

1 November 2023

Ms Kiersten Fishburn
Secretary
NSW Department of Planning and Environment
4 Parramatta Square
12 Darcy Street
PARRAMATTA NSW 2150

Copy by email: information@planning.nsw.gov.au

Dear Ms Fishburn

Re: Paling Yards Windfarm; SSD-29064077 (the Project)

We act for Oberon Against Wind Towers, Inc.

We are instructed that:

1. Notification of an opportunity to consider and make submissions to your Department on an EIS for the Project was first posted on your Major Project's Planning Portal (the **Portal**) on 10 October 2023: [Major Projects | Planning Portal - Department of Planning and Environment \(nsw.gov.au\)](https://www.planning.nsw.gov.au/major-projects/planning-portal)
2. Persons searching the internet for the Project using common search engines have been directed to the Portal. On entering the Portal, however, it has not always been possible to open and view the Project EIS. The Department has been notified of this issue in writing and has in turn acknowledged it in writing (ref Anthony Ko, Team Leader, Energy Assessments).
3. Access to the Portal itself was intermittently unavailable during the advertised notification period of 10 October to 6 November, including for the whole of 26-29 October.
4. In recognition of these problems (ref Nicole Brewer, Energy Assessments), on or about 30 October 2023 the Department posted an amended Exhibition Notice on the Portal extending the period during which submissions would be received for the Project to 10 November.

It is not known how many persons who are, were or may have been interested in considering and commenting on the EIS for the Project have been deprived of that opportunity because of a lack of access to the Project Portal page or its contents. Nor is it possible to know whether persons who were previously unable to gain access to the Project Portal page or properly review its contents concerning the Project would be aware of the recent short extension of the exhibition period.

The Portal is the primary means by which the Department calls for and receives public comments on major projects.

A key objective of the **Environmental Planning and Assessment Act** is “to provide increased opportunity for community participation in environmental planning and assessment.” (s1.3(j)).

This statutory objective reflects a fundamental tenet of the common law articulated 50 years ago by the High Court in *Scurr v Brisbane City Council* (1973) 133 CLR 242 per Stephen J at 257-8:

The fact that once an appeal is instituted by an objector the Court assumes from the council the task, initially the council's, of considering an application and the objections to it raises a strong inference that the Court should, in undertaking that task, be directly concerned to assure itself that all the requirements of the giving of public notice in due form have been complied with. Their non-observance will effectively prejudice the Court's proper consideration of the matter in a number of respects; first, it will result in it having before it a council proposal to which it would no doubt ordinarily wish to pay some regard as to the expression of the views of the responsible planning authority but which it will know has been arrived at without necessarily having benefited from a proper presentation to the council of objectors' views; this is an aspect to which I have already referred. Secondly, it will know that there may be persons who might have objected but who have, by reason of defective public notice, been deprived of the opportunity of qualifying as objectors. Thirdly, it will be aware of the fact that the objections which have been lodged come in response to a defective public notice of the application and may accordingly be misconceived in their grounds or in the facts and circumstances set out in support of those grounds.

Scurr has been repeatedly affirmed and applied – for example:

NSW Land and Environment Court:

Dungog Shire Council v Hunter Industrial Rental Equipment Pty Ltd (No 2) (2018) LGERA 1
Oberon Council v Minister for Local Government (2016) LGERA 219
Residents Against Intermodal Developments Moorebank Inc v Independent Planning Commission (No 2) [2021] NSWLEC 1501
Simpson v Wakool Shire Council [2012] NSWLEC 163
Csillag v Woollahra Council [2011] NSWLEC 17

NSW Court of Appeal:

Hoxton Park Residents Action Group Inc v Liverpool City Council (2011) NSWLRC 638
Hunters Hill Council v Minister for Local Government (2017) 224 LGERA 1

In circumstances where, as here, an unknown number of members of the public may have been deprived of an opportunity to properly consider and make submissions to the Department on the Project, any assessment and subsequent determination of an application to approve the Project would be legally unsafe – see, eg, *Simpson v Wakool Shire Council* [2012] NSWLEC 163 per Preston CJ at [83]:

Courts have held repeatedly that statutory requirements for notification and advertising of development applications are mandatory and the observance of the requirements of notification and advertising is a condition precedent to the exercise of the statutory power to determine the development application by the consent authority. A purported exercise of the statutory power has no validity where a condition for the exercise of the power has not been fulfilled: SS Constructions Pty Ltd v Ventura Motors Pty Ltd [1964] VR 229 at 245-246; (1963) 10 LGRA 210 at 230-231; Scurr v Brisbane City Council (1973) 133 CLR 242 at 255-

256; Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council (1980) 145 CLR 485 at 518; CSR Ltd v Yarrawlumla Shire Council (Unreported, Land and Environment Court of NSW, Cripps J, 2 August 1985) at 9-10; Monaro Acclimatisation Society v Minister for Planning (Unreported, Land and Environment Court of NSW, Stein J, 2 March 1989). [emphasis added]

The only appropriate course of action for the Department to follow, given what we have described above, would be for it to re-exhibit the Project for another full period of 28 days and for it to ensure that:

- a. that re-exhibition process was made widely known to the public, including by means of suitably prominent notices published in local newspapers;
- b. access to the Project page on the Portal through widely used internet search engines is readily available and remains so throughout the whole re-exhibition period; and
- c. persons accessing the Portal through widely used internet search engines can readily open and review all of the Project documents posted thereon (including the EIS and all of its annexures) and can readily transmit submissions to the Department through the Portal throughout the whole re-exhibition period.

Yours faithfully



Andrew Beatty
Director