

4.2. Department of Planning and Environment Discussion Paper: A new approach to rezonings

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ATTACHMENTS:

1. North Sydney Council Submission - Discussion Paper. A new approach to rezonings DP E. March 2022. Fi [4.2.1 - 6 pages]

PURPOSE:

To seek the Committee's endorsement of a submission to the Department of Planning and Environment (DPE) on proposed changes to the process of amending Local Environmental Plans (LEPs). The submission identifies key areas of concern with the proposed changes and outlines further considerations for DPE in approaching reform to this process.

EXECUTIVE SUMMARY:

In December 2021, DPE released the Discussion Paper: A new approach to rezonings, which outlines potential reform mechanisms to the existing process of amending an LEP. A copy of the Discussion Paper can be found at: <https://www.planning.nsw.gov.au/-/media/files/dpe/discussion-papers/policy-and-legislation/new-approach-to-rezonings-discussion-paper-december-2021.pdf>.

The Discussion Paper was exhibited from 15 December 2021 to 28 February 2022, with Council being granted an extension of time to enable Committee consideration. Council officers also attended an online briefing from DPE in February 2022.

The Discussion Paper contains a range of reforms which, on balance, do not enhance the current process. While power to determine LEP amendments is being given back to local governments in many cases, this is accompanied by measures which ultimately disadvantage Council and the community. Concepts such as strict timeframes for delivery, proponent-led exhibition periods, the option of refunds, and an appeals pathway for amendments will erode Council's ability to adequately assess and review LEP amendments in a way that leads to sound planning outcomes. The reforms as proposed are not supported, with refinements to the existing process preferred as the best outcome.

FINANCIAL IMPLICATIONS:

The submission identifies that there will be officer resourcing and cash flow and budgeting issues to Council should some of the reforms be adopted. Specifically, these relate to an

emphasis on pre-lodgement meetings where no fee is typically payable, and a “planning guarantee” where refunds may be issued if planning decisions are not issued in a timely manner.

RECOMMENDATION:

- 1. THAT** the Committee endorse the submission contained in Attachment 1.

LINK TO COMMUNITY STRATEGIC PLAN

The relationship with the Community Strategic Plan is as follows:

2. Our Built Infrastructure

- 2.1 Infrastructure and assets meet community needs
- 2.2 Vibrant centres, public domain, villages and streetscapes
- 2.3 Sustainable transport is encouraged
- 2.4 Improved traffic and parking management

3. Our Future Planning

- 3.1 Prosperous and vibrant economy
- 3.2 North Sydney CBD is one of NSW's pre-eminent commercial centres
- 3.4 North Sydney is distinctive with a sense of place and quality design
- 3.5 North Sydney is regulatory compliant

4. Our Social Vitality

- 4.1 North Sydney is connected, inclusive, healthy and safe

5. Our Civic Leadership

- 5.1 Council leads the strategic direction of North Sydney
- 5.2 Council is well governed and customer focused
- 5.3 Community is informed and consulted

BACKGROUND

Planning Proposals (PPs) are formal requests to amend the existing planning controls contained in North Sydney Council's Local Environmental Plan 2013 (LEP). These requests primarily relate to the setting of height and floor space ratio controls but also encompass land use permissibility. In recent years, North Sydney has received approximately ten (10) PPs each year, the majority of which are initiated by private landowners and developers with the remainder initiated by Council. PPs can range in application from an entire municipality, precincts such as a town centre, down to individual sites. Importantly, changes made to the LEP via a PP run with the land, and stay in place even if the land ownership changes, in a similar way to a development approval.

The Discussion Paper sets out the need to reform the current process of amending LEPs to reduce inefficiencies that have negative flow-on economic impacts on development. It states: "*A more streamlined and predictable process will help encourage investment, improve supply and create jobs.*" (p. 1). The intent behind the reform appears to be driven by COVID-recovery efforts and increased speed, rather than best-practice planning, with the majority of suggestions put forward lacking sufficient rigour or consideration of longer-term consequences and lacking detail on how they might realistically operate.

