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Australia's property industry

Creating for Generations

1 March 2022

Mr Micheal Cassel
Secretary
Department of Planning and Environment
Submission lodged via NSW Planning Portal

Dear Mr Cassel,

Re: A New Approach to Rezoning – Discussion Paper – December 2021

The Property Council of Australia thanks the Department for the opportunity to provide comment on the draft rezoning review discussion paper currently on public exhibition.

As Australia's peak representative of the property and construction industry, the Property Council's members include investors, builders, owners, managers and developers across all asset classes.

Rezoning applications are an important mechanism to enable the economic and orderly use of land and are an important process essential for maintaining housing supply, growth and development of our cities and regions.

We note that the discussion paper puts forward a range of proposed changes, including:

- Introduction of clearer and shorter timeframes
- Recognition of developers as applicants
- Expanded role and greater control for councils
- Mandatory pre-lodgement scoping meeting
- Removal of the gateway determination and pre-exhibition 'check' by the Department
- Right of appeal, with two options proposed – Land and Environment Court or the Independent Planning Commission.

The Property Council applauds many of the reforms proposed in the discussion paper and acknowledges the excellent work of the Department in this regard. Our detailed comments on these proposed changes are included at Attachment 1.

We look forward to our continued engagement with the Department on reform for the rezoning process. Should you wish to discuss our submission further please feel free to contact NSW Policy Manager Annie Manson on [REDACTED] or

[REDACTED].

Yours sincerely,

[REDACTED]

Luke Achterstraat
NSW Executive Director

General Commentary

The industry needs certainty and consistency, particularly during the post-COVID recovery period

Currently, uncertainty about rezoning timeframes and process are impacting industry confidence and the often overall financial viability of development projects. The rezoning process is long, complex and lacks transparency and accountability. Research by both the NSW Productivity Commission and the Australian Government's Productivity Commission have found that the NSW planning system is complex and inefficient, and there is a need to remove red tape and complexity wherever possible.

Adjustments to the rezoning process which acknowledges the role and importance of the proponent, encourages early engagement with state agencies and gives clearer and more consistent outcomes and timeframes are vital, particularly during this post COVID-19 recovery period. The NSW planning system has seen huge upheaval and change over the past twelve months with an overhaul of many aspects of the planning system under former planning Minister Rob Stokes. Any new reforms must now focus on providing a stable regulatory environment with consistent and clear processes and systems.

Consideration and weight should be given to goals and objectives of the NSW Government

Each council within the Sydney Metropolitan area has 0-5 year and a 6-10 year housing target, identified by the Greater Sydney Commission (shortly to become the Greater Cities Commission) through the Sydney Metropolitan Strategy and District Plans. We must meet and exceed these housing targets to address the ongoing supply and affordability issues currently experienced in Sydney, and the social and economic flow-on impacts of this. State-level objectives and priorities such as increasing housing supply should be given significant weighting when determining rezoning proposals. Although respecting local viewpoints is critical, it is also important that this is balanced with the need to address wider concerns and goals.

Concurrent lodgement of development and rezoning applications

The discussion paper suggests that there will be an opportunity provided to lodge concurrent rezoning and development applications, where the accompanying development application relies on the amended planning controls. This will save proponents time as the need to wait for the rezoning application to be approved before the development application can be lodged is removed – both assessments can happen at the same time. The Property Council supports this proposed change, but that more detail is needed on how this process will be facilitated. Generally, developers can be reluctant to invest the time and money into preparing a development application without the certainty that the rezoning will be approved.

Recommendation:

The Property Council supports the proposal to enable rezoning and development applications to be assessed concurrently. Further detail on the proposed process should be developed for more detailed feedback.

Merit assessment

The discussion paper provides little detail on the assessment criteria for rezoning applications, aside from stating merit assessments will be against ‘clearly articulated matters for consideration.’ The Property Council supports the standardising of assessments to provide more consistency in decision making across local government areas. We suggest that the matters for consideration are included in legislation to help ensure that they are applied consistently.

The discussion paper suggests a range of considerations that the planning authority assessment **may** consider.

- If the proposal has strategic merit (having regard to strategic planning documents, consistency with a local strategic planning statement and any change in circumstances not yet recognised under existing strategic plans)
- Provisions of any relevant SEPP or section 9.1 directions (including the Minister’s Planning Principles)
- Whether the proposal has site-specific merit (including natural and built environment, social and economic conditions, existing and future land uses in the vicinity and availability of services and infrastructure,
- Any submissions made by the public or state agencies.
- The public interest.

