

CITY OF WEST TORRENS



## Confidential Report Items 7.1

of the

### COUNCIL ASSESSMENT PANEL

will be held in the George Robertson Room, Civic Centre  
165 Sir Donald Bradman Drive, Hilton

on

**TUESDAY, 13 AUGUST 2019**  
**at 5.00pm**

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Pursuant to section 236(2) of the *Planning, Development and Infrastructure Act 2016* and clauses 16 & 17 of the *Assessment Panel Members – Code of Conduct*, it is an offence to disclose the information provided in confidence within this agenda except with prior approval of the Assessment Manager.

**Donna Ferretti**  
**Assessment Manager**

#### City of West Torrens Disclaimer

#### **Council Assessment Panel**

Please note that the contents of this Council Assessment Panel Agenda have yet to be considered and deliberated by the Council Assessment Panel therefore the recommendations may be adjusted or changed by the Council Assessment Panel in the process of making the formal Council Assessment Panel decision.

**Note: The plans contained in this Agenda are subject to copyright and should not be copied without authorisation.**

**INDEX**

**7 Confidential Reports Of The Assessment Manager ..... 1**  
7.1 Compromise Proposal - ERD-19-81 - 428 Henley Beach Road, LOCKLEYS ..... 1

Released

## 7 CONFIDENTIAL REPORTS OF THE ASSESSMENT MANAGER

### 7.1 Compromise Proposal - ERD-19-81 - 428 Henley Beach Road, LOCKLEYS

Application No 211/1059/2018

#### Reason for Confidentiality

It is recommended that this Report be considered in CONFIDENCE in accordance with regulation 13(2)(a) (vii) and (viii) of the *Planning, Development and Infrastructure (General) Regulations 2017*, which permits the meeting to be closed to the public for business relating to the following:

- (vii) matters that must be considered in confidence in order to ensure that the assessment panel, or any other entity, does not breach any law, or any order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty;
- (viii) legal advice.

as this matter is before the Environment Resources and Development Court and it is a requirement of the Court that matters are kept confidential until such time as a compromise is reached or the matter proceeds to a hearing.

#### RECOMMENDATION

It is recommended to the Council Assessment Panel that:

1. On the basis that this matter is before the Environment Resources and Development Court so any disclosure would prejudice the position of Council, the Council Assessment Panel orders pursuant to regulation 13(2) of the *Planning, Development and Infrastructure (General) Regulations 2017*, that the public, with the exception of the Chief Executive Officer, members of the Executive and Management Teams, Assessment Manager, City Development staff in attendance at the meeting, and meeting secretariat staff, and other staff so determined, be excluded from attendance at so much of the meeting as is necessary to receive, discuss and consider in confidence, information contained within the confidential reports submitted by the Assessment Manager on the basis that this matter is before the Environment Resources and Development Court and it is a requirement of the Court that matters are kept confidential until such time as a compromise is reached or the matter proceeds to a hearing.
2. At the completion of the confidential session the meeting be re-opened to the public.

#### DEVELOPMENT APPLICATION DETAILS

DESCRIPTION OF DEVELOPMENT	Combined Land division - Community Title; SCAP No. 211/C128/18; Create four (4) additional allotments and common property and construction of five (5) two storey group dwellings and associated retaining wall and fence (2.4 metres maximum combined height)
APPLICANT	428 Henley Beach Road Pty Ltd
ZONE	Residential Zone
POLICY AREA	Low Density Policy Area 20
APPLICATION TYPE	Merit
PUBLIC NOTIFICATION	Category 2
DEVELOPMENT PLAN VERSION	12 July 2018
RECOMMENDATION	Support with conditions
AUTHOR	Ebony Cetinich

## BACKGROUND

The application was presented to the Council Assessment Panel (CAP) at its meeting held on 9 April 2019 with a recommendation to support the proposal.

The CAP made the determination to refuse the application for the following reasons:

1. Residential Zone - Low Density, Policy Area 20, PDC 4.  
*The proposed site areas are smaller than the minimum required in the policy area.*
2. Residential Zone - Low Density, Policy Area 20, PDC 4.  
*The proposed frontage widths are smaller than the minimum required in the policy area.*
3. Residential Zone, PDC 8.  
*The proposed street setback is less than the minimum required in the zone.*
4. Residential Zone, PDC 11.  
*The proposed side setbacks are less than the minimum required in the zone.*
5. Residential Zone, PDC 11.  
*The proposed rear setbacks are less than the minimum required in the zone.*

A copy of the 9 April 2019 report, original plans and related decision can be found on Council's website (Item Number 6.3).

Subsequently, the applicant appealed this decision and a compulsory conference was held at the Environment Resources and Development Court (the Court) on 17 June 2019. The applicant has since amended the proposal and provided legal advice from Botten Levinson Lawyers for Council's consideration.

The amended plan set is contained within **Attachment 1** and the legal advice is contained within **Attachment 2**.

## AMENDMENTS

The amendments to the proposal are summarised as follows:

### Dwellings 1 & 2 (front dwellings)

- Increased front setback by 0.7m to the porch and 1.2m to the front wall.
- Floor plan reconfiguration (lower and upper levels) and the introduction of a street facing upper level balcony.
- External appearance and façade changes.

### Dwellings 3, 4 & 5 (rear dwellings)

- Increased rear setback by 0.8m to the lower level and 0.2m to the upper level.
- Minor floor plan reconfiguration (lower and upper levels).
- External appearance and façade changes.
- The boundary walls of dwellings 3 and 5 (carport) are now clearly shown as being open.

## LEGAL ADVICE

The legal advice from Botten Levinson Lawyers is summarised as follows:

- It is emphasised that the Development Plan is a practical planning document rather than a statute. Development Plan provisions are guidelines only and should be applied practically and not in isolation as regard should be given to the conditions of the locality.
- A number of case law examples were deliberated to address two main questions:
  - how to interpret PDC 4 of the Low Density Policy Area which refers to 300m<sup>2</sup>; and
  - whether the site area for each (individual) dwelling has to meet the 300m<sup>2</sup> minimum or can one have regard to the whole of the site.
- The case law examples also touch on site coverage and density as well as the importance of qualitative considerations and locality context in a planning assessment.
- There is no compelling reason to exclude the common property, which is used for landscaping and driveways, when considering the application of PDC 4 of the Low Density Policy Area. When assessing the site area of a detached dwelling, the driveway and landscaped areas are not excluded as they form part of the 'exclusive site area' of the dwelling. Irrespective of what form of dwelling is proposed, the driveway and landscaping areas are an integral part of the context/setting of a dwelling. It is not correct to ignore a substantial area of land that typically forms part of the context/setting of a dwelling.
- If the figure of 300m<sup>2</sup> was to be applied as an 'exclusive area' for group dwellings, it would result in an extraordinary outcome as a far greater site would be required to establish three group dwellings sharing a driveway compared to three detached dwellings.
- The view was taken that the CAP erred in relying on density shortfalls as a basis for refusing the application. In adopting the approach to include the common property, the proposed dwellings would have an average site area of 290m<sup>2</sup>, leaving a shortfall of 10m<sup>2</sup> or 3.3%. The shortfall was considered to be minor and an insufficient reason for the refusal.
- The advice concluded with a statement suggesting that the applicant appeal would most likely be successful.

## REFERRALS

No new internal or external referrals were required as the allotment configuration and built form remains consistent with the original proposal.

## DISCUSSION

This section focusses on the amended components of the application and the CAP's reasons for refusal.

### Site Area and Frontage

Reasons 1 and 2 for refusal relate to site area and frontage. In the original CAP report, the site area assessment was based on each 'exclusive' site not including the common property. This resulted in shortfalls between 14% and 30%. Upon further consideration and review of the Botten Levinson legal advice provided by the applicant, it has been determined that this method of calculating site area is unreasonable and a more logical approach exists when assessing a group dwelling development.

