Reginald Fiora
Land Division: 1 into 2
Boundary Realignment: 3 into 2

Various land parcels at Onkaparinga Road, Grivell Road, Beaumont Road, Gallasch Road and Ambulance Road, Verdun
473/D044/15

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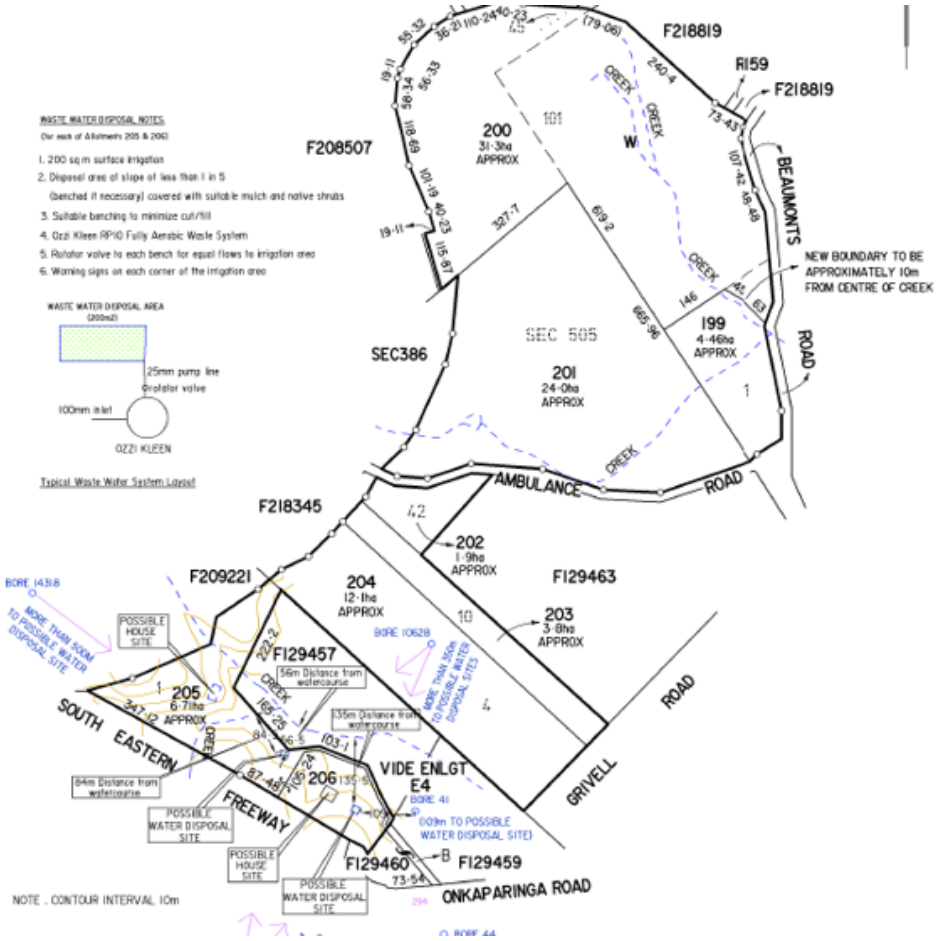

OVERVIEW

Application No	473/D044/15
Unique ID/KNET ID	EDALA 52368; 2017/10917/17
Applicant	Reginald Fiora
Proposal	Division of land – 8 into 8 allotments including: ▪ Northern portion (proposed allotments 199, 200) - boundary realignment (3 into 2) ▪ Southern portion (proposed allotments 205, 206) - A land division (1 into 2) creating one additional allotment.
Subject Land	Various land parcels at Onkaparinga Road, Grivell Road, Beaumont Road, Gallasch Road and Ambulance Road, Verdun
Zone/Policy Area	Watershed (Primary Production) Zone, Onkaparinga Slopes Policy Area 11
Relevant Authority	State Commission Assessment Panel >10% variation in the MLR Watershed
Lodgement Date	9 October 2015
Council	Adelaide Hills Council
Report Author	Laura Kerber, Senior Planning Officer
RECOMMENDATION	REFUSAL (Environment and Food Production Area)

EXECUTIVE SUMMARY

The proposed development is for a division of land – 8 into 8 allotments including two:

- northern portion (proposed allotments 199, 200) - a boundary realignment (3 into 2) with no additional allotments created
- southern portion (proposed allotments 205, 206) - a land division (1 into 2) creating one additional allotment.

The boundaries of the four central allotments are not proposed to be changed.

The land division in the southern portion seeks to create an additional allotment within an Environment and Food Production Area (EFPA).

Section 7(5)(d) of the *Planning, Development and Infrastructure (PDI) Act 2016*, which came into operation on 1 April 2017, requires a relevant authority to refuse development authorisation to a proposed development within an EFPA that involves a division of land which would create one or more additional allotments to be used for residential development. The development application was lodged on 9 October 2015, prior to the introduction of the *PDI Act 2016* and establishment of the EFPA, however, the application had not been granted development plan consent or development authorisation as at 1 April 2017.

The effect of the transitional provisions of the PDI Act 2016 is that section 7 of the PDI Act applies as if it forms part of the *Development Act 1993*. It provides:

> *The following provisions will apply in relation to a proposed development in an environment and food production area that involves a division of land that would create 1 or more additional allotments:*
>
> *(a) a relevant authority, other than the Commission or the Minister, must not grant development authorisation to the development unless the Commission concurs in the granting of the authorisation;*

(b) if the Commission is the relevant authority, the Commission must not grant development authorisation to the development unless the council for the area where the proposed development is situated concurs in the granting of the authorisation;

(c) no appeal lies against a refusal by a relevant authority to grant development authorisation to the development or a refusal by the Commission or a council to concur in the granting of such an authorisation;

(d) if the proposed development will create additional allotments to be used for residential development, the relevant authority must refuse to grant development authorisation in relation to the proposed development;

(e) a development authorisation granted in relation to the proposed development will be taken to be subject to the condition that the additional allotments created will not be used for residential development.

Section 7(5)(d) requires the relevant authority to refuse development involving the division of land if it will create additional allotments to be used for residential development.

It is considered that the proposed division of land in the southern portion will involve a division of land that would create an additional allotment to be used for residential development based on information supplied by the Applicant about the proposed uses of the land together with an objective assessment of the use that will result from the division of land.

It is therefore recommended that the State Commission Assessment Panel resolve to REFUSE the application as required by Section 7(5)(d) of the *PDI Act 2016*.

ASSESSMENT REPORT

1. BACKGROUND

The application was lodged on 9 October 2015 as an 8 into 8 boundary realignment at Verdun with the Watershed (Primary Production) Zone.

The application involved eight (8) contiguous allotments and sought to transfer the development right from one allotment to another (with four unaltered allotments in the middle separating the proposed re-arrangement of title boundaries at either end).

The centrally located allotments were included to demonstrate a degree of contiguity and allow the proposal to be lodged in a single Plan of Division. The original 'merit' categorisation was reviewed by the former Development Assessment Commission, with advice received that the nature of development included two discrete elements:

- A boundary realignment (3 into 2) with no additional allotments created
- A land division (1 into 2) creating one additional allotment

The creation of additional allotments within the Watershed (Primary Production) Zone was a 'non-complying' form of development and the application categorised accordingly.