Before presenting detail on what changes are proposed, the following section outlines the current process as it is followed today.

Current situation

Typically, proponents approach Council's strategic planning team to undertake a pre-lodgement meeting ahead of formal submission of a PP. Such meetings attract a nominal fee. This approach provides an opportunity for officer-level comments to help guide a proponent and/or refine a proposal before it is lodged. However, not all proponents opt to undertake a pre-lodgement discussion, or make changes incorporating comments received.

A PP may also be accompanied by a Voluntary Planning Agreement (VPA) where public benefits are offered. VPA offers are considered separately from the merit of any PP. They are typically offered to help support the demands generated by new development on existing services and infrastructure. The delivery of identified public benefits via a VPA can be over and above that typically anticipated by local infrastructure contribution plans and may include the delivery of new facilities such as childcare or community centres, affordable housing, additional public domain works or public open space.

PPs are now lodged formally via the NSW Planning Portal operated by DPE. Proponents are required to provide justification for the changes sought that demonstrate strategic and site-specific merit, in line with the Local Environmental Plan Making Guideline (DPIE, December 2021). This includes answering questions such as:

- Is the PP consistent with a regional or district plan?
- Does the PP achieve consistency with the Local Strategic Planning Statement?
- Is the PP consistent with existing controls such as Ministerial Directions, State Environmental Planning Policies?

By Ministerial direction, all PPs are required to be referred to the North Sydney Local Planning Panel for advice before being reported to Council for determination. A proponent has the ability to request the DPE to undertake a Rezoning Review where Council has not made a determination within 90 days or where a council has determined not to support the progression of the PP to Gateway Determination. The Rezoning Review effectively places the planning decision-making into the hands of the relevant Regional Planning Panel. The proponent also has the option to request the review of a Gateway Decision by the Independent Planning Panel within 40 days of issue.

Under the Environmental Planning and Assessment Act 1979, Council has 90 days to assess the PP and refer it to DPE requesting that a Gateway Determination be issued. A Gateway Determination is a means of State Government oversight of the progression of PPs and ensures consistency in planning decision-making across councils. A Gateway Determination includes conditions which must be complied with when progressing the PP and may include:

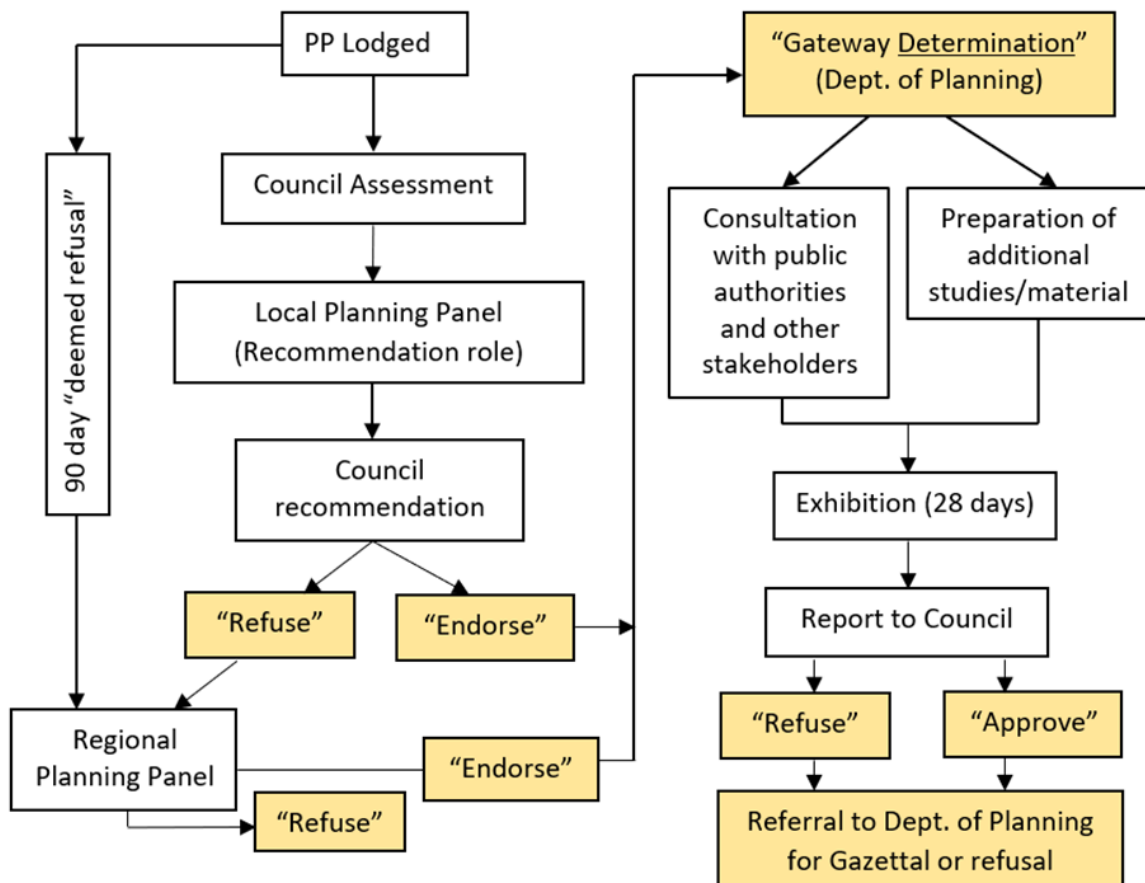
- Amendments to the PP prior to its public exhibition
- Requirements around public exhibition
- Whether a public hearing is required
- State Government agency referrals
- Whether the local government retains authority to progress the PP, and

- Timeframes to meet for each step.

DPE typically take six to twelve weeks to issue Gateway Determinations, depending on the level of complexity of the PP.

Following public exhibition, a post-exhibition report is prepared making a recommendation as to whether the PP should proceed in its current or amended form before a decision by Council (or other decision-making authority where applicable). If supported, it is then forwarded to the NSW Parliamentary Counsel’s Office to be made into legislation.

Depending on the complexity of a PP, and/or the level of public interest, a simple PP can take approximately nine months to complete with more complex PPs taking two years. The following diagram is a basic representation of the current process:



CONSULTATION REQUIREMENTS

Community engagement is not required.

DETAIL

The Discussion Paper proposes a new process for LEP amendments that is dramatically different in a number of areas to the current process. The key reform changes most relevant

to Council's operations are discussed in greater detail below, with issues of a more technical or administrative nature covered in the submission itself.

Increased role of private proponents

Currently local governments are responsible for advertising proposals, seeking referrals and assessing planning proposals. The proposed approach looks to enable private proponents to review and respond to submissions resulting from public exhibition periods, and to speak with referral authorities.

This increased role for private proponents is not supported in the submission. On the surface, giving private proponents increased responsibility would appear to have the effect of reducing the burden on local government resources. However, in reality, private proponents are not equipped to deal with planning issues on a precinct-wide basis, or have the motivation to objectively capture and respond to community aspirations above their own interests. It is likely that local governments will need to oversee this process to ensure it is balanced and transparent, which creates duplication of process that is counter to the reform objectives.

Instead, the submission recommends that proponents be given a "right of reply" to submissions that provides an avenue for proponents to respond to submissions in a formally recognised way, which will lead to improved planning proposals being lodged or suitable amendments made taking account of feedback received.

Introduction of a "planning guarantee" (refund)

Currently, proponents pay an assessment fee to local governments for PPs at the time of lodgement, with the amount dependent on whether a proposal is basic, standard or complex. Many local governments also request nominal fees for pre-lodgement meetings to cover staff time.

