

14 April 2022

Our Ref: 22/53588

Contact: Lisa Ho – [REDACTED]

Paulina Wythes  
Director, Planning Legislative Reform  
NSW Department of Planning and Environment  
Locked Bag 5022  
PARRAMATTA NSW 2124

Via Email: [REDACTED]

Dear Ms Wythes,

**Re: Bayside Council Draft Submission on the NSW Department of Planning and Environment's *Discussion Paper - A New Approach to Rezoning*s**

Thank you for the opportunity to respond to the *Discussion Paper – A New Approach to Rezoning*s circulated in December 2021 by the Department of Planning and Environment (DPE) regarding the proposed new approach to rezoning proposals.

A report on this matter was considered and endorsed by Bayside Council at its meeting on 23 March 2022. These comments represent the endorsed position of the elected Council.

The enclosed attachment responds in detail to each of the questions included by DPE in the *Discussion Paper*. The response has also considered comments made by Bayside Council and many other Councils who attended recent briefings by DPE in January and February 2022 regarding the updated (December 2021) *Guide to Preparing Planning Proposals*, and the subject *Discussion Paper*.

There was general consensus by Council officers in the briefings about the implications of the proposed new rezoning process, as well as the potential for negative externalities, but not limited to, the following:

- Proposals entering the public realm when Councils have not made a decision on whether they even have merit;
- Councils not receiving any resourcing for significant additional tasks proposed to be shifted to Councils from DPE;
- Proponents having increased levels of autonomy as part of the proposed new process - raising probity, oversight and ethical questions;
- Councils being distracted from focusing on local strategic planning by an even larger number of, and even more speculative types of, spot rezonings to respond to and manage;
- Significant concerns over DPE's proposal to seek out an appeals mechanism that would allow proponents to challenge decisions on rezoning proposals, similar to the current process applying to Development Applications considered by the Land and Environment Court; and

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- Implementation of timeframes for the assessment of PPs that focus on penalising Councils, where matters outside of Council's control may actually be the reason for delays.

Bayside Council shares these concerns, and questions whether efficiencies can be achieved as a result of the proposed new process. The efficiencies DPE propose are likely to result in less community, elected representative and Local Planning Panel involvement in PPs whilst establishing increased proponent autonomy. This poses questions regarding probity, ethics and oversight of PPs.

The proposed new rezoning process is considered to not be in the public, Councils' or State agency interests in light of the risks that may be introduced to the system, and the significant resourcing demands that will be required to service it.

DPE is encouraged to acknowledge that the planning outcomes associated with PPs are of a greater consequence than most DAs. PPs involve multi-million dollar property uplift, and can have significant consequences for the community if decisions are not in the public interest, or Council's interest. The implications of proponents having greater autonomy over PPs should not be underestimated or ignored.

Focusing on areas that have been identified for change in Local Strategic Planning Statements and Local Housing Strategies, should be the first focus of Councils, DPE, and proponents. The proposed new process will instead serve to encourage speculative proposals that lack merit and should not proceed, in locations that are unsuitable for change, without planned (State and/or local) infrastructure. A better approach would be to focus on locations that have been identified as subject to change in local strategic plans and strategies endorsed by Council. This would direct any interest in rezoning land to those locations, rather than out of centre, or outside identified investigation areas. The focus could then be on broader changes and site-specific considerations to arrive at the extent of changes proposed to development standards (for example, height, floorspace ratio etc) and/or rezoning in those locations already identified for change.

Spot rezonings continue to undermine the strategic land use planning process, and DPE are proposing a new approach that would continue to undermine the new strategic planning framework that has been put in place in the last couple of years. The requirement for Councils to have a Local Strategic Planning Statement (LSPS) prepared, and to periodically review that LSPS, is embedded in the NSW Environmental Planning and Assessment Act, 1979. It is a key consideration in the assessment of a PP, in accordance with the *Guideline to Preparing Planning Proposals* (December 2021). The LSPS maps areas that are subject to future consideration/investigation, and identify anticipated timeframes for their consideration. Not only are many rezoning proposals outside those areas, they are also well ahead of the time that their closest (geographically) identified investigation areas are proposed to be considered in the LSPS – which has been the subject of community consultation and Council endorsement.

