similar wording to the Covenant, and has been removed from the titles of the adjoining lots in applications to the Supreme Court.
- 42 Those modifications and / or removal of covenants relate to the properties at 674 Orrong Road, and 2A, 4, 7, 8/8A & 12 Dunraven Avenue, which notably include both immediately abutting neighbouring properties to the east and west of the Land (Figure 7).



Figure 6: Building storeys, basement levels and multi dwellings (nearmap)



Figure 7: Modifications to restrictive covenants within the Covenanted Area (Identified by 'Blue circle') (cadastral base: land.vic.gov.au)

3 THE PROPOSED MODIFICATION TO THE COVENANT

43 The application to modify the Covenant seeks to:

- Modify the reference to building storeys to enable a two storey dwelling with a basement level to be established on the Land;
- Modify the reference and restriction on building height by:
 - Deleting the reference to: “*twenty-five feet from the ground to the ridge of the roof*”; and
 - Replacing it with reference to: “*ten metres when measured from the highest point on the land*”; and
- Modify the prohibition on digging, carrying away and removing earth by including the words: “*save to the extent necessary to construct the building referred to herein.*”

44 The Plaintiff seeks to use the land for a single dwelling development, conceptually illustrated in the Development Plans (**Attachment 1**).

45 The principal features of the Development Plans are:

- A single, two-storey, 4-bedroom + study home over a basement garage and access to areas of private secluded open space;
- Vehicle access from Dunraven Avenue, in a similar location to the existing conditions and on-site parking provisions for at least 3 vehicles;
- A landscape setting, including retention of trees and opportunities for canopy tree planting; and
- A pitched roof form and proposed 9.9 metre building height.

46 The merits of the proposal in terms of the planning scheme and the relevant tests under the Act are discussed in the following section of this report.

4 ASSESSMENT OF INJURY TO THE PERSON ENTITLED TO THE BENEFIT

4.1 Overview

47 Section 84(1)(c) of the Act states that a covenant may be discharged or modified if the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction.

48 With regard to this matter, I refer to the principle outlined by Bell J in Freilich:

"... It is necessary to compare the benefit intended to be conferred by the covenant with the injury which will be suffered by those entitled to the benefit."

49 I do not believe that the intent of the Covenant was to protect a view given the:

- Slope and attributes of the Land;
- Layout of dwellings on lots;
- Regular pattern and rhythm of development in the streetscape; and
- Orientation of lots within the Covenanted Area.

50 The better view would have been toward the west. However, the slope of the land in Dunraven Avenue is such that insufficient elevation would have been provided for each single storey house to look over and beyond the one to its side, particularly if it had a roof up to 25-feet.

51 In my opinion the likely purpose and benefit of the Covenant was therefore to ensure a consistency of development scale, in terms of building height, shape and form, with building heights regulated to respond to the natural topography of the land and streetscape.

52 However, if I am wrong about this, I note that the building at 8A Dunraven Avenue has not been designed to avail itself of views toward the west. Indeed, I note that several west facing windows are in fact screened to at least 1.7 metres to avoid overlooking to the Land.

4.2 Development permitted by the Covenant

- 53 The Covenant does not prohibit the construction of several dwellings within a single-storey residential building (including attic rooms), up to twenty-five feet in height⁴ on the Land.
- 54 The building could be of an unspecified size, layout, setbacks from boundaries, architectural style, materials, colours, finishes, and roof form.
- 55 The Covenant would also enable:
- An unspecified number of vehicle crossings to be constructed upon the Land;
 - Car parking and garage(s) to be built on the Land for an unspecified number of vehicles without specification as to where they were to be located;
 - The construction of outbuildings as an adjunct to the development of the Land as a single dwelling; and
 - The removal of the mature trees on the Land.
- 56 Critically the Covenant does not prohibit subdivision of the Land or the construction of multiple detached dwellings under 25-feet.
- 57 By virtue of the restriction on building storeys and height, the Covenant controls the degree of overshadowing that might arise from the size, mass and siting of the building.
- 58 The Covenant does not control:
- The number of living and bedrooms;
 - The number, location or orientation of windows and the consequences upon overlooking and loss of privacy; or
 - The extent of site coverage by building(s).

⁴ Measured from the ground to the ridge of the roof.

- 59 In summary, a dwelling (or dwellings) that could be built upon the Land in compliance with the Covenant and the planning scheme, could, with the exception of the restrictions on built form and building height, impact upon a beneficiary by virtue of one or more of the above considerations.

4.3 The potential injuries that might be incurred by beneficiaries

- 60 The potential injury that might be suffered by a beneficiary, if the proposed modification to the Covenant was allowed and the Land was redeveloped as illustrated in the Development Plans, would include similar considerations to those associated with the construction of a large dwelling or residential building accommodating multiple dwellings on the Land in compliance with the Covenant, including:

- The impact of more intense development and use;
- Amenity issues associated with greater activity on the land, including traffic consequences; and
- Further change in the character of the locality.

- 61 The distinction presented by the modification might be some additional shadowing and greater building mass with the opportunity for an additional 2.38 metres of building height⁵, and a basement.

4.4 Residential standards and injury

- 62 The residential objectives and standards that would typically apply to residential development under the *Stonnington Planning Scheme* do not apply to this matter in so far as the size of the lot⁶ provides that there is no trigger in the provisions of the *General Residential Zone (GRZ)*⁷ for a planning permit to use or develop the Land for a single dwelling.
- 63 Notwithstanding, while the residential provisions of the planning scheme are not a test applicable to the Act, they may be considered as a useful tool of analysis in assessing the acceptability of the proposal in terms substantial injury caused by amenity impacts to beneficiaries.

⁵ 2.38 metres is the difference between the permitted 25-feet and proposed 10-metre maximum building height.

⁶ Approximately 634.7 square metres.

⁷ *General Residential Zone (Schedule 11)* of the *Stonnington Planning Scheme* applies to the Land and surrounding locality within and outside the Covenanted Area.

64 Accordingly, the following relevant matters are noted.

- GRZ provides for a maximum building height of up to 11 metres and no more than 3 storeys for dwellings and residential buildings (Clause 32.08-9).
- Schedule 11 to the GRZ applies to the Land and to land in Dunraven Avenue and the surrounds to modify the above requirement and enable residential development up to 12 metres in height⁸.
- In the absence of the Covenant the use and development of the Land with a residential building up to 13 metres in height might be contemplated.

65 In this context, the proposed modification to the Covenant can be held to be a tempered response in so far as the proposed modification does not seek to maximise the opportunity for a building envelope otherwise presented by the provisions of the planning scheme.

66 With respect to the Development Plans the following matters are noted.

4.4.1 Overshadowing

67 The Land is located on the south side of Dunraven Avenue and therefore no beneficiaries would be materially impacted by shadows cast by the proposed built form or additional first floor building height.

68 **Attachment 6** compares and contrasts the potential overshadowing impacts of the Development Plans with a large residential building that might be built on the Land in accordance with the Covenant.

69 The shadow analysis illustrates that if the proposed modification of the Covenant was allowed and the Land was redeveloped in accordance with the Development Plans, the difference between shadows that might be cast as a result of the Development Plans beyond the existing site conditions, compared with the shadows that might be cast as a result of a 'covenant compliant' development would be:

- Extremely limited; and

⁸ Unless the slope of the natural ground level at any cross section wider than 8 metres of the site of the building is 2.5 degrees or more, in which case the height of the building must not exceed 13 metres.

- Contained to a marginal area at the rear of the neighbouring property at 8/8A Dunraven Avenue in the late afternoon.

70 In my opinion the extent of additional overshadowing would not cause a material injurious impact.

71 In addition, the presence of an existing two-storey high solid brick wall adjacent the common boundary with 4 Dunraven Avenue, toward the west, would cause no change in the existing shadow conditions.

4.4.2 Overlooking

72 An opportunity to overlook from the proposed first floor building level toward beneficiaries' land would be similar to that offered:

- By a large residential building including upper level attic rooms with dormer style windows (similar to those incorporated within the existing development on the neighbouring property at 8A Dunraven Avenue); or
- From the upper level windows of the multiple examples of two-storey dwellings established within (and outside) the Covenanted Area.

73 In addition, consistent with the assessment of overshadowing, the presence of an existing two-storey high solid brick wall adjacent the common boundary with 4 Dunraven Avenue would mitigate any unreasonable loss of privacy toward the south, as would the appropriate inclusion of upper level screening treatments to windows to ensure that no substantial injury would arise as an outcome of the Development Plans with respect to views.

4.4.3 Building bulk and height

74 Two-storey development, including toward the rear of the properties, is an established feature of Dunraven Avenue, including on both neighbouring properties, at 4 and 8/8A Dunraven Avenue.

75 The existing built form conditions of the adjoining properties, including the layout and setback of buildings on the benefitted land, would serve to ensure that neither the proposed increase in building storeys or height would detrimentally injure the amenity enjoyed by beneficiaries.

- 76 A building constructed in compliance with the Covenant (including attic rooms) might span between both side boundaries and occupy a greater part of the Land's rear and / or frontage than the current proposal.

4.4.4 Site coverage

- 77 A dwelling built upon the Land could have a site coverage of 50% of the lot area and be in accordance with the Building Regulations.
- 78 In contrast the Development Plans provide for a low proposed site coverage of only approximately 42.5%.

4.4.5 Activity and traffic

- 79 The Development Plans and Application to the Court do not seek to vary either the existing conditions, in so far as it provides for a single dwelling, or the provisions of the Covenant as they relate to the number of dwellings that might be constructed on the Land.
- 80 Accordingly, despite the provisions of the Development Plans, which provide for an enlarged building envelope, the proposal for a single dwelling including commensurate provision of on-site parking, provides for a similar level of residential activity and vehicle usage on the Land as the existing conditions and dwelling.
- 81 Further, the Development Plans improve upon the existing conditions as they apply to car parking, in so far as they would satisfy and / or reduce the demand for kerb-side parking in Dunraven Avenue, for visitors and / or residents.

4.5 Change to character

- 82 The proposed modification to the Covenant and Development Plans would:
- Present as one dwelling facing Dunraven Avenue;
 - Retain a strong landscaped setting, including canopy trees;
 - Provide for an appropriate site coverage (approximately 42.5%);
 - Provide for a low-rise built form (two storeys), and appropriate transitional building height in the context of the streetscape;

- Provide for a manner of site layout similar to the established pattern of residential use and development in the street, including on both immediately neighbouring properties within the Covenanted Area; and
- Provide for a built form outcome and land use complementary to the existing neighbourhood character of Dunraven Avenue, including land within and outside the Covenanted Area.

83 The following are relevant considerations in assessing the injury that might be caused by a change in character from a single-storey dwelling to a two-storey dwelling, including basement, on the Land.

4.5.1 The character

84 The character of the locality of the Land is typical of the inner-middle distance suburban location.

85 It comprises predominantly well-established residential land use, on generously proportioned lots, with the presence of schools and parks established to support the residential community.

86 The residential streets are lined with a predominance of large, detached single and two-storey houses, generally set to the forefront of the lots with larger gardens to the rear and / or to the side of dwellings, but also interspersed with examples of townhouses and multi-unit style developments.

87 The age of the suburb has enabled trees to establish and mature, providing a canopied and landscaped setting.

88 The Covenanted Area is not unique or special as an intact area of detached housing.

89 Not only have at least two (2) lots within the original Plan of Subdivision (009145) been redeveloped for two or more dwellings⁹, but at least nine (9) lots in the street have been developed with buildings comprising two or more storeys, and at least five (5) lots contain basement levels (refer Figure 6).

