



Land and Environment Court

New South Wales

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Case Name:	NSW Community Renewables (Gunnedah) Pty Ltd v Gunnedah Shire Council
Medium Neutral Citation:	[2022] NSWLEC 1581
Hearing Date(s):	23-24 February 2022; 11 July 2022; submissions on conditions filed on 18, 20 and 25 July 2022
Date of Orders:	28 October 2022
Decision Date:	28 October 2022
Jurisdiction:	Class 1
Before:	Dixon SC
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development consent is granted to development application DA2020/035 for the construction and use of electricity generating works comprising 5MW solar farm and associated infrastructure on a portion of the land legally described as Lot 2 in DP 814689 known as 262 Hunts Road, Gunnedah, subject to the conditions of consent in Annexure A.</p> <p>(3) The exhibits are returned except for A, B, C, E, G, 2, 10 and 12.</p>
Catchwords:	DEVELOPMENT APPLICATION – regionally significant development – electricity generating works – solar farm – alienation of residential land – visual impacts and landscape character – site suitability – public interest
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, s 4.15</p> <p>Gunnedah Local Environmental Plan 2012, cl 2.3</p> <p>State Environmental Planning Policy (Planning Systems) 2021, cl 2.19, Sch 6 cl 5(a)</p> <p>State Environmental Planning Policy (Resilience and</p>

Hazards) 2021, Ch 4  
State Environmental Planning Policy (Transport and Infrastructure) 2021, Ch 2 ss 1.2, 2.7, 2.35, 2.36, 2.42

Cases Cited: Hastings Point Progress Association Inc v Tweed Shire Council (2009) 168 LGERA 99; [2009] NSWCA 285  
Ironlaw Pty Limited v Wollondilly Shire Council (No 3) [2014] NSWLEC 1057  
Liverpool City Council v Moorebank Recyclers [2018] NSWCA 7  
Trevor Allan McBride v MidCoast Council [2021] NSWLEC 100

Texts Cited: Draft Gunnedah Shire Local Housing Strategy 2021  
Draft Gunnedah Water Supply Strategy 2020  
Gunnedah Development Control Plan 2012  
Gunnedah Urban Landuse Strategy 2016  
Planning Guidelines for Managing Land Contamination

Category: Principal judgment

Parties: NSW Community Renewables (Gunnedah) Pty Ltd (Applicant)  
Gunnedah Shire Council (Respondent)

Representation: Counsel:  
J Lazarus SC (Applicant)  
A Seton (Solicitor) (Respondent)  
  
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File Number(s): 2021/210953

Publication Restriction: Nil

## **JUDGMENT**

### **Introduction**

1 These proceedings arise following the Northern Regional Planning Panel's refusal of the applicant's Development Application No. DA2020/035 (DA) comprising a 5-megawatt solar farm and associated infrastructure on a portion of the land at 262 Hunts Road, Gunnedah (site).

- 2 The proposed development comprises:
- (1) installation of approximately 11,232 solar photovoltaic (PV) panels and 160 ground mounted single axis trackers. The PV arrays will have a clearance above the existing ground level and extend to approximately 2.6 m at maximum tilt;
  - (2) installation of a power conversion unit, including transformer, inverters and switchgear, and a HV switchboard, O&M container and water tank;
  - (3) construction of a new site entrance gate, 4 m wide access road and hardstand area with car parking for a minimum of 10 vehicles and a construction offload zone along the site's western boundary to Black Jack Road;
  - (4) installation of 2.3 m high security fencing around the perimeter of the site;
  - (5) removal of 4 trees (White Box, *Eucalyptus albens*) and planting of compensatory vegetation in the north-western and south-western corners of the site in accordance with the approved landscaping plan referred to in Condition A1;
  - (6) construction of on-site stormwater detention basin and associated earthworks;
  - (7) planting for establishment of landscaping corridor around the perimeter of the site, with a temporary 1.2 m high stock proof fence to be installed adjacent to enable plant establishment;
  - (8) 5 m wide access corridor between the security fencing and landscaping barrier and the site boundaries; and
  - (9) establishment of minimum 10 m wide Asset Protection Zone (APZ) for emergency and fire access between the security fence and other structures.
- 3 The solar farm will be connected to Essential Energy's network via a 22-kilovolt distribution line running adjacent to the southern boundary of the site. It is noted that a separate application process is being undertaken with Essential Energy for this connection.
- 4 The solar farm will operate 24 hours a day, 7 days a week, with no permanent staff on site from the date of issue of an occupation certificate for a period of 30 years. Maintenance inspections will be undertaken daily or on an as needs basis. During the construction period there is estimated to be up to 30 personnel on site for up to 6 months.
- 5 The site will then be decommissioned and rehabilitated within 6 months of the cessation of the use in accordance with a Final Decommissioning and

Rehabilitation Plan (the Plan) prepared by the applicant addressing the following matters:

- (1) proposed method of removal of infrastructure from the site;
- (2) proposed method of disposal of solar panels, including expected waste volumes and potential location of disposal;
- (3) method of stabilisation of final land form post-decommissioning; and
- (4) required site validation and any remediation works to return the site to a satisfactory condition to support small lot primary production development.

### **The site and its context**

- 6 The site is legally known as part Lot 2 in Deposited Plan 814689 and is located on the western side of Hunts Road at 262 Hunts Road, Gunnedah (see Figure 1). The site is currently used for agricultural purposes with a little grass coverage. In terms of topography, the site is relatively flat with a gradual slope from southwest to northeast.
- 7 The site is a part of a large rural lot which contains a dwelling in the north-eastern portion of the site with the rest of the land used for agricultural purposes. A low number of scattered trees are present on the site, along the southern and western border as well as the northern border. Access to the existing dwelling is via Hunts Road at the western boundary of the site. The dwelling is approximately 400 m from the location of the solar farm.
- 8 The site is irregularly shaped comprising approximately 24.2 ha. The site has frontage to Hunts Road to the east, Black Jack Road to the west and Bushs Lane to the south.
- 9 Bushs Lane is an unsealed lane in each direction, unmarked with no kerb or guttering on either side. Black Jack Road is a sealed road, unmarked with no kerb or guttering on either side. The Gunnedah electrical substation to which the development is proposed to connect is located 2.4 km northeast of the site on Wandobah Road.
- 10 The proposed development will be constructed in a 15 ha “leased area” within the eastern portion of the site. The lease will run for a period of 25 years with a 10-year option (Ex C). Figure 1 from the Council’s Statement of Environmental

Effects (SOEE) shows the leased area outlined in dark red. The development will only use the Bushs Lane access point.



Figure 1

- 11 The site is located approximately 5 km southwest of the Gunnedah township within the RU4 Primary Production Small Lots zone under the Gunnedah Local Environmental Plan 2012 (LEP). The site adjoins land zoned R5 Large Lot Residential along its eastern boundary and RU4 zoned land to the north, west and south of the site.
- 12 The site is surrounded by large lot residential and small rural properties with existing dwellings. The nearest dwelling house is located about 100 m to the east and there are 29 residences within 1 km of the site as illustrated in Figure 6 below:



Figure 6: Residential receivers within 1km of the site marked as yellow stars.

- 13 At the commencement of the hearing, I had an opportunity to inspect the immediate locality. At that time, the owners of the residences opposite and the adjacent landowner spoke to their written objections. Collectively, they described the proposed development as uncharacteristic and at odds with the landscape character that they presently enjoy. They expressed concern about any loss of their existing rural amenity and the adverse visual impacts generated by the proposed development following removal of trees on the site and their replacement with uncharacteristic perimeter fencing and landscaping. The neighbour to the west, Mr Ewing said that his land had been identified as a potential rural residential area and that he was pursuing a 61 residential lot subdivision of his property. At the time of the hearing, he said that he had a 3-lot subdivision consent. Mr Ewing was concerned about the impact of the proposed development on views from Lots 11 and 12 - views which the Court endeavoured to appreciate from his property on the day.