Council was under significant time pressures to finalise its LSPS for endorsement by the GSC and DPE, along with having its Local Housing Strategy approved by DPE. As that comprehensive work has now been completed, is endorsed by Council, and endorsed/approved by GSC/DPE, Council should be able to make decisions about *not* supporting any rezoning proposals outside those investigation areas/locations identified as subject to change. However, the Rezoning Review process does not allow for that to be the case, as Council's decision is not final. Council would encourage DPE to focus on this broader issue, rather than create opportunities for speculative spot rezonings which are inconsistent with local strategic plans, strategies and policies.

The length of time that it takes to assess a rezoning is a product of the detailed strategic and site-specific merit considerations, number of key stakeholders, and potential community and infrastructure impacts that need to be considered. While Council makes every effort to minimise delays and blockages in the life cycle of a PP, the extended time it takes for a proponent to achieve a rezoning should serve to demonstrate to DPE and proponents the complexities of the assessment process. Some processes cannot be significantly altered – despite numerous attempts over many years – without compromising the integrity of the process. If DPE seeks to expedite rezoning proposals, the focus needs to be on places that Councils have identified for change in the broader strategic planning work which has already been.

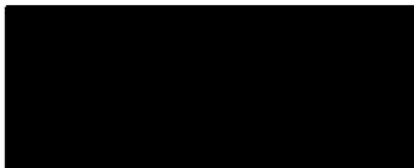
No discussion is included around parallel processes that are required, mainly Development Control Plans, Contributions Plans and Planning Agreements. There is no mention of how the proposed timeframes have factored in consideration of these supporting policy / financial / legal considerations that sometimes need to be updated, negotiated or implemented alongside a PP. All of those companion documents or pieces of work require significant time, resources in and their own governance and reporting requirements. This set of companion documents have legislative requirements and should not be ignored in proposing changes to the existing rezoning process.

As raised in the attached response to questions identified in the *Discussion Paper*, Council has lead-in times for reporting PPs (at Pre-Gateway and post-Gateway stages) to the Bayside Local Planning Panel, Planning and Environment Committee, Councillor Information Sessions, and Council. Furthermore, where companion documents support a PP, they also need to be reported.

Any court appeal mechanism is not supported. PPs propose changes to Council's LEP controls (legislation), and it is not appropriate for a court, or equivalent, to be approving changes to the Local Environmental Plan that may be contrary to Council's adopted local strategic planning framework developed through their Local Strategic Planning Statement and Local Housing Strategy.

Council officers are available to discuss any aspect of this matter and look forward to your feedback and further discussion on the attached return. Should you require further information please contact Lisa Ho (Senior Urban Planner) on [REDACTED] or via email [REDACTED]

Yours Sincerely,



Peter Barber  
**Director City Futures**

Enclosed

1. Response to Discussion Paper

## **Bayside Council Response to DPE's *A New Approach to Rezoning Discussion Paper* (circulated December 2021)**

### ***Do you think the benchmark timeframes create greater efficiency and will lead to time savings?***

- Timeframe for all stages needs to be increased as it does not account for:
  - Re-exhibition of Planning Proposals (PPs) as a consequence of PPs being amended to address submissions or advice from a Local Planning Panel.
  - Lead times to prepare reports for LPP in accordance with Ministerial Direction.
  - Lead times to prepare a report for consideration at a Council meeting.
  - Time taken to revise PPs as a consequence of Council resolutions.
  - Time taken to liaise with Parliamentary Counsel's office to finalise amendments to the LEP.
  - Time taken for proponents to submit additional information requested by Council or a public authority.
- The proposed process is not likely to create greater efficiencies or lead time savings. It is likely to result in the submission of PPs (including complex ones) that have no strategic merit proceeding to exhibition and assessment creating unnecessary strain on Council resources and community concern. Councils and staff will be the entities dealing with that fallout – without any resourcing proposed by DPE to service that additional workload.
- There will be a loss of faith in Councils from the community if PPs are allowed to progress before they are assessed
- Clarification on the consequences for private proponents if the timeframes are not met. Often delays are a result of proponents taking a considerable amount of time to respond to issues raised in submissions by Council officers or the Local Planning Panel. It would be unreasonable for Councils to be responsible for meeting timeframes if the proponents are not adhering to the same requirement – particularly if penalties are proposed for Councils and the delays are out of the control of Councils.