The proposed process enables proponents to request a refund of fees where strict assessment timeframes are not met. This approach, coupled with a greater emphasis on pre-lodgement meetings, means local governments run the risk of staff time and resources being expended with no certainty of financial recuperation. It also has the potential to invite purely speculative proposals to test a local government's willingness to adopt a set of planning controls that may be grossly inappropriate.

A better approach would be a system where the emphasis is on the progression of precinct-wide planning proposals that achieve greater coordination and reduce the amount of time assessing site-specific proposals that may not adequately relate to their surrounding context. For these reasons, the submission does not support the introduction of a planning guarantee.

Creation of an appeals pathway

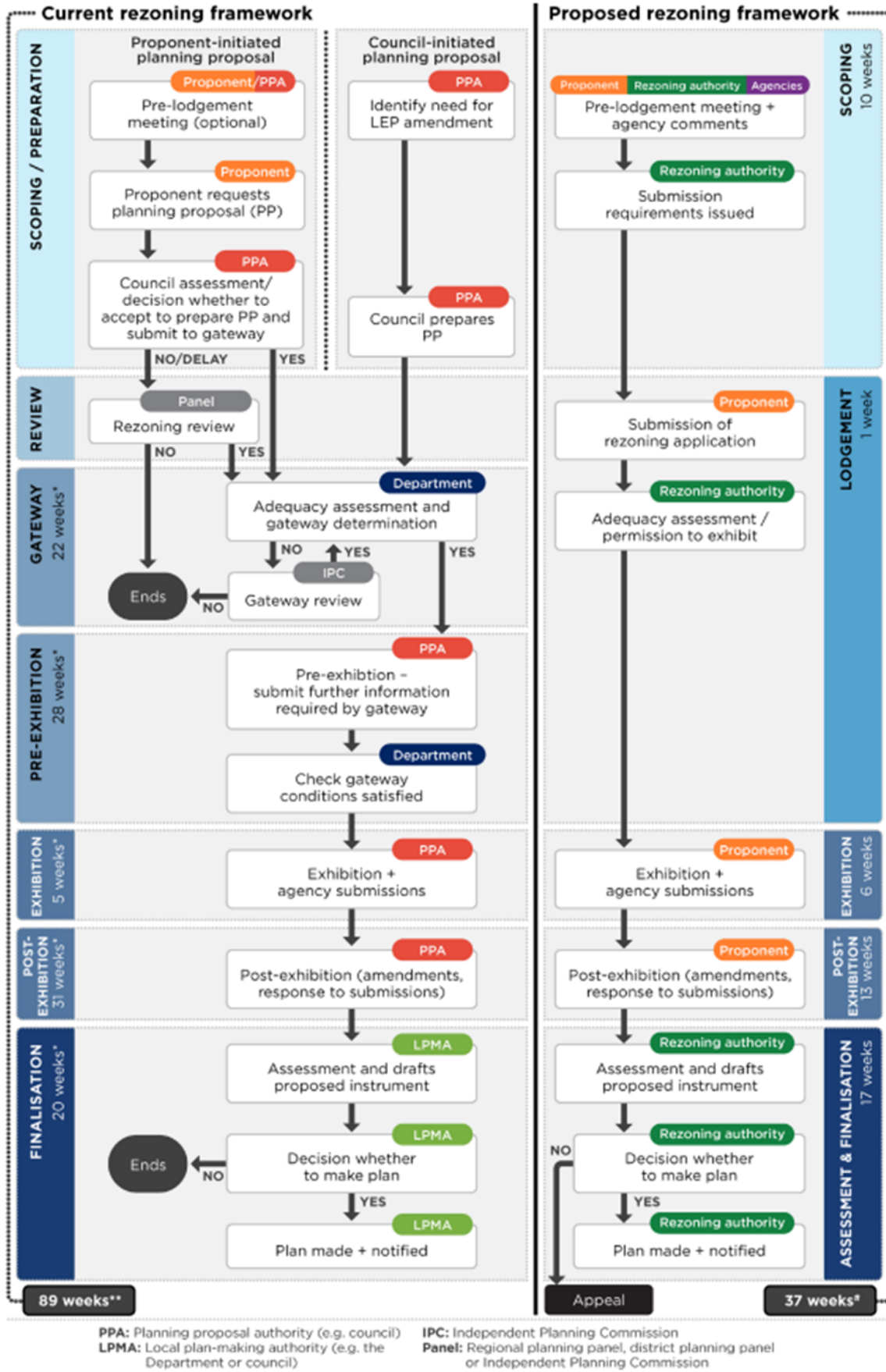
Currently, if a proponent is not satisfied with a planning decision, there are two key trigger points where reviews may occur. A proponent may request a rezoning review in order to enable a proposal to proceed to a Gateway Determination. This review involves an