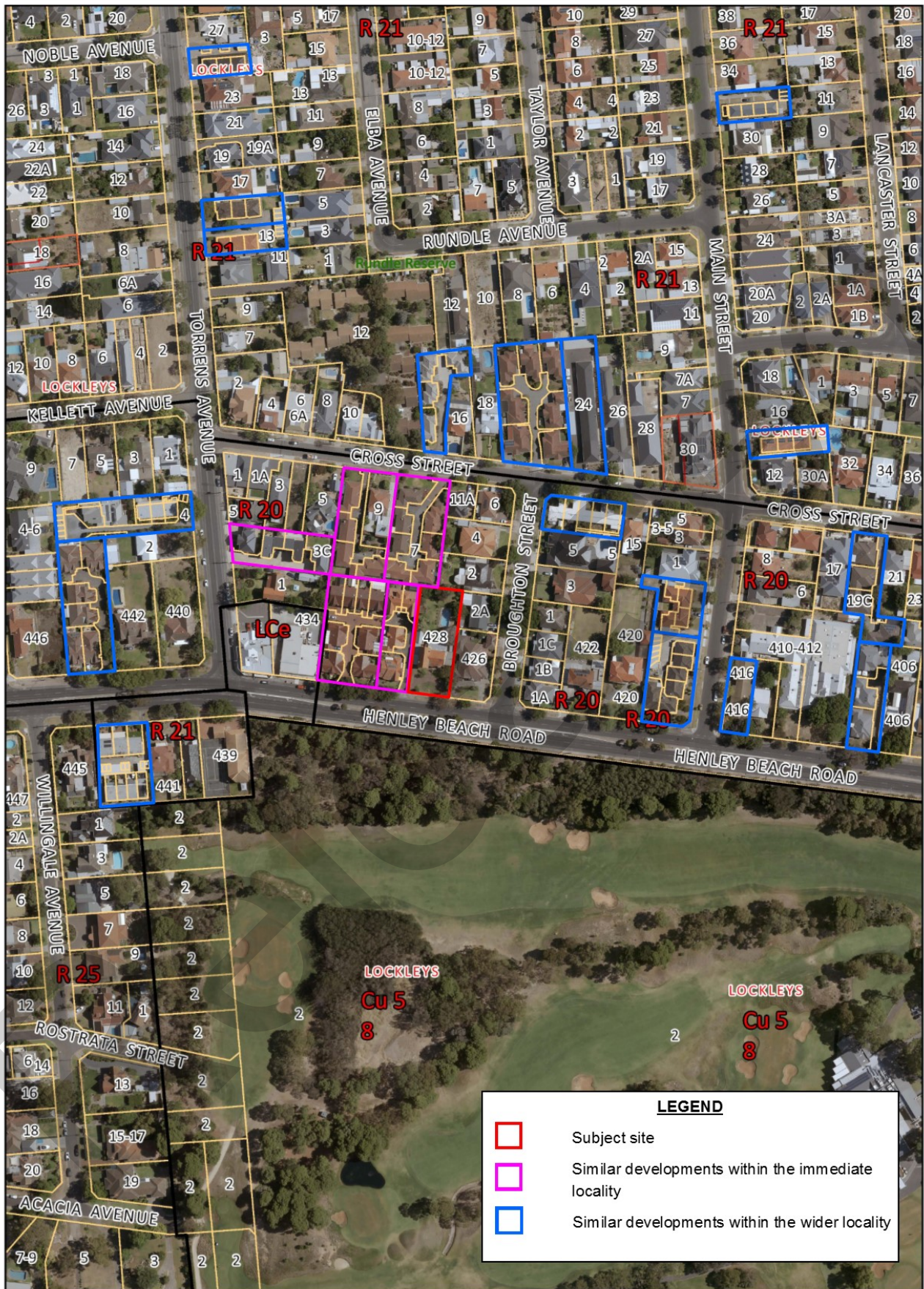
This alternative method of calculating site area is to include the common property (i.e. total site area divided by the number of proposed dwellings). As outlined in the Botten Levinson advice, it is not correct to ignore a substantial area of land that typically forms part of the context/setting of a dwelling. In this particular instance, all of the proposed dwellings are dependent on the common property for vehicular access. By adopting this approach, the average site area for the proposed development is 290m<sup>2</sup> per dwelling. This results in a shortfall of only 10m<sup>2</sup> or 3.3%, which is considered to be minor and an unreasonable reason for refusal.

Density is an important consideration in determining whether site area is appropriate. The desired character statement of the Policy Area seeks a low density character. The *30-Year Plan for Greater Adelaide* provides some guidance as to what is considered low density development, this being fewer than 35 dwellings per hectare. Taking into account the net density of the proposed development (34.3 dwellings per hectare), it is evident that the proposal fits within the guidelines of what is considered to be 'low density'.

In determining the appropriateness of the proposed development in light of the site area and frontage shortfalls, it is important to consider desired character and envisaged land uses within the Policy Area. Group dwellings and increased densities in close proximity to centre zones are specifically listed as envisaged within the Policy Area. The proposal clearly achieves this. The essential nature of a development comprising group dwellings is to incorporate a common driveway. Inherently, this means that some dwellings will not have frontage to a public road. The Policy Area is contradictory in that it desires group dwellings but also states that group dwellings should have a frontage of 9m to a public road, which simply cannot be achieved for this type of dwelling. Regardless of the frontage requirements specified within the Policy Area, the proposed allotment configuration, dwelling type and increased density is envisaged.

Following on from the above, it is important that the quantitative provisions of the Development Plan are not applied in isolation. Qualitative provisions such as private open space, landscaping and site coverage are all equally important factors in determining the appropriate site area. The proposal satisfies the relevant private open space, landscaping and site coverage provisions of the Development Plan. The amendments made by the applicant also improve the quality of private open space of dwellings 1 and 2.

Finally, it is important to take into account the existing built form and allotment pattern within the locality. Within the immediate locality, there are 5 existing group dwelling developments of a similar form and nature to the proposed development. Further to this, there are an additional 17 existing group dwelling and residential flat building developments within the wider locality. Please refer to the aerial plan below for the location of these existing developments in relation to the subject site.



It is important to note that these existing developments have a density and allotment configuration similar to that of the proposed development. The number of existing developments of a similar density and allotment configuration cannot be ignored in determining the appropriateness of the proposed allotment configuration and associated built form. Given the fragmented nature of the locality in terms of the prevailing pattern of development, allotment size and allotment configuration, it is considered that the proposed development fits well within the context of the locality.

### Setbacks

Reasons 3, 4 and 5 for refusal relate to the primary street, side and rear setback shortfalls. As detailed above, the applicant has made changes to the proposal to better align with the requirements of PDCs 8 and 11 of the Residential Zone. The rear setbacks now comply with the minimum requirements of PDC 11. The front and side setbacks have been improved, but are still at variance with PDCs 8 and 11. The front and side setback shortfalls are discussed below.

#### Front Setback

PDC 8 of the Residential Zone calls for the front setback of buildings to be the average distance of the two adjacent buildings. In this case, the average distance of the two adjacent buildings is approximately 7.85m. The front setback of dwellings 1 and 2 has increased by 0.7m to the porch and 1.2m to the front wall, however, the front setback distance still falls short of meeting this average measure by approximately 2m.

From reviewing aerial imagery, it is evident that there is not a consistent established front setback pattern along Henley Beach Road (refer figure 1 below). As demonstrated in the image below, the front setback of proposed dwellings 1 and 2 is the same distance as the front setback of a number of existing dwellings within the locality. As such, the proposed dwellings are unlikely to have a negative impact on the streetscape and departure from PDC 8 of the Residential Zone is not fatal to the proposal. It is also worthy to note that the existing buildings located at 434 and 438 Henley Beach Road are located on the front boundary.



