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

Dear Ms Wythes

Discussion Paper*: A new approach to rezonings*

Greenfields Development Company No. 2 Pty Ltd (GDC) has considerable experience in managing both major and minor rezoning proposals in greenfield and developing areas in south-western Sydney. We welcome the opportunity to provide feedback on the Department of Planning and Environment's(DPE's) discussion paper *A new approach to rezonings*. We commend the Department for its open and thorough examination of the issues impacting the efficacy of the rezoning process in the discussion paper. Our submission is attached to this letter and the main points we raise in the submission are summarised below.

Our recent experience of rezonings has identified issues with the rezoning process which are not explicitly identified in the Department's discussion paper, including:

- Non-mandatory or discretionary consultation undertaken by some councils is doubling the consultation effort for little discernible return
- Gateways are unnecessarily applied to all rezonings, including those that are aligned with the strategic planning framework
- Some agencies have reverted to "kitchen sink" standard responses when consulted, possibly due to being inadequately resourced to deal effectively with more complex rezonings and
- Big strategic decisions are occasionally re-prosecuted through subsequent rezoning processes in an attempt to overturn that original strategic decision.

In relation to the new process described in the discussion paper we make the following observations and recommendations:

Scoping Phase

- Scope and policy creep during the scoping phase needs to be managed
- Agencies must provide clear, targeted and unequivocable advice during scoping
- Documentation requests and requirements need to be matched to the rezoning task
- The Department must retain a role in coordinating agency input and there is considerable merit in establishing a "one-stop-shop" within Government for rezoning advice
- The trend towards "planning by consensus" must cease

- Councils should be enabled to deal with most inconsistencies with section 9.1 Ministerial Directions
- Strategically weak rezonings should be called out early and designated as such

Lodgement phase

- Keeping merit assessment out of the adequacy assessment will be challenging

Exhibition phase

- Having the right to comment shouldn't create the impression of a right of veto
- Extra information requests should be tailored to resolving rezoning issues, not development issues

Exhibition and assessment phase

- Proponents should be advised of post-exhibition changes and be invited to comment
- Councils should determine rezonings where there is a VPA

New fee structure

- Proponents will support reasonable, transparent fees if they improve system performance
- Planning guarantees should work hand-in-hand with the fee structure

New appeals pathways

- The right of appeal should be introduced to rezoning applications

Implementation

- Non-legislative improvements should be brought into effect as soon as practical.

We have a number of rezonings on foot already that would provide excellent case studies of the shortcomings of the current system, and we are happy to share our experiences with the Department if that is helpful as it moves to finalise the proposed reforms.

Thank you again for the opportunity to comment on the discussion paper *A new approach to rezonings*. Please contact us if you require further information or clarification of any issues raised in our submission.

Yours sincerely,

Stephen Driscoll
For and on behalf of
Greenfields Development Company No. 2 Pty Ltd

Introduction

Greenfields Development Company No. 2 Pty Ltd (GDC) has considerable experience in managing both major and minor rezoning proposals in greenfield and developing areas in south-western Sydney. We welcome the opportunity to provide feedback on the Department of Planning and Environment's discussion paper *A new approach to rezonings*. We commend the Department for its open and thorough discussion of the issues impacting the efficacy of the rezoning process in the discussion paper. Our submission will generally follow the section headings used in the Department's discussion paper with cross-referencing to the discussion paper where necessary.

The process today

In addition to the issues identified in the discussion paper, our experience of the rezoning process has identified a number of practices which have added to the complexity, time and/or cost of proponent-led rezonings. These are discussed below.

Non-mandatory consultation is doubling the effort for little discernible return

Some councils have adopted the practice of undertaking a round of preliminary, non-mandatory consultation with agencies and nearby land owners prior to commencing the process of seeking a Gateway determination. While this action is defended with observations that:

- it often provides a "heads-up" on issues likely to be of concern (particularly to agencies) ahead of formal consultation and
- it's done when the report to the local planning panel is being prepared and so is time-efficient,

it is an additional step that delivers very little real benefit. Having an early "heads-up" on something which may concern an agency later in the rezoning process does nothing to actually resolve the issue, which would be most proponents' desire. Furthermore, it means agencies run the risk of consultation overload as they are faced with multiple consultations (at least two, and possibly three if required as part of a conditional Gateway) on the same planning proposal. This is an unnecessary impost on applicants and agencies and should be discontinued under the new arrangements.

