REGIONAL COUNCIL OF GOYDER
COUNCIL DEVELOPMENT ASSESSMENT PANEL

Notice is hereby given that the next meeting of the Regional Council of Goyder Council Assessment Panel will be held in the Regional Council of Goyder Eudunda YAC Meeting Room, 25 Bruce Street, Eudunda, at 10.00a.m. on Wednesday 26th February 2020.

Fiona Barr
DEVELOPMENT ASSESSMENT MANAGER
20 February 2020

1. ATTENDANCE RECORD
   Mr B. Ballantyne (Presiding Member), Ms D Hibbert, Mr R Semrau and Mr G MacInnes

1.1 PRESENT

1.2 APOLOGIES

A) CONFIRMATION OF MINUTES
   Minutes of Meeting –
   RECOMMENDATION
   That the minutes of the previous meeting of the Council Assessment Panel held on 22 January 2020 be taken as read and confirmed.

3. MEMBER DECLARATIONS
   Pursuant to Section 56A of the Development Act 1993, the opportunity is hereby given to members of the CAP who have a direct or indirect personal or pecuniary interest in any matter before the CAP (other than an indirect interest that exists in common with a substantial class of persons) -
   (a) to, as soon as he or she becomes aware of his or her interest, disclose the nature and extent of the interest to the panel, and
   (b) to NOT take part in any deliberations or decisions of the panel on the matter and must be absent from the room when any deliberations are taking place or decision is being made.

   Furthermore, a member of the CAP will be taken to have an interest in a matter if an associate of the member has an interest in the matter.
   THE ONUS FOR DISCLOSURE RESTS WITH THE MEMBER (OR THE OFFICER)

4. DEVELOPMENT APPLICATIONS

4.1 Development Applications to be determined by the Panel

4.1.1 Category 3 –
   422/039/19 Carmen Grove
   Construction of Solar Panels on ground mounted framework
5. CORRESPONDENCE
   Nil

6. OTHER BUSINESS

7. NEXT MEETING

8. CLOSE OF MEETING
APPLICATION NO. 422/039/19
APPLICANT ACE MICROGRID PTY LTD
OWNER CARMINE GROVE PTY LTD
PROPOSAL GROUND MOUNTED SOLAR PHOTOVOLTAIC SYSTEM
LOCATION [LOT 824 BRUCE STREET, EUDUNDA SA 5374
ZONE RESIDENTIAL ZONE
NATURE OF DEVELOPMENT CATEGORY 3
PUBLIC NOTIFICATION YES
REPRESENTORS Six (6)
AGENCY REFERRALS Nil
RECOMMENDATION Option A or B

REASON FOR REPORT
At the January 22nd CAP Meeting the CAP moved the following recommendation;

CAP 03/20 The Regional Council of Goyder Assessment Panel resolves:

1. To defer Development Application 422/039/19 subject to Council obtaining legal advice to the determine the classification of the development and whether the proposal should be industry and assessed as a non-complying development.

CARRIED

Council sought legal advice and in summary:

- The nature of the development proposed in DA 422/039/19, being for a renewable energy facility (solar farm), is not a form of industry.
- A renewable energy facility (solar farm) is not defined form of development for public notification purposes within either the Public Notification requirements in the Residential Zone in the Development Plan or schedule 9 of the Regulations.
- In accordance with Section 38(2) of the Act 422/039/19 should be processed as a Merit and Category 3.

I have also included correspondence from Mark Kwaiatkowski dated 20 February 2020 that includes a copy of their advice from Botten Levinson Lawyers.

DESCRIPTION OF PROPOSAL
The application is for solar Photovoltaic is for Solar Photovoltaic (PV) Panels on ground Mounted Framework for commercial (renewable energy production) use incorporating;

- Width of panels is 991mm which will be mounted into the ground
- The rows Solar PV panels will be spaced 8 metres apart internally
- Solar Panels will be mounted on steel frames with a height above ground level of between 1.7 metres to a maximum height of 2 metres
- Transformer and Low Voltage Switchboard in the north eastern corner
- 1.8 metre high chain mesh perimeter fencing
- Associated landscaping.
PREAMBLE
The purpose of this report is to assist the Panel in its consideration and determination of the subject of this application. It is considered that any potential impacts have been minimised where possible, especially given the overall context of the development and its relationship to the surrounding area.