## **Issues**

- 14 The Council's Further Amended Statement of Facts and Contentions dated 19 January 2022 (FASOFC) raised five contentions relating to alienation of residential land, visual impacts and landscape character, suitability of the site, public interest and stormwater management.
- 15 Following the joint reporting of the experts these issues were reduced. The stormwater contention was resolved by an increase in the size of the onsite retention basin. The landscape character issue was moderated to a difference of opinion as to whether or not the proposed linear planting was in character (Ex 10 par 20).
- 16 The key issues agitated at the hearing were site suitability and the impact of the proposed development on the supply of R5 Large Lot Residential zoned land.

## **Expert evidence**

- 17 The Court received oral and written town planning evidence from Mr Patrick Quinlan and Ms Ashleigh Nixon. Their joint report is Ex 4. These experts also participated in a joint conclave with the landscape architects Mr Dean Butcher and Mr Matthew Taylor. Their further joint report is Ex 5. The landscape experts also prepared a supplementary report which is Ex 10.
- 18 The land economists Mr Chris McNeill and Mr Brian Haratsis assisted the Court with oral and written evidence in respect of the R5 Large Lot Residential zoned land. Their joint expert report is Ex 4.
- 19 At the close of the hearing, the Court received joint evidence from Mr Mark Tooker and Dr Grant Roberts in relation to water supply. Their joint expert report is Ex 11.

## **The planning framework; applicant's submissions as to relevance**

- 20 The Council's FASOFC identifies the following planning framework:

*State Environmental Planning Policy (Planning Systems) 2021 (Planning Systems SEPP)*

- 21 The proposed development is declared to be regionally significant development under cl 5(a) of Sch 6 to the Planning Systems SEPP because it is

development for the purposes of electricity generating works with a capital investment value of more than \$5 million. For that reason, the Northern Regional Planning Panel (the Panel) was the consent authority for the development application.

*State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP (Transport & Infrastructure)) – Ch 2 (previously State Environmental Planning Policy (Infrastructure) 2007 (SEPP Infrastructure))*

22 SEPP (Transport & Infrastructure) commenced on 1 March 2022: s 1.2. All of the provisions of SEPP Infrastructure were transferred into Ch 2 and continue to operate in the same way, but there was then an amendment made in s 2.35 that deals with electricity generating works or solar energy systems. The amendment was made on 1 April 2022 and redefines electricity generating works and also solar energy systems.

23 The term “solar energy system” is now defined in s 2.35 as:

(a) a photovoltaic electricity generating system used for the primary purpose of generating electricity for a land use—

(i) carried out on the land on which the system is located, or

(ii) carried out by the owner of the system on adjoining land...

24 There are no consequential changes as a result of this amendment.

25 Section 2.36(1)(b) of SEPP (Transport & Infrastructure) provides:

(1) Development for the purpose of electricity generating works may be carried out by any person with consent on the following land—

(a) ...

(b) in any other case—any land in a prescribed rural, industrial or special use zone.

26 In this case, Zone RU4 Primary Production Small Lots is a prescribed rural zone (s 2.35) for the purposes of Div 4 of Pt 2.3 of SEPP (Transport & Infrastructure).

27 Section 2.36(9) also provides that development for the purposes of a solar energy system (which includes a PV electricity generating system) may be carried out by any person with consent on any land.



- 28 The proposed development is located within 5 m of an overhead power distribution line. As such, the DA is therefore subject to s 2.42 of SEPP (Transport & Infrastructure).
- 29 Before development consent can be granted the Court on appeal must be satisfied that the proposed development:
- (1) is located to avoid significant conflict with existing or approved residential or commercial uses of land surrounding the development (s 2.42(2)(a)), and
  - (2) is unlikely to have a significant adverse impact on the regional city's (s 2.42(2)(b))—
    - (a) capacity for growth (s 2.42(2)(b)(i)), or
    - (b) scenic quality and landscape character (s 2.42(2)(b)(ii)).
- 30 In determining whether to grant development consent, the consent authority must consider any measures proposed to be included in the development to avoid or mitigate conflicts referred to in subs (2)(a) or adverse impacts referred to in subs (2)(b): s 2.42(3).

*State Environmental Planning Policy (Koala Habitat Protection) 2020 (2020 Koala SEPP)*

- 31 The parties agree that the 2020 Koala SEPP is the relevant Koala Policy (Tcpt, 23 February 2022, p 36). It was ultimately agreed between the experts that the site is not core koala habitat or within proximity to core koala habitat. As a result, no issue arises under the 2020 Koala SEPP.

*State Environmental Planning Policy (Resilience and Hazards) 2021 – Ch 4*

- 32 It is agreed that historically the site has been used for agricultural purposes; albeit the Council contends extensive agriculture.
- 33 Table 1 of the Planning Guidelines for Managing Land Contamination identifies agricultural/horticultural activities as a use that may cause potential contamination. However, the site is not listed on the NSW EPA's List of NSW contaminated sites notified to the EPA or the POEO Public Register and the Council raises no issue about site contamination.

*Gunnedah Local Environmental Plan 2012 (LEP)*

- 34 "Electricity generating works" is defined in the Dictionary to the LEP as:

**electricity generating works** means a building or place used for the purpose of—

- (a) making or generating electricity, or
- (b) electricity storage

and development for the purposes of “electricity generating works” is permissible with consent within the RU4 zone as a form of development as it is not specified in item 2 or 4 of the Land Use Table pursuant to the LEP.

35 The objectives of the RU4 zone are listed below:

- To enable sustainable primary industry and other compatible land uses.
- To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.
- **To minimise conflict between land uses within this zone and land uses within adjoining zones.**
- **To maintain the rural and scenic character of the land.**
- To ensure that development does not unreasonably increase the demand for public services or public facilities.
- To conserve and enhance the quality of valuable environmental assets, including waterways, riparian land, wetlands and other surface and groundwater resources, remnant native vegetation and fauna movement corridors as part of all new development and land use.
- To provide opportunities for a restricted range of employment-generating development that is compatible with, and adds value to, local agricultural production.
- **To minimise conflict between land uses in the zone and with adjoining zones.**
- To maintain native vegetation and wildlife corridors.

36 The parties agree that the zone objectives are a relevant consideration (cl 2.3 of LEP), and the Council identifies the three bolded objectives as of particular relevance in this case.

37 The applicant, however, submits that the weight to be accorded to the zone objectives in circumstances where - the overriding instrument, the dominant SEPP states that the use is permissible either “on any land or RU4 land”, thereby specifically overriding zoning controls, must be minimal or extremely low.

38 The Council has referred the Court to the decision of *Hastings Point Progress Association Inc v Tweed Shire Council* (2009) 168 LGERA 99; [2009] NSWCA

285 (*Hastings*) which is a case involving SEPP (Seniors Living) 2004, and inconsistency between the SEPP and LEP. McColl JA drew the following propositions from the judgment of Basten JA (who was in the minority) at [6]:

“6 Relevantly one can distil from Basten JA’s reasons, the following propositions with which I agree:

(a) when any environmental planning instrument is relevant to a particular proposed development, it is required to be taken into account pursuant to s 79C of the EP Act;

(b) in considering whether to grant approval for a development which falls under the SEPP - SL, the consent authority must also take into consideration the matters set out in s 79C(b) - (e);

(c) it thus follows that the fact that a development proposal to which SEPP-SL applies accords with its provisions does not mandate that it be granted consent;

(d) accordingly, the fact that a consent authority has power to grant consent for a development which accords with the requirements of SEPP-SL does not prevent it, in the exercise of its discretion, from refusing to grant that consent;

(e) the distinction drawn by Preston CJ in *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC 284 referred to by Basten JA at [52] between the existence of the power to consent and the manner of its exercise as reflected in the present case, is reflected in proposition (d) above.”

