

DRAFT SUBMISSION

A NEW APPROACH TO REZONINGS

DISCUSSION PAPER

MARCH 2022

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

OVERVIEW OF THE LOCAL GOVERNMENT SECTOR



Local government in NSW employs more than **55,000 people**



Local government in NSW looks after more than **\$136 billion of community assets**



Local government in NSW spends more than **\$1.9 billion each year on caring for the environment, including recycling and waste management, stormwater management and preserving and protecting native flora and fauna**



NSW has **450 council-run libraries** that attract more than **34.8 million visits each year**



Local government in NSW is responsible for about **90% of the state's roads and bridges**



NSW councils manage an estimated **3.5 million tonnes of waste each year**



NSW councils own and manage more than **600 museums, galleries, theatres and art centres**

TABLE OF CONTENTS

2 OPENING

4 BACKGROUND & CONTEXT

5 GENERAL COMMENTS

- Minister's Expectations Order
- Undermining strategic planning and erosion of council planning powers
- Rezoning are not the same as DAs
- Reforms are far-reaching
- Timeframes and incentivizing 'speedier' assessment
- Reforms are far-reaching

11 SPECIFIC COMMENTS

- The new approach
- Planning guarantee
- New fee structure
- Appeals pathways

19 CONCLUSION

20 SUMMARY OF RECOMMENDATIONS

22 ATTACHMENT

OPENING

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW welcomes the opportunity to make a submission on the Dept of Planning and Environment's (DPE's) proposals for changes to rezonings.

LGNSW consulted with councils to help inform the content of this submission.

The submission is also guided by LGNSW's policy platform¹ which highlights, among other things, the importance of:

- An efficient, fair, and locally led planning system;
- Local government retaining control over determination of locally appropriate development;
- Strategic plans that reflect the agreed planning outcomes from community engagement;
- Greater autonomy in determining fees and charges.

This is a draft submission awaiting review by LGNSW's Board. Any amendments will be forwarded in due course.

Local government supports having an *efficient* planning system that optimises the environmental, social *and* economic benefits of development to create more homes and space for businesses and industry (employment). To do this, councils agree that efficiency improvements – including better use of planning resources, reduced overall timeframes, greater certainty for all participants, ensuring strategic alignment and meaningful public input – are needed. The local government sector acknowledges the improvements already introduced with the new [Local Environmental Plan Making Guideline](#) (LEP Guideline) and is open to working with the department to consider the merits and practicality of further ideas that could improve the planning system to achieve this objective.

At the outset, LGNSW wishes to state that our members are universally opposed to proposals in the Discussion Paper for a planning guarantee ('fee refund') and court appeal rights for proponent-led rezonings. Most insulting and affronting for the sector is the degree to which these proposals, in combination with the recent Minister's Expectations Order², are demeaning and disrespectful of the local government sector. The proposals introduce punitive measures on councils under the guise of 'incentivising' assessment timeframes, and in doing so they diminish the role of elected representatives (councillors), communities and planning professionals and undermine the whole intent of local strategic planning.

¹ https://www.lgnsw.org.au/common/Uploaded%20files/Policy/2021_LGNSW_Policy_Platform.pdf

² <https://www.planningportal.nsw.gov.au/news/environmental-planning-and-assessment-statement-expectations-order-2021>

Despite increasing workloads and diminishing resources, councils have worked hard to ensure the delivery of timely and sound planning decisions through having well written policies and building up positive relationships with consultants and developers. While at face value the proposals seek to 'help' and 'support' councils, there is a general view within the sector that the Discussion Paper has a bias towards development proponents and industry with little in the package that will bring true improvements for councils.

Having said that, there is generally broad support from councils for mandatory pre-lodgement meetings (in practice this occurs already for many councils) and mixed and varying views from councils for other elements of the Discussion paper (including removal of gateway, use of the Independent Planning Commission (IPC) for rezoning appeals and a withdrawal of DPE's role in the rezoning process).

In the spirit of continuous improvement to the planning system, the local government sector would welcome the opportunity to work with the department to consider the merits and practicality of further ideas that could improve the planning system.

BACKGROUND & CONTEXT

LGNSW understands this Discussion Paper is intended as a ‘thought piece’ – a ‘speculative’ high level outline that proposes changes beyond those already in place following the release of the new LEP Guideline.

