



Our ref: 7606325

11 March 2022

Att. Planning Legislative Reform team  
Department of Planning and Environment,  
Locked Bag 5022,  
Parramatta NSW 2124.

Submission lodged via NSW Planning Portal

Dear Sir/Madam

## **Submission to the NSW Government on the Discussion Paper: A new approach to rezonings**

Please find enclosed a submission on the Discussion Paper: A new approach to zonings. This submission has been prepared following review of the exhibition documents and attendance of Council staff at various on-line webinars held over January and February 2022. Council sought (and was granted) an extended deadline to make a final submission until 11 March 2022.

Council thanks the NSW Government for the opportunity to provide input into this matter. The attached submission contains a number of matters which Council requests are taken into consideration by the NSW Department of Planning and Environment prior to finalising this matter.

For further information, please contact Sharon Smith on [REDACTED].

Yours faithfully

[REDACTED]

Sharon Smith  
Section Leader, Local Planning

Encl.

**A NEW APPROACH TO REZONINGS IN NSW – DISCUSSION PAPER**  
**Submission by Coffs Harbour City Council**  
**11 March 2022**

This submission has been prepared by staff of Coffs Harbour City Council (Council) in response to exhibition of the “Discussion Paper: A new approach to rezonings” (hereafter referred to as the Discussion Paper in this submission) by the NSW Department of Planning and Environment (DPE), which sets out proposed solutions to creating a better rezoning process and appeals or review framework for NSW. This submission has been prepared following review of the exhibition documents and attendance of Council staff at various on-line webinars held over January and February 2022. Council sought (and was granted) an extended deadline to make a final submission until 11 March 2022.

**A. GENERAL COMMENTS**

Council makes the following general comments about the proposed reforms outlined in the Discussion Paper:

- 1. Council recognises the need to improve the process to amend Environmental Planning Instruments.** Council thanks DPE for the opportunity to comment on the Discussion Paper and offers general support to the examination of the processes involved with the view to streamlining some processes. The new processes should, however, not come at the cost of poor planning outcomes that undermine the intent of strategic plans.
- 2. Council supports a planning system for NSW that is ‘plan-led’, which ensures that strategic planning is the foundation for all decisions about potential land-use changes.** Council is fundamentally opposed to the move to a ‘spot rezoning’ approach which dilutes the importance of strategic planning across NSW. Planning controls are put in place to implement strategic plans. Allowing developers to easily undermine strategic plans and amend them (with a streamlined DA like process) in a piecemeal fashion is not supported.
- 3. Similarly, the merit appeals process for planning proposals is not supported.** Council is fundamentally opposed to the process of merit appeals in the Land and Environment Court for planning proposals. Allowing the court system to make a decision on whether or not a proposal is consistent with a strategy is not supported. This decision should be made by councils, who have played a major role in the development of such strategies and are more connected to their communities. Or, in complex contentious matters, Council would prefer to see the matter determined by the Independent Planning Commission.
- 4. The planning proposal categories identified in the LEP making guidelines are not supported in their current form.** Council’s pricing policy within its adopted fees and charges for requests to amend Coffs Harbour Local Environmental Plan (LEP) 2013 is based on the ‘user pays principle’. Under the user pays principle, fees are introduced to offset the cost of service provision, in order to support the provision of services and to alleviate the burden that would otherwise be unfairly placed upon ratepayers. For LEP amendment applications where significant studies are required to be vetted by Council, the category of the application is considered to be complex not basic, regardless of whether the proposal is consistent with an endorsed local strategy, Regional Plan or Local Strategic Planning Statement. The technical expertise and time associated with a review of

lengthy studies can place significant demands on Council resources. The Local Environmental Plan Making Guideline should be amended so that applications comprising significant studies and technical reports are considered to be complex.

