

**Port Adelaide Residents Environment  
Protection Group  
(PAREPG)**

**Closing Statement**

**Environment, Resources & Development Court**

**No 308 of 2013**

**In the matter of an Appeal between:**

**Port Adelaide Residents Environmental Action Group (Appellant)**

and

**City of Port Adelaide and Enfield (First Respondent)**

**OTR 97 Pty Ltd (Second Respondent)**

12 June 2014

## **SUMMARY**

### **Arguments against Proposed Development**

We argue against this proposed development on grounds that include, but aren't limited to,

- Principles and Objectives in the Development Plan relating to Zoning and Interface provisions
- The exacerbation of noise and fuel emissions in an area under pressure from currently existing sources of such pollution
- Detrimental impacts on the Residential zone including noise, light glare, traffic impacts, antisocial behavior, loss of visual amenity, odour, hours of operation, air borne pollutants
- Current poor level of provision of public infrastructure, and uncertainty about the level of provision of infrastructure, for stormwater management in an area that as recent events and past history show is highly flood prone
- The potential impact of stormwater from the proposed development on homes in the area
- Diminishment of open space in an area that is poorly served with public open space
- The excessive scale and inappropriate placement of advertisements on the proposed development site

### **Appellants' Propositions**

1. This development fails to conform with the intent and purpose of the relevant Residential zone.
2. The Development Plan speaks to the desired future character of Restricted Residential Policy Area 65 and Residential Policy Area 57 and this proposed development is inconsistent with that desired future.
3. This development fails to conform with the intent and restricted purpose of the relevant Commercial zone which is careful to protect the amenity of adjacent residential areas.
4. For residents at the interface of Commercial, Industrial and Residential zones there are impacts on the residential zone. However the Development Plan seeks to prevent adverse impacts and conflict, to protect the enjoyment of residential land and to protect community health and amenity. In contravention of these provisions the development will generate substantial negative impacts arising from air borne pollutants, odour, traffic impacts, noise, glare, intrusive advertisements and its hours of operation.
5. The precautionary principle needs to apply especially in relation to stormwater management and fuel emissions.
6. The threat to facilities enjoyed by a community is a relevant planning consideration. Past use of the land has provided considerable benefits to the community. The proposed development will eliminate those benefits.
7. There was considerable evidence that the development would not be a suitable neighbour to nearby residents and the community generally.
8. The development does not fit the subject land as a 'workable site-planning solution'.
9. In reaching a decision on an application, the interests of all who may be affected deserve consideration.

10. In weighing the factors that speak for and against the proposal, the evidence is strongly weighted against the development.

## SECTION 1: INTRODUCTION

For those of us who live in proximity to this development, the evidence presented in this court speaks to the challenges facing our community such as

- the noise and emissions from Adelaide Brighton Cement (ABC)
- the emissions from the nearby fuel farms
- the hazards of living in close proximity to local industry
- the volume of and noise from Victoria Road
- the low level of provision of stormwater infrastructure and the potential risks of flooding
- the increased risk of flooding in the Hargrave and Elder Road stormwater catchment, arising from infill development in Residential Policy Area 57
- the low lying land and the increasing risk of tidal inundation associated with climate change
- the lack of local public open space and lack of public infrastructure for recreation, visual amenity and community enjoyment

However hopefully it has also been apparent to the court that we are a diverse community, who are generally resilient, supportive of each other and living lives that we enjoy in this community. While there are many older residents, there is also ample evidence of homes being upgraded, large blocks being split, infill development occurring and a wider spread of ages represented in our community.

This appeal has drawn support from a wide cross section of people including

- People who live in close proximity to this development and will be negatively impacted by its operations, especially its 24x7 business model
- People who used the ABC Park for almost 20 years for tennis, basketball and recreation and are losing access to this valued community facility
- People who value open space and its visual amenity in our locality
- People who live with the impacts of Adelaide Brighton Cement on their homes and property and who feel that an implied social contract has been dishonoured by ABC's sale of 60% of the Park.
- People who were flooded on February 14<sup>th</sup> 2014 and who are concerned that the Council's actions, in supporting this development and allowing its runoff unimpeded access to the public stormwater system, place them at increased risk of flooding.
- Relatives, friends and neighbours of the groups above.

Evidence for the Appellants was provided by

- Six lay witnesses including five local residents (Maureen Jones, Jane Edwards, Edith Moloney, John Mahoney and Len Scott) and Barbara Young of Hillbank.
- Four expert witnesses: Dr Ian Musgrave (fuel emissions), Mr Dean Nobbs (stormwater and flooding), Mr Peter Maddern (noise) and Mr Dennis Batge (planning)

## SECTION 2: APPELLANTS' PROPOSITIONS

### PROPOSITION 1

1. This development fails to conform with the intent and purpose of the relevant Residential zone.

#### **Residential Zone**

**Principle 2: Development listed as non-complying is generally inappropriate.**

**Principle 4: Non-residential development such as shops, schools and consulting rooms should be of a nature and scale that:**

- (a) serves the local community
- (b) is consistent with the character of the locality
- (c) does not detrimentally impact on the amenity of nearby residents

#### **Procedural Matters**

##### **Non-complying Development**

<b>Form of Development</b>	<b>Exceptions</b>
<b>Shop or group of shops</b>	<b>Except where either (a) or (b) applies: (a) a shop where: (i) the gross leasable area is 50 square metres or less (ii) the shop is attached and integrated with a dwelling (b) a shop or group of shops where: (i) the gross leasable area is 250 square metres or less</b>

#### **Restricted Residential Policy Area 65**

**Objective 1: The continuation of existing residential uses but no new residential development until the potential hazard impact from nearby industry is reduced to a level compatible with residential development.**

##### **Non-complying exemptions:**

- (a) maintenance and repair of an existing building
- (b) additions
- (c) one dwelling
- (d) outbuilding
- (e) land division

*On The Run* proposed its development, and purchased a site for the development, on land that is zoned Restricted Residential Policy Area 65. The western boundary of the site (approx 33 metres) also adjoins land zoned Restricted Residential Policy Area 65.

All development within Policy Area 65 is non-complying unless it falls within one of the listed exemptions above and this proposal does not. In September 2012 or

earlier<sup>1</sup> *On The Run* were advised by Council that the development application would be non-complying.

The Development Plan recognises that current industrial and residential uses in Policy Area 65, though obviously co-existing, are not 'compatible' and therefore will not allow new residential development until those hazards are reduced. Residents indicated that they were not made aware when moving into the areas, as home owners or renters, of the nature and impact of the 'hazards' from local industry.

Residents gave evidence that some of the 'hazards' arising from local industry include cement dust, noise and vibration, purging<sup>2</sup> and the risk of fire leading to attendance by the fire brigade<sup>3</sup> at Adelaide Brighton Cement. Dr Musgrave spoke of the risks arising from fuel emissions, including from the fuel farms and Victoria Road, as well as from particulates.

While Mr Rogic was not aware if Council has specified the 'hazards', he agreed that cement dust, fuel emissions, particulates, noise and purging could all be considered hazards from local industry.

The Development Plan recognises that having 'nearby industry' to residences has created a bad situation which should not be made worse. The proposed development is inconsistent with a policy of lifting restrictions on residential development once hazards have reduced.

The proposed development will emit similar if not identical emissions to the fuel farms, thus extending the effects of the adjacent Industrial zone. Both Dr Musgrave and Dr Tkaczuk agreed that there was insufficient data to establish the level of risk in the area of the proposed development.

The development will also generate further noise, especially noise that disturbs residents at night, when the noise is a hazard to be reduced and ABC have been seeking to reduce the impact of their noise (and dust).

The development envisaged in Policy Area 65 is for the maintenance of existing dwellings and there is no mention of development other than residential development. However the Residential zone supports non-residential development such as shops that serve the local community, shops that have a gross leasable floor area not greater than 250m<sup>2</sup>.