LGNSW understands the new LEP Guideline replaces the two previous guideline documents³ and was put in place to support better assessment, coordination and engagement in the LEP making process and help reduce assessment timeframes for planning proposals. These are sensible, well-considered changes and have been broadly supported by local government. At the same time, the Discussion Paper has emerged following stakeholder feedback on the NSW Government’s announcement in July 2020 that it would establish a “new class of appeals for rezonings” using the Land and Environment Court (LEC)⁴.

The local government sector remains strongly opposed to the idea of using the Court as an appeal mechanism for planning proposals. The proposal by the NSW Government in mid-2020 to introduce this new appeal process was announced with no prior consultation on costs and benefits nor any evaluation against other options. LGNSW acknowledges the Department has listened and responded to feedback on this initial and narrowly focused LEC appeals proposal by opening a broader discussion of a range of potential improvements. Key reform elements discussed in the paper include reducing timeframes for assessing planning proposals, streamlining processes, introducing a new fee refund if councils do not meet mandated timeframes, and a mechanism to appeal a decision on a planning proposal made by the council.

It is noted that both the LEP Guideline and the ‘speculative’ Discussion Paper were released in December 2021, with the new LEP Guideline taking effect immediately. On the same day, just days after being elected, councillors were greeted with an order from the former Minister for Planning and Public Spaces outlining his expectations for newly elected councils. As discussed below, **the local government sector rejects this Order and considers the Minister’s ‘welcoming’ statement to newly elected councils as insulting and unhelpful.**

This announcement which also included “a new planning guarantee [that] requires councils to make timely decisions or face having to refund planning application fees”⁵, along with the proposals outlined in the Discussion Paper, raise many questions and concerns for local government, and some elements are strongly opposed as detailed below.

³ ‘Guide to preparing planning proposals’ and ‘Guide to making LEPs’

⁴ <https://www.planning.nsw.gov.au/News/2020/Reforms-for-a-world-class-planning-system>

⁵ Media Release, ‘New planning rules to unlock housing supply’, Minister Stokes, 16 December 2021

GENERAL COMMENTS

Minister's Expectations Order

In a parting gesture before leaving the planning portfolio, the former Minister for Planning and Public Spaces, the Hon. Rob Stokes, issued his expectations for planning and development applications to incoming councillors across NSW. The *Environmental Planning and Assessment (Statement of Expectations) Order 2021*⁶ (Minister's Expectations Order) imposes on councils "clear performance benchmarks to meet in delivering planning decisions"⁷ and threatens ministerial intervention powers "where councils are not upholding their responsibilities"

As part of his announcement, the Minister's media release also promised a new planning guarantee to "give the housing industry confidence that assessment timelines will be achieved".

A resolution at the 2022 Local Government Special Conference in relation to the Minister's Order was:



That Local Government NSW lobbies the NSW Government to:

1. Revoke the Environmental Planning and Assessment (Statement of Expectations) Order 2021
2. Consult with councils to identify a suitable and workable policy approach to improve the timeliness of decision making specific to development applications, planning proposals and rezoning, and broader strategic planning
3. Ensure policy alignment with broader planning reforms that are currently underway.
4. Acknowledge that planning in rural and regional areas is vastly different to metro areas.

Councils consider the Minister's statement of expectations, in concert with elements of the Discussion Paper, to be disrespectful of local government and contrary to establishing a positive and constructive working relationship to improve planning system processes

⁶ <https://www.planningportal.nsw.gov.au/news/environmental-planning-and-assessment-statement-expectations-order-2021>

⁷ [Media Release](#), Minister Stokes, 15 December 2021

01



LGNSW recommends that the new Minister for Planning and Homes revoke the *Environmental Planning and Assessment (Statement of Expectations) Order 2021* and in the spirit of a constructive relationship, commit to work with LGNSW and councils to develop workable policy approaches to improve the timeliness of decision making in planning processes.

Undermining strategic planning and erosion of council planning powers

LGNSW is pleased to see the Discussion Paper reinforce the NSW Government's commitment to "a 'plan-led' system" with one of the aims of the 'new approach' being to "support a stronger strategic planning process"⁸.

A strategic-led planning system that focuses on the quality of outcomes and encourages fewer site specific or 'spot' rezonings is strongly supported by local government.

