

Blue Mountains City Council

Submission on 'A new approach to rezonings in NSW' Discussion Paper

Thank you for the opportunity to provide feedback on the discussion paper: a new approach to rezonings in NSW (December 2021). Blue Mountains City Council acknowledge that there is opportunity for improvement of the current rezoning process. However, several concerns are raised with the proposed reforms, detailed in this submission.

Introduction

Following more than 18 months of consistent planning reform, some of which is not insignificant (such as employment lands reform) and incredibly resource intensive, the Department released the proposed rezoning reform discussion paper mid December 2021. While it is acknowledged that there is an extended exhibition period running until the end of February 2022, the timing of this release, particularly as it immediately followed a local government election, was not ideal.

As a general comment, many State Government planning reforms have proposed fundamental changes to the planning system, particularly to the level of Local Government agency and control over local planning matters, and effectively diminishes community participation in planning.

In response to these reforms, Council has made strong submissions advocating on behalf of community, Council's adopted strategic land use policy direction, and the importance of locally responsive place based planning. This remains the position of Blue Mountains City Council in relation to the proposed rezoning reform.

General comment on the proposed reform

As outlined in the discussion paper, ideally in the planning system, Councils through consultation with the community set the strategic direction for land use planning for the local area and translate this into local planning controls. Over time, amendments are made to the LEP in response to updated strategic policy direction and emerging issues.

The premise put forward in the discussion paper is that if this has occurred, then there should be little need for spot rezonings and they would only occur where there are sound planning reasons, such as responding to infrastructure investment or changing circumstances.

However, this ignores the reality that many rezoning applications are speculative in nature, seeking to increase development potential or land value, not pursued for any planning reason or genuine desire to create better places.

The current process for assessing rezoning applications acknowledges that a change in the planning controls and development potential of land is significant and requires due consideration. In principle, the current system establishes that there is a bar that needs to be met for a rezoning application, with justification required to move away from the existing endorsed planning controls. Of concern, is that the exhibited discussion paper proposes a shift toward an expectation of a favourable outcome for those seeking a rezoning.

In fact, the proposed way forward appears to be designed for the benefit of developers, with little regard for Council expertise or community consultation. In particular, concern is raised that a planning proposal can move through the process despite a lack of strategic merit, then be able to proceed immediately to a legal appeal if the proposal is not supported.

This shift in the process is particularly concerning when coupled with other proposals put forward in the discussion paper to introduce stricter benchmark timeframe and fee refunds. It is anticipated that this could result in an increase in speculative proposals. With no requirement to establish the merits of a proposal prior to public exhibition, a proponent could submit an application that is inadequate or unsuitable, with the knowledge that Council is subject to benchmark timeframes. If an applicant knows they will get a refund for a proposal that is unsupported or can't be assessed within the timeframes there is no impetus to work with a Council. The proposed process opens the door to applications being lodged with the expectation of achieving an approval through an appeal pathway at the end of the set benchmark timeframes. The opportunity to 'game the system' is clear.

No initial assessment of strategic or site specific merit

The proposed introduction of compulsory pre-lodgement is supported. This is a service which Councils already provide to detail the justification and documentation that would be required to assess a rezoning application. It is also the opportunity to potentially indicate preliminary support for the merits of an application or to be clear and upfront when proposals do not have merit, before they proceed further. However, this should not replace a full merit assessment once a proposal with all the necessary supporting studies has been prepared.

Front loading the system, as suggested in the discussion paper, raises issues of efficacy both with the process and the opportunity to adequately raise issues or consult with relevant agencies or stakeholders. At a scoping stage, proposals are generally not detailed enough to provide complex responses that consider all risks and requirements. Compounding this, proponents are reluctant to invest in procuring all relevant supporting studies ahead of surety of support for a proposal. Fulsome comment cannot be made if a fulsome package is not provided.

The most concerning aspect of this proposed reform to the process is the removal of any initial assessment of strategic or site specific merit to determine whether a proposal is supportable before proceeding to public exhibition, or even the ability to review and work with an applicant to amend or improve a proposal before public exhibition. It is noted that the discussion paper suggests this could be done at the scoping stage. However, despite any assessment or advice at that stage, it is proposed that an application is able to proceed straight to public exhibition once lodged.