These are reasonable issues to be given consideration as part of merit assessment. However, the concept of ‘public interest’ is not clear and more detail should be provided as to what is ‘public interest’ and how this is identified and defined. For example, at times development can attract opposition from action groups, whose remit is generally self-interest and not representative of the broader ‘public interest’. These views should not be given any substantial weight and should be considered one of many diverse viewpoints making up the wider ‘public interest’.

Recommendation:

More detail is needed on the concept of ‘public interest’ as it relates to merit assessment. If public interest is adequately addressed in other ‘mandatory considerations’, removal of this from the list of consideration would be appropriate.

Discussion paper – questions:

Is this a fair summary of some of the issues within the current framework? Are there any other problems you think we need to address?

The discussion paper provides a fair summary of many issues within the current rezoning framework. Given the significant costs involved and delays currently experienced in the rezoning process, the Property Council welcomes any changes which improve timeframes and provide more certainty and accountability.

There are several critical overarching issues which have not been addressed. These include:

- The need to limit political interference by local councillors in rezoning assessments and determinations; and
- Inconsistent merit assessment of rezoning applications by councils and the Department

Delays caused by the approval process for associated planning documents have not been discussed or identified in this Discussion Paper. Often, councils will require Voluntary Planning Agreements, Development Control Plans, Affordable Housing Contributions, Section 9.11 contributions, Special Infrastructure Contributions and other requirements to be referred to a council meeting for approval before the rezoning application can be exhibited.

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

The Property Council strongly supports the introduction of benchmark timeframes and believes that this will go some of the way in decreasing the time it takes to have a rezoning application assessed and determined.

We note that the discussion paper does not specify whether the suggested assessment timeframes will be hardwired into legislation, similar to those applied to development applications, or only guided by policy. This approach will have a significant impact on how closely these timeframes are adhered to. We recommend that these are included in legislation alongside the timeframes provided for development applications, to provide sufficient weight to compel councils to adhere to these timeframes.

The Department should also require councils to regularly report on their performance against the timeframes. Monitoring and public reporting on performance will be crucial to ensure councils are compelled to process rezoning applications as quickly and efficiently as possible and for the Department to measure the effectiveness of the new rezoning application process.

Information and data on processing times is also a valuable risk assessment tool for developers and investors. Up-to-date, easy to access information on the amount of time taken by councils to process rezoning applications can help inform feasibility and risk analysis, calculate anticipated project timelines, and projected costings. We encourage the Department to require councils to report regularly on their performance and to publish

this information online where it can be easily accessed by the public, similar to the Department's Local Development Performance Monitor which was discontinued in 2015. The Department should also provide sufficient resources maintain and support this program.

Recommendations:

The Property Council recommends:

- the Department require all councils to monitor and report on their performance against the timeframes on a monthly basis
- the Department develops a public webpage which provides this information to the public and updates this page monthly
- the timeframes for rezoning applications are outlined in legislation, similar to timeframes for development applications.

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

The Property Council has some concerns regarding the effectiveness and fairness of providing councils with far greater control over each stage of the rezoning process for private proponent-led rezoning applications. We note the new approach appears to empower councils to make decisions without departmental intervention. Concerningly, for private proponent rezoning applications, the council will have full control over the process, including giving permission to exhibit the application, which under the current system is given by the Department at gateway determination.

The Department should be involved at the proposed 'Scoping' phase, to assist in obtaining and coordinating input from state government agencies on the proposed rezoning application.

We very strongly support the removal of the opportunity for the local councils to accept the role of relevant planning authority when they have failed to support the proposal. This removes the opportunity for a hostile council to continue delaying and frustrating the assessment and determination of a rezoning proposal which has demonstrated strategic merit.

Recommendation:

The Department establish a role during the proposed 'scoping phase', to assist in obtaining and coordinating input from state agencies on the proposed rezoning application.

What additional support could we give councils to enable high-quality and efficient rezoning decisions?

Councils often lack appropriately skilled and experience planning staff and expanding the role and responsibilities of councils in the rezoning process will cause strain on their limited resources. Providing councils with additional resources is critical to support this new process.

Council planners also need more support and autonomy from political influence directed from local councillors. Although this is difficult to manage, this is important to ensure that council planners can make difficult or controversial decisions without feeling pressured by local councillors to deliver a particular outcome.

What changes can be made to the department's role and processes to improve the assessment and determination of council-led rezonings?

As outlined above, the Department could be utilised during the proposed 'scoping phase' to assist in obtaining and coordinating input from state agencies on the proposed rezoning application.

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

It is critical to limit, as much as possible, councillor involvement and influence in rezoning applications. Council planning staff should remain as independent as possible from influence by councillors.