39 Applying these propositions to the present case, it is clear that the consent authority has discretion as to whether or not to grant consent to a development application to which SEPP (Transport & Infrastructure) applies. In exercising this discretion, a consent authority must take into consideration relevant matters in s 4.15 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

40 Although regard has to be had to the zone objectives, I accept that it would be contrary to the intent of SEPP (Transport & Infrastructure) and defeat its policy purpose if inconsistencies between the SEPP and the zone objectives were used as a ground to refuse consent to this development. Where the RU4 zone objectives are inconsistent with the objectives of the SEPP then s 2.7(1) provides that the SEPP prevails to the extent of the inconsistency.

*Gunnedah Development Control Plan 2012 (DCP)*

41 The Council also relies on the DCP controls in relation to industrial uses (Section 4.3) and the landscaping provisions in Sections 4.6 and 6.3 to support

its argument that the visual impacts and landscape character of the proposed development are unacceptable.

*Gunnedah Urban Land Use Strategy 2016 (Volume 4) (UL Strategy 2016)*

- 42 The Council places a particular emphasis on the fact that the site is situated within Residential Release Phase 4 area (Development Area M) identified in the UL Strategy 2016. Relying on the UL Strategy 2016 and the Draft Water Strategy, the Council contends on its evidence (Ms Nixon's evidence) that the area identified as Development Area M (which contains the development site) will be augmented by 2029 and the areas identified by K and L will not be augmented until 2039. Therefore, Development Area M in the UL Strategy 2016 will be the next area to be rezoned R5 Large Lot Residential (Ex 4).
- 43 The Council's position is that the development site has a potential yield of 18 allotments of 1.2 ha if rezoned to R5. The area identified as Development Area M has the potential to create 105 additional new lots. Therefore, the development site will reduce the capacity of Development Area M by 17.14%.
- 44 The applicant's position is that only part of the site is actually within Development Area M. Of the approximate 24.2 ha that forms the site approximately 3.1 ha falls outside Development Area M as identified in Figure 71 of the UL Strategy 2016.



- 49 The site is identified on Figure A in the Draft Local Housing Strategy (which has been the subject of public exhibition) as being an opportunity for additional Zone R5 land in the future (as per the Council's Environmental Report "Residential Release Staging Plan" (1981)).

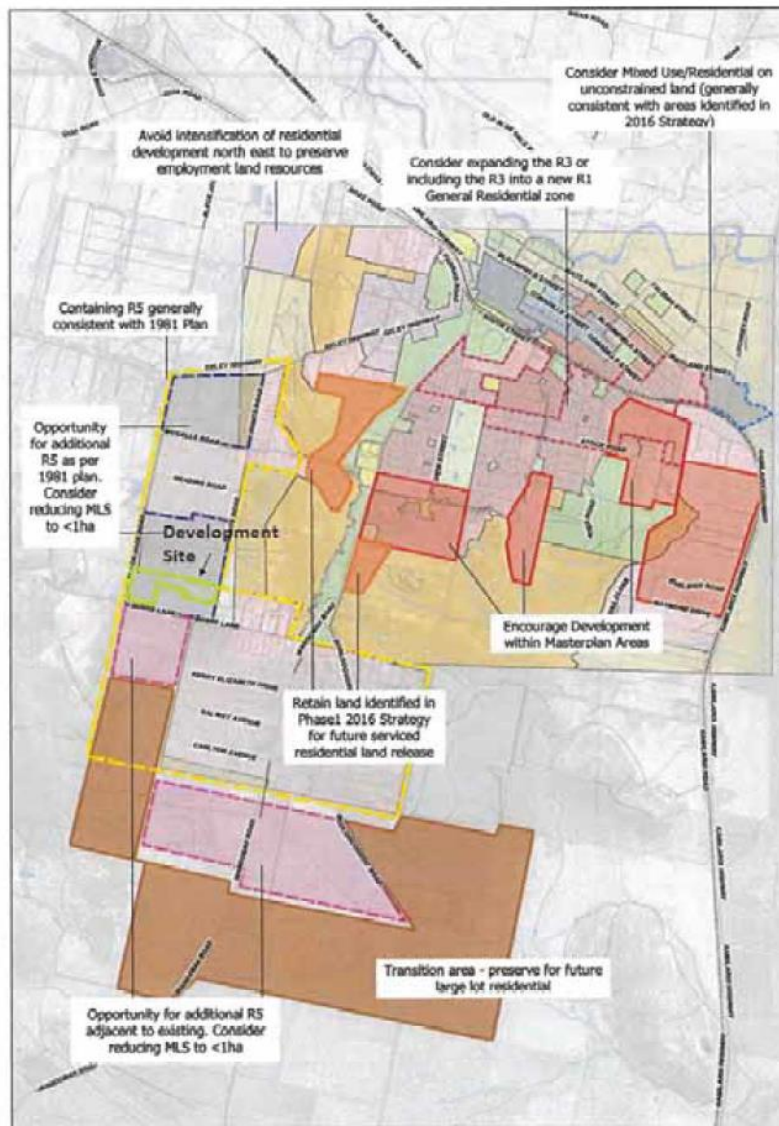


Figure A

- 50 The applicant maintains that population projections for the Gunnedah township contained in the UL Strategy 2016 were, and remain, inaccurate and do not consider or take account of more recent demographic data since the UL Strategy 2016 was prepared. In short, the submission is on the applicant's evidence that the housing demand is overstated. The UL Strategy 2016 is said to overlook the fundamental premises that realisation of the residential development potential is dependent upon the landowner of the land wishing to

pursue residential development of the land. The case at hand is evidence of the landowner's right to elect to forgo the development of land for any future residential purposes and decide to enter into a lease for the purposes of a solar farm (subject to law) – at least for the period of the lease.

- 51 In broad terms, the above policy documents identify areas for new residential development. The interpretation of these policy documents and the weight that should be given to them in assessing the current proposal was the subject of competing evidence and submissions by the parties.

*Draft Gunnedah Water Supply Strategy 2020 (Draft Water Strategy)*

- 52 The Council contends that the Draft Water Strategy identifies that the existing water supply system in the vicinity of the site will be required to be augmented by 2029 to meet the demand for additional residential growth.
- 53 The applicant does not accept the underlying projections referenced as the projected need for the subject site to be rezoned and made available for the purposes of residential housing to meet the needs of Gunnedah's future housing needs.
- 54 The timing of the availability of water to Development Area M was a particular matter of contention.

**Consideration**

- 55 By the end of the hearing there were two fundamental concerns that on the Council's case remained unresolved.
- 56 The first is alienation of residential land and the second is inconsistency of the proposed landscaping barrier with the character of the locality and the visual impact more generally: site suitability.
- 57 Then of course there is also the public interest.

*Site suitability / alienation of residential land (Contention 1)*

- 58 The evidence is that the site is identified on Figure A "Summary of precincts and opportunities in new residential development in Gunnedah" in the Draft Local Housing Strategy as being an "opportunity for additional R5 as per 1981 plan", with a possible minimum lot size of less than 1 ha.

