

SHIRE OF KOJONUP

Kojonup



MINUTES

Special Council Meeting

9 November 2022

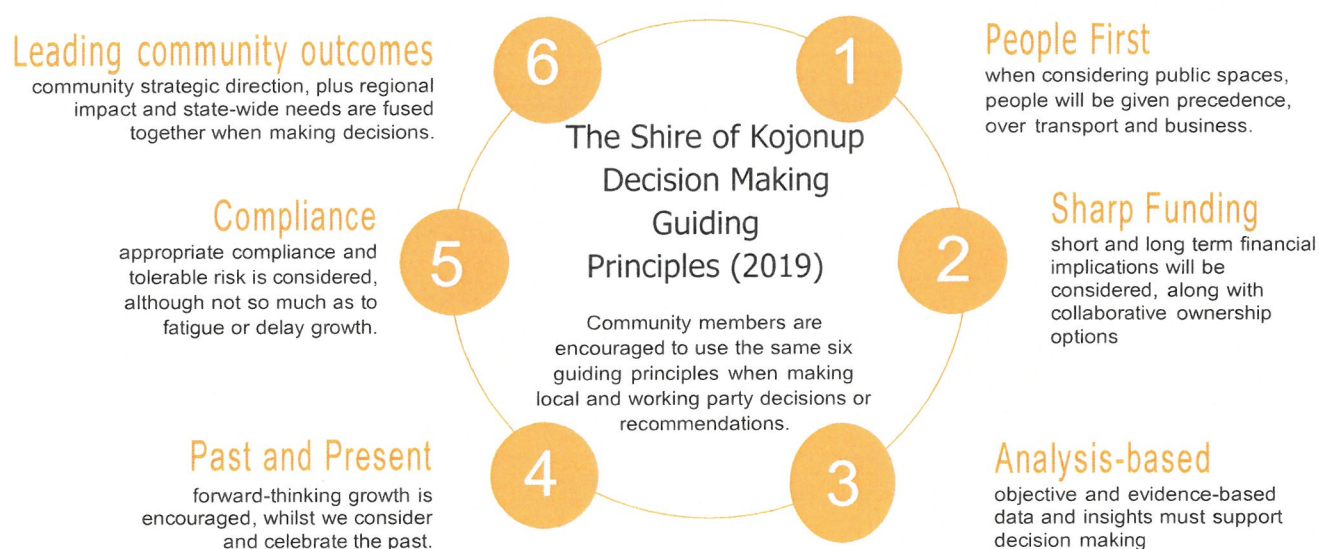
MINUTES OF A SPECIAL COUNCIL MEETING HELD ON 9 NOVEMBER 2022

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The Shire of Kojonup has a set of six guiding principles it uses when making decisions. These principles are checked and enhanced every two years in line with the Strategic Community Plan review schedule.



MINUTES

1 DECLARATION OF OPENING AND ANNOUNCEMENT OF GUESTS

The Shire President declared the meeting open at 4.01pm and drew the meeting's attention to the disclaimer below:

Disclaimer

No person should rely on or act on the basis of any advice or information provided by a Member or Officer, or on the content of any discussion occurring, during the course of the meeting.

The Shire of Kojonup expressly disclaims liability for any loss or damage suffered by any person as a result of relying on or acting on the basis of any advice or information provided by a member or officer, or the content of any discussion occurring, during the course of the meeting.

Where an application for an approval, a license or the like is discussed or determined during the meeting, the Shire warns that neither the applicant, nor any other person or body, should rely upon that discussion or determination until written notice of either an approval and the conditions which relate to it, or the refusal of the application has been issued by the Shire.

Acknowledgement of Country

The Shire of Kojonup acknowledges the first nations people of Australia as the Traditional custodians of this land and in particular the Keneang people of the Noongar nation upon whose land we meet.

We pay our respect to their Elders past, present and emerging.

Prayer – Cr Gale

Almighty God, we pray for wisdom for our reigning monarch King Charles.

We ask for guidance in our decision making and pray for the welfare of all the people of Kojonup.

Grant us grace to listen and work together as a Council to nurture the bonds of one community.

Amen

2 **ANNOUNCEMENTS FROM THE PRESIDING MEMBER**

Nil

3 **ATTENDANCE**

COUNCILLORS

Cr N Radford

Shire President

Cr P Webb

Deputy Shire President

Cr F Webb

Cr Wieringa

Cr Gale

Cr Singh

Cr R Bilney

Cr A Egerton-Warburton

STAFF

Grant Thompson

Chief Executive Officer

Robert Jehu

Manager Regulatory Services

Judy Stewart

Senior Administration Officer

Emily Sleight

Sport and Recreation Officer

3.1 **APOLOGIES**

Nil

3.2 **APPROVED LEAVE OF ABSENCE**

Nil

MEMBERS OF THE PUBLIC

Ian Palmer

John Price

Dr Sarah Rankin

J Milli

Darryl Byatt

Simon Klopper

Michael Hilder

Helen Bignell

Helen Todd

Carolyn Tonkin

Olivia Thorn

Bec Barton

Belinda Moharich

Rohan Thorn

Laura Thorn

James Hope

Brad Bilney

Adrian Bilney

Jayne Thorn

4 DECLARATION OF INTEREST

Cr Bilney – Item 9.4.2 – declared a Financial Conflict of Interest.

Cr Egerton-Warburton – Item 9.4.2 – declared an Impartiality Interest.

5 PUBLIC QUESTION TIME

5.1 RESPONSE TO PREVIOUS PUBLIC QUESTIONS TAKEN ON NOTICE

Not applicable

5.2 PUBLIC QUESTION TIME

The Chief Executive Officer read aloud the questions received from Narelle Goodall, Alan Goodall, Carolyn Tonkin, Ian Tonkin, Elizabeth Atkins, Adrian Bilney, and Luke Atkins.

The questions were taken on notice.

6 CONFIRMATION OF MINUTES

6.1 SPECIAL COUNCIL MEETING 1 NOVEMBER 2022

Unconfirmed Minutes of a Special Council Meeting held on 1 November 2022 are at [Attachment 6.1.1.](#)

OFFICER RECOMMENDATION/COUNCIL DECISION

121/22 Moved Cr P Webb

Seconded Cr C Wieringa

That the Minutes of a Special Council Meeting held on 1 November 2022 be confirmed as a true record.

