NELR casenotes

SOUTH AUSTRALIA

Environment, Resources and Development Court

Quinn & Ors v Regional Council of Goyder & Anor [2010] SAERDC 63

On 24 November 2010 the Environment, Resources and Development Court handed down judgment in the first appeal which has proceeded to hearing in South Australia concerning a proposed wind farm.

The proponent, AGL Energy Ltd, sought development approval to establish a wind farm on land east of the township of Hallett, near Mt Bryan. The proposed wind farm consisted of 38 turbines, access roads, cables, wind monitoring masts, electricity sub-station and other associated infrastructure.

The application was processed as a category 3 development. Numerous representations were received. The Council granted conditional development plan consent to the proposal, and several representors appealed against the Council's decision.

Prior to hearing of the appeal, AGL amended its proposal, including by omitting five turbines. The proposed turbines consisted of an 80m high tower, and 44m long turbine blades, giving an overall height of 124m above ground level.

The subject land was in a Primary Production Zone according to the relevant Development Plan.

The appellants' objection to the proposal related principally to the potential noise impacts of the turbines, and their visual impact including the effect of the proposal on users of the Heysen Trail. [The Heysen Trail is a 1 200 km walking trail from Cape Jervis on the Fleurieu Peninsula to Parachilna Gorge in the Flinders Ranges.]

The Court heard uncontested evidence that the location was very good in terms of efficient generation and supply of electricity, compared with other existing or proposed wind farms around Australia.

On that basis the Court was satisfied that the proposed wind farm would be sited in an 'appropriate location' having regard to Objective 1 and PDC 1 of the Renewable Energy Facilities (REF) of the Development Plan.

Importantly, the Court considered that the REF provisions express a planning policy which encourages the establishment of new wind farms in such areas.

Having established that the location was generally suitable, the Court considered whether the elements of the wind farm, and the wind farm as a whole, were suitable in terms of siting, design and operation.

The Court noted that the site was not in an area of the state where the landscape qualities were so significant that a wind farm would not be appropriate, at all, on visual grounds. The Court indicated that, generally, it would not expect such areas to be zoned Primary Production. Rather, it is more likely that they would have a conservation or heritage focus.

The Court also observed that the policy behind the provisions in the REF of the Development Plan which deal with visual amenity 'must have been set in the knowledge that a wind farm necessarily involves the establishment of very high towers, with very long blades attached to them, in visually prominent locations'. As such, some modification of the landscape 'must occur' for the objectives of the REF to be achieved.

The Court then considered the visual impacts of various elements of the wind farm, including the turbines, substation and access tracks and turbine pads. The Court held that although the landscape would be modified by the introduction of a new element into the landscape, it would retain an open, scenic, rural character as desired in the Zone. The modification of the landscape was therefore permissible in planning terms.

The Court heard expert evidence from two acoustic engineers, as well as anecdotal evidence from people living in proximity to an existing, neighbouring wind farm.

AGL's acoustic engineer was satisfied, on the basis of noise modelling, that the proposed wind farm would sufficiently comply with the relevant environmental noise standards. The acoustic engineer called by the appellants did not

undertake noise modelling but, rather, criticised the relevant noise guidelines and standards for predicting noise levels for wind farms. The Court held that it was not its role to re-write the noise standards. Rather, its role generally was to apply the standards as they exist.

In dealing with the anecdotal evidence, the Court stated that the framers of the Development Plan must have known that even in a sparsely populated rural area there would be residents who would be able to hear the turbines, and that a small percentage of those were likely to be annoyed. Thus, the Court was unable to draw any inferences from the anecdotal evidence in circumstances where the proposal was shown to sufficiently achieve relevant environmental noise standards.

Comment

The Quinn decision provides much anticipated clarification in relation to the interpretation and application of REF provisions in a number of Development Plans.

The decision confirms that the REF provisions encourage the development of wind farms in appropriate locations.

The decision also confirms that zone provisions relating to visual amenity must be viewed in the context of the REF provisions relating to visual amenity, which necessarily assume there will be some modification to the landscape.

The decision also confirms that notwithstanding that the establishment of a wind farm may cause noise nuisance to some people, the REF provisions seek the avoidance or minimisation of excessive noise which, in turn, invites assessment against relevant noise standards.

Peter Psaltis, Partner, Norman Waterhouse Lawyers

Environment, Resources and Development Court (ERD Court)

Sweeny v City of Onkaparinga [2010] SAERDC 65

The decision in Sweeny v City of Onkaparinga from the ERD Court contains some important guidance concerning the determination of residential density.

An appeal was brought against the decision of the Council to refuse a proposal for the construction of two two-storey group dwellings to the rear of an existing dwelling, a car-port in front of the existing dwelling, the removal of four significant trees and related landscaping and driveway works.

The proposed development was located in a policy area which strongly encouraged the retention of very low-density residential development.

The appellant's expert witness examined four areas surrounding the proposed development, and found that area 1 had a rate of 3.5 dwellings per hectare, area 2 had a rate of 6.1 dwellings per hectare, area 3 (which included the subject land) had a rate of 9 dwellings per hectare and area 4 had a rate of 10.2 dwellings per hectare.

The appellant argued that density is a relative concept, and as such, the existing density of area 3, having regard to its dwelling per hectare rate compared to areas 1, 2 and 4 was already medium-density and, as such, the proposed development was in accordance with the existing pattern of development in the locality.

This argument was advanced despite the fact that the average allotment size in the locality was 986m2, and the site area for each proposed group dwelling was approximately 350m2.

In rejecting the appellant's density argument, the Court held that density is indeed a relative concept, but that it is determined by reference to not only dwellings per hectare, but also site area, site coverage, bedrooms per dwelling and so on.

Accordingly, the Court found that, having regard to all of these factors, particularly site area and site coverage, the existing density was not medium-density, but rather low-density, and as such, the proposed development would be at odds with existing development in the locality.