- 59 The evidence is that Phases 1, 2 and 3 identified in the UL Strategy 2016 have already been rezoned for residential development and are mostly developed. Phase 4 is identified as the next residential release area to be rezoned to R5 Large Lot Residential to meet future residential growth and the site is situated within the Residential Release Phase 4 area identified in the UL Strategy 2016 (Development Area M).
- 60 The letter from the applicant dated 8 September 2020 identifies that the site is subject to a 25-year lease from the landowner with an option to extend or renew for up to 10 years thereafter. The applicant has not otherwise committed to an earlier decommissioning date for the electricity works and infrastructure.
- 61 In those circumstances, the Council contends that the proposed development would prevent the use of the site for residential purposes for up to 35 years which is inconsistent with the UL Strategy 2016. An approval would alienate land earmarked for future residential development and unreasonably restrict Gunnedah's residential development options.
- 62 As such, the proposed development would not promote the orderly and economic use and development of land in the Gunnedah LGA and this is inconsistent with the objects of the EPA Act.
- 63 The Council also argued that the introduction of the proposed development to the built environment may result in further alienation of future residential land due to the establishment of APZs around the site to protect residential areas from bushfire risk in accordance with the *Planning for Bushfire Protection 2019* document.
- 64 The applicant rejects the proposition that the proposed development should be refused on the basis of alienation of land earmarked for residential use and submits that the proposal is not inconsistent with the Draft UL Strategy and/or the Draft Local Housing Strategy. Put simply, it contends that there is no satisfactory evidence before the Court of any timely proposal for Development Area M (other than one planning proposal relating to Mr Ewing's land) to be rezoned to R5 land.



- 65 Areas D, F and H are not yet fully developed and there is no need for this site for R5 land in the near future. At best, the Draft Local Housing Strategy predicts opportunity for development in Gunnedah but the land is not reserved or preserved by the Strategy. At its highest level, this draft document identifies that there is an opportunity for additional R5 land and that has been the case since 1981 and the potential rezoning has not progressed in 40 years.
- 66 In terms of land supply, the economic experts Mr McNeill and Mr Haratsis assessed the supply of land that is zoned R5 presently, and reached different figures. Mr McNeill believes it is around 6.7 years supply and Mr Haratsis gave a figure of around 5.1 years (Tcpt, 24 February 2022, p 16(30-40)). Their extrapolation was based on the Draft Local Housing Strategy at about 103 lots of current zoned supply, yet they had different views as to where demand for R5 land might "land". Mr McNeill gave evidence of a demand of 15 lots per year and Mr Haratsis said it was 20 lots per year. Despite the differences the experts agreed that current supply was "pretty tight" and well under the ten years that is accepted as a balanced market in terms of supply of R5 land.
- 67 In summary, the expert evidence is that the 103 lots represents the present R5 zoned land available in Gunnedah, and if divided by 15 dwelling lots (demand per year) on Mr McNeill's figures, you get a 6.7 years of supply. When you divide Mr Haratsis' figure of 20 dwelling lots per year there is a 5.1-year supply.
- 68 Mr Haratsis also gave evidence that based on profile ID projections from 2010 to 2020 the indicated growth for Gunnedah is 54 persons per year (being a conservative number) (Ex 4 par 15). On that basis he estimated a need for 50 additional dwellings per year. After some interrogation of his calculations, he also gave evidence that if the SW area of the site is excluded from Development Area M under the Draft Local Housing Strategy, then the loss of the site represented a loss of 16 lots which is less than the yearly demand of 54 lots. Therefore, on either Mr McNeill or Mr Haratsis' evidence - whether 5.1 or 6.7 years - the supply of R5 land will run out whether or not the subject site is rezoned R5 (Tcpt, 24 February 2022, pp 21-22). That is, the current R5 land will run out irrespective of whether the solar farm is approved or not. However, when you take account of the potentially available land being another 157 lots

after 2029 and add them to the existing 103 lots, either available now or over the next twenty years then the evidence is a yield of 260 lots of R5 land. While Mr Haratsis agreed that overall, the solar farm would make a 5% or 6% difference in supply and that the subject RU4 land is one of the areas that would become available for rezoning in the 2029 to 2039 period (provided water supply was available), he said that the loss of the subject site made a material difference to the supply of R5 land.

- 69 Mr Haratsis accepted that if the Council adopted the recommendation in the Draft Local Housing Strategy to reduce the minimum lot size for R5 land from 1.2 ha to 9,000m<sup>2</sup> then the water storage requirements in the event of bushfire would be reduced and there would be an increase in the supply of R5 land. In terms of future supply, Mr Haratsis agreed this would add another 20-25% to the amount of R5 land. He also accepted that the removal of the subject land from the R5 supply for the lease period of 30 years would only take out that supply for a period of 15 or 16 years. Despite these concessions, Mr Haratsis remained resolute in his view that the impact of this development on the supply of R5 land was significant.
- 70 Mr McNeill provided an entirely different expert assessment. He described the impact of the proposal on the supply of R5 land as immaterial because the future rezoning of land would be dependent on the Draft Water Strategy which indicated water supply would not be provided until somewhere in 2029.

#### **Findings – Site suitability / alienation of residential land**

- 71 Based on the evidence of Mr McNeill which I found to be balanced and more objective I do not accept that an approval of this application will alienate residential land as the Council contends.
- 72 The evidence is that the development site has not been earmarked by Council for a particular purpose. Rather it has been earmarked for potential future land release as R5 land subject to water supply and rezoning. The experts have assessed the non-statutory documents, one of which is in a draft form, and given evidence that “at its highest the development would take out 16 or 18 R5 residential lots”. (Noting that Mr Haratsis conceded in Court that that number could be reduced to 9 to 10 lots because his assessment was on the basis of

the entirety of the cadastral lot). When considered in the context of the hundreds of hectares of R5 land identified in the evidence, if not immediately available but projected to be available to meet the supply generated by the anticipated increase in the population of Gunnedah, the loss of this site is immaterial as Mr McNeill has assessed.

- 73 One cannot lose sight of the fact that this development is temporary and after the expiration of the 30-year lease the land will become available for R5 land if required. In short, there is no doubt that there is adequate supply of residential lots to meet demand in Gunnedah for the foreseeable future. The Draft Local Housing Strategy at p 35 identifies 825 undeveloped lots with 22 years supply. The Council's case has only focused on one type of residential land that being R5 zoned land and the evidence is the loss of 16-18 R5 lots will be less than one year's supply (Ex 4 par 29). As Mr McNeill put it "if Gunnedah runs out of R5 Land it won't be because of the solar farm" . Mr Haratsis specifically agreed with that proposition; that is, Gunnedah may run out of R5 land whether or not this solar farm is approved.

#### **Findings – Water supply**

- 74 It is clear that the supply of water impacts the availability of the timing of the potential residential land release. Mr Tooker gave evidence that the supply of water to Area L would become available by 2029 and this would generate a further 51 lots (based on Table 2 in the joint report).
- 75 The problem with the evidence advanced by Dr Roberts is that there is an underlying assumption by him that all of the supply on the Hunts Road upgrade (to be completed by 2029) will be used for the purposes of the industrial developments to the north. However, Mr Tooker gave evidence that the consultants had significantly overestimated the amount of demand in terms of ET for that industrial land by about 250 ET. Therefore, if there are 250 ET available there is no issue at all from a water supply perspective in supplying 61.2 ET required for the 51 lots in Area L which is earmarked in the Draft Local Housing Strategy with Development Area M as within opportunity land. Furthermore, as the Draft Local Housing Strategy does not prioritise Development Area M over Area L the recommendation is "retain status quo

until all other development areas are exhausted and re-evaluate based on infrastructure and servicing facilitation”, there is no reason why Area L should be treated any different to Development Area M and that adds another 51 lots.

- 76 The evidence is that the number of lots will further increase if the minimum lot size is less than 1 ha as recommended in the Draft Local Housing Strategy because this will create greater efficiencies for service delivery for the Council and assist in meeting demand.

