



25 February 2022

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

*Submitted via the NSW Planning Portal*

Dear Ms Wythes,

### **A New Approach to Rezoning – Discussion Paper**

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Thank you for the opportunity to comment on the New Approach to Rezoning Discussion Paper. The Department's consultation approach and its effort and time in briefing councils during its exhibition is appreciated.

It is understood that the aim of the Discussion Paper is to outline and seek feedback about concepts and options for streamlining and reducing planning proposal timeframes and processes. It is further understood that some reforms have already been implemented through the *Local Environmental Plan Making Guideline, December 2021*.

The following comments identify Hornsby Council's key concerns with the proposals in the Discussion Paper. They are officer level comments only as the matter has not been reported to the elected Council for a formal view or resolution.

#### **1. General comments**

Council encourages planning reform and improvement and supports the aims and objectives of the reforms to develop a system that is transparent, faster, more certain, easier to use. However, these objectives should be balanced against the need for quality decision making in the best interest of the local community. Hornsby is committed to a place-based approach which achieves environmental, economic and social outcomes for the benefit of our community.

#### **2. Discussion Paper Part A: Background**

The summary of issues within the current framework outlined in Part A of the Discussion Paper reflects the issues experienced by Hornsby Council staff in navigating the current Planning Proposal process. However, as outlined below in this submission, the new approach appears to be aimed at improving the framework for private proponents at the expense of the autonomy of councils to uphold their strategic plans and visions for their area.

#### **3. Discussion Paper Part B: The New Approach**

##### **New terminology**

The proposed use of the term 'rezoning application' in place of planning proposal, whether rezoning is involved or not, is confusing. Planning Proposals can relate to requests to rezone land or other

changes to a planning instrument and the blanket term 'rezoning' for any LEP amendment is incorrect and may not reflect the true intent of a proposal.

### **New categories and timeframes**

It is understood that the planning proposal categories outlined in the Discussion Paper now operate under the LEP Guidelines 2021. The following suggestions are made in relation to the categories and associated processes.

- Simpler processes for some Category 1 (Basic) LEP amendments could be considered for removing a local heritage item from an LEP if its demolition or removal has been legally approved and has subsequently occurred, or the item no longer exists due to natural disaster or similar circumstance.
- For a State listed heritage item or an archaeological site, simpler processes could also be considered for efficiently aligning LEP listings, descriptions and maps to amendments made separately under the Heritage Act or the National Parks and Wildlife Act.

The following comments are made in relation to the proposed benchmark timeframes for each category:

- The benchmark timeframes, if implemented, should be just that – benchmarks. There should not be punitive consequences attached for councils if the timeframes are not met.
- Strict timeframes may discourage working with proponents to achieve quality, merit-based outcomes and may lead to councils rejecting more proposals due to financial/court risk, adding to costs and decreasing efficiencies overall.
- Further justification for the identified timeframes at each step of the process is needed, or in particular, the need for punitive consequences such as planning guarantees or appeal rights to be attached to them.
- Council's experience through the planning proposal process has been that the greatest delays are as a result of DPE involvement in the process. Therefore, removal of DPE from the process will achieve significant time savings. Do the remaining timeframes reflect an existing average, removing Gateway processes?
- Timeframes should be expressed as total normal working days and should clarify that weekends, public holidays, a three-week Christmas period shutdown and days subject to an emergency declaration, are not included in timeframe totals.
- The reforms should introduce a yearly review of benchmark timeframes to identify those that on the ground operation indicates are not realistic.
- Timeframes should only commence from lodgement – they are not relevant (i.e., scoping) until such time as a proposal has been submitted as pre-lodgement processes are beyond the control of the Council.
- Benchmark timeframes should be included for State Agency referrals not just councils.

### **New roles**

The Discussion Paper sets out and changes the roles of various parties in the planning proposal process but does not include any discussion about the role of the community, or its rights and expectations with regards to land use planning. This is a significant oversight in the review and reflects an industry focus approach to the reforms at the expense of community benefit. The Department is encouraged to comprehensively investigate the community and social impacts of the reforms before progressing any legislative changes.

#### *Private Proponents*

At present, local and state governments exercise a legislated role on behalf of the community to initiate and/or progress local planning instruments or amendments to them. The reforms contemplate transferring that role for private planning proposals to an individual or business via statutory recognition. Concerns are raised with probity, equity and fairness in this approach as follows:

- This would diminish Council's role and reduce the importance of making or amending local controls to a business option and private property right.
- Statutory recognition would provide private proponents with rights not afforded to other persons who may also have a legitimate reason to be involved in land use planning outcomes.