The paper presents a "new approach" that it claims will⁹:

- *simplify the rezoning process and minimise duplication*
- *improve transparency*
- *improve consultation processes*
- *reduce processing times*
- *create more certainty and consistency*
- *empower councils to make decisions on matters important to their communities while allowing the NSW Government to deal with matters where government intervention is beneficial*
- *give private proponents control and responsibility for rezoning requests*
- *improve the quality of planning proposals.*

LGNSW does not agree. The local government sector believes the proposed approach is likely to do the opposite – it will disempower councils, incentivise spot rezonings, slow down processing times, diminish opportunities for meaningful community engagement and reduce the quality of planning outcomes. The general sentiment is that the proposals in the Discussion Paper will support developers while undermining carefully crafted, community-led strategic planning.

⁸ *A New Approach to Rezonings – Discussion Paper*, p 1

⁹ *A New Approach to Rezonings – Discussion Paper*, p 1

"There's a sense the government is only listening to those loud development industry voices."
Quote from a council planner in January 2022.

Of particular concern to LGNSW is the potentially significant erosion of councils' role in local strategic planning and in particular the diminished role of elected councillors. With the introduction of mandatory local planning panels in recent years, the removal of DA determinations from elected representatives was justified by the argument that councillors set the policy and strategic direction through their local plans and policies, leaving development applications to be assessed independently against these local plans.

The Discussion Paper proposes to take this a step further to the rezoning process, whereby unelected officials (either the Land and Environment Court or the Independent Planning Commission) will determine the policy through an appeal. Local government objects to this proposal - this will override the statutory policy decision making of the elected council, dilute their role as representatives of the community and undermine their decision-making power.

02



LGNSW recommends that any fundamental changes to the planning proposal process must acknowledge and retain the important role played by the elected Council (councillors) in making strategic local land use policy decisions

Rezoning are not the same as DAs

Another fundamental problem with the paper is that it misunderstands the rezoning process, putting forward the flawed idea of more closely aligning it with the development application (DA) process.

The paper is proposing to shift the current planning proposal/rezoning process – which is a strategic process – to a more structured process, similar to the way DAs are treated in the planning system. According to the Department, it would mean developers take more responsibility for their projects.

Strategic plans and planning controls provide the framework and certainty that communities, landowners, development proponents, councils and state agencies need to build confidence and trust in the planning system. Changing these plans can deliver potential windfall gains for landowners and proponents, and trigger requirements for substantial infrastructure investment. The process for setting and changing these plans must therefore be thorough, robust and democratic. By necessity, this process is iterative and currently involves

collaboration and negotiation between all parties to achieve the best planning outcome. No credible case has been made or evidence presented in the Discussion Paper to justify many of these radical shifts and by likening the rezoning process to a DA process, the Discussion Paper raises more questions and concerns than it answers.

There are other system improvements that could be explored to streamline the process, rather than attempting to replicate the development assessment process for rezoning requests. We acknowledge the in-roads already made in this regard by the Department, referred to in the paper¹⁰, through several positive initiatives, including the new LEP Guideline and also the notable success of its Planning Delivery Unit (PDU). A more constructive approach would be to understand why some planning proposals advance more smoothly than others. Councils consistently report that early and ongoing collaboration between proponents and councils, early assessment of merit, and clear consultation led by councils are critical.

Timeframes and incentivising ‘speedier’ assessment

It appears that one of the driving forces behind this latest reform proposal is to further speed up planning assessment processes, by placing time constraints on councils, imposing a planning guarantee to ‘incentivise’ speedier decisions by councils. The paper proposes various changes and initiatives or ‘incentives’ that it says would shorten timeframes in the rezoning process. However, according to council planning professionals, what has been proposed does not reflect the reality on the ground. Anecdotally, council planners on the frontline report that the reality is that many delays arise within the department or agencies. Similarly, there is a strong view that the process is by its nature iterative, and as such, will involve negotiation and several requests for information (from applicants) throughout the process. These practical realities of the strategic planning process – as distinct from the DA process – have been misunderstood and not been properly considered in the Discussion Paper.

“By trying to speed things up, you’re going to slow things down.”
Quote from a council planner in January 2022.

Reforms are far-reaching

Part A of the Discussion Paper presents the background and rationale underpinning the proposals, flagging that the issues with the current framework are in the following areas:

- Time and complexity
- Inconsistencies

¹⁰ Discussion Paper, p 8: “Since 2019, the department has worked to clear the backlog of older planning proposals and reduce processing times, which was down to an average of 89 weeks [from 114 weeks] as of 30 June 2021.”