### ***What do you think about giving Councils greater autonomy over rezoning decisions?***

- Proposed reform will not offer greater autonomy to Councils over rezoning decisions, it will reduce the current two-point involvement for the elected Council (pre and post exhibition) in the planning process to just one (post exhibition), which diminishes the role of elected Councillors to represent the views of their constituents. Elected Councillors at any Council are unlikely to support this reduced involvement in decision-making, especially when decision making on DAs has been shifted to Local Planning Panels.
- The approach to recognise private proponents as applicant's and giving them rights within the PP process will diminish the ability of Council to make definitive public policy decisions as they relate to land use.



- Even if Councils did see this new proposed process as providing greater autonomy, it will be undermined if DPE introduce an appeals mechanism that turns over Council's decisions. The new process would potentially require more resources, but not necessarily result in improved decision making - as the Rezoning Review process currently takes away local decision making in any case.

***What additional support could we give councils to enable high-quality and efficient rezoning decisions?***

- The new process will allocate resources away from community-led strategic planning to respond to ad-hoc rezoning proposals. Additional funding and resources will be needed from DPE to assist with the unintended outcome of the proposed reforms.
- The new process will also create community confusion where proposals are contrary to endorsed strategic planning policy. Assistance from DPE to address community trust in the planning system would be required.
- Discussion paper acknowledges the expanded role of Councils under the proposed reforms and proposes Council will be better resourced through a new scheme that will compensate Councils for the full cost of assessing a rezoning application, while also enabling them to invest in staff and better systems. This is supported, however more clarification is required in relation to what the 'new scheme' is.
- Additional support would need to include, but not be limited to:
  - Adequately resourced DPE Region Teams that aren't balancing spot rezonings with LEP, LSPS and LHS/strategy reviews.
  - Funding additional Councils staff to undertake assessments on behalf of Council - not DPE appointed consultants. DPE requires clear and transparent (outward facing) probity arrangements and a framework in place for these arrangements.

***What changes can be made to the department's role and processes to improve the assessment and determination of council-led rezonings?***

- Support DPE non-involvement in Council-led rezonings once DPE has given permission to exhibit. That would actually provide more genuine autonomy for Councils in those scenarios.

***Is there enough supervision of the rezoning process? What else could we do to minimise the risk of corruption and good decision making?***

- The new process removes the Gateway Determination process and oversight by DPE for proposals that are proponent-initiated.
- DPE's role in issuing a Gateway Determination on all private rezoning applications provides a necessary and independent check to ensure that rezoning proposals and their supporting assessment reports meet the strategic legislative framework. Removing the role of DPE will result in less transparency and consistency in the assessment process.
- There needs to be a "checks and balances" mechanism for ensuring oversight of decision making. The intended greater autonomy that is proposed for Councils

should include some oversight to ensure that decisions are being made in accordance with the relevant planning framework.

***Do you think the new approach and the departments proposed new role strikes the right balance between what council's should determine and what the department should determine?***

- The discussion paper removes Council's assessment role for public authority proponent proposals. This new approach is not supported, as Council should be able to assess and determine proposals that are of strategic importance within the LGA. For example, within Bayside there are various sites owned by LAHC. Why should Council not be assessing these proposals? It will be an even more centrally planned approach by DPE than is currently the case if that function is removed from Councils.

