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Ms Paulina Wythes
Director, Planning Legislative Reform
Department of Planning, Industry and Environment

Shellharbour City Council Submission on Discussion Paper A New Approach to Rezoning.

Thank you for the opportunity to comment on the Department of Planning and Environment's (DPE) Discussion paper – A new approach to rezonings

This submission has been prepared by Shellharbour City Council staff and does not necessarily represent the views of the elected Council due to the exhibition of the discussion paper occurring so close to the local government elections and an inability to brief and report this complex matter to newly elected officials.

Generally speaking, the approach to rezonings as outlined in the discussion paper is not supported. This submission highlights the key areas of concern and the reasons for those concerns.

There appears to be an inherent contradiction contained in the "New Approach" as outlined in Part B of the discussion paper. On page 12 of the discussion paper, it is stated that new approach will "create a streamlined and efficient process for LEP amendments that align with strategic planning objectives" but "shifts all merit assessment to after exhibition" of a rezoning application.

Shifting fundamental assessment of strategic merit and alignment with strategic planning objectives to after exhibition, and at the last stage, does a number of things:

1. It creates inefficiencies by processing an application and keeping it in the system even though it has no strategic merit or alignment;
2. It requires the proponent to do all studies and assessments up front without any indication of the likely outcome of the application. This is a costly and time consuming process.
3. It potentially creates assumptions in the community that what is exhibited must have some degree of support by Council, otherwise they would never have put it on exhibition. This is because in all other cases, the Council sets the strategic direction for an area in partnership with the community (e.g. Community Strategic Plan, Local Strategic Planning Statement)

Rezoning applications are not development applications. The discussion paper appears to see merit in treating both the same but misunderstands the fundamental difference between the two.

Development applications are prepared and lodged by private parties based on the permissibility of a use as contained in an LEP or other environmental planning instrument. They are placed on public exhibition early because of the basic assumption that they generally align with the planning framework established for an area. Otherwise, it would be prohibited development, and the application would be rejected or refused prior to exhibition.

Rezoning applications are prepared and lodged to fundamentally change what is permissible or prohibited in an area by changing the planning framework. It is not about working within the adopted rules. It is about commencing a legal process to change the rules. You cannot assume alignment with Council or community expectations without assessing an application for its strategic merit. Why would you put that to a community via a public exhibition, without any merit assessment, and ask them to engage in a meaningful and rationale way? The discussion paper on page 26 suggest that it is to ensure that there "is an opportunity for the public to scrutinise rezoning applications in an open and transparent way". This is a misguided assumption because there is no transparency if there has been no assessment of planning validity in the first instance. It is simply information submitted by a proponent in support of their claim.

There are no efficiencies to be gained in this approach for councils or proponents. Benchmarking will not assist. On page 17 of the discussion paper, the question is asked, "Do you think benchmark timeframes create greater efficiency and will lead to time savings?". The question is non sensical unless the answer is "no". Benchmarks do not in and of themselves create efficiencies. Efficiencies are gained through establishing efficient processes, not through applying arbitrary benchmarks that will most likely never be achieved.

For example, on page 16 and 17 of the discussion paper, Category 1 "Basic" rezonings have a benchmark of 26 weeks. Category 1 rezonings include the reclassification of land. Such a rezoning application has added complexities under the NSW Local Government Act, including public hearings conducted by an independent chair that must take place after the conclusion of the public exhibition and has its own public notification processes and timeframes. If you do not understand the process, how can you benchmark it?

The rezoning benchmarks also do not distinguish between council led or proponent led rezoning applications. There is a big difference between a council implementing its Local Strategic Planning Statement or responding to the State Regional Plan; and a potentially speculative proponent led rezoning application that has no strategic merit assessment until the last stage of the new process.

This is confirmed on page 26 of the discussion paper:

> Under the new approach, the only opportunity to refuse a rezoning application if it lacks strategic merit is after exhibition, in the final assessment stage.