CARRIED 7/0

7 PRESENTATIONS

7.1 PETITIONS

Nil

7.2 PRESENTATIONS

Nil

7.3 DEPUTATIONS

7.3.1 BELINDA MOHARICH – ON BEHALF OF MOONIE HILLS ENERGY PTY LTD AND ENEL GREEN POWER AUSTRALIA PTY LTD

Please see [Attachment 7.3.1.1.](#)

Laura Thorn and Olivia Thorn left the meeting at 4.25pm.

The Manager Regulatory Services left the meeting at 4.26pm and re-entered the meeting at 4.27pm.

Laura Thorn re-entered the meeting at 4.28pm.

Question from Cr Singh to Belinda Moharich – stating everything the same as in 2011 – height of turbines is different?

Response from Belinda Moharich to Cr Singh – the acoustic methodology (2011 and 2017) is the same and correct as confirmed by Department of Water and Environmental Regulation at those times.

Question from Cr Singh to Belinda Moharich – Why does the Wind Farm not move turbines to make farmers happy?

Response from Belinda Moharich to Cr Singh – There is no capacity to move the turbines from the planned red dots (locations) – obligated legally to place the turbines at the red dots as per the DA.

Cr Singh to Belinda Moharich – 1 kilometre maximum - where can they build houses?

Belinda Moharich to Cr Singh – adjoining landowners are not limited to where they can build. Using science based information based on acoustic methodology, confident 1 kilometre is suitable.

Cr Singh to Belinda Moharich – 35-45db is allowed so why last time did it say 5 kilometres from a farm not 1 kilometre?

Belinda Moharich to Cr Singh - 5 kilometres was a starting point and was then reduced, using modelling and science, to achieve acceptable levels.

Cr Singh to Belinda Moharich – and if noise level is more, then Moonies Hill required to fix in 60 days, then what, how long, then Court?

Belinda Moharich to Cr Singh – If any noise issues, it is important that a complaint is made including record of time and meteorological conditions to check all factors. Testing would then be done based on that information and location; client will comply with Noise Impact Mitigation Management Plan.

Cr Singh – 1) in 2011, why not object to it all? 2) not a single farmer last few months wanting a meeting with the Shire Council, why questions a few hours before, no one spoke at this or last public question time against? Meeting announced 5 days ago, but only reply 1pm.

Cr Bilney – Things take time to prepare, notice late Friday. Have abided by conflict of interest so have not engaged but others have forwarded requests to meet. CEO had advised that he cannot discuss due to legal issues.

Cr Egerton-Warburton – Not here in 2011 but understand that farmers were protesting loudly and clearly. Public meeting badly misformed by CEO at the time, advised couldn't place dwellings near where turbines were erected. Whole scheme dropped for a few years then permission given a year ago. Ten years ago approved with significant changes in requirements since then.

Belinda Moharich - involved in 2011. There were objections but conditions – extensive reports to JDAP (Joint Development Assessment Panel) such as flora, fauna, environmental acoustics, traffic, landscape, farming, construction locations, and fire risk fully considered. Further information refreshed where necessary. 77 turbines originally, down to around half. JDAP now the process, Shire of Kojonup last to approve in-house. Further information and changes are reflected in the Development Application amendments as and when requirements are altered.

7.4 DELEGATES' REPORTS
Nil

8 METHOD OF DEALING WITH AGENDA BUSINESS
There were nil changes to the order of business.

9 REPORTS

9.1 KEY PILLAR 1 – 'PLACE' REPORTS
Nil

9.2 KEY PILLAR 2 – 'CONNECTED' REPORTS
Nil

9.3 KEY PILLAR 3 – 'PERFORMANCE' REPORTS
Nil

Cr Bilney stated his financial conflict of interest, declared earlier in the meeting, and left the meeting at 4.40pm.

The Manager Regulatory Services, the Sport and Recreation Officer and Members of the Public left the meeting at 4.40pm.

PROCEDURAL MOTION

122/22 Moved Cr F Webb

Seconded Cr P Webb

That the meeting proceed behind closed doors to receive legal advice in accordance with Section 5.23 (2) (c) of the *Local Government Act 1995* at 4.40pm.

CARRIED 7/0

PROCEDURAL MOTION

123/22 Moved Cr F Webb

Seconded Cr P Webb

That the meeting be reopened to the public at 4.52pm.

CARRIED 7/0

The Manager Regulatory Services re-entered the meeting at 4.52pm.

Simon Klopper, Jayne Thorn, John Price, Belinda Moharich, Sarah Rankin, Julian Mills, Hamish Thorn, James Hope, Ian Palmer, Helen Todd, Carolyn Tonkin, Laura Thorn, and Darryl Byatt re-entered the meeting at 4.52pm.

9.4 KEY PILLAR 5 – ‘PROSPERITY’ REPORTS

9.4.1 MOONIES HILL ENERGY PTY LTD – MOTION 120/22 GOVERNANCE CLARIFICATION

AUTHOR	Grant Thompson – Chief Executive Officer	
DATE	Friday, 4 November 2022	
FILE NO	BD.BDA.8	
ATTACHMENT(S)	9.4.1.1	221101 - Letter to Shire of Kojonup UNDER SEPARATE COVER Confidential Legal Advice

STRATEGIC/CORPORATE IMPLICATIONS		
“Smart Possibilities – Kojonup 2027+”		“Smart Implementation – Kojonup 2018-2022”
Key Pillar	Community Outcomes	Corporate Actions
KP 3 - Performance	Coordination of Council processes and provision of governance support.	

DECLARATION OF INTEREST

Nil

SUMMARY

This Officer’s report is for Council to note the legal position of the motion 120/22 moved at the Special Council Meeting held 1 November 2022. There is no action required from Council on this position as it stands.