The applicant commenced review proceedings against the non-complying categorisation in the Environment, Resources and Development Court, which was dismissed on 15 May 2016. A further appeal was made to the Full Court of the Supreme Court, which was subsequently dismissed on 19 May 2017.

At the request of the applicant, the statutory process then recommenced. DPTI-Planning staff resolved to proceed with an assessment of the application, and an amended Statement of Effect was provided by the applicant. Statutory referrals were made to the Adelaide Hills Council and relevant state agencies, and a public notification process commenced.

It was at this time the Adelaide Hills Council (though supportive of the proposal) sought clarification on whether the *Planning, Development and Infrastructure (PDI) Act 2016* applied to the division, with specific reference to whether or not the EFPA provisions could be applied to applications which had been lodged prior to, but not determined by, 1 April 2017.

2. DESCRIPTION OF PROPOSAL

Application details are contained in the ATTACHMENTS.

The essential nature of the development includes two (2) discrete elements:

- A boundary realignment (3 into 2) with no additional allotments created: affecting existing Allotment 1 in DP 18164, Allotment 101 in DP 77335, and Allotment 45 in FP 129499, located at the northern end of the allotment string.

  The existing three allotments will be rearranged in two allotments, proposed Lots 199 and 200, with areas of 30.7ha and 4.46ha respectively.

- A land division (1 into 2) creating one additional allotment: affecting existing Allotment 1 in FP 129455 at the southern end of the allotment string.

  Allotment 1 will be divided into two allotments, proposed Lots 205 (6.71ha) and 206 (2.54ha). Vehicular access to proposed Lots 205 and 206 is provided via an existing Right of Way across an adjoining allotment to Onkaparinga Road.

The two elements are separated by a series of four (4) intervening allotments. The intervening allotments are not altered in any way by the Plan of Division (except to be assigned new legal descriptors).

3. DETERMINATION OF PROPOSED LAND USE (LAND DIVISION)

Section 33(1) of the *Development Act 1993* provides the matters against which a relevant authority must assess a development application. For a division of land this includes consideration of whether the allotments resulting from the division of land may be lawfully used for the purposes proposed by the Applicant.

Further, Section 7(5)(d) of the *PDI Act 2016* requires the relevant authority to consider the future use of new allotments in assessing whether the criteria in Section 7(5)(d) are met. Section 7(18) of the *PDI Act 2016* defines 'residential development' as:

> ***Residential development*** *means development primarily for residential purposes but does not include—*
>
> *a) the use of land for the purposes of a hotel or motel or to provide any other form of temporary residential accommodation for valuable consideration; or*
> *b) a dwelling for residential purposes on land used primarily for primary production purposes.*

In this regard, consideration has been given to the proposed future use of the new allotments created by the subdivision of Allotment 1 in FP 129455based on the information provided by the Applicant, and on the physical characteristics of the subject land.

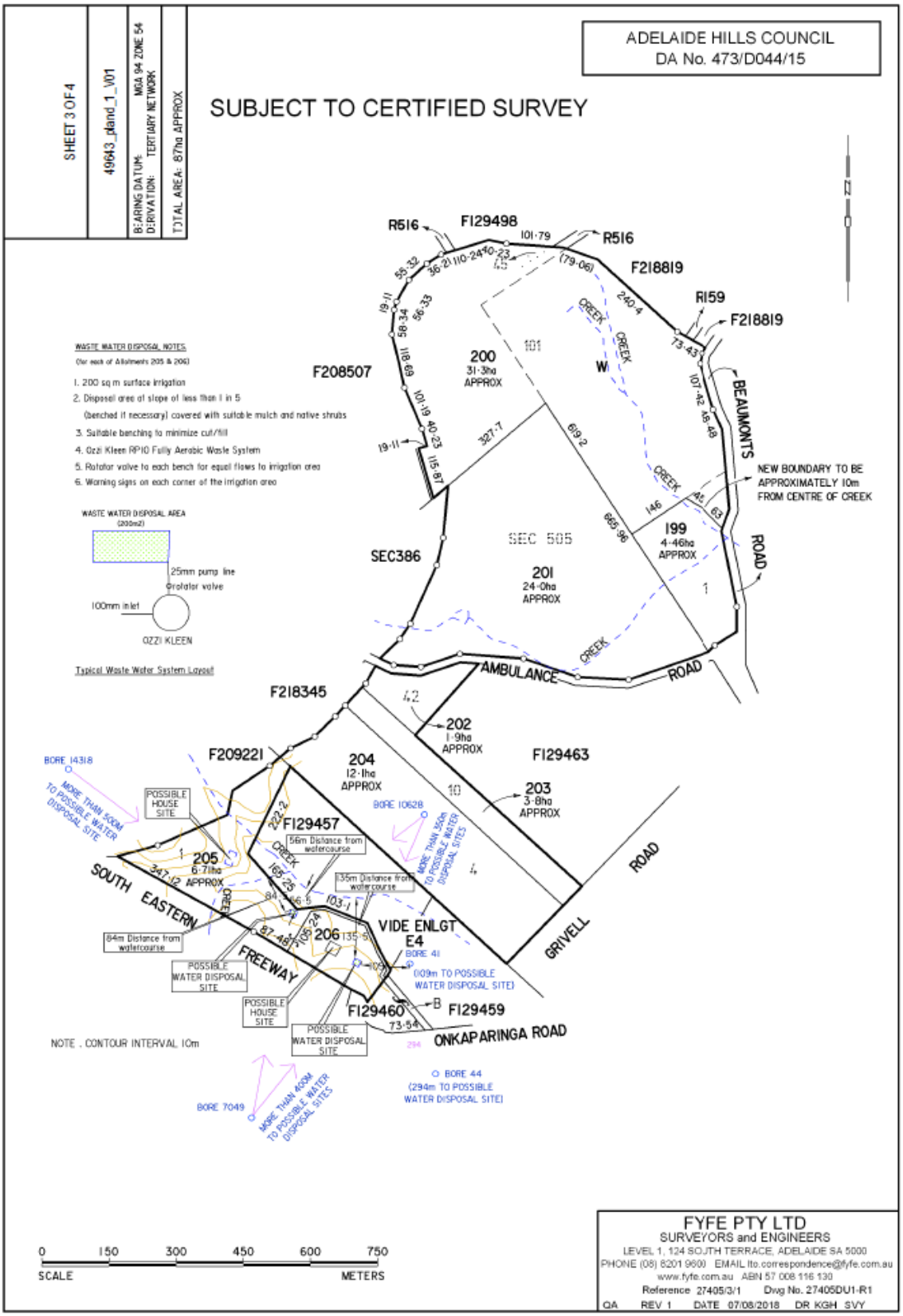

Figure 1: Plan of Division

The subject land is an irregular shaped allotment (approximately 9.25ha) bordered by the Freeway to the south and railway line to the northwest. It is land locked and accessed from Onkaparinga Road via a right of way over a neighbouring property (Lot 6). There are no existing dwellings on Lot 1. In the north-western corner is a rehabilitated rock quarry which is cleared of trees and incorporates a level area adjacent a creek. A disused weighbridge remains on site.

