



## SUBMISSION ON THE REZONING REVIEW (released December 2021)

### FOREWORD

Willoughby City Council (WCC) notes the proposed rezoning process review and congratulate the State government for an attempt to improve what is a notoriously complex aspect of the planning system in NSW. However, Council officers have a number of significant concerns with some elements of the rezoning review. Some of the proposals would appear to have merit, particularly the mandatory pre-lodgement review process, however, there is significant potential to undermine confidence in the strategic planning process, with the proposal for rezoning appeals considered to be singularly misguided.

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### GENERAL OBSERVATIONS

#### New approach to rezonings

In summary, the proposed new approach as outlined in the Discussion Paper proposes the following changes:

- *creates a new process for LEP amendments to align with strategic planning objectives*
- *sets matters for consideration, timeframes and a consistent fee regime to give greater certainty in the process*
- *allows councils to receive and determine private proponent-initiated LEP amendments, with no or minimal department involvement in assessment*
- *allows the minister to receive and determine, through the department, other LEP amendments, including those prepared by councils and public authorities*
- *bolsters the department's role in supporting, monitoring and assisting councils in the process*
- *requires LEP amendments to go through a mandatory and upfront pre-lodgement process*
- *shifts all merit assessment processes to after exhibition*
- *gives private proponents a right of appeal against the final decision.*

It is noted that there is also a new plan making Guideline (ie *Local Environmental Plan Making Guideline* released in December 2021) which is largely reflecting the current process. Council congratulates the Department for the preparation and release of the recent *Local Environmental Plan Making Guideline*.

#### Questions for response posed in the Discussion Paper as part of the exhibition are outlined below:

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

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

*Do Councils really have more autonomy?*

Benchmark timeframes will only lead to greater efficiencies if processes are streamlined and there is adequate priority and resources dedicated to each step eg timely agency referrals. While it is proposed to be mandatory to have a pre-application assessment, it is understood that Council must accept a rezoning application that is lodged even if Council still has concerns and does not support applications at officer level. Therefore, it is understood that a rezoning application could be lodged and go on exhibition which Council does not support. Full assessment of the proposal would not be completed until after exhibition process. There is also an appeal process proposed to be available. Therefore, Councils are losing control of the rezoning process under the guise of a more efficient process for planning proposals.



The most important times for a merit assessment are at the pre-lodgement stage, and after exhibition when community views are more widely known.

Councils can determine whether proposals should go on public exhibition, but it is unclear whether Councillors will be involved in this process. It is also unclear whether Local Planning Panels can continue to provide an advisory role at an early stage in consideration of the proposal by Council staff. There is no clarity in the process exhibited whether this is still to occur.

It needs to be clearly established whether Councils can still elect to put proposals to Councillors for their support at an early stage in the process. If Councils decide not to support the proposal at an early stage, it is understood that the applicant is not prevented from still lodging the proposal and seeking an appeal if Council does not support it.

*What additional support could we give councils to enable high-quality and efficient rezoning decisions? What changes can be made to the department's role and processes to improve the assessment and determination of council-led rezonings?*

A major problem with the current process is getting timely responses from state agencies. It is understood that applicants will have to undertake these referrals prior to lodgement. Obtaining timely Gateway determinations has also been an issue for Council (eg obtaining Bowen St Planning Proposal Gateway determination took 12 months). The Department could also play a more proactive role in coordinating more timely agency responses. If changes to rezoning processes are to be made, clear policy and guidance material will be important to outline all the proposed changes.

Despite Gateway delays having been experienced, Council appreciates the input from the Department that is provided by the existing Gateway process. This enhances the quality of applications that are put on public exhibition. There is concern with the proposal to remove the proposed Gateway process, when it should instead be streamlined.

*Is there enough supervision of the rezoning process? What else could we do to minimise the risk of corruption and encourage good decision-making? 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?*

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

Provided Councils have true autonomy and the power to support or reject a proposal at an early stage, there should be a good decision process maintained with a minimal risk for corruption. However, the risk of appeals against rezoning reduces the clarity of process and certainty and may allow for greater opportunity for threatening or corrupt behaviour.

