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Dear Ms Wythes,

### **Re: A new approach to rezoning – discussion paper**

Randwick City Council welcomes the opportunity to comment on the proposed changes to the rezoning process, which are being investigated as part of the Planning Reform Action Plan. The Departments *Discussion Paper: A New Approach to Rezoning* (the rezoning discussion paper), sets out proposed solutions for how the rezoning process can be better managed and outlines options for a new appeals framework.

As an overarching comment, Council is supportive of improvements to the planning system that provide efficiencies and clear direction to councils and private proponents alike. However, Council is strongly opposed to any reforms that remove planning responsibilities from local government by providing private proponents increased responsibilities for managing the rezoning application process. Council also questions the move towards mimicking the development assessment process, as a rigid process steeped in benchmark timeframes is not conducive to good strategic planning decision-making. Further, Council strongly opposes the introduction of an appeals process through the NSW Land and Environment (LEC) Court, as this will result in a framework that is costly, adversarial and time consuming, and at odds with the to the Departments aim of streamlining the rezoning process.

The following comments are made on specific components of the proposed new approach to rezoning and the policy responses and options set out in the rezoning discussion paper. This submission was endorsed by Council at the 22 February 2022 Ordinary Council meeting.

#### **New terminology**

The new approach seeks to formalise the role of private proponents, presumably via an amendment to the *Environmental Planning and Assessment Act 1979*. This formalisation is to allow for increased responsibility in the management of proposals by private proponents. Council has significant concerns regarding the level of ownership provided to private proponents throughout the proposed rezoning application process. These concerns are detailed throughout this submission, however in short, Council questions affording any additional responsibility to private proponents who have the potential to gain significant benefit via the rezoning process. Removing application process responsibilities from local governments and transferring these to private proponents is not conducive to sound strategic planning decision making that represents the local community.

While the rationale behind the replacement of the term 'planning proposal' with 'rezoning application' is understood, this could lead to confusion in the community for proposals that do not include the rezoning of land.

With the above exceptions, Council supports new terminology that removes duplication and clarifies roles.

### **New categories and timeframes**

Council is broadly supportive of the four categories and acknowledges that to streamline the process, clear definitions of types of rezoning proposals are required. Notwithstanding, as the proposed categories are already included in the Department's new *Local Environmental Plan Making Guideline*, their inclusion within the discussion paper for comment is unclear.

The Category 2 (Standard) description requires proposals are consistent with endorsed strategic planning or local strategic planning statement (LSPS). Experience shows that Council's assessment of whether a proposal is consistent with strategic policy can differ greatly from that of a private proponent's interpretation. The Category 2 description should clearly state that a proposal cannot be considered a Standard proposal if any part of the proposal is inconsistent with an LSPS or equivalent.

Significant concern is raised that Category 3 (Complex) proposals will lead the way for an increased number of highly speculative private proponent rezoning applications that have no regard for the strategic direction of a council. As detailed in the rezoning discussion paper, a council will not have the ability to refuse an application at the scoping stage even if a rezoning application is clearly inconsistent with strategic plans. This may result in an influx of inappropriate proposals being lodged and, in some cases, proceeding to the public exhibition stage when they have no strategic merit. Implications of this include unnecessary strain on council resources and community concern over the perceived support of proposals that are inconsistent with council's strategic direction.

### **New roles**

#### Proponents

The level of ownership provided to private proponents throughout the application process is a significant concern. It is understood that this approach seeks to relieve councils of certain tasks, however the consequence is that important parts of the assessment process are being outsourced to proponents who may not be willing or able to complete. Shifting the responsibility for State agency consultation and responding to public exhibition submissions mirrors the existing State Significant Development application process. Council experience has shown that relying on proponent lead consultation can at times, result in tokenistic engagement, and, in the case of responding to submissions, can lead to issues being dismissed or inadequately addressed. This could lead to significant implications and delays for councils (as the rezoning authority) during the assessment and finalisation stage. It may also result in missed opportunities for public benefits to be gained e.g improvements in the public domain, environmental sustainability and urban design. Further, shifting responsibility to private proponents who have the potential to gain significant benefit via the rezoning process undermines the integrity of the strategic planning process.