BACKGROUND

At a Special Council Meeting held 1 November 2022 the vote on motion 120/22, to approve amendments of certain conditions of the said development application, was 4/3:

*120/22 Moved Cr P Webb
That Council:*

Seconded Cr F Webb

- 1) In accordance with Regulation 77 of the Planning and Development (Local Planning Schemes) Regulations 2015 approve the amendment of the development approval issued to Moonies Hill Energy Pty Ltd for the Flat Rocks Wind Farm and issue a revised development approval through the following changes to conditions 4, 21 and 29 and adding advice notes.*

In particular, to reword as follows:

Condition 4

The wind turbines are to be micro-sited in accordance with the following restrictions –

- a) All wind turbines shall be located a minimum distance of 1 kilometre from any dwelling existing at the time of the issue of this planning approval unless approval in writing is first granted from the owner of that dwelling to a closer location;*

- b) *The wind turbines shall be located in accordance with the 'Flat Rocks Wind Farm Landscape and Visual Assessment'. This report requires, in order to satisfy visual amenity considerations, either relocation of specified wind turbines or in the alternative, the implementation of vegetation screening.*

Condition 21

Prior to commencing any works, the Applicant is to lodge a Noise Impact Mitigation Management Plan for approval by the local government. The Noise Impact Mitigation Management Plan is to outline the process by which the Applicant will –

- a) *Undertake post-commissioning testing to ensure compliance with condition 29, including testing at existing dwellings, based upon the testing procedures and analysis contained in the South Australian EPA Wind Farms Environmental Noise Guidelines (2021);*
- b) *Make arrangements with adjoining landowners regarding the construction of dwellings on land;*
- c) *Modify micro-siting to ensure compliance with condition 29;*
- d) *Modify the operation of the wind turbines to ensure compliance with condition 29;*
- e) *Manage complaints regarding noise impact during the operational phase of the development.*

Condition 29

- (a) *The Applicant shall ensure at all times that the operation of the wind farm complies with the following noise levels within a 30 metre curtilage of a dwelling:*

- a) *Will not exceed 35dB(A) (LA90, 10 minutes); or*
- b) *Will not exceed the background noise (LA90, 10 Minutes) by more than 5dB(A), whichever is the greater.*

- (b) *Assessment of noise impact is to be performed in accordance with SA EPA Wind Farms Environmental Noise Guidelines (2021).*

Adding advice

Insert new advice notes as follows:

- A) *The term 'dwelling' in this approval has the same meaning as the Residential Design Codes Volume 1.*

- B) *The applicant is advised that:*

- i) *There is potential for vacant lots adjacent to the proposed wind farm to be further developed with dwellings.*
- ii) *Legislation in Western Australia requires that the wind farm comply with the Environmental Protection (Noise) Regulations 1997. The controls on noise contained in this approval do not override those contained in the Regulations, nor vice versa, but the wind farm must comply with whichever control is more stringent at any given location at any given time under then-prevailing meteorological etc conditions.*
- iii) *The applicant takes the commercial risk that future wind farm operations may need to be altered or modified to continue to comply with noise limitations.*
- iv) *It is recommended that the applicant prepare and submit acoustic compliance reports by a suitably qualified and independent acoustic engineer to*

demonstrate compliance with Condition 29 at key stages of development. This would provide compliance assurances to both the local government and surrounding landowners.

- 2) *Advise the Shire of Broomehill-Tambellup of the decision to approve the amendments to the Moonies Hill Energy Pty Ltd wind farm development.*

LOST 4/3
(LACK OF ABSOLUTE MAJORITY)

Councillors are referred to a letter received (Attachment 9.4.1.1) 2 November 2022, from Moharich & More, lawyers (Moharich) dated 1 November 2022. Moharich are the lawyers for the proponent of the above matter.

Moharich's letter asserts that an absolute majority was not required and that a simple majority only was required.

COMMENT

The author sought legal clarification from McLeods Lawyers regarding Moharich's correspondence. The legal advice is attached Under Separate Cover (Confidential).

This report outlines the following for the Council to note:

The vote on the motion to approve amendments of certain conditions of development approval was 4/3, at the Special Council Meeting on Tuesday, 1 November 2022.

Council was in receipt of an officer report which advised that an absolute majority was required in order for the motion to pass.

A 4/3 vote does not, in the case of the Shire of Kojonup, constitute an absolute majority.

The motion was accordingly declared Lost.

The proper legal position, as subsequently advised, is that an absolute majority was not required. Although there have, in the past, been successive resolutions made by absolute majority relating to the approval of the wind farm and the conditions on which the wind farm is approved, the motion to Council on Tuesday, 1 November 2022 should not be regarded as an amendment to an existing resolution of Council.

Rather, there was a substantive new application; that application being to amend the existing conditions of development approval. That is a procedure provided by clause 77 of Schedule 2 to the Planning and Development (Local Planning Schemes) Regulations 2015. No special majority is required in the case of a clause 77 application to amend the conditions of an existing development approval:

- a. the legal effect of achieving a majority 4/3 vote on the motion, is that the motion is properly to be regarded as having been carried;

- b. the fact that a legally-incorrect declaration was made at the 1 November 2022 meeting that the motion was not carried, is not a matter to be corrected through the process of the confirmation of the minutes. Rather, it is to be corrected by means of this present report to Council;
- c. no resolution for endorsement or acceptance of this position is required from Council, because the 4/3 vote on 1 November 2022 was what it was, and its proper legal consequence was what it was.
- d. It should properly be interpreted as a resolution that was carried.

CONSULTATION

McLeods Lawyers

STATUTORY REQUIREMENTS

Planning and Development Act 2005 and Planning and Development (Local Planning Schemes) Regulations 2015.

POLICY IMPLICATIONS

Nil

FINANCIAL IMPLICATIONS

Nil

RISK MANAGEMENT IMPLICATIONS

RISK MANAGEMENT FRAMEWORK			
Risk Profile	Risk Description/Cause	Key Control	Current Action
3 – Compliance	Impulsive decision making Ineffective monitoring of changes to legislation	Professional accreditation/certification maintained	Nil
6 – Engagement	Inadequate documentation or procedures	Public notices/local papers/website communication	Nil
8 – Errors, Omissions and Delays	Complex legislation Incorrect information	Development Approval performance report	Nil
<i>Risk rating: Adequate</i>			
IMPLICATIONS			
Governance issues are complex and fall under several layers of legislation and there is always a risk of misinterpretation and error. Further due diligence is required on more complex items.			

ASSET MANAGEMENT IMPLICATIONS

Nil

SOUTHERN LINK VROC (VOLUNTARY REGIONAL ORGANISATION OF COUNCILS) IMPLICATIONS

Nil

VOTING REQUIREMENTS

Nil

OFFICER STATEMENT

That Council note this report that the legal effect of achieving a majority 4/3 vote on motion 120/22 at the Special Council Meeting held 1 November 2022 is that the motion is properly to be regarded as having been carried and that officers will be issuing formal documentation to the applicant confirming the approval of the amendment of the conditions.