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

Currently councils must notify the department and seek approval from the Secretary of the Department of Planning and Environment. The Property Council has no objection to permitting councils to approve inconsistencies with certain section 9.1 Directions. We note that there may be Directions where councils should not be permitted to approve inconsistencies, development near regulated airports and defence airfields, mine subsidence and unstable land. Councils should also ensure that they have the resourcing and technical proficiency to confidently approve inconsistencies to s.9.1 Directions.

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

Involving agencies in the scoping process for rezoning applications and allowing them the opportunity to make a submission during the exhibition of the proposed rezoning is sufficient involvement. This allows agencies the opportunity to provide their comments and feedback when the proposal is still at concept stage and also when at the detailed stage and enables the proponent to receive and incorporate these comments and feedback where appropriate.

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

In principle, a central planning body that co-ordinates agency involvement could be of great assistance to both councils and the proponent, who often must use a great deal of resources and time in pursuing and coordinating agency involvement. This would limit the ability of councils and agencies to blame each other for issues and delays. This agency could also police the adherence to timeframes and collect and publish data on each council's performance. The Queensland Government's State Assessment and Referral

Authority coordinates agency feedback for planning applications, which greatly assists proponents and councils. Further detail on any proposed 'central body' that coordinates agency involvement is needed before Property Council can offer support, however the idea is sound and is worthy of exploring.

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?

Generally, this should not be a concern as the reports and documents accompanying rezoning applications are prepared by experienced technical consultants who are aware of the issues and concerns of agencies that need to be addressed as part of the application.

However, there are times when there is information or plans that are under development within agencies and are not publicly known. These would not have been covered in the consultant's report and may become an issue or problem if they are not flagged early on.

Ongoing participation and support from the Department in the initial Scoping phase will be useful to help bring state agencies to the table and compel and encourage these agencies to provide their feedback into a timely manner.

Our members report to us the state agencies are often unresponsive or late in providing feedback regarding rezoning applications and cause substantial delays in the process. The Department of Planning must work collaboratively with other agencies to encourage provision of feedback quickly and consistently to reduce rezoning application timeframes.

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

A planning authority should never be able to prevent a rezoning application from being lodged. We are concerned that the proposed rezoning process presents a risk that potential applications could be effectively stalled at the scoping stage prior to lodgement as the rezoning authority would have the power to refuse to issue study requirements for the proposal on the grounds of perceived strategic merit (which can differ between councils and planning staff). This could be used as an effective pinch point for rezoning applications and should this occur, there is no avenue or authority to compel the rezoning authority to issue study requirements. Our members have experienced delaying tactics by Councils to delay lodgement and therefore create leverage for proponents to offer greater contributions in planning agreements.

The Property Council believes that the proponent should be allowed the opportunity to submit a proposal for exhibition and assessment, regardless of the council's refusal to provide study requirements. There is a danger that this could be manipulated politically by planning authorities to prevent applications from proceeding. Proponents must always be given the opportunity to submit an application for exhibition and determination under the relevant planning legislation.

We note that the Department has already issued three clear guidelines which comprehensively address what is required to be lodged with a rezoning application.

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?

The Department could prepare a standard disclaimer for rezoning authorities to include as part of the package of documents to be placed on public exhibition. This message could also be highlighted in community and stakeholder consultation material.

Recommendation:

The Property Council recommends that the Department prepare a standard disclaimer for use by rezoning authorities to assure community members that the exhibition of rezoning application does not mean that it is approved, it is an opportunity for them to shape the proposal and provide feedback.

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

There are benefits in exhibiting the proposal earlier in the process prior to merit assessment. However, the abandonment of the gateway process shifts a lot of the cost and risk to the front end of the process. There must be certainty at the 'back end' of the process to offset this upfront risk and cost.

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

Yes. The proposed process enables the public to comment on the application directly after lodgement. The comments and feedback can be considered and, where they hold merit, incorporated into the relevant structure plan.

Do you think requests for more information should be allowed?

Request for more information should be permitted, provided that these requests are reasonable, relevant and that this process is not used by the planning authority as a mechanism to delay the rezoning application from proceeding.

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

Public interest is an undefined term and it is difficult to determine what exactly this is and how it should be given weight and consideration. There are other proposed considerations which touch on this area so it may be sufficient to drop this as a 'necessary consideration.'

Do you think a body other than the council (such as a panel) should determine rezoning?

In principle the Property Council is supportive of the concept of allowing bodies or organisations other than council to determine rezoning applications. More information would be needed on this body/ organisation before more feedback could be provided.

Do we need a consistent structure for rezoning authority fees for rezoning applications?

The Property council supports a clear, consistent, fixed fee structure for calculating planning authority fees for rezoning applications. A consistent fee structure would offer proponents certainty as to the cost, regardless of which council area their proposed rezoning is located within and would be less of an administrative burden for council staff. 'Variable assessment fees' (options 2 and 3) will create inconsistencies between local government areas. The fees should only be permitted to increase in line with inflation (CPI).