NATURE OF THE DEVELOPMENT
The proposal is identified in the Regional Council of Goyder Development Plan Residential Zone, Development Act 1993 (the Act), as a merit form of development.

The application has been processed as a Category 3 development for public notification purposes, on the basis that it does not encompass a form of development that is listed under public notification Categories 1 or 2 in either the Development Plan or in Schedule 9 of the Development Regulations 2008.
PUBLIC NOTIFICATION
The proposed development has been identified as a Category 3 development in accordance with s38 (2) (c) of the Act. The application was placed on public notification between 23 July 2019 and 6th August 2019 in The Leader Newspaper.

Six (6) representations were received.

<table>
<thead>
<tr>
<th>Author</th>
<th>Address</th>
<th>Concern</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mary Morris</td>
<td>1285 Curio Highway, Hampden SA 5374</td>
<td>Residential Land, impact on neighbouring properties such as glare.</td>
</tr>
<tr>
<td>T&amp;W Coop &amp; P Beentjes</td>
<td>73 Bruce Street, Eudunda SA 5374</td>
<td>Industrial development within a residential zone, visual impact, loss of house value.</td>
</tr>
<tr>
<td>Shaun Schutz</td>
<td>79 Bruce Street, Eudunda SA 5374</td>
<td>Decrease in land value and inappropriate location.</td>
</tr>
<tr>
<td>Amanda Schaefer</td>
<td>35 Hannan Street, Eudunda SA 5374</td>
<td>Glare, devalue of property value, residential zone.</td>
</tr>
<tr>
<td>L&amp;M Zerner</td>
<td>89 Bruce Street, Eudunda SA 5374</td>
<td>Inappropriate location within a residential zone, glare, rise in heat and cause adverse discomfort for residents.</td>
</tr>
<tr>
<td>DA &amp; MM Booth</td>
<td>92 Bruce Street, Eudunda SA 5374</td>
<td>Inappropriate development within a residential zone, privacy impacts, visual, fire risks, soil erosion, noise and heat concerns.</td>
</tr>
</tbody>
</table>

The key issues raised in the public submissions related to land use compatibility and the amenity impacts of the development, including visual and that the development was inappropriate for the residential zone while also raising concerns that it may adversely affect the character of the residential zone and entrance into Eudunda.

Applicants Response

Residential Land
Whilst zoned residential, the large underutilised allotment has not been used for residential purposes and has remained vacant without market interest for future residential development given the supply of residential land within Eudunda.

Glare impacts from solar PV panels
In relation to glare impacts from the solar PV panels, a common misconception about solar photovoltaic (PV) panels is that they cause or create glare. Light absorption, rather than reflection, is central to the function of a solar PV panel in order to absorb solar radiation and convert it to electricity. Solar PV panels are constructed of dark-coloured materials and are covered with anti-reflective coatings which reflect as little as two percent of incoming sunlight which is about the same as water and less than soil or even wood.
Heat impacts from solar PV panels
In relation to heat impacts of solar PV panels, no evidence has been provided by the representors in support of this suggestion. From an evidence based approach, there have been several peer reviewed studies which identify that heat island effect is not applicable to solar farms and that natural convection will take any warm air upward and not towards adjoining properties.

Appearance / visual impact on landscape character
The solar PV modules have been designed in a consistent manner over the subject land to maximise its efficiency and minimise its visual impact. The overall maximum height of the solar modules will be in the order of 2.3m to 2.6m metres above natural ground level and the and the pile height will be 1.3m to 1.6m as shown on the plans.

Too close to adjoining dwellings and impacts on privacy.
The proposed panels will be adequately setback and separated to adjoining residential properties by proposed vegetation and existing vacant allotments which are not used for residential properties. Further, the existing vegetation along the Council verge and the roadway provides additional separation between the subject land to the properties to the west of the subject land. Based on the amended layout proposed, the solar panels at the closest point will be 85 metres from the closest dwelling to the north, 83 metres from the closest dwelling to the south and 86 metres from the closest dwelling to the west.

Noise and pollution impacts
Solar PV panels produce minimal noise and are generally silent during the operational phase. The only noise emitted from an operational solar farm would be from the substation and inverters, which can be inaudible with buffer distances to sensitive receivers and where equipment housing are used. There is no noise from inverters at night due to daytime operation of solar panels.

