THE LAW SOCIETY
OF NEW SOUTH WALES

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7 March 2022

Ms Pauline Wythes
Director, Planning Legislative Reform
Department of Planning and Environment
Locked Bag 5022
PARRAMATTA NSW 2124

By email: planninglegislativereform@planning.nsw.gov.au

Dear Ms Wythes,

A new approach to rezoning

The Law Society appreciates the opportunity to comment on the discussion paper: "A new approach to rezoning." The Law Society's Environmental Planning and Development Committee contributed to this submission.

We make some general comments below and respond to some of the questions set out in the discussion paper in Attachment "A".

General Comments

We welcome the ongoing reforms to the NSW planning system which aim for a 'plan-led' system to better align the rezoning process with strategic planning.
We understand that the term 'rezonings', rather than 'planning proposals', is used in the new approach to mean all changes to local environmental plans (LEPs) or, in limited circumstances, a State Environmental Planning Policy (SEPP), that use the existing planning proposal process, even though some changes may not actually 'rezone' land. For example, a proposal to increase the height and floor space ratio limit on a site, but not to change the zoning, will still be a 'rezoning' for the purpose of the new approach.

We note that the new approach is not intended to replace rezonings typically undertaken using a SEPP, such as state-led rezonings.

While the measures in the discussion paper relate to proponent-initiated rezoning proposals, which may be site specific or project specific, as opposed to a strategic plan implemented by government, the reforms address problems in the current system. There are currently limited opportunities to address delays or rejections of proposals that have merit. As noted in the discussion paper, the rezoning process "has become unwieldy, resulting in weaker planning outcomes, unnecessary delays and higher costs."[1] It is anticipated that these reforms will

[1] NSW Government, Department of Planning, Industry and Environment, *A new approach to rezonings,*1.

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give proponents greater confidence, which together with the proposed introduction of an appeal process may lead to an increase in proponent-initiated rezoning applications.

New Appeals pathways

It is proposed to introduce an appeal mechanism at the end of the new rezoning application process. We suggest that if an appeal right is granted to proponents, there is a strong case for granting equivalent rights to third parties, as an oversight and accountability mechanism. The benefits of third-party merit appeal rights are well-recognised as a key safeguard in improving the quality and transparency of decision-making.

Part C of the discussion paper outlines the recognised advantages and disadvantages of the two proposed options for an appeals pathway, namely a right to a merit appeal to the Land and Environment Court (LEC) or an appeal to the Independent Planning Commission (IPC).

The Law Society has long supported a merit appeal right for parties in planning disputes to the LEC. The LEC is recognised internationally for its planning decisions. Such a merit appeal right would also allow future decision making to be guided as principles are developed and allow public visibility of decision making which increases transparency and accountability of decision-makers.

However, despite these well-recognised advantages, we are persuaded in this case that the preferred option is an appeal to the IPC. This would involve the development of a new process, which could be similar to the determination process for state-significant development, with appropriate changes to account for it being a review function.

We consider that the zoning of land is an executive function which should not be transferred to a judicial body which may not have appropriate expertise or resources to properly determine challenges to rezoning proposals. The thrust of these reforms is to ensure that strategic planning is the foundation for all decisions about potential land-use changes. We consider that a proposal to allow a court-based appeal mechanism interferes with the appropriate role of the executive in determining strategic priorities.

Implementation

We agree that improvements to the capability of the NSW Planning Portal are critical to the implementation of the new reforms. We understand that these improvements are on-going, and that the Department anticipates commencement of the new approach to rezoning applications will commence in 2022.

We note that the new approach could involve both legislative and non-legislative changes. We suggest that in some cases, there will be benefit in incorporating some aspects of the requirements for planning proposals in legislation to ensure consistency in their application, such as the assessment criteria for rezoning proposals. We would appreciate the opportunity to provide input at the implementation stage of the reforms.

Other matters

We have some questions and comments which do not relate directly to the questions in the discussion paper but would assist to clarify the proposed new approach.

<u>LEP Guideline</u>
The new approach outlined in the discussion paper will operate in conjunction with the first step towards major rezoning reforms: the new *Local Environmental Plan Making Guideline* (LEP Guideline) released in December 2021, which replaces the two guidelines which have

formerly shaped the process: *Local Environmental Plans: A guide to preparing local environmental plans* (2018) and *Planning Proposals: a guide to preparing planning proposals*. We consider the LEP Guideline does not provide adequate guidance on the criteria for rejecting a lodgement. This may result in a risk that this new discretion may be misapplied.