*Visual impacts and landscape character (Contention 2)*

- 77 The Council contended that the DA should be refused because it has not been demonstrated that the proposed landscape barrier (or corridor as the applicant describes it) will be an effective visual screen for the proposed development. Furthermore, that the proposed landscaping will have an unacceptable visual impact on the rural landscape and character and will detract from the amenity and visual quality of the area.

- 78 The Council contends on the evidence of Ms Nixon and Mr Taylor that the proposed development was not consistent with the following RU4 zone objectives:

...

- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To maintain the rural and scenic character of the land.

...

- To minimise conflict between land uses in the zone and with adjoining zones.

...

(FASOFC)

- 79 It is also submitted that clause 4.3 of the DCP provides the following relevant control in relation to the design of industrial uses:

“• Industrial development proposed in close proximity to non-industrial uses must be compatible on both visual and operational grounds.”

- 80 In relation to the landscaping required to be provided for industrial uses it is submitted that clause 4.6 of the DCP provides the following relevant controls.

“• Landscaping is required:

- o in the front 3m if street setback;
- o side and rear setbacks where visible from public place or adjoining residential area; and
- o areas adjacent to building entrances and customer access points.
- Landscaping is to be provided on side and rear boundaries where visible from a public place or adjoining residential area;
- ...
- Landscaping shall comprise only low maintenance, drought, and frost tolerant species.”

81 Clause 6.3 is also said to be relevant. It provides the following controls in relation to landscaping generally:

- “• Location and grouping of plant types shall be multi-functional providing privacy, security, shading and recreation functions.
- ...
- Landscaping shall comprise low maintenance, drought and frost tolerant species.”

82 The Council is critical of the outcomes in *Table 4 Summary of Visual Impact Ratings for each receptor* of the VIA dated November 2021. It contends that they do not reflect the receptor sensitivity rating set by *Table 3 Effect Significance Rating*. It submits that the criteria indicated within *Table 1 Receptor Sensitivity Rating* and *Table 2 Magnitude of Change* should determine a High or Moderate-High significance rating when adopting these ratings for receivers R01, R23, R25 and R26. Therefore, outcomes of Table 4 misrepresent and undervalue the extent of the impacts on receivers R01, R23, R25 and R26. The imposition of landscaping to address the visual impacts of the development is further emphasised in this case.

83 It is the Council’s position that reliance on the proposed landscaping barrier does not satisfactorily resolve the visual impact of the development particularly if the vegetation is not able to be established to the densities proposed. The screening by the landscaping is ineffective from the day of planting until the vegetation maturity and growth is reached after 7 years, as depicted in Figures 8-10, 30-32, 38-40, and 43-45 of the VIA dated November 2021. Therefore, the proposed development cannot be adequately visually screened for this establishment period and the only interim solution is the green fence.

- 84 The Council contends that landscaping barrier introduces a visual character that is inconsistent with the surrounding rural scenic character of the land and therefore the site is not suitable for the proposed development. In short, the plans do not incorporate measures that sufficiently mitigate the adverse visual impact of the proposed development to maintain the rural and scenic character of the land.

**Expert evidence**

- 85 During the hearing the landscape architects prepared an agreed landscape plan reflecting species endemic to the site and the immediate area. They also agreed an appropriate maintenance regime. And, as the applicant submitted although the maintenance plan does not contemplate water restrictions being imposed during times of drought that may prohibit the use of water on the landscaping or ensure with absolute certainty that the proposed landscaping would achieve the level of screening stated in the timeframe in Ex 10, it is endorsed by both experts. In their joint report dated 8 April 2022, the experts noted their agreement: "That the landscape screening will provide 60% screening up to a minimum of 2.6 metres at the end of the 3-year establishment period and that there will [be] 90% coverage within 7 years of initial establishment" (Ex 10 at Section 2.1 par 21).
- 86 Where existing views are compared with the updated photomontages (at Ex F Tab 2) that take into account the agreed landscaping plan, the evidence is that any views of the proposed development, including at 3 years with a 60% screening will and be virtually imperceptible (Ex F at Tab 2). At year 3 there will be view of the mesh fence but that is temporary.
- 87 In respect of character the Council submits that this development is a "highly uncharacteristic form" of the development in its setting. The evidence, however, which has been accurately summarised by the applicant does not support the Council's position. In that regard, I note the evidence is as follows:

" (1) the visual impact of the proposed development arises from a security fence and potential glare from solar panels. The proposed mitigation measure is landscape screening in combination with the "green construction mesh covering on security fencing" (Ex 5 par 10(iii)). The evidence states further, "In combination with a substantial setback and existing road verge trees, the visual impact of the development is considered to be effectively managed

minimising impacts and remaining consistent with the character of the area." (Ex 5 par 10(iv));

(2) there are a number of existing uses in the RU4 zone with different uses, landscape values and visual characteristics (Ex 5 par 16(a));

(3) the proposed development is of a low height (maximum 2.6m) and does not alter the rural character of the area by obscuring important local views of local prominent natural features or rural landscapes (Ex 5 par 16(b));

(4) the landscape screening is in character with the surrounding landscaping adjoining and in the vicinity of the site. The independent landscape experts agree "that the species selected **reflect the native vegetation quality and character of the immediate area**" (Ex 10 par 3). The only difference of opinion was whether the clustering and proposed alignment of planting was "discordant" due to its "linear" nature. Mr Butcher gave oral evidence of other forms of linear planting in the area around road sides and property boundaries. In the applicant's submission, where a development is square or rectangular as in the present case (and for solar farms in general), it is an inevitable corollary that the perimeter planting will be linear. The square or rectangular nature of the six approved solar farms in the Gunnedah LGA is clearly shown in Ex 9 and in the landscape plans where some form of plan had been prepared for those developments (Ex F at Tabs 7, 11 and 18);

(5) the independent landscape experts agreed on the level of detail required within the landscape plan, the pot sizes and period of establishment of landscaping to ensure effective screening on the basis there would be a period of time before the landscaping is established if the proposed development were to proceed;

(6) the independent landscape experts further agreed on the amount of maintenance required for the life of the project, including the establishment period and set out in detail all the steps they considered necessary "to ensure that the plants will thrive" (Ex 10 par 20). None of the other approved solar farms in Ex 9 have a landscape plan or maintenance programme anywhere near the level of detail as the subject site (Ex F at Tabs 7, 11 and 18). With respect, the doubt that the Council attempts to cast on the veracity of the landscape and maintenance plan (Respondent's Submissions at par 5 is inconsistent with the level of detail in that plan and the significant expertise of its authors, who collectively have 67 years' experience in the industry; and

(7) ... when the existing views are compared with the updated photomontages that account for the agreed landscape plan, any views of the proposed development, even at year 3 on a 60% screening, are virtually imperceptible (Ex F at Tab 2). At year 3, there will be views of the fence from R01 but those views are mitigated by the setback of the development and the requirements of D10 for the green construction mesh shade cloth. It is the applicant's submission that the most prominent view from R01 remains of the hillside and the proposed development even at year 3 with less than full screening preserves those views and does not detract from it. The view of parts of the fence in the context of maintenance of the significant views from R01 does not warrant requiring the applicant to wait 7 years or longer for an "almost fully established" landscaping corridor. The applicant submits that the views at year 3 are effective at screening views of the solar panels and ancillary infrastructure from surrounding residences".

