



FILED ON

10 MAY 2024

SUMMONS (JUDICIAL REVIEW)

COURT DETAILS

Court Land and Environment Court of New South Wales
 Class 4
 Case number 2024 / 00173748

TITLE OF PROCEEDINGS

Applicant Ku-ring-gai Council
 Respondent State of New South Wales

FILING DETAILS

Filed for Ku-ring-gai Council, Applicant
 Legal representative Catherine Morton, Sparke Helmore
 Legal representative reference CLB/KUR955-00197
 Contact name and telephone Catherine Morton, 93731447
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HEARING DETAILS

This summons is listed at - 5 JUL 2024 9 AM

225 Macquarie St Sydney
(Windeyer Chambers)

TYPE OF CLAIM

Planning law – judicial review (s 9.45 Environmental Planning and Assessment Act 1979)

ORDERS SOUGHT

- 1 That *State Environmental Planning Policy (Housing) Amendment (Transport Oriented Development) 2024* and the amendments made to *State Environmental Planning Policy (Housing) 2021* by that environmental planning instrument are declared to be invalid.
- 2 That the Respondent pay the Applicant's costs of the proceedings.
- 3 Such further or other order as the Court deems fit.

A copy of this document
must be served

by.....17.MAY.2024.

GROUNDS

- 1 The making of *State Environmental Planning Policy (Housing) Amendment (Transport Oriented Development) 2024 (TOD SEPP)* was not authorised by the *Environmental Planning and Assessment Act 1979 (EP&A Act)* because the Planning Secretary failed to comply with s 3.25(2) of that Act, in that:
- a) s 3.25(2) of the EP&A Act required, before the TOD SEPP was made, that the Planning Secretary consult with the Chief Executive of the Office of Environment and Heritage if, in the opinion of the Planning Secretary, critical habitat or threatened species, populations or ecological communities, or their habitats, would or might be adversely affected by the proposed instrument;
 - b) non-compliance with s 3.25(2) of the EP&A Act invalidates the TOD SEPP and the amendments that were thereby made to *State Environmental Planning Policy (Housing) 2021 (Housing SEPP)*;
 - c) to comply with s 3.25(2) of the EP&A Act the Planning Secretary had to form an opinion, before the TOD SEPP was made, as to whether or not critical habitat or threatened species, populations or ecological communities, or their habitats, would or might be adversely affected by the proposed instrument;
 - d) to comply with s 3.25(2) of the EP&A Act the opinion referred to in paragraph (c) above was also required to be:
 - i. properly formed in that it was required to be an opinion that could be formed by a reasonable person who correctly understood the meaning of the law under which he or she was purporting to act; and
 - ii. not irrational or unreasonable;
 - e) in the premises, the TOD SEPP and the amendments that it made to the Housing SEPP are invalid because:
 - i. the Planning Secretary did not address her mind to whether or not critical habitat or threatened species, populations or ecological communities, or their habitats, would or might be adversely affected by the proposed instrument and form the requisite opinion as to that matter;
 - ii. in the alternative, if the Planning Secretary is found, before the TOD SEPP was made:

1. to have addressed her mind to whether or not critical habitat or threatened species, populations or ecological communities, or their habitats, would or might be adversely affected by the proposed instrument and to have formed the requisite opinion as to that matter; and
2. the opinion so formed was that there was no such adverse effect or possible adverse effect,

then the opinion was:

3. not one that could be formed by a reasonable person who correctly understood the meaning of the law at the time that the TOD SEPP was made; and/or
4. legally unreasonable or irrational.

Particulars

- A. The Court would not infer that the Planning Secretary had the necessary state of mind prior to the making of the TOD SEPP unless there was credible evidence to that effect.
- B. Materials published on the Department of Planning, Housing and Infrastructure website concerning the making of the TOD SEPP, that accompanied the publication of the TOD SEPP on the New South Wales legislation website under s 3.24(5) of the EP&A Act and s 45C of the *Interpretation Act 1987*, did not include an opinion of the Planning Secretary for the purpose of s 3.25(2) of the EP&A Act nor any evidence of consultation with the Chief Executive of the Office of Environment and Heritage on the matters in that provision.
- C. The TOD SEPP applies, among other areas, to land within 400 m of the entrances to Gordon Station, Lindfield Station, Killara Station, and Roseville Station, each of which are within the area for which the Applicant is constituted under s 219 of the *Local Government Act 1993*. The Applicant's functions include to provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community (including within those areas of application of the TOD SEPP in its local government area) and of the wider public under s 24 of the LG Act and to determine development applications under sections 4.15 and 4.16 of the EP&A Act where it is the consent authority under s 4.5 of that Act.