Chain fencing not appropriate around residential block.
The proposal includes a 1.8 metre high chain mesh fence which surrounds the subject land the proposed fencing will result in fencing which is consistent with other open natured fencing in the locality.

Increased fire risk.
The subject land is not contained within a general bushfire risk area and will not result in fire risk on the subject land.
An aerial view of Bruce Street showing the subject land within the residential zone and Three Chain Road Industrial Zone that is also currently underutilised.

ASSESSMENT OF THE PROPOSAL
In determining if the development is a reasonable form of development for the subject site, an assessment is conducted against the relevant provisions of the Development Plan. The appropriateness of the proposal is therefore reliant on satisfying such provisions and having no unreasonable impact upon the adjoining properties and on the amenity and character of the locality.

SITE DESCRIPTION
The subject land is located in the Residential Zone with access to the site from Three Chain Road. Whilst a residential zone surrounds the subject site, the Industrial Zone is located east of Three Chain Zone. There is no vegetation of significance on the site, however there is extensive vegetation along the council verge to the west of the subject land with the interface to Bruce Street and the adjoining residential land.
The site has a downwards slope from the south to the north and further slope from the middle of the site to the eastern and western boundaries.

**Locality**
The subject land is located at the northern gateway entrance into the Eudunda Township with wide street and street trees forming an important part of the open rural character of the town entrance. The current public realm needs to be maintained and any development needs to be sensitive and compliment the current building stock and character.

The surrounding area along Bruce Street can be described as low density and defined by single storey standalone dwellings on larger allotments. While to the east of the subject land it is zoned Industrial with much of the land underutilized.
The subject land from Three Chain Road (Dwelling in background)
RESIDENTIAL ZONE
The subject land is located in the Residential Zone as indicated on Zone Map Go/11 of the Regional Council of Goyder Development Plan, Consolidated 24 November 2016, where the desired character statement for the Zone envisages the following:

Residential Zone
Objective 1: A residential zone comprising a range of dwelling types.
Objective 2: Increased dwelling densities in close proximity to centres, public and community transport routes and public open spaces.
Objective 3: Development that contributes to the desired character of the zone.

Principles of Development Control

Land Use
1. The following forms of development are envisaged in the Residential Zone:
   • Domestic outbuilding in association with a dwelling
   • Domestic structure
   • Dwelling
   • Dwelling addition
   • Small scale non-residential uses that serve the local community, for example:
     • Child care facilities
     • Health and welfare services
     • Open space
     • Primary and secondary schools
     • Recreation areas
     • Shops, offices or consulting rooms
     • Supported accommodation
     • Tourist accommodation (1 to 5 units and maximum of 10 persons)

4. Vacant or underutilised land should be developed in an efficient and co-ordinated manner to increase housing choice by providing dwellings with densities higher than, but compatible with adjoining residential development.

The Objectives of the Residential Zone encourage the development of a wide range of dwelling types, increased densities and the revitalisation of underutilised land to facilitate a greater mix of housing types and improved residential amenity. The zone objectives and Policy Area provisions are silent on non-residential development in the Zone. However, PDC 5 does contemplate non-residential uses in the Zone providing that they are small scale and serve the local community, are consistent with the character of the locality and do not detrimentally impact on the amenity of nearby residents. These identified uses include childcare centre, schools and shops, office and consulting rooms in association with a dwelling.
The proposed development does not meet the PDC'S stated above and it is my view that the functionality of an envisaged land use should not be compromised by the establishment of a non-envisaged land use.

The proposed development is at variance with the Objectives and Principles of Development Control for the Residential Zone.
Dwelling in Bruce Street across from the subject land
**Desired Character**

**Pattern of Development**

New development areas to the north of Eudunda will reinforce and complement the existing character of residential development in Eudunda, which is characterised by traditional country town street pattern and widths with dwellings at low densities that are generally setback from boundaries to allow for will vegetated gardens. Development, particularly to the north, will occur in a logical and staged sequence, expanding the town in a manner that with maturity, development in this area will blend in with the remainder of Eudunda forming a seamless transition between the old and the new. Vacant sites within the existing built up area will be filled in with new housing.

The proposed development does not meet the Desired Character requirements.

**COUNCIL WIDE- GENERAL SECTION**

The Council Wide General provisions provide guidance for development. The provisions generally promote development of a standard and appearance which minimises visual impact on the landscape and doesn't jeopardise the continuance of adjoining land uses.

