

8.5 State Government Reform - A New Approach to Rezoning

8.5 State Government Reform - A New Approach to Rezoning

Section	Strategic Planning
Objective	To inform Council of proposals put forward by the State Government to reform the rezoning process and seek endorsement of a submission in response.

Background

The State Government, through the Department of Planning & Environment (DPE), is introducing a series of reforms to the planning system aimed at producing "a *plan-led system – an approach that ensures strategic planning is the foundation for all decisions about potential land-use changes*".

Included in these reforms are:

- an updated *Local Environmental Plan Making Guideline*, released in December 2021 (Attachment 1), and
- a discussion paper – *A new approach to rezonings* – also released in December 2021 (Attachment 2).

The Department states that the intention of these particular reforms is to "*speed up the process for changing planning rules on a particular piece of land – known as rezoning*".

The Local Environmental Plan Making Guideline is now in force, applying to any rezoning proposal received after 15 December 2021.

The Discussion Paper is draft – setting out ideas and suggestions for wider reforms, and was on exhibition until 28 February 2022.

Given the complexity of the proposals and suggestions, and the timing in relation to the new term of Council, staff requested an extension of time to make a submission on the draft Discussion Paper, as did many other councils.

The DPE declined to extend the deadline for submissions, indicating that a submission from Council staff should be made prior to 25 February and that a final Council submission could be made up until 25 March 2022; noting however "*Consideration of final submissions received after 25 March 2022 cannot be guaranteed*".

Based on that advice staff lodged a submission on 25 February 2022. A copy of that submission is contained in Attachment 3.

There are a number of process changes established in the new Guideline, which are summarised below. The Discussion Paper looks to expand on those changes, to further reform and streamline the process.

This report provides information about the changes, in place and proposed, and provides a summary of the submission prepared by staff to the Department on the Discussion Paper.

8.5 State Government Reform - A New Approach to Rezoning

Key Issues

- Categorisation of rezoning proposals, with associated process refinements and benchmark timeframes
- Potential for a mandatory pre-lodgement step
- Potential for a merit appeal process
- Potential "planning guarantee", including a proposal that application fees are refunded if benchmark timeframes are not achieved

Discussion

The rezoning process refers to changing the zoning of land or changing the planning controls that apply to land, and provides the process for transferring strategic plans into statutory controls.

Rezoning can occur at a property scale or a wider local scale and generally involves the making of amendments to the applicable Local Environmental Plan.

Currently, this is achieved through a *planning proposal* (the document describing and justifying the changes proposed) and requires support and approval at both local Council and Department of Planning and Environment levels.

As part of the State Government's planning reform agenda, the newly released *Local Environmental Plan Making Guideline* (Attachment 1) now applies to the preparation and processing of LEP amendments (planning proposals).

The Updated Local Environmental Plan Making Guideline

The new Guideline was released in mid-December 2021. It now applies to all rezoning proposals lodged after 15 December 2021.

The Guideline introduces new categories for rezoning proposals:

- *Basic* – low impact proposals such as 'housekeeping' amendments to correct errors,
- *Standard* – change zoning or alter standards where the proposal is consistent with relevant local and State strategic plans and policies,
- *Complex* – where the proposal is inconsistent with a regional plan or Council's Local Strategic Planning Statement, or where it would require a significant increase in infrastructure, or responds to a new policy or strategy, and
- *Principal* – creating or significantly amending a new LEP for the whole of a Local Government Area

The majority of rezoning proposals that Council deals with, particularly those initiated by land owners, will be *Standard* in terms of these categories.

The updated Guideline sets out the LEP making process (Figure 1) and establishes benchmark timeframes relevant to the various process stages. The intent of the benchmarks is to improve assessment times across the State.

8.5 State Government Reform - A New Approach to Rezoning



Figure 1: LEP making process overview

The pre-lodgement step is new to the documented process, but the guideline notes that it is not mandatory.

The intent of the pre-lodgement is for proponents to brief councils about the proposed rezoning, preferably meeting with Council staff and relevant State Government agencies to obtain guidance on the information that will be required to support the project.

The key change in the new Guideline is the introduction of benchmark timeframes, which are:

8.5 State Government Reform - A New Approach to Rezoning

Stage	Maximum Benchmark Timeframes (Working Days)			
	Basic	Standard	Complex	Principal
Stage 1 – Pre-lodgement	30 days*	50 days*	60 days*	20-30 days*
Stage 2 – Planning Proposal	80 days	95 days	120 days	40 days
Stage 3 – Gateway Determination	25 days	25 days	45 days	45 days
Stage 4 – Post Gateway	20 days	50 days	70 days	160 days
Stage 5 – Public Exhibition & Assessment	70 days	95 days	115 days	95 days
Stage 6 – Finalisation	25 days	55 days	70 days	80 days
Total (end to end)*	220 days	320 days	420 days	420 days

* Note: Pre-lodgement is currently not a statutory requirement; days have therefore not been included in total benchmarks.