Mr Rogic indicated that

Given the size and complexity of the proposal, it could be argued that the proposal would not be a small scale development, that said, if the development is of a nature and scale that serves the local community, is consistent with the character of the locality and does not detrimentally impact on the amenity of nearby residents, it could still be appropriate

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1 R1 pp5

2 Transcript pp112- Maureen Jones

3 Transcript pp185 - Len Scott

subject to the assessment of the qualitative requirements of the Development Plan.<sup>4</sup>

The proposal by *on The Run* is for a mix of shopping and commercial uses that we submit is of scale and function beyond that which is contemplated by the Development Plan. It is sited on 3408 sq m, operating 24x7 and located less than 1 kilometre from two 24x7 service stations with stores on Victoria Road. The development does not provide for ready access by bicycle or walking and will not encourage community interaction in the manner for example of local corner stores. The building for retail, dine in and other facilities would be 379 sq m.

Mr Batge advised the Court

The procedural matters for the Commercial Zone and Residential Zone both, among other things, list a shop with a gross leasable floor area in excess of 250m<sup>2</sup> as non-complying and to that extent their development is discouraged. The proposed building exceeds this by 129m<sup>2</sup> or 51.6%.<sup>5</sup>

Ample evidence was presented that the development is oriented to Victoria Road and would not be focused on service provision to the local community.

The following interchange<sup>6</sup> occurred between Counsel (Respondent 1) and Mr Batge:

R1: Could I put it to you that the layout of the site and the manner in which it is presented is very much to Victoria Road?

Mr B: I think yes, like it primarily addresses Victoria Road, yes.

R1: The very wide new incoming crossover and outgoing crossovers are on Victoria Rd?

Mr B: Yes

R1: The intent of the signage is presumably to attract the attention of vehicles moving along Victoria Rd...the intent is to attract traffic...the intent is to attract people on Victoria Road and to have them enter the site, conduct transactions and leave the site...the great majority of the persons using this facility will be using it for fuel or for the fast food offer in terms of numbers? (Multiple questions combined)

Mr B: That would be the greater number yes.

Mr Rogic makes six mentions in his report of the role of signs on Victoria Rd for 'early detection for motorists'.

Mr Garwood, site manager for *On The Run*, Hillbank on Main North Road said

We are very much traffic-driven, so when Main North Road is busy, we are busy. We are not overly residential in our – I guess with our customers.

The clear evidence of the development's orientation to the traffic of Victoria Road undermines arguments that it will serve the local community.

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4 R2 pp13

5 A12 pp14

6 Transcript pp357

As discussed below this proposed development would detrimentally impact on the amenity of nearby residents with regard to noise, loss of visual amenity, air borne pollutants, traffic volumes, headlight glare, intrusive signage, increased flooding risk and increased risk of antisocial behavior such as burn outs, crime, vandalism and graffiti.

## **PROPOSITION 2**

2. The Development Plan speaks to the desired future character of Restricted Residential Policy Area 65 and Residential Policy Area 57 and this proposed development is inconsistent with that desired future.

### **Restricted Residential Policy Area 65**

**Desired Character: This policy area is located in close proximity to significant industrial activities. The impacts of these industrial activities will constrain development opportunities in the area. Existing dwellings at the end of their economic life cycle will be replaced but there will be no additional dwellings built until the hazard risk associated with nearby industry has been reduced to acceptable levels.**

### **Lefevre Peninsula East Policy Area 57**

#### **Desired Character**

**The policy area, comprising a large portion of the older coastal suburbs of Lefevre Peninsula, is intended for redevelopment through infill redevelopment at low to medium densities. New residences are expected to reinforce the mixed character of the area with a wide range of housing types and styles. The main focus for larger medium density developments is near to adjoining railway stations and centres. Access to open space will be an important consideration for larger developments in the suburbs of Birkenhead, Largs North and Peterhead.**

The Development Plan anticipates residential development in Restricted Residential Policy Area 65, when the hazards of industry are reduced, and infill development in Residential Policy Area 57. An industrial scale service station complex in the zone is contrary to the Desired Character now and when new residential development will be possible.

Maureen Jones outlined<sup>7</sup> improvements made by Adelaide Brighton Cement under their environmental improvement plans over the last twenty years and which she described as 'reasonably significant' though clearly not yet to an extent that the community can now live without adverse environmental impacts. The Annual Compliance Plan 2013-14 for the EPA includes a 'Strategic Compliance Activity' of reducing ambient dust levels and noise from Adelaide Brighton Cement<sup>8</sup>.

Policy Area 65 is surrounded by the Residential Lefevre Peninsula East Policy Area 57 Zone to the north, west and south. Infill residential development is proposed in Residential Lefevre Peninsula East Policy Area 57. The addition of large integrated service station complex is completely contrary to the aims of these

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7 Transcript pp123-126

8 A18, pp12

policy areas. It also runs counter to current and planned residential development in the wider Birkenhead area. In addition, loss of open space will heighten the shortage of recreational open space in the area.

### **PROPOSITION 3**

3. This development fails to conform with the intent and purpose of the relevant Commercial zone.

#### **Commercial zone**

**Objective 1: A zone accommodating a range of commercial and business land uses.**

**Objective 2: Development that minimises any adverse impacts upon the amenity of the locality within the zone.**

#### **Desired Character**

**It is envisaged that commercial development will be compatible with adjacent residential character and amenity by avoiding excessive scale, noise or traffic generation.**

**PDC 1 The following forms of development are envisaged in the zone:**

- **bulky goods outlet**
- **consulting room**
- **motor repair station**
- **office**
- **petrol filling station**
- **service trade premises**

**PDC2 Development listed as non-complying is generally inappropriate.**

**PDC10 Development adjacent to, or immediately opposite a residential zone should not detract from the amenity of residents living in the Residential Zone and should:**

**(b) provide a visual buffer in the form of landscape plantings, attractive fencing, siting of buildings or other similar means between any car parking, service area, outdoor storage area or any other unattractive part of the development and the Residential Zone**

**(c) provide acoustic treatment between any excessive noise generating part of the development and the adjoining residential areas.**

**PDC13 Advertisements should not exceed a maximum height of (a) or (b), whichever is lesser:**

**(a) equal to the height of the associated building**

**(b) no greater than:**

**(i) 6 metres for sites with frontage onto Grand Junction Road, North East Road and Main North Road**

**(ii) 4.5 metres for all other sites.**

#### **Procedural Matters**

##### **Non-complying Development**

<b>Form of Development</b>	<b>Exceptions</b>
<b>Shop or group of shops</b>	<b>Except where:</b>

	<p><b>(a) the gross leasable area is 250 square metres or less</b></p> <p><b>(b) the shop is for a bulky goods outlet</b></p>
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*Scale of the development*

An integrated service station complex that operates 24 hours per day across 3408 m2 and includes the provision of fuel, shop, dining facilities (drive through, takeaway and restaurant) and car wash and dog wash service is not envisaged in the zone. It is not included in the list of developments envisaged in the zone and is significantly broader than a 'petrol station' as defined in the Development Regulations 2008.

The proposal is a non-complying development in that the building is 379m2. This is well in excess of the 250m2, above which development is non-complying and PDC2 states that development listed as non-complying is generally inappropriate.

*Impacts on amenity*

The proposed development will detract from the amenity of nearby residents. The adverse impacts will include increased and excessive noise, increased air pollution, loss of environmental amenity including visual amenity, increased traffic volumes, headlight glare, intrusive signage, increased flooding risk and increased risk of crime, vandalism and graffiti.

While the desired character of the Commercial zone envisages commercial development compatible with adjacent residential character and amenity by avoiding excessive scale, noise or traffic generation, this extensive proposed development seeks to attract trade from the high volume traffic along Victoria Road. It is intended that instead of continuing along Victoria Road that vehicles will slow, brake, enter, idle or stop, start and exit from this large facility. Vehicles will enter and exit from both Victoria Road and Hargrave Street and the impacts of this will be felt especially during sleeping hours.

This will significantly change the nature of the traffic noise that will be heard by local residents, who indicated that at present Victoria Road operates as a hum. Mr Maddern's evidence highlighted the impacts of his so called 'rabbits' on residents and Mr Garwood indicated that burn outs and drive offs occur onto Main North Road. Mrs Young, whose property adjoins *On The Run* Hillbank, spoke of the impact of the drive through and also of the noise arising from anti-social behavior of customers:

A couple of the biggest problems is the noise. When people come in to order food their radios are blaring loud, they're swearing, it is just on mainly through the weekend from Thursday to the Sunday, they screech in their brakes<sup>9</sup>.