#### Councils

Council welcomes the removal of Department intervention for the majority of proposal categories. The removal of the gateway determination stage will allow councils to progress applications in a timely manner while focusing on local decision-making. However, the enhanced role of councils at the scoping and adequacy review stages (previously gateway determination) will need to correspond to increased resourcing in the form of fees. Comments on the newly proposed fee structure are included in the relevant section below.

#### Department

The removal of council's assessment role for public authority proponent proposals is a significant concern. The new approach sees council in a consultation role for public authority proposals (other than council-led proposals), regardless of the category. Council maintains it is best placed to assess all proposals, particularly public authority proposals that are of strategic importance within

the LGA. This is especially important in the Randwick LGA, where large parcels of land are owned by the Land and Housing Corporation and the NSW Government. Council raises particular issue with the legislative and process uncertainty relating to negotiation of Voluntary Planning Agreements (VPAs) with public authority proponents. It is unclear how the Department as rezoning authority can negotiate on councils behalf in relation to VPAs. Council's preference is to retain a decision-making role in the assessment of public authority proposals.

The new approach identifies potential for councils to approve inconsistencies with Ministerial Directions, a responsibility that lies solely with the Department's Secretary under the current approach. This would allow for a more streamlined approach for proposals being assessed by council and is supported. In instances where Department approval is required, clear timeframes should be established for this task – a maximum of 2 weeks is recommended.

#### Public authorities

The new approach seeks to provide clear direction to State agencies on the matters that should be considered, and the level of assessment required, for strategic planning proposals. This will assist in obtaining beneficial agency feedback in a timely manner. However, as noted above shifting the responsibility for State agency consultation to private proponents has the potential to water down this important engagement process. It is recommended that councils or the Department maintains responsibility for State agency consultation to minimise risks during the assessment process and ensure good decision-making.

If timeframes are placed on State agencies to respond, the NSW Government must ensure that all agencies are resources adequately to respond in a meaningful way within the benchmark timeframes. The 'silence taken to be acceptance' approach could lead to critical assessment issues being missed during the consultation stage, creating risks to timing during the assessment and finalisation stage.

As noted above, Council does not support the wholesale assessment of public authority proponent proposals (other than councils) by the Department and seeks to be integrated into the assessment framework for these types of development.

### **New steps**

#### Scoping

A mandatory pre-lodgement scoping meeting is welcome. This will assist in identifying relevant issues upfront and putting private proponents on notice if a proposal does not accord with councils' strategic direction. Similarly, the issuing of formal study requirements will assist in establishing a clear path of assessment, particularly as the later stages of the process (assessment and finalisation) rely heavily on the success of the scoping stage. To achieve an integrated, rigorous, and comprehensive scoping stage, adequate time and resources should be provided to councils and State agencies alike to properly consider study requirements.

The rezoning discussion paper does not make reference to potential Voluntary Planning Agreements (VPAs) that may be required as part of proponent led rezoning applications. Under the current system VPAs are negotiated with proponents/applicants at early stages of the rezoning process. This process is time intensive and requires detailed consideration of public benefits to ensure that an appropriate VPA is able to be exhibited to the public.

The rezoning discussion paper briefly notes that study requirements will be valid for 18 months. It is recommended that councils have authority to reduce this timeframe if new strategic infrastructure projects or State or regionally significant development plans arise within the 18 month period, and if these projects have the potential to impact the rezoning application study requirements.

At present, the new approach requires a council to issue study requirements even if a rezoning application is inconsistent with local strategic planning policy. Council recommends that circumstances be established whereby councils can refuse to issue study requirements if proposals

are inconsistent with strategic policy and cannot be supported in this regard. These circumstances may include when a council's LSPS (or similar) is current, and there are no new infrastructure projects that have not been accounted for within the local strategic planning framework. This mechanism will be important to deter speculative or inappropriate proposals being out forward.

The scoping process should also require the proponent to include a timeframe for lodgement, to allow councils to prepare resources for the adequacy review.

### Lodgement

The benchmark 1 week timeframe for the adequacy review at lodgement is grossly inadequate for Category 2 and 3 proposals. This timeframe should be increased to 2-3 weeks respectively to ensure that all scoping requirements are met.

