

South Australia Continuing to Make Room for Wind Farms: *Tru Energy Renewable Developments Pty Ltd V Regional Council of Goyder & Ors* [2014] SAERDC 48



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The Environment, Resources and Development Court of South Australia (**the Court**) recently overturned a decision of the Regional Council of Goyder (**the Council**) to refuse a development application lodged by Tru Energy Renewable Developments Pty Ltd (**Tru Energy**) proposing a large wind farm development and transmission line over several parcels of land to the north of Tothill Ranges, about 5 kilometres south of Burra in South Australia. Burra is located approximately 160 kilometres north of Adelaide.

This decision is significant as it demonstrates that wind farm developments in rural areas of South Australia are generally encouraged by planning policy and will, in the absence of clear and unequivocal evidence which establishes that a wind farm development will result in unacceptable *audible* noise impacts or unacceptable impacts upon flora or fauna, most likely warrant the grant of consent.

Under the *Development Act 1993* (SA) (**the Act**),² Development Plan consent, Building Rules consent and development approval must be obtained before a wind farm can be established on land. In rural and primary productions areas of South Australia, wind farms are generally a “merit” form of development³ which means that they are assessed against the Objectives and Principles of the relevant Development Plan (in this case, the Goyder Council Development Plan).

Prior to the hearing, the Council agreed to an amended proposal which reduced the number of turbines in the wind farm from 41 to 35 and ensured that a minimum separation distance of 2 kilometres was achieved between each turbine and any dwelling not owned by an entity or person who had agreed to lease land to accommodate the wind farm.

Two neighbouring property owners, Mr Coffey and Mr Dunn, successfully applied to be joined as respondents to the appeal in 2013.⁴ Mr Coffey and Mr Dunn were not satisfied with the amended proposal and so the matter progressed to a hearing.

During the hearing, the Court was provided with a vast amount of evidence by the parties and considered many planning issues. This article discusses the issues identified by the Court, particularly with respect to amenity and noise, in light of the Court’s decision to reverse the Council’s refusal and grant conditional consent to the wind farm.

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² See sections 32 and 33 of the Act

³ Section 35 of the Act provides for three classifications that may be assigned to a development application, “complying”, “non-complying” and “merit”. Where a development application proposes a “complying” form of development, the relevant authority (usually the local council) must grant Development Plan consent to the application. Codified assessment criteria usually apply to the assessment of complying developments. Non-complying developments are those which are considered to be generally inappropriate in a particular Zone within a Development Plan. Non-complying developments undergo an especially vigorous and onerous assessment process and appeal rights generally do not exist in respect of decisions to refuse or impose conditions of approval in respect of a non-complying development application. “Merit” developments are assessed against the objectives and principles of the relevant Development Plan and appeal rights exist in respect of decisions made on such applications.

⁴ See the ERD Court’s decision in *Tru Energy Renewable Development Pty Ltd v Regional Council of Goyder* [2013] SAERDC 11



The Court's decision is significant as the relevant Objectives and Principles of the Council's Development Plan are also contained in 56 other Development Plans within the State, having been inserted into the Development Plan by the *Ministerial Statewide Wind Farm Development Plan Amendment*⁵ approved on 18 October 2012.⁶

The Court made the following relevant findings.

Land Use

When assessing this wind farm against the provisions of the Council's Development Plan,⁷ the Court accepted that the Objectives of the Primary Production Zone, in which the proposed development was located, specifically sought the development of wind farms.⁸ The Court determined that this intention was evidenced in the Desired Character statement of the Primary Production Zone:

*Windfarms and ancillary development are an **envisaged** form of development within the zone.*⁹

Visual Appearance and Amenity

The Court found that the visual impact of the wind farm, which all parties agreed would be significant, was an acceptable outcome in the Primary Production Zone given that:

- Principle 2(a) of the Council's Development Plan required that wind farms be designed to *manage* (rather than 'minimise' or avoid altogether) visual impact;¹⁰
- Objective 3 required that the visual impact of wind farms be *managed* (again, not minimised or avoided) where the wind farm and its ancillary development is sited in prominent locations.¹¹

In interpreting and applying the provisions of the Development Plan relevant to visual appearance, the Court stated that the provisions which relate to visual amenity tacitly acknowledged that the visual prominence of wind farms is inevitable, but that nonetheless they remained seen as a desired form of development.¹² As such, the Court held that the visual prominence of turbines and their effect on the rural outlooks from properties in the Zone did not weigh against them in their assessment under the Development Plan.¹³

Noise

The Development Plan specifically requires that wind farms and ancillary development should be sited, designed and operated to avoid or minimise excessive noise impacts on nearby property owners and/or occupiers, road users and wildlife.¹⁴ Development at an interface between land uses should also be

⁵ Government of South Australia, South Australian Government Gazette 18 October 2012 https://www.sa.gov.au/data/assets/pdf_file/0020/17660/DPA_Minister_Approved_Statewide_Wind_Farms_DPA_Gazetted_18_October_2012.PDF.