Recommendation:

The Property Council supports a consistent structure (option 1 in the Discussion Paper) for calculating planning authority fees for rezoning applications.

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?

The Property Council supports the refunding of fees should a proponent decided not to progress a rezoning application. A portion of the fees could be refunded based on what stage the rezoning had progressed to before the proponent decided not withdraw 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?

The Property Council supports the ability for proponents to request a fee refund if a planning authority exceeds the timeframes for assessment 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?

The Department would need to identify a list of potential delays councils are unable to control and develop a process for councils to account for these in determining the time taken to assess and determine a rezoning application.

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

The Property Council supports the Department of Planning's decision to not allow an appeal to public authorities such as councils or state-owned corporations. We note that *Premier's Memorandum M1997-26 Litigation Involving Government Authorities*, discourages litigation between public authorities. There is also a possibility that elected officials (for example councillors) could pressure council officers to appeal applications for a political rather than a merit basis, effectively using public funds to garner public support particularly around election time.

Recommendation:

The Property Council recommends that the Department use of the Planning Delivery Unit to resolve disputes arising between public authorities.

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?

The Property Council welcomes the introduction of a 'right of appeal' that enables the merits of a rezoning application to be independently assessed. There are pros and cons for each of the appeal options put forward in the discussion paper.

It should be noted that once an appeal process is established for proponents to challenge an unfavourable rezoning application determination, it is possible that councils may use the scoping phase as a 'pinch point' to frustrate a rezoning application, by imposing excessive study requirements and repeated requests for additional information. This is because there are no other stages in the process for the rezoning authority to scuttle or delay the process.

The Property Council believes that an appeal process through the Land and Environment Court (LEC) is the better of the two options. The LEC is well equipped to provide a far more robust, independent review of a zoning decision. By way of example, for a large complex development, it would not be unusual to a commissioner of the LEC to spend four hearing days taking evidence and listening to submissions. The IPC is not required to adhere to these process or protocols and would possible only spend one hour holding a meeting to review the merit of a development of the same complexity.

Aaron Gadiel from Mills Oakley provides an overview below of the benefits of utilising the LEC for this process, not only for the proponent but for the broader community.

'There is no denying that the level of rigour that the Court brings to any decision it makes far exceeds that of any panel or the Independent Planning Commission. However, in our view, that rigour comes with benefits to developers and the wider community. We consider it means the following:

- *The Land and Environment Court, is, without doubt, the most trusted institution in the planning system. There has never been any serious attack on its independence or integrity.*
- *The extent of community trust in the Court means that it does not hesitate to make unpopular decisions, when justified by the evidence and the law. This can assist developers – who are often friendless when there is a sustained NIMBY campaign against them.*

- *The Court currently brings discipline to the whole development assessment system. While most development applications are not appealed to the Court, the fact that they can be appealed is often a check against abuse of discretion by local council officers and panels. The current haphazard decision-making on planning control changes merely flows from the absence of an appeal right to the Court.*
- *The Land and Environment Court has had 41 years to build up community trust and establish its rigorous and credible approach. The Independent Planning Commission is a relatively new institution, and its current role will not be readily adapted to the proposed new role.*
- *The Independent Planning Commission is unlikely to have the resources or structure that would allow the cross-examination of experts, subpoenaing of documents or the taking of sworn testimony. These tools are all vital if members of the public (such as developers) are able to consistently and meaningfully challenge well-resourced and sophisticated public authorities.¹*

In addition to this, an appeal process through the LEC would ensure:

- the mere potential of a Court appeal will, in itself, encourage local councils to be less arbitrary when dealing with rezoning applications.
- The LEC process also provides the opportunity to resolve the matter in a mandatory 'conciliation conference' held prior to the formal court process, where disputes are often resolved without the need to progress to court.

The Property Council supports the proposal to enable an appeal based on a delay once set timeframes have passed, similar to a 'deemed refusal' of a development application. This will further encourage councils to process rezoning applications in a timely manner and allows the proponent some certainty that they can appeal to the LEC once the set time period has passed.

Recommendation:

The Property Council notes NSW Government must commit sufficient resources and funding to the chosen organisation to satisfactorily service the influx of rezoning review applications. This will ensure that the organisation can deliver on its existing workload and process rezoning reviews quickly and efficiently.

Of the two appeals options provided, the Property Council supports the development of an appeals pathway via the Land and Environment Court to review rezoning applications.

¹ <https://www.millsoakley.com.au/thinking/rezoning-appeals-in-the-land-and-environment-court-overcoming-arbitrary-development-prohibitions/>