***Should councils be able to approve inconsistencies with certain S9.1 Directions? If so, in what circumstances would this be appropriate?***

- Minor inconsistencies may be appropriate as this would allow for a more streamlined approach, however, DPE should outline what circumstances would be appropriate.
- Some directions are of a far greater magnitude than others (eg flooding), for Council to be delegated the task of signing off on those inconsistencies. What also follows from that is the implications that may be inherited by Councils should an appeals mechanism be created by DPE as part of this process, where challenges could be made to Council's assessment of these inconsistencies.
- Considerable thought needs to be given to this, so it is simply not a task handed off to Councils without recognising the commensurate risks involved by Councils. After all, DPE staff currently carry out this delegation on behalf of the Minister. It may make things more efficient for DPE by freeing their time from this task, but it doesn't propose any real efficiencies for Councils who then have to pick up that task. The issue of probity is inherent here – is it appropriate for local Councils to make those sort of calls, on behalf of a Minister?

***Is it enough to have agencies involved in scoping and to give them the opportunity to make a submission?***

- Agency input at both the scoping and assessment stage is critical to the determination and assessment of PPs, their involvement in the process should be retained. They are the subject matter experts, and need to be involved, as stakeholders, in the resolution of any objections they may have.
- DPE need to acknowledge, though, that agencies need to be adequately resourced to be able to prioritise these tasks, as there will be an ongoing steady number of Scoping Proposals. That means more resourcing. Just like Councils, agencies will be asking about where that resourcing is proposed to come from. Motivations to implement a process that cannot actually be realised are, otherwise, a pointless part of the discussion.

***Do you think it would be beneficial to have a central body that co-ordinates agency involvement?***

- The concept of a central body that can co-ordinate agency involvement and consultation for PP is supported, provided that all agencies are resourced adequately, and benchmark timeframes are placed on them to respond to matters in a comprehensively and timely manner.
- The central body should not be attempting to resolve/satisfy issues on behalf of Council. Communication with Councils would be of utmost importance in ensuring delays are mitigated. If DPE are proposing a similar approach to how the Planning Delivery Unit operates, then, no, a DPE quasi-mediator should not be required in order for Councils and State agencies to resolve matters.

***If a State agency has not responded in the required timeframe, are there any practical difficulties in continuing to assess and determine a rezoning application?***

- Where State agencies have not responded in the required timeframe, there are difficulties with addressing and resolving an objection or issue of a proposal leading to poor planning outcomes.

***Should a council or the department be able to refuse to issue study requirements at the scoping stage if a rezoning application is clearly inconsistent with strategic plans? Or should all proponents have the opportunity to submit a fully formed proposal for exhibition and assessment?***

- The paper notes that proponents have the right to lodge a rezoning application and Council is obliged to issue study requirements to the proponents even if a proposal is inconsistent with strategic plans. Council should be able to refuse to issue study requirements at the scoping stage as this will save time and resources for both the proponent and the planning authority.
- Clarification is sought on the new process regarding study requirements being rejected or resubmitted. For example, does this refer to the studies that are required but have not been submitted? Or does it refer to adequacy of the findings of the studies, or even the adequacy of the study methodology and assumption?
- No, proponents should not have the opportunity to exhibit a proposal that clearly lacks strategic merit as it would require significant, and otherwise unnecessary, resourcing.

***What sort of material could we supply to assure community members that exhibition does not mean the rezoning authority supports the application and may still reject it?***

- Exhibiting proposals that are contrary to endorsed planning strategies creates community confusion. Explanatory material exhibited with a PP to explain that 'exhibition does not mean the rezoning authority supports the application and may still reject it' will not justify exhibition of a PP that lacks strategic merit.

***What do you think of removing the opportunity for a merit assessment before exhibition? will it save time or money to move all assessment to the end of the process?***

- Allowing exhibition of PPs that are inconsistent with strategic plans, including Government and Council-endorsed strategies, will encourage lodgment of spot rezoning's that lack strategic merit and will create community confusion.
- This would have dire consequences for both Councils and DPE. PPs involve multi-million dollar value uplifts and often result in amenity impacts on many people in local communities. Exhibition of any proposal that has the potential to impact the local community should be accompanied by an objective, evidence based assessment prepared by council staff. Again, we would remind DPE of the fact that Councils would be resourcing these complaints, not DPE. What resourcing is proposed to manage that, and fix the reputational damage caused to local Councils by ongoing speculative proposals entering the public realm en masse?

