

15 February 2022

Department of Planning, Industry and Environment  
Locked Bag 5022  
Parramatta NSW 2124

By online submission:

To Whom It May Concern,

**City of Canada Bay submission to “A new approach to rezonings” Discussion Paper**

The City of Canada Bay Council would like to thank the Department of Planning, Industry and Environment for the invitation to provide feedback on “*A new approach to rezonings*” Discussion Paper. This correspondence is the City of Canada Bay’s submission.

Council supports a strategic-led planning system, a system that focuses on the quality of outcomes delivered and encourages fewer site specific (spot) rezonings.

The submission summarises concerns and issues for consideration by the Department of Planning, Industry and Environment regarding the proposed changes outlined in the Discussion Paper. It is requested that the NSW Government responds to the issues raised before the proposed reform is progressed.

If you have any questions in relation to this submission, please contact Paul Dewar, Manager, Strategic Planning on [REDACTED] or by email to [REDACTED].

Yours sincerely,



**Monica Cologna**  
**Director, Community and Environmental Planning**

## “A new approach to rezonings” Discussion Paper

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### Executive Summary

Council supports a strategic-led planning system, a system that focuses on the quality of outcomes delivered and encourages fewer site specific (spot) rezonings.

Council raises the following concerns and matters for consideration in response to the proposed reforms outlined in the A new approach to rezoning Discussion Paper:

#### *Proposed rezoning framework*

- Reducing the current two points of involvement for the elected council in the planning proposal process to only one, diminishes the role of Councillors, who are elected to represent the views of their constituents.
- The reforms will encourage the submission of planning proposals that lack strategic merit. This will require councils to allocate resources away from community-led strategic planning to respond to speculative planning proposals and spot rezonings. It will also create community confusion where proposals are contrary to endorsed policy, and damage community trust in the planning system.
- The new process removes the Gateway Determination process and oversight by the Department of Planning, Industry and Environment for proposals that are proponent initiated. This reform is considered to be a regressive step in relation to reducing the risk of corruption and will impact the ability of the planning system to ensure consistent and high quality decision-making.
- The proposed timeframes are insufficient to account for delays caused by proponents or other circumstances beyond Council’s control, or for lead times for Local Planning Panel meetings and Council meetings.
- Landowner initiated planning proposals that have been publicly exhibited should not be a consideration in the assessment of a development application, pursuant to part 4.15(1)(a)(ii) of the *Environmental Planning and Assessment Act, 1979*. This will require consent authorities to consider proposals that may not exhibit strategic and site specific merit.

### *Elevated role of proponents*

- Giving responsibility to private proponents to liaise directly with State Agencies alienates councils from the assessment process, and will require Agencies to devote time and resources to liaising with private proponents, who may not have the strategic or subject-specific knowledge or expertise to provide a response that represents the public interest rather than private interest.

### *Appeals*

- Council does not support the determination of planning (“rezoning”) proposals by the Land and Environment Court (LEC), the Independent Planning Commission or the Planning Delivery Unit (PDU). The creation of a new appeals pathway will reduce accountability as the ability for councils to have the final say on local land use policy will be removed.
- Should a new appeals pathway proceed, councils (as proponents) should be afforded the same appeals rights as private proponents.
- The Planning delivery Unit (PDU) is not an appropriate authority to determine the appeal of planning proposals by local government, given their role within the Department of Planning, Industry and Environment (the Department) and their responsibility to the Minister for Planning.
- Should appeals to the LEC be pursued, the status of the *Local Environmental Plan Making Guideline* must be elevated by including relevant provisions in the *Environmental Planning and Assessment Act, 1979*.

### *Proposed fee regime*

- Council supports fixed planning proposal fees where the fee is set at a rate to cover the full cost of assessment. The payment of a non-refundable fee encourages genuine proposals to be submitted and compensates councils for the significant cost incurred by the assessment process.

### *Planning Guarantee*

- Council strongly objects to the proposed planning guarantee.

The City of Canada Bay Council does **not support** the changes to the planning proposal process outlined in the Discussion Paper. It is requested that the proposed reforms be reconsidered and revised.

## **New terminology**

The Discussion Paper proposes to change the name of planning proposals to Rezoning Applications.

Many changes to LEPs do not relate to zoning and therefore the use of the word “rezoning” is a misnomer. Terming planning proposals ‘rezoning applications’ also supports the view that planning proposals will be treated similarly to development applications. In addition, there is now some level of understanding by the community of the term “planning proposal”, and a change in terminology to a misnomer of “rezoning applications” will create confusion within the community.