NOTED

9.4.2 ENEL GREEN POWER AUSTRALIA PTY LTD – ASSESSMENT OF DEVELOPMENT LAYOUT PLAN AND MANAGEMENT PLANS RELATING TO CONDITIONS 4, 17 & 21, AND EASEMENT FOR ACCESS TO PORTIONS OF CERTAIN ROAD RESERVES

AUTHOR	Grant Thompson – Chief Executive Officer Steve Thompson - Consultant Planner, Edge Planning & Property	
DATE	Saturday, 5 November 2022	
FILE NO	BD.BDA.8	
ATTACHMENT(S)	9.4.2.1	Amended conditions of development approval (letter dated 5 October 2021)
	9.4.2.2	Development Layout Plan including micro-siting plans
	9.4.2.3	Noise Impact Mitigation Management Plan
	9.4.2.4	Draft Agreement for the installation of underground cabling

STRATEGIC/CORPORATE IMPLICATIONS		
“Smart Possibilities – Kojonup 2027+”		“Smart Implementation – Kojonup 2018-2022”
Key Pillar	Community Outcomes	Corporate Actions
KP 4 - Prosperity	4.1 – Be providing business assistance for growth in small local industry	4.1.1 – Amend Town Planning Scheme to encourage economic development and private investment

DECLARATION OF INTEREST

Edge Planning & Property receive payment for planning advice to the Shire and declare a Financial Interest (section 5.70 of the *Local Government Act 1995*).

SUMMARY

The applicant has submitted a Development Layout Plan and Management Plans to the Shire of Kojonup (Shire) seeking approval.

BACKGROUND

The Council has considered matters relating to the wind farm on various occasions including that Council, on 13 September 2022, approved various management plans.

The Shire, on 5 October 2021, issued amended conditions of development approval (see Attachment 9.4.2.1).

On 1 November 2022, Council deliberated on a request by the proponent for amended wording for Conditions 4, 21 and 29. A separate report to go to the same Council meeting as this present item, is understood to clarify that the Council vote taken on that request on 1 November 2022, had the effect that Council approved the requested amendments to those conditions. This report is prepared on that understanding. The final outstanding plans and management plans to be determined by Council are the Development Layout Plan (DLP) and the Noise Impact Mitigation Management Plan (NIMMP). The plans associated with Conditions 4, 17 and 21 are reproduced in Attachments 9.4.2.2 and 9.4.2.3. The development approvals propose 42 wind turbines (7 in the Shire of Kojonup and 35 in the Shire of Broomehill-Tambellup) plus supporting infrastructure and buildings.

The proponents have separately requested approval from the Shire of Broomehill-Tambellup to the plans and management plans to reflect the development approval issued by the Great Southern Joint Development Assessment Panel.

COMMENT

This item has been prepared on the basis that Council, on 1 November 2022, approved the proponent's request to amend the wording of Conditions 4, 21 and 29 to address some ambiguity. The item now considers plans, information and management plans associated with Conditions 4, 17 and 21.

Conditions 4, 17, 21 and 29

The above Conditions of development approval now read as follows:

Condition 4

The wind turbines are to be micro-sited in accordance with the following restrictions –

- c) All wind turbines shall be located a minimum distance of 1 kilometre from any dwelling existing at the time of the issue of this planning approval unless approval in writing is first granted from the owner of that dwelling to a closer location;
- d) The wind turbines shall be located in accordance with the 'Flat Rocks Wind Farm Landscape and Visual Assessment'. This report requires, in order to satisfy visual amenity considerations, either relocation of specified wind turbines or in the alternative, the implementation of vegetation screening.

Condition 17

Prior to commencing any works, the Applicant is to lodge a Development Layout Plan for approval by the local government. The Development Layout Plan must include the following detail –

- (a) The location of access/egress points and service roads;
- (b) The location of any cabling between wind turbines;
- (c) The location of any fencing;
- (d) Permanent buildings;
- (e) Permanent car parking areas;
- (f) Locations of the wind turbines, having regard to the restrictions in conditions 3 and 4 above;
- (g) The location of any landscaping if required by condition 4(b).

Condition 21

Prior to commencing any works, the Applicant is to lodge a Noise Impact Mitigation Management Plan for approval by the local government. The Noise Impact Mitigation Management Plan is to outline the process by which the Applicant will –

- a) Undertake post-commissioning testing to ensure compliance with Condition 29, including testing at existing dwellings, based upon the testing procedures and analysis contained in the South Australian EPA Wind Farms Environmental Noise Guidelines (2021);
- b) Make arrangements with adjoining landowners regarding the construction of dwellings on land;
- c) Modify micro-siting to ensure compliance with Condition 29;
- d) Modify the operation of the wind turbines to ensure compliance with Condition 29;

- e) Manage complaints regarding noise impact during the operational phase of the development.

Condition 29

- (a) The Applicant shall ensure at all times that the operation of the wind farm complies with the following noise levels within a 30 metre curtilage of a dwelling:
- a) Will not exceed 35dB(A) (LA90, 10 minutes); or
 - b) Will not exceed the background noise (LA90, 10 Minutes) by more than 5dB(A), whichever is the greater.
- (b) Assessment of noise impact is to be performed in accordance with SA EPA Wind Farms Environmental Noise Guidelines (2021).

Development Layout Plan and Noise Mitigation Management Plan

The Development Layout Plan is required by Condition 17. Condition 17 interacts with Condition 4 in that Condition 17 requires the DLP to reflect the requirements of Condition 4. Condition 17 also requires DLP to satisfy certain other requirements that are not set out in Condition 4.

The NIMMP is required by Condition 21. Condition 21 interacts with Condition 29 in that Condition 21 requires an outline of a process by which several things under Condition 29 will be addressed. Condition 21 also requires the NIMMP to address things that are not specifically mentioned in Condition 29 – e.g. management of complaints.

Development Layout Plan - Condition 17

The applicant submitted a DLP as per the development approval Condition 17.