- Transparency and trust
- Council resourcing
- Recognition of proponents
- State agency input

While most would agree there is room for improvement, the case has not been put to justify such a radical shift in the structure and culture of the planning proposal process.

Some of the approaches being pushed in this paper would involve a major shift in the reform agenda and culture that may be a bridge too far. Despite increasing workloads and diminishing resources, councils in general have worked hard to ensure the delivery of timely and sound planning decisions through having well written policies and building up positive relationships with consultants and developers. But there are currently more than a dozen major structural or procedural/administrative reforms in the planning system either proposed or at different stages of implementation which cumulatively, have ramifications for the local government and development sectors. At the same time, councils in many areas of the state have seen sharp rises in development application numbers in recent times

In responding to the combined additional development activity and the multitude of other reforms, councils' resources are already stretched. The risk and reality of introducing additional major reforms is that business-as-usual processing of planning and development applications may be further affected, with the unintended consequence of setting back any measurable improvements in assessment times.

By the DPE's own admission, some of the changes proposed in the Discussion Paper to "re-frame existing processes" are far-reaching. They will require the department to develop new processes and procedures and "would be a significant shift in operations, requiring resourcing"¹¹. If adopted, many of the elements proposed would involve significant structural and resourcing changes for *all* stakeholders (state, local, industry, consultants, legal advisors, the court and other decision-making bodies like panels) many of whom are currently adapting to and adopting other planning and building reforms.

While it is acknowledged there is room for improvement in the planning system, on top of the existing reform trajectory LGNSW questions the wisdom of pursuing further extensive reforms at this time. LGNSW recommends that it would be advisable to pause, monitor and evaluate the measures already in place with the anticipated improvements from the new LEP Guideline, before hastening into further far-reaching structural and cultural change as proposed in the Discussion Paper.

To attain meaningful improvements in assessment timeframes, LGNSW urges the NSW Government to instead focus its attention on measures in the immediate, short and longer term to:

- Enable the proper and full funding of council resourcing for the assessment of development and planning proposals.
- Fix compliance funding to enable councils to fulfil their expanding compliance responsibilities.

¹¹ *A New Approach to Rezoning – Discussion Paper*, p 37

- Fix problems with the NSW planning portal
- Address the acute shortage of planning resources and staff - LGNSW acknowledges the NSW Government's recent announcement of a regional housing Flying Squad¹² to assist councils, as an immediate measure, but submits that a holistic and long term plan is needed.

LGNSW and councils are willing to work with the department, in a constructive way, to discuss these issues and explore how these and other initiatives can achieve further gains.

03



LGNSW recommends that:

- Further structural and cultural change as proposed in the Discussion Paper is not progressed unless and until the Department can monitor and evaluate anticipated improvements from the new LEP Guideline; and
- The DPE establishes a working group with councils and LGNSW to consider the merits and practicality of further ideas, that could improve the planning system within the current framework.

¹² <https://www.dpie.nsw.gov.au/news-and-events/articles/2022/helping-hand-to-boost-regional-housing-supply>

SPECIFIC COMMENTS

The new approach

The discussion paper puts forward a new approach that proposes a number of key changes to the rezoning process (see **Attachment** for a summary of key changes).

At face value, the paper appears to have some positive aims, which include:

- 'Empowering councils'
- Improving the quality of planning proposals
- Strengthening requirements for initial pre-meetings with councils
- Categorisation of planning proposals
- Clarifying roles and responsibilities
- Early/improved involvement of state agencies
- Recognition of the need for councils to be better resourced
- A proposed fee scheme based on full cost recovery

The paper's premise of increasing trust, transparency and helping councils with the administrative load are also commendable – no-one would question these outcomes. However, it is the general view of the local government sector that many elements of the proposed approach in fact may have the reverse effect.

From local government's perspective, the risks, impacts and unintended consequences include:

- Incentivising spot rezonings, leading to increased speculation by developers which will divert already-limited council resources from vital, worthwhile and genuine strategic planning
- Reduced local autonomy
- A marked shift towards an adversarial approach at the expense of negotiation and collaboration
- Increased timeframes and costs (eg councils estimate \$100k per appeal if a court appeals mechanism was introduced, plus indirect costs on council strategic planning staff and other resources to prepare for and defend cases in court).
- Undermining strategic plans, with associated reduction in community trust.
- Conversely, **greater process delays** by moving all merit assessment to the end of the process
- Significant upskilling and new strategic planning expertise/resources would need to be injected into the Independent Planning Commission or LEC if an appeal process was introduced through either of these channels

- Contradictory expectations for dealing with infrastructure provision – the Discussion Paper proposes to ‘decouple’ planning agreements from rezoning whereas the current infrastructure contributions reforms are calling for these to be undertaken concurrently.

