



# Environmental Defenders Office

28 February 2022

Ms Paulina Wythes  
Director, Planning Legislative Reform  
Department of Planning, Industry and Environment  
Parramatta NSW 2124

Submitted by email: [planninglegislativereform@planning.nsw.gov.au](mailto:planninglegislativereform@planning.nsw.gov.au)

Dear Ms Wythes,

## **Discussion Paper: A new approach to rezonings**

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide feedback on the *New Approach to Rezoning Discussion Paper* (**Discussion Paper**).

The Discussion Paper proposes a number of changes to the way in which Local Environmental Plans (**LEPs**) are amended, and in particular provides a number of new rights to private proponents seeking site-specific amendments, and reduces the role of the Department of Planning and Environment (**Department**) in overseeing these amendments.

The Discussion Paper asserts at the outset that “[o]ngoing reforms to the NSW planning system aim for a ‘plan-led’ system – an approach that ensures strategic planning is the foundation for all decisions about potential land-use changes.”

In our view however, the proposed changes – which encourage ad-hoc, reactive rezoning at the request of individual landowners – will potentially undermine strategic planning and will further erode public confidence in the integrity of the planning system.

Due to the limited capacity of the EDO to respond comprehensively to the Discussion Paper, we have instead focussed our submission on the following four key matters.

## **Discussion paper fails to consider the public interest**

We are concerned that the Discussion Paper is not framed around the public interest, good governance, or probity, but rather around “speeding up” rezoning.

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While there are clear benefits to proponents from the changes proposed, the public benefits (and impacts) have not been considered in the Discussion Paper, let alone demonstrated.

We note that the consultation process described engagement with local government, state agencies, and industry, but not with the community. This is reflected in proposals that prioritise the interests of developers at the expense of communities.

Further, in response to a question posed in the Discussion Paper: the public interest must be a separate mandatory consideration in decision-making on rezoning,<sup>1</sup> and must be genuinely considered and prioritised.

### **Proposed reforms in the Discussion Paper encourage proponent-initiated rezoning, which undermines strategic planning**

The Discussion Paper notes the Government’s intent that the planning system be governed by strategic planning:

One of the aims of this discussion paper is to create a system that better aligns the rezoning process with strategic planning. Strategic planning guides long-term planning for the state’s regions, districts and local communities, using a longer-term view to clarify what might happen, when, why and where.

Strategic planning requires a broader consideration of how best to shape a sustainable future for a region, district or local government area (LGA). The process guides the decisions that planning authorities make about land use and development, environmental sustainability and the integration of transport and infrastructure.

By going beyond individual development proposals, strategic planning can capture an agreed vision for the future of an area, drawing from evidence about the attributes that makes places unique, the characteristics to retain and enhance, economics, the changing climate and the aspirations that people have for their community.

EDO agrees that robust strategic planning is critical, but submits that the facilitation of spot-rezoning as proposed has the potential to seriously undermine strategic planning goals.

#### *Proponent-initiated rezoning is distinct from rezoning initiated by planning authorities*

The Discussion Paper elides rezoning initiated by planning authorities such as local councils – which is more likely to be based on strategic planning, community input, and the public interest – and rezoning initiated by private landholders – which tends to be based on private interests and maximising profit. These two types of rezoning are plainly very different propositions and conflation of the two in the Discussion Paper means that the analysis and measures proposed are likely to be inapt for either one or the other.

For instance, the Discussion Paper says that “[c]hanging the zoning of land or the controls applying to land – referred to in this paper as the rezoning process – translates strategic planning into statutory controls”. While this may be the case when the rezoning is initiated by a public

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<sup>1</sup> Discussion Paper, p 29.

authority following a strategic planning process, it not the case for proponent-initiated rezoning which is almost uniformly site and project specific, is ad-hoc, and is not the culmination of a strategic planning process. For the Discussion Paper to stand up to scrutiny on this point, and for its proposals to have their stated effect, it would be appropriate to examine rezoning proposals initiated by planning authorities separately from proponent-initiated rezoning proposals, and for regulatory measures to be tailored to each category.

#### *Proponent-initiated rezoning detracts from strategic planning*

EDO considers that facilitating proponent-initiated rezoning, particularly through removing oversight mechanisms (such as the gateway process) and providing merits appeal rights to proponents (both of which are discussed further below), undermines rather than strengthens the stated aim of a “plan led” system, in which “strategic planning is the foundation for all decisions about potential land-use changes”.

Proponent-initiated proposals are often site and project specific, and when approved, override LEPs – the actual legislative instruments that are in place to govern land use. Ad-hoc, proponent-initiated changes to LEPs undermine the certainty and consistency of the planning system and engenders the perception in the community that the planning system is beholden to developers.