The ability for an application to proceed to public exhibition without the requirement of a merit assessment by Council sets up almost a 'catch-22'. A rezoning application will be able to proceed to public exhibition, even if it is without merit. However, by proceeding to public exhibition, an expectation is set that a favourable assessment will be made if issues raised during public exhibition are addressed. This is particularly concerning given that it is proposed that the applicant manages the review of submissions, and then reports the outcome to Council as part of their application. This proposed approach is not supportable.

Aside from the concerns regarding removing upfront consideration of the merits of a proposal, issue is raised with only an 'adequacy assessment' being conducted prior to public exhibition. From the discussion paper it appears to simply be a check box exercise that all reports or documents are lodged. There appears to be no opportunity to assess the quality or accuracy of the content of these documents, particularly given the tight timeframe for this 'adequacy assessment'. This particularly concerning for proposals where expert reports such as strategic bushfire assessments or flora or fauna studies are required.

The shift of any assessment of a proposal to the end of the process also increases the likelihood that re-exhibition will be required, or that a proposal may change significantly from

exhibition. This sets up a situation where it could be expected that an applicant is less open to modification to a proposal or working with Council to address issues.

In addition, the Department has confirmed that standardised matters for consideration will form part of the assessment criteria, such that there is consistency across the State for proponents, but have not provided the detail of this for comment or feedback. Standardisation is inappropriate and at odds with place based planning principles for assessment of rezoning applications. The rezoning or strategic planning stage is where context and locally specific issues and assessment criteria are most important. Standardisation of matters for considerations could result in key strategic issues for an area not being a matter for consideration. For example the City of the Blue Mountains is uniquely a city within a world heritage national park. It is critical that this context be able to be considered as part of strategic planning at a rezoning stage.

No role for the Department prior to public exhibition

The reforms propose removing the role of the Department through the Gateway review process. This is an important step which can often provide support for the strategic position of Council and guides the State agency consultation. Without this step prior to public exhibition there is no requirement for the applicant to engage with these agencies, or onus on agencies to provide feedback. This is critical where projects may be dependent or have impact on State infrastructure, or in relation to key strategic issues such as bushfire through the RFS.

It is noted that the discussion paper suggests this be done at the scoping stage and that the applicant do this during public exhibition. However, this is not proposed to be mandated. This is concerning coupled with the proposed approach to treat silence as support from a State agency. While this might help processing times, it does little to consider and address the actual issues at hand to ensure a positive planning outcome on the ground.

The proponent to conduct public exhibition

These proposed changes to the process are compounded by the intention to make the proponent responsible for conducting the public exhibition. This raises a number of questions and concerns about the transparency, fairness, and governance of this process.

Typically in planning, any notification and exhibition is run by Council or a public authority. During consultation with Council, the Department have confirmed that they expect the Planning Portal to be the mechanism by which proponent led consultation occurs. There is no further detail in the exhibited discussion paper about how exhibitions run by the proponent would be conducted, and how it will be ensured that the process is conducted correctly and transparently.

There are practical issues with proponents conducting exhibition, particularly around neighbor notification, advertisement, and record keeping. Further to this there is the issue that different proponents may conduct public exhibition through different mechanisms, likely resulting in no consistent process for community members in terms of where to expect advertisements, who to send submissions to, and who to contact for questions. It is anticipated that questions and submission will still be directed to Council, complicating and confusing the process.

Aside from the practical issues, there are real concerns that a proponent run exhibition process creates an opportunity for misrepresentation of a proposal, inadequate consideration of community input and the potential for coercion, particularly where people are directly affected by a proposal.

Councils conduct public exhibition through clear established processes that are set out in a community participation plan, and subject to scrutiny. The discussion paper does not establish the benefit to a proponent conducting a public exhibition, particularly how it would improve community participation or build trust and confidence in the process. In the absence of such justification, it appears that it is proposed intentionally to diminish the importance of community participation in the rezoning process.

It is critical that there remains robust community participation in strategic planning. Importantly, this includes rezoning applications, despite the discussion paper positioning a rezoning application as separate to strategic planning processes such as developing a Local Strategic Planning Statement (LSPS). The local planning framework, through LEP controls, is just as important in setting the direction and achieving desired outcomes for an area as an LSPS, and the community should be able to participate in this process.