Combined rezoning and development applications (DAs)
The discussion paper states that the new approach is designed to align more closely with the development application process. It notes that one benefit of making the processes more consistent may be to increase the number of combined rezoning and development applications. We would appreciate further details on the processes for lodgement of concurrent rezoning applications with DAs that rely on amended LEPs. We suggest that the timeframes may require better alignment.

Strategic merit test
We support the changes to the strategic merit test. Further guidance would assist, for example, in relation to the "change in circumstances" that would satisfy the strategic merit test for a rezoning proposal not aligned with existing strategic planning policies.

Local Planning Panel (LPP)
We note the continuing role of LPPs and would appreciate clarification as to the stage at which rezoning proposals would be referred to an LPP.

Pre-lodgement scoping
We would appreciate more detail as to how councils will determine if a study requirement has been met, without a full assessment of the application. We do not support the study requirement being valid for 18 months. There will inevitably be land use and legislative changes during such a period.

The Law Society appreciates the opportunity to participate in the reform process. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours sincerely,

Joanne van der Plaat
President

Encl.

Attachment "A"

Response to "A New Approach to Rezonings"

Part B: The new approach

New categories and timeframes

Do you think benchmark timeframes create greater efficiency and will lead to time savings?

The benchmark timeframes are aspirational and will not affect efficiency or achieve time savings without the implementation of supporting measures and additional council resourcing. The discussion paper notes that councils will be better resourced through a new fee scheme that will '"compensate councils for the full cost of assessing a rezoning application, while also enabling them to invest in staff and better systems".[2] We note that details of the new fee scheme are not yet available.

We are not convinced that all the proposed timeframes are achievable. For example, in Category 3, councils require time to prepare reports and carry out an assessment, to prepare and finalise Contributions Plans, Voluntary Planning Agreements (VPAs) and Development Control Plans to support the rezoning. We also consider that the proposed timeframes do not take account of the wide variety of applications that fall within each category.

It is also not clear whether the assessment timeframes will be incorporated into the legislation or included in a supporting policy.

Councils

What do you think about giving councils greater autonomy over rezoning decisions?

We understand that giving councils greater responsibility and accountability allows the Department to focus on State-led zoning, State significant DAs, rezoning to amend SEPPs, and State and Regionally significant rezoning.

We support councils having more autonomy in straight-forward rezoning applications where they are consistent with strategic planning and any relevant Ministerial Direction. However, councils need to be properly resourced to undertake this additional work. As previously noted, we do not have any details of the proposed fee scheme which we understand will supply the requisite additional funding.

Department of Planning and Environment

Is there enough supervision of the rezoning process?

We are concerned that category 2 rezonings could be used to avoid compliance with development standards. It is not clear what is meant by a change in planning controls "consistent with strategic planning" in such circumstances.

[2] ibid,19.

What else could we do to minimise the risk of corruption and encourage good decision-making?

One option may be to provide appeal rights to objectors, similar to those for designated development.

Do you think the new approach and the Department's proposed new role strikes the right balance between what councils should determine and what the Department should determine?

It is hard to comment on whether the right balance has been achieved until the new approach has been in operation for a reasonable period. There should be a review period to inform improvements to the system early on in its implementation (for example after 1 year).

Should councils be able to approve inconsistencies with certain s. 9.1 directions? If so, in what circumstances would this be appropriate?

We recommend that inconsistencies with Ministerial directions should continue to be approved by the Secretary for reasons of transparency and accountability.

Public authorities

Is it enough to have agencies involved in scoping and to give them the opportunity to make a submission during exhibition?

Yes.

Do you think it would be beneficial to have a central body that co-ordinates agency involvement?

Yes.

If a state agency has not responded in the required timeframe, are there any practical difficulties in continuing to assess and determine a rezoning application?

This is an issue encountered in the assessment of development applications. Greater resources and priority should be given to agency responses to notifications of rezoning applications, with an opportunity for an agency to extend the timeframe for a response in appropriate circumstances.

Scoping

Should a council or the Department be able to refuse to issue study requirements at the scoping stage if a rezoning application is clearly inconsistent with strategic plans?