If a LEP does not implement a strategic plan, the appropriate, transparent and efficient course of action is that the LEP be amended at the initiation of the relevant level of government, not through numerous site-specific rezonings.

#### **The gateway determination, or a robust alternative oversight safeguard, is crucial for probity**

EDO strongly opposes the proposal to remove the gateway determination process without replacing it with a robust oversight and scrutiny mechanism, the importance of which was stressed by the Independent Commission Against Corruption (ICAC) in its March 2021 *Report on the Investigation into the conduct of councillors of the former Canterbury City Council and others*. In this report, the ICAC noted that “the corruption risks associated with planning proposals are significant” including because of “the capacity to make large windfall profits from an LEP amendment”<sup>2</sup>

The proposal is in fact contrary to the relevant recommendation (Rec 17) that more robust Departmental oversight of planning proposals through gateway determinations was necessary.

Engagement with the Department and other agencies at the scoping stage does not fulfil this oversight role.

There also needs to be a clear point early in the process where a proposal can be refused if inconsistent with strategic planning goals. There is no equivalent of an early refusal in the proposed scheme compared to the current process – see Figure 3, p13. We recommend that the

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<sup>2</sup> Independent Commission Against Corruption, March 2021, *Report on the Investigation into the conduct of councillors of the former Canterbury City Council and others*, available at < <https://www.icac.nsw.gov.au/media-centre/media-releases/2021-media-releases/icac-finds-former-canterbury-city-council-councillors-and-senior-staff-corrupt-recommends-tighter-planning-safeguards-in-nsw> >, pp 194-195

rezoning authority be provided with powers to reject a rezoning application before it goes on exhibition, particularly where it is inconsistent with strategic plans.

### **Merits review rights for third-parties improve decision-making and safeguard against corruption**

It is proposed that development proponents will have formal rights of review in relation to rezoning requests. EDO strongly opposes this proposal. While review rights are presented in the Discussion Paper as an additional accountability measure, such review rights would in fact serve to increase the influence of proponents over local development decisions.

Granting review rights to proponents where a council refuses a rezoning application could potentially influence initial council decisions, simply by the 'threat' of having to expend further council resources if a well-resourced proponent seeks a review.

Further, increasing proponents' review rights is likely to increase the number of rezoning proposals and amending LEPs. This is because well-resourced proponents may be more likely to put forward rezoning proposals if they know they can simply seek review should the council reject the proposal.

That is, the proposal is likely to increase the number of rezoning proposals (which, as noted above, may undermine strategic planning and also carries a significant corruption risk) and will place a significant administrative burden on councils (and on the review forum, whether that be the IPC or LEC).

However, *if* these rights are granted to proponents, we strongly believe that it is crucial that equivalent rights are also provided to third parties as an oversight and accountability mechanism, and to counter community perception that the planning system favours the interests of proponents over the community.

The benefits of third-party merits appeal rights are well-recognised: they improve the quality of decision making, are a key safeguard against corruption, and improve public confidence in the planning system. The ICAC's 2012 report on strengthening anti-corruption safeguards in the NSW planning system examined these benefits and recommended the increase of third-party merits review rights in the NSW planning system.<sup>3</sup> Since that report, these rights have been diminished rather than expanded. The Discussion Paper's proposal to extend merits appeal rights to proponents but not affording those rights also to the community would be another regressive step and is unacceptable.

Overall, the Discussion Paper's proposed reforms are likely to increase proponent-initiated rezoning, will reduce important scrutiny over LEP amendments, while increasing opportunities for developers to use review rights to push through rezoning proposals that are rejected by council, thereby undermining strategic planning. The Discussion Paper and proposed reforms are not designed with a view to the public interest, ICAC recommendations around probity, or the

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<sup>3</sup> Independent Commission Against Corruption, February 2012, *Anti-corruption Safeguards in the NSW Planning System*, available at < <https://www.icac.nsw.gov.au/media-centre/media-releases/2012-media-releases/icac-recommends-changes-to-the-nsw-planning-system-to-minimise-corruption-risks>>, pp 22-23.

imbalance in influence between well-resourced proponents and members of the community. As such, they would not achieve the aims of increased transparency, accountability or public confidence in the planning system, nor will they assist in the move towards a plan-led system.

We are very concerned about the proposals outlined in the Discussion Paper and we would be happy to discuss the above concerns in more detail. For further information, please contact

 or (02) 9262 6989.

Yours sincerely,

**Environmental Defenders Office**



Rachael Chick  
Solicitor