

28 February 2022

Ms Paulina Wythes  
Director, Planning Legislative Reform  
Department of Planning, Industry and Environment

Online submission

## **A new approach to rezonings in NSW**

Dear Ms Wythes

I write in relation to "A new approach to rezonings in NSW" discussion paper (the Discussion Paper), prepared by the Department of Planning and Environment (DPE), which has been made available for industry comment until 28<sup>th</sup> February 2022.

The Discussion Paper has many good elements that will improve the rezoning process in NSW.

The Urban Taskforce supports the objective of the reforms to reduce the lengthy process of rezoning in NSW. Specifically, we welcome the Discussion Paper's commitment to reduce the timeframe for assessment of rezoning applications "by removing duplication in who assesses the application and how often it is assessed throughout the process."

Another step in the right direction is the proposed change in the post-exhibition stage which allows the proponent, as part of their response, to submit changes or amendments to the rezoning application before the final assessment. This change can save a lot of time by preventing a proponent having to restart the entire process for even a minor amendment to the initial application.

The revised terminology which recognises private proponents in the process is welcome. Further, the consideration of an appeal process for rezoning determinations (discussed later in this submission) is also seen as a positive initiative.

The Urban Taskforce welcomes DPE's decision to exhibit this Discussion Paper before the policy is drafted and invite industry to comment on these important planning matters.

In this submission Urban Taskforce provides a range of recommendations on how to further improve key areas of the rezoning process and how to ensure that the stated objectives in the Discussion Paper are achieved.

## **Benchmark Timeframes Guarantee**

The Discussion Paper sets reasonable benchmarks for the rezoning process at every stage, varied by category. However, Urban Taskforce is concerned about the likelihood that many councils, for various reasons, will not comply. While the benchmarks have potential to significantly speed up the process, without strict mechanisms for monitoring and enforcement, there is a risk that the timeframes will become obsolete.

If the benchmarks have not been met, then a mechanism should be established to create a presumption that DPE will step in as the rezoning authority unless there are compelling reasons not. It is vital that DPE's decision making role on rezonings is not optional, rather it is presumed that this process will apply following a "trigger" which can be defined as a "breach of the benchmark timeframes." This will ensure that local councils have a strong incentive to carry out their role within the benchmark timeframes.

DPE's role as the guarantor of the benchmark timeframes should be included in the Planning Guarantee, which is designed to increase confidence in the rezoning process. At the moment, the Planning Guarantee includes financial penalties for councils that breach the benchmark timeframes and option for proponents to start the appeal process. This is a welcome proposal, however the Planning Guarantee can be strengthened to include the role of DPE as a rezoning authority for rezoning applications that move too slow at the local government level.

**Recommendation 1: The Urban Taskforce recommends that a mechanism be established to have DPE step-in when timeframes are being breached.**

## **Increased role of DPE**

The Discussion Paper attempts to enhance the role of local councils in the rezoning process while reducing the role of DPE. It suggests that the new framework "bolsters the department's role in supporting, monitoring and assisting councils in the process". There is a fundamental flaw in this approach. While DPE clearly has strategic planning resources and technical expertise, many local councils do not. In the rural and regional areas, Council's continually strain to attract and retain the best town planning talent. There is a risk of diluting the DPE expertise and capacity (by making the DPE role more administrative) while failing to ensure Councils can perform their function.

Local governments have the least resources, the least capacity (in terms of strategic planning assessment) and are most at risk of political involvement and dictate. On the other hand, DPE has the capacity to attract and retain some of the best planners in the State. They must be central to rezoning applications made by private proponents and therefore DPE should provide recommendations on all rezoning reviews.

At a recent stakeholder briefing, DPE proposed the option for establishing Specialist Rezoning Panels which will replace the Regional Planning Panels. The new panels would be coordinated by DPE and have the authority to assess rezoning applications. Such Specialist Rezoning Panels would also be able to coordinate with all State agencies that are required to provide input during the rezoning review process.

Councils would be invited to comment and be part of this process but the assessment would be coordinated by DPE. This would assist in removing the rezoning applications from the local political environments which can sometimes be detrimental to the process.