Clarity is required as to whether the adequacy review will allow the rezoning authority to refuse to exhibit a proposal on the bases of strategic merit. The discussion paper clearly states that the only opportunity to refuse a rezoning application if it lacks strategic merit is after exhibition. However, it is assumed that the rezoning authority can refuse a rezoning application at the lodgement stage if strategic merit has not been adequacy demonstrated within the study requirement documents.

### Exhibition

The new approach removes the gateway determination stage which is currently required prior to public exhibition. The removal of the gateway stage is supported, particularly in the context of council-led proposals. Allowing councils more control over what is included within the exhibition stage results in transparent decision making, as locally supported initiatives can be consulted on without unnecessary Department oversight or intervention.

The new approach allows rezoning applications to be placed on public exhibition prior to any merit assessment being undertaken, permitting community feedback early in the process. Advantages of this approach are increased public transparency and upfront consideration of issues that are important to the community. A disadvantage, however, is community concern over the perceived support of a rezoning application that is inconsistent with councils' strategic direction, leading to unnecessary strain on council resources.

Under the current framework, planning proposals are only a matter of consideration within the development assessment framework after they have been publicly exhibited. Shifting the exhibition period earlier in the process will require clear direction for when a rezoning proposal should be included within the development assessment process. In this regard, it is recommended that the matters of consideration be amended to include rezoning applications that are formally in the assessment and finalisation stage.

Following exhibition, a proponent must both summarise and respond to submissions received, including working with State agencies to resolve any objections. As part of the response, the proponent will need to amend the rezoning application prior to submission to the rezoning authority for assessment and finalisation. Significant concerns are raised regarding this new responsibility, particularly in relation to private proponents. As the existing development assessment process demonstrates, whilst applicants are often requested to address issues that arise during exhibition and assessment, the satisfaction to which these issues are addressed varies considerably. It is not uncommon for applicants to partially amend proposals, with the view to obtaining a favourable outcome via the LEC Court appeals process. Similar implications exist for the proposed new approach. At best, inadequate responses to submissions and agency issues have the potential to cause delays in the assessment and finalisation stage if rezoning authorities are required to request additional information. At worst, the inadequate consideration of submissions may result in a proposal being refused by the rezoning authority, leading directly to an appeal. Depending on the nature of the appeals process, the later scenario might be attractive to private proponents who pursue widely speculative rezoning applications.

## Assessment and Finalisation

The new approach seeks to standardise matters of consideration. Council supports the list of potential matters of consideration put forward in the rezoning discussion paper, including the addition of public interest.

Further clarification is sought on the stop the clock process. In this regard, 25 (calendar) days from the date of lodgement is insufficient to undertake a thorough assessment and obtain comments from internal and external stakeholders. Again, the private proponent-led process assumes that all issues will be resolved prior to the submission for assessment and finalisation, however this is unlikely to occur for every proposal. Additional stop the clock opportunities should be investigated to request further information if proponents do not adequately resolve submission matters, including those raised by State agencies. Clarity is required on whether the rezoning authority can request additional information and/or consult with design review panels during the exhibition process, or whether this can only be requested and undertaken once the assessment and finalisation stage has commenced. Similarly, clarity is sought regarding the involvement/consideration of proposals by Local Planning Panels.

Clarification is sought on the benchmark timeframes, including whether Council's cyclical monthly meeting schedules (and associated reporting lead time) have been considered during the development of benchmark timeframes. Clarification is also required regarding the re-exhibition of amended proposals following exhibition. It is recommended that if applications need to be re-exhibited there is an opportunity to pause the assessment and finalisation timeframe.

## **New fee structure**

### Assessment fees

The introduction of a fee for the scoping stage is supported. The success of the proposed new approach largely relies on the success of the scoping stage and as such, appropriate fees should be levied to reflect the level of input and coordination required by the rezoning authority at this stage.

The proposed fee option 3: Fixed and variable assessment fees, offers the potential for actual cost recovery, however concerns are raised as to how this option works in practice, including administrative requirements to justify additional assessment fees. A benefit of this option is the opportunity to recoup costs if a portion of the assessment is outsourced by the rezoning authority i.e. assessment of a technical aspect of a proposal. Regardless of which fee structure is pursued, it is critical that each Council can set appropriate fees based on their operational needs (whether fixed or hourly rates).