⁹ The existing development of Lots 2 and 14 of the original subdivision (now known as 678 Orrong Road, 1A, 8 and 8A Dunraven Avenue) with more than one dwelling may comply with the Covenant with respect to the intensity of residential land use.

4.5.2 Assessment

- 90 I estimate that more than half of the lots (approximately 64%) within the Covenanted Area have been developed with dwellings that exceed the height restriction and depart from the intent or purpose of the Covenant.
- 91 In addition, I am instructed that at least a third (approximately 38%) of lots within the Covenanted Area have had similarly worded restrictive covenants modified and / or removed (refer section 2.3.2 of this report).
- 92 Despite this there remains a sense of rhythm and consistency, in terms of building height, shape and form.
- 93 The sense of rhythm and consistency within at least the Covenanted Area of Dunraven Avenue is aided by the topography and fall of the streetscape, which provides generally for a transition in building heights, regardless of built form, style, shape and / or the number of building storeys.
- 94 Adding to the relative consistency of the existing streetscape is the use and development of the balance of lots at the eastern end of Dunraven Avenue, outside the Covenanted Area, which have also been developed with a mix of one and two storey developments, as illustrated at **Attachment 7**.
- 95 In this context, it can fairly be concluded that:
- The principle to be achieved by the restrictions of the Covenant has been compromised on a number of occasions within the Covenanted Area;
 - The intended single storey character has changed in a way that opens up the opportunity to consider the proposed variation sought to the Covenant by the Application to the Court; and
 - The redevelopment of the Land as detailed in the Development Plans would be consistent with the existing character, use and development of burdened and unburdened properties within Dunraven Avenue, including the proposed provision for an upper storey and basement level.
- 96 The proposed modification to the Covenant that references a second storey and 10-metres, rather than one storey and 25-feet, does not broach new

‘territory’ or a higher built form outcome than that which has already been achieved on proximate and adjoining lots.

- 97 It may therefore be said that the proposed modification is unlikely to dilute or in any way weaken the established neighbourhood character of the Covenanted Area.

4.6 Precedent

- 98 The Land is the only land affected by the Covenant. The proposed modification of the Covenant would accordingly not create a precedent for further change to the Covenant and indeed the wider neighbourhood.
- 99 As outlined in this report, at a least a third of properties within the Covenanted Area have had a restrictive covenant applying to the land modified and / or removed.
- 100 This has contributed to and / or enabled development which departs from at least the single storey restriction, if not also the 25-foot maximum building height, with the development of first floor levels evident on at least lots 2, 3, 6, 9, 12 and 14 of the original subdivision.
- 101 These changes have established a precedent for change in the area.

5 CONCLUSIONS

102 The assessment of matters that might substantially injure persons entitled to benefit from the Covenant leads to the conclusion that the impact of an enlarged building envelope, including an additional building floor level (first floor) may present:

- A similar injury to that attributable to a complying single dwelling with attic rooms given the absence of limitations on the size, layout and form of that building; and
- No greater injury than that attributable to the multiple examples of dwellings containing at least a second storey developed on properties within the Covenanted Area and on both sides of Dunraven Avenue, including on both immediate adjoining lots.

103 Modifying that aspect of the Covenant that prohibits the digging or removal of earth to enable the construction of a basement level will have no material impact on the Land as it will not impact the presentation of a single dwelling to the streetscape, as illustrated in the Development Plans. In addition, it would enable the development of the Land consistent with the existing use and development of other properties within Dunraven Avenue, including within the Covenanted Area.

104 The Development Plans are generally consistent with the purposes and provisions of the GRZ, despite the absence of a requirement for a planning permit for the proposed development of a single dwelling in this matter.

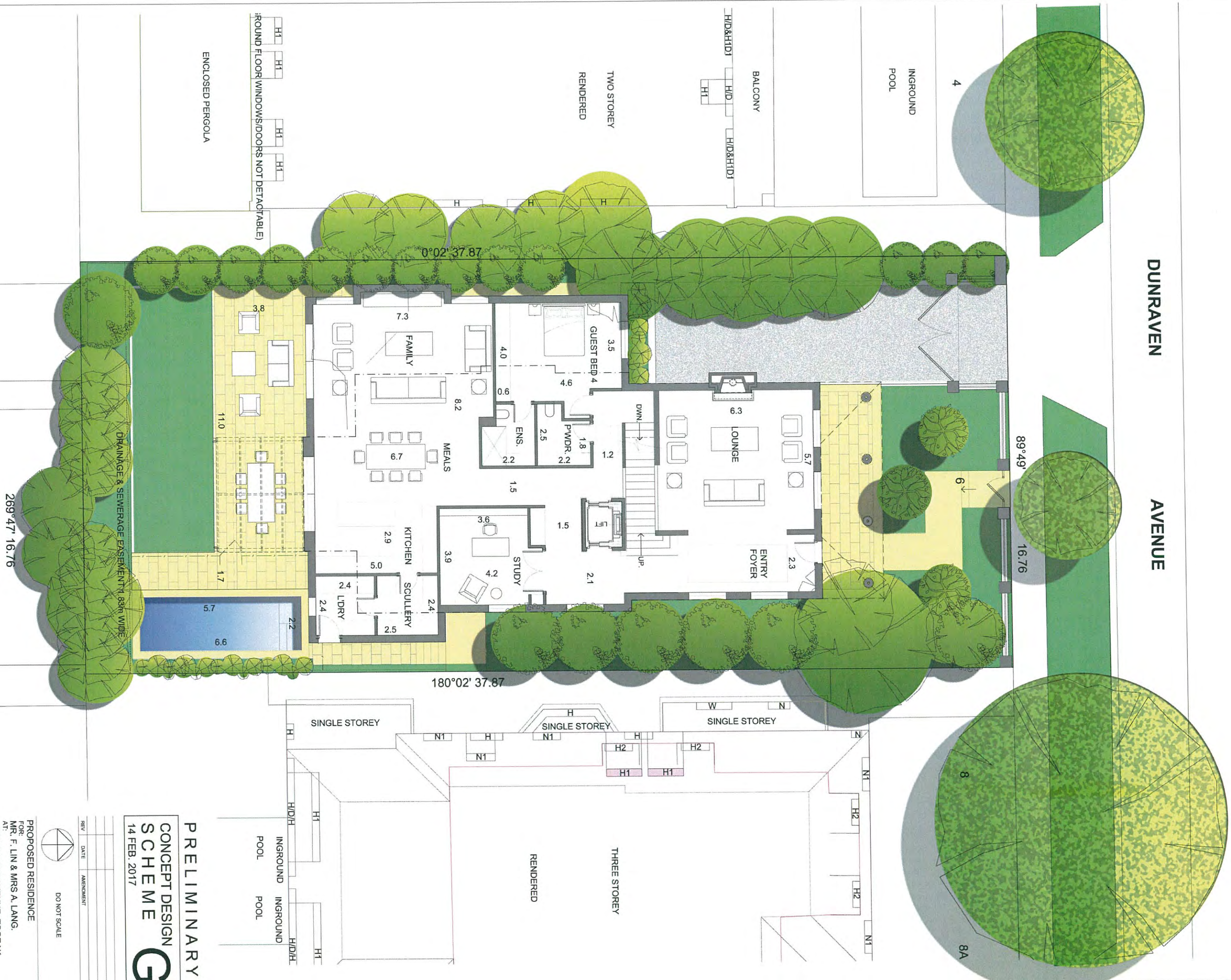
105 Given the examples of modifications and / or removals of restrictive covenants identified in the Land's immediate neighbourhood and within the Covenanted Area, the proposed modification would not create a precedent.

Robert Milner
May 2017

Attachment

1 Development Plans

AVENUE



"WITHOUT PREJUDICE"

PRELIMINARY
CONCEPT DESIGN
SCHEME
14 FEB. 2017

GROUND FLOOR PLAN

PROPOSED RESIDENCE
FOR:
MR. F. LIN & MRS A. LANG.
AT:
6 DUNRAVEN AVENUE, TOORAK

DO NOT SCALE

REV	DATE	AMENDMENT

CATT ARCHITECTS

P.O. BOX 4177, MALVERN 3144 AUSTRIA
TEL: +613 9509 4650 FAX: +613 9500 91
office@cattarchitects.com www.cattarchitects

DUNRAVEN

AVENUE

4

89°49'

16.76

8

8A

INGROUND
POOL

BALCONY

H/D&H/D1 H/D H/D&H/D1 H1

TWO STOREY
RENDERED

0°02' 37.87

SCREEN

180°02' 37.87

SINGLE STOREY

SINGLE STOREY

SINGLE STOREY

THREE STOREY

RENDERED

ENCLOSED PERGOLA

H1 H1 H1 H1
GROUND FLOOR WINDOWS/DOORS NOT DETACHABLE)

DRAINAGE & SEWERAGE EASEMENT 1.83m WIDE

269°47' 16.76

"WITHOUT PREJUDICE"

PRELIMINARY
CONCEPT DESIGN
SCHEME
14 FEB. 2017

REV	DATE	AMENDMENT



DO NOT SCALE

PROPOSED RESIDENCE
FOR:
MR. F. LIN & MRS A. LANG.
AT:
6 DUNRAVEN AVENUE, TOORAK

FIRST FLOOR PLAN

REF. NO. 211825 DWG. NO. REVISION:
SCALE: 1:100
DATE: NOV. 2016 CD02 -



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DUNRAVEN

AVENUE

4

89°49'

16.76

6

8

8A

INGROUND
POOL

BALCONY

H/D&H/DJ H/D H/D&H/DJ H1

TWO STOREY
RENDERED

0°02' 37.87

ENCLOSED PERGOLA

H1 H1 H1 H1
GROUND FLOOR WINDOWS/DOORS NOT DETACHABLE)

THEATRE / STORAGE

6.5

8.4

1.1

LIFT

UP

1.

7.6

2.

3.

6.7

4.