- 88 In assessing the visual impacts, Ms Nixon accepted that the magnitude of the change must be assessed by reference to the mitigating effects of the screening vegetation because that is a key component of the development.
- 89 That said, the evidence is that she misapplied the criteria in Table 1 of the visual assessment, and it was accepted that none of the views under review fall into the category of “significant or unique views”.
- 90 In fact, the evidence demonstrates that all views from the residual receptors (see Ex C Tab 3 Plan 1 Locality diagram) of the solar arrays and the perimeter fence are either screened by existing vegetation or will be as a result of the proposed landscaping. Accepting that during the first three years the green mesh fence screen will form a temporary screen while the planting is established.
- 91 Section 2.36 of SEPP (Transport & Infrastructure) provides that the proposed development is permissible with consent on the basis that the development is for the purposes of electricity generating works. The grant of consent is consistent with the aim of Ch 2 under SEPP (Transport & Infrastructure) to provide flexibility in the location of infrastructure and service facilities as the applicant submits.
- 92 By operation of s 2.7(1), SEPP (Transport & Infrastructure) prevails to the extent of any inconsistency with the LEP. And, although the zone objectives properly considered could not be excluded from consideration, it is my considered opinion that they could not found the basis of refusal of this DA: *Ironlaw Pty Limited v Wollondilly Shire Council (No 3)* [2014] NSWLEC 1057 at [72]-[81]; *Hastings*; and *Trevor Allan McBride v MidCoast Council* [2021] NSWLEC 100 (Robson J).
- 93 That said, having had regard to the zone objectives I do not consider that the proposed development is inconsistent with the relevant objectives of the RU4 zone of the LEP. In that regard, I note that the land is zoned to maintain the rural and scenic character of the land. The evidence is that the proposed development is of a low height (up to 2.6m) and based on my observations at the site and the agreed position of the landscape experts (apart from the lineal planting) I am satisfied that in this locality the proposed development will sit



appropriately within its rural setting. The views to canopy vegetation and surrounding vegetated hills from public domain and private locations within the rural and natural landscape will be maintained.

- 94 The rural area that I observed has a variety of different visual elements including open grassed fields, rural dwellings vegetation regrowth, mature canopy growth. And, while this new low-scale development will be different in my assessment the proposed landscaping will provide screening and a vegetated corridor which will reasonably screen the solar arrays whilst integrating with and maintaining the rural and natural scenic character of the area. The landscape experts are agreed that the species now selected from local native species will be low maintenance and drought and frost tolerant. The selection is now designed to integrate with rural and scenic setting.

#### **Findings – Visual impact and landscape character**

- 95 After a consideration of the evidence, as summarised, and the relevant matters under s 4.15 of the EPA Act, I am satisfied that the proposed development will be virtually imperceptible after 3 years. To the extent that there are any resulting visual impacts or potential impacts on the character of the surrounding area such impacts will be appropriately mitigated and managed by conditions of consent. Coupled with the other mitigation measures that work in combination with the landscaping screening including the setback of the development and the retention of certain existing trees which render any views of the site negligible there is no satisfactory evidence to support refusal of the DA on the grounds of visual impact, character or site suitability.
- 96 The proposed development is not only permissible but has now been designed to be compatible with the surrounding environment, being a low scale, low rise development with appropriate landscaping and a native vegetated corridor. The Table 4 summary of visual impact ratings for each receptor of the VIA dated November 2021 reflects the assessment and application of the sensitivity rating set by *Table 3 Effect Significance Rating* undertaken in the VIA.
- 97 The rural and scenic character of the land will be maintained for the reasons articulated by Mr Butcher and Mr Quinlan as summarised above. The proposed

development is consistent with sustainable primary industry in the RU4 Primary Production Small Lot zone and other compatible land uses.

- 98 I accept, as the Council submits that future electricity generation needs to be met by renewable resources and facilities and does not give “a social licence to the proponent of such facilities to place them in any location without consideration of relevant matters”. There must be engagement with landholders in regional communities to codesign solutions that will have everlasting social licence (AEMO 2022 Integrated System Plan (Ex F Tab 1)). The fact that a proposed development is permissible with consent does not mean that the development must be approved: *Hastings*. However, in this case I cannot accept on the evidence before me that the proposed development is not in an appropriate location for the reasons advocated by the Council after assessment of all matters relevant under s 4.15 of the EPA Act.

### **Conditions**

- 99 On 8 July 2022, the parties filed competing draft conditions of consent. The three conditions that remain in dispute are:

- (1) Condition D11
- (2) Condition E7(b)
- (3) Condition E13(b)

#### *Condition D11*

- 100 The applicant is seeking the following simplified version of condition D11:

“All landscaping identified on the approved landscape plan shall be planted within 3 months of commencement of any works. The planting is to be effective at screening views of the solar panels and ancillary infrastructure (excluding the overhead power lines) from surrounding residences within 3 years of commencement of construction.

**Reason:** To ensure that visual screen is properly established as to reduce the visual impact on adjoining receivers.”

- 101 The Council is seeking the following drafting:

“No Construction Certificate shall be issued and no works shall commence unless and until the landscaping corridor as shown in the approved landscaping plan is established to such a standard that it is effective at screening views of the solar panels and ancillary infrastructure (excluding the overhead power lines) from surrounding residences, other than any Construction Certificate that may be required to carry out the landscaping works shown on the approved landscaping plan. The Applicant must obtain

written confirmation that Council is satisfied with the standard of the landscaping corridor prior to obtaining a Construction Certificate (or further Construction Certificate) and commencing works.”

- 102 The proposed reason for the condition is the same as identified in the applicant’s condition above.
- 103 The applicant submits that its simplified version of condition D11 ensures that from the date of commencement of any works all planting must be carried out. This applies whether those works are exempt development, complying development or the subject of a construction certificate.
- 104 At Day 1 of commencement of any works, the development site is no different to any other vacant development site in the Gunnedah LGA. That is, there are a series of preparatory works that need to be undertaken and under the construction programme there will be a period of time before the development itself is constructed. The construction period for the entire development is estimated in the Statement of Environmental Effects to be 4 to 6 months (Ex C Tab 2 at p 35). This means for the surrounding community any views at Day 1 would be of a construction site not of a constructed solar farm.
- 105 A three-month period has been provided to enable the planting works to be carried out. The applicant submits this period is reasonable given the volume of planting and the challenges the construction industry is facing with unprecedented wet weather and COVID.
- 106 The independent landscape experts, Mr Butcher and Mr Taylor, have agreed that the proposed planting will provide an effective visual screen within 3 years of planting. Mr Butcher and Mr Taylor do not mandate the establishment of planting to this standard prior to any other works.
- 107 Council's proposed drafting of Condition D11 is said to be inconsistent with Condition D10 which already provides for a form of a green mesh-like shade cloth as a temporary screening to reduce the visual impact of the development on the surrounding community while planting is being established.
- 108 Condition D10 has been agreed between the parties. It requires details of temporary screening measures to be submitted to and approved by Council prior to the issue of a Construction Certificate. The temporary screening is to

"demonstrate effectiveness as a temporary measure to reduce the visual impact of the development on the surrounding locality by using materials and colours consistent with the surrounding landscape."