The physical characteristics of the land make it unsuitable for supporting a primary production enterprise for the following reasons:

- Local topography: the land generally slopes upwards towards the freeway, with a series of ridges and gullies moving from Onkaparinga Road to the railway line.
- Native vegetation: the subject site is well vegetated and comprises two (2) Significant Environmental Benefit (SEB) areas set aside for the conservation of native flora. The SEB areas were established as on-ground offsets for approved clearance undertaken in relation to subdivision infrastructure at Hallett Road Littlehampton by the Fiora Group in 2011 and 2015.
- Size: proposed Lot 205 (2.54ha) and Lot 206 (6.71ha) are of a size which is unlikely to support a primary production enterprise.

The documentation provided by the Applicant generally supports this conclusion (pg 14, Planning Chambers, 18.12.15):

> *Lots 205 and 206 are not suitable for primary production purposes other than in the form of low intensity grazing as the allotments would have to be almost entirely cleared of native vegetation for substantive primary production activity to occur.*

However, the written submission submitted on behalf of the applicant by Botten Levinson (ATTACHMENT 3) indicates that the new allotments "can and will be used primarily for primary production. Such uses can include grazing, floriculture, bee-keeping, animal husbandry to name but a few."

The documentation provided by the Applicant includes numerous references to a future residential land use on proposed Lots 205 and 206. The Plan of Division identifies potential dwelling and wastewater treatment sites and technical investigations have been submitted to support the suitability of the land for this purpose.

The application documentation does not specifically contemplate any alternate land use such as tourist accommodation. However, the written submission submitted on behalf of the applicant by Botten Levinson (ATTACHMENT 3) indicates that the new allotments "could be developed/used for such a purpose."

No application for temporary residential accommodation has been made or approved in relation to the land. Such a use, under the applicable Development Plan, would itself be a non-complying form of development (as could not meet any of the exemptions under PDC70 of the Watershed (Primary Production) Zone, which seeks the re-purposing of existing buildings or heritage places or where such a land use has already been established (and then subject to further qualifications).

It is considered that the application provides sufficient information for the relevant authority to be satisfied that the proposed development will create an additional allotment to be used for residential development, contrary to the intention of section 7(5)(d) of the PDI Act 2016. Further, it is not considered that the SCAP has before it sufficient information to be satisfied that the proposed land use meets any of the exclusions from the definition of 'residential development' as provided in section 7(18) of the *PDI Act 2016.*

4. SITE AND LOCALITY

The subject land is located at Onkaparinga Road, Beaumont Road, Ambulance Road, Grivell Road and Gallasch Road, Verdun, and is described as follows:

Lot No	Section	Street	Suburb	Hundred	Title
A45, F129499	-	Lot 45 Gallasch Road	Verdun	Onkaparinga	CT 5465/524
A101, D77335	-	143 Beaumont Road	Verdun	Onkaparinga	CT 6020/59
H105600	S505	34 Ambulance Road	Verdun	Onkaparinga	CT 5666/31
A1, D18164	-	83 Beaumont Road	Verdun	Onkaparinga	CT 5701/727
A42, F217949	-	Lot 42 Beaumont Road	Verdun	Onkaparinga	CT 5885/776
A10, F129464	-	39 Grivell Road	Verdun	Onkaparinga	CT 5809/533
A4, F129458	-	19 Grivell Road	Verdun	Onkaparinga	CT 5809/663
A1, F129455	-	Lot 1 Onkaparinga Road	Verdun	Onkaparinga	CT 5274/987

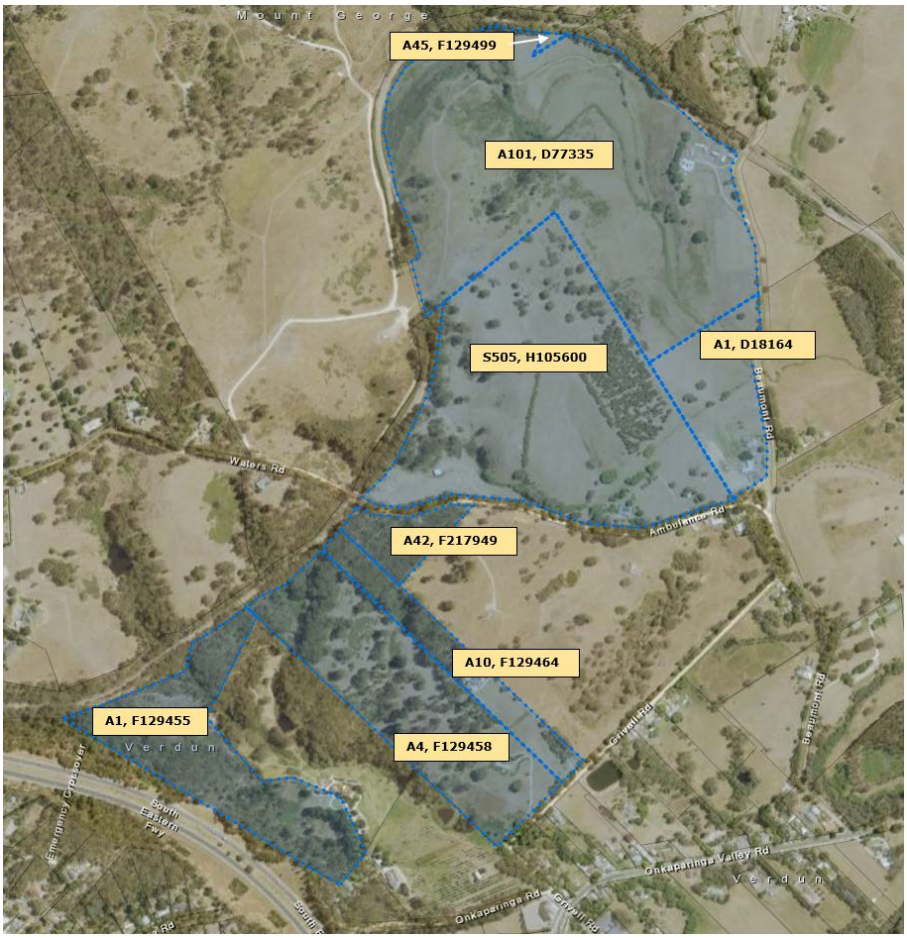

Figure 2: Site Plan

5. POLICY OVERVIEW

Section 7 of the *PDI Act 2016* established the EFPAs to ensure that areas of rural, landscape, environmental or food production significance are protected from further urban encroachment by restricting the creation of new allotments.

The relevant EFPA came into operation on 1 April 2017 (the 'designated day') under Section 7(1) the *PDI Act 2016*. Section 7(5)(d) provides that if the proposed development involves

a division of land which will create one or more additional allotments to be used for residential purposes, the relevant authority must refuse to grant development authorisation.

The transitional provisions of the *PDI Act 2016* provided a two-year sunset period allowing land division applications within rural living areas (which complied with the zoning rules in place as at 1 December 2015) to be lodged before 1 April 2019. Such applications could be assessed in the previous manner – i.e. on their merits.

The transitional provisions also stipulate that section 7(5) does not apply to land divisions that were granted a development plan consent and development authorisation under the *Development Act 1993* prior to the designated day or the expiration of the designated transitional period, as appropriate. An application which had not been granted a development plan consent and development authorisation before the designated day or expiration of the designated transitional period would therefore be subject to section 7(5) of the *PDI Act 2016*.