They're all yelling with their car windows down, they're yelling and shouting and swearing and then they order their food and they keep doing

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9 Transcript pp138

it until they get the food and then they sit round the side, same thing to eat their food<sup>10</sup>.

They ride their brakes and smoke pours out of the exhaust with them riding their brakes<sup>11</sup>.

While some residents were not affected by the noise of ABC or Victoria Road, others spoke of sleep being interrupted by ABC e.g. a fire alarm at 3am. There is potential for interference with the sleep of more residents through the Victoria Road and the Hargrave Street entrances/exits, as indicated by Maureen Jones:

We already endure noise and so to have people screaming into a speaker box their orders for food, tooting horns, yelling, braking, screeching cars and revving cars, which are all things that I have observed when I've gone around to look at the other *On The Run* service stations...I mean it's hard enough to sleep. It's that interspersing noise. The continuous noise is one thing, but that screeching.<sup>12</sup>

Mr Batge advised

There is noise and activity associated with car engines and doors, human voices, mechanical operations of car washing, possible dog barking and the noise of car engines, human voices and in-car entertainment systems all of which has the possibility of detracting from the amenity of adjacent residential premises<sup>13</sup>.

In relation to amenity, the Commercial zone includes specific provision for a visual buffer and acoustic treatment. While a visual buffer is required for residents who live on the southern side of Hargrave Street, the proposed development provides for an entrance/exit on Hargrave Street directly opposite them. This entrance/exit will cause headlight glare into their homes and allow noise to leave the site. It will generate excessive noise especially from vehicles exiting and will exclude these residents from any benefits of a visual buffer.

There is no dispute that residents on Hargrave Street will be affected by the entrance/exit and Council's report to DAP recognises that

there is potential for some negative social impacts emanating from the site via the increased use of the local street network for access and egress to the site<sup>14</sup>.

Despite the zone's intention to minimise adverse impacts on residents, Mr Rogic sees no need to do so in relation to headlight glare.

In my opinion vehicles leaving the site via the Hargrave Street exit may cause a degree of light impact on the dwellings at 192 and 194 Hargrave

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10 Transcript pp141

11 Transcript pp146

12 Transcript pp116-117

13 A12, pp14

14 R1, pp192

Street, however the proposal has been assessed on its overall merits and it is considered that the degree of headlight impact is considered acceptable.

In relation to visual buffers, the site proposes only 372m<sup>2</sup> of landscaping, generally concentrated on Victoria Road. The scale of the development on the site allows for very limited landscaping along Hargrave Street. Following questioning about the width, height and depth of the landscaping on the Hargrave Street boundary, Counsel (Respondent 2) indicated that a landscaping plan could be developed and that *On The Run* would be willing to consider landscaping only (no fence) if that was the appellants' preference. However, while the entrance/exit remains, the residents on Hargrave Street who will be most affected by noise and headlight glare will not benefit from either option of landscaping only or a fence and minimal landscaping. It is also unclear what extent of landscaping will be provided given the scale and layout of the site.

A 2.5 metre off white colourbond fence on Hargrave Street will not be visible to the *On The Run* staff and could be a target for graffiti. There is no landscaping plan at present and any landscaping would have to be provided and maintained at an appropriate width, height and depth of planting.

As will be outlined under Proposition 4, the evidence of Mr Maddern should be given much greater weight than that of Mr Turner in relation to the adverse impacts of noise on the homes along Hargrave Street. Similarly the direct experience of Mrs Young of Hillbank, in line with the evidence of Mr Maddern, warrants most weight in relation to noise impacts on 8 Alfred Street.

The proposed advertisements at 9 metres and 7 metres are well in excess of the height envisaged in the Commercial zone and will detract from the residential areas to the west and the south.

The benefits of large signs seem to lie with *On The Run* rather than motorists, given there is a competitor service station further north on Victoria Road, and the signs are without benefit to the local community.

While swapping the signs might lessen the impact on nearby residents, they are still excessive in relation to the surrounding residential areas and to commercial areas (further north) and will still not conform with PDC13. They could also set an unhelpful precedent for the (narrow) Commercial zone to the north of the development.

## **Proposition 4**

4. For residents at the interface of Commercial, Industrial and Residential zones there are impacts on the residential zone. However the Development Plan seeks to 'prevent adverse impact and conflict between land uses', to protect the enjoyment of residential land and to 'protect community health and amenity'. In contravention of these provisions the development will generate substantial negative impacts arising from air borne pollutants, odour, traffic impacts, noise, glare, intrusive advertisements and its hours of operation.

### **Interface between Land Uses**

**Objective 1 Development located and designed to prevent adverse impact and conflict between land uses.**

**Objective 2 Protect community health and amenity and support the operation of all desired land uses.**

**PDC1 Development should not detrimentally affect the amenity of the locality or cause unreasonable interference through any of the following:**

**(a) the emission of effluent, odour, smoke, fumes, dust or other airborne pollutants**

**(b) noise**

**(c) vibration**

**(d) electrical interference**

**(e) light spill**

**(f) glare**

**(g) hours of operation**

**(h) traffic impacts.**

**PDC2 Development should be sited and designed to minimise negative impact on existing and potential future land uses considered appropriate in the locality.**

**PDC4 Residential development adjacent to non-residential zones and land uses should be located, designed and/or sited to protect residents from potential adverse impacts from non-residential activities.**

**PDC6 Development should be sited, designed and constructed to minimise negative impacts of noise and to avoid unreasonable interference.**

### **Orderly and Sustainable Development**

**1 Orderly and economical development that creates a safe, convenient and pleasant environment in which to live.**

**3 Development that does not jeopardise the continuance of adjoining authorised land uses.**

The provisions of the Interface section of the Development Plan continue the thread of minimising adverse impacts and seek to 'prevent adverse impact and conflict between land uses'.

Five factors that should not detrimentally affect amenity – air borne pollutants, noise, glare, hours of operation and traffic impacts – will generate adverse impacts on the residential zone if the proposed development proceeds. There is substantial disagreement between the parties about the extent to which regard should be given to those impacts.

#### *Air borne pollutants*

Council received representation from PAREPG<sup>15</sup> that included information about the potential impact of the development on the local air quality arising from Volatile Organic Compounds and Small Particle pollution. PAREPG proposed use of Stage 2 vapour recovery for this development given existing local levels of emissions. However Council elected not to forward PAREPG's representation to the EPA.

The Council submission to the DAP argued that

Likewise the baseline air quality is considered likely to be poor given the adjacent industrial uses within the locality with a reasonably high amount of localised pollution likely. Therefore additional movements of vehicles to and from the site are not considered to be changing the nature of the baseline environment, from the perspective of air quality.

This suggests a lack of concern for residents and no effort to prevent or minimise adverse impacts.

Mr Rogic contends that the appropriate referrals were undertaken<sup>16</sup> and with Stage 1 vapour recovery and EPA conditions that air emissions are minimised and managed to an acceptable degree. The evidence of Dr Musgrave and Dr Tkaczuk indicate that no such conclusion can yet be reached.

#### *Odour*

Mrs Young gave evidence of an odour 'like bad fat'<sup>17</sup> from the Hillbank *On The Run* and this was confirmed by Miss Stockman from *On The Run* who indicated that the smell arose from the system dealing with runoff from the site.

..it's like the oil filter, for all petrol sites..it filters out all the oil from the stormwater<sup>18</sup>.

No evidence was led that these same problems would not arise at the proposed site.

#### *Traffic Impacts*

Mr Weaver's report was supplied to the Appellants late on the afternoon of 15<sup>th</sup> May, when final submissions were due by cob on 13<sup>th</sup> May.

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15 R1 pp144 - 146

16 R2 pp27

17 Transcript

18 Transcript pp689

We understand that Mr Weaver is highly regarded by the Court and that the Court does not envisage any difficulties associated with traffic management.

Local experience suggests there are difficulties at the intersection of Hargrave St and Victoria Rd. In their testimony to Court Mr Mahoney, Ms Jones and Ms Edwards anticipated further difficulties arising from the entrance to the development on Victoria Road and the entrance/exit on Hargrave Street.