It is recommended that all applications to make or amend an LEP continue to be called a planning proposal.

## **New categories and timeframes**

The Discussion Paper proposes to categorise planning proposals into 4 categories so as to standardise timeframes, information and public exhibition requirements and fees.

Council supports benchmark timeframes. However, the proposed process will not create greater efficiencies or lead to time saving. It is likely to result in the submission of planning proposals that are wholly without strategic merit proceeding to exhibition and assessment, where in fact, they should be refused at the outset.

The timeframes for all stages and all categories should be increased. Contrary to the workflows illustrated in the Discussion Paper, it is not uncommon for planning proposals to depart from a linear program. The timeframes do not account for:

- re-exhibition of planning proposals, often as a consequence of planning proposals being amended to address submissions or advice from a Local Planning Panel;
- lead times to prepare reports for the Local Planning Panel in accordance with the Ministerial Direction;
- lead times to prepare a report for consideration at a Council meeting;
- time taken to revise planning proposals as a consequence of Council resolutions; and
- time taken to liaise with Parliamentary Counsel’s office to finalise amendments to the LEP.

Council also seeks clarification of the consequences for private proponents if the timeframes are not met. It is not uncommon for proponents to take a considerable amount of time to respond to issues raised in submissions by Council officers or the Local Planning Panel. It is unreasonable for councils to be held responsible for meeting timeframes if proponents are not similarly bound to adhere to the same requirements.

Further, the proposed new process needs to allow time for councils to undertake due diligence and comprehensively review the proponents' submissions report to ensure that issues raised in submissions have been adequately addressed by proponents, who may not be planners and may not have the strategic, site-specific, subject-specific or Council-operational knowledge or expertise to adequately address issues raised. This will include councils having to comprehensively review and respond to the submissions themselves.

## **New roles**

The Discussion Paper changes the roles of various parties in the rezoning process.

### *The role of proponents*

The Discussion Paper elevates the role of the private proponents by giving them ownership of the application throughout the process.

- Council supports the proposal that private proponents will only be able to lodge a planning proposal if they are the owner of the land or have obtained the consent of the landowner.
- Council does not support the view that private proponents should be 'applicants' and for planning proposals to follow a similar process to development applications.

Planning proposals relate to the creation of public policy and require decisions to be made in relation to a broad range of matters that effect land use and infrastructure (quantum and location of new open space, qualitative assessment of appropriate density/scale in a locality and the aspirations and expectations of the local community). In this way, they are not the same as development applications, which are limited to implementing adopted development standards and controls.

Elevating private proponents to applicants and providing them with associated "rights" within the planning proposal process will diminish the ability of Council to make definitive public policy decisions as they relate to land use.

- Council does not support private proponents being the authority to consult with State Agencies or to review and respond to submissions. Private proponents are not likely to have sufficient strategic, subject-specific knowledge and expertise, or sufficient understanding of councils' strategic work and operational plans, to be able to adequately or meaningfully engage with Agencies, or review or respond to submissions.

Submissions received often pertain to matters overseen by specialist staff within a council or directly relate to services provided by councils. These community

matters are therefore unable to be entirely resolved/addressed by private proponents.

Private proponents also have an inherent conflict of interest as they are the beneficiary of the outcome delivered by a planning proposal and it is inappropriate for them to assess and respond to public submissions.

#### *The role of Local Government*

The Discussion Paper states that councils will have full control of the planning proposal process for all private proponent-initiated applications, including the removal of the requirement for a Gateway Determination and the ability to make the final decision.

- The process embeds the (pecuniary) interests of developers deep into the planning system by allowing all planning proposals to proceed to public exhibition, including planning proposals that are contrary to State, Regional and Local Policy. This outcome will damage community trust and confidence in the planning system.
- The *Local Planning Panels Direction – Planning Proposals* requires planning proposals to be referred to a Local Planning Panel for advice prior to a planning proposal being reported to Council for determination. Independent advice is important to improve the quality of planning outcomes and creating confidence in the planning system. It is unclear as to what role Local Planning Panels will play under the new process outlined in the Discussion Paper. It is requested that clarification be provided.

#### *The role of the Department of Planning, Industry and Environment*

The Discussion Paper recommends that the Department no longer assess or determine rezoning applications initiated by private proponents.

- There are limited circumstances where the Department will continue to play a role in the assessment of planning proposals. These include rezoning by public authorities and “rezonings that are state or regionally significant”.

Clarification is required in relation to what is considered a state a regionally significant rezoning.

- The Department’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 the Department will result in less transparency and consistency in the assessment process.