6. DISCUSSION

The proposed development is located wholly within an EFPA and is not within a designated rural living area. The land division proposes the creation of one additional allotment.

Following a review of the matter, it was determined that:

- It is considered that Parliament intended Section 7(5) of the *PDI Act 2016* to operate immediately from the designated day, including in relation to applications submitted before the designated day that do not otherwise fall within a specific exception.

- Specific exceptions from Section 7(5) are detailed in Clause 8, Schedule 8 of the *PDI Act 2016*. The proposed development does not meet any of these exceptions.

- As the proposed development had not been granted development plan consent or development authorisation under the *Development Act 1993* as at 1 April 2017, Section 7(5) of the PDI Act 2016 is considered to apply to the proposed development.

- The application includes two discrete developments, one of which involves the division of land which would create an additional allotment within an EFPA to be used for residential development based on information supplied with the application and the particular characteristics of the site.

- As it is considered that the development application involves the creation of an additional allotment within an EFPA to be used for residential development, it must be refused pursuant to Section 7(5)(d) of the *PDI Act 2016*.

No right of appeal exists against a refusal in accordance with section 7(5)(c) of the *PDI Act 2016* and as the application is for a non-complying form of development. However, it is noted that the applicant – through Botten Levinson – has contested the retrospective application of Section 7(5) of the *PDI Act 2016* and further submitted that, in the event that section 7(5) does apply, the proposed development does not fall within the scope of section 7(5)(d) of the *PDI Act 2016* because:

- it encompasses both a land division (1 into 2 allotments) and boundary realignment (3 into 2 allotments) and there would remain the same number of total allotments at the end of the development process; and

- the application does not also seek consent for building development, and so any future use of the new allotments for residential development would be matter for a future owner, or alternatively, the new allotments can be used for primary production purposes.

A copy of the applicant's legal advice and further written submissions is provided in ATTACHMENTS 2 and 3.

7. CONCLUSION

Based on the explanation set out above, it is considered that the merits of the application do not require further consideration on the application of section 7(5)(d) of the *Planning, Development and Infrastructure Act 2016* to the development application.

The SCAP remains the relevant authority to issue this decision pursuant to Section 29(1)(a) of the *PDI Act 2016*.

8. RECOMMENDATION

It is recommended that the State Commission Assessment Panel:

1) RESOLVE to REFUSE to grant Development Plan Consent (and Land Division Consent) to the proposal by Reginald Fiora for a Land Division (1 into 2) and Boundary Realignment (3 into 2) at Onkaparinga Road, Grivell Road, Beaumont Road, Gallasch Road and Ambulance Road, Verdun (various land parcels) for the following reasons:

    - The development involves a division of land which would create one additional allotment to be used for residential development within an Environment and Food Production Area (EFPA) established under Section 7(1) of the *Planning, Development and Infrastructure (PDI) Act 2016*.

    - Section 7(5) of the *PDI Act 2016* applies specific criteria to a proposed development within an EFPA area involving the division of land that would create one of more additional allotments, including (d) if the proposed development will create additional allotments to be used for residential development, the relevant authority must refuse to grant development authorisation in relation to the proposed development.

    - The application is not offered relief from the transitional provisions which modify the operation of Section 7(5) as detailed in Clause 8 of Schedule 8 of the *PDI Act 2016* and must therefore be refused.

    Advisory Notes

    a. The applicant has no right of appeal against this refusal.

Laura Kerber
SENIOR PLANNING OFFICER
PLANNING AND LAND USE SERVICES (DPTI)

PURPOSE:	DIVISION	AREA NAME:	VERDUN	APPROVED:	
MAP REF:	6628/48/N, 6627/03/D	COUNCIL:	ADELAIDE HILLS COUNCIL		
LAST PLAN:		DEVELOPMENT NO:	473/D044/15/001	DEPOSITED/FILED:	SHEET 1 OF 4
					49643_text_01_v01

AGENT DETAILS: FYFE PTY LTD
LEVEL 1, 124 SOUTH TERRACE
ADELAIDE SA 5000
PH: 82019600
FAX:

AGENT CODE: ALRF

REFERENCE: 27405/3/1 DU1-R1

SURVEYORS CERTIFICATION:

SUBJECT TITLE DETAILS:

PREFIX	VOLUME	FOLIO	OTHER	PARCEL	NUMBER	PLAN	NUMBER	HUNDRED / IA / DIVISION	TOWN	REFERENCE NUMBER
CT	5465	524		ALLOTMENT(S)	45	F	129499	ONKAPARINGA		
CT	6020	59		ALLOTMENT(S)	101	D	77335	ONKAPARINGA		
CT	5666	31		SECTION(S)	505			ONKAPARINGA		
CT	5885	776		ALLOTMENT(S)	42	F	217949	ONKAPARINGA		
CT	5809	533		ALLOTMENT(S)	10	F	129464	ONKAPARINGA		
CT	5274	987		ALLOTMENT(S)	1	F	129455	ONKAPARINGA		
CT	5809	663		ALLOTMENT(S)	4	F	129458	ONKAPARINGA		
CT	5701	727		ALLOTMENT(S)	1	D	18164	ONKAPARINGA		

OTHER TITLES AFFECTED:

EASEMENT DETAILS:

STATUS	LAND BURDENED	FORM	CATEGORY	IDENTIFIER	PURPOSE	IN FAVOUR OF	CREATION
EXISTING		LONG	EASEMENT(S)	C IN D77335		200 MARKED W	RT 6935605
EXISTING	205.206	SHORT	FREE AND UNRESTRICTED RIGHT(S) OF WAY	A			
EXISTING		SHORT	FREE AND UNRESTRICTED RIGHT(S) OF WAY	B		205.206	

SHEET 2 OF 4

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ANNOTATIONS: ALLOTMENT(S) 201 TO 204 INCLUSIVE (CT 5666/31, CT 5885/776, CT 5809/533, CT 5809/663) DO NOT FORM PART OF THIS DIVISION.