The Shire corresponded with the proponent, requesting modifications to its original DLP. In particular, precise locations of each turbine have been required and, accordingly, there is now a plan for each individual turbine on the Shire of Kojonup side contained within the DLP. Various plans which now collectively comprise the DLP, have been reproduced as Attachment 9.4.2.2, and that is the set of documents that Council is being asked to approve.

The inclusion of the detailed location plan, separation from residences/sensitive premises and associated checklist and verification assists to show Council and other interested parties as to how the Applicant has considered and addressed matters. The Applicant outlines that:

- Wind turbines are located a minimum distance of 1 kilometre (km) from any off-site (non-stakeholder) dwelling which currently exists; and
- The wind turbines are located in accordance with the 'Flat Rocks Wind Farm Landscape and Visual Assessment'.

The previously prepared site-specific acoustic studies, which have been produced at all relevant stages, should provide the Council with comfort that the noise maximums referred to in Condition 29 should be achievable at off-site (or non-stakeholders) dwellings. This is considered to satisfy the WAPC (Western Australian Planning Commission) Position Statement. There is a requirement that the wind farm comply with the *Environmental Protection (Noise) Regulations 1997* at all times. That requirement exists by virtue of those Regulations of their own force, separate from the development approval.

Lawyers Steedman Stagg, through a series of letters to the Shire or to the Shire's lawyers, have been asserting on behalf of a number of landowners in proximity to the wind farm, that Condition 4(a) had the effect that each wind turbine must be separated at least 1km from each farm lot boundary. Shire Administration did not consider this to be the proper interpretation of Condition 4(a) as it previously stood. By virtue of Council's 1 November 2022 decision, any ambiguity about the meaning of Condition 4(a) was removed by replacing the words '*1 kilometre from any residential dwelling/sensitive premises existing at the time of the issue of this planning approval*' with the words '*1 kilometre from any dwelling existing at the time of the issue of this planning approval*'. This is considered to have been the underlying intent of:

- (a) the proponent's proposal;
- (b) the JDAP decision which first adopted this wording for the Broomehill/Tambellup side; and
- (c) Kojonup Council when it first adopted standardised conditions on both sides of the municipal boundary.

This was explained in the item to Council on 1 November 2022. The Council's vote on 1 November 2022 is considered to have removed any ambiguity in favour of making it clear that the relevant separation is to dwellings not farm boundaries. The DLP should not be refused on the ground that it does not achieve a 1 km separation to farm boundaries.

Steedman Stagg, in correspondence of 1 November 2022, make reference to the prospect that farm lot owners might choose to construct dwellings in closer proximity to the boundary between their lots and a wind farm lot, and that the proponent might then be unable to meet the noise levels set out in the Noise Regulations. The approval of a DLP is; however, only concerned with dwellings existing as at the date of issue of the wind farm development approval. The matter of how the wind farm complies with the Noise Regulations with regard to potential future receiver points is outside the scope of the DLP.

Steedman Stagg draw attention to the fact that an environmental consultant has, on behalf of several of Steedman Stagg's clients, made a referral of the Flat Rocks Wind Farm proposal to the Western Australian Environmental Protection Authority (WA EPA), seeking environmental assessment of the proposal by the EPA. It is acknowledged that if the WA EPA was to choose to assess a proposal under the *Environmental Protection Act 1986 (EP Act)*, then decision-makers in relation to the proposal must hold off from making decisions pending that environmental assessment. The Shire is not in receipt of advice that the EPA has chosen to assess the proposal under the *EP Act*. It is also somewhat unclear what exact decisional process has been referred to the EPA. Development approvals for the Kojonup and Broomehill-Tambellup sides of the municipal boundary have already been granted. Administration is not aware of any impediments to Council approving the DLP and the NIMMP, due to the *EP Act*.

A further issue taken by Steedman Stagg in relation to the DLP, is a claim which is understood to be that certain underground electricity reticulation to be constructed as part of the wind farm, is 'located outside of the previously approved project area'. They draw attention, in particular, to the electricity reticulation adjacent to Warrenup Road, between the proposed sites of turbines T04 and T18. Steedman Stagg's reference to 'the project area' is understood to be a reference to the freehold lots on which actual turbines are intended to be located. The contention is understood to be that any installations not within those freehold lots, would be outside of the scope of what was approved by the development approval.

Condition 13(a) of the development approval grants development approval to, among other things, cabling and electricity reticulation: Condition 13(b) and (c). It is then further provided that electricity reticulation shall not be placed on or over land outside of the lots the subject of the approval without the written consent of those land owners: Condition 15(c). Then there is the requirement for a Development Layout Plan which requires details including ‘the location of any cabling between wind turbines’: Condition 17.

The effect of the development approval is considered to be that the development approval plans contained enough detail to satisfy the Shire that the proposal was fundamentally acceptable with regard to relevant planning considerations, but some aspects of infrastructure and the exact location of infrastructure would remain to be settled by way of the DLP. The reference to ‘*electricity reticulation shall not be placed on or over land outside of the lots the subject of the approval without the written consent of those land owners*’ must be taken to mean that the scope of the development approval is not literally limited to the freehold lots on which turbines are located, but is capable of including electricity reticulation outside of those lots, subject to agreement of owners.

In the case of a road reserve, the ‘owner’ is the Crown, but the Shire has care, control and management of the road reserve and, accordingly, has the power to decide what installations may go into the road reserve (See *Land Administration Act 1997*, section 55). The Shire is the agent of the Crown where consent of the ‘owner’ of the road is required: see State Administrative Tribunal decision *Adbooth Pty Ltd and City of Perth* [2006] WASAT 343.

In so far as electricity reticulation may require some clearing of native vegetation within road reserves, there is a separate process required with another agency (Department of Water and Environmental Regulation) to determine the acceptability of that clearing. Impact on native vegetation is capable of being a relevant planning consideration. Therefore, in the context of considering the DLP, Council may be justified in applying its own assessment to the acceptability or otherwise of any impact on native vegetation. However, it is also open to Council to take impacts on native vegetation into account to the extent only of noting the separate need for a clearing permit to be determined by DWER. Given DWER’s greater and more specialised expertise on the matter of clearing permits, it is recommended that Council doesn’t form its own independent view on this issue but allows the acceptability of any clearing to be determined by DWER. That doesn’t mean that Council is ignoring a potential environmental impact, but rather Council is satisfied that a sufficient separate process exists to safeguard vegetation clearing concerns. This comment also applies to the extent that any aspect of the wind farm requires clearing on freehold lots as well. If Council intended to apply its own substantive assessment on the acceptability of clearing, then it is suggested that a deferral of this would be required.