Establishing Specialist Rezoning Panels is a good alternative to the council-led rezoning process and the Urban Taskforce supports this proposal.

**Recommendation 2: The Urban Taskforce supports the role of DPE to make recommendations on rezoning reviews.**

**Recommendation 3: The Urban Taskforce supports the establishment of Specialist Rezoning Panels to assess and determine rezoning applications.**

## **Scoping**

The scoping phase can be very useful as it is an opportunity for proponents to initially explain the proposal to Council and gain better understanding of the number and type of documents required for the rezoning application.

However, the Urban Taskforce is concerned to ensure that the Scoping stage is not extended. Strict measures must be established to ensure that councils are not adding unnecessary scope to the assessment process.

DPE needs to have a core role in stopping Councils from unnecessarily increasing the documentary burden during the scoping stage and have a default step-in capacity. Proponents should be able to refer councils to DPE for a rapid review where they believe this has occurred.

The Urban Taskforce is strongly opposed to giving Councils or DPE the ability to refuse to issue study requirements at the scoping stage, as we believe that all proponents should have the opportunity to submit a fully formed proposal for exhibition and assessment.

To avoid the time period blowing out, there should be a deeming provision allowing proponents to lodge the rezoning application after 10 weeks from the initial scoping meeting, irrespective of what has or has not been put to them by the local council following that meeting.

**Recommendation 4: The Urban Taskforce recommends that study requirements must be issued to all proponents and that DPE has a step-in role during the scoping stage if councils add unnecessary scope to the application. Further, private proponents should be automatically allowed to lodge the rezoning application after 10 weeks from the initial scoping meeting, with no further obligation to address new subject matter not previously included in the scope of the assessment criteria.**

## Lodgement

The Urban Taskforce supports the 7-day timeframe for lodgement of the application as it is indicative of the true intent of this stage of the process; it is a document review and therefore a simple 'tick-a-box' approach.

The Urban Taskforce notes that the intent of the Lodgement stage as a "tick a box" approach was confirmed by DPE staff. The Urban Taskforce also acknowledges that this approach puts the onus on the proponent to make sure the quality of the documents is good.

The 7-day timeframe should be confirmed to make it clear to Council staff that they should not make any other assessment of the documents, but simply acknowledge that the documents have been submitted by the private proponent. The legal drafting needs to make absolutely clear that the local council will have no discretion at this stage of the process.

**Recommendation 5: The Urban Taskforce recommends that the 7 days benchmark timeframe for the Lodgement stage is confirmed with the new policy or legislation. Further, the new rezoning policy should clearly state that the role of councils at this stage is limited to acknowledging the submission of the relevant documents and is not to make any judgement or merit assessment on the content or the quality of the documents submitted.**

## (The former) Minister's Planning Principles and Section 9.1 Direction

Since the announcement of the 9 Minister's Planning Principles in December 2021, the principles have been used to consolidate the large number of state environmental planning policies (SEPPs) in NSW. In accordance with the Minister's Planning Principles, on 1 March 2022, 43 SEPPs will be repealed and consolidated into 11 SEPPs.

The 9 Minister's Planning Principles have already been used as guiding principles to consolidate the SEPPs in NSW. In that way, they have served their purpose as guiding principles of the highest level.

The Discussion Paper states that the Minister's Planning Principles will have to be taken into account for all rezoning applications. This is problematic as it introduces a whole new level of complexity and detail to the rezoning process, and is inconsistent with the Ministerial Direction which requires that only those planning principles 'that are relevant' to the preparation of the planning proposal be concerned. The Urban Taskforce is concerned that the Planning Principles become a tool to demand more and more studies and information and thereby delay rezonings and undermine the objective of improving the rezoning process.

The Planning Principles embody a range of ideas and concepts. If they all must be considered in every application, it requires the proponent and approval body to adopt a 'tick a box' approach by having reports examine each and every principle and sub-principle.

Determining compliance with the Planning Principles is a very subjective exercise. Every time a planning principle is raised, there is an opportunity for differences of opinion through the many stages of the assessment process. Many rezonings will not require detailed consideration of every principle (such as change R2 to R3). The Planning Principles should not apply to the re-zoning process. The 9.1 Direction should be amended to remove reference to the Planning Principles.