Generally development should be located and designed to prevent adverse impact and conflict between land uses. Sensitive uses likely to conflict with the continuation of lawfully existing developments and land uses considered appropriate for the zone should not be developed or should be designed to minimise any negative impact.

**Interface between Land Uses**

**Principles of Development Control: 1**

The Development Plan seeks to ensure that development is located and designed to minimise adverse impact and conflict between land uses and that development should not detrimentally affect the amenity of the locality.

**Principles of Development Control**

1. 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
Currently, planning policies do not provide any real explicit guidance on the cumulative impacts of renewable energy developments on neighbouring land, so each development is considered on its individual merits and recently there has been much discussion on solar heat island and frost effects, buffers and visual amenity from solar farms. That is why these types of developments are generally envisaged within Council's Primary Production Zone.

Orderly and Sustainable Development

The Objectives and Principles of Development Control relate to Orderly and Sustainable development seek Orderly and economic development that creates a safe, convenient and pleasant environment in which to live, development that does not jeopardise the continuance of adjoining authorised land uses and development that does not prejudice the achievement of the provisions of the Development Plan. Further the provisions encourage vacant or underutilised land to be developed in an efficient and co-ordinated manner to not prejudice the orderly development of adjacent land.

Objectives

3 Development that does not jeopardise the continuance of adjoining authorised land uses.
4 Development that does not prejudice the achievement of the provisions of the Development Plan.

Principles of Development Control

1. Development should not prejudice the development of a zone for its intended purpose.

The principle concern with the development is the fact that it will occupy an area of land given over to residential for a use that is better suited in a Primary Production zone. Above all, development should not prejudice the development of a zone for its intended use. Whilst this impact will not be severe, it is exacerbated by virtue of the site being located in a residential zone and main entrance to Eudunda.

The proposed development does not meet with the above Objectives and Principles of Development Control.

Landscaping

Principles of Development Control 2 (b)

(b) be oriented towards the street frontage

The applicant has provided an amended landscaping plan which proposes additional landscaping to the periphery of the site which may reduce the visual impact of the proposal when viewed from properties surrounding the subject land.

The applicant has advises the species proposed to the periphery of the site along the boundary will include:

- Melaleuca lanceolata Dryland Tree 3-4 metres
- A triplex nummularia Oldman Saltbush 2-2.5 metres

It is important to note that a solar panel's absorption of incoming sunlight is fundamental to the production of electrical energy. Thus any landscaping to such a development needs to be low to avoid overshadowing the panels.
Renewable Energy Facilities
Objectives: 1
Principles of Development Control: 1(a)

Objective 1 states the Development of renewable energy facilities that benefit the environment, the community and the state.

Council's current Development Plan policies haven't kept pace with new and more efficient energy infrastructure such as solar farms and there are no policy regarding any separation from neighbouring properties and other sensitive assets. As such the State Government currently has a Discussion paper on proposed changes to renewable energy policy in the Planning and Design Code that is out for public consultation till February 2020.

While the proposed changes can not be assessed under this application it is anticipated that under the new Planning and Design Code a proposed Solar Farm will be required to meet the following setbacks:

- 500m from conservation areas
- 100m from Township and rural living areas
- 30 m from all neighbouring land.

Currently renewable energy developments are generally anticipated within Council's Primary Production Zones and as such we need to consider buffers and visual amenity impacts with this proposed development.

Objective 1 of the renewable energy facilities section is met as the proposed development of renewable energy facilities would benefit the environment, the community and the state.

However, the proposal is at odds with the remainder of Objectives and Principles of Development Control.

Siting and Visibility
Objectives:
Principles of Development Control: 8(b)
(b) along allotment boundaries to provide permanent screening of buildings and structures when viewed from adjoining properties and public roads

The relevant provisions of the Council's Development Plan require development to be sited and designed to minimise its visual impact on the natural, rural or heritage character of the area. As such I consider that when assessing the visual impact of such a development that it is important to recognise:
That solar arrays require good solar access unaffected by shading. In my view, Siting and Visibility provisions provide the best guidance for the assessment of the visual impact of the proposed development, in particular through the following Principles of Development Control:

1. Development should be sited and designed to minimise its visual impact on: the natural, rural or heritage character of the area
2. Areas of high visual or scenic value, particularly rural areas
3. Views from public reserves, tourist routes and walking trails.