Assuming that Council is willing for DWER only to decide on the acceptability of the vegetation clearing, it would nevertheless be appropriate to include within Council’s resolutions, separate from the resolution for Council approval of the DLP, a resolution that the CEO and the Shire President have authority (acting jointly) to sign off on Shire approval, in the Shire’s capacity as road authority, to the specific installations in the road reserve that are approved by the DLP. To explain further: the DLP is part of the planning process – it is required by Condition 17 – and its role is to locate various things to a higher level of precision than the development approval’s approved plan. (This also includes some things that weren’t depicted at all on the development approval’s approved plan but were contemplated by the development approval when read in totality with the development application, e.g. some cabling, and the concrete batching plant). Approval of the DLP involves the Council exercising powers as part of the planning process. In the case of the detailed engineering of cabling

in the road reserve, e.g. the depth of the cables, thickness of cables, whether there are any service ducts etc. – those are engineering matters which the Shire can reasonably require of the proponent so that the Shire has accurate records of what are located in the Shire's own asset. That is not part of approving the DLP, but can be asked for separately in the Shire's capacity as road manager.

The best way of achieving this is via an Agreement for Installation of underground cabling. The Shire's lawyers and the proponent have been working since 2017 on a draft Agreement in the expectation of a DLP being approved in due course. Work on this went dormant for several months when attention focussed on the DLP, the NIMMP and more recently the amendment of Conditions 4, 21 and 29. However, the draft Agreement, which is Attachment 9.4.2.4, is the appropriate mechanism to achieve the matters referred to in the preceding paragraph in the Shire's capacity as road manager. The Agreement also provides for the granting of easements over portions of the road reserves. The CEO should first be satisfied that the easement locations depicted in any plans associated with the Agreement match with the locations for installations in the DLP. The CEO should also be satisfied with the drawings of cabling to be attached to the Agreement.

In summary, approval of the DLP and also authorisation for the sign-off of the Agreement for Installation, is recommended.

There may separately be a need to obtain other approvals for certain aspects of the development works from other agencies including from Western Power and/or Department of Water and Environmental Regulation.

NIMMP - Condition 21

The NIMMP sets out the process by which the applicant will:

- Undertake post-commissioning testing to ensure compliance with Condition 29, including testing at existing dwellings, based upon the testing procedures and analysis contained in the South Australian EPA Wind Farms Environmental Noise Guidelines (2021) to be called the 'SA Guidelines'. The SA Guidelines have broad-based regulatory acceptance across Australia for measuring wind farm noise;
- Make arrangements with adjoining landowners regarding the construction of dwellings on land;
- Modify micro-siting to ensure compliance with Condition 29;
- Modify the operation of the wind turbines to ensure compliance with Condition 29; and
- Manage complaints regarding noise impact during the operational phase of the development.

The applicant initially lodged a NIMMP with the Shire on 18 August 2022. After due consideration and investigation, the Shire issued correspondence to the proponent requesting a number of changes to the NIMMP. The proponent submitted a revised NIMMP on 28 October 2022, taking account of the Shire's feedback. The proponent has not taken on board all of the Shire's requested amendments, and this has been subject to further Shire assessment. A summary of the Shire's amendment requests, the proponent's responses, and further assessment, is set out as follows:

1. Shire's amendment request: The noise emission from the wind turbines is to be represented by the LAeq,adj noise parameter for assessment against the South Australian EPA's Wind farms environmental noise guidelines, dated November 2021 [SAEPAWF].

Revised Shire position: Not needed. Assessment of LA90 noise emission accepted. This subject matter was addressed in the item that went to the Council meeting on 1 November 2022.

2. Shire's amendment request: For acknowledgement in the NIMMP that the wind farm must also comply with the WA Environmental Protection (Noise) Regulations 1997 (Noise Regulations).

Revised Shire position: On further review of this issue by the Shire administration, it is acknowledged that the NIMMP is produced pursuant to, and for the purposes of, the DA conditions, not pursuant to the Noise Regulations.

The need to comply with the WA Noise Regulations applies by force of law separate from the DA conditions. The wind farm must comply with the Noise Regulations as well as with Condition 29. Neither of these sets of controls (Noise Regulations and Condition 29) overrides the other – both must be complied with. Under certain conditions at certain times of the day or night, one or other of these controls might be the more stringent, whilst under other conditions or at other times, the other control might be more stringent.

3. Shire's amendment request: The noise emission from the wind turbines is to be represented by the LA10,adj noise parameter for assessment against the WAEPR

Revised Shire position: The NIMMP is produced pursuant to, and for the purposes of, the DA conditions, not pursuant to the Noise Regulations.

Aspects of noise measurement methodology which are specific to the Noise Regulations need not be set out in the NIMMP. The applicable noise measurement methodology for the purposes of Conditions 21, 29 and the NIMMP, is the SA 'Wind farms environmental noise guidelines'.

That doesn't mean that the LA10,adj noise parameter for assessment against the Noise Regulations can be disregarded.

Rather, it must be complied with as well, but the NIMMP is not directed at that – compliance with the Noise Regulations must still be achieved, but the need to comply with the Noise Regulations applies by force of law separate from the DA conditions and the NIMMP.

4. Shire's amendment request: Discussion should be added acknowledging the process applicable for the intended Stage 2 of the wind farm, and noting that further development approval would be required for Stage 2.

This has been included in the revised NIMMP.

5. Shire's amendment request: For discussion of the process by which background noise level at the site have been or are to be determined.

Revised Shire position: The proponent is saying in its revised NIMMP that they will rely on the 35dB. They won't rely on the ability to alternatively go up to 5dB above background noise.

The proponent says that if ever they wish to rely on going to 5dB above background, they will get new background levels assessed, and will submit this to the Shire, incorporated into a revised NIMMP.

The above is considered satisfactory, but it is recommended that any resolution for approval of the NIMMP be expressed as follows:

1. The CEO has authority to confirm the Shire's approval of the Noise Impact Mitigation Management Plan, provided the proponent causes the version Rp 001 R01 20220108 dated 28.10.22, to be amended in the second-last sub-paragraph of 3.0 so as to state:

'In the event that background noise monitoring is carried out in the future, the results of this monitoring would be used for determining wind speed dependant noise limits in accordance with Condition 29, subject to their inclusion in an updated version of this NIMMP requiring approval by the Shire's Chief Executive Officer.'