The current position, with the current 9.1 Direction in place which requires that Planning Principals be considered will significantly increase costs and delays, and undermine the benchmark timeframes, it would increase the likelihood of judicial review litigation for failing to consider mandatory matters.

We note that industry was not consulted on the Minister's Planning Principles and there was no public exhibition process. It is therefore not surprising that the number of sub-principles are excessive and they have the wrong priorities – they do not appear consistent with the new focus for the Ministry of Planning and Homes on "*productivity, performance and probity.*"

**Recommendation 6: The Urban Taskforce recommends that the new rezoning application process clearly states that the Minister's Planning Principles should not be a relevant consideration when assessing or determining rezoning applications.**

### **Inconsistency with 9.1 Directions**

The Discussion Paper raises for consideration the approval of rezoning proposals which are inconsistent with 9.1 Ministerial directions. The new approach proposes that:

- in some circumstances, a council can approve an inconsistency, rather than notifying the Department and seeking approval from the Secretary
- in other circumstances, the Department will be given the opportunity to comment and/or approve an inconsistency.

The Urban Taskforce supports the above approach. In addition, we would support councils being given wider flexibility to progress rezoning proposals where they can justify on planning grounds the non-compliance with Ministerial Directions. Urban Taskforce welcomes the proposed solution to empower councils to be able to approve inconsistencies. However, we believe that council staff should be further empowered to use their judgement to evaluate and, when appropriate, recommend approval for rezoning proposals that are inconsistent with 9.1 Ministerial directions in with clear guidelines and instructions.

As a general rule, inconsistencies with 9.1 ministerial direction should be allowed if it is assessed that the proposal does not reduce the development potential of the land.

There should be no flexibility afforded Councils when it comes to any consideration of the down-zoning of land. In this case, flexibility **should not** apply.

**Recommendation 7: The Urban Taskforce recommends that inconsistencies with the 9.1 ministerial directions should be allowed if it is assessed that the proposal does not reduce the development potential of the land.**

## Consideration for 'fast track' applications

The current focus of the Discussion Paper is largely on cases of disagreement and how to set appropriate benchmark timeframes.

However, the rezoning policy should also consider a quick assessment process in cases where both the proponent and rezoning authority agree on the merit of a proposal.

When the private proponent and the rezoning authority are in concordance, the rezoning application should be fast-tracked.

**Recommendation 8: The Urban Taskforce recommends that the rezoning policy outlines the shortest assessment process for rezoning applications in cases where the private proponent and the rezoning authority agree.**

## Appeal process

Having an appeal pathway for all rezoning applications is essential for the rezoning reforms to meet their objectives of making the process shorter and more efficient, and in order to bring certainty and finality.

The Urban Taskforce recommends that the appeal process for **Category 1** (Basic) and **Category 2** (Standard) rezoning applications is through the Land and Environment Court (L&E Court). This is mainly because the L&E Court can provide a robust and disciplined appeal process and because it produces reasoned published decisions which may provide future guidance for proponents and decision makers.

Over time, the decisions of the L&E Court are likely to provide more predictability to the planning system. For example, the L&E Court currently publishes its own planning principles to guide proponents and consent authorities in the assessment and determination of development applications. With rezonings, over time, clear principles will emerge from the published decisions and over time. Additionally, when there is a difference of opinion between experts, there are opportunities for that opinion to be tested through joint conferencing and cross-examination in a transparent way.

In addition, unlike the Independent Planning Commission, the L&E Court has the power to compel the production of documents required by Notices to Produce and Subpoena and even compel the attendance of witnesses to give evidence via a Subpoena. These tools are far more powerful (and quicker and cheaper) than GIPA applications.

However, **Category 3** (Complex) rezoning applications are complex and demand an appeal process by a panel that has the necessary skills, knowledge and experience to properly assess these applications. Due to the varied nature of Category 3 rezoning proposals, individuals deciding on the appeal will have to be appropriately selected and appointed as decision-makers in the appeal process.