Rezoning applications by private proponents which are clearly inconsistent with strategic plans should be dealt with only by the Department and the Department should retain a right (equivalent to gateway refusal) to refuse to issue study requirements. There should be no right of appeal from that decision.

Or should all proponents have the opportunity to submit a fully formed proposal for exhibition and assessment?

No, as above.

Lodgement

What sort of material could we supply to assure community members that exhibition does not mean the rezoning authority supports the application and may still reject it?

A clear statement to that effect in the advertised material should be sufficient.

What do you think of removing the opportunity for a merit assessment before exhibition? Will it save time or money to move all assessment to the end of the process?

The single stage merit assessment system is not novel and applies for DAs. A "Pre-Rezoning" meeting, similar to a "Pre-DA" meeting may be of utility. There are potential time and costs savings for meritorious rezoning applications if there is a single assessment stage.

Should the public have the opportunity to comment on a rezoning application before it is assessed?

Yes, although there is a risk that exhibition may occur too early and have limited or inadequate evidence to enable the community to properly comment.

Exhibition

What other opportunities are there to engage the community in strategic planning in a meaningful and accessible way?

Renotification of amendments to rezoning applications would allow better community engagement.

Do you have any suggestions on how we could streamline or automate the exhibition process further?

As a general comment, the exhibition system seems to operate effectively.

It would be useful, however, to have further information as to how it aligns with the reforms to infrastructure contributions. If a contribution plan and voluntary planning agreement (VPA) are required, these should be exhibited with the rezoning application.

Changes after exhibition

Do you think the assessment clock should start sooner than final submission for assessment, or is the proposed approach streamlined enough to manage potential delays that may happen earlier?

We consider that starting the assessment clock at the final submission for assessment is appropriate.

Information requests

Do you think requests for more information should be allowed?

Yes, such requests are an effective way of identifying shortcomings in rezoning applications.

Assessment and finalisation

Do you think the public interest is a necessary consideration, or is it covered by the other proposed considerations?

Yes, there are aspects of the public interest which might not be caught by the other proposed matters for consideration.

Conflicts of interest

Do you think a body other than the council (such as a panel) should determine rezoning applications where there is a VPA?

Yes. The existence of a VPA has the potential to create a conflict of interest and an avenue for corruption in the absence of independent oversight. Whether a panel is an appropriate body to determine a rezoning application will depend on whether the panel has appropriate experience and expertise to adjudicate on strategic planning matters. In the absence of such experience and expertise, the Department should be the preferred body to determine the rezoning application.

Where a council has a conflict of interest, should a rezoning application be determined by the local planning panel (as proposed), or should the Department take full responsibility for the assessment and determination of the rezoning application?

Please see our comments in response to the preceding question.

New fee structure

Do we need a consistent structure for rezoning authority fees for rezoning applications? What cost components need to be incorporated into a fee structure to ensure councils can employ the right staff and apply the right systems to efficiently assess and determine applications? Should the fee structure be limited to identifying for what, how and when rezoning authorities can charge fees, or should it extend to establishing a fee schedule? What is your feedback about the 3 options presented above? Should fee refunds be available if a proponent decides not to progress a rezoning application? If so, what refund terms should apply? What should not be refunded?

We suggest that the fees for private proponent applications should be sufficient to cover the expense to which the council or Department is put to assess the application.

Do we need a framework that enables proponents to request a fee refund if a rezoning authority takes too long to assess a rezoning application? If so, what mitigation measures (for example, stop-the-clock provisions, or refusing applications to avoid giving fee refunds) would be necessary to prevent a rezoning authority from having to pay refunds for delays it can't control? If not, what other measures could encourage authorities to process rezoning applications promptly?

Refunds may be appropriate if the application is withdrawn early in the process, but refunds should not be used as a 'penalty' against under-resourced councils.

Part C: New appeals pathways

Options

Which of these options – the Land and Environment Court or the Independent Planning Commission (or other non-judicial body) – do you believe would be most appropriate?

We consider that if an appeal mechanism is introduced, the appeal body should be an independent and appropriately experienced panel, not the Land and Environment Court.

The zoning of land is an executive function which should not be transferred to a judicial body which may not have appropriate expertise or resources to properly determine the strategic implications of rezoning applications.