POOL SHELL

4.0

3.0

3.0

2.9

180°02' 37.87

SINGLE STOREY

SINGLE STOREY

SINGLE STOREY

RENDERED

THREE STOREY

INGROUND
POOL INGROUND
POOL

"WITHOUT PREJUDICE"

PRELIMINARY

CONCEPT DESIGN
SCHEME
14 FEB. 2017

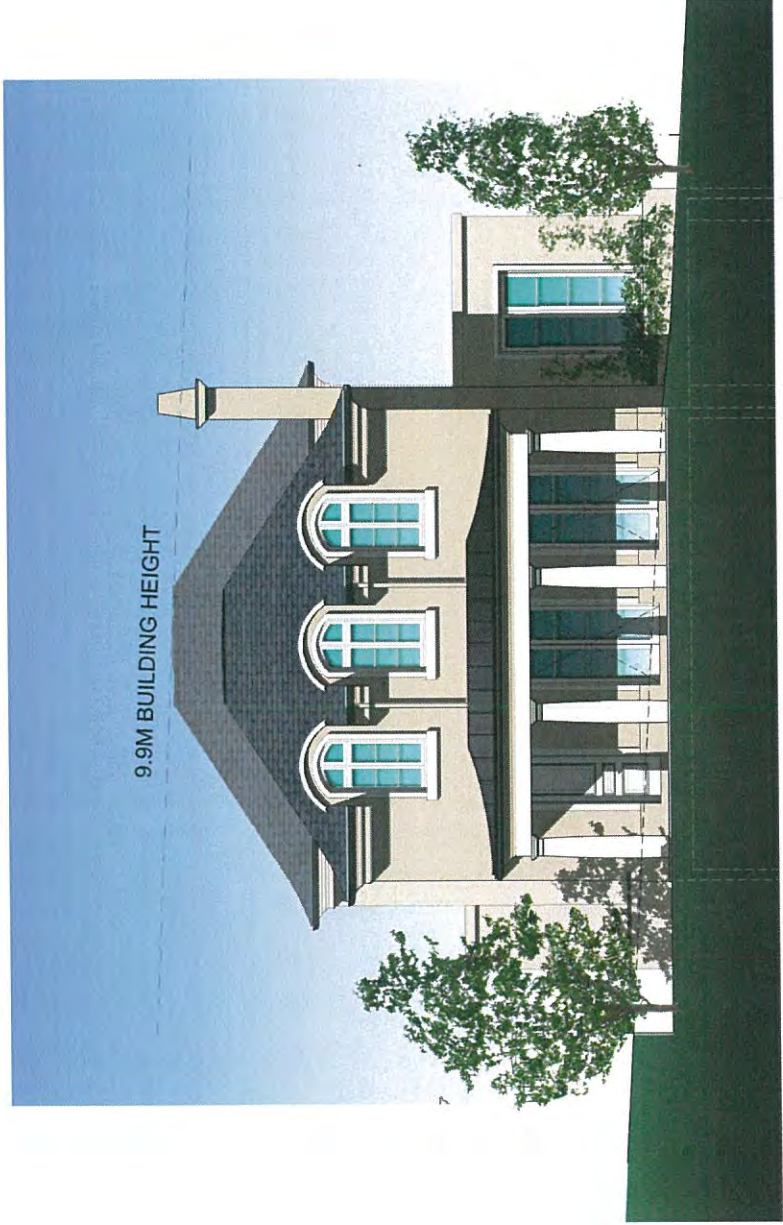
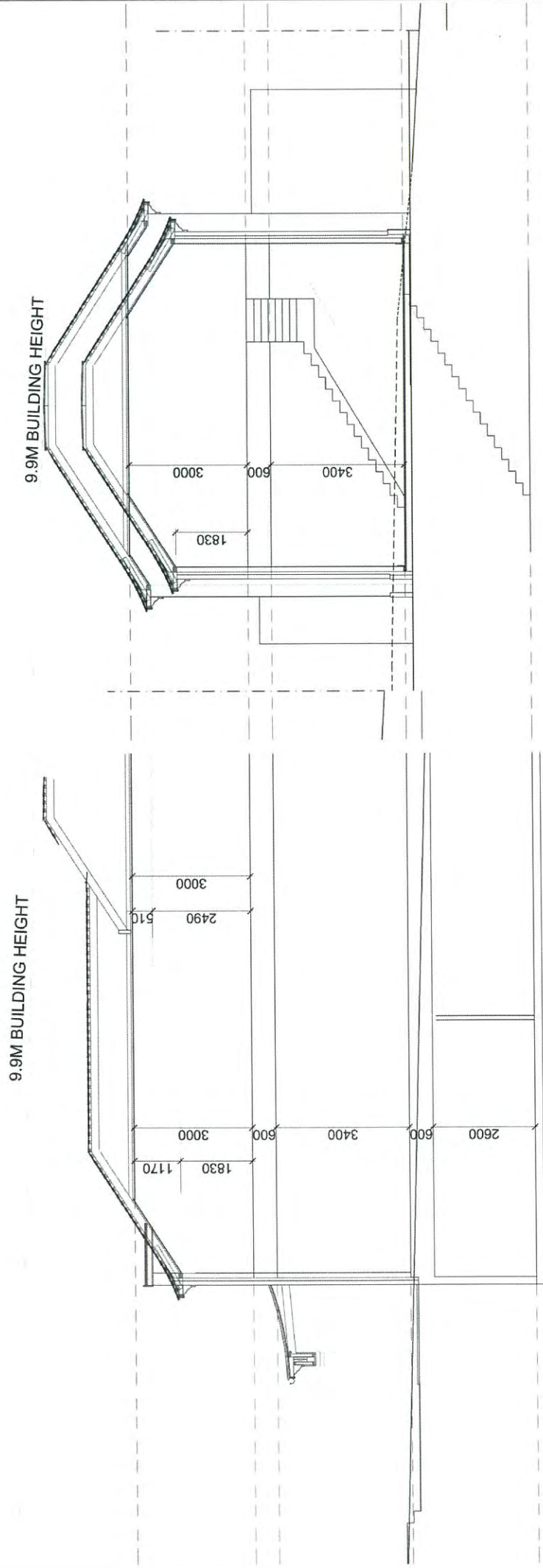
DO NOT SCALE

PROPOSED RESIDENCE
FOR:
MR. F. LIN & MRS. A. LANG.
AT:
6 DUNRAVEN AVENUE, TOORAK

BASEMENT PLAN

REF. NO. 211825 DWG. NO. REVISION:
SCALE: 1:100
DATE: NOV. 2016 CD03 -

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DUNRAVEN AVE. ELEVATION. (5TH ELEVATION.)

"WITHOUT PREJUDICE"
PRELIMINARY

CONCEPT DESIGN
SCHEME
14 FEB. 2017

REV	DATE	AMENDMENT



DO NOT SCALE

PROPOSED RESIDENCE
FOR:
MR. F. LIN & MRS A. LANG.
AT:
6 DUNRAVEN AVENUE, TOORAK

SECTIONS &
ELEVATION.

REF NO: 211825
SCALE: 1:100
DATE: NOV. 2016

DWG NO: REVISION:

CD04 -



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8 DUNRAVEN AVE.

6 DUNRAVEN AVE.
(SUBJECT SITE)

4 DUNRAVEN AVE.

"WITHOUT PREJUDICE"

PRELIMINARY

CONCEPT DESIGN
SCHEME

14 FEBRUARY 2017

G

REV	DATE	AMENDMENT



DO NOT SCALE

PROPOSED RESIDENCE
FOR:
MR. F. LIN & MRS A. LANG.
AT:
6 DUNRAVEN AVENUE, TOORAK

STREETSCAPE

REF NO: 211825 DWG NO: REVISION:
SCALE: 1:100
DATE: NOV. 2016 **CD05** -



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Attachment

2 Witness Statement

Expert Witness Statement

The following outlines the information requirements of *Form 44A Expert Witness Code of Conduct*.

- a. My name is Robert Milner, Director of 10 Consulting Group located at 3/2 Yarra Street, South Melbourne, 3205, Victoria.
- b. I have read the code and agree to be bound by it.
- c. I have an honours diploma in Town and Country Planning from Liverpool Polytechnic and I am a Life Fellow of the Planning Institute of Australia and a Fellow of the Victorian Planning and Environmental Law Association. I have a broad range of experience in planning and development matters. My curriculum vitae is attached in full as Attachment 7 of this report.
- d. There are no assumptions upon which this report relies other than those explicitly stated in the report or as outlined in my letter of instruction dated 21 October 2016.
- e. The facts and matters on which my opinions are based are contained within the briefing material that I was provided and review of additional documents, which consisted of:
 - *Stonnington Planning Scheme*.
- f. The (i) reasons for; (ii) any literature or other materials utilised in support of, and (iii) a summary of each such opinion are detailed in the body of the evidence.
- g. I have not been briefed to provide evidence on any matters outside of my expertise;
- h. Alison Milner, a Senior Consultant at 10 Consulting Group, assisted in the preparation of this evidence;
- i. I have made all of the enquiries which I believe are desirable and appropriate, and no matters of significance have, to my knowledge, been withheld from the Court.
- j. I do not require to qualify any opinion expressed in the report.



Robert Milner

May 2017

Attachment

3 Curriculum vitae

ROBERT MILNER – DIRECTOR

Qualifications and Positions

- Director 10 Consulting Group Pty Ltd and The Milner Group Pty Ltd
- Diploma in Town and Country Planning (First Class Honours) Liverpool Polytechnic
- Life Fellow Planning Institute of Australia
- Fellow of the Victoria Planning and Environmental Law Association
- Former State and National President of the Planning Institute of Australia
- Member, Planning and Local Government Advisory Council (1994 – 1999)
- Deputy Chairman, Future Farming Expert Advisory Group (2009)

Employment History

2010 – Current	Director 10 Consulting Group Pty Ltd
1999 – 2010	General Manager, Senior Principal and Adjunct Senior Planning Counsel – Planning, CPG Australia Pty Ltd (Formerly the Coomes Consulting Group)
1994 – 1999	Director, Rob Milner Planning Pty Ltd and Savage Milner
1991 - 1994	Project Director, Collie Planning and Development Services
1988 – 1991	General Manager, Town Planning, Jones Lang Wootton
1980 - 1988	City Planner, City of Box Hill
1977 – 1980	Planner, Perrott Lyon Mathieson, Architects and Planners
1976 – 1977	Planner, Kirklees Metropolitan Borough Council

Career Overview

Rob Milner is a respected strategic and statutory planner. He is equally competent in urban and regional practice.

He is recognised as a leader of the planning profession in Victoria. He has had a high profile career spanning 40 years with extended periods of experience working for local government and private practice.

Until 2010 he worked with CPG Australia building that planning team to be one of the larger and most respected strategic and statutory practices in Victoria. The team was twice awarded planning consultant of the year in Victoria.

He now directs 10 Consulting Group, as a small boutique consultancy offering the highest level of advice and service to clients wanting the benefit of Rob's considerable experience, knowledge and understanding of planning in Victoria.

He is regularly retained to provide expert evidence to courts, panels and tribunals on the broadest range of land use and development planning issues. He is usually involved in 4 or 5 different matters monthly and has a reputation for objectivity, an original style of evidence and for providing clear and fearless advice. Particular expertise is in complex and controversial projects, gaming matters, acquisitions and compensation and restrictive covenants.

He is an acknowledged advocate and negotiator and is regularly engaged in development approval and rezoning projects where process and relationships need to be carefully nurtured to ensure a viable and timely outcome.

His ability to communicate effectively among a broad range of stakeholders means that he is regularly engaged to facilitate workshops, conferences, consultation and other situations where leadership and engagement of groups is required.

His clients have included many State government agencies (including planning, community development, justice, roads, growth areas and regional development), municipalities throughout metropolitan Melbourne and regional Victoria, as well as a broad range of corporate and other private sector interests.

Robert Milner brings a high level of integrity to his work, choosing to participate on those projects that accord with his professional opinion.

Areas of Expertise and Experience

Strategic studies, policy development and statutory implementation

Rob is widely acknowledged for his capacity to take a strategic perspective to urban and regional and planning challenges and provide direction and leadership that is responsive, creative and thoughtful in its strategic intent and detail.

When combined with his depth of experience with strategic policy based planning schemes he is powerfully equipped to deliver sound advice on the spectrum of land use and development planning issues.

His strategic planning skills are ground in work experience at the State, regional, local and site specific levels dealing with the issues that affect a town or sub region or examining themes or subjects that span geographical areas.

While working for CPG Australia he lead multi disciplinary planning teams that worked for clients that included DPCD, Department of Justice, Department of Innovation, Industry and Regional Development, and many municipal councils in metropolitan Melbourne and regional Victoria.