5. **The proposed timeframes for each step within the LEP amendment process are unrealistic.** Realistic timeframes for basic LEP amendments are at least twelve months, whilst complex applications can take up to eighteen months on average. Council is concerned that regional, coastal and greenfield rezoning issues often involve complicated environmental constraints such as flooding, bushfire, biodiversity, which take time to analyse and review, unlike rezonings in metropolitan areas where, for example, additional height may be the issue, and which are fairly quick to process. There seems to be no consideration given in the timeframes to regional, coastal and greenfield investigations and the time to complete them, and a 'one size fits all' approach is expected to be applied across the stage. The changes proposed to the LEP amendment process are unlikely to streamline the process enough to achieve the required timeframes. Such timeframes will place a significant amount of pressure on local councils, which are already critically under resourced. Council is fundamentally opposed to the timeframes outlined within the Discussion Paper; and more so to the fact that under the Minister's Environmental Planning and Assessment (Statement of Expectations) Order 2021 there is no 'stop the clock' provisions and councils can be penalised or even have a planning administrator or regional panel appointed to exercise a council's planning functions in place of the elected council if deadlines are missed. This is considered a combative approach and will lead to a more adversarial approach by applicants towards council staff.
6. **The proposed LEP amendment process is heavily reliant on a pre-lodgement scoping process, which will only work if this part of the process is mandatory, not subject to timeframes, and is able to be adequately funded by councils.** Council fully agrees with the pre-lodgement scoping process, however considers this should be mandatory, and prefers it be named something like 'assessment of strategic intent' to ensure that the main focus at this stage is to determine alignment with the strategic planning framework, along with an estimation of the technical studies to be undertaken to satisfy environmental issues. Council currently offers a voluntary user-pays pre-lodgement meeting process for proponent-initiated LEP amendments. Council has recently had an applicant refuse to attend a pre-lodgement meeting and lodge an application despite Council's recommendation to receive pre-lodgement advice. The application was initially rejected from the planning portal by Council, as it was an incomplete application. The applicant subsequently re-lodged the same application via the planning portal, noting that the pre-lodgement process was not mandatory. An initial assessment of the application by Council revealed significant issues that were not identified or addressed by the applicant. Council staff were required to spend considerable time reviewing the application (with no payment) so that it could respond to the applicant and identify the detailed deficiencies with the proposal and what studies needed to be undertaken. This application is still in the portal and is currently subject to the current 90-day timeframe. The only option for Council is to recommend that the application be withdrawn voluntarily or to note that Council would determine the application based on its current form. If the applicant does not withdraw the application, Council is required to spend considerable time in preparing an assessment report and Council report with a recommendation to refuse the application. The applicant then has the ability to appeal to the panel.
7. **Public Agency input into the process needs to be addressed and clarified in respect to addressing inconsistencies and risk if Agency referrals are overdue.** LEP amendments undertaken by Council are mostly delayed by two factors: 1) inadequate information submitted with the proposal and 2) significantly slow referral responses from Agencies. Most of the delays to date, have been related to slow responses from Agencies which also comprise inconsistencies with planning directions.

The timeframes identified in the Discussion Paper have not taken this into account. Council understands that Agencies have received similar Orders to councils to expedite referral responses in a clock based environment. However, clarification is required in relation to when Council may be able to approve an inconsistency and where DPE will approve an inconsistency, thus allowing the process to continue. The proposed new rezoning process should include a 'stop the clock' mechanism when referrals are overdue. Clarification is also required in relation to risk (that is, if the inconsistency relates to bush fire risk – who takes on the liability if the LEP is made without considering the Agency's response?). It is very rare that Council processes an LEP amendment that is not impacted by bushfire prone land and associated inconsistencies with a planning direction. Failure to address this issue will ensure that the proposed timeframes are not met.