New terminology – ‘rezoning application’ and removal of gateway

The Discussion Paper proposes changes to planning proposal terminology and notably, this includes:

- replacing the term ‘planning proposal’ with ‘rezoning application’ and
- removing the term ‘Gateway’, noting the Gateway stage is proposed to be removed.

There are varying views among councils about rebadging planning proposals as ‘rezoning applications’. Planning proposals not only relate to requests to rezone land but also cover other changes to planning instruments, so it would be incorrect to adopt the blanket term ‘rezoning’ for any LEP amendment and may not reflect the true intent of a proposal. Furthermore, councils know their communities have expressed concern that this change has the potential to be confusing for the public who have become accustomed to the planning proposal terminology.

The proposed removal of gateway has also received mixed views from councils, with some metropolitan councils supporting its removal and others, from rural and regional councils, expressing the need for gateway to be retained. Funnily enough, in 2009 the gateway process was originally introduced “to improve the process for making local environmental plans”¹³ and has been subject to various reviews since then. It is clear that the idea of removing the gateway process requires far more rigorous analysis and stakeholder consultation before a decision is made to substantially alter the current arrangements.

04

LGNSW recommends that the DPE undertakes further rigorous analysis and stakeholder consultation before making any decisions to remove the gateway process

New categories and timeframes

The Paper proposes having 4 categories of rezoning applications based on the strategic consistency and complexity of the proposal. Categories have been introduced in the new LEP Guideline and there is general support from councils for using categories, although some fine tuning may be needed. Councils have provided details in their submissions.

In general, councils support having sensible and realistic benchmark timeframes which can help bring certainty for all players in the planning proposal process. However, the timeframes

¹³ DPE, [Pre-Gateway Review - Findings and Recommendations Report](#), 2015, p 6

suggested in the Paper are unrealistic and impractical, with most councils' experience being that the actual timeframes for each stage of the process take longer than those listed. For example:

- Providing only 1 week for a council to review a rezoning application after lodgement is insufficient to complete an adequacy check of the quality of material submitted, nor would it allow the ability to organise briefing sessions for elected officials. This would mean an application could go on exhibition after 1 week, and would not enable time for a council to have considered the quality of the rezoning application or necessarily form a position on whether or not it is supported. For Category 2 and 3 proposals, the timeframe should be extended to 2-3 weeks to allow and ensure all scoping requirements are met.
- There is little recognition of council reporting cycles and no provision for delays caused by state agency referrals, involvement of DPE or waiting for Parliamentary Counsel responses on the drafting of an instrument. The requirement to consult with state agencies prior to exhibition can take longer than the timeframes suggested in the paper, particularly in situations where complex questions involving land and infrastructure are concerned. Reliance on benchmark timeframes also needs to ensure state agencies are equipped with appropriate resourcing and funding to enable them to meet these consultation/scoping phase timeframes.
- The workflows illustrated in the Discussion Paper assume a linear process but in practice planning proposals commonly are iterative not linear.

"Most timeframe delays are often out of council hands. Such delays can include waiting for response from agencies, waiting for additional and adequate information from proponent, creating LEP maps that meet DPIE's technical requirements and having them reviewed and working through PC drafting."

Quote from council planner in January 2022.

Rather than encouraging councils to work with proponents to achieve quality, merit-based outcomes, imposing strict timeframes with punitive consequences will discourage them from working with proponents to reach positive and balanced outcomes and will lead to more proposals being rejected. 'Benchmark' timeframes should be treated as indicative only and must not be tied in any way to guarantees of fee refunds or appeals. To be effective and result in any meaningful change, the DPE and state agencies should also be held to benchmark timeframes.

05



LGNSW recommends that:

- Benchmark timeframes listed in the paper should be extended to ensure they are realistic and practical
- Benchmark times must be indicative only and not have punitive consequences such as planning guarantees or appeal rights attached to them.
- Other players in the process, including DPE and state agencies should also be factored into these applicable indicative benchmark timeframes

New roles for proponent

The proposed changes shift the focus of the process to the proponent, requiring them to be responsible for all fees, meeting information requirements, consulting with state agencies, and reviewing and responding to any submissions received during consultation. With the significant windfall gains at stake in land rezonings, the idea of the proponent running the consultation and engagement with communities and agencies, with the exclusion of council, raises many questions, particularly around the potential conflict of interest. This proposal also fails to factor in the legitimate role of Community Participation Plans and requirements on councils around exhibition and consultation compliance.