It is recommended that the Department’s role in issuing Gateway determinations on all privately initiated rezoning proposals be retained.

The Discussion Paper states that, in certain circumstances, councils will be able to approve inconsistencies with 9.1 Planning Directions or, in other circumstances, seek approval from the Department for approval of an inconsistency.

- Council supports being able to approve minor inconsistencies with the 9.1 Directions. The application of 9.1 Directions in the assessment of planning proposals often involves weighing up the implementation of competing Directions to ensure best overall planning outcomes.

It is important that this process is not made prescriptive or reduced to a box-ticking exercise, as weighing up the respective impacts of different Directions is dependent on the application of broad-ranging planning expertise and policy knowledge. For example, impacts that are narrow but significant often need to be weighed against impacts that are broad but less significant.

- Clarification is required in relation to the process for the Department to comment and/or approve an inconsistency with a 9.1 Direction. It is unclear as to the stage in the process this is to occur or whether the advice by the Department will act as a defacto Gateway Determination.

#### *The role of State agencies*

The Discussion Paper seeks to implement changes that clarify when referral to a State Agency is required, information that is to be provided to State Agencies, the level of assessment expected, timeframes for assessment and the ability for a rezoning authority to approve a proposal despite objection being raised by a State Agency.

- Agencies need to retain the ability to be involved in resolving agency issues prior to the determination of a planning proposal. The ability for planning authorities to approve rezoning applications in spite of any outstanding agency objections may reduce the timeframes involved, but this significantly reduces the ability for Agencies, who are the subject-matter experts, to be stakeholders in the resolution of any objections they may have. This could seriously undermine good planning and could jeopardise Government policies and commitments for the environment, social sustainability, heritage, and transport.
- Council supports the concept of a central body that can co-ordinate agency involvement and consultation for planning proposals. This could assist in ensuring Agencies respond to matters in a comprehensive and timely manner.

## New Steps

### *Scoping*

The Discussion Paper includes a mandatory pre-lodgement stage called “scoping”.

- Council supports a mandatory pre-lodgement process for all planning proposals.
- Council generally supports standardised information requirements, but only if the information requirements are comprehensive and able to be tailored to relevant unique circumstances.

### *Lodgement and Exhibition*

The Discussion Paper proposes to allow all planning proposals that meet lodgement requirements to proceed to public exhibition.

- Council strongly objects to rezoning applications progressing to public exhibition if they are inconsistent with endorsed strategic plans. Exhibiting planning proposals that are inconsistent with strategic plans, including Government and Council endorsed strategies, will actively encourage spot rezonings that lack strategic merit.

The planning process is improved by preventing the exhibition of planning proposals that lack strategic merit and which will ultimately be refused. Exhibiting proposals that lack strategic merit is a poor use of Agencies’ and the proponents’ time and resources, gives false hopes to proponents, creates community confusion and angst, and further erodes trust in the planning system. It also means that when concerned members of the community approach their local Councillor with questions and concerns about a planning proposal on exhibition, Councillors may have limited knowledge of the proposal, as under the proposed changes, their involvement is confined to the finals stages of the process.

No amount of material exhibited with planning proposals to explain that ‘*exhibition does not mean the rezoning authority supports the application and may still reject it*’ justifies the exhibition of planning proposals that lack strategic merit.

The current planning proposal process enables applications without strategic merit to be determined efficiently, thereby saving time and resources for proponent and planning authorities. Two examples are provided below:

*Case study 1: Planning proposal that was wholly inconsistent with the State Government’s endorsed Parramatta Road Corridor Urban Transformation Strategy, Council’s GSC-endorsed Local Strategic Planning Statement and Council’s Department-endorsed Local Housing Strategy. It was*



recommended for refusal by the Local Planning Panel and refused by Council **prior** to submission to Gateway and **prior** to public exhibition.

*Case study 2:* Planning proposal that was inconsistent with the *Eastern Sydney District Plan*, the *Canada Bay Local Strategic Planning Statement* and Council's *Employment and Productivity Strategy*. The application was recommended for refusal by both council staff and the Local Planning Panel. The proposal was withdrawn **prior** to a decision being made by Council as to whether the proposal should be forwarded to the Department for a Gateway Determination.

The proposed new system will enable these types of proposals to proceed to exhibition, thus pointlessly wasting the time and money of all stakeholders and creating confusion and uncertainty in the local community, and the development industry.