***Should the public have the opportunity to comment on a rezoning application before it is assessed?***

- See comment above. Exhibiting proposals that lack strategic merit and that will not be supported by Council following exhibition will create community confusion where proposals damage community trust in the planning system, waste Councils and the proponent's time and money and unnecessarily detract from existing commitments

***What other opportunities are there to engage the community in strategic planning in a meaningful and accessible way?***

- Do not support exhibition proposals that lack strategic and site-specific merit. See comments above.
- Councils adopted Community Participation Plan is implemented every time we progress a Planning Proposal. No one is excluded from the process currently, so there is nothing to change here.

***Do you have any suggestions on how we could streamline or automate the exhibition process further?***

- Mandating exhibition timeframes in the Gateway determination achieves that already.

***Do you think the assessment clock should start sooner than final submission for assessment, or is the proposed approach streamlined enough to manage potential delays that may happen earlier?***

- As noted earlier, timeframes need to be increased to consider various factors that delay the process eg time for proponent to submit additional information, lead time for reporting etc. At Bayside, staff have a 3-4 week lead-in for scheduling reports to LPP and Council meetings. This clearly is not being factored in as part of these proposed changes by DPE. We would suggest consulting Councils on their existing



obligations. Council planning teams are not simply an extension of DPE – there are systems and parameters that Council planning teams need to work to within their own organisations, including reporting timeframes. This is the same situation for SSDs and Policy submissions etc.

***Do you think request for more information should be allowed?***

- The discussion paper limits the ability of State agencies and rezoning authorities to request additional information to inform a PP.
- Information requests are necessary to allow a proper assessment of a PP. The scoping stage may not be able to capture all the required information, and the quality of information submitted to Council for the assessment of the PP may warrant a request for information. Council recommends the proposed reform should allow for additional information to be requested to inform the assessment process.
- There should not be limitless opportunities, though. Alternatively, maybe DPE could implement a process by which a date is provided by which the assessment will cease and resubmission/payment of fees will be required if the proponent does not provide all outstanding information by that timeframe on the second request.

***Are there any changes that we could make to streamline the assessment and finalisation process more? What roadblocks do you currently face at this stage of the process?***

- The discussion paper states that proponents must both summarise, and respond to, submissions received following public exhibition, including working with State agencies to resolve any objections. Under the new approach, proponents will need to amend the rezoning application in response to submission, and lodge their scheme for assessment by the rezoning authority.
- Council is concerned with this new responsibility of the proponent. As the applicant, the proponent will have an inherent conflict of interest and potential bias when assessing and responding to submissions. Rezoning authorities should be able to carry out due diligence to review the submissions and the proponent's response, to ensure they are accurate, in the public interest, and address concerns raised in the submission. It is recommended that should this proposed reform proceed, Council should be afforded – as a minimum – the opportunity to review the adequacy of the proponent's submission report.

***Do you think that the public interest is a necessary consideration, or is it covered by the other proposed considerations?***

- Of course the public interest is a necessary consideration. Councillors play a significant role in understanding the community's views and reactions to proposals. The public exhibition process allows the views of the community to be heard in greater detail and considered by Council and DPE. DPE should consider the ample evidence in NSW where the public interest wasn't considered by agencies or Ministers in making planning decisions.

- The process is representative of the current Response to Submissions process embedded in the current SSD and Modification process. It will be too easy to dismiss Council's concerns if this idea proceeds to implementation. Council does not agree that this process poses benefits to the community or stakeholders. It is inherently geared towards the proponent, and this is viewed as a significant probity issue, where key matters, risks and issues may be glossed over and may contribute to enabling inappropriate proposals to proceed.