While I acknowledge that the solar arrays have a low height in the order of 1.7 to 2.2 metres above natural ground level I believe they are at variance with the above Principles of Development Control.

**Vacant Land**

Whilst the rationale of the applicant outlines the allotment has not been used for residential purposes and has remained vacant without market interest for future residential development it is not my contention that the proposal can exhibit planning merit on that presumption to warrant consent.

While the land has been vacant for a period of time it may be appropriate for the proposal to be accommodated more appropriately in either industrial, or rural zoned areas.

**Referrals**

This Development Application does not trigger any mandatory referrals as listed in Schedule 8, of the *Development Regulations 2008*.

Vehicle access to the site is via the existing access point from Three Chain Road and is to remain unchanged. As a result, a referral pursuant to Schedule 8 of the *Development Regulations 2008*, referral to the Department of Planning, Transport and Infrastructure (DPTI) is not required.

**CONCLUSION**

Council does not dispute that Solar Energy Farms can make a positive impact on the local economy. However, any negative impacts should also be considered and given weight in the assessment process to ensure both the positive and negative local impacts of any development are considered, and that development of one land use or another is not at the expense of another land use.

Assessment of the application on its merits requires application of the relevant Development Plan provisions to the proposed development and regard to the context of the locality in which the subject land is located. It is important to consider that the Development Plan provisions are guides for the assessment of development but are not rules or a statute. Accordingly, each matter needs to be assessed as a planning judgement and therefore a matter of fact and degree.

Section 33(a) of the Act requires the relevant authority (the Council) to assess a development application against the provisions of the relevant-appropriate Development Plan and Section 35(2) specifies that where a development is assessed as being seriously at variance with the Development Plan, it must not be granted.

This report has highlighted that the proposal is at variance with several provisions of the Development Plan, both quantitative and qualitative, as such the proposal is considered to be finely balanced. When provisions of the Development Plan are silent on a particular use, it can be difficult
to determine whether or not such a proposal is able to be supported, or should be refused.

The task of the Panel is therefore two fold firstly, it is to consider the proposed development against the provisions of the Development Plan as required by Section 33(1) (a) of the Act.

Second, it must consider whether the development is seriously at variance with the Development Plan as required by Section 35(2) of the Act. Before consent is granted Section 35(2) implicitly requires the planning authority to make an assessment that the development is not seriously at variance with the Development Plan.

In assessing the extent to which the proposed development complies with the provisions of the Development Plan, the Courts have made it clear that one must first distil the overall intent and purpose and desired character of the zone in which it is sought to place the proposed development.

Having done so, one must then proceed to assess the proposal by reference to the provisions in the Development Plan, that is, to weigh the benefits and detriments or the ‘pros and cons’ of the proposed development by reference to the Development Plan.

In doing so, the planning authority must also bear in mind that the Development Plan is ‘a practical code for practical application’.

Whilst I acknowledge that there is certain planning merit in the proposal there are matters that are of concern and variance to the Development Plan. I further acknowledge that there may be argument to support the proposed development.

It isn’t the place of any planning authority, to secure the best possible development but to determine having regard to the Development Plan, whether a proposed development is sufficiently in accordance with the relevant provisions of the plan as to warrant planning consent.

**RECOMMENDATION**

Should the Council Assessment Panel hold the view you have the ability to **refuse** the application as it is at variance with the Development Plan or the Panel can **approve** the application then the (in support option) as produced below would be suitable for adoption.

**OPTION A**

The Regional Council of Goyder Council Assessment Panel resolves that having regard to the relevant provisions of the Regional Council of Goyder Development Plan and pursuant to Section 37 (1) (b) of the Development Act, 1993 that:

1. Pursuant to Section 35 (2) of the Development Act 1993, the proposal is not considered to be seriously at variance with the relevant provisions of the Regional Council of Goyder Development Plan, however there is such a departure from the policies that the development does not warrant consent

2. Pursuant to Section 33 of the Development Act 1993, Development Application 422/039/19 at Lot 824 Bruce Street, Eudunda for Construction of Solar Panels on ground mounted framework be **REFUSED** Development Plan Consent because it is considered to be significantly at variance with the relevant principles of development control in the Regional Council of Goyder Development Plan for the following reasons:
Objectives 1,2,3
Principles of Development Control: 1,3,4,5 (a-c)