Asked by Counsel (Respondent 2) about 'the occasional fast car along Hargrave Street' Ms Jones replied

There isn't a problem at this stage but that does concern me because with the exit coming on to Hargrave Street and the fact that the corner is so close to where the exit from the petrol station is, they're going to have to rev to get out because those people coming around the corner basically doing about 50 ...you've got seconds to get around that corner because people are right behind you<sup>19</sup>.

To undertake his breakdown of traffic volumes between Hargrave St and Victoria Rd, Mr Weaver was supplied with transaction data for the BP Wayville and for the Oporto at Hillbank. Mr Garwood from *on the Run* advised the Court that the performance of this Oporto is disappointing:

..the Oporto's offer, unfortunately for us, hasn't been that busy..<sup>20</sup>

This calls into question the base data on which Mr Weaver has modeled the extra volumes and split of traffic at Peterhead.

It is noted that while *On The Run* at Hillbank has a control building of about 530m<sup>2</sup> on a site of about 4230m<sup>2</sup>, and there are 16 bowlers and 35 to 40 seats in the dine in food facility, there are 42 car parks onsite and most staff park offsite. By comparison the proposed development will have a site of 3408m<sup>2</sup>, a control building of 379 sq metres, 18 fuel filling points, 36 seat dine in facility and yet only 23 car parks onsite. This suggests there will be a significant problem for local residents with staff parking on the street, given that many homes along Hargrave Street do not have garages or space to drive their vehicles in off the road.

Mrs Young and Mr Garwood advised that staff parking had caused difficulties for local residents. Mr Garwood outlined:

We have three staff car parks onsite...The remaining team members park where the council allow them to basically...There were 'no parking' provisions put into place...The majority of the staff park, there is a - a little bit further north there's actually a section of road that is then blocked off, it's a dead end and there's trees and a bit of dirt there which is where the majority of the team members park now...it's not in front of any houses or anything, so I would assume it's council land..<sup>21</sup>

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19 Transcript pp127

20 Transcript pp667

## Noise

In relation to noise, the experts are divided in their opinion in relation to

1. Hargrave Street crossover
2. Northern boundary with 8 Alfred St

Mr Maddern's Statement was provided to the Respondents by email late on 13<sup>th</sup> May whereas Mr Turner's Statement dated 14<sup>th</sup> May was provided to the appellants late on 15<sup>th</sup> May.

Significant weight should be given to Mr Maddern's evidence and less weight to Mr Turner's evidence in relation to the Hargrave Street crossover since the evidence revealed that

- Mr Turner's August 2012 report wrongly assumed that the site was based 'within a Commercial zone while residences in vicinity are located within a Residential zone'<sup>22</sup>. In fact the site includes land zoned Restricted Residential Policy Area 65 and adjoins land in the new park and 8 Alfred Street that are also in this zone.
- Sonus identified the most noise affected property as 103 Victoria Road<sup>23</sup>, whereas Mr Maddern advised that houses on the south of Hargrave Street are most noise affected. These homes are also close to the crossover.
- With the recommended acoustic treatment in place, the noise levels predicted by Sonus at 103 Victoria Rd was 52 dB(A) during the day and 49 dB(A) at night. Sonus argued this met the goal noise levels of the *Environment Protection (Noise) Policy 2007* of 57 dB(A) during the day and 50 dB(A) at night. The required development levels for a site that includes land in both Commercial and Residential zones are 52 dB(A) during the day and 45 dB(A) at night. This means that the level at 103 Victoria Road was at the daytime limit during the day and above it at night.
- Mr Maddern measured the ambient noise levels<sup>24</sup> at 194 Hargrave Street and found that the L90 and Leq levels were significantly lower than those reported<sup>25</sup> by Mr Turner at the 'nearest residences'. Mr Maddern reported 52-54 dB(A) L90 whereas Mr Turner's measures were in the vicinity (above and below) 60 dB(A) L90.
- Mr Maddern measured noise levels of two way traffic flow on Hargrave Street through the night and found it appeared to fit within the 60-70 dB(A) Lmax range but with some going over 80dB(A).
- Mr Maddern determined that traffic use of the proposed crossover is on average 68.8dB(A) and considerably louder than the existing influence of industry (52-54 dB(A) L90).
- Mr Turner utilising a different methodology determined levels of 55 to 65 dB(A) for turning in and out of a crossover at Welland Plaza. Mr Turner

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21 Transcript pp659-660

22 Exhibit D, "A" pp3

23 Exhibit D, "D" pp2

24 Exhibit A10, Appendix 1

25 Exhibit D, "A" Appendix A

indicated that he positioned himself at Welland Plaza at the distance from the crossover to the facade of 94 Hargrave Street, though he conceded that 94 Hargrave may not be the most noise affected residence.

- Despite vehicles going west needing to cross Hargrave Street from the development and avoid encountering vehicles turning into Hargrave Street from Victoria Road, Mr Turner suggested that the crossover would provide a traffic calming effect.
- While traffic analysis by Mr Weaver suggested that there would be 9% additional traffic on Hargrave Street to and from the development during sleeping hours, this analysis is derived in part from data from the Hillbank Oporto which OTR advised is a poorly performing facility. This makes it an unreliable data source for the Peterhead traffic analysis.
- Mr Maddern referred to the 'degraded residential acoustic environment' created as one of the impacts by neighboring industry and the provisions of the Development Plan that seek prevention and minimization of further impact on residents. Mr Maddern also took into account that some of the houses in the vicinity of the crossover are relatively close to the road and many are not of masonry construction.
- Ultimately Mr Turner argued that the crossover 'will not unreasonably interfere with the amenity of the Hargrave Street locality'. Mr Maddern referred to the WHO standard for sleep disturbance and recent case law and argues that 'I do not think it could be reasonably said that significant use of the Hargrave Street cross over after 10pm at night can do other than act to the detriment of amenity of dwellings largely opposite it and beyond.'

The Appellants called Mrs Young of Hillbank and her experience provided clear evidence as to the likely impact of the drive through on 8 Alfred Street. Mrs Young gave evidence that she heard vehicles for 10 to 15 minutes in the drive through of *On The Run*, Hillbank playing loud bass music (doof doof) that she experienced as vibrating through her body and home.

In response to a question about queuing in the drive through, Mrs Young replied

They do come in various stages. Some come like, maybe two or three or they might just come once, you know one car, but it's when there's a few of them out for a joyride and they're following one another. That's the worse part when they come through<sup>26</sup>.

Asked about the time when she hears noise that most concerns her, the nature of the noise and if it's a bass sound she replied<sup>27</sup>

Probably about eight o'clock til twelve when we're sitting down watching television, all we can feel is thump, thump, thump in our chests and the music, it's between those hours...

The radio is like big blasting music and all my house starts to shake with the vibration of the thumping of their music...

Yes a very heavy bass.

Asked by Counsel (Respondent 2)

The whole of the house you say starts to shake?

Mrs Young replied

Some of the windows rattle with them, yeah<sup>28</sup>.

Evidence of windows vibrating was earlier received from Maureen Jones who spoke of 'shaking windows' from the noise of Adelaide Brighton Cement

And it's an ongoing noise problem and vibration - my windows rattle most nights.<sup>29</sup>

Mr Turner advised the Court that noise would need to be above 100 or 110 dB(A) to get window vibration, and yet Sonus' background noise data<sup>30</sup> at Peterhead does not show Maximum Noise Levels at those levels. Mr Turner agreed that sound theory does not rule out windows vibrating at lower noise levels.

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26 Transcript, pp139

27 Transcript 139 - 140

28 Transcript pp145

29 Transcript pp124

30 Exhibit D, Appendix A, pp10

Staff at *On The Run* Hillbank indicated that they did not hear noise in the drive through unless the vehicle was in close proximity to the order station (orders are taken via radio link by staff with headphones elsewhere in the store) and/or the collection point. Mr Garwood also reported that they had had no noise difficulties in the drive through except for the occasion of Mr Maddern's visit which was in contrast to Sonus' visit which 'made no noise'<sup>31</sup>.

Mr Garwood confirmed that customers wait on average 3.5 minutes but can wait up to 10 minutes at peak periods for their drive through orders and that there is room for perhaps six cars between the order and collection points.

Space for 9 vehicles is provided in the drive through of the proposed development.

Staff at *On The Run* Hillbank advised that there had been no noise complaints from neighbours and that they were unaware that Mrs Young was experiencing noise impacts, since they had not initiated contact with neighbours. Mr Garwood also indicated that there are about 39 CCTV cameras onsite but none directed to the drive through where they might detect anti social behavior.