There is no certainty for the proponent in this system until the end of what appears to be a very arduous process. It is arduous in terms of both time and cost. The proponent has to do all studies and investigations upfront with no indication from the determining authority whether, in its opinion, there is any strategic merit in the proposal until the very end of the process.

It is arduous for the community as they get no assistance from their council as to whether the exhibited proposal is actually in line the council's strategic direction for an area. It is merely the proponent's interpretation of the council's strategic direction that is put on public exhibition.

This also limits councillors and council staff ability to meaningfully engage with the community during exhibition. No advice on the strategic merit or validity of the proponent's arguments for the strategic merit can be made because this is not allowed to occur at this point in the process under the new approach.. The community is effectively isolated from assistance. This is not genuine community engagement on strategic planning issues. It is merely notification. It is also worth noting that the discussion paper makes no reference to the Community Participation Plans for Planning Functions that all councils are required to have. Neither does it address the intent of these Community Participation Plans. Instead the discussion paper places emphasis on having the application viewable on the NSW Planning Portal and potentially the Service NSW app. (page 27).

This is not the case with the current system as staff and councillors formally and openly consider a rezoning application and then decide whether there is strategic merit before requesting it be placed on public exhibition. Through this method, local councils can continue to engage with their local communities throughout the process in a meaningful way.

Another key plank of the new approach is that it is the proponent, not council as determining authority, that liaises directly with the state agencies. This has the potential for misinterpretation and misuse. Legally it is currently the determining authority and/or DPE that needs to be satisfied that state agencies concerns, and issues associated section 9.1 directions have been addressed. This is because the councils and the state agencies bear the long-term risks and liabilities for any issue that has not been properly addressed. As a result it is difficult to understand why councils are expected to take the proponent's word that state agency issues have been resolved? The new approach also fails to recognise the existing collaboration between councils and state agencies in resolving planning issues. It also appears to side line the newly formed Planning Delivery Unit in assisting proponents, councils, and state agencies in resolving planning issues relating to rezoning applications.

In relation to rezoning application fees, the discussion paper does not set a clear argument for moving away from the current situation where councils have the ability to set their own fees.(page 32) There are too many variables in the ways different council's are set up and resourced as well as the complexities of the diverse types of rezoning applications and how they are assessed.

Many councils, like Shellharbour, have structured their fees to recognise the different steps in the process. Therefore, proponents are charged in stages depending on how far a rezoning application progresses. The new approach will not allow for this staged assessment, as every application goes through the same process.

The discussion paper talks about the UK model of planning guarantees and refunding of fees if a determining authority takes too long to assess planning applications. Even if a fee is refunded, the determining authority must continue the assessment. This approach seems punitive and regressive. It should not form part of any new approach to rezonings in NSW. As stated elsewhere in the discussion paper, many sources of delays relate to finance and resource issues faced by councils. Further penalising councils will only add to the existing problem.

Part C of the discussion paper talks about appeals pathways for rezoning applications. It appears to lean away from the current use of planning panels for rezoning reviews and the Independent Planning Commission for gateway reviews.

Alternatives discussed in the paper include the Land and Environment Court or a revised role for the Independent Planning Commission. Decisions on appeal mechanisms and appeal bodies seem premature until a clear approach is established on how rezoning applications are to be assessed. With that said, adopting a development application approach to rezoning application appeals further blurs the line between strategic and statutory planning, and further encourages speculative rezoning applications. Whatever the pathway, the appeal body must have clear and transparent rules of operation that are enforceable with a high degree of oversight by DPE or other government body.

A final comment is the apparent lack of integration of this discussion paper with other planning reforms being proposed by the State. For instance, the Draft Design and Place SEPP (submissions close the same day as discussion paper) has a requirement to refer a planning proposal to a design review panel if the proposed draft Ministerial Direction applies. This is potentially a significant and new step in the process for the assessment of planning proposals, but no reference in the discussion paper or the proposed new approach, nor allowance in the benchmarks.

Council would welcome the opportunity to discuss this submission further with DPE. You can contact me via email [redacted] or via phone [redacted].

Yours sincerely

[redacted]

Geoff Hoynes

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