Gateways are unnecessarily applied to all rezonings

The Gateway process was introduced in the late-2000s/early-2010s to stop ill-conceived rezoning proposals entering the planning system and diverting scarce resources from core business activities at State and local council level. It was designed specifically to "weed out" proposals that were inconsistent with strategic planning objectives and was introduced at a time when the State Government needed to focus on major land release rezonings to ensure land supply continued in the Sydney market. Over time, it has become practice for all council or proponent initiated rezonings to be exposed to a Gateway determination. Our experience of the current Gateway process is that it adds only time to the rezoning process and delivers no discernible value. The proposed new process seems to generally address this issue and a more streamlined approach is welcomed.

Some agencies have reverted to "kitchen sink" standard responses when consulted

Over time, GDC has observed that some agency responses to rezoning consultation/notification have become increasingly generic and tending not to deal with the substantive issues associated with the specific rezoning. This has included some agencies also requesting additional information for greenfields rezonings that would normally be lodged with development applications, such as detailed road design, detailed flood modelling and landscaping details. It is nearly impossible for proponents to provide this level of detail as part of the rezoning process: it is simply not known. However, councils feel obliged to try and obtain the information from a proponent because a State agency has requested it, so beginning a process of "to and fro" between the proponent, council and the agency again adding unnecessary time and frustration to the rezoning process. Agencies' comments should be targeted to address the specific nature of the rezoning proposal and "kitchen sink" standard responses should be discontinued. For this to occur, agencies will need to be appropriately resourced to comment on rezoning proposals which (more often than not) are not the agency's core business.

Big strategic decisions have occasionally been re-prosecuted through subsequent rezoning processes

Although less common now, there are multiple cases where big strategic decisions (such as the decision to make rural land available for urban development) have been re-prosecuted through subsequent rezoning processes by agencies or individuals opposed to that initial decision. The new process needs to make it evident to all parties what of the strategic or policy framework is up for review under a rezoning process and what is not, to limit this practice in the future. The discussion paper describes several steps which will limit the opportunity for this to occur in the future and these are supported.

Part B: The new approach

Scoping phase

Scope and policy creep during the scoping phase needs to be managed

The requirement for a specific scoping stage for most rezonings is sensible as it ensures requirements and expectations for supporting documentation are understood from the outset. As proponent for a number of long running rezonings, GDC has experienced scope and policy creep during the equivalent of the scoping stage (which has now run for a number of years in the case of the Pondicherry rezoning). Quite simply, the rezoning process has been very slow and with the passage of time, standards (eg. open space ratios) and policies (eg. *Designing With Country*) have been introduced or evolved. As proponent, we have been required to address these new policies in our documentation which either involves the re-work of existing documentation and plans, or the production of new documentation. The new process needs to include a "line in the sand" moment during scoping which "saves" the rezoning from new rules or policies, requiring instead that any new endorsed and adopted policies are addressed post-exhibition in the proponent's response to submissions.

Agencies must provide clear, targeted and unequivocable advice during scoping

Agencies need to be accountable to give advice during scoping which is relevant to the specifics of the proposed rezoning, and not provide "kitchen sink" responses. The ability for agencies to defer comments and serious consideration to a later stage of the process also needs to be removed. This will avoid the situation where a rezoning is derailed late in the process by an agency providing late, relevant and important advice. Our experience suggests that agencies will need to either up-skill or focus additional resources on the rezoning process if they are to provide relevant and timely responses during the scoping phase. The Planning Delivery Unit may have a role to play in facilitating this process.

Documentation requests and requirements need to be matched to the rezoning task

We have noticed a propensity for councils and agencies to "pull forward" detail into earlier stages of the development process. We are frequently asked to provide development application-level detail at rezoning stage for items such as flooding/stormwater management and basin design, road design, traffic assessment and building form/massing. While this level of detail may be appropriate for rezonings for smaller, inner-city sites where a rezoning may also be accompanied by a detailed urban design study or master plan, it is less relevant for large greenfield rezonings which cover hundreds of hectares at a time. A rezoning is fundamentally about assessing if a range of land uses are suitable for particular land. The physical form of that development, if the rezoning proceeds, is assessed at development application stage. The new process needs to emphasise the importance of having the right information to make the right decisions at the right time and resist the current temptation to "pull forward" detail into earlier stages of the process.