Significant weight should be given to Mr Maddern's evidence and less weight to Mr Turner's evidence in relation to the Alfred Street boundary because the evidence revealed that

- Mr Maddern was mindful of the narrow space of the drive through, the tall building, vehicles between other vehicles (queueing) and the many reflecting surfaces these combine to create. He also advised that low frequency sounds are absorbed very little.
- Mr Turner and Mr Maddern used different methodologies in modeling, different noise sources for testing at Hillbank OTR and different residences at Hillbank. The results of the measured noise level reduction were inconsistent; Mr Maddern getting lower levels of reduction (higher levels of noise) than Mr Turner.
- Mr Turner used 'white noise' that includes all the frequencies as a noise source. However the human ear does not hear all those equally and the lower frequencies, which Mrs Young reported gave the greatest problem, are underrepresented (as heard by people) in white noise.
- Mr Turner has, but did not provide, the data for the reduction in noise levels for low, medium and high frequencies, while reassuring the Court that there was a 'reasonable reduction' in all frequency bands.
- Both Mr Maddern and Mr Turner agree there will be some masking of noise from the drive through because of the background noise.
- Mr Maddern was concerned by what he termed 'rabbits' and the impacts they generate. Mr Turner indicated that in testing at Hillbank he recorded 1 of 10 vehicles in an hour 'resulting in a maximum noise level of 58 dB(A) i.e. one rabbit in that daytime period.
- Mr Turner reported that the woman at who's home in Hillbank he'd conducted testing (name unknown) did have occasional difficulties with noisy vehicles.
- Mr Maddern advised that the proposal does not amount is his view to practical minimization and that he would defer to the experience of Mrs Young.

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31 Transcript pp651

*Headlight Glare*

In responding to how he and his family might be affected by the proposed development, which is directly opposite the Hargrave Street crossover, Mr Mahoney said

There will be a driveway opposite our driveway virtually. I should imagine that there will be an increased traffic flow in and out of that and if I could make any recommendation, if this proposal went forward, that they not have a driveway there...

at night-time there will be headlights coming into our house<sup>32</sup>.

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32 Transcript pp102-103

Mr Batge's advised the Court that

The proposal has not been laid out and designed to sufficiently minimise its impact on the Development within the Residential Zone. It locates a driveway on Hargrave Street where it will maximise the impact of onsite activities, vehicle movements, noise and headlight glare on residences in that street.

Mr Rogic downplayed the consequences of 'light impact' on the dwellings at 192 and 194 Hargrave St in the context of the development's 'overall merit'<sup>33</sup>, despite evidence and the view showing that car lights when exiting the development would shine directly into these homes.

### *Hours of Operation*

The proposed development would operate 24x7 on a site that currently generates no use after dark. Residents spoke of the pleasure of both using the site and seeing others use it and the lack of anti-social behavior associated with its use as a park, for almost 20 years.

Residents are concerned that the 24x7 nature of the operation will generate noise, glare, people congregating at the facility and or at the adjoining park, stereo noise while vehicles are refueling, stereo noise while people eat their food in the parking bays, anti-social behavior such as burn outs, drive offs, graffiti and crime.

Individually the five areas of impact discussed above - air borne pollutants, noise, glare, hours of operation and traffic impacts - would all be wearing for residents. Collectively they are likely to be demanding and stressful and impact negatively on residents' sleep. If *On The Run* and /or Council are then unwilling to act on resident concerns, feelings of powerlessness can exacerbate the stress and heighten the diminishment of residents' quality of life, particularly as they consider the situation before and after the presence of the development.

### **Proposition 5**

5. The precautionary principle needs to apply especially in relation to fuel emissions and stormwater management.

In relation to fuel emissions and stormwater management we ask the Court to apply the precautionary principle, one definition of which is:

3.5.1 Precautionary principle<sup>34</sup> -  
Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

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33 R2 pp27

34 <http://www.environment.gov.au/node/13008>

1. Careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
2. An assessment of the risk-weighted consequences of various options.

The evidence before the Court revealed a lack of reliable scientific data in regard to the amount and type of emissions and flooding that will arise from the development. Therefore the Court cannot make an informed decision, based on scientific data and analysis of that data by the experts. In this case, 'careful evaluation' is not possible because of a lack of data - so the Court cannot assess the likelihood and/or extent of environmental damage nor can it assess the consequences.

### *Fuel emissions*

#### **Interface between Land Uses**

**Objective 1 Development located and designed to prevent adverse impact and conflict between land uses.**

**Objective 2 Protect community health and amenity and support the operation of all desired land uses.**

**PDC1 Development should not detrimentally affect the amenity of the locality or cause unreasonable interference through any of the following:  
(a) the emission of effluent, odour, smoke, fumes, dust or other airborne pollutants**

**PDC2 Development should be sited and designed to minimise negative impact on existing and potential future land uses considered appropriate in the locality.**

**PDC4 Residential development adjacent to non-residential zones and land uses should be located, designed and/or sited to protect residents from potential adverse impacts from non-residential activities.**

#### **Orderly and Sustainable Development**

**1 Orderly and economical development that creates a safe, convenient and pleasant environment in which to live**

The precautionary principle applies to situations in which threats of serious or irreversible environmental damage exist. Such threats exist in this case because, as outlined by Dr Musgrave, levels of some fuel components may be of the order of regulatory concern in the vicinity of the proposed development.

In summary Dr Musgrave's evidence was that

- Fuel component concentrations measured at the EPA's Jenkins St site in 2004 were approximately half those of the recommended guidelines. This implied that corresponding levels closer to the Adelaide's fuel storage areas must be considerably higher. The proposed development lies in close proximity to the fuel storage areas.
- While regulatory levels of benzene in fuel have been reduced since 2004, benzene is not the only compound of concern.

- Emissions from the proposed development would add to local levels. While the example chosen of Morales Teres paper had a sphere of influence which would include residences in Restricted Residential Policy Area 65, the proposed development is of a significantly larger scale (18 pumps vs 5 pumps<sup>35</sup>) with a correspondingly larger area of influence.

Dr. Musgrave gave evidence that local populations may be more susceptible<sup>36</sup> and increased incidence of asthma in 'children aged 5-14 years and in adults aged 15-24 years and in males stratified by gender' were detailed<sup>37</sup>. Furthermore Dr Musgrave highlighted that his initial information was consistent with later findings<sup>38</sup>.

This threat is particularly serious when set in a local context that includes considerable investment in efforts to remediate the local environment e.g. work in reducing leakage from fuel storage facilities and environmental improvement plans by Adelaide Brighton Cement.

Both experts' submissions and evidence spoke to the inadequate nature of the data available and the need for monitoring to occur to meet the requirements of the National Environmental Protection (Air Toxics) Measure 2011. The precautionary principle would suggest that given the incidence of health problems in the area and this lack of data, that the development not proceed.

In Dr. Musgrave's opinion<sup>39</sup>

The area where the proposed petrol station is to be sited already has poor air quality and higher levels of chronic disease (Pilotto et al., 1999). This proposed development is in close proximity to a major road, a fuel farm and a bitumen plant and their emissions will be combined with those of the proposed fuel station.

Without substantial monitoring data, and modelling of emissions during summer and winter under the prevailing wind conditions the possibility of significant impacts on the health of residents in close proximity to the proposed petrol station cannot be dismissed.

The second respondent has attempted to measure benzene as a proxy for wider fuel component concentration at both the subject site and at a facility expected to have similar emissions to that of the proposed development.

That attempt has not been successful and both Dr. Musgrave and Dr Tkaczuk agree that

The limited benzene, toluene and xylene vapour concentrations measured do not allow any precise statement to be made regarding the annual

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35 Exhibit A15 p104

36 A14, pp7

37 A15 pp101

38 MFIA16 - North West Adelaide Health Study – Chronic conditions – Asthma

39 A14, pp8-9

average concentration of these vapours in the locality around the proposed development, nor is it possible to give an opinion regarding the exact sources of the benzene, toluene and xylene vapours<sup>40</sup>.