- D. On or about 21 February 2024 Ku-ring-gai Council made submissions to the Department of Planning, Housing and Infrastructure annexing an expert report by Land Eco Consulting dated 6 February 2024 that included information to the effect that:
- i. the area of impact of the TOD SEPP includes Sydney Turpentine Ironbark Forest Critically Endangered Ecological Community (up to approximately 217 ha) and Blue Gum High Forest Critically Endangered Ecological Community (up to approximately 162 ha);
 - ii. they hold serious concerns for the on-going survival of these two critically endangered ecological communities, since the proposal area holds one of the largest remaining extents of these communities;
 - iii. there is the potential that the developments associated with the TOD SEPP will interfere with flight paths of some protected animals, including migratory species; and
 - iv. two threatened species most at risk from the TOD SEPP are the Powerful Owl (*Ninox strenua*) and Grey-headed Flying-fox, which rely heavily on the tree canopy across the Ku-ring-gai local government area for foraging, and local and regional populations could be detrimentally impacted by the proposal as it is likely to result in extensive loss of both their shelter and foraging resources.
- E. By particular D above, the Planning Secretary had information before the TOD SEPP was made by which she ought to have been aware of the potential for the TOD SEPP to adversely affect species or communities of the type in s 3.25(2) of the EP&A Act. While the Planning Secretary was required to comply with s 3.25(2) of the EP&A Act by forming the requisite state of mind even if she did not have such information, this information was further reason to expect that an opinion, taking this information into account, should have been formed and evidenced for the purpose of s 3.25(2) before the TOD SEPP was made.
- F. Further or in the alternative, having regard to particulars D and E above, any opinion held by the Planning Secretary to the effect that the proposed instrument would not or might not adversely affect the species or communities of the type in s 3.25(2) of the EP&A Act was legally unreasonable or irrational.

2 The making of the TOD SEPP was not authorised by the EP&A Act because the Minister for Planning and Public Spaces failed to comply with s 3.30(1) of that Act, in that:

- a) s 3.30(1) of the EP&A Act required, before the Minister recommended the making of the TOD SEPP by the Governor, that the Minister take such steps, if any, as he considered appropriate or necessary to publicise an explanation of the intended effect of the proposed instrument and to seek and consider submissions from the public on the matter;
- b) non-compliance with s 3.30(1) of the EP&A Act invalidates the TOD SEPP and the amendments that were thereby made to the Housing SEPP;
- c) to comply with s 3.30(1) of the EP&A Act, the Minister was required, before the making of the TOD SEPP was recommended to the Governor, to address his mind to and form an opinion as to what steps, if any, were appropriate or necessary to publicise an explanation of the intended effect of the proposed instrument and to seek and consider submissions from the public on the matter; and
- d) the Minister did not address his mind to and form the requisite opinion as to what steps, if any, were appropriate or necessary to publicise an explanation of the intended effect of the proposed instrument and to seek and consider submissions from the public on the matter.

Particulars

- A. The Court would not infer that the Minister had the necessary state of mind prior to recommending the making of the TOD SEPP unless there was credible evidence to that effect.
- B. Materials published on the Department of Planning, Housing and Infrastructure website concerning the making of the TOD SEPP, that accompanied the publication of the TOD SEPP on the New South Wales legislation website under s 3.24(5) of the EP&A Act and s 45C of the *Interpretation Act 1987*, did not include an opinion of the Minister for the purpose of s 3.30(1) of the EP&A Act.
- C. By publication dated December 2023 entitled "Transport Oriented Development Program" (**TOD Program Brochure**) the Respondent represented in respect of the then proposed TOD SEPP that "*We need to confront the housing crisis together, so councils in areas where the SEPP will apply will be able to have their say on the proposed changes to the*

planning controls during the targeted consultation period: p 10. No indication was given in that publication as to whether the proposed consultation was based on an opinion formed by the Minister for the purpose of s 3.30(1) of the EP&A Act.