SHEET 3 OF 4

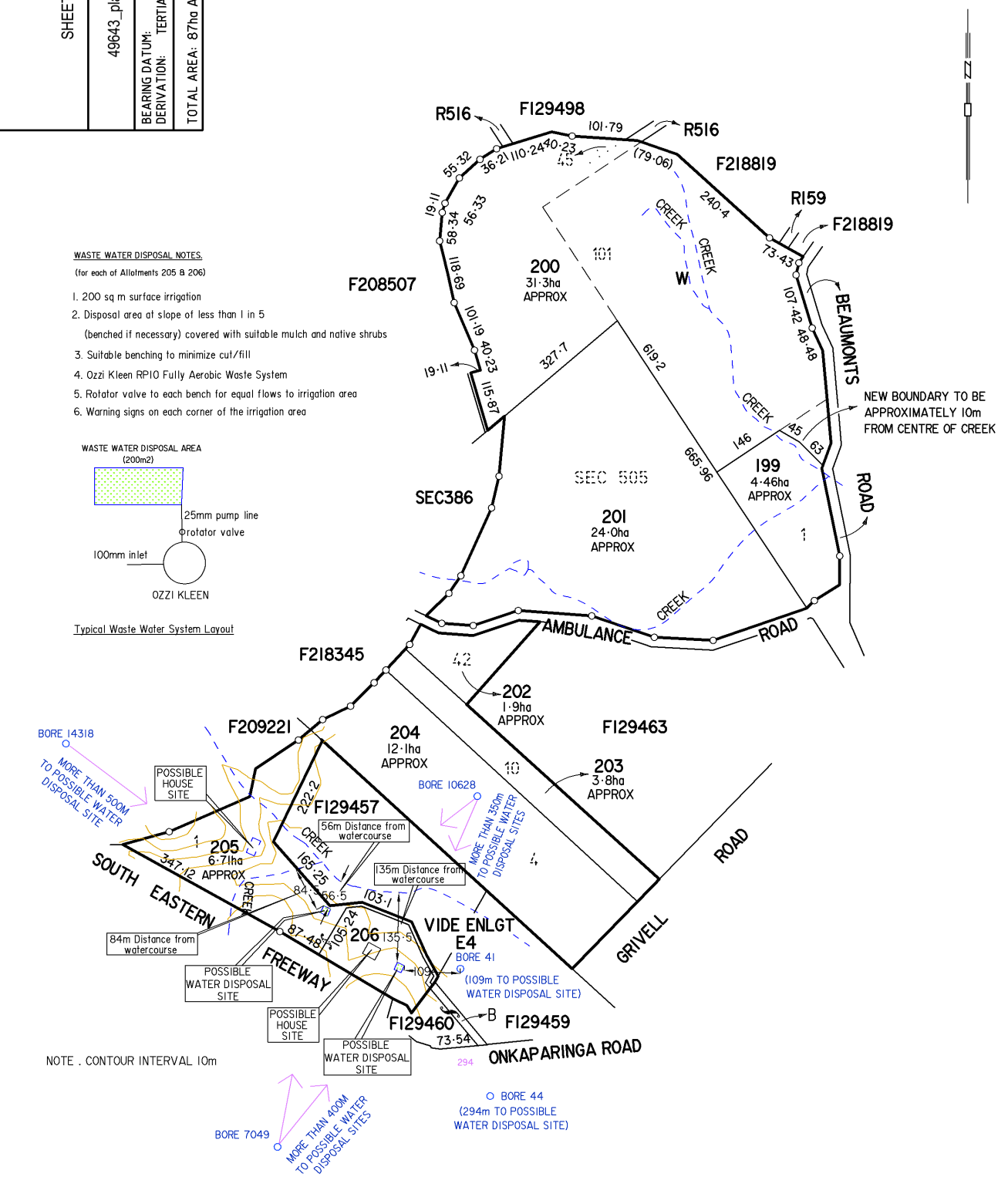
49643_pland_1_V01

BEARING DATUM: MGA 94 ZONE 54
DERIVATION: TERTIARY NETWORK

TOTAL AREA: 87ha APPROX

ADELAIDE HILLS COUNCIL
DA No. 473/D044/15

SUBJECT TO CERTIFIED SURVEY



WASTE WATER DISPOSAL NOTES.

(for each of Allotments 205 & 206)

1. 200 sq m surface irrigation
2. Disposal area at slope of less than 1 in 5 (benched if necessary) covered with suitable mulch and native shrubs
3. Suitable benching to minimize cut/fill
4. Ozzi Kleen RP10 Fully Aerobic Waste System
5. Rotator valve to each bench for equal flows to irrigation area
6. Warning signs on each corner of the irrigation area

Typical Waste Water System Layout

0 150 300 450 600 750

SCALE METERS

FYFE PTY LTD
SURVEYORS and ENGINEERS
LEVEL 1, 124 SOUTH TERRACE, ADELAIDE SA 5000
PHONE (08) 8201 9600 EMAIL lto.correspondence@fyfe.com.au
www.fyfe.com.au ABN 57 008 116 130

Reference 27405/3/1 Dwg No. 27405DU1-R1

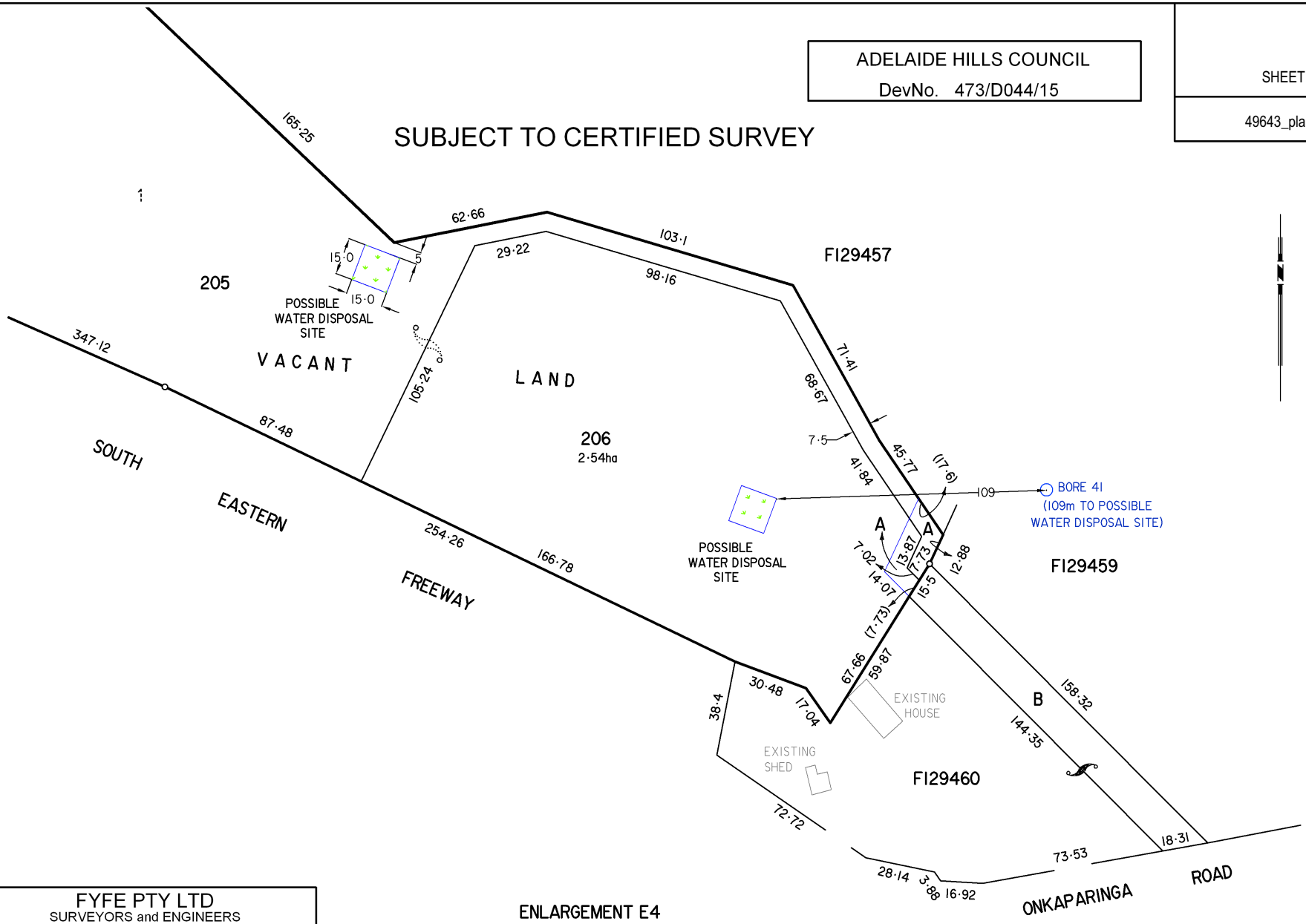
QA REV 1 DATE 07/08/2018 DR KGH SVY

ADELAIDE HILLS COUNCIL
DevNo. 473/D044/15

SHEET 4 OF 4

49643_pland_2_V01

SUBJECT TO CERTIFIED SURVEY



ENLARGEMENT E4

0 50 100 150
SCALE METRES

FYFE PTY LTD
SURVEYORS and ENGINEERS
LEVEL 1, 124 SOUTH TERRACE, ADELAIDE SA 5000
PHONE (08) 8201 9600 EMAIL lto.correspondence@fyfe.com.au
www.fyfe.com.au ABN 57 008 116 130