In 1994 he lead the planning consultancy that recommended the model for the Victorian Planning Provisions, the strategic policy driven planning scheme that is now consistently used throughout Victoria.

In 2009 Robert served as the Deputy Chairman on the Future Farming Expert Advisory Group reporting to the Minister for Planning. That work addressed a broad range of issues facing the next three decades of land use and development in regional Victoria.

Expert evidence and advocacy

Rob is regularly called upon to provide expert evidence and reports to clients, courts, Independent Panels and VCAT. He has acted in this capacity or as an advocate in over 1,200 cases during his career.

He is often retained to provide the strategic perspective to planning disputes. He is equally capable in commenting on matters of urban design, and compliance with planning policy and provisions.

The scope of matters that he has addressed in this capacity is extremely diverse and includes:

- Medium density and high rise residential development,
- Greenfield, master planned communities in growth areas,
- Waste management, quarries and landfill proposals,
- Major shopping centres and mixed use developments,
- Industrial and residential subdivisions,

- Hotels, motels, restaurants and other leisure facilities
- Retirement villages,
- Rail projects,
- Coastal developments,
- Office and CBD projects
- Heritage projects
- Compensation and land acquisition matters,
- Liquor licence and gaming proposal,
- Freeway service centres and petrol stations,
- Agribusiness centres.

Legislative and planning scheme reviews and amendments

Aside from Rob's leadership of the consultant planning team that conceived the model for the Victorian Planning Provisions, he has been associated with many reviews of municipal planning schemes and amendments.

Planning scheme review usually takes the form of comprehensive research examining both the merits of the strategic policies as well as the statutory provisions. Wide ranging consultation is involved in the task.

Work associated with planning scheme amendments usually includes strategic justification of the proposal as well as statutory documentation and management of the process. The provision of expert evidence to independent panels is often involved.

In more recent times Rob has been involved in projects that entail a review of allied legislation as well as amendments to planning schemes. Recent relevant projects have included the following:

Reviews of Victorian planning provisions and allied legislation

- Activity Centre Zone construction and application in Footscray, Doncaster, Knox and Sunshine
- Tramway infrastructure and the VPP's,
- Higher density living adjacent to tramway corridors
- Liquor Licensing legislation and planning provisions
- Gaming (EGM) policy and provisions for Councils

- Review of the Farming and Green Wedge zones for their economic implications

Planning scheme reviews

- Shire of Surf Coast 2007
- Shire of Wellington 2009 -10
- Rural City of Horsham 2010
- Borough of Queenscliff 2011- current

Organisation audits and process reviews

Rob has a long and established career providing reviews of planning documents, teams and processes, particularly in a local government environment.

Trained as a LARP facilitator in 1990 as part of a Commonwealth Government initiative his experience in this area commenced with the development of planning and building specifications for tenders as part of Compulsory Competitive tendering process and the coaching of bid teams.

Since then Rob has developed a specialisation in providing reviews and recommendations to State and Local Government, which audit planning schemes, the performance of planning teams and departments and development approvals processes.

In the last 20 years he has worked with the majority of metropolitan councils and many regional municipalities; he prepared the model audit process for the Department of Sustainability and Environment in 2003 and recently provided a facilitated program for the Department of Planning and Community Development reviewing how it processes planning scheme amendments.

He has worked with Councils in Victoria, New South Wales and South Australia.

He uses a range of audit techniques, extensive consultation with users of the processes and provides detailed strategies on necessary reforms.

His most recent work has been as a major contributor to the VicSmart program.

Attachment

4 Certificate of Title



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**REGISTER SEARCH STATEMENT (Title Search) Transfer of
Land Act 1958**

Page 1 of 1

VOLUME 04761 FOLIO 018

Security no : 124060035268B
Produced 19/04/2016 03:29 pm

LAND DESCRIPTION

Lot 13 on Plan of Subdivision 009145.
PARENT TITLE Volume 04638 Folio 435
Created by instrument 1124139 30/08/1923

REGISTERED PROPRIETOR

Estate Fee Simple
Joint Proprietors
FRANK GANG-MING LIN
ANGELA YANG both of 7A SWEYN STREET BALWYN NORTH VIC 3104
AL659899Y 04/02/2015

ENCUMBRANCES, CAVEATS AND NOTICES

MORTGAGE AL659900T 04/02/2015
COMMONWEALTH BANK OF AUSTRALIA

COVENANT 1124139

Any encumbrances created by Section 98 Transfer of Land Act 1958 or Section 24 Subdivision Act 1988 and any other encumbrances shown or entered on the plan or imaged folio set out under DIAGRAM LOCATION below.

DIAGRAM LOCATION

SEE LP009145 FOR FURTHER DETAILS AND BOUNDARIES

ACTIVITY IN THE LAST 125 DAYS

NIL

-----END OF REGISTER SEARCH STATEMENT-----

Additional information: (not part of the Register Search Statement)

Street Address: 6 DUNRAVEN AVENUE TOORAK VIC 3142

DOCUMENT END

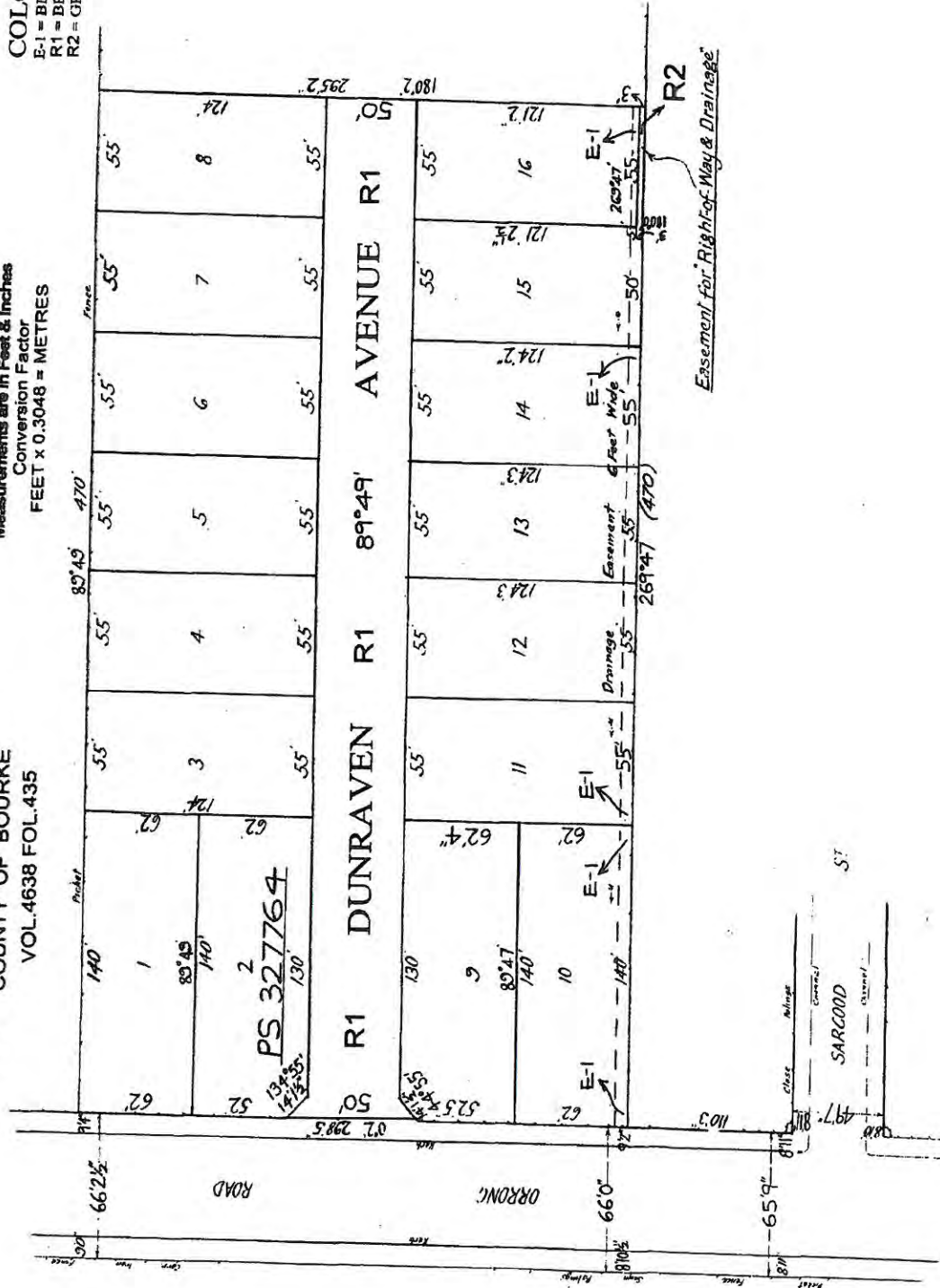
LP 9145
EDITION 1
PLAN MAY BE LODGED 10/01/23

COLOUR CODE
E-1 = BLUE
R1 = BROWN
R2 = GREEN

ROADS COLOURED BROWN AND GREEN

Measurements are in Feet & Inches
Conversion Factor
FEET x 0.3048 = METRES

PLAN OF SUBDIVISION OF
PART OF CROWN PORTION 29
PARISH OF PRAHRAN
COUNTY OF BOURKE
VOL. 4638 FOL. 435



Attachment

5 Covenant

1124139

*2nd Registrar of Titles
 Please register this instrument
 Blake & Riggall
 20/8/23
 2385123*



JOHN W. McCOMAS
John W. McComas
 VICTORIA.
 TRANSFER OF LAND



*4638 pt.
 435
 Red & blue.
 Under anacre
 Enc. as to blue
 APPENDIXES.
 05/04/24
 The Court in
 11/12/4/30*

29/9/23

26/10

12-5-23

I, GEORGE FAIRBAIRN formerly of "Dunraven" Clendon Road Toorak in the County of Bourke but now of Como Avenue Toorak Gentleman being registered as the proprietor of an estate in fee simple in the land hereinafter described, subject to the encumbrances notified hereunder, in consideration of the sum of THREE HUNDRED AND FIFTY POUNDS paid to me by MAURICE ELIAS COPPEZ of 243 Collins Street Melbourne Investor, and of the sum of FIVE HUNDRED AND -- NINETY-ONE POUNDS FIVE SHILLINGS paid to the said Maurice Elias Coppel by EDWARD ALAN MACKAY of 412 Toorak Road Toorak Bachelor of Medicine and of the sum of SIX HUNDRED AND SEVENTY-FIVE POUNDS paid to the said Edward Alan Mackay by FREDERICK GEORGE WESTAWAY Storeman and MARY ANN WESTAWAY Married Woman both of Fitzgerald Street South Yarra DO HEREBY at the request and by the direction of the said Maurice Elias Coppel and Edward Alan Mackay testified by their signatures hereto TRANSFER to the said Frederick George Westaway and Mary Ann Westaway as joint tenants All my estate and interest in ALL THAT piece of land being Lot numbered Thirteen on the Plan of Subdivision numbered 9145 lodged in the Office of Titles and being part of Crown Portion Twenty-nine Parish of -- Prahran at Toorak County of Bourke and being part of the land now comprised in Certificate of Title Volume 4638 Folio 927435 AND the said Frederick George Westaway and Mary Ann Westaway do hereby for themselves and each of them their and each of their heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land hereby transferred COVENANT with the said George Fairbairn his heirs executors administrators and transferees registered proprietor or proprietors for the time being of the ~~land~~ ^{land hereby transferred} in the said Certificate of Title that he she or they will not erect on the said land hereby transferred any house or outbuilding which shall contain more than one storey other than a dwelling house containing attic rooms and that the height of any building erected on the said land shall not exceed twenty-five feet from the ground to the ridge of the roof.