**General Section**

**Interface between Land Uses**
Objectives: 1
Principles of Development Control: 2,5

**Orderly and Sustainable Development**
Objectives: 3,4
Principles of Development Control: 1,8

**Siting and Visibility**
Objectives: 1

*REASON: The development is not consistent with what is envisaged for a Residential Zone*

**OR**

**OPTION B**
The Regional Council of Goyder Council Assessment Panel resolves that:

Development Application 422/039/19 at Lot 824 Bruce Street, Eudunda for Construction of Solar Panels on ground mounted framework be **GRANTED** Development Plan Consent subject to the following conditions:

1. Except where minor amendments may be required by other acts or by conditions imposed by this application, the development is to be established in strict accordance with the details and plans submitted in Development Application 422/039/19

*REASON: To ensure the proposed development is undertaken in accordance with the approved Plans*

**NOTES**
Hi Mark

Thanks for your email.

Can I please just confirm that you support the attachment in full to be included in the item for the CAP?

Just confirming to verify no issues with the legal advice being made public?

Cheers

Fiona Barr MPA
Development Assessment Manager

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From: Mark Kwiatkowski [mailto:mark@adelaideplanning.com.au]
Sent: Thursday, 20 February 2020 1:15 PM
To: Fiona Barr <fbarr@goyder.sa.gov.au>
Subject: FW: Draft letter of advice - Bruce Street, Eudunda (BLL 220032)

Hi Fiona,

As discussed, please find attached a copy of the legal opinion for this matter at 824 Bruce Street Eudunda to be submitted to the CAP with the previous application documentation.

I can confirm that Tom Game or a representative from Botten Levinson, Dr Donna Ferretti and Myself will be attending the meeting at the Eudunda chambers.

Regards

Mark Kwiatkowski
Director + Principal Urban Planner

Adelaide Planning & Development Solutions Pty Ltd I Town Planning Specialists I Planning Private Certifiers
e: mark@adelaideplanning.com.au I ph: 0499933311 I w: www.adelaideplanning.com.au
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e: mark@adelaideplanning.com.au | ph: 0499933311 | w: www.adelaideplanning.com.au

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20 February 2020

Mark Kwiatkowski  
Principal Urban Planner  
Adelaide Planning & Development Solutions Pty Ltd  
35 Pinnacle Crescent  
FLAGSTAFF HILL SA 5159

By email: mark@adelaideplanning.com.au

Dear Mark

Advice - DA 422/039/19 - Ground mounted solar photovoltaic system - Lot 824 Bruce Street, Eudunda

You have sought my advice on this development on behalf of the applicant, Carmine Grove Pty Ltd. Specifically, my advice has been sought on the characterisation, merits, and correct approach to the assessment of the application.

The development application comprises solar photovoltaic (PV) panels on ground mounted framework for commercial renewable energy production at lot 824 Bruce Street, Eudunda (Land). The Land is currently a vacant allotment and is located within the Residential Zone of the Regional Council of Goyder Development Plan.

By way of summary, my advice is that:

1. the nature of the proposed development is best characterized as "a solar farm with associated transformer, fencing and landscaping";
2. the proposed development is not in the nature of "industry" and is an undefined land use; and
3. although it is not a land use envisaged within the Residential Zone, approval may nonetheless be warranted having regard to the circumstances and factual context of the proposed development.

I set out my advice in detail below.

Characterisation of development

The proposed development consists of 20 rows of solar photovoltaic panels of 90 metres in length mounted on steel frames. A transformer, chain mesh fence and landscaping also form part of the proposed development. The specific details of the nature of the proposal are contained in the report prepared by Adelaide Planning and Development Solutions (APDS) and submitted as part of the development application.¹

Having reviewed the materials and considered the applicable land use definitions, it is my view that the proposal does not fit within any land use definition.

The proposed development is for an undefined land use, namely, a "solar farm with associated transformer, fencing and landscaping".

Is the proposed development a form of industry?

I understand that it may have been suggested by members of the Council Assessment Panel that the proposed development is a form of "industry". It is my respectful view that this is not the case.

