

Public Exhibition – Discussion paper: A new approach to rezonings

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Submission

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Discussion paper: A new approach to rezonings

These changes appear to largely be addressing what is actually a shortfall with the State's management of planning proposals. The State's reaction being to remove itself from the process in relation to the planning component.

In summary Goulburn Mulwaree Council (Council):

- Considers the new pathway suggested is flawed due its heavy reliance on a non- mandatory scoping phase; will encourage unsolicited applications; will not ensure adequate time or empowerment of the Council to vet and consider applications prior to exhibition; will result in exhibition fatigue and diminish the reputation of Council and the State.
- Considers that it will be a huge waste of resources and a public distraction if proposals with no strategic merit cannot be vetted prior to exhibition.
- Recommends further improvements to processing of proposals through improved resourcing of and guidance to State agencies to ensure proportionate and timely input.
- Recommends introducing "stop the clock" provisions to ensure proponents remain engaged in the process.
- Objects to and will not support any change to force councils to enter into a planning agreement by a proponent or by a Planning Panel etc.
- Agrees with the new fee structure (as Council currently uses a similar process). But would only support fixed fees.
- Objects strongly to the "planning guarantee refund" based on the stipulated benchmarks. This should be a matter for individual councils to consider as currently most councils would have mechanisms to consider waivers/refunds where warranted.
- Strongly objects to the proposed option of a Land and Environment Court (LEC) appeal pathway (outside of that already available in s.3.27 of the Act) for planning proposals.
- Recommends amending the current review process to allow a later point of review should matters require mediation/intervention from an impartial third party such as the Regional Planning Panel or Independent Planning Commission.

General Comment

- Is concerned that the changes proposed in the *Draft Design and Place SEPP* may have a significant impact upon the timing and implementation of the new approach to rezonings outlined in the discussion paper.

The new framework would legitimately raise the question as to whether we just give up on any strategic process and just allow development applications for “prohibited development”?

Ultimately the issue with dumping the responsibility for all planning proposals on the council and the respective State agencies is that the State agencies only consider their respective disciplines and therefore cannot be expected to provide an overarching protection against bad planning. This role belongs to both councils and the Department of Planning and Environment (DPE) with the Department providing a state wide “holistic” perspective of planning proposals that neither councils nor other State agencies provide. Is “planning” coming out of the title of the DPE, maybe it can follow “Industry” somewhere?

Part A: Background

The need for reform “case for change” justification states that:

“Since 2019, the department has worked to clear the backlog of older planning proposals and reduce processing times, which was down to an average of 89 weeks as of 30 June 2021.”

This is an improvement over the earlier observation that a planning proposal could take several years to finalise. This would suggest that considerable improvement has already occurred within the existing framework?

The delays mentioned do not seem to mention the failure of planning proposals to adequately address Ministerial Directions nor delays for the submission of technical studies from reluctant proponents? This is the biggest area of concern in our experience with delays with the process.

Additionally, the level and quality of State agency input/engagement is highly varied. Some agencies do not have a clear understanding of the difference between a planning proposal and a development application demonstrated in their advice. This is an area of co-ordination and oversight that DPE could immediately improve? Agency advice needs to be timely, proportionate and contextual.

Some State agencies are better funded and resourced than others and return considered submissions in the required time frames – other agencies can be unresponsive or late, or miss the mark entirely with the requested information (in terms of scope and context). Guidelines should be provided for each State agency in relation to the consideration of planning proposals as their role is not clearly articulated in relation to this.

The “case for change” seems to be very biased towards the “benefits” change, largely being to improve timeframes. It does not seem to balance this with a view of the impacts and what may be lost as a result of the changes?

Strategic planning is a process that should deliver benefits to the community as a whole through the effective implementation of land use planning through the local environmental plan. This process belongs to the public and rightly should have a high level of scrutiny from both the Council and the State. When land is rezoned it can result in a huge value uplift for the owner/proponent. This should only occur where there is an overall public benefit for this to occur. This process is not equivalent to the development application process, where the area has already been

deemed to be appropriate for certain types of land use pending an assessment of specifics as outlined under Section 4.15 of the Act.

**Part B:
The new
approach**

Categorisation

Council generally supports the proposed categorization of planning proposals into basic, standard, complex or principal LEP. This actually aligns with the current Council fee structure for planning proposals.