independent regional planning panel which report to the Minister for Planning (or delegate) with a recommendation. Where a proponent is not satisfied with the outcome of the Gateway Determination, there is also the option of a Gateway Review, which is heard by the Independent Planning Commission who provides a recommendation and advice to the Minister for Planning (or delegate). There is no appeal pathway once a final decision on the planning proposal is made.

The Discussion Paper presents a new avenue to appeal a decision made on a planning proposal, whether that be a formal determination or the lapsing of a set deadline for a determination by way of a “deemed refusal”. The Discussion Paper contemplates either the Land and Environment Court or the Independent Planning Commission undertaking this role, and leaves it open to consider alternative entities, while also acknowledging the time and cost impost on local governments that may result.

The difficulty with establishing an appeals process for planning proposals lies in part with the lack of finality and confidence in a planning decision, and also the inability for traditional courts of law to adequately address the sometimes more grey areas and nuance in thought that local strategic planning challenges present. The attached submission recommends that a planning appeals pathway not proceed, as it will not address the objectives of reform relating to certainty of process or timely and efficient decision-making.

A flowchart is contained in the Discussion Paper comparing old and new processes (p. 13):



Summary

Local governments are the practitioners of the current process of amending LEPs. Councils take seriously their role in ensuring appropriate and well-considered development occurs within their municipalities achieves a suitable level of growth and urban regeneration and benefits the broader community.

This reform threatens this delicate balance, skewing it towards a developer-driven outcome that offers little in the way of community benefit and is likely to shift further cost and resourcing implications onto local government. While some elements of the reform are supported, the majority are over-reaching and will have negative long-term consequences on quality planning outcomes and the capacity of local governments to progress important strategic work.

It is recommended that the Committee endorse the submission at Attachment 1 for consideration by DPE. Further work on the reform package is required in order to achieve a system that better balances the need for jobs and economic growth with the delivery of quality development through more robust planning processes.



**Discussion Paper: A New Approach to
Rezoning Submission**

by North Sydney Council

to the Department of Planning and
Environment

March 2022

North Sydney Council welcomes the review and optimisation of existing processes by the Department of Planning and Environment (DPE). Council considers that the current planning proposal process works reasonably well and does not require major reform. On review of the Discussion Paper, there are several alternative pathways being contemplated that represent major changes to current process. This submission outlines the position of Council on key elements of the proposed reform for further consideration and refinement by DPE.

Strategic Context

The NSW Planning system has rightly been on a trajectory of increased focus and reliance on strategic planning to guide significant change. The creation of the Greater Sydney Commission in 2018 reinforced this with the creation of the Regional Plan, District Plans and the local embodiment of these plans through the Local Strategic Planning Statements (LSPS). This has been a welcome focus particularly at a time of significant and fast paced change.

The general thrust of the Discussion Paper must be cognisant of this overarching direction in the NSW Planning system. A planning proposal must continue to be consistent with the general planning directions outlined in Council's LSPS. Heading too far down a streamlined and efficient process of facilitating changes to the planning controls must be carefully managed to discourage speculative planning proposals that both undermine the strategic planning framework and lead to ad hoc decisions that begin to set a different and unintended strategic direction.