#### *Councils*

Providing greater autonomy for councils to prepare local controls and/or progress changes in accordance with its strategic priorities is supported. However, for private proponent initiated proposals, the following concerns are raised in regard to Council's role

- Not enough autonomy is given to allow councils to turn away or refuse exhibition of proposals that do not have strategic merit or community benefit.
- The reforms would compel councils to potentially progress to exhibition a private planning instrument even it does not support it, an inherent conflict of interest.
- The reforms appear to reduce Council's role in a private planning proposal to service delivery in the interests of private financial benefit while simultaneously exposing Council (thereby the community) to financial loss if a private proponent is dissatisfied with the outcome.

#### *DPE*

Council is supportive of the proposed new system that removes the Department from detailed local plan making and Gateway determination and review as it will result in timeframe efficiencies.

However, the proposed reforms are unclear with regards to the extent and specifics of the Department's comment, support, case management and monitoring role, and how that role may in turn impact Council's role and timeframes as the rezoning authority for most plans.

It is unclear how the proposal to allow councils to approve inconsistencies with Ministerial Directions would work. It would appear to diminish the importance of the Ministerial Directions and question the purpose of them in the first place if councils can decide on inconsistencies.

#### *State Agencies*

It is unclear how State Agencies will be compelled to participate in the various phases of a planning proposal. Assumed concurrence from agencies is problematic where supporting commitment of infrastructure is required. The following is suggested:

- A central agency within the Department should be established to ensure agency responses are provided within timeframes.
- It is suggested that the reforms are not implemented until agency engagement and referral processes are identified and mutually agreed.

### **New Steps**

#### *Scoping*

Hornsby Council already offers pre-lodgement meetings for proponent-led planning proposals and the approach to include a mandatory pre-lodgement stage is supported. However, the following concerns are raised with the 'scoping' step outlined in the proposed new framework.

- The Discussion Paper states that merit assessment is not intended at the Scoping stage, yet councils will be required to formulate an opinion about whether a proposed plan is consistent with strategic plans and identify studies needed. This would require some merit assessment.
- The scoping report as defined would not provide enough detail to form a consistent opinion or identify all studies.
- As part of the scoping process, councils should be able to refuse to provide lodgement requirements if the proposal lacks merit. A 'do not pass go' provision to prohibit lodgement should be triggered when Council has advised in writing during scoping that a proposed plan is unsupportable.

- Concern is raised that councils would be required to resource scoping at short notice. Timeframes should be removed from the scoping process. Benchmark timeframes for scoping should not be established now as it is a new concept and realistic timeframes are difficult to identify.
- Alternatively, a mandatory minimum 30-day notice of intention to council to commence a scoping phase should be introduced to provide councils with time to plan for and allocate resources.
- The process should include submitting a draft planning proposal package to council at its request prior to formal lodgement for review and feedback and an option for councils to require more than one scoping meeting.

#### *Lodgement*

Lodging planning proposals through the planning portal has merit. However, one week to review the adequacy of planning proposal for exhibition is insufficient, except perhaps for single issue Category 1 (Basic) proposals with limited geographic impact or little likely community interest. It is suggested that:

- The adequacy review duration for Category 2 and 3 planning proposals is extended to 10 working days if a draft planning package has been previously submitted to council and agreed, and up to 20 working days if it has not.
- Clearer grounds to accept or reject a planning proposal at lodgement need to be included in the LEP Guidelines.

#### *Exhibition and Post Exhibition*

The specific exhibition and post exhibition roles and requirements of council and a proponent are unclear. It is understood that a private proponent would be responsible for exhibiting their own plan, which raises the following concerns:

- Inconsistency with Council's Participation Plan may cause confusion, angst, and concern, as the community will not understand that an exhibited plan is not Council's.
- The reforms must acknowledge the legitimate role of Council Participation Plans and require exhibition and consultation compliance.
- Considerable Council resources could be spent referring inquiries, forwarding submissions, and dealing with media inquiries etc, adding to costs overall and decreasing efficiencies.
- The exhibition timeframes proposed in Discussion Paper for Category 1 and 2 proposals appear reasonable but timeframes for many Categories 3 and 4 proposals may not be adequate.
- The post exhibition timeframes proposed appear appropriate for Category 1 and most Category 2 proposals but are unlikely to be sufficient for many Categories 3 and 4 proposals
- Substantial amendment is often required in response to submissions for complex proposals and the post exhibition phase is likely to include active engagement and negotiation between a proponent, the Department, agencies, and the plan making authority.
- Concerns are raised with regards to private proponents receiving, summarising, and responding to submissions. Careful review is required concerning privacy legislation and provision of personal information in consideration of this proposal. Privacy and intimidation issues could arise, and the community is unlikely to accept that a private proponent with a direct financial interest would undertake impartial issues review and provide unbiased submission responses.
- The new framework would need to provide councils with the opportunity, at the proponents cost, to also review all submissions and prepare their own independent submissions reports.

#### *Assessment and Finalisation*

As already outline above, the timeframes for all steps, including assessment and finalisation, should be benchmarks and should not have refunds or appeal rights tied to them. The following comments and questions are provided regarding assessment and finalisation:

- Public interest should be included as a primary consideration.
- Site specific rezoning considerations should also include community benefit.

- What are the timeframes for Parliamentary Counsel responses on the drafting of the instrument? These should be considered as part of the benchmark timeframes, which may need to be extended to accommodate the steps required by the Parliamentary Counsels Office.

### **New Fee Structure**

None of the three fee options in the Discussion Paper provide full cost recovery security for Councils. Our concerns include the following:

- Financial compensation based on the premise of full cost recovery should relate to all council involvement, including staff time, peer review, specialist consultant assessments, establishment and administration.
- In addition to full cost recovery, fees should also be used to discourage Rezoning applications without merit.
- All costs need to be recognised and fees accrued should be able to be invoiced on an incremental basis rather than at finalisation as that is open to variable definition and funds release at end-of-process may be complicated by any refund sought under the planning guarantee or commencement of an appeal.
- Fee payment should be subject to normal debt recovery processes and actions.

Council raises strong concerns with the proposed Planning Guarantee for the following reasons:

- The initiative aims to put expediency above community consultation and better planning decisions
- The refund of fees is inconsistent with the DA process and the rationale is unsubstantiated.
- How would refunds be funded where assessment monies have been expended?
- The concept that fees may be refunded would likely result in more speculative or poorer quality planning proposals as proponents believe that they will get a refund if a plan is not supported.
- The planning guarantee is a process used for development applications in the UK, which does not have land use zones and its success has been questionable.
- It is not clear whether the guarantee would apply the Department or a panel when they are the rezoning authority. Will similar timeframes and penalties be applied to State agencies and PC?
- The threat of punitive action during assessment risks trivialising thorough and comprehensive assessment and is likely to result in an increased rate of refusals, variations, deferrals and court action. In turn, this would decrease efficiency, increase costs, and complicate processes.

### **4. Discussion Paper Part C: New appeals pathways**

Concern is raised with the potential to introduce an appeal right for a private proponent if progress is delayed or they are dissatisfied with a decision. The issues listed below would apply whether the appeal pathway was through the Land and Environment Court, the Independent Planning Commission or any type of Panel:

- An adversarial process is not suited to rezonings or the consideration of strategic issues and community benefit.
- The threat of appeal is unlikely to result in better planning outcomes and will risk an increased rate of plan variations, deferrals and the adoption of mediocre plans.
- Appeals are not efficient.
- Appeals add to costs and stretch resources.

### **5. Discussion Paper Part D: Implementation**

It is requested that further research, analysis and discussion with Councils occur prior to implementation of this or any new approach to planning proposals.

Council suggests that the new framework could be trialled without the Planning Guarantee or Appeals Pathway to ascertain the efficiencies gained by reducing DPE's role and giving Council's more autonomy in the process. There does not appear to be any basis for punitive action against councils who are responsible for strategic planning and should continue to be the gatekeepers against proposals inconsistent with the public interest, community benefit, Local Strategic Planning

Statements and strategic studies. Removing the Gateway Determination step would provide expediency in the process without trivialising thorough and comprehensive assessment by local councils.

Thank you for the opportunity to comment on the New Approach to Rezoning Discussion Paper. I trust these comments are beneficial to the Department and would appreciate the opportunity to discuss any proposed framework further prior to refinement and implementation.

Should you have any inquiries concerning this submission or wish to organise a meeting to discuss the comments raised, please do not hesitate to contact me on [REDACTED].

Yours faithfully

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Katherine Vickery

Manager, Strategic Land Use Planning Branch