Reference 27405/3/1 Dwg No. 27405DU1-R1
QA REV 1 DATE 07/08/2018 DR KGH SVY

ATTACHMENT 2: LEGAL ADVICE BOTTEN LEVINSON – 13 MAY 2019

From: George Manos [mailto:gm@bllawyers.com.au]
Sent: Monday, 13 May 2019 10:33 AM
To: Neldner, Simon (DPTI) <Simon.Neldner@sa.gov.au>; jeff@planningchambers.com.au
Cc: Kleeman, Robert (DPTI) <Robert.Kleeman@sa.gov.au>
Subject: Fiora Land Division assessment - DA 473/D044/15 - interaction of PDI Act and EFPA restrictions
Importance: High

Dear Simon,

Thanks for your email below – or should I say I wish I could say thanks!

Your email was in response to the email sent by Jeff Smith to you in December 2018 after an issue arose as to whether or not as a matter of law the application may be granted 'planning consent' because the land the subject of the land division application is within the Environment Food and Production Area (EFPA).

The issue has arisen because of the terms of section 7 of the *Planning Development and Infrastructure Act* (**the PDI Act**) which came into operation, or at least parts of it, in April 2017. The effect of section 7 is that a land division creating allotments for residential development cannot be approved if the land that is within the Environment Food and Production Area (**EFPA**).

In your email you have expressed the opinion that the application can no longer be the subject of a merits application because of the "prohibition" contained in section 7(5)(d) of the PDI Act. In particular, you go on to say that the effect of the PDI Act – section 7 and clause 8, schedule 8 to that Act have:

> "*the effect of partially displacing, amending or repealing section 53 of the Development Act 1993"*. (the current Act).

I do not agree.

Statutory Interpretation

I have the considered the rules in relation to Statutory Interpretation etc. In particular, I have had regard to the leading textbook on that topic being "Statutory Interpretation in Australia" by *Pearce and Geddes*.

The assumption in Australia is that legislation is not retrospective in its application, unless there is some clear statement to the contrary. In other words, an Act will be assumed to have a prospective operation.

According to *Pearce*, the most frequently cited statement relevant principle is from the High Court case in *Fisher v Hebburn* where the following was said

> *There can be no doubt that the general rule is that amending enactment – or, for that matter, any enactment – is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts, or events which occurred before its commencement.*

Critically here is whether or not the effect of sec 7(5)(d) of the *PDI Act* has, using your words, *partially displaced, amended or repealed* section 53 of the current Act. That section is relevant in two respects –

> *(1) Where an application is made for a development authorisation under this Act, the law to be applied in deciding the application and the law to be applied in resolving any issues arising from the decision in any proceedings (whether brought under this Act or not) is the law in force as at the time the application was made.*
> *(2) The provisions of a Development Plan that are relevant to the consideration of an application for a development plan consent and to the resolution of issues arising in subsequent proceedings based on that application (whether brought under this Act or not) are the provisions of the relevant Development Plan as in force at the time the application was made.*

I think you will agree that there is no express provision in the *PDI Act* which seeks to amend section 53.

The Application and the Law relating to Prospective Operation of an Act

The application was made in 2015, well before the *PDI Act* was passed by Parliament, let alone came into operation. The EFPA referred to in sec 7 of the PDI Act is that as of 1 December 2015, again after the land division application was made.

The land division application is being treated as non-complying. However, under sec 53(1) as set out above, the law to be applied to the application is the law in force as at the date – October 2015. Thus, Mr Fiora accrued rights to have his application approved in accordance with the law in force at that time which permitted not only the processing and the assessment against the provisions of the Development Plan in force as at that date but also the legal right to have the application approved.

The courts have considered whether or not the presumption against retrospectivity can be set aside. Obviously it can. However, the courts have also said that when a person has acquired rights, the courts are most reluctant to apply retrospective application to legislation. Quoting again from *Pearce*, the case that is directly applicable is that of *Coleman v Shell Co of Australia Ltd*, being a decision of the New South Wales Court of Appeal. In that case the following was said:

> *"… as regards any matter or transaction, if events have occurred prior to passing of the Act which has brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transactions as regards the creation of further particular rights or liabilities*". (my emphasis)

As I say pursuant to section 53 of the current Act, Mr Fiora was legally entitled - thus had a right - to have his application granted development plan consent.

By further reference to *Pearce*, the Court's presumption that an Act does not have retrospective operation is based on a quote from a 1957 High Court case where the High Court said:

> *"upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation"*.

In more recent times, the SA Supreme Court has also had to consider the issue of retrospectivity of legislation. In the 2017 decision of *Diakou*, after considering the rules set out above, the Court went on to consider another High Court decision. At [39] the SA Supreme Court quoted the following passage from the High Court:

> *"The presumptive rule of construction is against reading a statute in such a way as to change accrued rights the title to which consists in transactions passed and closed or in facts or events that have already occurred. In other words, liabilities that are fixed, or rights that have been obtained, by the operation of the law upon facts or events for, or perhaps it should be said against, which the existing law provided are not to be disturbed by a general law governing future rights and liabilities unless the law so intends, appears with reasonable certainty."*

As a say, Mr Fiora obtained certain legal rights namely, that his land division application could be granted development plan consent which rights were obtained "by the operation of the law – section 53 (1) of the current Act.

Further, the *Diakou* case went on to consider yet another recent High Court case (where that Court again quoted from another earlier decision of the High Court) where the following rule was expounded:

> *"It is a settled rule of construction of Statutes that a law is not to be construed as retrospective in its operation unless the legislature has clearly expressed that intention and a further rule that is not to be construed as retrospective to any greater extent than the clearly expressed intention that the legislature indicates".*

Properly considered there is no express intention in the *PDI Act* to alter in any way sec 53 of the current Act. Put another way I cannot see any provision in the *PDI Act* nor in sec 7 itself as to why section 7 of the *PDI Act* is to be given *retrospective application* when it will be contrary to the law as clearly set out above, as referred to in *Pearce*, and as referred to in the Supreme Court decision in *Diakou*.