Supported changes:

- Streamlining approach that avoids double-handling by multiple agencies and panels.
- Emphasising strategic Local Environmental Planning (LEP) amendments and discouraging site-specific rezoning requests.
- Increasing transparency and consistency of planning decision-making.
- Returning planning power to local authorities who are best-placed to make local plan changes.

Comments on key reform elements:

Process and timeframes

The proposed maximum timeframes for each step in the rezoning process are insufficient and do not accurately reflect the typical journey of a planning proposal. It is recommended that timeframes be reviewed to avoid misaligned expectations.

While the introductory text states that there are no set timeframes for the scoping phase, various references to timeframes have been included ranging from 6-12 weeks. It is not considered necessary or helpful to give any indication of timeframes during this scoping stage, as the preparation of proposals varies significantly and can sometimes be flagged months if not years in advance of a proposal being formally lodged. It should also be noted that, like the present process, there is no ability to compel proponents to modify plans to align with preliminary advice provided, which means issues may not be addressed any earlier in many cases.

A single week for lodgement is insufficient and should be expanded to two - four weeks. This accounts for any administrative errors (incorrect forms, missing reports, fee payment), gives time for the proponent to prepare and provide additional requested supporting details, and time for the rezoning authority to process and record the information submitted. This timeframe becomes more important given exhibition is intended to be brought forward ahead of any formal assessment, thus documents lodged must be correct. A maximum timeframe for the proponent to respond could be added which, if missed, means the proposal lodgement lapses.

It is recommended that an additional step for preliminary assessment of the proposal ahead of any exhibition is incorporated into the process. The strategic alignment test of a planning proposal must

occur up-front to ensure proposals are worthy of being considered suitable for initial exhibition and that the community only responds to planning proposals where there is a reasonable prospect of them proceeding. Some proposals will require refinement, while others may simply be speculative, inconsistent with a LSPS, and should have the option of being rejected and not entertained. Just because a proposal is lodged should not automatically generate a right to exhibition where strategic alignment is not demonstrated at the outset.

The proposal would be publicly exhibited before Council could prepare or consider any necessary associated Development Control Plan (DCP) amendments or Voluntary Planning Agreements (VPAs) for concurrent public exhibition. This may prevent the community and Council from understanding a proposal holistically as such mechanisms are intended to work in tandem and not be processed independent of the primary planning proposal. Currently, the process would require a second round of exhibition incorporating any DCP amendment or VPA, duplicating effort, risking community consultation fatigue, and potentially disrupting the subsequent development application process if not readily resolved alongside the planning proposal stage.

The proposed exhibition periods are generally consistent with current benchmarks, but to allow more fulsome community engagement, consideration should be given to extended periods when over public holidays (particularly Easter and Christmas – New Year). If the proposal is State Government led, additional timeframes need to be added that allow a local government to present proposals to its council, incorporating sufficient agenda preparation lead-in times. If consideration by a Local Planning Panel remains obligatory (discussed further in this submission below), time allowances for this process this should be included.

Proposed timeframes do not account for requests for further information, or when items are deferred by Council, amongst other reasons. The concept of a “stop-the-clock” mechanism may be beneficial in this regard however no detail is provided on this point in the Discussion Paper. The application of a “stop-the-clock” adds an administrative layer which adds complexity and is time-consuming. Experience from other jurisdictions suggests that proponents either refuse to agree or agree to very short and incremental intervals of 1-2 weeks which can be unworkable and invites replication of the administrative process to extend further. The idea of only one extension of time is not acceptable in this regard. Equally an extension being no longer than the original timeframe does not add sufficient flexibility in instances where it might be warranted to hold the proposal in abeyance for longer, to allow a more complex issue to be examined, particularly where Council and the proponent are generally aligned.