The likelihood that emissions from the development being added to those of the ambient air were initially raised by the Port Adelaide Resident's Environment Protection Group in December 2012<sup>41</sup>. While the benzene concentration of fuel has decreased due to regulatory changes, and improvements have been made to emission containment at Mobil the closest fuel storage facility, no evidence has been presented of any reduction in levels of other fuel components, or emission containment at other fuel storage facilities (BP and Caltex).

The second respondent made no attempt to address that issue until undertaking measurements on 15/16 April 2014 - some 16 months later. Had the second respondent acted more promptly, ample time would have been available to enable an assessment to be made, and the issue resolved without engaging the resources of the Court.

### *Flooding*

#### **Hazards**

**Objective 4: Development located and designed to minimise the risks to safety and property from flooding.**

#### **Flooding**

**PD4 Development should not occur on land where the risk of flooding is likely to be harmful to safety or damage property.**

**PD5 Development should not be undertaken in areas liable to inundation by tidal, drainage or flood waters unless the development can achieve all of the following:**

**(a) it is developed with a public stormwater system capable of catering for a 1-in-100 year average return interval flood event**

The threat of serious or irreversible environmental damage exists in relation to flooding since, as recent events and past history show, the area is highly flood prone, it has a poor level of stormwater infrastructure, the stormwater system is being further taxed through infill development in Lefevre Peninsula East Policy Area 57 and there is currently a serious lack of crucial scientific information, with the Le Fevre Peninsula Stormwater Management Plan to be undertaken in 2014/15 and 2015/16.

George Rogic indicated that PDC5

..refers to major land development which requires a drainage system (Major/Minor) with road reserves to be vested to Council for the management of public stormwater with the newly created development. Given this development proposed is only a private development it subsequently only requires a private drainage system to be provided.

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40 Exhibit G, p13

41 R1 pp 144, 145

Mr Batge gave a very different interpretation of this provision of the Development Plan which comes under the General Section of Plan. Mr Batge indicated:

I think it's more general in its application. It certainly doesn't say it's to be limited to major development or new land divisions etc....In my view I think it's applicable<sup>42</sup>.

I think it is going just a step too far to say that you can read this only into a land division or only to that kind of development which will provide a public stormwater system. The intent is that development should be provided with a system capable of a 1 in 100 ARI event, otherwise you end up with a problem. We know it's an area where there are currently isn't enough drainage, it's an area with a problem.

The Development Plan has, under the General Section of Land Division,<sup>43</sup> provision for stormwater management including how the arrangement of roads, allotments, reserves and open space enable the provision of a stormwater management drainage system.

The evidence of local residents highlighted the lived reality of flooding. Len Scott provided feedback on the 1992, 1998 and 2014 Peterhead flooding. Mr Scott provided a list of 13 properties that had been flooded above their floor boards on February 14<sup>th</sup> 2014 and advised that there were many more that had been flooded under their homes and/or in their yards. Jane Edwards, Maureen Jones and John Mahoney all spoke of their direct experience of the flooding that occurred nearby and into their properties on February 14<sup>th</sup>, and of the impacts upon their homes and yards, and for Jane her car.

Council documents<sup>44</sup> suggest that Council estimated the rainfall event that occurred on Feb 13<sup>th</sup> and 14<sup>th</sup> 2014 to be 'approximately a 1 in 20 year event.'

Len Scott also advised that there is street level flooding 2 to 3 times per year in his vicinity and that urban infill of the ICI oval behind his home was felt by local residents to have contributed to their flooding problems.

Mr Rogic confirmed that most of the Hargrave and Elder Road Catchment lies within Residential Policy Area 57 where infill development is promoted.

The experts both agree that the area is subject to inundation both in a 1 in 100 year event by stormwater and due to a 1 in 100 year tide event. Both agree that the site will produce an increase in stormwater runoff due to the proposed development and that the existing underground stormwater system currently provides a 1 in 1 year service. Both agree that the proposed development provides for no infiltration or retention onsite and that any stormwater generated will proceed directly to the public stormwater system.

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42 Transcript pp340-342

43 Development Plan PAEF Council (16 Feb 2012) pp58-63

44 A7 Bundle

Since Mr Schalk was not authorised to speak on behalf of Council he was unable to confirm when the pump on Hargrave St would be operational, though he understood construction would begin in June and take approximately 40 weeks. Work had commenced when the Court visited Peterhead on June 10<sup>th</sup>. Mr Schalk indicated that if the pump and pipes were fully and effectively operating it would potentially raise the level of stormwater provision from 1:1 to 1:5. While Mr Nobbs agreed with this he described it as 'very low standard.'

.. a key point of my argument is that because of the current low level of service provided by the current and proposed upgraded stormwater systems, I don't believe it's acceptable to make a poor system marginally worse when we should be trying to make it a lot better. So just adding to the problems, of not providing mitigation measures onsite, is only going to make it, the current situation worse. And it's a good sizeable area that's being paved, as well - it's 3000 sq metres...<sup>45</sup>

The most recent reports relating to stormwater in the area date from 1997<sup>46</sup> and 1999<sup>47</sup> and refer to the Lulu Terrace Catchment which included Peterhead and went from the Gulf St Vincent to the Port River. (Lulu Terrace is now under an ABC shed.)

Despite the Court encouraging Council on April 22<sup>nd</sup> to provide the 1990s studies to the Appellants, the Council elected not to provide the reports until the afternoon of Wednesday April 30<sup>th</sup>, two days before Draft Expert Statements were due.

The 1997 report identified a major depression in the vicinity of the intersection of Mary, Alfred and Walton Streets. The report, based on records from the Port Adelaide Enfield Council, reported on the intense storm of 18 December 1992 (estimated as 1:50 ARI event) 'which caused flooding in several areas including Mary Street, Wills Street, Alfred Street and Walton Street.'<sup>48</sup> There was also a report of a severe storm of 13 December 1993 with property damage reported in 8 houses in Alfred Street and 1 in Mary Street. Mr Schalk agreed that there was considerable overlap between the properties in Len Scott's list (homes flooded in 2014 above their floorboards) and those flooded in 1992 and 1993.

The 1997 report said in relation to Mary Street, Alfred Street, Walton Street

This area has the most potential for flood damage by the ponding of excess stormwater... this site is a low point within the catchment with Victoria Road as the barrier. Victoria Road is approximately three quarters of a metre higher than the low point at the Alfred Street and Walton Street intersection. This means that the area has the potential to fill to a depth of 0.75 m if the outlet drain was surcharged.

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45 Transcript pp211

46 Exhibit A8, Appendix 7

47 Exhibit A8, Appendix 8

48 Exhibit A8, Appendix 7 pp10

The number of dwellings that could be at risk if the full ponding was to occur is approximately 108. The threshold at which property flooding would commence is estimated to be between the 2 and 5 year ARI design events. It is anticipated that most of these dwellings would be inundated to varying degrees in the 100 year ARI event<sup>49</sup>.

The 1999 report reiterated

The Alfred Street/Walton Street intersection is one of the lowest points in the catchment with flood flows from many areas draining to this point.

There is no current stormwater management plan for the area and Council documents<sup>50</sup> indicate that Le Fevre Peninsula Stormwater Plan will be prepared in the 2014/15 and 2015/16 years.

Mr Schalk was the Project Manager of the 1999 report and Mr Schalk used for his Statement a hydrological model provided to him by Council in the late 1990s. The date of development of the model is unknown though Mr Botting who developed it retired between 1997 and 1999. Mr Nobbs did not have access to the model which he suggested would take many months and much effort to reproduce.

Given the age of the model and the changes since then (e.g. extent of infill development and climate change) there are doubts about the current validity of the 1990s model. Mr Schalk indicated that both a hydrological model and a hydraulic model are needed in order to effectively model the likely impacts of the development on flooding in the locality. This is consistent with Mr Nobbs' advice<sup>51</sup>

Additional hydrologic/hydraulic analysis may be required to assess the catchment 100-year ARI critical storm duration so that the 100-year ARI on site storage volume can be determined.

Mr Schalk also advised that a new hydrological model and a new hydraulic model are likely to be developed as part of the proposed Le Fevre Peninsula Stormwater Plan.