As indicated above a question on unjustness arises. Certain cases make express reference to that concept or the expanded concept as to whether unfairness or injustice arises. There are judgements from the UK to that effect. However, the High Court seems to have taken a slightly narrower view - the question being approached based on the "*established rules of interpretation*" but in any event they should be applied in such a way that they "*will mitigate or minimise the effects of the statute, from a date prior to its enactment, ... upon existing rights and obligations*".

Further in that context I also refer to the 2012 SA Supreme Court decision of *Bell v Police.* After quoting some of the passages set out above, the Court went on to consider the retrospectivity of legislation attaching new legal consequences to facts or events which have occurred before its commencement. The Supreme Court relevantly said:

> "*That is to say, legislation does not operate retrospectively if it imposes rights or obligations by reference to both antecedent and subsequent conduct or circumstances*".
>
> "*In this narrower sense a statute operates retrospectively if all of the conditions, facts and circumstances on which it operates occurred before its enactment*".

Suffice to say, there was no EFPA in existence nor any legislative provision similar to Section 7 of the PDI Act when Mr Fiora proposed his land division. Indeed to the contrary - sec 53 of the current Act permitted the application being granted development plan consent

Further, in the Bell case the SA Supreme Court also said the following:

> "*The injustice of retrospective legislation and its inconsistency with the general concept of the rule of law rests, fundamentally, in the denial of a person's capacity to make an informed choice about how to conduct his or her affairs in a way which will either fall within, or outside of, the scope of the legislation*."

What that means in this instance is why Mr Fiora continued with his land division application or put another way why 'make' an application if the application could not be granted consent. In that regard sec 7 of the *PDI Act* has operated for some time. I do not need to explain to you there is a major distinction between an application which cannot be granted consent, which is the view that you have taken, as expressed in your email (with which I do not disagree with as set out herein) and an application that can be made which can be approved, even though it might be for a non-complying development.

In addition to the above legal discussion, one can also have regard to the *Acts Interpretation Act*.

Summary

In all the circumstances, I respectfully disagree with the opinion that you expressed. To the contrary, there is nothing in the *PDI Act* which has the effect of in any way displacing, amending or repealing section 53 of the *current Act*. Mr Fiora acquired legally rights pursuant to sec 53(1) such that his application could (legally) be granted consent. To contend that sec 53 of the current Act has been *partially displaced, amended or repealed* by the new *PDI Act* is simply not supported

- by the terms of that Act itself,
- sec 53 of the current Act which applied and continues to apply to the application, and
- the principles of statutory interpretation which generally speak of protecting rights accrued under previous legislation.

Thus for all these reasons, I agree with the sentiments expressed by Jeff Smith in his email that Mr Fiora is entitled to have this application determined as a consent use application and that (section 7 of) the *PDI Act* simply has no application to Mr Fiora's land division application. In short that is made clear because of a number of factors including:

1. The rights that have accrued under section 53 of the *current Act* including most importantly the legal right that the application can be granted development plan consent;

2. The right to have his application assessed in accordance with the relevant Development Plan in force at the time the application was made, and

3. The on-going legal entitlement to ensure his application can be approved because to take a different position would be to impact adversely ie, in a negative way, the rights that have accrued to Mr Fiora which if lost would result in an unjust outcome ie meaning unfairness or injustice as referred to in the cases discussed above.

In all of the circumstances, I therefore ask you to reconsider the matter and to treat the application as a non-complying application but one which can nonetheless be granted

development plan consent, land division consent etc as (section 7 of) the PDI Act has no application to Mr Fiora's land division application.

Please advise if you require any further information.

Response Requested

If you do (rightly!) accept this response as a correct statement of law I presume the DA will be submitted to SCAP at the first available opportunity. If however you do not accept this advice please advise immediately and the reasons why and in particular advise clearly and concisely the words used in the PDI Act to support your contention that sec 53 of the current Act has been *partially displaced, amended or repealed* by the new *PDI Act* so as to give it retrospective application. My client will then consider what action will be taken given that my client has come this far and at long last has the support of the Adelaide Hills Council.

I await positive news from you.

Finally please note I am on leave for 6 weeks from early June and I would like to think this is well and truly wrapped up by then.

Regards

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3 March 2020

Mr Jeff Smith
Planning Chambers Pty Ltd
219 Sturt Street
ADELAIDE SA 5000

By email: jeff@planningchambers.com.au

Dear Jeff

Response to State Commission Assessment Panel in relation to DA 473/D044/15 - Land division one into two allotments and three into two allotments (non-complying) at South Eastern Freeway, Verdun

You have sought my comments and advice in response to a letter dated 4 February 2020 addressed to the applicant via you as his planning consultant from the State Commission Assessment Panel (SCAP). SCAP has invited the applicant to *provide any additional information in relation to the application of Section 7 of the Planning, Development and Infrastructure (PDI) Act 2016 before the above application is further considered by SCAP*.

This letter responds to that invitation.

Before responding in detail it is helpful to recall the events that have occurred via a brief chronology.

Brief Chronology

DA 473/D064/10 - initial application

1. The initial application 473/D064/10 – was processed by the Development Assessment Commission but was opposed by the Adelaide Hills Council.

2. An issue arose as to whether the application was non-complying. Proceedings were taken in the ERD Court. The Court ruled the application was non-complying.

3. The initial application was then put on hold pending the lodgement of a new application.

DA 473/D044/15 - current application

4. On 9 October 2015 a new development application was lodged ie before the EFPA was gazetted.

5. SCAP treated the application as non-complying.

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6. An appeal was filed in the ERD Court. It upheld the SCAP ruling.

7. The appellant appealed to the Full Supreme Court. The Full Supreme Court, by a majority, ruled that the application was for a non-complying development.

8. Following the completion of the Full Court appeal process, a brief Statement in Support, in accordance with Regulation 17, was submitted by Planning Chambers on 22 June 2018.

9. On 26 July 2018 SCAP advised Planning Chambers that SCAP had resolved to proceed with an assessment of the application and sought a Statement of Effect.

10. A Statement of Effect was submitted to SCAP in September 2018.

11. The application was referred to the Adelaide Hills Council by SCAP. In November 2018 the Adelaide Hills Council formally resolved to support the new application.

12. SCAP also advertised the application as a Category 3 development. A number of representations were received. Planning Chambers lodged a response to representations dated 23 November 2018.

13. As from that date there was nothing in the Development Act which prevented the application being determined on its merits.

Section 7 of the PDI Act

14. In December 2018, SCAP Officers informally raised the issue as to whether the current application could be approved by reason of Section 7(5) of the PDI Act (and clause 8 of schedule 8 of the PDI Act).

15. The effect of Section 7(5) is to, in effect, provide that an application that "would create 1 or more additional allotments" to be used for "residential development" must be refused consent ie, there is no power to approve such an application.

16. Section 7 has application to the land because as from 1 April 2017 the land was included within the Environment and Food Production Area (EFPA) ie post lodgement of the development application in 2015 and post the first gazettal of the EFPA in December 2015.

17. However there is an "exemption" in relation to the prohibition in Section 7(5) of the PDI Act in relation to applications that fall within the parameters of Schedule 8 clause 8 of that Act. Further as discussed below the section only applies in limited expressly nominated situations.

18. Other than to repeat that sec 7(5) is not expressed to have retrospective application it is not proposed to repeat the submissions made in May 2019 in relation to the retrospectivity of Section 7(5) (and Schedule 8) of the PDI Act for the simple reason that it is inappropriate to do so when no information has been provided as to why the submissions previously made have not been accepted.

