25 March 2022

NSW Department of Planning and Environment
GPO BOX 239
SYDNEY NSW 2001

Sent via email: planninglegislativereform@planning.nsw.gov.au

Dear Sir or Madam

Re: SSROC Submission to the A New Approach to Rezoning Discussion Paper Effect

Thank you for the opportunity to provide feedback on the A New Approach to Rezoning Discussion Paper. As noted in correspondence on 24 February 2022, provided by Ms Paulina Wythes, Director, Planning Legislative Reform, SSROC is now providing its final submission.

The Southern Sydney Regional Organisation of Councils Inc (SSROC) is an association of eleven local councils in the area south of Sydney Harbour, covering central, inner west, eastern and southern Sydney. SSROC provides a forum for the exchange of ideas between our member councils, and an interface between governments, other councils and key bodies on issues of common interest. Together, our member councils cover a population of about 1.7 million, one third of the population of Sydney, including Australia's most densely populated suburbs. SSROC seeks to advocate for the needs of our member councils and bring a regional perspective to the issues raised.

SSROC population and housing data[1], in the period from 2011 to 2016, reveals a very diverse socio-economic area marked by rapidly rising numbers of dwellings and underlying growth in the number of households in the area. The estimated resident population increased by over 150,000 during this five-year census period.

Although the urban growth of the SSROC area is unique, our region shares a number of issues and drivers with many other urban areas managing rapid population growth sustainably while enhancing liveability.

Because of its size and diversity, issues experienced within SSROC often reflect statewide trends like population growth supported by migration. The experience of strong growth and related development across both highly urban as well as more suburban parts of Sydney has provided a number of valuable insights and has helped to shape our feedback on the Discussion Paper.

SSROC appreciates this opportunity to help shape and contribute to the policy reforms to enable better design and place outcomes. SSROC supports the Department of Planning and Environment's (DPE) objective to balance the need for a responsive and flexible planning system with the robust processes that maintains good planning outcomes. However, there are concerns that some of the proposed reform elements, such as: a possible Land and Environment Court appeal avenue; a 'Planning Guarantee' refund to proponents; and other proposed elements that could create perverse outcomes. By encouraging and de-risking the spot rezoning process, they could undermine the integrity of a strategic plan-led system, and reduce community and Council trust in the planning system.

[1] Source: Australian Bureau of Statistics, Census of population and Housing 2011 and 2016, compiled by id https://profile.id.com.au/ssroc/

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1 Introduction

In December 2021, the Department of Planning and Environment (DPE) announced a review of existing rezoning processes, in which SSROC Councils currently participate as part of the planning proposal process. As part of this review, *A New Approach to Rezonings* (the discussion paper) has been on public exhibition.

DPE states that the proposed approach intends to balance the need for a responsive and flexible planning system with the robust processes that maintains good planning outcomes. The new approach aims to support a stronger strategic planning process by:

- simplifying the rezoning process and minimising duplication,
- improving transparency,
- improving consultation processes,
- reducing processing times,
- creating more certainty and consistency,
- empowering councils to make decisions on matters important to their communities while allowing the NSW Government to deal with matters where government intervention is beneficial,
- giving private proponents control and responsibility for rezoning requests, and
- improving the quality of planning proposals.

However, process improvements should also be informed by the adoption of a set of principles that support the intended planning outcomes for rezonings. Acceleration is only a good outcome if the process is heading in the right direction.

Rezoning of land is not simply a mechanical process as a key driver is commercial advantage. Rezoning involves a land use planning decision that affects value for a property owner on one hand, and amenity and irreversible changes to the socio-economic and physical environment for existing residents and workers on the other. Negative consequences can occur if the decision fails to adequately balance and optimise the competing interests, opportunities and risks present for new place users, owners and existing communities.

Seeking to change an LEP, which is established with the community and observed by a significant majority of the development community, should only be facilitated in exceptional circumstances and should not be seen as a riskless activity.

SSROC therefore proposes that a revised policy incorporate a set of six explicit principles about rezoning of land to inform and shape the design of the process.