- D. By a document dated January 2024 with file name "Council staff TOD Briefing Pack Jan 2024 - Ku-ring-gai(92785667.1).pdf" (**Presentation Document**), provided to the Applicant's staff for the purpose of a meeting on or about 16 January 2024, the Respondent represented to the Applicant on a number of slides following a title slide "Consultation" (p 11) that "*We are seeking your feedback*" and gave instructions for how to provide feedback (pp 4 and 15). No indication was given in that publication as to whether the proposed consultation was based on an opinion formed by the Minister for the purpose of s 3.30(1) of the EP&A Act.
- E. By email dated 5 March 2024 received by the Applicant, an Acting Deputy Secretary of the Department of Planning, Housing and Infrastructure requested final endorsed submissions or any additional information by close of business 8 March 2024. No indication was given by that email as to whether the proposed consultation was based on an opinion formed by the Minister for the purpose of s 3.30(1) of the EP&A Act.

- 3 Further or in the alternative to Ground 2, the making of the TOD SEPP was not authorised by the EP&A Act because the Minister for Planning and Public Spaces failed to comply with s 3.30(1) of that Act, in that:
- a) s 3.30 of the EP&A Act required the Minister, in forming his opinion that it was necessary to take steps to publicise an explanation of the intended effect of the proposed instrument, to form an opinion as to the content of the explanation to be given; and
 - b) the Minister did not form an opinion as to the content of the explanation to be given.
- 4 In the alternative to Grounds 2 and 3 above, if the Minister formed the opinions referred to in Grounds 2 and 3 (or formed the opinion referred to in Ground 2 but was not required to form the opinion referred to in Ground 3) and this led to publication and consultation concerning the TOD SEPP being undertaken in the way identified in the particulars to Ground 2, the making of the TOD SEPP was not

authorised by the EP&A Act because the Minister for Planning and Public Spaces failed to comply with s 3.30(1) of that Act, in that:

- a) having chosen to take steps in accordance with s 3.30(1)(a) of the EP&A Act, the material the Minister publicised was required to be "*an explanation of the intended effect of the proposed instrument*" under that subsection of the EP&A Act;
- b) the material publicised would not constitute "*an explanation of the intended effect of the proposed instrument*" under s 3.30(1)(a) of the EP&A Act if it purported to explain the intended effect of the proposed instrument in a way that involved material inaccuracies or materially misrepresented the intended effect of the proposed instrument; and
- c) in the premises, the TOD SEPP and the amendments it made to the Housing SEPP are invalid because the purported explanation of the intended effect of the TOD SEPP that was given:
 - i. explained the intended effect of the TOD SEPP in a way that involved material inaccuracies; and/or
 - ii. materially misrepresented the intended effect of the TOD SEPP.

Particulars

- A. The Respondent, by the TOD Program Brochure (p 8) and the Presentation Document (p 8), represented that the TOD SEPP would apply within 400m of identified stations. The Department of Planning, Housing and Infrastructure's notes of a briefing to the Applicant's representatives given on 16 January 2024 record that the Department represented to the Applicant's representatives that the 400m radius would be: "*400m as the crow flies from station entry. Lots that partially intersect will be included*"(p 2). Contrary to these representations:
 - i. clause 152 of the amendments made to the Housing SEPP by the TOD SEPP applies the substantive provisions of the TOD SEPP to land within Ku-ring-gai, among other local government areas, that is in a "Transport Oriented Development Area";
 - ii. clause 151 of the amendments made to the Housing SEPP by the TOD SEPP defines "Transport Oriented Development Area" to be '*land identified as a "Transport Oriented Development Area" on the*

Transport Oriented Development Sites Map' (which in turn is defined to be the Housing SEPP' map of the same name);

- iii. the Transport Oriented Development Sites Map published on the NSW Planning Portal spatial viewer as at the date of this summons identifies both a "Transport Oriented Development Area" by a red line and "Transport Oriented Development Sites" by blue shading;
- iv. only the land identified as "Transport Oriented Development Area" on that map is land to which the TOD SEPP applies under clause 152 and the definitions in clause 151. The term "Transport Oriented Development Sites", and the land identified as such on the map, is not defined under the TOD SEPP and does not have an identified purpose under the terms of the TOD SEPP;
- v. the "Transport Oriented Development Area" identified on that map, to which the substantive TOD SEPP amendments apply, is an area bounded by a red circle on the map within a 400m radius from a single arbitrary point within each station; and
- vi. as a consequence, the TOD SEPP applies to a different area from that which was represented before the TOD SEPP was made and the terms of the TOD SEPP fail to make partially intersected lots part of the "Transport Oriented Development Area", so that the explanation that was publicised materially failed to correctly identify, and/or misrepresented, the intended effect of the proposed instrument.