Scoping

This is a non-mandatory phase and therefore potentially makes it very difficult for councils, agencies and the public to ensure that the next phases are meaningful?

A lot of pressure will be placed on council's to provide a preliminary appraisal of submitted proposals at this stage. Goulburn Mulwaree Council currently offers unlimited meetings at no cost to proponents for planning proposals (as this is covered in the commencement fee). Despite this GMC still receives "cold" proposals with no prior contact regardless of Council's or DPE's PP Guidelines? GMC would question the benefit of including the scoping component if not mandatory for all parties?

Council's should be allowed to refuse to provide the requirements to move on to the next phase if a proposal is clearly inconsistent with the strategic framework. Currently we spend a lot of time defending strategies, investing in the time at the beginning to prevent things which are clearly inconsistent (without justification) from proceeding. This saves the Council, agencies and the public from wasting time and resources. Additionally it means that proponents are not misguided from the start. This proposed process could potentially incite greater speculation and greater wastage of government resources at all levels?

As previously mentioned, some State agencies are more engaged and resourced than others. Even as a Council there are some agencies which we have difficulty in contacting (with agencies hiding behind generic email addresses and complex structures where responsibility is not clear for particular matters). Again there are agencies where we have phone numbers and direct contact details for relevant staff (for the engaged ones) and others where emails just go nowhere.

In attending the original stakeholder engagement it was clear that much of the development industry frustration was actually directed at the State agencies and DPE (interestingly not so much at the local councils).

Lodgement

It is noted that in Table 3 that the benchmark timeframes differ per category for most stages except for the "Lodgement" phase. This remains a constant 1 week benchmark across all categories.

It is also noted that more time is spent on the "scoping" phase. This is on the presumption that this phase will be undertaken by a proponent as it is not mandatory. It is interesting to note that this phase is also not "mandatory" in the *Draft Design and Place SEPP*.

There is also the significant matter of staff resourcing in smaller and regional councils and the capacity to undertake this within the timeframe.

As currently drafted, the framework is heavily dependent on the scoping phase having been thorough with feedback provided from Councils and State agencies having been considered and ideally adopted in the proposal.

Under the 1 week lodgement phase is the period of adequacy assessment/permission to exhibit. There is a significant difference between an adequacy assessment and assessment and consideration of whether a proposal is supported to proceed? Either way 1 week is not sufficient for either task. The graphic display of the time frame has the 1 week period extending for a proportionately longer component than the other phases as shown below.