1. *The rezoning pathway should preference and prioritise strategic planning made through comprehensive, well integrated planning reviews by local government and approved by the Planning Department, over ad hoc spot rezonings that do not (need to) assess the cumulative impacts of all development.*

   A plan-led decision-making system should preference and support rezoning proposals that are consistent with the community's and region's long term strategic planning directions, all things being equal. Local Environmental Plans are required to be continually updated every five years, they must reflect respective Local Strategic Planning Statements and Housing Policies which in themselves must be individually approved by the NSW Government.

2. *Place-making and the collective needs of the entire community should take precedence over the creation of value for the land holder.*

   Rezoning is the making of delegated legislation. Rezoning decisions confer new (and often improved) rights to land holders. Applying for a rezoning may be a right but there is no right to have the subject land rezoned. It is entirely a public decision. The

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system should recognise and reward well justified rezoning applications that are well aligned and consistent with a place's strategic planning directions with expeditious approvals. Proponent-led planning proposals that respond to specific endorsed strategies can equally contribute to common strategic aims.

As a form of value creation, a rezoning decision is essentially an investment in the future, made by representatives of the affected communities and citizens of NSW. Some this value should be captured, shared and put into service for local communities, citizens of NSW and residents. A priority use for the value capture process involves ensuring negative rezoning impacts, like displacing low-income renters, are mitigated so that the future developments do not exacerbate disadvantage.

It entirely fitting that windfall gains from granting development rights should be shared with the communities who have invested in a place and created much of the potential value. This will improve public trust and can help to ensure that development related inequities are addressed.

3. *The merit case for a rezoning should justify why well considered and consulted plans are to be significantly changed, as rezoning decisions are irreversible in practice, in the absence of public compensation.*

   In a modern representative democracy, and in full accordance with NSW Planning law, the adopted decisions of a duly elected local government and state planning bodies are now translated into Local Strategic Planning Statements. These long-term decisions are intended to cascade to Local Environmental Plans (LEPs) and Development Control Plans (DCPs). The LEP represents the community's view on how their area should develop and gives certainty to the community and development industry. To maintain public trust in the system, when significant rezoning changes to these plans are proposed, public consultation, genuine engagement of duly elected Councils (and their delegates) and obtaining objective supportive evidence need to be prioritised above speedy processes. Increasingly, members of the community are concerned with overdevelopment, and increasing pressures on traffic, services, and infrastructure. They have the potential to devalue the built legacy communities enjoy made possible through consistent and responsible planning and design excellence.

4. *Growth in housing and business space is only one driver. Growth can be met through a range of mechanisms apart from new rezonings, such as making use of existing growth capacity.*

   In many contexts the growth of local housing supply is an insufficient reason alone to justify a successful merit assessment for an individual rezoning application, especially when a local council has in place capacity targets for new housing supply demonstrated and endorsed in their Local Housing Strategy across their LGA.

5. *A collaborative approach is more robust and will deliver better planning outcomes*

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Rezoning applications are often complex with interrelated factors that need to be considered from first principles given the absence of adopted standards. There may be multiple stakeholders with an interest including the proponent, adjacent landowners, the wider community, councils and state agencies which may need to provide supporting infrastructure. State and local plans and strategies establish strategic direction, and while they strive for consistency, they are complex with many strategic priorities to be assessed and weighed in considering any rezoning. The nature of strategic alignment can change during the planning process as the project adjusts to address identified opportunities, shortcomings, and impacts. Changes that escalate tensions between the development and building sectors, governments and the community at large should be avoided.

6. *A clear, unconflicted transparent process maintains a high level of public trust, and confidence in the rezoning process.*

    Spot rezoning decisions are an area of public contention and high interest, and have sometimes been associated with corrupt behaviours, incentivised by the potential for very large amounts of money to be made through the process. All development and construction are dependent on maintaining the social licence of the planning system.