Public exhibition should not be something conducted centrally through the planning portal, which there is not broad awareness of, run by an applicant with no oversight, and effectively ticked off as a formality in the process. It is critical that Councils or a public authority continue to manage public exhibition and community consultation processes to ensure fair and transparent community participation.

Timeframes for assessment and fee refunds

The reforms also propose implementing set timeframes for assessment that consider a rezoning application more like a development application. However development assessment against established planning controls is very different to a proposal which seeks to amend such controls, typically to increase permissibility or development potential.

Rezoning applications can be complex and it is critical that the focus be on the quality of planning outcome not the timeframe for assessment. Once planning controls are changed and permissibility or development potential increased, it is more difficult in the future to reverse this. A future development assessment can only achieve an outcome within the planning rules set, hence the importance for thorough decision making at the rezoning application stage. This should not be diminished to achieve target timeframes arbitrarily set by the State Government.

The introduction of fee guarantees for applicants is also proposed, providing an avenue for the refunding of fees if applications are not assessed within the timeframes set. This would put the onus on Council to assess applications within a set timeframe, with no corresponding requirements related to the thoroughness or quality of an application. It also highlights an emphasis in the reforms on the quick approval of rezoning applications over a thorough assessment of their merits or impacts.

Other elements within the assessment timelines have not been adequately considered, such as the drafting process with Parliamentary Counsels Office. The impact this has on drawing out the process at the end, and the desire to get upfront support for draft wording, combined with delays with State agency response, will impact the ability to meet benchmark timeframes, but Council will have no control over this. In this regard, it appears the reforms are addressing processing times and concerns of proponents, to the burden of Councils.

New appeal pathways

The proposed potential new appeal pathways for rezoning applications that are not supported, or not determined within the set timeframes, are problematic. There is little detail on these pathways but one option presented is an appeal through the Land Environment Court (LEC). There are a number of concerns with this proposal. The LEC make judgements on planning law, assessing whether a development application or other matter has met the planning rules

that are in place. A rezoning application by its nature is seeking to change planning rules themselves and is an assessment of the strategic and site specific merits of a proposal. Although this occurs in the context of other established planning controls and principles, it is not an assessment like a development application is against planning rules. This means that the exhibited reform proposes either an expansion of the role of the LEC, or suggests that a review of a rezoning application being focused on whether process, as set out in Legislation, was followed, rather than the merits of the proposal itself.

Conclusion

The discussion paper proposes a significant shift in the process for assessing rezoning applications. This shifts the onus from an applicant demonstrating the merits of their proposal to an expectation of a favourable and timely outcome for an applicant if process is followed. The emphasis in the proposed reforms is on reduced processing times and determination of rezoning applications, not on ensuring appropriate planning outcomes. The reforms appears to place burden and expectation on Councils to the benefit of proponents, without even proposing any corresponding requirements or responsibility to submit quality rezoning applications.

Blue Mountains City Council advocates for the retention of a robust process for the assessment of rezoning applications. This submission acknowledges that rezoning applications are a necessary part of the planning system, and proposals with sound strategic merit can have a positive outcome. However, this speaks to the importance of there being a thorough process for the assessment of rezoning applications in place.

The costs of these fundamental and permanent changes cannot be overlooked. The incremental impact of successive, piecemeal reform increasingly shifts the system away from core planning principles, and further limits local government and community involvement in the planning system.

Work being done to implement our Local Strategic Planning Statement is being compromised as a result of this movement away from a locally focused place-based approach, appearing to directly contradict the substantial strategic work all Councils have undertaken through the completion of these land use statements, endorsed by the state government and Greater Sydney Commission. The agency of local government is eroded through such reforms, replaced with a one-size-fits-all whole of state approach that considers only a narrow field of interest, without regard for the long ranging negative consequences.

The proposed reforms to the rezoning process compound this situation, weakening the assessment of rezoning applications and reducing public participation in strategic planning. Council raises strong objection to any reform to the rezoning process which puts arbitrary processing times ahead of planning outcomes.