- 109 The applicant submits that a combination of the planting at the outset of works (Condition D11) and the temporary screening (Condition D10) collectively will ensure that the solar farm, comprising of the cluster of panels and ancillary infrastructure, will not be visible to the surrounding receptors identified in these proceedings. It is inevitable that there will be a period during which the temporary screen will be visible while the planting is established but that is consistent with the purpose of the temporary screen.
- 110 The applicant contends that the Council's drafting of Condition D11 is unreasonable and unduly onerous. Moreover, it is inconsistent with the evidence of the two independent landscape experts that the period of establishment of landscaping is to be three years.
- 111 In effect, the Council's Condition D11 would prohibit the issue of a Construction Certificate for at least three years until landscaping is established. However, that prohibition could be longer than 3 years because the issue of the construction certificate is dependent upon the Council's satisfaction with the standard of the landscaping corridor. If Council never reaches a state of mind of satisfaction, no Construction Certificate may be issued. Such a prohibition is unnecessary in circumstances where the independent landscape experts have agreed on the standard of the landscaping screen to be implemented including the species to be planted, the time for that landscaping to be established to be effective at screening and how that planting is to be maintained over time.
- 112 The applicant submits that only one approved solar farm in the Gunnedah LGA has a requirement for planting to occur prior to the issue of a Construction Certificate for the solar farm, being the Wandobah Road solar farm (Ex F Tabs 16 and 17). However, in that application a detailed landscape plan had yet to be submitted and was the subject of a separate condition. The separate condition required a detailed landscape plan to be prepared which would include "a report prepared by a suitably qualified landscape architect which confirms that the selected vegetation species, growth rates, densities and

canopy areas will create a suitable barrier within a minimum of 3 years, to visually screen the development from adjoining public spaces and private residence". The detailed agreed landscape plan endorsed by the experts and incorporated into the conditions differentiate this DA which also requires effective screening of views from surrounding residences prior to the issue of a Construction Certificate. Nor did the Wandobah Road consent require Council to be satisfied with the standard of the landscaping corridor prior to obtaining a Construction Certificate.

- 113 I accept that the matters identified by the applicant demonstrate the unreasonableness of Council's proposed Condition D11 which I find to be overly complex and without basis on the evidence of the landscape experts which does not support restricting the issue of a Construction Certificate prior to landscaping works being established. Furthermore, there will likely need to be site preparation works interrelated with landscaping works (for example, culverts in road reserve for drainage, new site driveway access, preparatory civil works, irrigation and water infrastructure installation amongst other works) which can be undertaken as part of the applicant's drafting of the condition but not on the Council's drafting of the condition.
- 114 The Council's drafting of Condition D11 is not sufficiently clear. It prohibits "works" yet landscaping itself is a work. It is also overly complex on the issue of whether or not a Construction Certificate is required for landscaping works.
- 115 The applicant has already agreed to Condition G2. Condition G2 states "All landscaping identified on the approved landscaping plan shall be implemented prior to the issue of an Occupation Certificate". To impose the Council's restriction of the issue of a Construction Certificate until planting is established is unnecessary and the appropriate means of ensuring planting works are carried out is to require those works to be carried out within three months of commencement of any works.
- 116 As the applicant identifies, if the Council's proposed condition were imposed this would have the effect of delaying that land from being available for an additional 3 years or longer.

- 117 On the applicant's drafting of the condition, it is therefore inevitable that there will be some visual exposure to the development during the establishment period and until the landscaping corridor is almost fully established after 7 years.
- 118 While Condition D10 does require the installation of temporary screening measures, the purpose of those measures is merely to provide temporary screening while the landscaping corridor is being established. The mesh-like shade cloth form of the screening would also be highly uncharacteristic within the rural landscape and to this extent the Council considers the measures to be a "necessary evil" in the construction of the proposed development. The applicant would inevitably place significant reliance on these measures to screen the development because the landscaping corridor would not provide full screening during the 3-year establishment period. It is not at all inconsistent for the Council to require those measures to be implemented while also preventing the issue of a construction certificate in the manner proposed in Condition D11.

**Finding – Condition D11**

- 119 The Council's submissions reinforce the unreasonableness and unfeasible nature of the Council's formulation of Condition D11 and I endorse the version prepared by the applicant with the amendment to the wording as supported by the applicant in its submissions in reply.
- 120 The Council is concerned that the use of the word "effective", and the applicant proposes amending the condition to incorporate the following agreed evidence of the independent landscape experts:

“(A) All landscaping identified on the approved landscape plan shall be planted within 3 months of commencement of any works. The planting is to be effective at screening views of the solar panels and ancillary infrastructure (excluding the overhead power lines) from surrounding residences within 3 years of commencement of construction **in accordance with the level of screening required for this period in the Approved Landscape Plan.**”

- 121 I accept that amendment gives greater certainty to the level of screening.
- 122 Contrary to the Council's submission, there is no doubt that the landscape plan will be implemented in practice. Condition G2 already requires "all landscaping identified on the approved landscaping plan shall be implemented prior to the

issue of an Occupation Certificate" (Applicant's Submissions at par 2.2(n)). An occupation certificate cannot be obtained until this implementation occurs. It is therefore unreasonable for Council to seek an additional opportunity to approve the implementation of the plan. Council's submission at par 14 is inconsistent with its submission at par 17 which acknowledges the "purpose" of G2 to "...reiterate that all landscaping is to be implemented...". The purpose of Condition G2 is important because it cures Council's concern about ensuring that the landscaping plan is implemented. Condition A1 also serves this purpose by requiring that the proposed development shall be carried out generally in accordance with the details set out in the approved landscape plan. If, hypothetically, during the life of the development the Council had issues regarding compliance with Condition A1, the Council has a series of enforcement powers available to it to address any such concerns without the need to prohibit the development for a period in excess of 7 years.

- 123 As for likely future residential receivers, there is no evidence to suggest that there is a category of "likely future residential receivers" at this stage. The land falls within "Area M" which has been identified as "Retain Status Quo until all other development areas (D, F and H) are exhausted and re-evaluate based on infrastructural servicing facilitation" under the UL Strategy 2016 (Ex 3 at Tab 35). Reverting to the 1982 study, the land has retained the "status quo" for 40 years with no future residential land release of the area on the horizon. While there is evidence of one development approval for residential subdivision and Council is of the opinion the development physically commenced rather than lapsing on 8 June 2022, the fact is there is no evidence that development will proceed, nor is there evidence that there would be any views affected by the solar farm from that land (Ex 14).
- 124 Relevantly, as the applicant identifies the approved Wandobah Road solar farm (DA2021/35) is also identified in the Draft Local Housing Strategy as falling within a "Transition area - preserve for future large lot residential" (Ex F at Tab 17 p 379). That land is also directly adjacent to the R5 Opportunity Area "for additional R5 adjacent to existing. Consider reducing MLS to <1ha". The Council's submission that the proposed prohibition of the development in Condition D11 is justified based on proximity of the proposed development to

"existing and likely future residential receivers" was not applied to the Wandobah Road development with similar proximities.

*Condition E7(b)*

- 125 The applicant seeks the following insertion to Council's drafting of Condition E7(b) as shown in bold and underlined:

"implement all recommended noise mitigation measures outlined in the Noise Assessment prepared by Muller Acoustic Consulting dated 26 November 2021 **except for hoarding around the piling vehicles**; and"

- 126 The Council is seeking the following drafting:

"E7. Noise

The Applicant must:

...

(b) implement all recommended noise mitigation measures outlined in the Noise Assessment prepared by Muller Acoustic Consulting dated 26 November 2021 **except for hoarding around the piling vehicles (which should be used where possible and particularly where the equipment is to be used close to the site boundaries and/or a residential receiver)**; and

..."

- 127 The applicant is concerned that hoarding around piling vehicles is unsafe due to the frequency of movement of piling vehicles/rigs and the corresponding frequency of movement of mobile screens/hoarding. The applicant has therefore suggested the above insertion to provide clarity for the Council and the applicant.
- 128 Noise during the construction period was originally a contention in these proceedings but it was no longer pressed by the time of the hearing of the matter in February 2022.
- 129 The applicant submits on the evidence of SLR Consulting that the proposed amendment to Condition E7(b) to make it explicit that the hoarding/mobile screens will not be used during construction and does not change the noise assessment that has been agreed between the parties in these proceedings.
- 130 The Council maintains that the hoarding around the piling vehicles is referred to in Part 7 Recommendations of the Noise Impact Assessment ("NIA") prepared by Muller Acoustic Consulting dated 26 November 2021 as one of a number of noise mitigation measures that should be considered during the



construction phase (Annexure GJD-3 to the Affidavit of Guy Jesse Dwyer filed 30 November 2021, p 35).