IMAGED

21671

W.H. JHO

and further that he^{or} they will not dig carry away nor remove any Marl earth clay gravel or sand from the said land hereby transferred.

DATED the *twentieth* day of *August* 1923.

SIGNED in Victoria by the said
GEORGE FAIRBAIRN in the presence of

} *proprietor*

JHO to Brent
Clerk to Messrs Blake & Riggall
Solicitors Melbourne

SIGNED in Victoria by the said
MAURICELIAS COPPEL in the presence of

} *M. E. Coppel*

A. Leach
Solicitor
Melbourne

SIGNED in Victoria by the said
EDWARD ALAN MACKAY in the presence of

} *Edward Alan Mackay*

A. M. Mollath
Solicitor Melbourne

SIGNED by the said FREDERICK GEORGE
WESTAWAY in Victoria in the presence of

} *F. G. Westaway*

Henry Manning
Clerk to John W. McComas
Solicitor Melbourne

SIGNED in Victoria by the said MARY
ANN WESTAWAY in the presence of

} *M. A. Westaway*

Henry Manning

ENCUMBRANCES REFERRED TO.

W.H. { The rights of Maurice Coppel Purchaser under Contract of
20/9/23 { Sale dated 31st May 1922 document numbered 420924 in the
Record Book of the Office of Titles Melbourne
do to that part of Lot 13 coloured blue on said lodged plan
Any encumbrances affecting the same.

W.H.
19.10.23

DATED

1923.

GEO. FAIRBAIRN ESQ.
(by direction of
MR. M.E. Coppel)

to

MR. F.G. WESTAWAY and SONS.

T R A N S F E R

J. W. MCCOMBS,
Solicitor,
1450 Collins Street,
MELBOURNE.

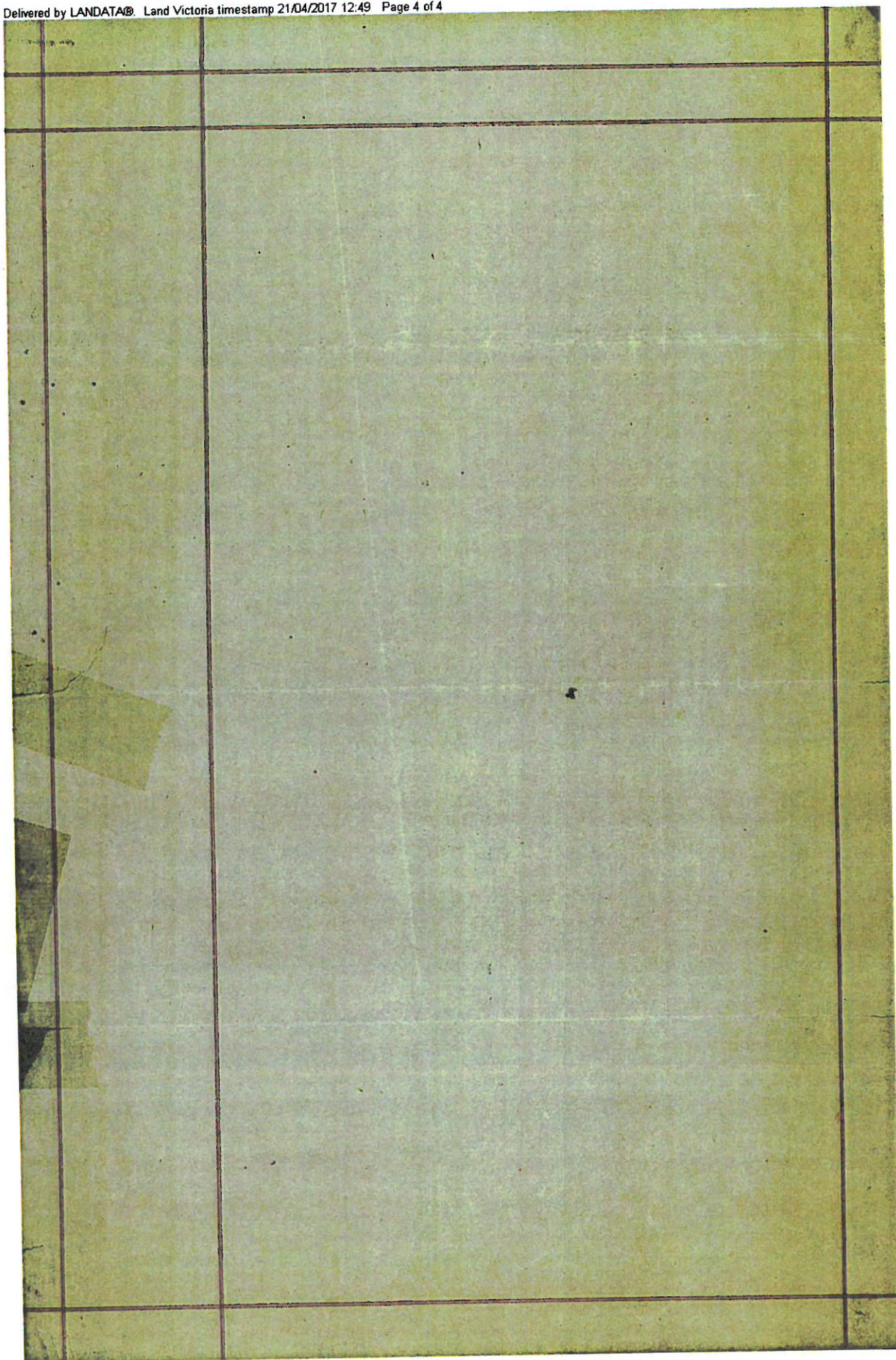
MEMORIAL OF INSTRUMENT.

NATURE OF INSTRUMENT	TIME OF ITS PRODUCTION FOR REGISTRATION	TO WHOM GIVEN	NUMBER OF SYMBOL THEREON
Transfer as to part	THE 30 th DAY OF August. 1923.	TO Frederick George Westaway and Mary Ann Westaway	1124139.

Clifford J. Dormer
ASSISTANT REGISTRAR OF TITLES.

I CERTIFY THAT A MEMORIAL OF THE WITHIN INSTRUMENT WAS ENTERED AT THE TIME LAST MENTIONED IN THE REGISTER BOOK VOL 4638 FOL 927435.

Clifford J. Dormer
ASSISTANT REGISTRAR OF TITLES.