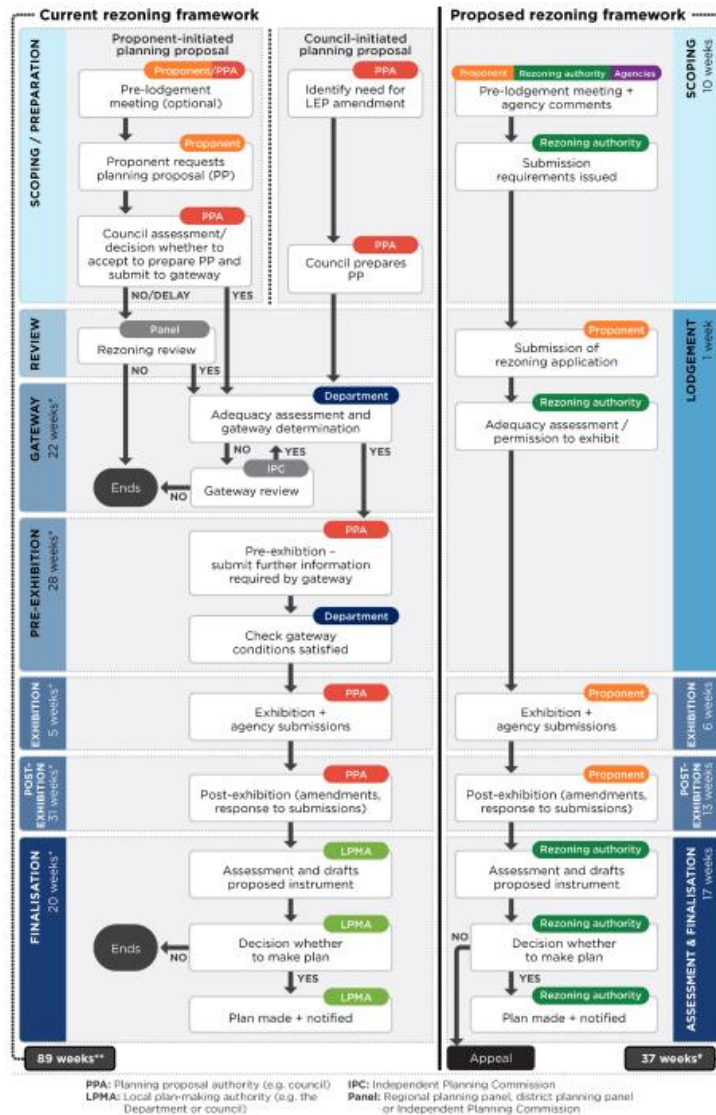


Figure 3. Comparing the current and proposed rezoning frameworks

Council considers that it will be a huge waste of resources and a public distraction if proposals with no strategic merit cannot be vetted prior to exhibition. Council objects to the automatic exhibition of proposals where there is no strategic merit or if Council fails to undertake the check in the required time frame. The loss of resources due to this change could affect the limited resources available to actually assess valid applications with strategic merit?

Exhibition

Where in this process is the planning proposal written? Is it still Council's LEP? Typically Council will make tweaks and changes to scoped proposals from

proponents to ensure strategic alignment. There appears to be no opportunity for this to occur within the one week lodgement and then exhibition. Again, there is an assumption of a successful scoping phase, which may not have occurred?

The graphic also suggests that the proponent is responsible for exhibition? This is a council responsibility under the legislation, is the legislation being changed? The graphic is confusing? If the proponent is to be responsible there will be an implied support from the council which does not seem responsible nor fair. When council undertakes an exhibition for a planning proposal it is fairly standard. If a cashed up proponent were to undertake an exhibition that marketed proposals in a partisan way to bring the public on board, this will cause problems with the later assessment phase. Also what scrutiny can be provided that the proponent has actually undertaken the exhibition appropriately?

As currently proposed and displayed, the framework would suggest that there is no scrutiny beyond a mere checklist "tick a box" exercise for planning proposals once lodged before exhibition. This could result in an overload of proposals going straight to exhibition without sufficient strategic merit or council oversight. The public could be put through the exhibition phase for a completely unsuitable proposal for no reason? This is not just about consultation fatigue from the public but also the resources to support the exhibition without any ability to time delivery of exhibitions in a way that staff can provide professional support. Council unlike some State agencies, does provide a phone and personal contact point for community queries.

Submissions

How are the privacy details to be managed for those who make submissions? It is possible that the public may be reluctant to make submissions knowing that they are being assessed and viewed directly by the proponent? This becomes even more concerning in small communities where the proponent may be a friend or neighbour. Council's currently manage this process and redact confidential information. The community understands this and also understands that Council acts as the impartial arbiter. Community confidence in the submission process may be undermined by this process?

Post Exhibition

The response to submissions and amendments to the proposal are to be managed by the proponent. Effectively when the next phase occurs and this is submitted to the rezoning authority, the onus will still be on the rezoning authority to check that this has all occurred and agrees? If all is not in accordance with what it should be, there could be a big delay at this point which would affect the benchmark timeframes for the rezoning authority?

Assessment

The current system already provides some delegations to councils for planning proposals which is usually commensurate to scale and public interest or whether there is a perceived conflict of interest with the relevant council. This approach is considered to be appropriate on a number of levels. Under the current approach, how often do councils argue that they want to be the delegated plan making authority if this is denied at the Gateway?

Furthermore the framework does not account for delays with internal reporting to councillors. Most council's in the regions do not delegate any decision making on LEPS to staff. This means reporting may occur at least twice (with a decision around supporting the PP at the start and post public exhibition). More complex PPs can require re-exhibition due to changes made post exhibition.

Our experience has been that due to public interest or pressure, occasionally at post exhibition phase the Council has deferred a decision or more rarely required re-exhibition. Council's sometimes require briefings before matters are presented and can have a lead in time of 2 – 3 weeks before a matter is presented on a Council agenda. The proposed process combined with the appeals mechanism would potentially put pressure on Councils to delegate further functions to staff. Whilst this may be faster it is questionable whether it is in the spirit of the Act?