## B. SPECIFIC COMMENTS

Council makes the following comments about specific aspects of the proposed changes outlined in the Discussion Paper:

### 1 Terminology

- The proposal to call an LEP amendment request a 'rezoning application' is not supported. This term is misleading, as many such amendments are unrelated to the rezoning of land. Stakeholders should be educated on correct terminology (eg. LEP amendment application), as opposed to utilising an outdated term. Council prefers the use of the term 'LEP amendment application'.
- Similarly, the term 'rezoning authority' is not supported. Council prefers the use of the term 'planning authority', so that the process is not misleading. The term rezoning has often been flouted by the development industry, as a way to side step local planning controls. This term is uncondusive to a plan-led planning system and should not be re-introduced or encouraged.
- Fresh consideration should be given to the name 'scoping' at the beginning of the process, perhaps even for the pre-lodgement meeting. This process should be aligned to the strategic planning framework, given an assessment of strategic intent from the outset, and named to represent this fact. Council prefers the use of the term 'assessment of strategic intent'.

### 2 New Categories and Timeframes

- **Category 1 (Basic)** - The inclusion of an LEP amendment request proposing to attain consistency with an endorsed local strategy, such as a local housing strategy should be conditional upon proposals not requiring complex studies and/or technical reports (see below). Failure to do so, will place unrealistic timeframes and unrecoverable cost burden on local councils.
- **Category 2 (Standard)** - The inclusion of a site-specific rezoning application should be conditional upon proposals not requiring complex studies and/or technical reports (see below). Failure to do so, will place unrealistic timeframes and unrecoverable cost burden on local councils.
- **Category 3 (Complex)** - To enable local councils to charge appropriate fees and recover costs associated with proponent initiated LEP amendment applications, this category should include proposals (such as site-specific rezoning proposals and amendments to implement endorsed strategic plans) that comprise complex studies and/or technical reports, regardless if they are inconsistent with strategic plans. Failure to do so, will place unrealistic timeframes and unrecoverable cost burden on local councils due to the technical expertise required to review such studies and reports. Council has real life case studies demonstrating this at the moment. Council is currently assessing a number of applications that are site specific rezoning proposals

that comprise significant studies and technical reports. All of these applications have been nominated as complex, due to the internal resourcing required to assess the applications. Under the proposed categories, Council would not be able to recover costs associated with these applications (and the timeframes would have been well exceeded).

- **Category 4 (Principal)** - No comment.
- **Benchmark Timeframes**
  - **Scoping (proposed six weeks)** - This process should not be subject to timeframes. Refer to Point 5 (page 2 of this submission). A regional, coastal and greenfield lens has not been drawn over this aspect to the process, and it seems as though the approach targets metro and built form issues, perhaps to expedite delivery of infill housing. This part of the process can take months, sometimes years for the completion of certain studies following the provision of advice from Council as part of the pre-lodgement process. Pre-lodgement should be mandatory in the new process, but timeframes are unrealistic.
  - **Lodgement (proposed one week)** - Refer to Point 4 (New Steps) below.
  - **Exhibition (proposed four weeks)** - Refer to Point 4 (New Steps) below.
  - **Post-Exhibition (proposed ten weeks)** - Refer to Point 4 (New Steps).
  - **Assessment & Finalisation (proposed eleven weeks)** - Refer to point 4 below.
  - **Assessment clock for appeal rights commences at stage 6 (Finalisation) (25 days Basic, 55 days Standard, 70 days Complex, 80 Days principal)** - The Discussion Paper is unclear in relation to assessment timeframes which then allow appeal rights. Realistic timeframes for basic LEP amendments are at least twelve months, whilst complex applications can take up to eighteen months on average (refer to comments elsewhere in this submission). The changes proposed to the LEP amendment process are unlikely to streamline the process enough to achieve the required timeframes. Such timeframes will place a significant amount of pressure on local councils, which are already critically under resourced.