Threshold Issues under sec 7(5)

19. Before sec 7(5) can have **any** application two threshold issues must be satisfied.

20. Sec 7 only applies where the application involves a division of land

    20.1 'that would create 1 or more additional allotments', and

    20.2 which additional allotment is to be used for 'residential development'.

Additional Allotment?

21. The original application had the effect of incorporating land owned by Mrs Fiora at the northern end (near Verdun) (allotment 45) which title was to be extinguished and incorporated into the adjacent land owned by Mr Gallasch with the "transfer" of the title of allotment 45 to other land owned by Mr and Mrs Fiora at the 'southern end' nearer Verdun.

22. As result of that process, there would always be the same number of allotments within the EFFA.

23. As regards the current application, SCAP describes the development as follows:

    1 into 2 allotments and 3 into 2 allotments.

24. Thus at the present time and based on that description, there are four allotments existing - 1 at the southern end & 3 at the northern end and there will be four allotments after the division - 2 at the southern end & 2 at the northern end.

25. Accordingly there will **not** be an *'additional allotment'* as that term is used in Section 7(5) of the Act created within the EFPA. In simple terms this is borne out by the SCAP description!

26. Next section 7(5)(d) only applies the additional allotment is to be "used for residential development" within the EFPA.

27. Section 7(18) defines 'residential development' to mean:

    Development primarily for residential purposes but does not include

    (a) the use of land for the purpose of hotel or motel or to provide any other form of temporary residential accommodation for valuable consideration …, or

    (b) a dwelling for residential purposes on land used primarily for primary production purposes.

Nature of development proposed (at the southern end)?

28. The application is purely for land division. The application proposes new allotments 205 and 206 at the southern end, where currently there is one allotment, lot 1. As part of the plans submitted, and consistent with the "requirements" in relation to the initial application, information was provided as to where a dwelling could possibly be sited on proposed allotments 205 and 206. That requirement arose by reason of Table AdHi/5 in the Adelaide Hills Development Plan.

29. However, and most relevantly, at no time has it been it identified that either allotments 205 or 206 were proposed to be used for 'residential development'.[1]

[1] The brief Statement in Support dated June 2018, the Statement of Effect dated September 2018 and the Response to Representations dated 23 November 2019 (all authored by Planning Chambers)

30. Allotment 205 will have an area of 6.71 hectares and allotment 206 will have an area of 2.54 hectares.

31. Section 7(18) provides that "residential development" does not include land that is 'primarily used for primary production purposes'.

32. It is respectfully submitted that, having regard to the areas of each of proposed allotments 205 and 206, they can and will be used primarily for primary production. Such uses can include grazing, floriculture, bee-keeping, animal husbandry to name but a few. An associated (ancillary) dwelling can be established consistent with such primary production uses but that does not mean the land is to be used for *'primarily [for] residential development'* having regard to the definition in the PDI Act.

33. The application simply proposes large allotments. No form of building development is proposed. Any new use, if any, will be a matter for the owners of the allotments once they have been created.

34. Even if a dwelling were proposed given the size of the allotments it cannot be said that the 'development [would be] primarily for residential development'. At worst the land would have two equal or equivalent uses - primary production and residential development. In that event the definition of residential development is not satisfied as any residential use is not 'primary'. If the allotments had been in the order of 500m² - 1000m² the situation is different. Rather 65,000m² and 25,000m² allotments are proposed.

35. As mentioned as part of the original application it was necessary to show a dwelling could be established on allotment 45, at the northern end. That was demonstrated by the Applicant to the satisfaction of the relevant authority. Additionally a dwelling could be established on the existing allotment 1 at the southern end. Thus at the present time there are 2 allotments that each can be developed with dwellings. That will remain the case post the division as no dwelling can be established on the area of allotment 45 as it will be incorporated into the adjacent land and a dwelling exists on that land.

36. The next point is the prohibition in sec 7 of the PDI Act as to residential development excludes from the definition of 'residential development' land being used for 'temporary residential development'. That includes a dwelling being used for 'bed and breakfast facilities'. Each allotment could be developed/used for such a purpose and thus would sec 7 would not have any application. The Adelaide Hills area is well placed for bed and breakfast purposes, and tourism development is strongly encouraged in the Hills. Verdun is very well placed to accommodate such uses.

37. Further given the existing use of the land indeed it may be unnecessary to seek any approval for a land use as the current lawful 'farming/agricultural/primary production' use may continue. That means the legal requirements in sec 7(5) again have not been satisfied.

Section 7 has no application

38. It therefore follows that the proposed division is not "prohibited" by the terms of section 7 because:

    38.1 for the purpose of section 7, no additional allotments are proposed in the EFPA. Currently there are four allotments and there will be four allotments if the application were to be approved, noting the SCAP description of the current application which is both factually and legally correct, and

38.2 there is nothing to suggest that Allotments 205 and/or 206 will be used for 'residential development'.

38.3 No dwellings are proposed as part of the land division application.

39. Thus it is unnecessary for SCAP to consider whether or not section 7 has *retrospective application* because there are two threshold questions that need to first be considered, each of which must be answered in the affirmative, before the prohibition in sec 7(5) of the PDI Act applies, the questions being:

39.1 is an additional allotment proposed? The answer is no because before the division, there will be four allotments and after the division there will be four allotments in the EFPA. Further new dwellings could only be developed on 2 allotments, which is the case both pre and post the division proposed; and

39.2 will the allotments be used for "residential development", as defined by sec 7(18)? There is nothing to show proposed Allotments 205 and 206 will be used that way. No dwellings have been proposed. Rather, only a land division has been proposed. Proposed allotments 205 and 206 are "exempt" from the definition of 'residential development' because they can and will be used be used for primary production as per the current use. Any dwelling that is then established on those allotments is to aid that activity and is specifically exempt from the prohibition in section 7(5) of the PDI Act because of the definition of 'residential development' in Section 7(18) of the PDI Act.

Planning Merits of the Proposal

It is not proposed to recite the planning merits of the application save I note that you have provided the following comment to me regarding the current application:

> *The application comprises two land division components but is presented as a single plan of division, in a form that is consistent with survey practice and is as required/acceptable to the Lands Titles Office.*
>
> *It does not propose to create additional allotments in the Watershed (Primary Production) Zone nor the EFPA.*
>
> *The division will ensure the continuation of land for primary production, in the northern portion for horticulture, cropping and grazing and the southern portion for grazing.*
>
> *The division will not prejudice the attainment of the Objectives and Principles of Development Control for the zone.*
>
> *The division, when properly considered and assessed against all the relevant provisions of the Development Plan is worthy of consent noting it complies with, or by its development can be made to comply with those provisions.*
>
> *It is a development proposal that is clearly not seriously at variance with the provisions of the Plan and ought to be approved.*

Request to be heard

In my view it is appropriate that the applicant be heard in person and also by counsel and consultant at the time this application is submitted to SCAP for consideration. You should thus request that opportunity.

However given the nature of the matters discussed should that opportunity be provided to me I would not make any further submissions about the *retrospectivity* of Section 7(5) of the PDI Act (for the reasons stated above).

Yours faithfully

George Manos
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