The Department must retain a role in coordinating agency input

While the move to delegate more of the rezoning process to local councils for management is generally welcomed, DPE still needs to retain a role, particularly in helping resolve conflicting agency positions and/or eliciting responses from recalcitrant agencies. As noted previously, agencies need to be encouraged to appropriately resource the rezoning process. This may include additional staff or upskilling existing staff so they are better equipped to respond to information requests and resolve issues. We think DPE's Planning Delivery Unit has an important role to play in coordinating and resolving competing agency positions and could also provide responses on behalf of recalcitrant agencies during scoping so that the process does not bog down. There may also be real time and cost benefits derived by establishing a "one-stop-shop" within Government to provide consolidated rezoning advice to proponents, allowing a centre of excellence to evolve in Government.

"Planning by consensus" must cease

Related to the above observations, there has been a trend in recent years for the planning profession to try and achieve consensus where opposing views are expressed either by agencies or the public. In some cases it is impossible to arrive at consensus positions and planners in these cases need to make evidence-based decisions about where the "weight" of the argument needs to lie. If the State has taken a decision to release certain land for urban development, retaining rural views to/from items of environmental heritage should not be a dominant consideration in assessing strategic merit. Again, we think that the Planning Delivery Unit could play a role in determining where the strategic "weight" of a rezoning must lie to help break deadlocks and avoid planning by consensus (which nearly always involves otherwise developable land being given over to non-developable uses).

Councils should be enabled to deal with most inconsistencies with section 9.1 Ministerial Directions

Ministerial Directions are issued over time and, with time, the strategic planning framework can change or evolve to the point that a particular Direction is no longer relevant in certain circumstances. In cases where the strategic framework has evolved in such a way, councils should have the ability to approve an inconsistency with Ministerial Directions. The relevant test would be that councils have followed through on action/s in their Local Strategic Planning Statement (LSPS) which make a Direction no longer applicable. GDC recently experienced the challenge of navigating this process when we proposed to rezone (undeveloped) residential land we owned to employment to meet local demand. The rezoning was technically inconsistent with a Ministerial Direction prohibiting the rezoning of residential land, but consistent with the Council's LSPS and draft Centres and Employment Area Strategy.

Strategically weak rezonings should be called out early and designated as such

The discussion paper asked if a council or the Department should be able to refuse to issue study requirements at the scoping stage if a rezoning application is clearly inconsistent with strategic plans. GDC does not have a firm view on this question, however we do note that this question originally sat at the heart of the original Gateway process over a decade ago. GDC also acknowledges that diverting agency and council resources to manage non-aligned rezonings is not optimal. However, if the new process does allow non-aligned rezonings to be lodged, strategically weak rezonings need to be clearly designated as such during the scoping phase, highlighting those areas where there is no or poor strategic alignment. This will then give proponents firm direction on the likelihood of rezoning success and will help target effort in the documentation phase. If a proponent does not agree with the "non-aligned" designation and the rezoning is ultimately refused, this could provide a basis for a merit-based challenge to the decision.

Lodgement phase

Keeping merit assessment out of the adequacy assessment will be challenging

While the intent to limit the adequacy assessment phase to a simple documentation check is clear, it will be difficult to limit councils' propensity to either require additional scope or policy items be addressed (scope creep) in a rezoning proposal or that amendments to submitted documentation be made prior to exhibition. We recommend that there is a route for immediate escalation if a council either fails to complete the adequacy test in the required timeframe, or if new and previously undisclosed items/studies are requested by a council once it completes the adequacy test.

Exhibition phase

Having the right to comment shouldn't create the impression of a right of veto

The community and agencies should have the right to comment on rezonings during the exhibition phase, ahead of assessment. However, the right to comment should not be confused with the right to approve/refuse a rezoning which needs to rest firmly with the rezoning authority, no matter the weight of popular public opinion for or against a particular rezoning proposal. Documentation should be made available by the Department and local councils during the exhibition process which helps guide the public's expectations regarding the exhibition and assessment process. Ideally, the public

would be more fully engaged in earlier strategic land use planning processes, removing the need for communities to mobilise around particular rezoning proposals. However, experience has shown the community often struggles to engage in wider strategic planning because its relevance/impact at a local level is often hard to convey.