**Figure 1 - Setback Diagram**

#### Side Boundaries

Dwellings 3 and 5 both have a carport located on different side boundaries. It has been made clear that where positioned on the boundary, the carport will remain open. This will be reinforced by way of condition. The visual impact associated with an open structure is notably less than a structure with a solid wall. The carport of dwelling 3 is positioned to abut the common property of the adjoining residential development to the west. The carport of dwelling 5 will be located predominantly adjacent to an existing boundary wall and small domestic outbuildings over two separate residential properties to the east. Further, the carports are relatively limited in length and height at 6.5m and 2.8m respectively.



It is worth noting that a domestic outbuilding or detached garage with a wall height of 3m and a length of 8m could be constructed in the location of the proposed carports without obtaining Development Plan consent. Provided that other criteria are met, only Building Rules consent would be required which does not take into account amenity impacts on adjoining allotments. A structure of this nature would have a much greater impact on the adjoining properties than the open carports of dwellings 3 and 5.

Taking into consideration the above, is it considered that the carports of dwellings 3 and 5 have an acceptable visual impact on the adjoining properties and the shortfall in side setback is not fatal to the proposal.

The eastern side wall (ground floor and upper floor) of dwelling 3 is situated on the eastern boundary of the site. This is internal to the development site and will have relatively limited impact on the adjoining dwelling. A majority of the boundary wall will be situated adjacent to non-habitable rooms of the adjoining dwelling, namely the garage, laundry and W/C. The upper level windows of the adjoining dwelling will still have adequate access to sunlight and the ground floor living room and private open space will still achieve optimal northern solar orientation. As such, the eastern boundary wall of dwelling 3 is considered to be appropriate.

### **Additional Considerations**

Amendments have been made to the floor plan of the proposed dwellings as well as their external appearance, resulting in a number of positive changes.

The external colour palette has changed from dark grey (almost black), light grey and off-white to cream, grey and earth tone which results in a softer appearance and complements existing dwellings within the locality.

The external façade of the buildings has been improved and simplified which is considered to reduce the visual bulk of the buildings when viewed from the street and adjoining residential properties. The width of dwellings 1 and 2 has been minimised which also reduces the bulk and scale of the buildings.

A balcony has been added to the front facade of dwellings 1 and 2 which allows for passive surveillance of Henley Beach Road, improved streetscape presence and increased articulation to the front façade.

The floor plan of dwellings 1 and 2 has been altered resulting in an increased the amount of private space.

An amended Civil Plan and Plan of Division has not been provided at this stage. Given the uncertainty surrounding the outcome of the compromise proposal, it was considered to be an unreasonable expense to place on the applicant at this stage. As the layout of the development has not substantially changed from the original proposal and a suitable Civil Plan and Plan of Division were previously provided, a Reserved Matter is appropriate in this instance.

### **SUMMARY**

The subject development application is currently under appeal in the Court. In order to reach a compromise and avoid going to trial, the applicant has provided an amended plan set and legal advice from Botten Levinson Lawyers for consideration by Council's Administration and the CAP.

A number of positive amendments have been made including increased setbacks, floor area reconfigurations and façade changes to greater align the proposed development with the relevant Development Plan provisions. The changes also result in a number of improvements such as increased passive surveillance of the street, reduced bulk and scale, improved building design and improved quality of private open space.

Legal advice provided by the applicant has shed light on an alternative approach to calculating site areas which includes the common property. This approach is considered to be logical and reasonable as the proposed dwellings are reliant on the common property for vehicular access. By adopting this approach, the proposal results in a minor site area shortfall of 10m<sup>2</sup> or 3.3%, which is not considered to be fatal.

The proposed development is of a type and form specifically envisaged within the Policy Area. A majority of Development Plan provisions are satisfied by the proposal and any shortfalls have been determined to be minor and not fatal. The amendments and additional information provided by the applicant are considered to reasonably address the CAP's reasons for refusal. As such, it is recommended that the CAP reconsider its previous decision and support the amended proposal.

## RECOMMENDATION

1. The legal advice from Botten Levinson Lawyers in **Attachment 2** of the Agenda report be received and noted.
2. The Council Assessment Panel, having considered the application for consent to carry out development of land and pursuant to the provisions of the *Development Act 1993* finds the proposal to be not seriously at variance with the Development Plan and resolves to advise the Environment Resources and Development Court that it does SUPPORT Development Plan Consent and Land Division Consent for Application No. 211/1059 /2018 by 428 Henley Beach Road Pty Ltd to undertake a combined Land division - Community Title; SCAP No. 211/C128/18; Create four (4) additional allotments and common property and construction of five (5) two storey group dwellings and associated retaining wall and fence (2.4 metres maximum combined height) at 428 Henley Beach Road, Lockleys (CT 5462/274) subject to the following reserved matters and conditions of consent:

### Reserved Matters:

The following information shall be submitted for further assessment and approval by the City of West Torrens as reserved matters under Section 33(3) of the *Development Act 1993*:

1. An amended plan of division to reflect the site boundaries as per the 'Site Plan - Ground Floor Plans' by Visual Lines Building Design (Drawing Number: BG19-04, Sheet: 1, Date: 01-07-2019);
2. Detailed Stormwater Management Plan/Civil Plan.

### Development Plan Consent Conditions:

1. The development shall be undertaken and completed in accordance with the following plans and information detailed in this application except where varied by any condition(s) listed below.
  1. 'Site Plan - Ground Floor Plans' by Visual Lines Building Design (Drawing Number: BG19-04, Sheet: 1, Date: 01-07-2019);
  2. 'Upper Floor Plans' by Visual Lines Building Design (Drawing Number: BG19-04, Sheet: 2, Date: 01-07-2019);
  3. 'Elevations' by Visual Lines Building Design (Drawing Number: BG19-04, Sheet: 3, Date: 01-07-2019);
  4. 'Colour Schedule' by Visual Lines Building Design (Drawing Number: BG19-04, Sheet: 4, Date: 01-07-2019).

*Reason: To ensure the proposal is developed in accordance with the plans and documents lodged with Council.*

2. Prior to occupation of the dwellings approved herein, the upper level windows, where indicated on the approved 'Elevations' by Visual Lines Building Design, shall be fixed with obscure glass to a minimum height of 1.7 metres above the upper floor level. Obscure glass shall be maintained in good condition at all times to the reasonable satisfaction of Council.

*Reason: To maintain the privacy of neighbouring residents.*

3. Within one (1) month of the practical completion of the development approved herein, all driveways, parking and manoeuvring areas shall be formed, surfaced with concrete, bitumen or paving and properly drained, and maintained in good condition at all times to the reasonable satisfaction of Council.

*Reason: To provide safe and convenient parking and manoeuvring areas for users of the development and ensure that dust nuisance is minimised.*

4. Within six (6) months of the practical completion of the development approved herein, all landscaping indicated on the approved 'Site Plan - Ground Floor Plans' by Visual Lines Building Design, shall be planted. The landscaping shall be maintained in good health and condition at all times and any dead or diseased plants shall be replaced immediately to the reasonable satisfaction of the Council.

*Reason: To enhance the amenity of the site and locality and to mitigate against heat loading.*

5. The sides of the carports located on the eastern and western boundaries (dwellings 3 and 5) shall remain open at all times.

*Reason: To ensure the proposal is developed in accordance with the plans and documents lodged with Council and to maintain amenity to neighbours.*

**Conditions imposed upon recommendation of the Department of Planning, Transport and Infrastructure:**

6. All access shall be gained via the shared access adjacent the eastern property boundary (as shown on related Concept Drawing WO 01, dated 27 November 2018).

*Reason: To satisfy the requirements of the Department of Planning, Transport and Infrastructure (DPTI).*

7. The shared access shall be flared appropriately to the kerb for easy access and egress movements.

*Reason: To satisfy the requirements of DPTI.*

8. The obsolete crossover adjacent the western property boundary shall be closed and reinstated to Council's kerb and gutter standards at the applicant's expense.