2. Council notes that it is Council's understanding that any future noise monitoring for the purpose of establishing background noise should be undertaken without the turbines in operation.
-
6. Shire amendment request: Detail should be provided of measures to achieve noise-curtailed modes of operation in certain circumstances.

Revised Shire position: It is noted that the requirement of Condition 21 is to 'outline the process by which the Applicant will' (among other things):

(c) modify micro-siting to ensure compliance with Condition 29;

(d) modify the operation of the wind turbines to ensure compliance with Condition 29.

On further review, the section of the NIMMP which the Shire was saying should provide more detail of measures to achieve noise-curtailed modes of operation, was the section dealing with (c) above rather than the section dealing with (d). The section dealing with (d) above is considered under point (d) below, and has been assessed as having been revised satisfactorily. It is acknowledged in addition that 'the process' which Condition 21 requires focuses on a management or administrative process, rather than details of a potential turbine operation noise curtailment techniques. It must be emphasised that Condition 29 stands as a condition in its own right; the operator must not exceed certain noise levels. How they achieve that is largely a matter for the operator. Condition 21 is partly in aid of Condition 29, and tries to promote a proactive approach to the requirements of Condition 29 but, in the end, it is considered that specific turbine operation noise curtailment techniques are not mandatory within the NIMMP, and it might be undesirable to require listing of such techniques as if they were an exclusive list. Ultimately, this aspect of the NIMMP is considered satisfactory.

7. Shire amendment request: The complaints handling procedures need to be updated.

Whilst the Shire administration initially sought a hotline which corresponded with Western Australian business hours, rather than eastern states, on review, this may be somewhat excess to requirements. Noise complaints are not in the same nature, as say, fire or chemical spills which require immediate reporting and response. Ultimately, this aspect of the NIMMP is considered satisfactory.

8. Shire amendment request: Various amendments were sought to the section of the NIMMP which dealt with the scenario in the event that post-commissioning noise monitoring or a noise investigation report indicated noise exceedances.

The NIMMP has been revised to state that a noise remediation plan shall identify the aspects of the operation of the turbines that will be modified to achieve compliance with Condition 29 of the development approvals.

The original report was insufficiently clear about the need to ensure that immediate steps are taken to ensure compliance pending formulation of a long-term solution. The NIMMP now states:

‘If a non-compliance is detected, an interim operating pattern is to be implemented immediately to prevent continued non-compliance, pending the formulation and implementation of a long-term solution. Details of measures being immediately implemented are to be advised to the Shires.

Revised Shire position: amendments address Shire’s requirements.

Alternate options and their implications

The Council has a number of options available to it, which are discussed below:

1 Not approve the management plans

The Council can choose to not approve the management plans and advise the proponent giving reasons. If this option were chosen, the Applicant would need to produce revisions of the management plan(s) which are not approved which better accord with the requirement of the technical subject matter that the plans and management plan relates to, and Council’s decision to not approve would need to be based on a lack of satisfaction that those technical requirements have been met.

2 Approve the management plans

The Council can choose to approve the management plans, in part or whole and/or with or without modifications. Approval of the management plans, the subject of this report, would be a step forward towards the wind farm proceeding.

3 Defer the proposal

The Council can choose to defer the matter and seek additional information from the proponent or undertake consultation, if deemed necessary, before proceeding to make a decision.

There is not a right of merits review of Council’s decision to approve or not to approve the Management Plan where it is lodged pursuant to a condition of development approval. However, the rationale for this is that the merits of the acceptability of the development have fundamentally been determined by the grant of the development approval, and what remains by way of DLP and Management Plans is an assessment of detail within the confines of specific narrow technical fields. Therefore, a DLP or a Management Plan should not be refused approval if it appropriately addresses the technical subject matter that it is supposed to address.

CONSULTATION

McLeods Lawyers

The Shire has previously consulted on the Development Application.

STATUTORY REQUIREMENTS

Planning and Development Act 2005, Planning and Development (Local Planning Schemes) Regulations 2015, and Environmental Protection (Noise) Regulations 1997.

POLICY IMPLICATIONS

The proposal satisfies the WA Planning Commission Position Statement: Renewable Energy Facilities (March 2020) which replaced the former Planning Bulletin 67 Guidelines for Wind Farm Development (2004).

FINANCIAL IMPLICATIONS

The applicant has paid the Development Application fee.

RISK MANAGEMENT IMPLICATIONS

RISK MANAGEMENT FRAMEWORK			
Risk Profile	Risk Description/Cause	Key Control	Current Action
3 – Compliance	Impulsive decision making Ineffective monitoring of changes to legislation	Professional accreditation/certification maintained	Nil
6 – Engagement	Inadequate documentation or procedures	Public notices/local papers/website communication	Nil
7 – Environment	Inadequate local laws/planning schemes	Environmental management compliance	Nil
8 – Errors, Omissions and Delays	Complex legislation Incorrect information	Development Approval performance report	Nil
<i>Risk rating: Adequate</i>			
IMPLICATIONS			
Applicants need to ensure that Development Applications accord with the intent of the Shire of Kojonup Town Planning Scheme. Council, in assessing applications, needs to adopt a similar approach that reflects present and future requirements without compromising amenity or establishing precedents.			

ASSET MANAGEMENT IMPLICATIONS

Nil

SOUTHERN LINK VROC (VOLUNTARY REGIONAL ORGANISATION OF COUNCILS) IMPLICATIONS

Although the Moonies Hill wind turbine project is located in two Shires, this request for approving the management plans only relates to turbines located in the Shire of Kojonup. The Shire of Broomehill-Tambellup will separately consider the management plans.

VOTING REQUIREMENTS

Simple Majority

ALTERNATIVE MOTION

124/22 Moved Egerton-Warburton

Seconded Cr Gale

1) That the Council DEFER the matter until the Minister for Environment and Climate Action, the Honourable Reece Whitby, MP, has been requested to, and decided whether to, exercise his power under the Environmental Protection Act to direct the Environmental Protection Agency to assess this project having regard to the matters listed in Points 60.1 to 60.9 in Steedman Stagg Lawyers' letter to McCleods Lawyers dated Tuesday 1st November, 2022 at 11.57am.