Discussion Paper – A New Approach to Rezonings

This discussion paper was released in December 2021 to outline options to reframe the existing rezoning process, with the key objectives being:

- simplifying the rezoning process and minimising duplication,
- improving transparency,
- improving consultation processes,
- reducing processing times,
- creating more certainty and consistency.

The discussion paper adopts the rezoning categories and benchmark timeframes in the new guideline (see above) and suggests a number of significant changes to the existing rezoning process, including:

- making the pre-lodgement stage mandatory for every rezoning proposal,
- removing the Gateway Determination stage for basic and standard proposals, with Council to manage and control all stages of those rezoning proposals,
- 'automatic' public exhibition of proposals on lodgement (organised through the Planning Portal),
- requiring that proponents address all submissions to the public exhibition,
- introduction of a "planning guarantee", whereby an applicant's fees would be refunded if benchmark timeframes are not met, and
- introduction of a merit-based appeals pathway where applicants are not satisfied with Council's determination of a proposal or where a decision has been delayed (i.e. benchmark timeframes not met).

The Discussion Paper was on exhibition until 28 February 2022.

8.5 State Government Reform - A New Approach to Rezoning

Given the complexity of the proposals and suggestions, and the timing in relation to the new term of Council, staff requested an extension of time to make a submission on the draft Discussion Paper, as did many other councils.

The DPE declined to extend the deadline for submissions, indicating that a submission from Council staff should be made prior to 25 February and that a final Council submission could be made up until 25 March 2022; noting however *"Consideration of final submissions received after 25 March 2022 cannot be guaranteed"*.

Based on that advice staff lodged a submission on 25 February 2022. A copy of that submission is contained in Attachment 3.

The staff submission noted a number of positives in the Discussion Paper's content, including support for the mandatory pre-lodgement process and the greater autonomy for councils to process and determine applications.

The submission outlined significant concerns, however, regarding the suggested "planning guarantee" and the potential for a Land & Environment Court merit-based appeal.

A summary of the submission comments is outlined below:

Pre-lodgement

- Making this a mandatory requirement is a good step forward.
- Inclusion of State Agencies in pre-lodgement stage is welcome, but will require additional resourcing of agencies at regional level.
- Council needs to be able to stop a proposal where it is clearly inconsistent with state, regional or local strategies.

As set out in the discussion paper, Council could advise a proponent that the proposal is strategically inconsistent, and therefore that Council will not support the proposal. However, under the process suggested, the proponent would still be able to formally lodge a proposal on the planning portal and have it proceed immediately to public exhibition.

Council would still be able to refuse to support the application, at which stage the appeal mechanism becomes problematic (see below).

Lodgement/ Exhibition

- Applications will be lodged on the planning portal.
- Council will have seven days to check that the submission is complete – this could only be a cursory check to see that the reports/ documents requested through the pre-lodgement process have been provided. There will not be sufficient time to assess whether those reports/ document appropriately address the relevant issues.
- Once Council confirms that the application is complete, public exhibition will automatically commence, with Council given an additional seven days to send out notification letters.

The staff submission outlines concern that this timeframe is too tight and recommends that exhibition of proposals should not occur until it can be

8.5 State Government Reform - A New Approach to Rezoning

determined that reports/ documents submitted have adequately addressed relevant issues.

A brief cursory review of documentation is really not sufficient in a strategic planning context and sacrifices considered planning outcomes.

It also has the potential to generate unnecessary concern in the community making the exhibition process inefficient and impacting timeframes (e.g. issues that can be easily addressed pre exhibition may generate extensive objection if allowed to progress to exhibition unresolved).

The staff submission contends that there needs to be a step whereby Council staff have an opportunity to review the completeness/ merit of the information submitted before the material is exhibited for public comment.

This would avoid the need for re-advertising of proposals, where reports and assessment need to be updated – a common occurrence in rezoning applications.

It is also reasonable for the broader community to expect that rezoning proposals are given careful consideration relative to strategic plans that have been developed with the community.

Post Exhibition Assessment

- Staff support the requirement to have the proponent review submissions and respond to issues raised.
- Staff also support having the assessment 'clock' start (i.e. start of the benchmark timeframe for this stage) after receipt of the proponent's response to submissions.

Planning Guarantee/ Deemed Refusal

The suggestion for a planning guarantee is modelled from the UK planning system, which provides for a fee refund if councils take too long to assess the application. The intention is to encourage the timely progress of rezoning applications.