*Reason: To satisfy the requirements of DPTI.*

9. All vehicles must enter and exit Henley Beach Road in a forward direction.

*Reason: To satisfy the requirements of DPTI.*

10. The initial 6 x 6 metre area of the shared driveway and all on-site vehicle manoeuvring areas shall remain clear of any impediments (including utility meters, vegetation, fencing/retaining walls, letterboxes and parked vehicles).

*Reason: To satisfy the requirements of DPTI.*

11. Stormwater run-off shall be collected on-site and discharged without jeopardising the safety and integrity of Henley Beach Road. Any alterations to the road drainage infrastructure required to facilitate this shall be at the applicant's expense.

*Reason: To satisfy the requirements of DPTI.*

## Land Division Consent Conditions

### Council Requirements

Nil

### SCAP Requirements

12. The financial requirements of the SA Water Corporation shall be met for the provision of water and sewerage services (SA Water H H0077577).

SA Water Corporation further advise that an investigation will be carried out to determine if the water and/or sewer connection/s to your development will be costed as standard or non-standard.

The developer must inform potential purchasers of the community lots in regards to the servicing arrangements and seek written agreement prior to settlement, as future alterations would be at full cost to the owner/applicant.

*Reason: To satisfy the requirements of the South Australian Water Corporation.*

13. Payment of \$29,012.00 into the Planning and Development Fund (4 allotments @ \$7253.00 /allotment). Payment may be made by credit card via the internet at [www.edala.sa.gov.au](http://www.edala.sa.gov.au) or by phone (7109 7018), by cheque payable to the State Planning Commission marked "Not Negotiable" and sent to GPO Box 1815, Adelaide 5001 or in person by cheque or card, at Level 5, 50 Flinders Street, Adelaide.

*Reason: To satisfy the requirements of the State Commission Assessment Panel.*

14. A final plan complying with the requirements for plans as set out in the Manual of Survey Practice Volume 1 (Plan Presentation and Guidelines) issued by the Registrar General to be lodged with the State Commission Assessment Panel for Land Division Certificate purposes.

*Reason: To satisfy the requirements of the State Commission Assessment Panel.*

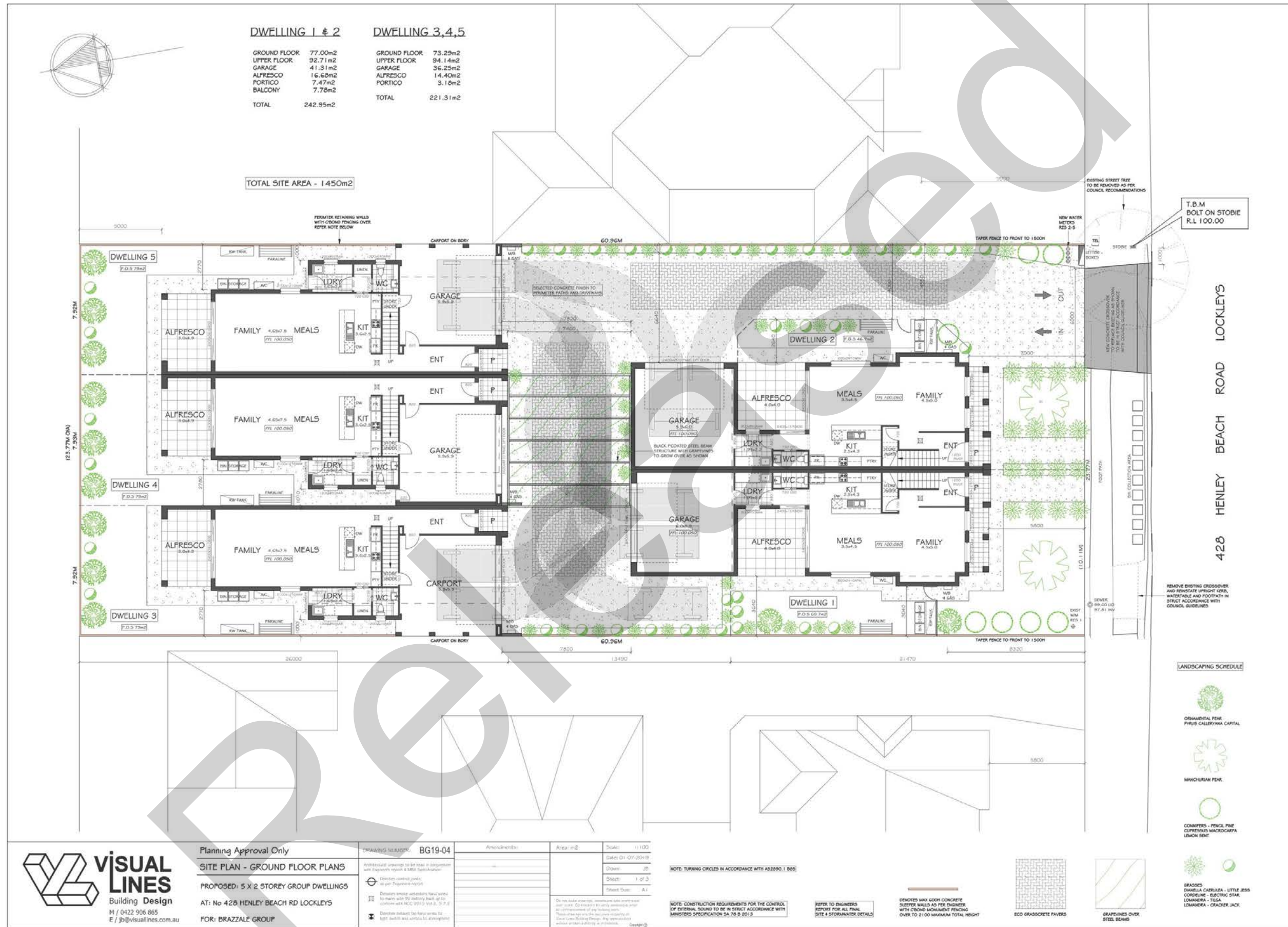
### FURTHER

1. Pursuant to regulation 13(2) of the *Planning, Development and Infrastructure (General) Regulations 2017*, Item 7.1 - Compromise Proposal - ERD-19-81 - 428 Henley Beach Road, LOCKLEYS, including the report, attachments and any discussions (excluding the decision), having been dealt with in confidence under regulation 13(2)(a)(vii) and (viii) of the *Planning, Development and Infrastructure (General) Regulations 2017* and in accordance with regulation 14(4) of the *Planning, Development and Infrastructure (General) Regulations 2017*, be kept confidential until a decision of the Environment, Resources and Development Court relevant to the item is made, on the basis that it is a requirement of the Court that matters are kept confidential until such time as a compromise is reached or the matter proceeds to a hearing.
2. The Council Assessment Panel gives authority to the Assessment Manager to review, but not extend, the confidential order on a monthly basis.