Attachment

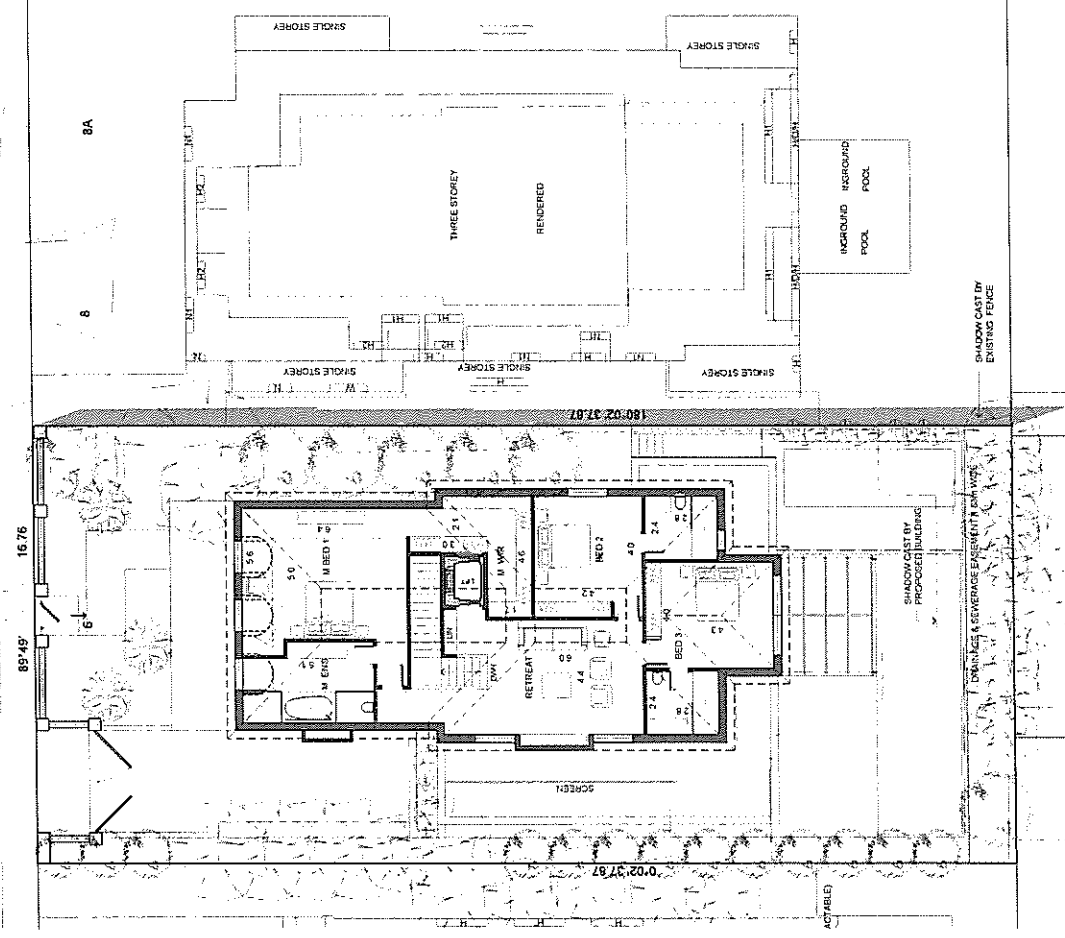
6 Shadow analysis

DUNRAVEN

AVENUE

DUNRAVEN

AVENUE



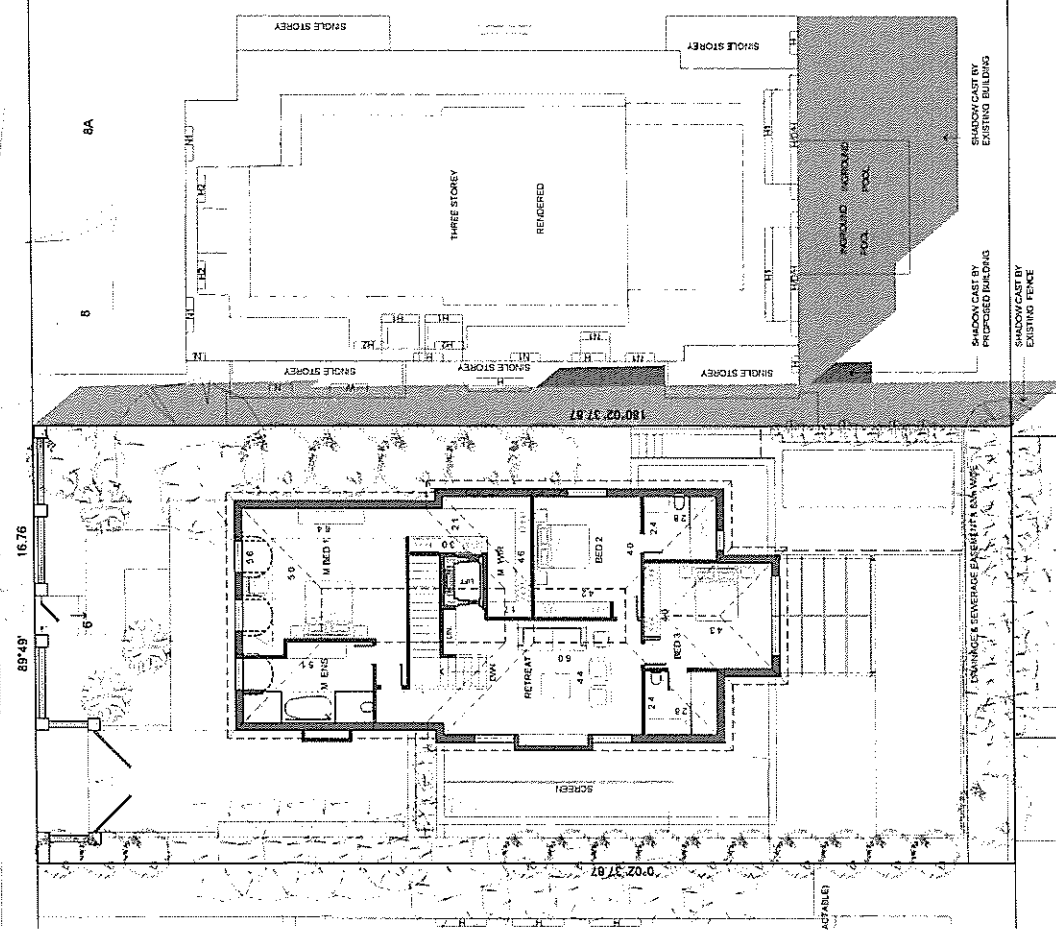
PROPOSED DESIGN
SHADOW DIAGRAM - 1PM SEPT EQUINOX
SCALE 1:200

DUNRAVEN

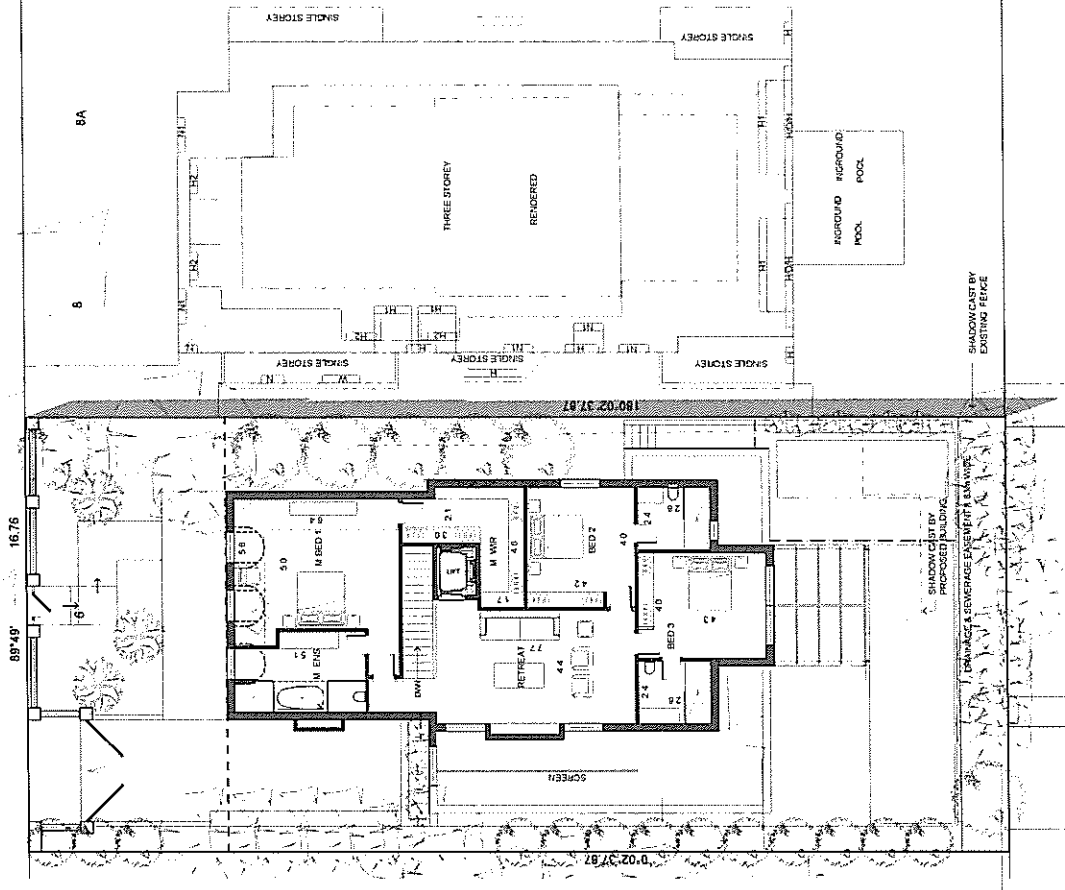
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DUNRAVEN

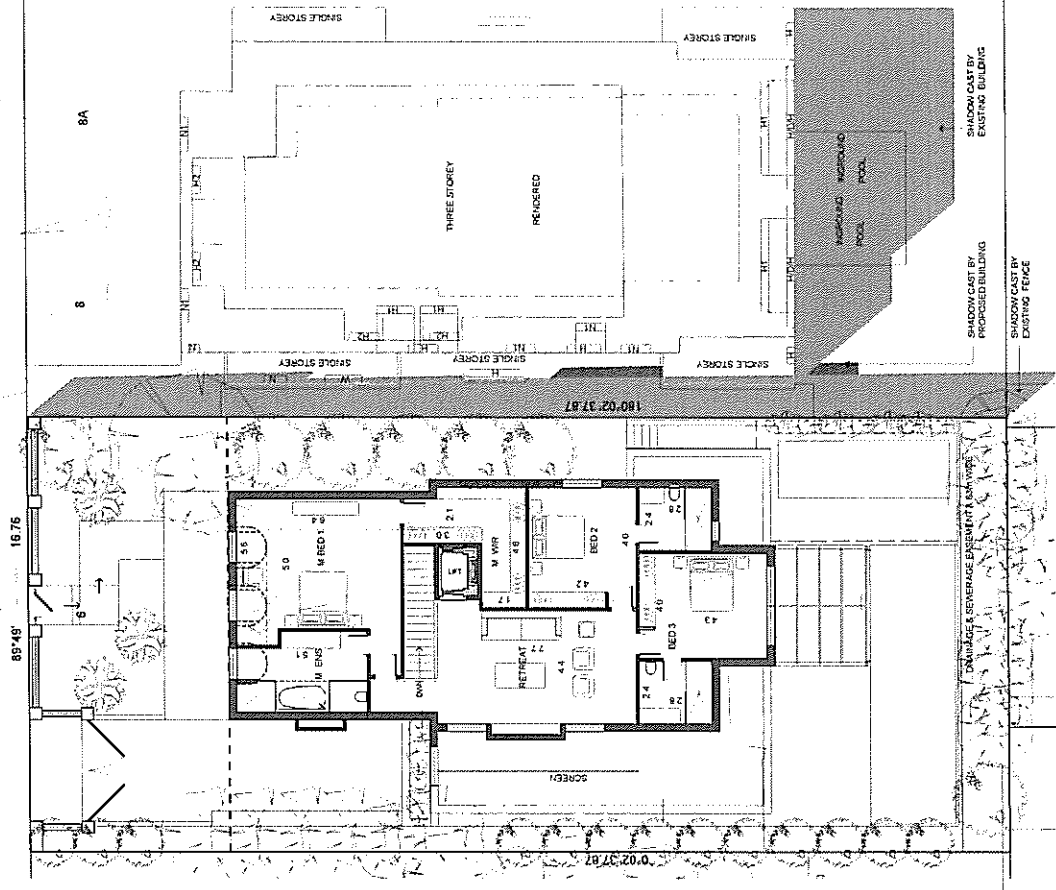
AVENUE



PROPOSED DESIGN
SHADOW DIAGRAM - 2PM SEPT EQUINOX
SCALE 1:200



COVENANT COMPLIANT, 25 FEET MAX BUILDING HEIGHT DESIGN
SHADOW DIAGRAM - 1PM SEPT EQUINOX
SCALE 1:200



COVENANT COMPLIANT, 25 FEET MAX BUILDING HEIGHT DESIGN
SHADOW DIAGRAM - 2PM SEPT EQUINOX
SCALE 1:200

KEY:
SHADOW OF EXISTING BUILDINGS & FENCE
SHADOW CAST BY PROPOSED BUILDING

DATA SHEET DS01
SHADOW DIAGRAMS

PROPOSED RESIDENCE
REF NO: 211825
FOR: MR. F. LIN & MRS A. LANG
SCALE: 1:200
DATE: 11.05.2017

6 DUNRAVEN AVENUE, TOORAK

CATT
ARCHITECTS

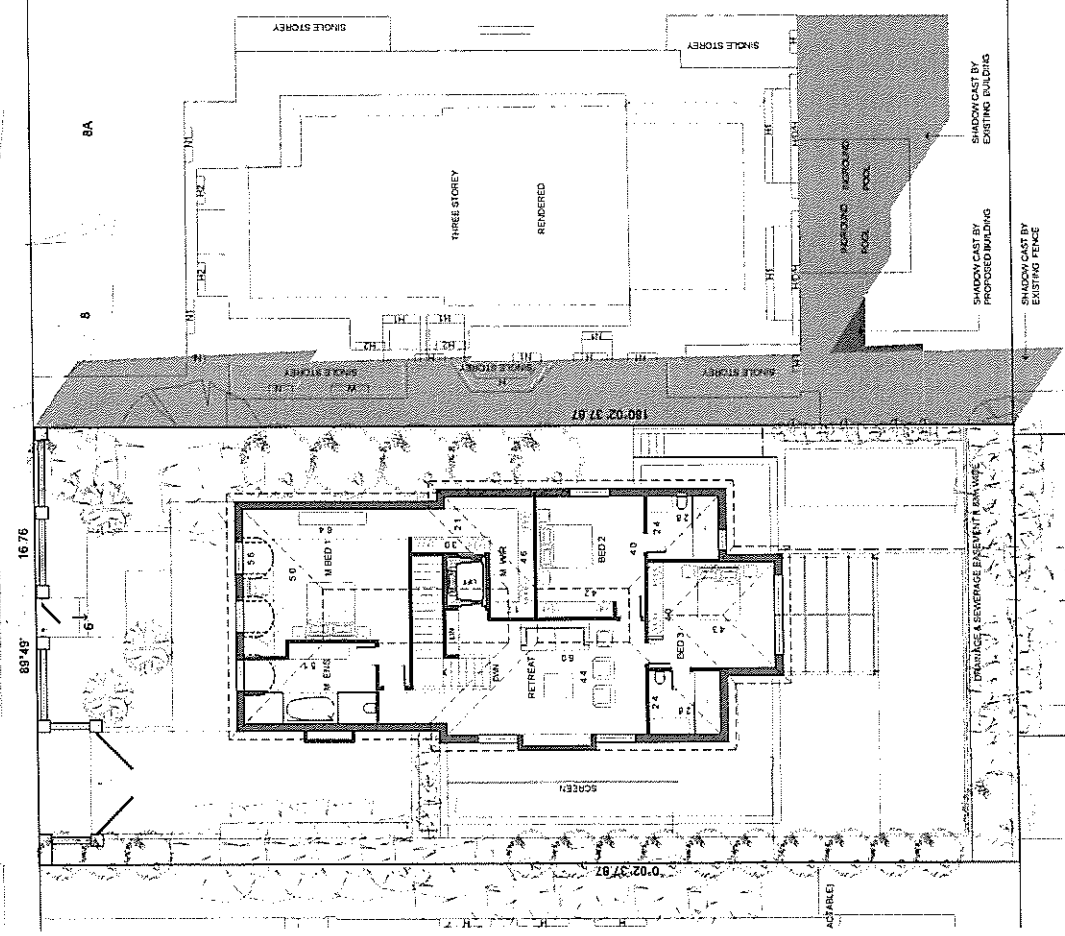
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DUNRAVEN