The reality of a planning proposal assessment is that there is no standard one-size-fits-all timeframe. Rather than a reliance on benchmarking, there should be an emphasis on regular and transparent interaction between the proponent and rezoning authority at key milestones to ensure that status updates are available and realistic timeframes are generally agreed or modified as the proposal progresses.

Role of Proponents

The increased role of private proponents is not supported as proposed as it will not achieve the reform objectives of efficiency and transparency. There is merit in a proponent responding directly to submissions in that it improves ownership of issues and greater accountability to the community. However, allowing private proponents to have such significant responsibilities including both advertising and responding to the public exhibition submissions blurs the line between proponent and decision-maker, particularly when combined with the introduction of a “planning guarantee” (discussed further below). It invites low-value quality in proposals to achieve the bare minimum for compliance, and has the potential to erode public trust and confidence in the planning process. Proponents bring vested interests in progressing their own site redevelopment and are not able to

approach planning issues strategically, objectively or with the community's best interests always in mind. Inevitably it will fall to Council officers to cross-check any proponent-led submission review, causing a doubling-up which does not currently exist.

It is recommended that Council retains ownership of submission assessment – including referrals to state agencies, with proponents responding to submissions in a “right of reply” process step which is then incorporated into Council reporting.

Role of Local Governments

Strong support is given to returning decision-making power to local governments for the majority of proposals given its knowledge and strength in setting the strategic direction of its municipality. State government determination of State-led proposals also has merit, provided local government has sufficient ability to provide feedback and shape outcomes.

Clarification should be provided regarding the scope of State Government comments and “checks and balances” in relation to Council-determined proposals. If a Gateway Determination is removed, the interaction between local and state levels should be limited to matters of process to ensure consistency across LEPs, as local governments are capable of assessing for consistency with legislation and policy. Such resourcing should be expanded to include assistance with obtaining external agency referrals where they are not forthcoming. A State Government resource and assistance regarding process and interpretation would be welcomed in lieu of the current Gateway Determination, particularly to maintain consistency and standardisation of LEP controls across local governments. Note the table identifies actions (not roles) of each stakeholder and should be modified for clarity.

Role of public agencies

Clearer parameters for public authority involvement in rezoning applications is supported. Public authorities should be adequately resourced to respond to referrals in a timely manner, ideally with specific staff dedicated to this purpose. It is not sufficient that they be consulted during the scoping stage only, as proposals often evolve during the process or more complex issues become apparent after a more detailed assessment. Further consultation may be necessary where it may negate advice previously given, or the proposal is substantially changed. State Government should also perform an intermediary or co-ordinating role if and when public authorities are not responsive and/or in navigating a difference of opinion.

Fee structure and refunds

The proposed fee structures should be tested and explored against real case studies based on a variety of different planning proposal types. Variable, rather than fixed, rates are preferred for improved cost recovery that accounts for the level of complexity and time spent assessing proposals.

It is important to be aware of the cost implications to Councils on these new measures, particularly the greater emphasis on the pre-lodgement phase. This creates a resource burden for Councils, where significant officer time may be spent navigating a proponent through the process and in providing advice, without any ability to recoup through a suitable fee structure. Fees for pre-lodgement advice on a per-meeting basis with a maximum number of meetings should be foreshadowed by any changes to the rezoning framework. This will also deter those with speculative or baseless proposals and enable councils to properly resource a component of the process that the Discussion Paper seeks, quite rightly, to reinforce.

The concept of a refund is not supported. There needs to be recognition that it costs time and money for councils to assess planning proposals, irrespective of the final outcome. The concept of a refund conflates a planning decision with a financial one, which is inappropriate and not reflective of effort

expended. This is a punitive measure that is not used anywhere else in the planning system that will simply lead to more hasty refusals as refund deadlines loom. Removing the ability to seek a refund (except in administrative situations, as is presently the case) will also reduce speculative proposals seeking a view only to withdraw where the assessment outcome does not arrive in favour.