2) That further or alternatively, the Council request the adjudication of the Minister for Local Government, the Honourable John Carey, to assess the liability of the Shire of Kojonup if this project proceeds as laid out on the Development Approval.

LOST 2/5

OFFICER RECOMMENDATION/COUNCIL DECISION

Moved Cr P Webb

Seconded Cr C Wieringa

That:

- 1) Council approves the Development Layout Plan (Condition 17) for the Flat Rocks Wind Farm as reproduced in Attachment 9.4.2.2.
- 2) The Chief Executive Officer (CEO) and Shire President are granted authority to execute, to apply the Shire of Kojonup's (Shire) common seal to the Agreement for Installation (Attachment 9.4.2.4) to enable the proponent to have access to portions of road reserves for infrastructure approved by the Development Layout Plan, and to enable the Shire (in the Shire's capacity as manager of the road reserve) to approve and have a record of the engineering details of the infrastructure approved of or contemplated by the DLP in the affected road reserves. This authority is subject to the CEO being satisfied that the intended easement locations provided for in the Agreement match with the DLP locations, and being satisfied with the technical details of the drawings for the cabling.
- 3) The CEO is granted authority to confirm the Shire's approval of the Noise Impact Mitigation Management Plan, provided the proponent first causes the version Rp 001 R01 20220108 dated 28.10.22 (Attachment 9.4.2.3), to be amended in the second-last sub-paragraph of 3.0 so as to state:

'In the event that background noise monitoring is carried out in the future, the results of this monitoring would be used for determining wind speed dependent noise limits in accordance with Condition 29, subject to their inclusion in an updated version of this NIMMP requiring approval by the Shire's Chief Executive Officer.'
- 4) Council notes that it is Council's understanding that any future noise monitoring for the purpose of establishing background noise should be undertaken without the turbines in operation.
- 5) Council further notes that approval of the Development Layout Plan and management plans does not override the need to obtain any relevant approvals that may be separately required from other agencies.
- 6) The CEO advises the Shire of Broomehill-Tambellup of this decision.

AMENDMENT TO THE MOTION

125/22 Moved Cr Singh

Seconded Cr Egerton-Warburton

That the following be added to the motion: Enel Green Power Australia Pty Ltd and Moonies Hill Pty Ltd will respond to all complaints as per the Noise Impact Mitigation Management Plan and will respond within ten (10) days.

LOST 3/4

THE ORIGINAL MOTION WAS PUT

126/22 Moved Cr P Webb

Seconded Cr C Wieringa

That:

- 1) Council approves the Development Layout Plan (Condition 17) for the Flat Rocks Wind Farm as reproduced in Attachment 9.4.2.2.
- 2) The Chief Executive Officer (CEO) and Shire President are granted authority to execute, to apply the Shire of Kojonup's (Shire) common seal to the Agreement for Installation (Attachment 9.4.2.4) to enable the proponent to have access to portions of road reserves for infrastructure approved by the Development Layout Plan, and to enable the Shire (in the Shire's capacity as manager of the road reserve) to approve and have a record of the engineering details of the infrastructure approved of or contemplated by the DLP in the affected road reserves. This authority is subject to the CEO being satisfied that the intended easement locations provided for in the Agreement match with the DLP locations, and being satisfied with the technical details of the drawings for the cabling.
- 3) The CEO is granted authority to confirm the Shire's approval of the Noise Impact Mitigation Management Plan, provided the proponent first causes the version Rp 001 R01 20220108 dated 28.10.22 (Attachment 9.4.2.3), to be amended in the second-last sub-paragraph of 3.0 so as to state:

'In the event that background noise monitoring is carried out in the future, the results of this monitoring would be used for determining wind speed dependent noise limits in accordance with Condition 29, subject to their inclusion in an updated version of this NIMMP requiring approval by the Shire's Chief Executive Officer.'
- 4) Council notes that it is Council's understanding that any future noise monitoring for the purpose of establishing background noise should be undertaken without the turbines in operation.
- 5) Council further notes that approval of the Development Layout Plan and management plans does not override the need to obtain any relevant approvals that may be separately required from other agencies.
- 6) The CEO advises the Shire of Broomehill-Tambellup of this decision.

CARRIED 5/2

9.5 KEY PILLAR 5 – ‘DIGITAL’ REPORTS

Nil

10 APPLICATIONS FOR LEAVE OF ABSENCE

Nil

11 MOTIONS OF WHICH PREVIOUS NOTICE HAS BEEN GIVEN

Nil

12 QUESTIONS FROM MEMBERS WITHOUT NOTICE

Nil

13 NEW BUSINESS OF AN URGENT NATURE INTRODUCED BY DECISION OF THE MEETING

Nil

14 MEETING CLOSED TO THE PUBLIC

14.1 MATTERS FOR WHICH THE MEETING MAY BE CLOSED

Nil

14.2 PUBLIC READING OF RESOLUTIONS THAT MAY BE MADE PUBLIC

Nil

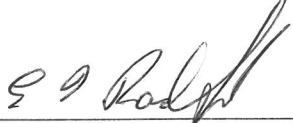
15 CLOSURE

There being no further business to discuss, the President thanked the members for their attendance and declared the meeting closed at 5.50pm.

16 ATTACHMENTS (SEPARATE)

- | | | |
|-------|---------|---|
| 6.1 | 6.1.1 | Unconfirmed Minutes of a Special Council Meeting held 1 November 2022 |
| 7.3 | 7.3.1 | Deputation – Belinda Moharich on behalf of Moonies Hill Energy Pty Ltd and Enel Green Power Australia Pty Ltd |
| 9.4.1 | 9.4.1.1 | 221101 - Letter to Shire of Kojonup |
| | | UNDER SEPARATE COVER
Confidential Legal Advice |
| 9.4.2 | 9.4.2.1 | Amended conditions of development approval (letter dated 5 October 2021) |
| | 9.4.2.2 | 221013 - KO DA amendment - FRWF |
| | 9.4.2.3 | MHE Correspondence 25102022 DA amendment request |
| | 9.4.2.4 | 221026 - Letter to Shire of Kojonup with attachment |

Confirmed on 29 November 2022 as a true record –



Presiding Member

29/11/2022
Date