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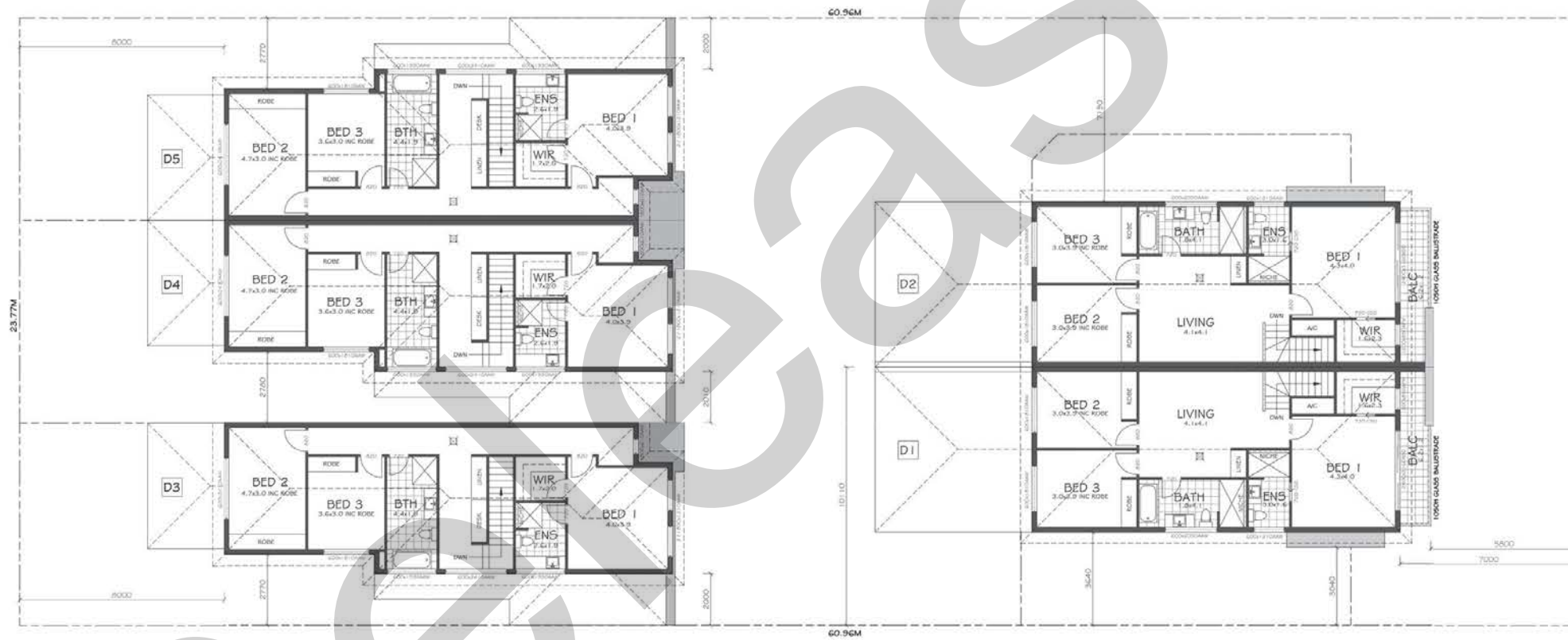
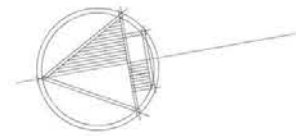
### Attachments

1. **Amended Plan Set**
2. **Botten Levinson Legal Advice**





STREET SCAPE ELEVATION



UPPER FLOOR PLANS



Planning Approval Only  
 UPPER FLOOR PLANS  
 PROPOSED: 5 X 2 STOREY GROUP DWELLINGS  
 AT: No 428 HENLEY BEACH RD LOCKLEYS  
 FOR: BRAZZALE GROUP

DRAWING NUMBER: BG19-04  
 Amendments:  
 1. Discretionary conditions as per Council's request  
 2. Discretionary conditions as per Council's request  
 3. Discretionary conditions as per Council's request

Scale: 1:100  
 Date: 01-07-2019  
 Drawn: JB  
 Sheet: 2 of 3  
 Sheet Size: A1

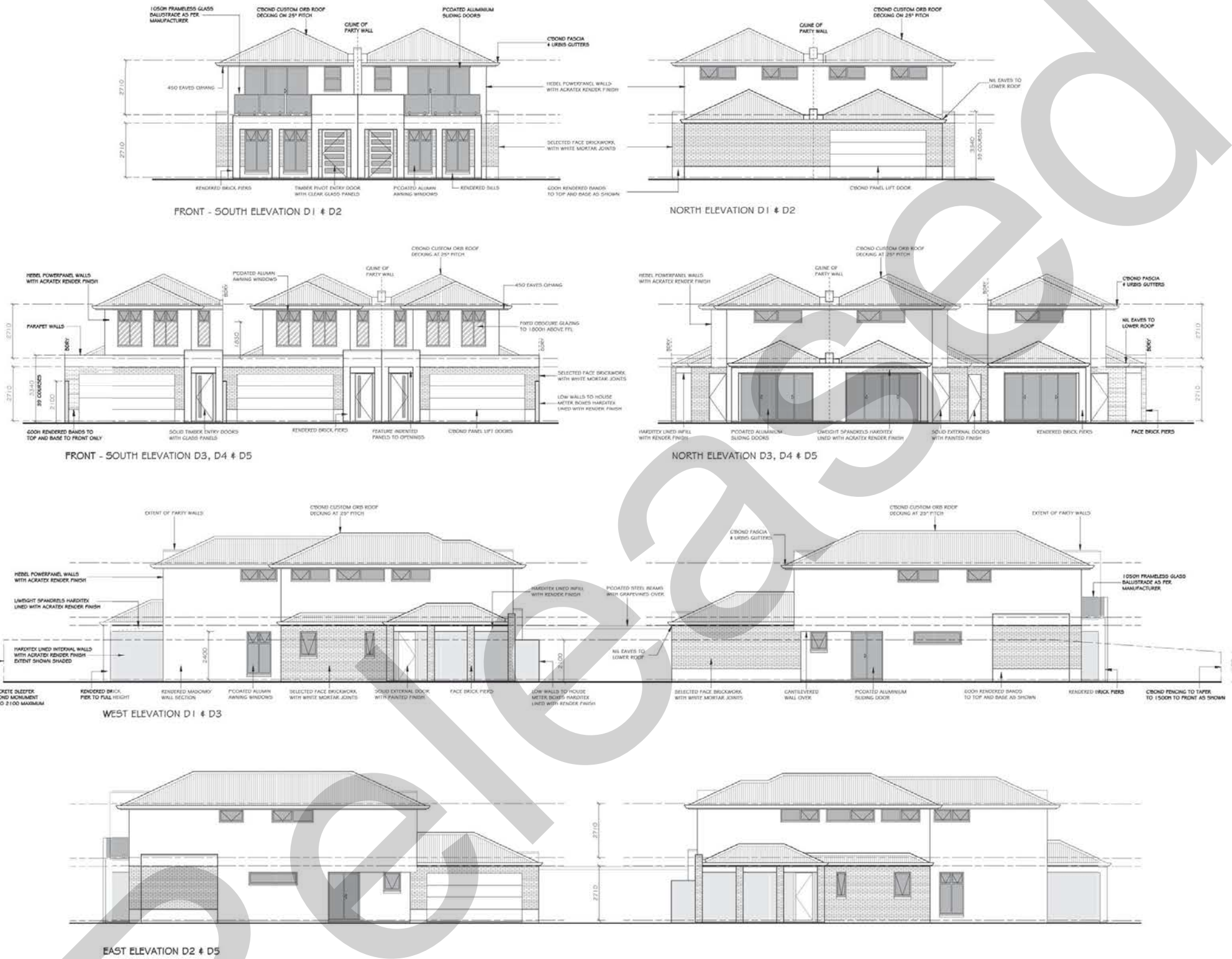
Do not build anything, otherwise you will be liable for any costs incurred. These drawings are the property of Visual Lines Building Design. Any reproduction without written authorisation is prohibited.