The Environment, Resources and Development Court (ERD Court) has, on a number of occasions, considered the meaning of the terms "industry" and "general industry". Most notably, in the case of *Paltridge & Ors v District Council of Grant & Anor* the ERD Court considered whether a wind farm constituted a form of industry as defined in the Development Regulations 2008. In *Paltridge* the Court referred to the definition of industry and stated:

*The Development Regulations 2008 ("the Regulations") include "general industry" as an "industry" and define "industry" as the "carrying on, in the course of a trade or business, of any process ... for or incidental to the making of any article ..."*

*We would view the process of making an article in the definition of "industry" to contemplate and be limited to the production of something physical or tangible.*

Accordingly, *we do not regard the operation of a wind farm, where the activity in question is the conversion of wind energy into electrical energy, to be "caught" by the definition in the Regulations.* *(My emphasis)*

In *Palridge* the ERD Court ultimately found that the definition of industry is limited to the production of something physical or tangible and that the conversion of wind energy into electrical energy could not be considered to fall within the definition of industry.

This decision is directly relevant in this instance. The purpose of the proposed development is the conversion of solar energy into electrical energy. It follows that, as the ERD Court found in *Palridge*, the electrical energy produced by the solar farm is neither physical nor tangible and therefore this activity does not meet the definition of industry and should not be characterised that way.

Approach to assessment generally

You have also requested my advice as to the merits of the proposal and the correct approach to assessment.

The proposed development is located within the Residential Zone of the Council's Development Plan. While the establishment of renewable energy facilities in the form of solar PV panels is not specifically envisaged in the zone, it is not listed as a non-complying form of development. It is a 'merit' form of development.

The Courts have established a range of principles to guide planning authorities in their assessment of a proposed development against the Development Plan. Those principles relevant in the subject circumstances include:

1. the assessment of a proposal against the relevant Development Plan is not to take place in a theoretical "vacuum". The assessment of a proposed development against the provisions of the Development Plan must be undertaken having regard to the factual and historical context in which the proposed development will be implemented, and by having regard to the relevant surrounding circumstances; *

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2 [2011] SAERDC 23
3 *Courtney Hill Pty v SAPC* (1990) SASR 259

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2. the particular factual circumstances of a proposed development will inform the planning judgement and will affect which of the principles and objectives will predominate;⁴ and

3. any interpretation of the Development Plan must be conducted against the background of the "on the ground reality."⁵

The Development Plan

The provisions of the Residential Zone promote development that reinforces and complements the existing character of residential development. However, that does not mean that only residential development is suitable in this zone.

PDCs 3 and 4 of the residential zone indicate that development should primarily be detached dwellings and vacant or underutilised land should be developed to increase housing choice.

When considering the proposed development against these provisions of the Development Plan, it is necessary to first consider the specific language utilised in the relevant provisions. That language informs the weight the provisions will carry, and also the flexibility in their application. The word "should" cannot be read as of mandatory import. Thus, before even considering the factual and historical context, the wording of the Zone provisions alone contemplates some flexibility in its application and leaves room for non-residential development.

Further to this, PDC 5 itself contemplates the establishment of "non-residential development" within the zone and states that non-residential development should be of a nature and scale that, among other things does not detrimentally impact on the amenity of nearby residents.

The Development Plan also promotes the establishment of renewable energy facilities within the Council area.⁶ The Development Plan provisions encourage the "location, sitting, design and operation of renewable energy facilities to avoid or minimise adverse impacts on the natural environment and other land uses".⁷ The proposed development clearly meets this objective as it is a renewable energy facility with minimal adverse impacts on the environment and other land uses.

In this circumstance while the development may not be explicitly encouraged within the Residential Zone, it nonetheless finds some support in the Development Plan and meets the council-wide provisions promoting renewable energy facilities.

The Full Court of the Supreme Court, in Lakshmanan & Anor v City of Norwood, Payneham and St Peters & Anor⁸ considered how planning authorities should consider such applications. In that case the Court instructed:

It is well accepted that principles of development control are guidelines. An application for development must be assessed against those principles. On occasions, perhaps even commonly, developments will advance the objects of some parts of a development plan but be inconsistent with others. In that case, a planning judgment must be made as to the merits of the proposed development. Only if the development is seriously at variance with the Development Plan in the opinion of the planning authority is it necessary to refuse approval.⁹

⁴ Lakshmanan v City of Norwood Payneham and St Peters [2010] SASCFC 15
⁵ City of Unley v Hall [2002] SASC 14
⁷ Ibid, Objective 3.
⁸ [2010] SASCFC 15
⁹ Ibid, at [45]
Assessing departures from the Development Plan

Clearly, the proposed development does not propose any form of residential development in a residential zone where residential development is envisaged. This departure from the Development Plan must be considered and assessed in the context of the Development Plan as a whole and the particular factual circumstances of the Land and this proposal.