B. Further:

- i. the Department of Planning, Housing and Infrastructure's notes of the briefing to the Applicant's representatives given on 16 January 2024 record that the Department represented to the Applicant's representatives that "*heritage items will still apply and have protection*";
- ii. while the TOD SEPP does not override existing heritage item controls, contrary to the representation in particular B(i) the TOD SEPP does not provide protection for heritage items;
- iii. while it appears that some heritage items may have been excluded from the "Transport Oriented Development Sites" shown in blue shading on the Transport Oriented Development Sites Map

published on the NSW Planning Portal spatial viewer as at the date of this summons, potentially with the intention to exclude that land from the operation of the TOD SEPP, the map does not have that effect because, for the reasons in particulars A(i) to (iv) above, the TOD SEPP amendments apply to the "Transport Oriented Development Area" shown on that map and not to the "Transport Development Oriented Sites" shown on that map;

- iv. that is, the TOD SEPP amendments apply to the whole of the area within the red circle on the map and not only to the land shaded in blue; and
 - v. as a consequence, the TOD SEPP applies to heritage items and there is no protection in the TOD SEPP for heritage items, so that the explanation that was publicised materially failed to correctly identify, and/or misrepresented, the intended effect of the proposed instrument.
- C. Further, the explanation that was publicised failed to identify, and/or misrepresented, the intended effect of the proposed instrument insofar as it concerned the impact of the TOD SEPP on the infrastructure capacity of areas to which the TOD SEPP applies, in that:
- i. the TOD Program Brochure (p 8) refers to selection of the 31 transport oriented development precincts based on analysis of 305 stations "*to identify locations that have enabling infrastructure capacity close to a transport station to support additional housing growth*" informed by an "*evidence-based approach that used planning, infrastructure and spatial data, along with expert advice and feasibility analysis*". It was said that the 31 locations were identified as having capacity to support additional growth;
 - ii. in an answer to a resolution of the Legislative Council dated 7 February 2024 that made an Order for papers under Standing Order 52, an Acting Secretary of the Cabinet Office produced to the clerk of the upper house on 28 February 2024 certain documents or lists of documents, which indicated that there were no documents to produce in respect of a number of categories that related to the basis for the TOD SEPP identified in particular C(i);

- iii. on 26 February 2024, a representative of the Minister, on Ministerial letterhead, certified that, to the best of their knowledge, all documents that were held by the office of the Minister covered by the terms of the upper house resolution referred to in particular C(ii) and were lawfully required to be provided were provided;
- iv. materials published on the Department of Planning, Housing and Infrastructure website accompanying the making of the TOD SEPP did not disclose the preparation of further materials that would support the areas to which the TOD SEPP applies having the capacity to support the additional growth;
- v. contrary to the representations in particular C(i), up until and at the time the TOD SEPP was made, some of the types of material did not exist that the TOD Program Brochure said supported the proposition that the areas to which the TOD SEPP applies have capacity to support additional growth. The materials that did not exist included planning data and infrastructure data (such as road capacity, school capacity, health capacity, housing affordability and climate change data); and
- vi. in the premises, the explanation of the proposed instrument that the Minister considered it appropriate or necessary to publicise misrepresented the intended effect of the proposed instrument, or explained the intended effect of the proposed instrument in a way that involved material inaccuracies.

5 In the alternative to Grounds 3 and 4, if:

- a) the Minister formed an opinion as to the content of the explanation, as referred to in Ground 3; and
- b) s 3.30(1)(a) of the EP&A Act does not require the explanation of the intended effect of the TOD SEPP to be materially accurate and not materially misleading,

then:

- c) the Minister's opinion as to the content of the explanation was:

- i. not one that could be formed by a reasonable person who correctly understood the meaning of the law at the time that the TOD SEPP was made; and/or
- ii. legally unreasonable or irrational.

Particulars

The Applicant repeats the particulars to Ground 4.

- 6 The making of the TOD SEPP was not authorised by EP&A Act because the Minister failed to comply with mandatory requirements of the community participation plan that applied to the Minister in respect of the preparation of state environmental planning policies under sections 2.22(2) and 2.23(3)(a) of the EP&A Act.