***Are there any additional matters that are relevant to determining whether a plan should be made?***

- The demand on local and State infrastructure is a key issue which needs to be factored into any reforms.
- Council must ensure that supporting policy / agreements triggered by a PP are also updated. Specifically, DCPs, s7.11/s7.12 Plans and Planning Agreements. There is no point expediting a PP, only to get to the end of the process and not have a DCP or Planning Agreement finalised. More thought and understanding from DPE is required in relation to this. Please consider the reporting and exhibition timeframes for these supporting items, not only the PP itself.

***Do you think a body other than the Council (such as a panel) should determine rezoning applications where there is a VPA?***

- This proposal could only succeed if a proposal has merit to begin with. Elected Councillors are likely to want to continue make decisions regarding Planning Agreements, due to the economic considerations / Council budget and what they view as the net community benefits for their constituents.

***Where Council has a conflict of interest should a rezoning application be determined by the Local Planning Panel (as proposed), or should the Department take fully responsibility for the assessment and determination of the rezoning application?***

The Local Planning Panel are best placed to determine strategic and site-specific merit, given they would be assessing both - amongst other key considerations - against the strategic planning framework. Alternatively, the Independent Planning Committee could be involved in such proposals.

***Do we need a framework that enables proponents to request a fee refund if a rezoning authority takes too long to assess a rezoning application?***

- Depending on the spend that occurs during a PP assessment (ie peer review costs, staff time, legal costs etc), if a proposal is *withdrawn*, Council would not object to any residual fee costs being refunded. However, if significant time and resourcing has gone into a PP where the proponent does not get the outcome they wanted, or further assessment time is required to determine the merits of the proposal that would not be supported. Again, Council have internal reporting lead-in timeframes – is DPE considering this when making such suggestions? That is all time that is necessary to account for, and remains unavoidable, due to the reporting

requirements for LPP and Council. It may be viewed as “lost time” by DPE, but it is necessary time that needs to be acknowledged in the PP assessment process.

- The discussion paper proposes the inclusion of a UK style planning guarantee model that requires PP fees be refunded where a planning authority does not assess a PP within the required timeframe. Council does not agree to the proposed planning guarantee. This model does not acknowledge Council’s experience with PPs where significant delays are caused by proponents through inadequate and insufficient rezoning applications to address strategic and site-specific issues, or waiting for proponents to address conditions of the Gateway Determination or Local Planning Panel conditions. Council should not be penalised for delays caused by proponents.

***If so, what mitigation measures, would be necessary to prevent a rezoning authority from having to pay refunds for delays it can’t control?***

- The emphasis here is on “delays it can’t control”. Council does not support any payment of refunds for delays that it cannot control. That would be unreasonable and increase the financial burden on Councils.

***If not, what other measures could encourage authorities to process rezoning applications promptly?***

- PPs are complex and involve the making of strategic policy decisions, and should not be treated like DAs. They are far more qualitative and have the potential to cause significant social, economic and environmental consequences if they are proposed to be “pushed through” by DPE. Sometimes things are complex by nature, and opportunities for shortcuts are limited and not appropriate. PPs are certainly in that realm, due to their technical complexities.
- It is our understanding that the Rezoning Review process will remain. That is in place already, and will continue to ensure that Councils are encouraged to make decisions on PPs within certain timeframes, once they are lodged.

***Do you think public authorities should have access to appeal?***

- Councils should be given the same rights of appeal as are proposed to be afforded to private proponents.

***Which of these options – the LEC or IPC do you believe would be most appropriate?***

- The role of the LEC is to determine DAs. PPs are significantly more strategic and policy focused, and far more broad reaching in relation to their consequences for decision making by local Councils and DPE.
- From the two options provided, Council would support the IPC as being the most appropriate – given the IPC already provide the determination function on significant development proposals where DPE or other agencies/Ministers have a conflict. Their scope would need to align with the relevant considerations under the strategic planning framework, which is very different to their current delegations relating to SSDs and Modification proposals, for example.

- Council highlights that the creation of a further pathway to appeal PPs will result in further time delays, costs and uncertainty. This will be exacerbated where PPs are subject to Rezoning Review in the earlier stages.