Voluntary Planning Agreements – Conflict of Interest

Planning agreements are a two sided “agreement” no other party other than the Council and the proponent should be involved in this. Council should have the right to withdraw support for an agreement just as the proponent can.

When will agreements be negotiated and exhibited in this process?

Planning Guarantee

Council completely disagrees with this part of the discussion paper and proposed reform. There may be absolutely legitimate staffing and resourcing issues that may prevent the achievement of benchmarks. The recent upheaval around staffing and resourcing caused by the pandemic is a classic example of a factor that is totally out of the control of the council to manage. DPE is already aware of the staff shortages in the regions so why suggest such a ridiculous framework? In fact DPE with its myriad of recent planning exhibitions and changes are also a factor (read impediment) to consider for small councils with limited resources.

Councils generally have a process to either waive or refund fees in relation to applications. Council considers that this would be a matter for the relevant Council to consider and should not be mandatory. Fee refund or waiver requests can be dealt with on their merits as each claim is typically different.

The timeframes specified of 1 week for lodgement is ridiculous. If a council only has one planner and they are off sick what happens? This scenario may seem absurd for DPE but the reality is that some councils have minimal resources for strategic planning.



Figure 7. Example of planning guarantee timeframes in rezoning process

Councils would accept “stop the clock” mechanisms being introduced but used as a means to keep the proponent engaged or to allow the application to lapse/be refused.

Part C:
**New appeals
pathway**

Court Appeal Pathway

Council strongly objects to the proposed option of a Land and Environment Court (LEC) appeal pathway (outside of that already available in s.3.27 of the Act) for planning proposals. Council would dispute that the threat of an appeal actually improves delays in the system. Council's experience with Court appeals with compliance matters, development applications and other appeals have usually resulted in protracted proceedings. This is usually at the public's expense. Small councils do not always have a legal budget and funding for appeals comes at the expense of capital works or staff resources (which then exacerbates other issues). The level of time and cost for LEC appeals is disproportionate in many cases to the overall public benefit. Council supports the right for a review process as this is considered to be entirely reasonable but does not consider the ability to undertake LEC merit appeals to be appropriate.

The land value uplift for rezonings is considerably greater than that of a typical development application. It is basically worth a developer "trying it on" given the potential windfall if successful. There is nothing "strategic" about allowing the LEC to effectively determine the local strategic planning of a council. This discussion paper assumes a best case scenario of all relevant strategies being in place to determine strategic merit. Unfortunately the reality for many councils (especially regional councils), is that there is not a complete suite of strategic documents to guide decision making.

Additionally, many regional councils are also the water and sewer authority and consider strategically the combined effects of planning proposals in relation to land use planning more generally as well as forward asset planning and provision for infrastructure (beyond roads and waste). Therefore a LEC appeal could also determine the future of Council's planning for major assets. Furthermore, could this approach mean that if a proponent led proposal is upheld in the LEC that Council could be forced into an agreement (which is meant to be voluntary)?

It is noted that the proponent led appeals in the discussion paper are to be the sole responsibility of the Council. This conveniently leaves the Department of Planning and Environment and State agencies out of any legal costs or obligations. Similar to integrated development applications, councils could wear the costs of proceedings even when defending advice provided by State agencies?

There is also the question of the suitability/qualifications of the LEC assessors to effectively be strategic planners?

There is also the small question of separation of powers between the government and the courts? This proposal would appear to be handing over the policy making power of government to the LEC? This is not an appropriate pathway for planning. Again, Council questions what actual role is DPE is playing in this process given it is the State's planning agency?

Another option could have been simply reviewing and amending the current review process to allow a later point of review should matters require mediation/intervention from an impartial third party such as the Regional Planning Panel or Independent Planning Commission?

**Part D:
Implementation**

There is no consideration of how smaller councils can implement these changes in relation to resources and timing? The implications of opening up the appeals process would also have significant implications on staff resources and council budgets.

There is also the impact of the implementation of Draft Design and Place SEPP as this SEPP requires at PP stage that a DCP which is compliant with the SEPP is either in place or that a site specific DCP will be required. This could mean that drafting of a site specific DCP will be required or alternatively projects will be on hold until the comprehensive DCP is updated?