The concept of a “planning guarantee”, or refund, has the potential to gamify planning and skews the focus towards timeframes not quality of proposals for planning outcomes that are robust and enduring. While additional funding for assessment is generally welcomed, it should be done so in a highly controlled and consistent basis. Otherwise, this creates the potential for local governments to appear as consultants for the development industry, potentially eroding community perceptions of integrity and independence given that they are working on the community’s behalf. Ultimately, greater resources are required in-house at Councils and State Government is best-placed to provide additional funding directly rather than cost-shifting to proponents.

Rather than a focus on time and cost, the emphasis should be placed on increasing transparency, reliability and trust in the decisions of the planning profession by keeping private proponents separated from assessment and determination through rigorous processes and regular engagement with stakeholders.

Rezoning Appeals

Council does not support the introduction of a rezoning appeals avenue. It is not expected to achieve the objectives of the proposed reform in that it will significantly increase timeframes, increases costs with significant resource implications for local governments, and undermines local planning decision-making without any assurance of an improved planning outcome. There has been much discussion and general opposition to a third-party appeals pathway for planning proposals already documented in recent submissions by Local Government NSW, the Planning Institute of Australia and legal practitioners.

While an appeals pathway is suitable for development applications, it cannot be readily replicated for planning proposals which are strategic in nature and set policy direction rather than adhere to existing legislative standards. It is not apparent from the Discussion Paper why there is a need to deviate from the current process of a Rezoning Review, or if this step will remain and be supplemented by a more formal appeals authority. The first question should be what benefit such a pathway would add to quality planning outcomes that the current process does not already address, bearing in mind the initial comments in this submission regarding the maintenance of the integrity of a strategic planning-led system. The benefit of providing greater power back to local governments in determining planning proposals is tarnished with the new threat of appeal.

Secondly, the mechanism of appeal needs much greater clarity. Traditional courts of law struggle with the sometimes grey areas of strategic planning and policy review, traditionally taking the role of adjudicator of an existing set of prescribed rules and legislative process. Allowing a legal court to dictate such outcomes may skew the focus towards compliance with current controls and lessen the quality of merit-based planning decision-making. The increased cost of involving courts and lawyers in lengthy strategic planning exercises should also be considered.

Further consideration should also be given to an appropriate appeal trigger, whether it be a timeframe or a decision. The apparent loss of avenues such as Local Planning Panels and Rezoning Reviews prevents a second pair of eyes and independent evaluation and judgement being applied separate from a Council decision. These avenues should be reinstated, and their roles enhanced, such as in the

instance of both a Local Planning Panel and Council not supporting a proposal no further appeal avenue is triggered as it is deemed to have been independently assessed.

Other issues and comments

- Consideration should be given to mechanisms that emphasise the need for precinct-based controls to avoid reliance on site-specific planning proposals to make changes. Councils should be resourced to lead precinct-wide LEP amendments, where speculative proposals are not entertained until the controls are in place and development can be suitably rolled-out with a high level of community acceptance.
- In certain circumstances, consideration could be given to planning proposals running concurrently with a development application to better marry the processes and achieve more cohesive place-based outcomes. The approval of planning proposals often includes the consideration of a vast array of information and design that simply leads to a crude numerical amendment to an LEP. Concurrent planning proposal and development application processes would allow a greater degree of detailed design resolution upfront for more complex sites. While this capacity already exists in the *Environmental Planning and Assessment Act 1979*, councils are extremely reluctant to utilise this option given the extreme focus on development application processing times.
- If inconsistencies with s. 9.1 Ministerial Directions are allowed, then their strength falls away, and the concepts and objectives should instead be embedded in the relevant SEPPs. The new Minister's Principles duplicates the intent of many directions and adds yet another layer to an already complex series of considerations. Such documents require streamlining as part of this reform package.

Council would be happy to discuss any of the above and continue to attend forums to further assist DPE in refining this important reform initiative. Please contact Alice Brown, Senior Strategic Planner, on 9936 8354 or alice.brown@northsydney.nsw.gov.au to arrange.