Extra information requests should be tailored to resolving rezoning issues, not development issues

Related to our earlier comments about an emerging propensity for councils to "pull forward" assessment detail into earlier stages of the development process, information requests post-exhibition or during exhibition should relate to resolving the primary consideration of a rezoning: is the land capable of supporting the proposed land use/s? The impact of the proposed land use/s on the land and its neighbours is assessed later in the development application stage, if the rezoning proceeds. The tendency to conflate these two issues must be resisted by the new process.

Assessment and finalisation phase

Proponents should be advised of post-exhibition changes and be invited to comment

If post-exhibition/post-assessment changes are proposed by the rezoning authority, the proponent should be advised of the proposed changes and their comments invited. As the owner of the rezoning proposal, it seems incongruent that a rezoning authority could unilaterally make amendments to the rezoning proposal – even in response to submissions – without advising the proponent of this intention. In extreme cases, a proponent may elect to discontinue a rezoning rather than be subject to a revised rezoning which does not achieve the outcomes the proponent originally sought. Bearing in mind the proponent would have largely funded the rezoning process to this point, the right to make comments on any proposed changes to the proposal seems logical and fair. As with community or agency comments, the proponent must also accept that the right to comment does not bind the rezoning authority to a particular outcome or action in response to a proponent's comments.

Councils should determine rezonings where there is a VPA

Given that councils will deal with the legacy issues of VPAs (ownership and maintenance of the public benefits provided under a VPA) it seems logical for councils to determine those rezonings. A council might elect to refer a VPA-related rezoning to an appropriately qualified Panel for advice, but that should be an option exercised at the Council or proponent's election, time-bound and a once-only occurrence in the life of a rezoning.

New fee structure

Proponents will support reasonable, transparent fees if they improve system performance

A recurring theme in the discussion paper and this submission is the need to resource the rezoning process properly at all stages. Most proponents, including GDC, would support rezoning fees that move towards a cost-recovery structure, provided the basis for calculating the fee was transparent and it improved system performance. Improved system performance could be measured in various ways, but quicker rezoning decisions (to either approve, amend or refuse rezoning schemes) would be prime amongst them.

Planning guarantees should work hand-in-hand with the fee structure

If rezoning fees are based on a cost-recovery model, it is reasonable that a planning guarantee is applied to the rezoning. Some industry commentators have suggested that if process timeframes are breached at *any* stage of the process, DPE should step in and administer the rezoning process in lieu of the local council, in addition to the rezoning authority returning a portion of the rezoning fee in line with the guarantee. We believe this sanction is too onerous and that an alternative might be to offer the proponent a choice: continue with the council or continue with DPIE as the rezoning authority. A partial refund of fees would apply in either case.

New appeals pathways

The right of appeal should be introduced to rezoning applications

We agree with the reasoning in the discussion paper about the potential benefits brought by appeals to rezoning processes, but only at the conclusion of the process. Knowing that appeals could be lodged for "deemed refusals" post-exhibition will encourage rezoning authorities to deal with rezonings in a timely manner. Merit appeals will dissuade rezoning authorities from making ill-considered amendments to rezonings immediately prior to final approval and gazettal, without the proponent's knowledge. As a balance, the concept of a "vexatious litigant" may need to be considered in the context of rezoning appeals, to dissuade well-resourced proponents from making spurious rezoning applications and then attempting to use the appeal system to overturn well-justified refusals. We do not have a firm view whether appeals are better heard by the Land and Environment Court or the Independent Planning Commission. It might be possible for different classes of rezoning appeals to be heard by different authorities, depending on the complexity of the rezoning. However, proponents should not have a choice of pathway to avoid a public perception of proponents "gaming the system" in appeals.

Implementation

Non-legislative improvements should be brought into effect as soon as practical

We would support the staged introduction of the rezoning reforms, with an initial focus on bringing the non-legislative aspects into effect as soon as practical. While we support the option for rezoning appeals, this is a significant change to the planning system in this state requiring specific legislative reform. The notion of rezoning appeals also seems less resolved than the non-legislative improvements canvassed elsewhere in the discussion paper. For this reason, we recommend the other reforms be prioritised and further time be taken to properly scope legislative reforms.

[submission ends]