Further, Category 3 (Complex) rezoning applications typically result in intensified land use. As a result, these applications require new or augmented infrastructure. Urban Taskforce suggests the best appeal pathway for **Category 3** applications is through the IPC. Should this option be progressed, the Minister should have the power to make temporary appointments to the IPC for the purpose of any particular appeal. This would ensure that the relevant expertise was available to the Chair of the IPC.

**Recommendation 9: The Urban Taskforce recommends that the appeal process for Category 1 and 2 rezoning applications is through the Land and Environment Court and that the Court is properly resourced.**

**Recommendation 10: The Urban Taskforce recommends appeals for Category 3 rezoning applications should be assessed by the IPC, provided additional specialist resources are made available. The Minister for Planning and Homes should ensure Commissioners have strategic planning expertise as well as other experience and expertise relevant to the proposal. The ability to make temporary appointments will facilitate this outcome.**

**At the end of the process – there can still be delay!**

A number of cases have been brought to the attention of the Urban Taskforce advising of extensive delays between a rezoning decision and its practical implementation by Council. For example, in cases where the rezoning of land is conditioned with a requirement to complete a Development Control Plan and/or a Neighbourhood plan, it can take years before any DAs can be assessed, thus frustrating the realisation of the rezoning in practical terms.

Just as there are benchmark timeframes proposed for the different stages of the rezoning process, there should also be prescribed timeframes for the preparation and finalisation of a Development Control Plan and Neighbourhood plans. These timeframes should also be enforced by DPE with appropriate mechanisms.

**Recommendation 11: The Urban Taskforce recommends that reasonable timeframes are set for the preparation and finalisation of Development Control Plans and Neighbourhood plans so that the rezoning decisions are not delayed and can be implemented as soon as possible.**

I look forward to further engagement with DPE in finalising the rezoning reforms.

The Urban Taskforce's recommendations can be found in consolidated form at **Attachment 1**.

Yours sincerely



**Tom Forrest**  
Chief Executive Officer

**Attachment 1 – Summary of all Urban Taskforce recommendations**

1	The Urban Taskforce recommends that a mechanism be established to have DPE step-in when timeframes are being breached.
2	The Urban Taskforce supports the role of DPE to make recommendations on rezoning reviews.
3	The Urban Taskforce supports the establishment of Specialist Rezoning Panels to assess and determine rezoning applications.
4	The Urban Taskforce recommends that study requirements must be issued to all proponents and that DPE has a step-in role during the scoping stage if councils add unnecessary scope to the application. Further, private proponents should be automatically allowed to lodge the rezoning application after 10 weeks from the initial scoping meeting, with no further obligation to address new subject matter not previously included in the scope of the assessment criteria.
5	The Urban Taskforce recommends that the 7 days benchmark timeframe for the Lodgement stage is confirmed with the new policy or legislation. Further, the new rezoning policy should clearly state that the role of councils at this stage is limited to acknowledging the submission of the relevant documents and is <u>not</u> to make any judgement or merit assessment on the content or the quality of the documents submitted.
6	The Urban Taskforce recommends that the new rezoning application process clearly states that the Minister’s Planning Principles <u>should not</u> be a relevant consideration when assessing or determining rezoning applications.
7	The Urban Taskforce recommends that inconsistencies with the 9.1 ministerial directions should be allowed if it is assessed that the proposal does not reduce the development potential of the land.
8	The Urban Taskforce recommends that the rezoning policy outlines the shortest assessment process for rezoning applications in cases where the private proponent and the rezoning authority agree.
9	The Urban Taskforce recommends that the appeal process for Category 1 and 2 rezoning applications is through the Land and Environment Court and that the Court is properly resourced.



<b>10</b>	<b>The Urban Taskforce recommends appeals for Category 3 rezoning applications should be assessed by the IPC, provided additional specialist resources are made available. The Minister for Planning and Homes should ensure Commissioners have strategic planning expertise as well as other experience and expertise relevant to the proposal. The ability to make temporary appointments will facilitate this outcome.</b>
<b>11</b>	<b>The Urban Taskforce recommends that reasonable timeframes are set for the preparation and finalisation of Development Control Plans and Neighbourhood plans so that the rezoning decisions are not delayed and can be implemented as soon as possible.</b>