### 3 New Roles

- **Proponents** - Council is generally comfortable that Council will make all proponent-initiated applications from basic to complex. However, Council contends that there are circumstances where the option should be available to elevate it to DPE where it becomes contentious. Proponents will be able to appeal a decision because of delay or dissatisfaction with a decision. Please see comments elsewhere in this submission in relation to the unrealistic timeframes and the need for a plan-led planning system (including using the courts to decide on such appeals).
- **Council** - It is Council's understanding that Council will make all proponent-initiated applications from basic to complex, but that DPE will make complex Council-led applications. There are circumstances where the option should be available to elevate Council-led applications to DPE, particularly if there are probity issues, regardless of the scale of the application. The Discussion Paper doesn't seem to be clear on this matter.
- **DPE** - Council contends that there are circumstances where the option should be available to elevate an application to DPE where a proponent initiated application becomes contentious, prior to an outright appeal direct to the new planning panel or the courts.
- **State Agencies** - The proposed changes to the referral process with State Agencies is supported. As mentioned previously, this is one of two major factors for Council that results in significant delays in the LEP amendment process. Clarification is however required in relation to when Council may be able to approve an inconsistency and where DPE will approve an inconsistency (in the absence of an Agency referral response); and also in relation to risk

(i.e. if the inconsistency relates to bush fire risk or flood – who takes on the liability?). The proposal for applications lodged by public authorities to be determined by DPE is supported.

#### 4 New Steps

- **Scoping** - This step is supported and necessary in the process, however see comments elsewhere in this submission relating to this step being mandatory and not included within the 90-day timeframe. The requirement for the rezoning authority to provide written feedback to the proponent in relation to the proposal's consistency with s9.1 Planning Directions is not supported at this stage of the process. This cannot often be ascertained until such time as certain technical reports have been provided and vetted and/or Agency feedback has been obtained. Council prefers that this process instead provide feedback to the proponent in terms of ability to meet strategic intent, along with technical studies to be undertaken to satisfy environmental issues.
- **Documentation Requirements** - Council would like the opportunity to provide feedback on the proposed scoping template. This has not been offered within the current round of consultation.
- **Lodgement** - Council is supportive of the payment of fees at the time of lodgement in the NSW Planning Portal (which should occur after a mandatory pre-lodgement meeting in which the fee category has been identified for the proponent). If the incorrect fees are applied at lodgement, councils should have the ability to reject the application. Council does not support the proposed seven-day timeframe to confirm that study requirements have been met in applications, and again believes the regional/coastal lens has not been applied to this approach when identifying timeframes. This process involves a multitude of steps, such as: 1) downloading of the application from the portal by Council's customer service team; 2) setting up the application in Council's TechOne software; 3) referral to a manager (for general oversight and to allocate the application to an appropriate staff member); 4) referral to an assessment planner; 5) referral to subject matter experts for feedback on the adequacy of the documents (eg flood engineer, biodiversity officer). A realistic timeframe is two weeks (provided that a pre-lodgement meeting has been held, otherwise three weeks is required). The timeframe is much too short to enable public exhibition of the application (day eight from lodgement). This proposal has the risk of the community thinking that the proposal is supported by Council – regardless of what material is placed on exhibition with the proposal. Council does not support the removal of a merit assessment prior to exhibition. This will delay the process and result in an administrative nightmare for Council. It is difficult to get feedback from the public currently; this will further overwhelm the community. In addition, exhibiting a proposal that may be a proper application, but that has no strategic merit is wasting significant planning resources within local Councils that could otherwise be utilised for strategic planning purposes.
- **Exhibition** - There needs to be adequate time provided within the process for a merit assessment to be undertaken by Council prior to exhibition. Local councils need the ability to bypass the exhibition process and refuse applications that fail the merit assessment. See comments elsewhere in this submission in relation to the proposed timeframes and the need for a merit assessment prior to exhibition. This process as outlined in the Discussion Paper is not supported by Council. Automation of the exhibition period is supported; however, councils are best placed to utilise their own engagement software to provide plain English interpretations of the proposal and planning requirements. Councils have done a lot of work getting their communities to utilise their engagement platforms – this work should not be undermined.