Further, LGNSW is concerned that these changes would effectively exclude council from the community and agency conversation and erodes councillor engagement and public confidence. Private proponents are not equipped with sufficient strategic, subject-specific knowledge and expertise, or have sufficient understanding of councils' strategic and operational plans, to be able to adequately or meaningfully engage with agencies, or review or respond to submissions. The community is less likely to raise issues of concern if they are being made directly to the private proponent or 'applicant'. In these strategic decisions, councils must be involved in both agency and community consultation to meet public expectations and ensure a transparent process.

06



LGNSW does not support the proposal for private proponents being responsible for consulting with state agencies and reviewing and responding to submissions and recommends that responsibility for community consultation and state agency engagement remains with councils.

Planning Guarantee

The discussion paper proposes a fee refund, or planning guarantee, for proponents where a council does not make a determination in the mandated timeframe. This refund fee idea is taken from the UK, where, as noted in the paper, it applies to “the equivalent of a development application”¹⁴, not rezonings.

Local government opposes this proposal. Firstly, the Paper’s rationale for this proposal is scant, and it is misguided to assume that the use of a guarantee or refund for development applications in the UK is in any way appropriate or applicable to the decision-making process for strategic land use changes in the NSW planning system.

Secondly, applying these punitive measures on councils is demeaning and seems to reinforce the underlying sentiment in the Discussion Paper that local government is to blame for delays in the planning proposal process. The Paper proposes no such timeframes on the operation of the Department, other state agencies or proponents for their part in the planning proposal process. Nor is there consideration of the time delays that occur in the pipeline of work queued at the Office of Parliamentary Counsel.

It fails to recognise the many stages and players in the process that may contribute to potential delays. It discourages collaboration between parties to facilitate good planning outcomes and most concerningly it will have the perverse effect of an increase in the number of refusals to ensure timeframes are met.

“One of our current planning proposals has been in with the Department for assessment since December 2020. We are still waiting on a Gateway Determination to allow public exhibition.”
Quote from a metropolitan council in February 2022.

Thirdly, the planning guarantee is a further incentive for the spot rezonings and ad-hoc proposals that the planning system should be avoiding, and which the Discussion Paper itself has acknowledged can cause “inefficiencies”¹⁵

LGNSW recommends this proposal be abandoned. Councils are dismayed at the inclusion of this notion of offering a planning refund and are unanimously opposed to it. Rather than introducing punitive measures such as this, a far more constructive approach is to work with LGNSW and councils to identify and create *positive incentives* for councils (such as the Public Spaces Legacy Program¹⁶) to get improved results while using the Planning Delivery Unit (PDU) to continue to address potential barriers in all parts of the rezoning process

¹⁴ Discussion Paper, p 33

¹⁵ Discussion Paper, p 1

¹⁶ The [Public Spaces Legacy Program](#) was a good example of a positive incentive, with DPE working with councils to get improved results

07



LGNSW recommends the NSW Government abandon the punitive measure of a planning guarantee or 'fee refund' to "incentivise" councils' rezoning assessment timeframes and instead identify and create positive incentives in consultation with LGNSW and councils to address potential barriers in all parts of the rezoning process.

New fee structure

The proposed reforms include the introduction of a new fee structure with consistency statewide, with three options proposed.

- Option 1: Fixed assessment fees
- Option 2: Variable assessment fees
- Option 3: Fixed and variable assessment fees

While the paper recognises councils' resourcing challenges, it overlooks the broader issue of the failure of regulated fees and charges to allow councils to properly fund their planning, building and development assessment responsibilities. LGNSW and councils support a fee regime that allows for councils to recover the full cost of assessment.

Councils are concerned that the proposed fee structure is too rigid and none of the three fee options in the Discussion Paper would provide councils with full cost recovery security. A blanket statewide approach to fee-setting for planning proposals is too simplistic. Councils need a system which is flexible enough to set their own fees in accordance with the particular needs and circumstances of their resources and community expectations. This proposal requires far greater consideration.