- 131 The NIA specifically notes that the “reduction achieved from the mitigation measures will depend on the specific measures implemented” (Annexure GJD-3 to the Affidavit of Guy Jesse Dwyer filed 30 November 2021, p 36).
- 132 The memorandum prepared by SLR Consulting forming Appendix D to the NIA states that hoarding is unlikely to be a practicable mitigation measure.
- 133 The applicant obtained and provided confirmation from SLR Consulting that the model used to provide a distribution of anticipated noise levels for piling activities across the site did not take into consideration the use of hoarding as a mitigation measure. In light of this information, the Council proposes the following alternative drafting of Condition E7(b) (with the additions marked in bold and underline):

“**E7. Noise**

The Applicant must:

...

(b) implement all recommended noise mitigation measures outlined in the Noise Assessment prepared by Muller Acoustic Consulting dated 26 November 2021 **except for hoarding around the piling vehicles (which should be used where possible and particularly where the equipment is to be used close to the site boundaries and/or a residential receiver);** and

...”

- 134 This alternative drafting of the condition recommends that hoarding be used where possible and particularly where works are undertaken close to the site boundaries and/or residential receivers, rather than expressly requiring the hoarding to be used in all circumstances.
- 135 The applicant acknowledges the additional wording the Council has provided in its proposed Condition E7(b). Notwithstanding this additional wording, the applicant remains concerned, given the advice of SLR Consulting that hoarding or acoustic blanket screening is unlikely to be practicable (Applicant’s Submissions at par 3.2(b)). The time and level of work involved in moving hoarding or acoustic blanket screening around mobile piling rigs also raises safety concerns. Furthermore, due to the time limitation imposed on the

completion of piling works within 30 days pursuant to Condition E7(c), it will not be possible for the applicant to incur the additional time to install and move hoarding or acoustic blanket screening around piling rigs. SLR describe this additional time and work involved as "greater than the piling activity itself" (SLR dated 20 October 2021, Section 5 at Tab GJD-3 of the Affidavit of Guy Dwyer affirmed 29 November 2021).

- 136 The applicant seeks to be candid with the Court and the Council that for the above reasons the hoarding around piling vehicles will not be possible.
- 137 The applicant notes for completeness that the language "close to" a residential receiver is not sufficiently clear. Furthermore, the SLR Report found that the closest receptor, receptor R01, would experience moderately intrusive noise for a total of one day under the piling plan estimated at 22 days (Applicant's Submissions at par 3.2(d)). It follows from the evidence of SLR Consulting that rather than mitigate piling noise, the introduction of hoarding or acoustic screening around mobile rigs would unnecessarily result in a prolongation of the length of time of piling works and hence the noise associated with those works.

#### **Findings – Condition E7(b)**

- 138 For the reasons identified by the applicant, I am satisfied with its drafting of Condition E7(b).

#### ***Condition E13(b)***

- 139 The applicant is seeking the following proposed Condition E13(b):

“Following any construction or upgrading on the site, the Applicant must undertake the following in accordance with the approved landscaping plan:

...

(b) outside the proposed gravel road and hardstand area, reasonable endeavours will be made to maintain the ground cover with appropriate perennial species and ensure the nature and quantity of the ground cover does not reduce the long term overall retardance coefficient for runoff below 0.05 despite the presence of the solar arrays, vehicular traffic on the site and maintenance activities; and”

- 140 The Council is seeking the following version of Condition E13(b):

“maintain the groundcover with appropriate perennial species and ensure the nature and quantity of groundcover does not change despite the presence of the solar arrays, vehicular traffic on the site and maintenance activities; and”

- 141 The Council's drafting of Condition E13(b) creates uncertainty. It requires that there be "no change" in groundcover due to the solar panels. Clearly, the groundcover may change for a variety of reasons including seasonal conditions such as drought and wishes to avoid disputes in the future as to whether such change was attributable to the solar panels or not.
- 142 The Council has indicated to the applicant that the purpose of the condition is to address the requirements of Council's Infrastructure Services Team to ensure the runoff coefficient is consistent with the Stormwater Management Report.
- 143 Mr Tooker having reviewed the condition proposed the amendments to the condition that are seen in the current version of condition E13(b) proposed by the applicant. The purpose of the condition seeks to address the concerns of Council's specialists in respect of the maintenance of the runoff coefficient while being drafted in a manner that is capable of compliance by the applicant in order to provide certainty to the parties.
- 144 The Council submits that its wording aims to ensure that runoff does not increase to more than predevelopment flows despite the presence of solar arrays, vehicular traffic and maintenance activities through the maintenance of ground cover of appropriate perennial species. This will ensure that the runoff coefficient is consistent with that which was modelled in the applicant's Stormwater Management Report (Ex C Tabs 5 and 7).
- 145 The applicant's proposed drafting requires "reasonable endeavours" to be made to maintain the groundcover so that it "does not reduce the long term overall retardance coefficient for runoff below 0.05" (Ex E, Condition E13(b)).
- 146 The Council's fundamental concern with the amendments proposed by the applicant is that they will make the condition difficult to practically enforce, where that is necessary.
- 147 Each party considers the other party's version of the condition to be uncertain and impracticable to enforce.

148 Both parties are also aligned in their respective views that the purpose is to ensure the runoff coefficient is consistent with what was modelled in the applicant's Stormwater Management Report (Respondent's submissions at par 30). While the applicant had sought to make this purpose explicit in the condition, the applicant acknowledges that it renders the condition technical in nature.

149 In order to bridge the limited impasse in respect of Condition E13(b), the applicant proposes the following revised version of condition E13(b) with insertions in bold and underline and deletion in strikethrough:

"Following any construction or upgrading on the site, the Applicant must undertake the following in accordance with the approved landscaping plan:

...

maintain the groundcover with appropriate perennial species and ensure the nature and quantity of groundcover **meets the requirements of the approved Stormwater Management Plan** does not change despite the presence of the solar arrays, vehicular traffic on the site and maintenance activities; and..."

#### **Findings – Condition E13(b)**

150 I am satisfied that the alternative wording of condition E13(b) addresses the requirements of the respective stormwater experts and ensures that the benchmark against which compliance with the condition in respect of maintenance of groundcover is measured is compliance with the approved landscaping plan and approved stormwater management plan.

#### **Public interest (Contention 4)**

151 I have carefully considered the concerns expressed by the local objectors who addressed me at the site view and the written submissions tabled in the Council's bundle received during the notification period. As I understand them, their issues align with the specific issues raised by the Council addressed by the experts and which I have earlier addressed in detail. In essence they relate to the land use proposed and its visual impact. In respect of those issues, I accept the expert evidence and for the reasons I have indicated consider that the proposed development addresses those concerns.

#### **Conclusion**

152 For the reasons stated above, I am satisfied that the proposed development is an appropriately designed development for the site, and subject to the

proposed conditions that I have considered, warrants the grant of development consent.

153 Accordingly, the Court orders that:

- (1) The appeal is upheld.
- (2) Development consent is granted to development application DA2020/035 for the construction and use of electricity generating works comprising 5MW solar farm and associated infrastructure on a portion of the land legally described as Lot 2 in DP 814689 known as 262 Hunts Road, Gunnedah, subject to the conditions of consent in Annexure A.
- (3) The exhibits are retuned except for A, B, C, E, G, 2, 10 and 12.

.....

**S Dixon**

**Senior Commissioner of the Court**

[Annexure A \(297038.pdf\)/asset/1843b9ad7d85d37266bb502f.pdf/asset/1843b9ad7d85d37266bb502f.pdf](#)

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## **Amendments**

14 November 2022 - Correction to typographical errors at [1] and [4].

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