It was put to Mr Schalk that recent local experience, the 1997 Botting report (which identified 108 unnamed houses at risk) and reports to Council of flooding of Feb 14<sup>th</sup> 2014 create doubts about the extent of the area identified in Figure 2 of Mr Schalk's report of the area of the Feb 14<sup>th</sup> flooding, in that the area shown is too large. This also creates uncertainty about the distribution of flooding in a 1:100 ARI event and the estimated increase in flood level of 1.8mm.

Asked by Counsel, (Respondent 2) about Mr Schalk's calculation of 1.8 mm of additional flood height, Mr Nobbs responded

That's exactly what it is, it's an estimate. Mr Schalk and I didn't do a detailed analysis of the ... elevation storage relationship...

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49 Exhibit A8, Appendix 7 pp22

50 A7 Bundle

51 Exhibit A8, pp10

It's an estimate to gain an appreciation of what order of magnitude we are talking about in relation to flood level rise...

Any increase is going to be significant, you know, in a situation that's poor at best...

I believe these low lying areas are down around 1m AHD and we have a contour which is spread out to one and a half metres AHD. What we didn't analyse is what happens between that one and one and a half metres - is there a level difference where these very low lying properties, where a small increase in run-off volume can result in a larger increase in flood depth. We haven't analysed it to that detail and that's why I recommended that should be undertaken to assess that.

Mr Schalk initially expressed concern that retention of stormwater onsite could exacerbate flooding issues - since the development sits at the downstream end of the planned Hargrave St pump station catchment and release from the site could coincide with stormwater reaching the pump from further up in the catchment. However he agreed that the timing of the release can be delayed (for hours) so that it occurs at a time when it is safe.

Mr Schalk was convinced that a hydrograph<sup>52</sup> that he drew gave confidence that the stormwater from the site would be able to safely leave via the public stormwater system. Mr Nobbs however indicated that while Mr Schalk's hydrograph would apply for a short term storm event, storm events come in different levels of intensity and over different time periods. He advised that the hydrograph did not give confidence that the proposed development would not contribute to flooding of local properties and he demonstrated this by using a model of Cumulative Rain versus Time<sup>53</sup> for the February 13<sup>th</sup> and 14<sup>th</sup> rain event.

Mr Nobbs gave evidence that given there is no provision for retention on site or infiltration to avoid the additional load on an inadequate public system, the additional volume from the development would be stored in people's properties and homes when the public system is at full capacity.

Mr Nobbs advised that there is an unacceptable risk to flood prone properties, though the additional volume from the development may be small, depending on the nature and extent of the storm event.

Mr Nobbs advised that the level of increased flood risk associated with an increase in stormwater runoff from the site is dependent on the elevation versus storage relationship of the low lying area to the west of Victoria Road. The elevation versus storage relationship in this low lying area may be sensitive to a relatively small (50 m<sup>3</sup>) increase in runoff volume resulting in a significant increase in the risk of flooding. Further assessment of the elevation versus storage relationship, property floor levels in the low lying area to the west of Victoria Road and flooding from a range of ARI storm events would be required to assess the sensitivity of increased stormwater runoff from the proposed development on flood risk.

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52 Exhibit L

53 A20

Mr Nobbs indicated there is uncertainty inherent in the modeling undertaken by Mr Schalk (Botting model). He also indicated that confirming the groundwater level and undertaking infiltration testing to develop his proposed flood mitigation measures for the site would generally be undertaken by the developer.

While greater weight needs to be given to Mr Nobbs evidence than to Mr Schalk's and the Principles of the Development Plan would not be met, the precautionary principle would also suggest that given the lack of reliable scientific and engineering information, and the high risks posed to residents and the environment that the development should not be allowed to proceed.

### **Proposition 6**

6. The threat to facilities enjoyed by a community is a relevant planning consideration. Past use of the land has provided considerable benefits to the community. The proposed development will eliminate those benefits.

### **Lefevre Peninsula East Policy Area 57**

#### **OBJECTIVES**

- 1 Infill development at low to medium densities to achieve an increase in the number and diversity of dwellings**
- 2 Development that contributes to the desired character of the policy area**

#### **DESIRED CHARACTER**

**The policy area, comprising a large portion of the older coastal suburbs of Lefevre Peninsula, is intended for redevelopment through infill redevelopment at low to medium densities. New residences are expected to reinforce the mixed character of the area with a wide range of housing types and styles. The main focus for larger medium density developments is near to adjoining railway stations and centres. Access to open space will be an important consideration for larger developments in the suburbs of Birkenhead, Largs North and Peterhead.**

#### **OPEN SPACE AND RECREATION**

##### **OBJECTIVES**

- 1 The creation of a network of linked parks, reserves and recreation areas at State, regional, district, neighbourhood and local levels.**
- 2 Pleasant, functional and accessible open spaces providing a range of physical environments**
- 3 A wide range of settings for active and passive recreational opportunities.**
- 5 An appropriate quantity, quality and distribution of open space, that reflects the local neighbourhood, district, council wide and regional needs of the community as reflected by indicators such as population density and demographic structure.**
- 6 Open space of a quality, amenity and design that has regard for:**
  - (a) the needs of residents, visitors and tourists, particularly in relation to the size, type, shape and location**
  - (b) public safety, within open space and adjoining areas**
  - (c) maintenance requirements and costs.**

**7 A network of open space within residential areas that gives priority to local open space.**

**PDC6 Neighbourhood parks should be at least 0.5 hectares and generally closer to 1 hectare in size, and provided within 500 metres of households that they serve.**

**PDC7 Local parks should be:**

**(a) a minimum of 0.25 hectares in size**

**(b) centrally located within a residential area, close to schools, shops and generally within 300 metres of households that they serve.**

**PDC20 Other than within Avicennia Waters Policy Area 37, Dock One Policy Area 39, Fletcher's Haven Policy Area 41, Hart's Mill Policy Area 42, McLaren's Wharf Policy Area 44, Newport Quays Policy Area 45, North Bank Policy Area 46 or Port Approach Policy Area 49 of the Regional Centre Zone, public open space should be provided at the rate of 4 hectares for every 1000 persons.**

Residents spoke of their use and the community's use of the site as the ABC Community Park. ABC bought the land for that purpose in 1994. The Court indicated that it understood the high level of community support for our endeavour not to lose a highly valued and well used community asset. Ours is a community lacking in open space<sup>54</sup> and the loss of this site, as open space, will deprive a community, of valued visual, recreational and environmental amenity.

Similarly past use of the land has provided considerable benefits to the community for recreation, for social interaction, visual amenity and as an environmental buffer whereas the proposed development will eliminate those benefits.

Mr Rogic indicated in relation to the adjoining land:

The remaining open space to the west of the subject site (privately owned by ABC Ltd) will have an area of 2,389 square metres, which falls some 11 metres short of the above requirement. (*refers to PDC7*) ... the remaining 2,389 square metres, is still in my opinion considered to be of sufficient size and dimension to provide a wide range of settings for active and passive recreational opportunities for the local community.<sup>55</sup>

Conversely he also said:

While the owner of the site may have historically permitted the general public to use this area, in my opinion the area cannot be defined as 'public space' or 'public open space' whilst this open area to the west remains privately owned...The owner in my view could restrict access to the remaining open space by erecting a permanent obstacle around the boundaries such as a fence, which would then restrict the general public to use this area...<sup>56</sup>

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54 A2 pp15

55 R2, pp13-14

56 R2, pp29

Evidence to the Court clearly demonstrated that there is inadequate public provision of open space in relation to the provisions of the Development Plan. There is no Neighbourhood Park in the vicinity and the adjoining land, if it was to continue as open space, is smaller than a Local Park. There is no certainty about the future use of the adjoining area as public open space. The proposed development will permanently deprive the community of the use and amenity of open space.

### **Proposition 7**

7. There was considerable evidence that the development would not be a suitable neighbour to nearby residents and the community generally.

Evidence was provided by Mrs Young, an adjacent neighbor to the *On the Run* Hillbank of excessive noise including drivers sitting on both their brakes and accelerator, low bass noises, loud music for periods of 10 to 15 minutes. She also reported problems with odour ('it's like bad fat'<sup>57</sup>) and with workers who 'park their cars outside our house in the road, by the reserve'<sup>58</sup> owing to lack of provision of staff parking.