The discussion paper aims to build on recent changes to the way in which amendments of a Local Environmental Plan (LEP) occur, with the release of the new *LEP Making Guideline*. The new Guideline seeks to better explain the planning proposal system to rezone land and implements new changes, intended to improve the process, such as the introduction of timeframe expectations for the assessment of planning proposals. The changes outlined in the LEP Making Guideline came into effect on the 15 December 2021.

SSROC has organised the following feedback around the structure of the discussion paper, providing comment on the specific questions raised within the document, as well as providing general and additional comments where necessary. A number of figures and tables from the discussion paper have also been provided throughout the submission for reference.

The proposed new framework compared to the current framework is shown in the overleaf figure extracted from the discussion paper.

2 General Comments

A key concern of SSROC is that proposals in the discussion paper will incentivise spot rezonings and, if adopted, will undermine the overall policy position which has focused on improving and enhancing a rigorous strategic planning process. The proposed incentives and disincentives – in the form of time limits on assessment, financial disincentives and appeals – will only increase the number of speculative applications that councils (and the courts or panels) will be required to deal with.

If these proposals are progressed by the NSW Government, they will significantly change planning in NSW to its detriment. SSROC is concerned that they will progressively erode certainty and trust in the NSW planning system, damage long term strategic planning, often pit proponents against the community, increase delays and waste limited planning resources, all of which are contrary to good governance aims.

SSROC acknowledges that improvements are needed. Opportunities exist for the more efficient use of planning resources, reducing overall timeframes, greater certainty for proponents and the community, improved strategic alignment of homes and business space, and increased opportunities for meaningful community input.

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Key issues

- As noted, LEPs are delegated legislation, subject to NSW Government oversight, which have been through extensive community consultation prior to their adoption, with councils acting as the decision-maker on behalf of the community. The Department discussion paper indicates the NSW Government wants private proponents to take greater ownership of their rezoning applications. SSROC considers it is not appropriate to outsource changes to laws to conflicted private proponents who stand to benefit from the proposed changes and put little weight on the shared community impacts compared to the opportunity for a few. Councils as the rezoning authority must maintain primary responsibility for the process. There is room to give private proponents greater strategic recognition and responsibility without going to the extent proposed in this discussion paper.
- There is potentially a significant shift towards an adversarial approach at the expense of collaboration that will create greater expense for the system and its stakeholders. Proponent issues can be complex, needing to gain approvals from easement owners and associated property interests after lodgement. Strictly mandated timeframes and punitive measures proposed to implement them reduce incentives for councils to wait for property related approvals, for proponents to collaborate with councils, and encourages refusals and appeals. These include deemed refusals for failure to meet mandated timeframes, and a potential planning guarantee to refund proponent fees. The proposed approach requires significant resources from proponents, councils and the community before a final determination can be made at the end of a lengthy process.
- The approach taken by the discussion paper incentivises speculative spot-rezonings at the expense of strategic rezonings. As the Government wants 'fewer ad-hoc, site specific rezonings that are more likely to cause these inefficiencies' then the process should have an opportunity to determine the merit of a rezoning application early. Rezonings should only respond to a specific state or council endorsed strategy or a framework for a defined area that anticipates rezoning applications.
- Moving a major part of merit assessment to the end of the process means there can be no early certainty for investment or for councils in allocating resources. There will be considerable risks carried through to the assessment and finalisation stage of large, complex rezoning applications. Many proponents value the higher certainty provided by early merit assessment, de-risking further investment decisions.
- In addition, moving all merit assessment to the end of the process will likely cause even greater process delays or appeals. A rezoning proposal can change substantially during the initial consideration of the merit in the current process as issues become identified and addressed collaboratively. The new approach means this will only happen at the end of the process, meaning many applications will require re-exhibition and re- assessment, increasing time and diverting resources.
- Major issues and misalignments that arise in the assessment, whether they be strategic alignment or site-specific merit, will be more likely to lead to refusals. Where proponents and councils can work together to address issues, any significant changes will likely lead to the re-exhibition of applications. The best way to avoid these additional and costly delays is to maintain the requirement for early merit assessment prior to public exhibition. Greater certainty is achieved by presenting the community with a proposal that has well-articulated strategic merit and clearly manages site specific impacts. If a proposal is not so well formed, any

opposition is likely to continue despite any changes made at later stages in the process.