DWELLING 1 & 2

GROUND FLOOR	77.00m <sup>2</sup>
UPPER FLOOR	92.71m <sup>2</sup>
GARAGE	41.31m <sup>2</sup>
ALFRESCO	16.60m <sup>2</sup>
PORTICO	7.47m <sup>2</sup>
BALCONY	7.70m <sup>2</sup>
<b>TOTAL</b>	<b>242.95m<sup>2</sup></b>

DWELLING 3,4,5

GROUND FLOOR	73.29m <sup>2</sup>
UPPER FLOOR	94.14m <sup>2</sup>
GARAGE	36.25m <sup>2</sup>
ALFRESCO	14.40m <sup>2</sup>
PORTICO	3.18m <sup>2</sup>
<b>TOTAL</b>	<b>221.31m<sup>2</sup></b>



Planning Approval Only  
**ELEVATIONS**  
 PROPOSED: 5 X 2 STOREY GROUP DWELLINGS  
 AT: No 428 HENLEY BEACH RD LOCKLEYS  
 FOR: BRAZZALE GROUP

DRAWING NUMBER: <b>BG19-04</b>	Amendment	Area: m2	Scale: 1:100
Professional approval to be made in conjunction with Engineers report & MVA Specification			Date: 01.07.2019
Notes: partial plans as per Department report			Drawn: JB
Diagrams indicate refer to other sheets to be used with this drawing			Sheet: 3 of 4
Diagrams indicate refer to other sheets to be used with this drawing			Sheet Size: A1
Diagrams indicate refer to other sheets to be used with this drawing			



DWELLINGS 1 & 2



DWELLINGS 3, 4 & 5



# VISUAL LINES




Building Design

M / 0422 906 865

E / jb@visuallines.com.au

## Planning Approval Only

Architectural drawings to be read in conjunction with Engineers report # MBA Specification

-  Denotes control joints as per Engineers report
-  Denotes smoke detectors hard wired to mains with 9V battery back up to conform with NCC 2015 Vol 2, 3.7.2
-  Denotes exhaust fan hard wired to light switch and vented to atmosphere

PROPOSED: 5 X 2 STOREY GROUP DWELLINGS

AT: No 428 HENLEY BEACH ROAD LOCKLEYS

FOR: BRAZZALE GROUP

## COLOUR SCHEDULE

DRAWING NUMBER: **BG19-04**

Area: m2	Scale: 1:100
	Date: 01-07-2019
	Drawn: JB
	Sheet: 4 of 4
	Sheet Size: A3

Amendments:

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Our ref: GM/211060

7 May 2019

Mr Bill Stefanopoulos  
Town Planning Advisors  
PO Box 9061  
HENLEY BEACH SOUTH SA 5022

By email: [bill@townplanningadvisors.com.au](mailto:bill@townplanningadvisors.com.au)

Dear Bill

### Proposed development at 428 Henley Beach Road, Lockleys

You have sought my advice in relation to the prospects of an appeal to the ERD Court succeeding following the decision of the City of West Torrens CAP to refuse development plan consent to an application to establish five dwellings with associated community title land division at 428 Henley Beach Road, Lockleys (**the land**).

### The Development Plan

The land is within the area of the City of West Torrens, is in the Residential Zone and more particularly within Low Density Policy Area 20.

The General Section of the Plan relating to Residential Development includes the following:

#### OBJECTIVES

1. *Safe, convenient, pleasant and healthy-living environments that meet the full range of needs and preferences of the community.*
2. *An increased mix in the range and number of dwelling types available within urban boundaries to cater for changing demographics, particularly smaller household sizes and supported accommodation.*
3. *Medium and high density residential development in areas close to activity centres, public and community transport and public open spaces.*

The Residential Zone includes the following provisions

1. *A residential zone comprising a range of dwelling types, including a minimum of 15 per cent affordable housing.*
2. *Dwellings of various types at very low, low and medium densities.*
3. *Increased dwelling densities in close proximity to centres, public transport routes and public open spaces.*
4. *Development that contributes to the desired character of the zone.*

### *DESIRED CHARACTER*

*This zone will contain predominantly residential development. There may also be some small-scale non-residential activities such as offices, shops, consulting rooms and educational establishments in certain locations. Non-residential activities will be complementary to surrounding dwellings.*

*Allotments will be at very low, low and medium densities to provide a diversity of housing options in different parts of the zone. The range of allotment sizes will support the desired dwelling types anticipated in each policy area, and the minimum allotment sizes shall be treated as such in order to achieve the Desired Character for each policy area and, in turn, reinforce distinction between policy areas. Row dwellings and residential flat buildings will be common near centres and in policy areas where the desired density is higher,*

### **CAP and the recommendation**

The application was treated as a category 2 development. There were two representors in support of the proposal. The CAP heard from the representors and then your office was given the opportunity to 'respond' on behalf of the applicant for consent.

Council staff recommended the application be granted development plan consent – both in terms of the land division and the built form of development which was described as being for "5 two-storey group dwellings together with retaining walls and fences to a maximum height of 2.4m". The land division component in the form of community titles, was described as being for 4 additional allotments and community property.

### **The land and the locality**

The land is currently developed by way of a detached dwelling which is in part two-storey.

Having regard to Google maps, there appears to be a building in the form of a detached dwelling immediately to the east (on the corner of Broughton Street) whilst to the west, there appear to be four or so dwellings on that land, one - two behind the other and to the further west of that land, there appear to be six dwellings serviced by a central driveway.

I note that within the locality, in addition to the description provided of the development of adjacent land, there are other two-storey dwellings within the locality and in the instance of 430 Henley Beach Road, i.e., immediately to the west, there are two-storey dwellings on that land. Further, there are two-storey dwellings immediately to the west of that land at 432. "Around the corner" on Torrens Avenue, there are two-storey dwellings together with at least 1 two-storey dwelling on Cross Street which would appear to be within about 50m of the subject land.

Further as appears in the locality plan prepared by council planning officer, there are a number of "allotments" which appear to be smaller in area than the 300m<sup>2</sup> for certain building forms including group dwellings referred to in the Policy Area 20 table (as set out in PDC 4) which is the relevant PDC as to 'site areas' as the land is within 400m of Centre zone (see further discussion below).

I mention these matters because, as noted below, in assessing the application, the Development Plan is not to be applied in a vacuum, i.e., one has regard to the circumstances that exist within the locality both as to allotment sizes and the built form.

### The proposal

As mentioned, the proposal was assessed as being for five two-storey group dwellings with associated retaining walls and fencing. Whilst there was the separate land division application (associated with the group dwelling proposal) I will not spend much time in relation to that aspect. Rather, I focus this advice on the "true reasons" for the refusal - effectively an over-development of the land in that the CAP says there is an excessive density associated with the proposed.

That relates back to the site area. I understand the total land area to be some 1,450m<sup>2</sup>, with a frontage to Henley Beach Road of 23.8m.

The proposal was for a total of three buildings, the "front" building i.e., fronting Henley Beach Road was in the form of two-storey semi-detached dwellings. To the rear of that building was a single dwelling with double garage (the building in the north-western corner of the land) and there is another building side by side with that building (next to the double garage) which was in the form/appearance of 'semi-detached dwellings', of a two-storey nature. Having regard to the elevations, the whole of the buildings at the rear appear to be being a single building but more accurately it appears that there are two buildings.

In any event, 5 two-storey dwellings are proposed.

The land division plan proposed development lots for each of the dwellings with common property in the form of common driveways – to the east of the front facing dwellings and a common driveway between the front facing dwellings and the 3 dwellings at the rear.

Having regard to the report prepared for the CAP by Council planning officer Ebony Cetinich, the following matters appear:

- the Development Plan seeks a 300m<sup>2</sup> (minimum) site area for dwellings within the Policy Area 20, but here the allotment sizes range from 206m<sup>2</sup> to 257m<sup>2</sup>. However those figures are arrived at by excluding the common property which serves as the driveway for the five dwellings and also accommodates landscaping. In terms of a simple mathematical calculation, on the basis that there should be 300m<sup>2</sup> for each dwelling, the site having 1450m<sup>2</sup>, there is only a shortfall of 10m<sup>2</sup> per dwelling. Put another way, the total shortfall is about 3.3%! That is clearly a very minor shortfall.
- if however one were to allocate only the area exclusively available to each dwelling, the shortfall is in the order of 24% - 30% given the area of the common property.
- from the planners report, I notice that on one view, the site frontage provision is not met and nor is the primary street setback together with some of the side setbacks. However, the building height complies, the internal floor area complies and the private open space provisions in the Development Plan are also satisfied.
- Without detailing the same, there are a range of provisions with which the proposal does not fully comply with whilst a multitude of others are complied with.

### Approach to assessment

The Courts have had to consider how one assesses a development in the context of the *Development Act* and the relevant provisions of the Development Plan.