Staff from *On the Run*, Hillbank were unaware of neighbour concerns since they do not engage with adjacent neighbours. Inside the control building staff are unaware of any noise problems or any anti-social behavior in the drive through. There are no CCTV cameras directed towards the drive through, though there are about 39 onsite and this is the area closest to neighbours. There was confirmation by *On the Run* of odour issues.

In relation to its engagement with our community, evidence of being a poor neighbour is apparent in

- the advertisement<sup>59</sup> in the Portside Messenger that indicated 'support' by government (regulatory) agencies for the development and made no mention of an appeal before the Environment, Resources and Development Court
- the email<sup>60</sup> to the Mayor seeking urgent subdivision of what was then the Adelaide Brighton Cement Community Park and Council intervention with the DAC
- denying the community access<sup>61</sup> to the site including the tennis court and basketball ring while this appeal was underway and allowing the site to become unkempt
- Counsel for *On The Run* failing to meet Court timelines for provision of two expert statements and their List of Authorities to us as Appellants.

### **Proposition 8**

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57 Transcript pp141

58 Transcript pp140

59 A2 pp43

60 A2 pp7-8

61 A2 pp14

8. The development does not fit the subject land as a 'workable site-planning solution'.

The development does not fit the subject land as a 'workable site-planning solution' in that it overlaps with 8 Alfred St by 6.5 metres and places the drive through along that boundary; it chose to intrude into RR Policy Area 65; the entrance and exit on Hargrave St will have negative impacts of noise, traffic and light glare for neighbours opposite; there is inadequate provision and possibly too little space for reasonable density landscaping on Hargrave St. The development is also very large and very noise intensive.

### **Proposition 9**

9. In reaching a decision on an application, the interests of all who may be affected deserve consideration.

This includes Ms Maureen Jones who was overseas and unable to lodge her representation before the Dec 18 2012 deadline, Mr John Mahoney who received too little notice to properly consider representation and the nearby residents flooded on Feb 14<sup>th</sup> 2014 who do not have a right of objection or appeal.

## Proposition 10

10. In weighing the factors that speak for and against the proposal, the evidence is strongly against the development.

As outlined in the Propositions above

- This development fails to conform with the intent and purpose of the relevant Residential zone and the relevant Commercial zone.
- This proposed development is inconsistent with the desired future character of Restricted Residential Policy Area 65 and Residential Policy Area 57.
- In its Interface provisions, the Development Plan seeks to 'prevent adverse impact and conflict between land uses', to protect the enjoyment of residential land and to 'protect community health and amenity'. In contravention of these provisions the development will generate substantial negative impacts arising from air borne pollutants, odour, traffic impacts, noise, glare, intrusive advertisements and its hours of operation.
- There is an uncertain risk in relation to fuel emissions that can only be assessed through appropriate measurement.
- There are substantial risks associated with stormwater from the site going directly to inadequate public infrastructure that at best with the provision of a new stormwater pump will provide 1:5 year provision.
- The precautionary principle needs to apply in relation to stormwater management and fuel emissions.
- Past use of the land has provided considerable benefits to the community. The proposed development will eliminate those benefits.
- There was considerable evidence that the development would not be a suitable neighbor.
- The development does not fit the subject land as a 'workable site-planning solution'.
- In reaching a decision on an application, the interests of all who may be affected deserve consideration.

Further the free standing pylon signs having heights of 7 metres and 9 metres do not meet Commercial Zone PDC13. While swapping the signs is proposed by *On The Run*, the signs are still excessive in relation to the surrounding residential and commercial areas, could create an unhelpful precedent and will still not conform with PDC13.

As a non-complying development, the applicant was required to produce a Statement of Effect and this was developed by Nolan Rumsby and incorporated in the documents and submission that went to DAP from Council. Little weight can be given to this Statement of Effect.

In relation to environmental impact, the report to DAP described the existing environmental situation as poor and further impacts immaterial.

It is considered that a high degree of background traffic noise is prevalent in the locality currently ...Likewise the baseline air quality is considered likely to be poor given the adjacent industrial uses within the locality with a reasonably high amount of localised air pollution likely...Considering the

baseline environment, and design measures adopted, any potential increase in emissions and noise outputs are likely to be negligible in the context<sup>62</sup>.

The Statement of Effect claimed economic benefits through employment creation and Council failed to recognise that there would be displacement in employment, and potential for businesses, especially those along Victoria Road, to fail (arising from the loss of sale of fuel, food, lotto tickets, coffee, car wash etc) with all the attendant economic and social consequences.

The Statement of Effect, while recognising some negative social impacts arising from the Hargrave Street entrance/exit, made claims of benefits to the community via increased services and the prevention of crime:

With regards to the social impact of the proposed development, it is noted that the proposed development will provide positive employment opportunities however there is potential for some negative social impacts emanating from the site via the increased use of the local street network for access and egress to the site.

Additionally, it is suggested within the Statement of Effect that *'the proposed development will provide convenience store, fast food, petrol re-fuelling, car/dog wash services, on a site that is currently vacant of any kind of development. These services will be of significant benefit to the community. The proposed will prevent crime by putting the land to an active, 24 hour use providing surveillance in the area.'*

On review of this statement, Council considers as the immediate locality consists of primarily residential uses and industry uses with minimal, if any commercial uses. It is likely the proposal will provide a range of choice and convenience for the local community as suggested<sup>63</sup>.

Jane Edwards' submission<sup>64</sup> to Council outlined the wide and diverse range of services available to our community and the Appellants Documents<sup>65</sup> show the four service stations located near to the proposed development, including two that operate 24 x 7 about 500-600 metres further north on Victoria Road.

The extensive use of CCTVs at Hillbank *On The Run* indicate the concern for crime and unlawful behavior on the site. The 24 hour operation and the availability of cash make these developments vulnerable to armed robberies, as reflected in regular reports in the local media. The potential for anti-social behavior is such that Mr Garwood indicated that SA Police are provided with discounts to encourage their presence at the *On The Run* Hillbank facility.

## **CONCLUSION**

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62 R1 pp191

63 R1 pp192

64 R1 pp137-138

65 A2 pp16-18

The Development Plan recognises that current industrial and residential uses in Restricted Residential Policy Area 65, though obviously co-existing, are not 'compatible'. The Plan aims for new residential development only after the hazards of nearby industry are reduced. This development will exacerbate noise and fuel emissions in an area under pressure from current pollution sources.

Mr Batge advised:

The Development Plan indicates an intention over time to ameliorate negative environmental issues within the area and that such improvement needs to occur prior to new residential development in Policy Area 65. The proposal needs to be of a standard of design and function that is commensurate with improving the amenity within Policy Area 65, not contributing to deterioration of it<sup>66</sup>.

The proposal is non-complying in the Commercial as well as the Residential zone and will generate negative impacts on residential amenity in a context where multiple provisions of the Development Plan seek compatibility of land uses and protection of the amenity and enjoyment of residential land.

In contravention of these provisions the development will generate substantial negative impacts arising from air borne pollutants, odour, traffic impacts, noise, glare, intrusive advertisements and its hours of operation.

There is substantial risk in relation to stormwater and uncertain risk regarding fuel emissions arising from the proposed development. It is clear that the Development Plan requirement for development to be undertaken, with provision or access to a public stormwater system with 1 in 100year ARI capability, in an area liable to inundation by flood waters, clearly will not be met.

There is a lack of reliable scientific data in regard to the amount and type of emissions and flooding that will arise from the development therefore the Court cannot make an informed decision, based on scientific data and analysis of that data by the experts. In this case, 'careful evaluation' is not possible because of a lack of data - so the Court cannot assess likelihood/extent of environmental damage nor can it assess the consequences.

Mindful of the precautionary principle, the application should be refused on these grounds alone.

While the emissions or flooding on their own are enough to warrant refusal, the cumulative impacts of these with noise, traffic, headlight glare, hours of operation, intrusive signs and odour reinforce the planning grounds for refusal i.e. the overall impact of all the factors is greater than the individual impacts and the individual impacts cannot be viewed in isolation.

Some of the benefits claimed for the development e.g. 'improve safety and aid in preventing crime in the locality' are disputed in relation to their factual basis while other claims e.g. generation of employment, need to be offset against the losses they will create e.g. potential displacement of employment and possible bankruptcies in competitor businesses.

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66 A12, pp21-22

The Appellants ask that the Court not approve the development.