AVENUE

DUNRAVEN

AVENUE



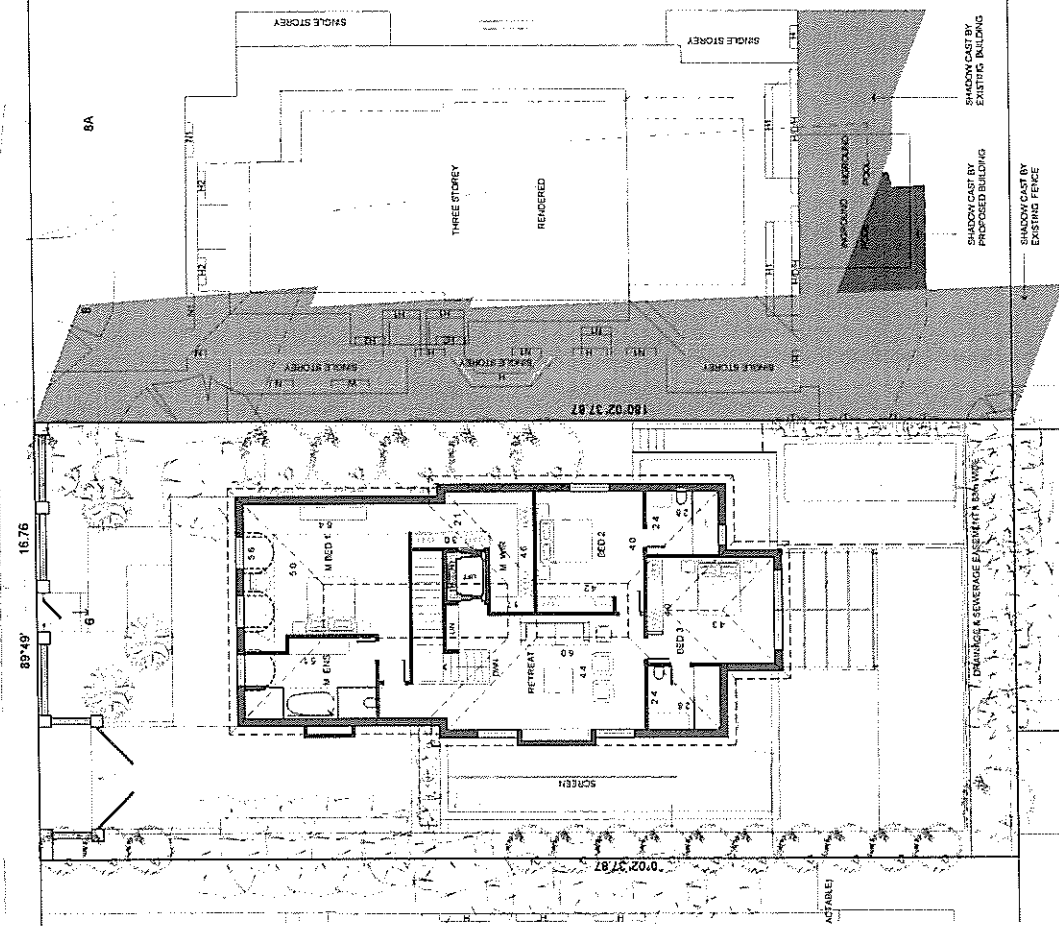
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SHADOW DIAGRAM - 3PM SEPT EQUINOX
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DUNRAVEN

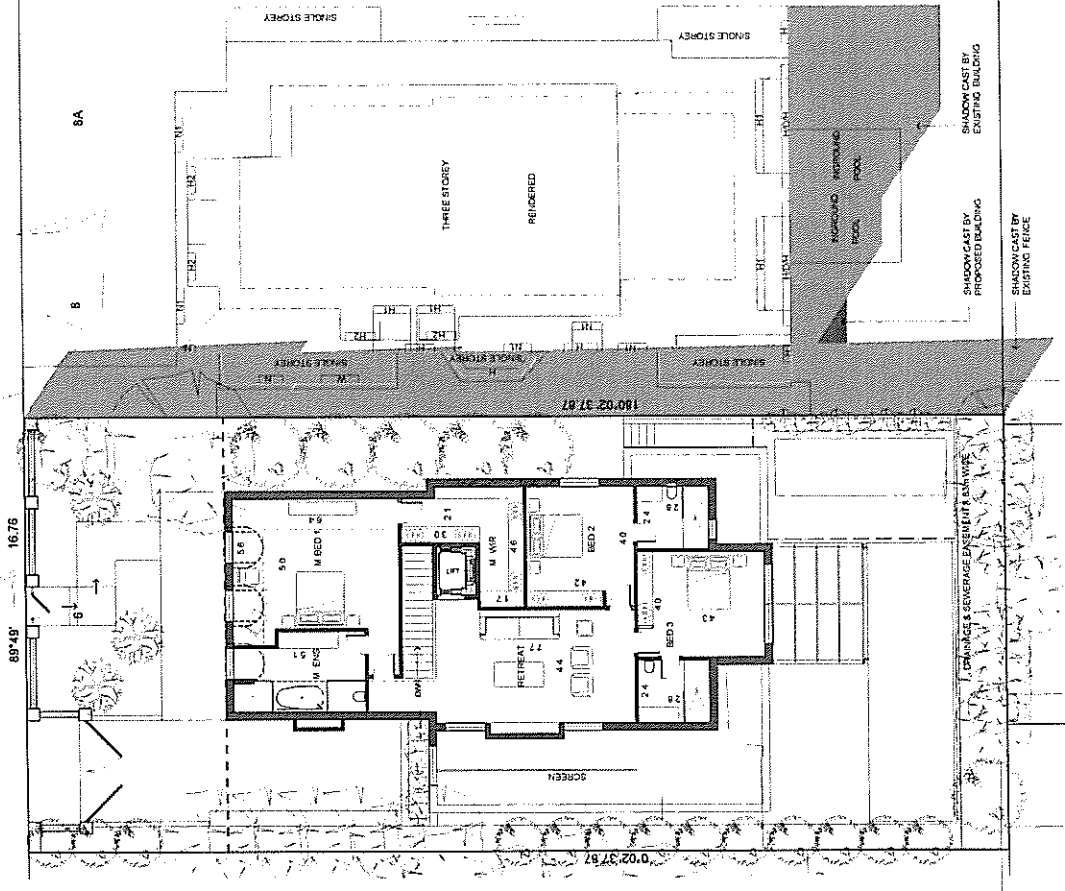
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DUNRAVEN

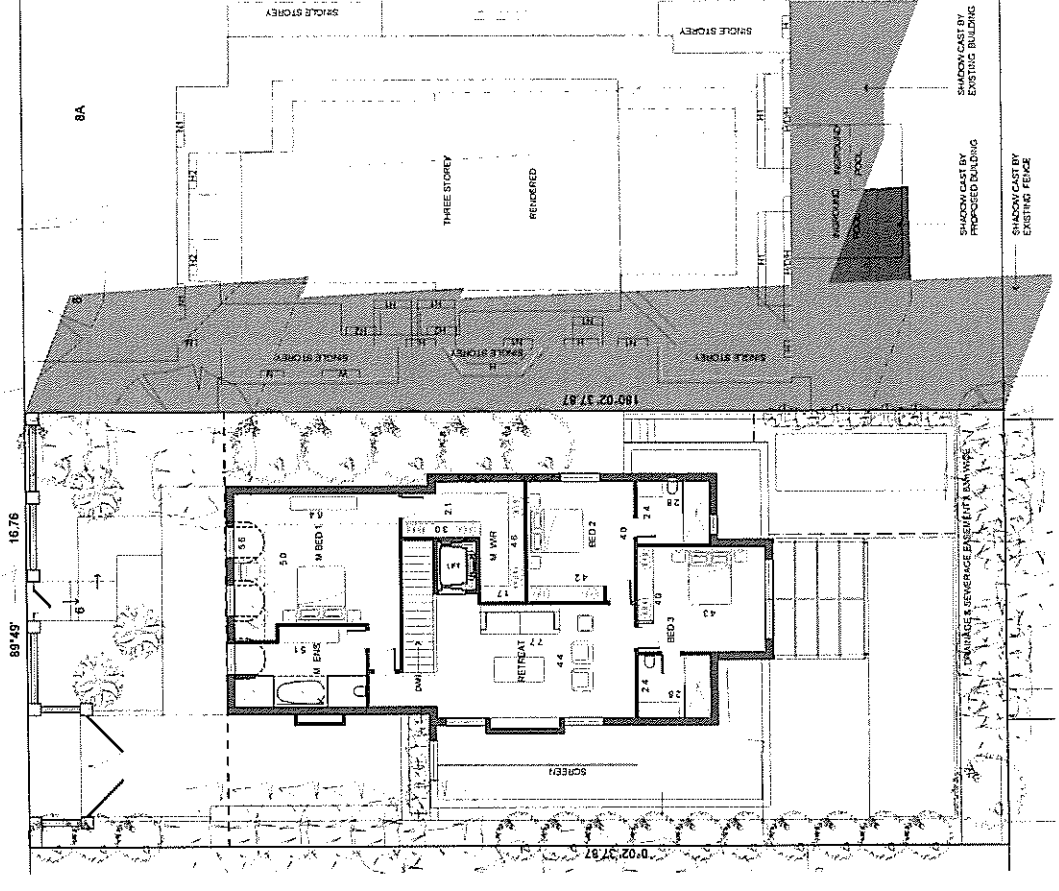
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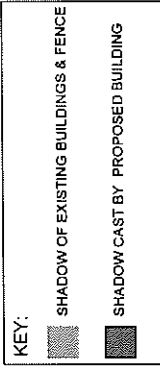
PROPOSED DESIGN
SHADOW DIAGRAM - 4PM SEPT EQUINOX
SCALE 1:200