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The following basic principles emerge:

- although the provisions of the Development Plan are important they are at the end of the day not mandatory; they are couched in the language of "guidelines"<sup>1</sup>;
- the Development Plan is a practical "planning document" rather than a statute. In other words, it is to be approached on the basis that it expresses planning objectives and principles rather than hard and fast rules having mandatory effect<sup>2</sup>;
- the Development Plan is a "practical code calling for practical application"<sup>3</sup>; and
- the Development Plan is not applied in a "theoretical vacuum". The assessment of a proposed development against the provisions of the Development Plan must be undertaken having regard to the factual and historical context in which the proposed development will be implemented, and having regard to relevant surrounding circumstances.<sup>4</sup>

### Reasons for decision

The Decision Notification Form recites that the application was refused for 5 reasons, two of which relate to the low density and the others relate to setback 'non-compliance'.

The question that therefore arises is whether or not the CAP correctly assessed the development against the relevant provisions of the Development Plan and in particular the weight that ought to be attached to the provisions relied on by the CAP in refusing to grant DPC to the application.

Critically, the most important question is how is one to interpret PDC 4 in the Low Density Policy Area 20 which refers to 300m<sup>2</sup>? Does the site area for each (individual) dwelling have to meet the 300m<sup>2</sup> minimum or can one have regard to the whole of the site?

### The Development Plan

I note that in some Development Plans, and to some extent, the West Torrens Development Plan when dealing with group dwellings, residential flat buildings and the like, i.e., where there are a significant number of dwellings, the Development Plan sometimes includes a reference to an 'average' site area. When it comes to that approach one has regard to the total site area rather than the "exclusive area" for the individual dwelling and one 'divides' the total site area by the number of dwellings. That is akin to determining the site area for a detached dwelling or semi-detached dwellings where there is an exclusive site area 'requirement'. In determining the site area in those instances it obviously includes driveways, landscaping etc. The site area simply means all the land irrespective as to how the land is to be used.

The question here is whether there should be a different approach in this matter.

I am mindful of the 2018 decision of Commissioner Rumsby in the ERD Court in the relatively recent matter of *Gregory & Noor v City of Charles Sturt & Anor* which considered a proposal for a number of dwellings in the City of Charles Sturt. In that instance, the land was in the Residential Zone and more particularly within a policy area that nominated or identified minimum dwelling site areas for detached, semi detached and row dwellings.

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<sup>1</sup> *Alexandrina Council v Strath Hub Pty Ltd* [2003] SASC 382 at para 35.

<sup>2</sup> *St Ann's College v Corporation of the City of Adelaide & Renton* (1999) SASC 479

<sup>3</sup> *City of Mitcham v Freckmann* (199) 74 SASR 56

<sup>4</sup> *Courtney Hill Pty Ltd v SAPC* (1990) 59 SASR 259 : *South Australian Housing Trust v Development Assessment Commission and Corporation of the City of Marion* (1994) 63 SASR 35

The site area provision set out a different range of areas depending on the nature of the form of the residential development. The Development Plan included an express provision dealing with the group dwellings and residential buildings which adopted the averaging approach for those form of dwellings.

One of the key factors in that case was the issue of density. As to that issue, the Commissioner said the following:

57. *If the whole of the subject land (2,100m<sup>2</sup>) is included in the calculations this yields an average 350m<sup>2</sup> per dwelling. The average dwelling site area falls[32] to 293m<sup>2</sup> if the tennis court area is excluded. If, on the other hand, all common areas are excluded the average dwelling site area exclusive to each dwelling is 183m<sup>2</sup> per dwelling.[33]*
58. *The key feature distinguishing dwellings in the nature of a residential flat building or group dwelling from the other listed dwelling types is that they do not occupy exclusive, street-fronting, dwelling sites but functionally rely on common areas – typically the driveway and associated landscape areas and often visitor parking. In these circumstances, the term 'average' serves little purpose if the common land is excluded from the calculations.*
59. *Moreover, some residential flat buildings can involve dwellings which do not have any at-ground 'site' ie where occupying floor levels exclusively above the at-ground floor level. It would be a nullity in these circumstances if the common land is excluded from the calculation of average dwelling site areas.*
60. *I prefer the dwelling density assessment of Messrs R, O... to that of Mr .... I consider the proposal conforms to the average dwelling site area given the language of the relevant policy area provisions.  
(my emphasis)*

I acknowledge that in that instance, the Development Plan contained an "averaging provision" and the word "average" does not appear in the table for this particular policy area.

However it is most important to consider the words as underlined in [58] and [59] where the court said "the term "average" serves little purpose if the common land is excluded from the calculations as regards [particularly] group dwellings'.

Those parts of the judgment sit well with my comments above that one includes all of the land including the driveway etc for say a detached dwelling.

I also refer to the decision of the ERD Court involving the City of West Torrens. The decision is *Ward Frasten v City of West Torrens*. In that instance, the land was in Policy Area 21. The Development Plan sought a minimum of 340m<sup>2</sup> for detached dwellings. On this issue, the court said the following:

32. *Mr Mcl... assessed that:*

- 7.2.2 *Residential Policy Area 21 Principle 3 seeks a minimum site area for a detached dwelling of 340 square metres. The Principle seeks an average of 340 square metres for dwellings other than detached dwellings. The use of the words 'average site area' is important. In my opinion, the wording acknowledges that many forms of dwellings defined in the Development Regulations 2008, including group dwellings and residential flat building, do not occupy a site that is held exclusively with the dwelling and that some areas of a development site are shared with other dwellings.*

7.2.3 *In my opinion the average site area, in the circumstances of the Residential Policy Area 21, for the proposed development is simply calculated by dividing the area of the whole of the subject land by the number of dwellings proposed.*

*On this basis, the proposal will result in dwellings with an average site area of 354.3 square metres which is in excess of the minimum average site area expressed in Residential Policy Area Principle 3.*

33. *I see merit in this approach, though I note the narrower approach of Ms Lennon which requires consideration. On her analysis and approach neither the individual lot areas (235, 308 and 273 square metres) meet the guide of a minimum of 340 square metres for detached dwellings (though not strictly applicable to the dwelling types in question), nor the average site area of 340 square metres for other dwelling types – on the basis of excluding the shared common driveway area and averaging the three residential lot areas (235, 308 and 273, average of 272 square metres). Nor on her reasoning does it do so, excluding only the access handle (with some interpretative reliance upon GS Land Division Principle 7 (a)).*
34. *Amongst several methods considered by Ms Lennon, she relied upon a preferred method involving deleting the battle-axe handle area, given the abovementioned Land Division Principle 7(a) – that is deleting an area of some 96 square metres from an overall site area of 1063, providing 967 square metres and averaging three dwellings over that area, producing a 322 square metres average – which was also less than the 340 square metres average area guide.*
35. *On the issue of dwelling/allotment/residential density – purely in terms of site area (not floor area, bulk, setbacks to boundaries, site coverage or private open space considerations, which on many occasions go to make up an overall perception of density) - I have considered and taken into account all of the different methods and approaches and have weighed up the development proposal density factors in the light of RZ and RPA 21 Desired Character statements, all relevant GS, RZ and RPA 21 principles, including the so-called “fit” with existing character and the (dwelling/allotment/residential) densities in the locality. I assess and conclude that there is an adequate degree of compliance by the proposed community lot areas, with the broad intent and with the detailed guides, as well as the locality context (in terms of residential density). Whilst marginal on some basis, I assess the proposed community lot areas and the net or overall densities not to be fatal to potential approval of this development. (my underlining)*

Again, I acknowledge that in that instance, that the word 'average' appeared.