- **Post Exhibition** – Clarification is required in relation to how the proponent's summary of submissions will be made available to submission authors. This is an outright probity/transparency issue, and could result in an administrative and resourcing nightmare for councils – who will inevitably be bombarded with enquiries from submission authors when a response to their submission has been provided to them without any information on determination of the proposal. A better process would be for the proponent to provide their response to submissions to Council, who then report the item back to Council for determination, along with a copy of the proponent's response to submissions. Council's recommendations for the determination may alleviate concerns raised by submission authors that may not have been addressed in the proponents' response to submissions.
- **Assessment and Finalisation** - The assessment and finalisation stage of the LEP amendment process needs to take into consideration the time required for assessment officers to prepare a council report and assessment documentation, as well as the lead times required to include an item within a council meeting agenda. The reporting lead-time for meetings of Coffs Harbour City Council is six weeks. Council does not support the proposal to enable proponents to receive a fee refund through a planning guarantee (see Point 5 below).
- **Additional Information Requests** - The notion of discouraging requests for more information is unrealistic, as there are almost always issues that arise that cannot be identified in the scoping phase of a project. Additionally, proponents do not always provide the requested information and thus more information is sought. Council does not support the proposal to allow information requests only within 25 days of being forwarded to the rezoning authority for assessment. Council also does not support direct consultation between State Agencies and the proponent, as the council assessment officer is out of the loop. It is much neater and clearer for all of the information requests to be provided to the proponent at the same time. Again, Council contends that this approach seems to be missing the regional/coastal lens where environmental matters are at question, and which need to be resolved to satisfy the s9.1 Planning Directions.
- **Conflict of Interest** - The use of Voluntary Planning Agreements is sometimes unavoidable and preferred, particularly where a Contributions Plan is not appropriate. Council is able to provide explicit examples in this regard. Recent case law about relating to Voluntary Planning Agreements seems to confirm this fact. Conflicts of interest could be avoided for such applications if DPE were to be the determining body. The use of a panel may delay the process depending on resourcing of such panels for the entire State of NSW.

## 5 New Fee Structure

- **Set Fee Structure** - Council does not support a set structure for fees for LEP amendment applications. Fees should be set at the discretion of each Council.
- **Scoping Fees** - If fees are to be based on application categories, the application categories need to be refined and council feedback obtained (please see comments elsewhere in this submission, particularly Point 2 New Categories and Timeframes).
- **Assessment Fees** - Council has a reduced fixed fee one off fee, which is non-refundable and a staged fee which can reduce the risk to proponents. Flexibility needs to be maintained for local councils.
- **Planning Guarantee** - Council does not support the proposal to enable proponents to receive a fee refund through a planning guarantee. Refer to comments in relation to 'user pays' and the significant resource burden that such applications place on local councils (Section A Point 5). Coffs Harbour City Council currently has seven complex applications that are being assessed by external planning consultancies, due to high workloads and insufficient resources.

It would not be possible for Council to engage external consultants to assist in the assessment of such applications if funds from proponent-initiated applications were not secured and potentially refundable. This would result in significant delays to assessment timeframes and increase the risk of proponents appealing and Council being penalised in accordance with the Minister’s Environmental Planning and Assessment (Statement of Expectations) Order 2021 (see comments in Section A of this submission in relation to a merits assessment undertaken by the court system).

## **6 New Appeals Pathway**

- **Merit appeals** - Council does not support a Land and Environment Court merit appeal process; but is less concerned with an appeal option heard by the Independent Planning Commission. As stated in section A of this submission, allowing the court system to make a decision on whether or not a proposal is consistent with a strategy is not supported – this decision should be made by Councils, who have played a major role in the development of such strategies and are more connected to their communities.

## **7 Implementation**

- **NSW Planning Portal Improvements** – Proposed improvements to the NSW Planning Portal are supported and welcomed, noting that there are a number of quite significant issues with the portal that require attention prior to any new process being implemented by the NSW Government.