08



LGNSW recommends that:

- Any new fee structure must be based on full cost recovery principles and be designed with sufficient flexibility to provide councils with full cost recovery security.
- DPE undertakes further detailed exploration of fee options in consultation with local government

Appeals Pathways

For privately-initiated planning proposals, the Paper proposes allowing a new appeal pathway after the public exhibition, assessment and final decision has been made. It is further proposed that this appeal would be determined by the Land and Environment Court (LEC) or the Independent Planning Commission (IPC).

If adopted, this would be a significant departure from the current system and the role of the Court and is opposed by LGNSW and the local government sector¹⁷. Councils do not support the idea that such proposals would be determined by unelected officials. It contravenes the current system which is designed to enable transparent, consultative and democratic strategic planning decisions.

The LEC exists to interpret and apply existing legislation when determining DAs. Planning proposals on the other hand, occur through a democratic process that involves the community and elected councillors to establish new strategic policy and direction. This process results in changes to legislation i.e. the making of or amendment to an LEP. The proposal to have rezoning application appeals heard by the LEC will further undermine the ability of elected councillors to determine land use outcomes and represents a significant erosion of councils' role in the local strategic planning.

In addition to questioning its premise and justification, councils universally agree this proposal would:

- incentivise ad hoc, speculative planning proposals ('spot rezonings')
- divert strategic planning resources to defend court cases
- undermine the integrity of the planning system
- fundamentally reshape strategic planning and create a lack of public trust
- have major cost and time implications - defending decisions in the Court is a costly process and resource intensive. (This is of particular concern for councils which have large numbers of planning proposals in the system.)

The Discussion Paper correctly points out that the Court is not set up and appropriately skilled to resolve the complex matters inherent with some planning proposals. These views were also shared by the court users group (lawyers) in stakeholder consultation sessions with the Department in 2020. Similarly, the IPC would need substantial re-skilling if it was to take on this role.

LGNSW supports sensible and evidence-based reforms that will assist the broader economic stimulus goals. However, if the objective is to speed up planning proposals, using the Court for rezoning appeals is not the solution. Similarly, much more work is needed to explore the merits, costs and benefits of the alternative option proposed in the Paper of using the IPC.

Any move to introduce an appeal mechanism for planning proposals must have regard for the

¹⁷ The 2020 Local Government Annual Conference resolved to oppose "reforms that will allow a new class of appeals for rezoning applications making it easier for developers to significantly change the character of local areas". Refer to [LGNSW 2020 Record of Decisions](#), Resolution 58, p 20.

current system whereby communities understand and expect that strategic planning for their local areas is and should be made by locally elected councils. LGNSW has always maintained that councils and their communities are best placed to make strategic land use and policy decisions about where and how development will occur in their local area.

Having said that LGNSW would be prepared to work with the NSW Government and the Department to identify other suitable administrative review pathways and/or bodies that could be established to facilitate conciliation processes as part of a merit review, in certain, specified circumstances and with tight thresholds around it.

09



That the NSW Government withdraw its proposal to introduce a new appeals process through the LEC and work with LGNSW and councils to explore the costs and benefits of other mechanisms and/or bodies that could be utilised or established to facilitate conciliation processes under certain specified circumstances

CONCLUSION

While local government supports improvements to the system, there has been a large degree of caution and questioning from councils as to whether the rationale, practicality, balance and timing of these proposals can be justified and are warranted. A recurring theme is that what is being proposed in the paper risks incentivising spot rezonings and having the perverse outcome of increasing speculative rezoning requests, adding further costs and time delays and undermining strategic plans. It is deeply concerning and somewhat ironic, that if adopted, the provisions of this 'speculative' piece would lead to a flood of speculative planning proposals being submitted to councils.

While selective elements of the Discussion Paper may be supported in principle by local government, some aspects fall just short of punishing councils for delays in the process or for requesting additional information to assist in achieving a good planning outcome. In short, this leaves our members with the general feeling that the paper has a beneficial bias towards development proponents and industry with little in it that will bring true improvements for councils. The timeframes, appeal mechanism and planning guarantee, in concert with the Minister's December 2021 Expectations Order, all combine to contribute to this unequivocal sector view. LGNSW rejects the proposals in the Discussion Paper and calls for the Minister's Expectations Order to be revoked.

Having said that, this submission has acknowledged there may be value in certain selected elements of the Discussion Paper that could be further looked at in close consultation with all stakeholders and in good faith. LGNSW and councils are willing to work with the department, in a constructive way, to explore these and achieve some further gains, provided these do not create unintended consequences that leave councils worse off.