An issue commonly related to the issue of density is that of site coverage. In the matter of *Juczenko v City of Mitcham*, the ERD Court considered the rationale for site coverage guidelines at paras 23 and 24, said:

23. *... One must look at the rationale behind a site coverage guideline and not just accept the 40% guideline as an immutable numerical standard. Site coverage comprises at ground level, the balance between roofed built form and unroofed built form that is open space.*



*It has multiple town planning purposes particularly:*

- *as one element of the density and character of an area;*
- *to allow for landscaping opportunities;*
- *to ensure adequate open space and functional areas for occupants; and*
- *as one element to assist minimising stormwater run-off from new more intensive development.*

24. *In addition, it is only perceived aerially or in three dimensions from external vantage points - in this case, negligibly from the public realm and only to a minor extent from two adjacent sites.*

So applying those comments site coverage has a town planning purpose and is an element of density. By ensuring there is an appropriate site cover will allow for landscaping and adequate open space for the residents noting the POS is met in this instance. Further, the area of common property that seemingly the CAP wishes to not take into account may have little or a negligible impact on the public realm, or put another way, the public would be unaware of how that area is utilized behind the front dwellings.

Another ERD Court case that is relevant is *Karidis Corporation Limited v The Corporation of the City of Marion* which considered in detail density and related issues regarding a retirement village addition. The Court said

- 92 *.... with regard to the specific purposes of limiting site coverage referred to in the extract from Juczenko quoted above, I am satisfied, on Mr Tonkin's evidence, that the subject land has adequate space for landscaping; that the landscaping on the subject land will be consistent with, and an extension of, the established landscaping in the existing retirement village; and that adequate arrangements can be made on the subject land for the detention and management of stormwater. I am further satisfied that sufficient private open space can be provided, taking account of the design of the supported accommodation units, the available open space within the extended retirement village and the likely needs, including storage, of the elderly residents of the proposed development.*

93. *With regard to the question of whether the density of the proposed development accords generally with the Desired Character for Northern Policy Area 13, the character sought is that of "an attractive residential environment containing one and two-storey, low-to-medium density dwellings of a variety of architectural styles". One way of achieving this will be through the redevelopment of appropriate properties "generally at greater densities than that of the original housing". The proposed development would be at a greater density than the present dwelling on the land, it would be two-storey and would contribute to the variety of architectural styles in the locality." (my underlining)*

In this instance those observations apply equally to the development proposed at 428 Henley Beach Rd.

The Court continued

96. *In Odwell v City of Mitcham,[19] Commissioner Turner expressed the opinion that "... whether a development comprises low, medium or high density is a matter of planning judgment ..." and I think that opinion is still sound.*

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*Factors such as the site coverage, the allotment size, the number of bedrooms per dwelling, the number of persons per dwelling and the areas of private and common open space available may all provide useful indicators of density, but density is a relative concept that will often need to be considered in the context of a particular locality. What is regarded as medium density in one part of a city may be regarded as high in another. While some quantitative indicators of density may be available, such as the minimum site areas per dwelling required in this case, **these will not always be decisive in a planning assessment.** One group of residential flat buildings may have dwellings with smaller site areas and floor areas than another but may be better designed so that the consequences in terms of overlooking, overshadowing or other potential impacts of increased density on adjoining land are less. Two storey dwellings may sometimes allow for more attractive and usable open space than single-storey dwellings on similar sized blocks. In some circumstances, proximity to public or common open spaces may substitute to an extent for reduced amounts of private open space on an allotment, while the quality of private open space may be more important than the quantity. In short, there will usually be important qualitative questions to ask about the consequences of introducing a higher density form of development into an existing residential area. This is where Zone Principle 3 is relevant in its reference to dwellings "at densities higher than, but compatible with adjoining residential development".*  
(my emphasis/underlining)

These comments reinforce the correct approach to assessing an application and considering not only the Development Plan but the conditions in the locality.

#### Logical approach

The site provision in Policy Area PDC 4 which seeks 300m<sup>2</sup> for a group dwelling is obviously an important provision. It "provides a guide" as to site area for the form of development proposed, being group dwelling. However, is failure to comply with the provision be fatal, or does it simply form part of the overall assessment?

Accepting the apparent approach of the CAP that the 300m<sup>2</sup> ought to be held 'exclusively', in my opinion, the logic that flows from the approach taken by the Court in the West Torrens case, which is consistent with what was said in the Charles Sturt case referred to above, ought to be applied in this instance despite the fact that the word 'average' is absent. That is reinforced by the other cases that I have mentioned.

Put another way, there is no good reason as to why one would "dismiss" the common property area which is used for driveways and landscaping which also forms part of a site for say a detached dwelling or a semi-detached dwelling merely because in those instances they form part of the 'exclusive site areas'. The driveway and landscaping areas form part of the context/setting of a dwelling, irrespective of what form of dwelling is proposed.

Further in this instance, group dwellings are a form of development expressly desired within the residential zone and more specifically within Low Density Policy Area 20. To apply the figure 300m<sup>2</sup> to an "exclusive area" for group dwellings would result in an extraordinary outcome as the common property area for a group dwelling would play no role as to the site area provision in PDC 4 for Policy Area 20 (and indeed in PDC 3) is identical for a detached, semi detached and group dwellings! It would therefore mean that a far greater site area overall would be required to establish say 3 group dwellings when there was a sharing of the driveway compared to 3 detached dwellings. That cannot have been the intention of the author of the Development Plan.

I note however Land Division PDC 7(a) in the General Section of the Development Plan which reads as follows

**7 Allotments in the form of a battleaxe configuration should:**

- (a) *have an area of at least the minimum site area specified by the zone, policy area or precinct (excluding the area of the 'handle' of such an allotment)*

Is that PDC relevant?

First what is proposed is not allotments in the form of a *battleaxe configuration*. Second and this follows from the above point there is no handle for any of the development (al)lot(ment)s. Third the intent of PDC 7(a) has a planning function - one might propose a handle 3m wide and comprising say 200m<sup>2</sup> and only 'leave available' 100m<sup>2</sup> for development. It would be nonsensical to say the 300m<sup>2</sup> allotment site area would be met when in reality 2/3 of the land would be devoted to access and only access. Here however that is not the case, access being provided via the common property which is also landscaped and provides an appropriate context/setting for the built form development, as does a driveway generally which adds to/forms part of the space around a building. Fourth all Development Plan principles they are advisory, not mandatory or directory.

On balance, in my view the CAP has erred in relying on the density shortfalls as a basis for refusing the application. Properly understood, the application proposes five dwellings on 1450m<sup>2</sup> of land (or thereabouts) providing an average of 290m<sup>2</sup> per dwelling, which is 10m<sup>2</sup> or 3.3% less than the figure mentioned in table 4 for low density Policy Area 20. It is but a minor shortfall and is no good reason why the application should be refused.

**Other reasons for refusal**

The CAP also referred to other reasons for refusal which ultimately come back to the issue of the site area/density. You instruct however that the setback of the dwellings as to front, side and rear boundaries can be altered so as to the comply or more closely align with the Development Plan expectations. On the basis that that will be done, I will not otherwise comment in relation to those reasons for the refusal as issued by CAP.

**Opinion**

Clearly, the reference to 300m<sup>2</sup> site area is an important provision, some might say, a very important provision. But how is it to be applied and is it determinative of the matter?

It can be argued that by reason of the lack of the word "average" in Policy Area 20 PDC 4, the 'exclusive' site area available for each dwelling is 300m<sup>2</sup>. But logically, that means a substantial area of land that typically forms part of the context/setting of dwellings is to be "ignored". That cannot be correct.

**Prospects of success**

For all the reasons set out above, it is my view that an appeal to the ERD Court would have reasonable prospects of success. That said, in recent times, the trend of the Court has been rather conservative and one cannot necessarily anticipate a consent. However, given the opinion expressed herein and the conditions in the locality, the fact that the land is near a centre, the general support for group dwellings and for a range of dwellings within the Residential Zone – see Residential Development General Section objectives 1 - 3 inclusive.

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The fact that the private open space provisions are met, the area devoted landscaping is more than desired by the Development Plan, site coverage seem appropriate etc and the fact that this express form of development is envisaged in Policy Area 20, the appeal ought to be successful.

On that basis, I recommend that an appeal be pursued in the ERD Court against the decision of the West Torrens CAP.

Yours faithfully



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