Particulars

- A. Subsection 2.21(1)(a) of the EP&A Act applies Division 2.6 of that Act to the Minister and subsection (2)(a) applies the Division to planning instrument functions under Part 3.
- B. Subsection 2.22(2) of the EP&A Act includes in the mandatory requirements for community participation any other forms of community participation that are set out in a "community participation plan" under Division 2.6 and that are identified in that plan as mandatory requirements.
- C. The community participation plan dated November 2019 prepared by the Planning Secretary (**Community Participation Plan**) applies, both on its terms (p 7) and by operation of s 2.23(3)(a) of the EP&A Act to the Minister.
- D. The Minister, at the time the Community Participation Plan was made, asserts in that document that "*This Community Participation Plan sets out in a clear, transparent and easily understood way exactly when, where and how you can have a say in what's happening around you*" (p 5). This was a representation for the purpose of s 2.22(2) of the EP&A Act that the community participation requirements in that plan are mandatory. To the extent that the plan later contradicts the Minister's statement by asserting that it "*does not outline specific engagement strategies for individual proposals or projects*", which are to be determined on a "*project-by-project basis*" guided by the plan (which language is more apt to apply to development proposals than environmental

planning instruments), this does not diminish the obligation to comply with any terms of the plan that are, on their proper construction, mandatory.

- E. The Community Participation Plan identifies different approaches to community participation depending on whether a planning function involves “planning framework matters”, “strategic planning” or “assessment projects and plans” (pp 10 and 12 “Engaging the community”). The Community Participation Plan applies to the making or amendment of state environmental planning policies under the “planning framework matters” (or “planning frameworks”) planning function (p 12).
- F. For “planning framework matters”, and so for the TOD SEPP, the Community Participation Plan identifies how the community is to participate (p 13), including that:
- i. under the heading “keep up to date”, the Department “will” notify the community, as required under the EP&A Act and its regulations, when creating or updating a SEPP;
 - ii. under the same heading “keep up to date”, the community “will” be notified of events the Department will host, the release of draft or related information, public exhibitions, and outcomes and how community feedback was considered when reaching a project decision; and
 - iii. under the heading “provide formal feedback”, once draft proposals “have” been developed, they “may” be exhibited through public exhibition. At this point the community “is” invited to make a formal submission responding to the proposal.
- G. The use of the words “will”, “have”, “may” and “is” in their context in particular F indicate that these requirements are mandatory for the purpose of s 2.22(2).
- H. In the context of mandatory minimum public exhibition timeframes (p 19), where the Plan asserts that “*The only mandatory requirements in this CPP are those set out in Table 1 and Table 2*”, this is not referring to the whole plan but is only referring to mandatory requirements for public exhibition timeframes, by contrast with Table 3 which sets out timeframes that are not mandatory.
- I. The requirement in particular F(i) comprises an obligation to consult “with the community” in the way otherwise contemplated by s 3.30(1) of the EP&A Act and so was either a riding decision for the purpose of s 3.30(1) that the

Minister would consult with the community or was a separate, and additional, obligation to consult (in the way otherwise contemplated by s 3.30(1)) regardless of whether the Minister decided to consult under s 3.30. The consultation that occurred fell short of this: Particulars C, D and E to Ground 2.


- J. The requirement in particular F(ii) comprises an obligation for those notifications to be given to the community, including relevantly notification of the release of a draft and, by implication in circumstances where there was no mechanism in the EP&A Act that addressed the release of drafts, the obligation to release a draft of the TOD SEPP. No draft was ever publicly released. A draft of the TOD SEPP was shown to representatives of the Applicant in a private briefing on or about 16 April 2024, but this was not a notification of the type contemplated by the requirement in particular F(ii).
- K. The requirement in particular F(iii) comprises an obligation for the community to be given an opportunity to provide formal feedback on a draft proposal, including because "may" does not confer a discretion but indicates what is required to happen once a draft proposal has been prepared. A draft of the TOD SEPP was never made available to the community and, insofar as any formal consultation was undertaken, this was confined to councils: Particulars C, D and E to Ground 2.

SIGNATURE OF LEGAL REPRESENTATIVE

This summons does not require a certificate under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014.

I have advised the applicant that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature
Capacity
Date of signature


Solicitor on the record
10 May 2024

NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the relief claimed in the summons and for the applicant's costs of bringing these proceedings.

Before you can appear before the court you must file at the court an appearance in the approved form.

HOW TO RESPOND

Please read this summons very carefully. If you have any trouble understanding it or require assistance on how to respond to the summons you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the summons from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Level 4, 225 Macquarie Street, Windeyer Chambers, SYDNEY NSW 2000
Postal address	GPO Box 3565, SYDNEY NSW 2001
Telephone	(02) 9113 8200

FURTHER DETAILS ABOUT APPLICANT**Applicant**

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Legal representative for Applicant

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DETAILS ABOUT RESPONDENT**Respondent**

Name	State of New South Wales		
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