There are certainly areas which can be focused on to improve the planning system. High on this list is the proper and full funding of council resourcing for the assessment and compliance enforcement of development and planning proposals. Rather than proposing to introduce further major structural change to the planning system, we urge the department to focus its attention on measures in the immediate, short and longer term to fix the planning portal, address the acute shortage of planning resources and staff and fix compliance funding to enable councils to fulfil their expanding compliance responsibilities.

For further information in relation to this submission, please contact Jane Partridge, Strategy Manager, Planning on [REDACTED] or [REDACTED]

SUMMARY OF RECOMMENDATIONS

Recommendation 1

LGNSW recommends that the new Minister for Planning and Homes revoke the *Environmental Planning and Assessment (Statement of Expectations) Order 2021* and in the spirit of a constructive relationship, commit to work with LGNSW and councils to develop workable policy approaches to improve the timeliness of decision making in planning processes.

Recommendation 2

LGNSW recommends that any fundamental changes to the planning proposal process must acknowledge and retain the important role played by the elected Council (councillors) in making strategic local land use policy decisions

Recommendation 3

LGNSW recommends that:

- Further structural and cultural change as proposed in the Discussion Paper is not progressed unless and until the Department can monitor and evaluate anticipated improvements from the new LEP Guideline; and

The DPE establishes a working group with councils and LGNSW to consider the merits and practicality of further ideas, that could improve the planning system within the current framework.

Recommendation 4

LGNSW recommends that the department undertakes further rigorous analysis and stakeholder consultation before making any decisions to remove the gateway process.

Recommendation 5

LGNSW recommends that:

- Benchmark timeframes listed in the paper should be extended to ensure they are realistic and practical
- Benchmark times must be indicative only and not have punitive consequences such as planning guarantees or appeal rights attached to them.

Other players in the process, including DPE and state agencies should also be factored into these applicable indicative benchmark timeframes

Recommendation 6

LGNSW does not support the proposal for private proponents being responsible for consulting with state agencies and reviewing and responding to submissions and recommends that responsibility for community consultation and state agency engagement remains with councils.

Recommendation 7

LGNSW recommends the NSW Government abandon the punitive measure of a planning guarantee or 'fee refund' to "incentivise" councils' rezoning assessment timeframes and instead identify and create positive incentives in consultation with LGNSW and councils to address potential barriers in all parts of the rezoning process.

Recommendation 8

LGNSW recommends that:

- Any new fee structure must be based on full cost recovery principles and be designed with sufficient flexibility to provide councils with full cost recovery security.

DPE undertakes further detailed exploration of fee options in consultation with local government

Recommendation 9

That the NSW Government withdraw its proposal to introduce a new appeals process through the LEC and work with LGNSW and councils to explore the costs and benefits of other mechanisms and/or bodies that could be utilised or established to facilitate conciliation processes under certain specified circumstances.

ATTACHMENT

Key changes proposed by the new approach

- New terminology - planning proposals to be referred to as 'rezoning applications', and the relevant authority (council or the Department) as the 'rezoning authority'
- New roles - giving proponents 'ownership' of the application throughout the process. Currently, the planning authority has responsibility for the process. The Department will take less of a role in general
- Alignment of rezoning and DA processes to encourage combined applications which seek to change the rules while applying for development approval.
- A mandatory scoping stage before lodgement
- Exhibition of a proposal prior to any Council assessment or determination on the merit of the proposal
- Proponent will have responsibility for:
 - Public exhibition and community consultation - no involvement by council and no formal opportunity for council to provide public information to support the community understanding of the rezoning application.
 - The assessment and response to submissions.
- A single merit assessment which would happen only at the very end of the process, after public consultation and the proponent response to submissions.
- Limited opportunities for council to request additional information to inform their assessment and enable a positive determination, with only one opportunity permitted.
- New mandated timeframes for the different stages - which would be implemented by deemed refusals with the right to appeal for exceeding the timeframe.
- A planning guarantee or 'fee refund' for proponents where council does make determinations in the mandated timeframe.
- A formal appeal process to either the LEC or IPC.
- New roles, with council no longer having significant involvement with any state agency rezoning request, which instead would be assessed and determined by the Department with minimal council involvement
- Councils will be considered to have a conflict of interest if a rezoning application involves a Voluntary Planning Agreement where council receives a public benefit
- Standardised planning proposal fees across all councils.