⁶ Under the *Development Act 1993* (SA) (ss 24-26), amendments to Development Plans may be initiated by an individual council or by the Minister for Planning. The Minister can amend multiple Development Plans through a single DPA.

⁷ Goyder Council Development Plan as consolidated 17 February 2011.

⁸ Goyder Council Development Plan as consolidated 17 February 2011, Primary Production Zone Objective 5 as cited in *Tru Energy Renewable Developments Pty Ltd v Regional Council of Goyder & Ors* [2014] SAERDC 48, 5 [14] (**Tru Energy**)

⁹ Goyder Council Development Plan as consolidated 17 February 2011, Primary Production Zone Desired Character as cited in *Tru Energy*, 5 [15] – emphasis added by the author

¹⁰ Goyder Council Development Plan as consolidated 17 February 2011, General Section Renewable Energy Facilities as cited in *Tru Energy*, 7 [21]

¹¹ Goyder Council Development Plan as consolidated 17 February 2011, General Section Design and Appearance as cited in *Tru Energy*, 5 [15]

¹² *Tru Energy*, 10 [26].

¹³ *Ibid.*

¹⁴ Goyder Council Development Plan as consolidated 17 February 2011, General Section Renewable Energy Facilities Principle 2 as cited in *Tru Energy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 10 [27].

consistent with the relevant *Environment Protection (Noise) Policy* published by the South Australian Environment Protection Authority (EPA).¹⁵

The EPA has produced numerous guidelines and reports and has undertaken investigations in respect of wind farm noise impacts.¹⁶ It is the position of the EPA that wind farms do not produce perceptible levels of infrasound and low frequency noise.

Tru Energy called evidence from an acoustic engineer who concluded that the wind farm would, if constructed in accordance with the relevant plans and specifications in the development application, comply with all Development Plan and EPA requirements concerning noise.

The Respondents' acoustic engineer gave evidence that wind farms produce infrasound and low frequency sound which has the potential to affect amenity and cause detrimental impacts to surrounding property owners.¹⁷ It was argued by the Respondents that the applicable EPA policy and guidelines were inadequate as they do not deal with infrasound and low frequency noise.

The Court did not find that there was any factual basis for it to refuse development plan consent on the basis of noise or the perception of energy below the audibility level, thus dismissing the claims raised with respect to infrasound and low frequency sound.¹⁸

The Court preferred Tru Energy's evidence and found that the predicted noise levels of the proposed wind farm met the recommended standards.

Shadow flicker, reflection, glint, and electromagnetic interference

General Section Principle 2 in the Council's Development Plan, relating to Renewable Energy Facilities, requires that wind farms minimise shadow flicker, reflection, glint and electromagnetic interference with television and radio signals.¹⁹ In the evidence presented to the Court, Tru Energy acknowledged that one stakeholder dwelling would be affected by shadow flicker for a maximum of 21 hours per year.²⁰ Despite this, the Court was satisfied that no non-stakeholder dwellings were going to be affected by interference of this nature and it was unlikely that road users would be affected. Further, of significance to the Court was the fact that Tru Energy had undertaken to monitor compliance with the provisions relating to electromagnetic interference to ensure that this would not become an issue in the future.

Impact on flora and fauna

In support of Tru Energy's case, an ecologist and environmental manager conducted an assessment of the potential impact of the proposed wind farm on flora and fauna species and communities. When all of the native fauna and flora were identified, it was found that all of the likely significant ecological impacts of the proposed development could be managed satisfactorily by the micro siting of the turbines and the implementation of the proposed construction of an environmental management plan. Having regard to the evidence presented, the Court was satisfied that with micro siting of the infrastructure proposed for sensitive areas, and adherence to an appropriately constructed environmental management plan, the ecological impacts of the proposed development would be minimised to the extent that the proposal would sufficiently comply with Renewable Energy Facilities

¹⁵ Goyder Council Development Plan as consolidated 17 February 2011, General Section Interface between Land Users Principle 8 as cited in *Truenergy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 10 [27].