The model suggested in the discussion paper involves:

- The **assessment clock** starts once the proponent submits the response to submissions and any amended rezoning application to Council for assessment and finalisation.
- **Timing** is based on the benchmark timeframes for that category of rezoning application (see table above) and act as 'deemed refusal timeframes' (i.e. a proponent is able to assume the application refused and lodge an appeal once the timeframe is exceeded).
- **Refund amount**, whether full or a portion and staged, so that the longer a rezoning authority takes, the higher the refund (this could mean, for example, an additional 10% refund for every week the rezoning authority does not meet the determination timeframe).

8.5 State Government Reform - A New Approach to Rezoning

- An **extension of time** would be required if it becomes clear that more time is genuinely required. Extension requests and agreements would be in writing and agreed to before the end of the determination timeframe. Only one extension can be agreed to and the extension cannot be longer than the original finalisation time for that category of rezoning application.

The staff submission strongly objects to the requirement to refund fees.

A refund does not recognise that, regardless of the outcome, resources and expertise are applied to the processing of applications.

Local Government is struggling to resource planning functions and more pressure from a time and financial perspective does not support delivery of better outcomes for the community.

A refund of fees will push councils into the need to prematurely refuse applications in many cases, i.e. where the opportunity remains to negotiate a positive outcome despite the end of the benchmark timeframes.

Providing the opportunity for councils to negotiate positive outcomes is significantly preferable to forcing refusals and subsequent appeals/ reviews.

Appeals Pathway

The discussion paper indicates the Department's intention to introduce an appeal mechanism relating to a final application determination, or in the 'deemed refusal' case, where benchmark timeframes are not met.

The paper outlines two options, being appeals heard by:

- the NSW Land & Environment Court (LEC); or
- the Independent Planning Commission of NSW (IPC).

The staff submission supports the notion of appeals, but strongly suggests that the LEC is not the appropriate option, given the complexity and costs associated with LEC appeals.

The Court, operating in relation to Development Application decisions, is a statutory body not suited to strategic planning decisions.

While the IPC might be a better option than Court, particularly given its independence from government, it is considered to be too far removed from local strategic planning.

The staff submission suggests that the Regional Planning Panels are the appropriate 'third-party' body to deal with rezoning appeals, given their local knowledge and experience.

These Panels are made up of appropriately qualified individuals familiar with local environments and could be authorised to hear rezoning reviews/ appeals with little or no change to current protocols or practice.

The Panels are also likely to address matters in a much shorter timeframe than either the Court or IPC process can.

8.5 State Government Reform - A New Approach to Rezoning

Fees

The discussion paper raises a number of options regarding rezoning application fees, including statutory fixed fees, variable fees, or a combination.

The staff submission suggests that a fixed fee structure for any part of the process that is carried out by councils is not supported.

LEP amendments vary in complexity and context and councils should be able to determine appropriate fees for the work undertaken.

Amendment processes should not have to be subsidised by the community, particularly given the substantial financial gain that most amendments provide for proponents.

Timely processing of proposals needs to recognise that those carrying out the assessment work need to be suitably resourced.

Next Steps

The Discussion paper was exhibited for public comment until 25 February 2022, although the DPE indicated that it would be possible to provide a further submission by way of Council resolution, until the end of March.

The Department has indicated an intention to introduce system changes in the second half of 2022. The changes are likely to require a mix of legislative amendments and policy updates. Details are unlikely to be available for a number of months.

Delivery Program Strategy / Operational Plan Activity

The management of LEP amendment requests and the associated assessment and processing of such requests is referenced in action HE3.1j of the Delivery Program and Operational Plan 2020 – 2024.

Community Consultation Policy

Changes to the rezoning process as suggested may require updates to Council's Community Engagement Policy, dependent on final details of the process adopted.

Financial / Risk Considerations

The changes as suggested in the discussion paper have financial implications, dependent on the final fee structure adopted and the presence or otherwise of a "planning guarantee" involving a fee refund. Introducing Land & Environment Court appeals would also have potentially significant implications for Council's legal budget.

Options

As outlined, the DPE required submissions by 25 February 2022, and cannot guarantee that further submissions from Council will be considered after that date.

8.5 State Government Reform - A New Approach to Rezoning



The staff submission lodged with the Department is Attachment 3 to this report.

Council has the option to endorse the staff submission, to amend it, leave it as a staff submission (not Council endorsed) or to advise the DPE that it wishes to withdraw the submission.

RECOMMENDATION

That Council endorses the submission regarding the Discussion Paper – A New Approach to Rezoning and that the Department of Planning and Environment be advised accordingly with Council urging the Department to closely consider the concerns and issues expressed.

Attachment(s)

1. Local Environmental Plan Making Guideline Dec 2021 
2. New Approach to Rezoning Discussion Paper December 2021 
3. Rezoning Discussion Paper - Staff Submission 