- Clarification of the statement that '*if study requirements have not been met, the rezoning application will be rejected and will need to be resubmitted.*' For example, does this refer to studies that are required but that 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 assumptions?
- At present, planning proposals that have been publicly exhibited are a consideration in the assessment of a development application, pursuant to part 4.15(1)(a)(ii) of the *Environmental Planning and Assessment Act, 1979*. This provision enables consent authorities to consider draft plans that may have a material impact on development and the desired future character of a place.

The reforms will allow all planning proposals to proceed to public exhibition irrespective as to whether they exhibit strategic or site-specific merit. It is inappropriate to give any weight to the outcomes sought by planning proposals as part of the development application process where it has not been established that they are consistent with endorsed local, regional and state strategies. This situation underscores the importance of a planning authority be able to determine the strategic and site-specific merit of a planning proposal prior to public exhibition.

#### *Changes after exhibition*

The Discussion Paper states that proponents must both summarise and respond to submissions received following the public exhibition period and lodge their scheme (with any amendments) for assessment by the rezoning authority.

- Council objects to the role of submissions assessment being solely given to proponents. It must be accepted that, as the applicant, the proponent will have an

inherent conflict of interest and potential bias when assessing and responding to submissions.

Irrespective of the response provided to each submission by a proponent, due diligence requires that rezoning authorities will still need to review the submissions and the proponent's responses to ensure they are accurate, in the public interest and proportionate to the concerns raised. Should this proposed reform proceed, a step whereby the proponent's submissions report is reviewed by Council officers against the submissions received (together with commensurate time to do so), is recommended.

### *Information requests*

The Discussion Paper limits the ability of State agencies and rezoning authorities to request additional information to inform the assessment of a planning proposal.

- Information requests are often necessary to enable the proper assessment of a planning proposal. Planning authorities cannot be expected to be sufficiently across the fine-grained detail of proposals at the Scoping stage and the quality of information submitted to a council for the assessment of a planning proposal may warrant a request for additional information. Any reform should allow for additional information to be requested to inform the assessment process.
- It is noted that the reforms do not encourage a conciliatory approach to the assessment of planning proposals as this would lead to exposure to appeals and proponent access to a fee refund. In this way, planning proposals will be determined based on the information provided, rather planning authorities seeking amendments that would make a proposal acceptable.
- Council objects to State agencies liaising directly with a proponent. As councils will be charged with determining most private initiated planning proposals under the reforms, it is unclear why the Department would seek to alienate planning authorities from the assessment process and limit the ability for proposals to be considered holistically based on all issues and submissions received.

### *Assessment and finalisation*

Following exhibition and any amendments, the Discussion Paper suggests that the rezoning authority will assess and finalise the planning proposal.

- The proposed new process fails to acknowledge the important role played by the elected Council (Councillors) in making policy decisions in relation to land use.

It also fails to acknowledge and allow for lead times to consult with Local Planning Panels (LPP) and report the matter to a Council meeting for consideration. The City of Canada Bay Council allows 21 days lead time for each of these processes,

but it can be longer, such as during the Christmas shutdown period (December) and January, when there are no LPP or Council meetings.

- Due diligence will require councils to comprehensively assess a proponent's submissions report against the submissions made during the exhibition to ensure that issues raised have been comprehensively and adequately addressed. This will increase the time councils need to assess planning proposals, which has not been allowed for in the mandatory timeframes.

### **New fee structure**

The Discussion Paper outlines three different options for planning proposal application fees, involving fixed assessment fees, variable assessment fees and fixed and variable assessment fees.

- Should the Department pursue consistent application of fees for planning proposals, Council's preferred Option is for Fixed Fees (Option 1) for simplicity and ease of implementation.

However, the fees need to be set at an amount sufficient to cover the full cost of assessment.

In setting the fee, the Department should acknowledge the significant burden the assessment of planning proposals have on council time and resources. Planning proposals often involve pre-lodgement reviews, meetings, administration (website updates, planning certificate updates), exhibition and notification, LPP administration and meetings, assessment, and Council meetings. Certain complex planning proposals incur additional costs such as legal advice and independent peer reviews that often result in costs that are not recovered by local government.

Council's existing fee of \$100,000 has been found to generally cover the cost of most planning proposals, noting that the assessment of some proposals exceed this amount.

- Council objects to the proposed refunding of fees.

Spurious or poorly considered planning proposals, which are likely to increase substantially under the proposed new process, are less likely to be lodged where a proponent is at risk of losing the fee that is payable. Councils and public agencies should not be put in a position of having to assess proposals that lack strategic or site specific merit, only for the proposal to be withdrawn when it becomes apparent that the proposal is not going to be supported, so that the fee can be refunded.

In this way, the payment of a non-refundable fee assists with cost recovery by councils and also encourages only genuine proposals to be submitted.