COVENANT COMPLIANT, 25 FEET MAX BUILDING HEIGHT DESIGN
SHADOW DIAGRAM - 3PM SEPT EQUINOX
SCALE 1:200



COVENANT COMPLIANT, 25 FEET MAX BUILDING HEIGHT DESIGN
SHADOW DIAGRAM - 4PM SEPT EQUINOX
SCALE 1:200

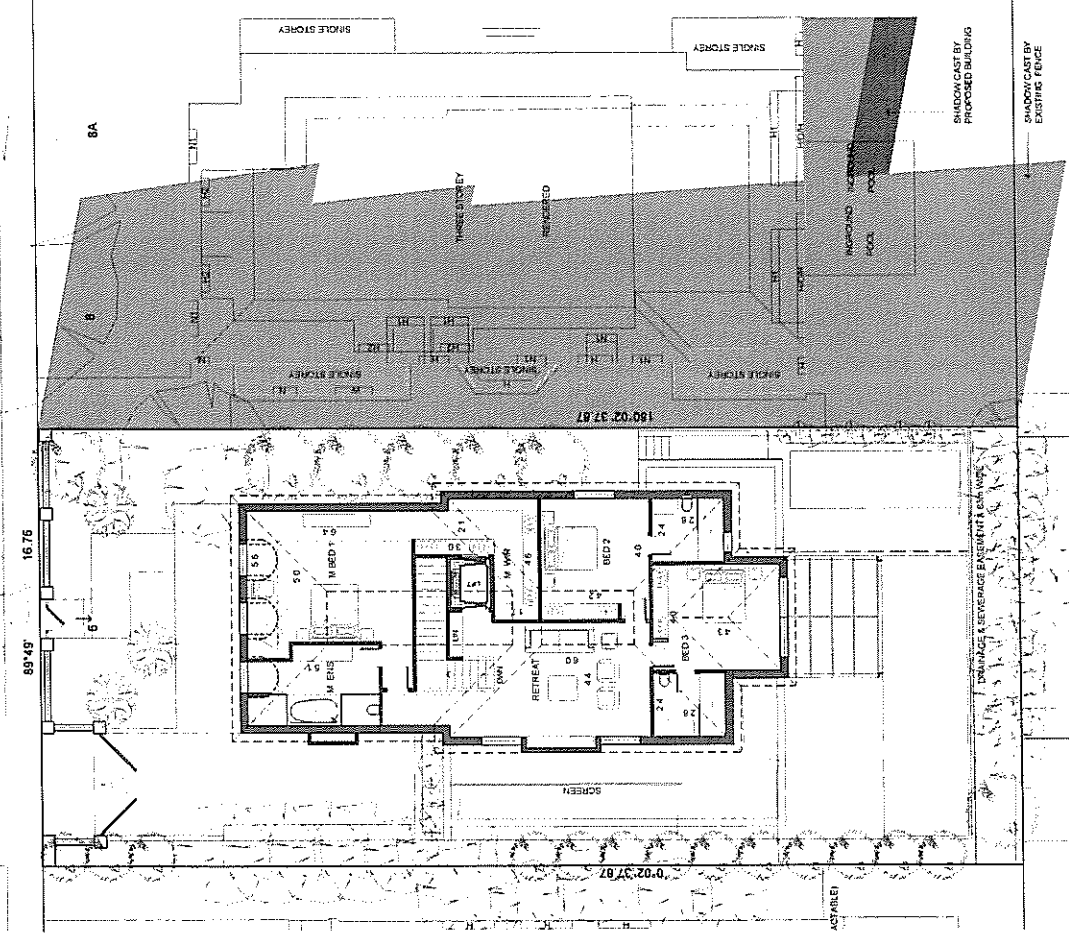


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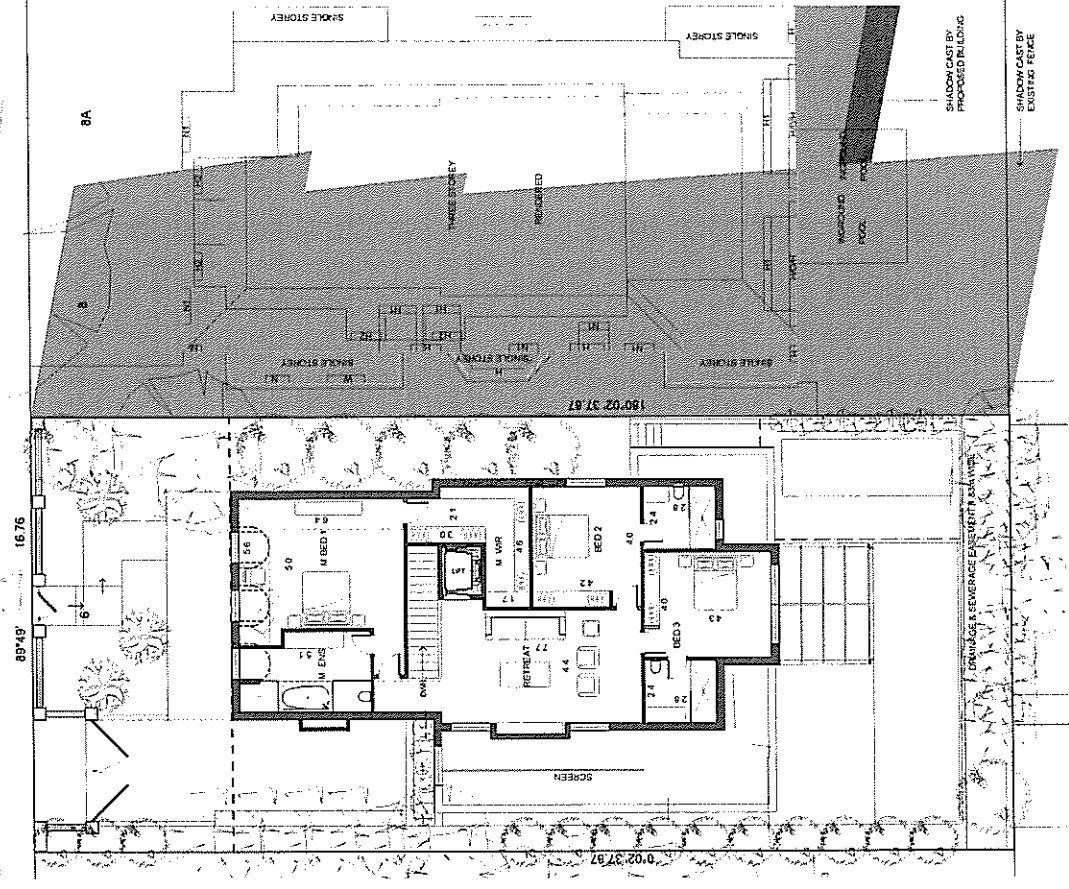
AVENUE

DUNRAVEN

AVENUE



PROPOSED DESIGN
SHADOW DIAGRAM - 5PM SEPT EQUINOX
SCALE 1:200



COVENANT COMPLIANT, 25 FEET MAX BUILDING HEIGHT DESIGN
SHADOW DIAGRAM - 5PM SEPT EQUINOX
SCALE 1:200

KEY:

SHADOW OF EXISTING BUILDINGS & FENCE

SHADOW CAST BY PROPOSED BUILDING

DATA SHEET DS03

SHADOW DIAGRAMS

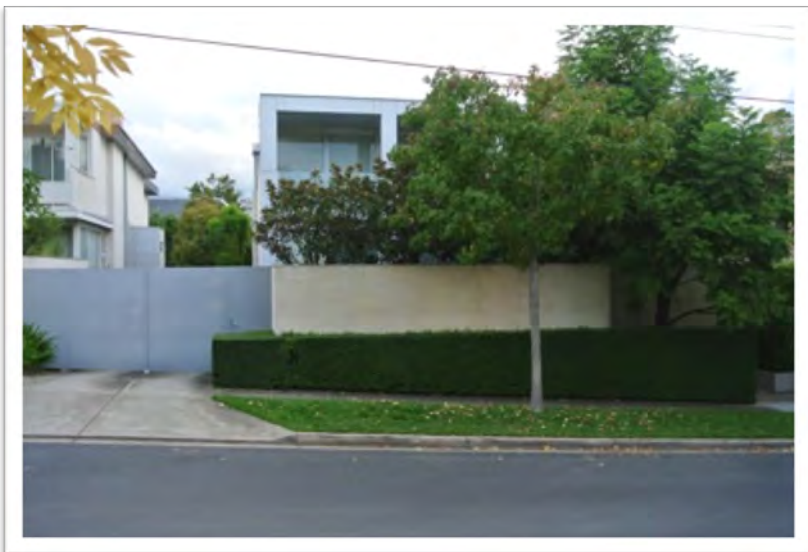
PROPOSED RESIDENCE
REF NO: 211825
FOR MR. F. LIN & MRS A. LANG
SCALE: 1:200
DATE: 11.05.2017
FOR 6 DUNRAVEN AVENUE, TOORAK

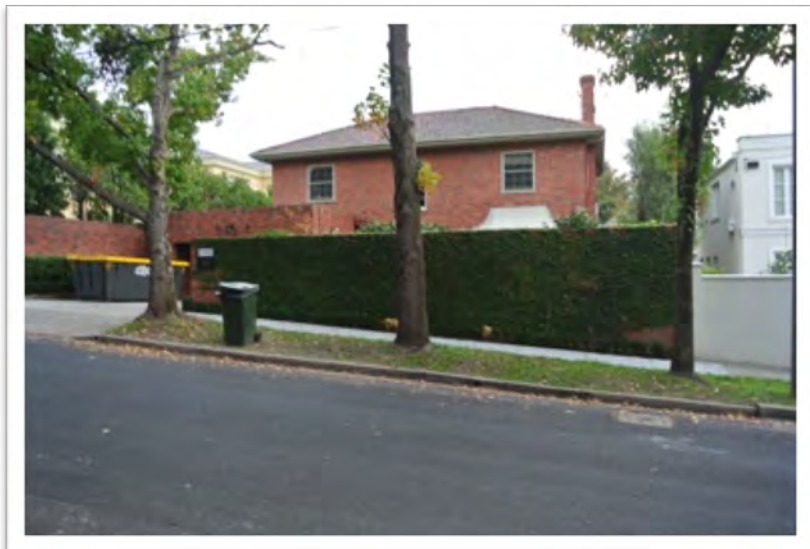


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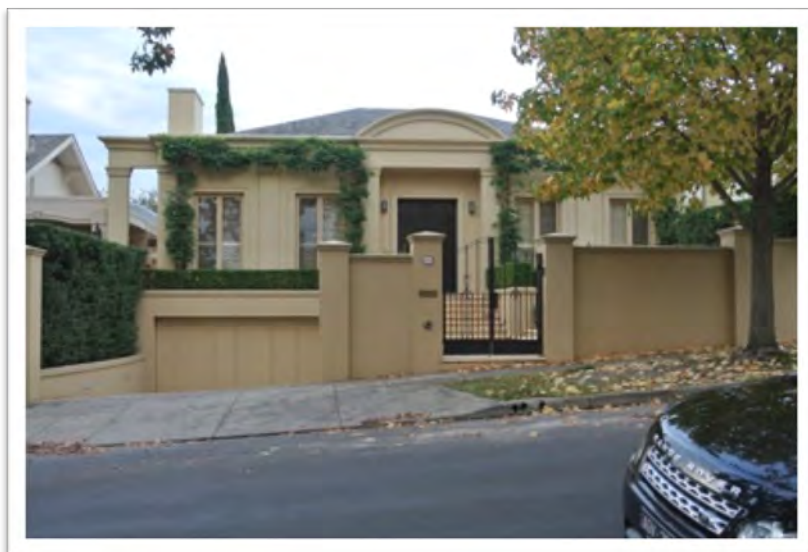
Attachment

7 Dunraven Avenue: Existing development of unburdened land











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