Councils should have capacity to approve minor inconsistencies provided it complies with and can be justified against Council's local strategic framework or a specific local or regional situation is clearly justified.

*Is it enough to have agencies involved in scoping and to give them the opportunity to make a submission during exhibition? Do you think it would be beneficial to have a central body that co-ordinates agency involvement? 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?*

There are practical issues to progress rezonings if state agencies do not respond in a timely fashion. It is also important that agency input and comment is received in the process of Council assessing the



application, particularly for more complex proposals. DPE could play a useful role in facilitating and coordinating agency comments when required.

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

Council should be able to refuse to issue study requirements if a proposal is clearly inconsistent with the strategic framework. This is a clear measure that would give Councils more autonomy in the process and should be a fundamental aspect of the current arrangements that should be retained. Otherwise confidence in local strategic planning will falter. It is proposed that Councils only have 7 days to confirm that study requirements have been met when a rezoning application is lodged. This is an inadequate time particularly for more complex rezonings – should be minimum of 21 or 28 days and Councils should be able to say no to 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? What do you think of removing the opportunity for a merit assessment before exhibition?*

Merit assessment should occur before exhibition – this in fact generally happens (or should happen) as part of the pre-application review. Clear public statements to the effect that only an initial assessment has been carried out which will be further informed by community feedback before a final decision is made.

*Will it save time or money to move all assessment to the end of the process? Should the public have the opportunity to comment on a rezoning application before it is assessed?*

Council strongly believes that there is a need to complete an assessment of the proposal before it is put on exhibition. This is the most important stage in the planning proposal process. Doing the assessment later could undermine Council's strategic planning framework and all the trust it has built up with the community in developing this framework. It would give the impression that any proposals merit exhibition when in fact some may be so clearly counter to local strategy they should be terminated quickly without exhibition. It must not be forgotten the community will have been fully involved with the finalisation of local strategic work. If proposals are refused by Council at an early stage, there should not be a provision for applicants to lodge the rezoning applications despite the refusal by Council.

*What other opportunities are there to engage the community in strategic planning in a meaningful and accessible way? Do you have any suggestions on how we could streamline or automate the exhibition process further?*

Community engagement is critical as part of Council' LSPS and other strategic work. This is clearly the best stage for consultation ie before rezoning applications are lodged and allows the publication of Council's local strategic planning vision, objectives and priorities, as agreed with the community, having applied the cascade of State priorities in the process. If a new planning proposal cuts across or counter to that agreed strategic direction it should not be entertained.

*The finalisation timeframe is based on the category of rezoning application in Table 4. Table 4. Assessment/finalisation timeframes:*

*Category 1 (Basic) (11 weeks) 2 (Standard) (17 weeks) 3 (Complex) (24 weeks) 4 (Principal LEP) N/A (appeal only for private proponents)*



*What do you think? 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?*

*Do you think requests for more information should be allowed?*

The assessment clock should start when the final assessment has been lodged with Council. Opportunities to provide more information should be allowed. The following scenario described below in the Discussion Paper is unlikely to be realistic or achievable:

*Ongoing requests for more information cause delays throughout the rezoning application process and create uncertainty for all parties to the process.*

*Requests for more information will be discouraged as the new approach is designed to:*

- provide an opportunity for all necessary information to be identified upfront in the study requirements at scoping stage*
- ensure that proponents resolve any outstanding agency and community concerns before submitting the final version of the rezoning application after exhibition.*

*Where requests for more information are unavoidable, or determining the application depends only on minor or unforeseen clarifications, requests for more information are allowed:*

- from state agencies during exhibition/agency consultation, direct with the proponent*
- within 25 days of being forwarded to the rezoning authority for assessment. Where this happens, the assessment clock (see Part D: Appeals) will be paused.*

*Are there any other changes that we could make to streamline the assessment and finalisation process more? What roadblocks do you currently face at this stage of the process? Do you think the public interest is a necessary consideration, or is it covered by the other proposed considerations? Are there any additional matters that are relevant to determining whether a plan should be made?*

The process is generally streamlined if the applicant provides comprehensive information and justification upfront and respects and reflects the strategic framework and takes full account of Council's requirements at the pre-application stage.