### **Planning guarantee**

The Discussion Paper proposes the introduction of a “planning guarantee” that would require planning proposal fees to be refunded where a planning authority does not assess a planning proposal within the required timeframe.

- Council strongly objects to the proposed planning guarantee.

The UK planning guarantee cited is for development applications, not complex planning proposals involving assessment by numerous stakeholders, including council planners, expert consultants, state agencies, local planning panels and the elected Council. Planning proposals involve the making of strategic policy decisions, and cannot and should not be treated like development applications.

- The Discussion Paper fails to acknowledge the experience of local government, where significant delay is caused by proponents. Two examples are provided below:

*Case Study 3:* Initial planning proposal was refused. A second planning proposal was subject to two major amendments to address issues raised by Council Officers and the Local Planning Panel. Further delay was caused waiting for the proponent to address conditions of the Gateway Determination.

*Case Study 4:* Planning Proposal where required information was provided for lodgement, however the planning proposal was not satisfactory to progress to the Department for a Gateway Determination. Significant time elapsed waiting on the proponent to update documentation to address strategic and site specific issues.

The process outlined in the Discussion Paper would enable the above planning proposals to be lodged, be exhibited and be submitted to Council for assessment and finalisation. To meet the required timeframes and not be exposed to the proposed planning guarantee, it would be in Council’s interest to refuse the planning proposals.

- The assessment period contemplated by the Discussion Paper needs to acknowledge that councils have a long lead time for Local Planning Panels and Council meetings (21 days for City of Canada Bay for each). Whilst some of the larger metropolitan councils meet fortnightly, many councils meet once a month. Councils should not be penalised for not meeting unreasonably short timeframes, if, for example, meetings are delayed.

## **New appeals pathways**

The Discussion Paper is considering new appeal pathways for privately initiated planning proposals, including either appeals to the NSW Land and Environment Court or appeals to the Independent Planning Commission.

- Council does not support the determination of planning proposals by the Land and Environment Court (LEC), the Independent Planning Commission or the Planning Delivery Unit (PDU).

The role of the LEC is to determine development applications based on an interpretation and application of legislation, whereas planning proposals seek to create legislation and establish new 'policy' based on strategic justification and knowledge of local circumstances.

Local Government Councillors are elected to represent the views of their constituents and make land use policy. The ability of Councillors to determine development applications was reduced following the introduction of Local Planning Panels, and concern is raised that the creation of a new appeals pathway will further undermine the ability of Councillors to determine land use outcomes.

Rather than improving the accountability of decision makers as suggested by the Discussion Paper, the creation of a new appeals pathway will reduce accountability as the ability for Council to have the final say on local land use policy will be removed.

In addition, significant concerns are raised about the capability of the LEC system to determine strategic land use planning matters. There is a significant difference between the statutory determination of development applications and the determination of strategic land use planning proposals. Councils have experienced this challenge through the Local Planning Panels process, with many Council ensuring they have a balance of statutory and strategic skillsets and experiences amongst their pool of technical panel members.

- Despite the numerous references to improving assessment timeframes within the Discussion Paper, the creation of a further pathway to appeal planning proposals will result in further time delays, costs and uncertainty.
- Should the Department proceed to permit appeals, Council strongly objects to public authorities not being granted the same appeal rights as private proponents. This unreasonably limits the ability of local government to seek peer reviews of decisions made by the Department.

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

- Council objects to appeals for Council initiated planning proposals being dealt with by the Planning Delivery Unit (PDU).

The PDU was established by the Minister for Planning to progress priority development applications and planning proposals that are stuck in the system. Given the role and function of the PDU, it not possible for this arm of DPIE to exercise their functions impartially due to their inherent conflict of interest. If the PDU's role was to be expanded to determine the appeal of planning proposals by local government, councils and the community would have no confidence in the objectivity of decisions made.

- Should appeals be able to be dealt with by the LEC or Independent Planning Commission (IPC), it is critical that relevant requirements contained within the *Local Environmental Plan Making Guideline* be included within the *Environmental Planning and Assessment Act, 1979*.

Case Study 5: A planning proposal where the Sydney Eastern Planning Panel advised that the Local Environmental Plan Making Guidelines was only a guide and therefore discretionary. Core requirements of the Guide were set aside, creating a situation whereby the subject planning proposal was able to proceed contrary to the requirements applying to all other planning proposals in the State.

As the contents of the Guideline inform the processing, assessment and determination of planning proposals, relevant requirements, such as the strategic and site-specific merit test should be referenced in the *Environmental Planning and Assessment Act, 1979*.