In *Town of Gawler v Impact Investment Corporation Pty Ltd* Justice Bleby identified 10 factors to be considered in determining whether a departure from the provisions of a Development Plan might be justified. The considerations include whether the language of the principles concerned "is direct or contemplates some flexibility in approach" and "whether non-compliance with the policy in this particular case is likely to encourage other non-complying developments in the zone."11

In the present case I note that:

1. The provisions of the Development Plan which describe the desired character of the zone while encouraging residential development, are tempered by non-exclusive language. The use of the word "should" contemplates flexibility in their application.

2. Non-residential development is contemplated in the zone where it does not detrimentally impact on the amenity of nearby residents. Significantly, the proposed development includes extensive screening vegetation along the perimeter of the Land to minimise visual impact. The landscaping proposed is 5 metres wide and between 2 - 4 metres in height. Such dense vegetation around the perimeter of the Land will ensure the solar PV panels will have no detrimental impact on the amenity of nearby residents. The only break in vegetation along the perimeter is for access gates that are located in the eastern boundary which face the adjacent industry zone.

3. The Land is located on the boundary between the residential zone and the industry zone. Where development occurs on the boundary of a zone the integrity of that zone and the extent to which the desired character of that zone is met can be different to land located more centrally in the relevant zone. The Supreme Court has noted that "the residential integrity of a residential zone at its perimeter might be very different from its residential integrity elsewhere."12 In this sense it is not unusual for a proposal that departs from the desired character of the zone to be located at the perimeter of the zone where it will likely have less impact.

4. As referred to above, the Development Plan encourages the establishment of renewable energy facilities.13 The proposed development involves renewable energy facilities that will almost entirely be screened from the outside by way of vegetation and will therefore avoid or minimise adverse impacts on other land uses. The proposal does not involve any impacts on the natural environment (on the basis that the infrastructure is not permanent). No site contamination will occur and no noise or dust will be emitted from the Land. I consider the proposal to meet the objectives of the Renewable Energy Facilities provisions of the Development Plan.

5. Importantly, the approval of this development will not prevent the Land from being used for residential purposes in the future. The proposed development does not involve any permanent infrastructure on the Land. The solar panels and the steel framework can be removed from the Land relatively easily. Currently, the Land is vacant and, as we understand it, there is very low demand for the Land to be used for residential purposes, given the abundance of residential land for sale in Eudunda at the present.

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10 [2007] SASC 356.
11 ibid at [81-82].
12 Papadopoulos v Corporation of the City of Woodville (1985) 39 SASR 569 at 575.
The proposed development currently represents the best use of the Land. Should demand for residential land in Eudunda increase it is unlikely the solar farm will continue to represent the best use of the Land i.e., the market is likely to determine when the Land is developed for housing. It is likely to be several decades before the supply of residentially zoned land in Eudunda is exhausted. Until the land is required for residential development it is appropriate to consider an interim use.

6. I do not consider that the establishment of this non-residential land use in the zone will lead to, or encourage other non-residential developments in the area. The development of the Land will not prejudice the ability for adjoining land to be developed for residential purposes. As described above, the infrastructure associated with the proposed development can be removed from the Land. The proposal will not be detrimental to the locality and will not prejudice the long term objectives of the zone.

7. Whether there are other development proposals that could better conform with the Development Plan is irrelevant. It is not the task of the Council to refuse a development proposal because a different development would conform better with the Development Plan.

Summary

In assessing the application it is necessary to have regard to its particular factual circumstances and to have regard to the provisions of the Development Plan as a whole.

Having regard to the above, there are a number of considerations which weigh in favour of the proposal such that a departure from the provisions of the Residential Zone is likely to be justified.

Yours faithfully

Tom Game
BOTTEN LEVINSON
Mob: 0419 809 361
Email: thg@bllawyers.com.au

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14 Clement-Stone Town Planners v City of Charles Sturt & Anor [2014] SAERDC 6 at [47].