Clarity is sought as to how public exhibition expenses are funded. It is recommended that separate public exhibition fees be levied, based on the expected level of consultation for each proposal Category.

### Planning guarantee

The discussion paper offers little rationale for the inclusion of a UK style planning guarantee model, aside from a means to incentivise quick assessment timeframes. An examination of the disadvantages or benefits of the UK model has also not been put forward. Council is strongly opposed to a planning guarantee model, as such a model could result in proposals being finalised without proper assessment to avoid refunding of fees. If a council is unable to assess a rezoning application in a timely manner, the reasons for this should be examined and addressed prior to any further consideration of a planning guarantee model. Further, the planning guarantee model places the onus on councils to perform while failing to hold private proponents' responsible for inadequate and insufficient rezoning applications following the exhibition and stakeholder consultation stages.



## **New appeals pathway**

### Private proponent appeals

The new approach proposes reworking and relocating the existing appeal pathway to sit at the end of the rezoning process. While Council does not object to the shifting of the appeals pathway in the timing of the process, it strongly opposes the proposed reworked approach, in particular the use of the LEC Court merit appeal process. Council's strong position is that this option should be removed from the proposed new rezoning process.

The introduction of a court appeals pathway that is costly, complex, adversarial and time consuming is directly at odds with the aim of streamlining the rezoning approvals process. While the LEC Court merit appeal process may be suitable for the development assessment process, where technical planning matters are often appealed, it is not a suitable avenue to appeal rezoning applications that require strategic assessment. Council's primary concern is that rezoning applications that do not demonstrate strategic merit will be assessed by the courts at the appeal stage. This is an unacceptable outcome as the onus should be on the proponent to ensure proposals are in line with councils' strategic direction. Further, the LEC Court system is not readily accessible to the local community, with judgements written in legal language that is often difficult to interpret without legal or planning expertise.

Council favours a non-judicial appeals pathway, such as the Independent Planning Commission (IPC) option. The expansion of the IPC's role in current review processes, such as gateway review, would allow for appropriate independent review of strategic planning proposals. Such a process would still require that decisions are justified by written decisions to ensure transparency, while being time efficient and less costly.

The new approach proposes appeals that are based on a delay to be available to private proponents once set timeframes have passed, similar to a deemed refusal of a development application. Council strongly opposes this pathway, as it provides no recognition for private proponents failing to properly address exhibition and State agency concerns, which can derail assessment and finalisation timeframes. If rezoning authorities are to be held accountable for processing timeframes, private proponents should also be held accountable if they provide incomplete or speculative proposals that cannot be justified by strategic merit.

From Councils perspective, a significant advantage of an IPC pathway is the lack of opportunity for drawn out mediation and limited opportunities to amend proposals during the appeal process. As demonstrated by the current development assessment LEC merit appeals process, applicants can amend applications during the Court's mediation process. While this might be appropriate for detailed design issues encountered at the DA stage, Council maintains that the nature of strategic proposals does not require the need for various amendments and ongoing resolution of issues. In order to provide an efficient appeal process that focuses on the merit assessment of strategic planning issues, opportunity for significant and ongoing amendments as part of the appeal process should not be permitted. This will also assist in ensuring that issues raised during exhibition, State agency consultation and assessment are adequately addressed by proponents when the process requires.

### Public authority appeals

From Council's perspective, a disadvantage of removing the gateway determination process is the consequential removal of the gateway review process. The gateway review process is an important avenue for councils to pursue and achieve sound strategic planning outcomes in situations where state-wide policies do not readily align with local strategic planning priorities. It is critical that a public authority appeals pathway is provided in the new rezoning approach. Similar to private proponent appeals, Council favours a non-judicial appeals pathway to address this need.

Thank you once again for the opportunity to comment on the proposed new rezoning approach. If you would like to discuss the matters outlined in this submission further, please do not hesitate to contact Stella Agagiotis on telephone [REDACTED] or email [REDACTED]

Yours Sincerely,

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**Kerry Kyriacou**  
Director City Planning

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