¹⁶ See the EPA's Wind Farm Noise Guidelines, and the Waterloo Wind Farm Environmental Noise Study, www.epa.sa.gov.au/environmental_info/noise/wind_farms/waterloo_wind_farm_environmental_noise_study

¹⁷ *Truenergy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 13 [41].

¹⁸ *Ibid*, 18 [50].

¹⁹ Goyder Council Development Plan as consolidated 17 February 2011, General Section Renewable Energy Facilities Principle 2 as cited in *Truenergy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 19 [51] and [53].

²⁰ *Truenergy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 19 [52].

Objective 3, Principle 2, Objectives 1 and 7, and Natural Resources Principle 34.²¹ The Court was also satisfied that the imposition of conditions could address any matters of concern with respect to micro siting and the potential for turbines to be closer together than manufacturer recommendations.²²

Geotechnical, traffic management, aeronautical impacts

The Court accepted that the proposal was sufficiently in compliance with provisions such as Sloping Land, Transportation and Access, and Siting and Visibility under the General Section provisions of the Development Plan, which incorporate geotechnical, traffic management and aeronautical concerns.²³

Heritage

Objective 1 and Principle 1 of Heritage Conservation and Objective 3 and Principle 5 of Heritage Places seek the conservation and protection of heritage places.²⁴ One of the Representors' homes (known as the Old Koonoona Homestead) was listed as a State Heritage Place under the *Heritage Places Act 1993* (SA). Whilst the evidence presented to the Court stated that the homestead would be located at least 2 kilometres from the nearest turbine, the Court accepted that the homestead would be conserved.²⁵ It was evident that the turbines were not likely to be viewed from any vantage point from the homestead except the frontage of the property, and on the other side of the road from its location. The Court held that this was satisfactory.

Bushfire

Given the rural location of the proposal, it was necessary for the Court to consider siting and ways in which the proposal would minimise any threat of bushfires to life and property. In this regard, Hazards-Bushfire Principle 6 stipulates that buildings and structures should be positioned away from areas where they pose an unacceptable risk, particularly as a result of vegetation cover, poor access, rugged terrain, the inability to provide an adequate building protection zone and the inability to provide an adequate supply of water for fire-fighting purposes.²⁶

In support of Tru Energy's case, a bushfire safety expert gave evidence on the fire risk assessments undertaken for the proposal. The results identified a series of risks (such as transformer electrical faults, welding igniting vegetation, and arcing between transmission cables), however, it was argued that the facility would be designed and managed through both construction and operational phases in such a way as to reduce the risk to bushfire.²⁷ The Court also considered that the proposal would be situated on land largely cleared of vegetation, and that it would afford improved access routes throughout the land, particularly for emergency services vehicles.²⁸

Conclusion

Having considered and assessed all of the evidence against the Council's Development Plan, the Court ruled in favour of Tru Energy. It did so on the basis that the policies relating to wind farm development

²¹ Goyder Council Development Plan as consolidated 17 February 2011, General Section Renewable Energy Facilities Objective 3 and Principle 2, and General Section Natural Resources Objective 1 and 7 and Principle 34 as cited in *Truenergy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 19 [54].

²² *Truenergy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 23 [67].

²³ Goyder Council Development Plan as consolidated 17 February 2011, General Section Sloping Land, Transportation and Access, and Siting and Visibility.

²⁴ Goyder Council Development Plan as consolidated 17 February 2011, General Section Heritage Conservation Objective 1 and Principle 1, and Heritage Places Objective 3 and Principle 5 as cited in *Tru Energy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 23 [69] and 24 [70].

²⁵ *Tru Energy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 24 [71].

²⁶ Goyder Council Development Plan as consolidated 17 February 2011, General Section Hazards Bushfire Principle 6 as cited in *Tru Energy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 25 [72].

²⁷ *Tru Energy Renewable Development PL v Regional Council of Goyder* [2013] SAERDC 11, 25 [73].

²⁸ *Ibid*, 27 [75].

in the Development Plan (and which apply across rural and Primary Production areas in South Australia) are unequivocally clear. The relevant provisions relating to wind farms can only be interpreted as encouraging these developments. Wind farm developments are continuing to be developed in South Australia, no doubt as a result of planning assessment criteria which are designed to favour their establishment.