Developers often have unrealistic expectations regarding site potential and enter the process with ambit claims seeking to maximise development on a site. Dealing with this often extends the early stages of a planning proposal (eg Bowen Street). There needs to be more consideration by developers of Council's strategic planning framework, particularly if it is recent and comprehensive. Moreover, there has been a culture that has developed with proponents not always providing comprehensive information upfront due to the desire to reduce costs and hoping to avoid submitting an aspect of analysis of the proposal.

The public interest which includes the broad range of community views is a vital consideration for rezonings.

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

Local Planning Panels would have a useful role in determining Planning Proposals when Councils have a conflict of interest. Alternatively, they could continue to play a useful role in providing advice to Councils on applications. Council would favour the advisory role being continued by panels for rezoning proposals.



The parallel negotiation of a VPA must be kept at arm's length and not influence the Council's decision which is an arrangement regarding which all Councils are very well aware. This is not a reason to have a body other than the Council determine the rezoning. For Willoughby City Council this would be the case with the majority of site specific rezonings.

*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?*

It is suggested that Councils should have discretion in setting rezoning fees (potentially within a proposed range of fees for different proposals that is consistent across the State). Rezoning proposals have a wide range of complexity and issues to be addressed.

The upfront fee for pre-lodgement advice should not be refundable. If a planning proposal is rejected by Council at lodgement after initial review, no refund should be payable as the service has been provided.

*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?*

There should not be an option to request refunds unless the proposal is rejected up front (ie partial rezoning fee refund). Rezoning applications are more likely to progress promptly if proposals are lodged that are generally consistent with the strategic planning framework and applicants have addressed Councils' requirements from pre-application assessment comprehensively including all relevant reports provided. The fact that a rezoning takes a significant period to be determined should not be used as a reason for a refund to be available for a rezoning, as Council will have already undertaken significant work.

The planning guarantee approach should not be adopted for planning proposals. It would not be reasonable for applicants to request and obtain refunds if proposals are not progressed in a timely manner. There are many legitimate reasons for rejection of planning proposals or for them taking a significant time in some instances. This is often outside Councils' control. The process proposed will rely much more on the proponent progressing the application in a timely fashion at key stages, including providing adequate information and obtaining timely comments from State agencies as well as responding to submissions from the community.

Councils should retain autonomy in the rezoning process, including obtaining agency comments and assessing community submissions. Giving these responsibilities to the applicant will weaken the Council's role in the rezoning process and remove confidence in the impartiality of the strategic planning framework.

*Do you think public authorities (including councils) should have access to an appeal? 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?*

Appeals should not be available for rezoning proposals. Regional Planning panels already have a review process available at certain stages which can be continued. The Court should not be involved in rezoning appeals.



### Concluding comments

In summary the proposed changes have the potential to significantly undermine Council autonomy as well as confidence in the strategic planning system. The opportunity for legal challenge by the applicant will have a significant potential impact on the community's ability for self-determination as is currently the case with the current system for rezonings. Legal challenges and appeals will also likely greatly extend the timeframe, cost and complexity for determining proposals.

Councils' general concerns about the potential for appeals to undermine the strategic planning process appear to get little consideration in the discussion paper. There appears to be more consideration given to developers' concerns about the length of time taken and the complexity of the process.

Council considers that more consideration should be given to make incremental changes to the existing system rather than fundamentally changing it. Council congratulates the Department for the preparation and release of the recent *Local Environmental Plan Making Guideline*. This will assist in providing clarity for the rezoning process and confirm responsibilities at each stage. It is noted that the *Guideline* includes making pre-lodgement meetings compulsory for all planning proposals which is supported.

It is considered that mandatory pre-application meetings and advice being provided by Councils, as well as more timely responses from State agencies at an early stage are just two measures that can significantly improve the process. These changes will also make the existing system more robust and therefore reduce the time taken for the current rezoning process. These changes could be supported by clear guidelines and documentation (including the *Guideline* referred to above) that makes clear the roles and responsibilities of all parties in the rezoning process.