SSROC strongly recommends retaining the requirement for the consent authority to make a determination on strategic and site-specific merit prior to public exhibition.

- The new approach is potentially wasteful and inefficient and will divert limited expertise and resources from critical state approved strategic planning which supply the majority of housing and jobs growth. Additional planning resources will be required to manage an increase in speculative and ad hoc spot-rezonings and to process inefficiencies created through moving all merit assessment to the end of the process.
- Treating rezonings like regular Development Applications and encouraging combined applications will seriously undermine certainty and trust in NSW planning system. There will be little incentive for a proponent to pay attention to an adopted planning control if it can be simply changed. This will undermine long term strategic planning along with community trust in the planning system and risks putting upward pressure on land values through increased speculation.
- One of the proposed appeals pathways would have the Land and Environment Court making delegated legislation, which is fundamentally incompatible with its role. It is therefore not appropriate for the Land and Environment Court to hear these appeals. The ability for the Court to set a precedent on the basis of a single application will rapidly collapse the strategic planning system focussed on long-term outcomes. An ad hoc system and a strategic system are incompatible. Any review or mediation process should be undertaken by an independent administrative (non-judicial) body with the relevant expertise and the capacity to facilitate discussions and negotiations between proponents and rezoning authorities. Any such body would need to be appropriately resourced to manage the anticipated load of complex matters referred for review.
- The proposed appeals pathway will incur significant costs for councils. A complex rezoning appeal would be similar to a complex DA appeal, with similar costs for legal advice and representation, expert consultants, and a similar amount of court time. Some estimates of costs to councils for the suggested appeals as being in the order of $250,000 - $400,000.
- Significant delays caused by Parliamentary Counsel are not addressed. These are often caused by poor early collaboration and limited experience of the practical application of LEPs by drafting officers. Councils are often given little time or scope to comment on drafting leading to rushed and sub-optimal outcomes, including delays and complexities when assessing subsequent development applications.
- SSROC supports the elimination of the Gateway request stage for locally significant rezoning applications. Avoiding ‘double-handling’ of request at this point will significantly streamline the planning process and offer clarity and real time-savings for private proponents.
- Spot rezonings (ad hoc planning proposals) are by their nature often contrary to a framework, strategy or long-term plan, all of which are required to have extensive community consultation prior to their adoption – they are mostly driven by private rather than public interest.
- In summary, rezoning requests must respond to a framework or strategy so that they are not ad hoc, disruptive, out of sequence or create uncertainty for the community.

They should respond to a state or council endorsed strategy; a response to an endorsed Local Strategic Planning Statement or endorsed housing or employment strategy. Endorsed strategies are often matched with significant investment in infrastructure as well which gives certainty and a rationale to landowners and neighbours about intended change, enabling government and the private sector to align resources.

- Rezonings must support a process that is strategically aligned, in the public interest, and as stated in the NSW Government's discussion paper results in 'fewer ad-hoc, site specific rezonings that are more likely to cause these inefficiencies.'[2]
- Rezonings have been purposefully linked by NSW Government policy (Housing SEPP and Housing 2041 (NSW Housing Strategy) to the provision of affordable rental housing through Council affordable housing contribution schemes. Affordable housing is essential infrastructure that is necessary for developing sustainable long-term communities.

  It will be important that this connection is maintained and successfully integrated into any new rezoning reform arrangements, such as during the scoping pre-lodgement phase when planning requirements are to be clarified. It is not generally possible to use inclusionary zoning once rezoning has occurred and the land has been transacted.
- The discussion paper does not demonstrate consultation with the Independent Commission Against Corruption (ICAC) in seeking to streamline proponent-led changes rezonings and introduce punitive measures by proponents against councils. Evidence of this will be critical to obtaining broad support for any reform proposals.

[2] NSW Department of Planning, Industry and Environment, *A new approach to rezoning*, December 2021, p1

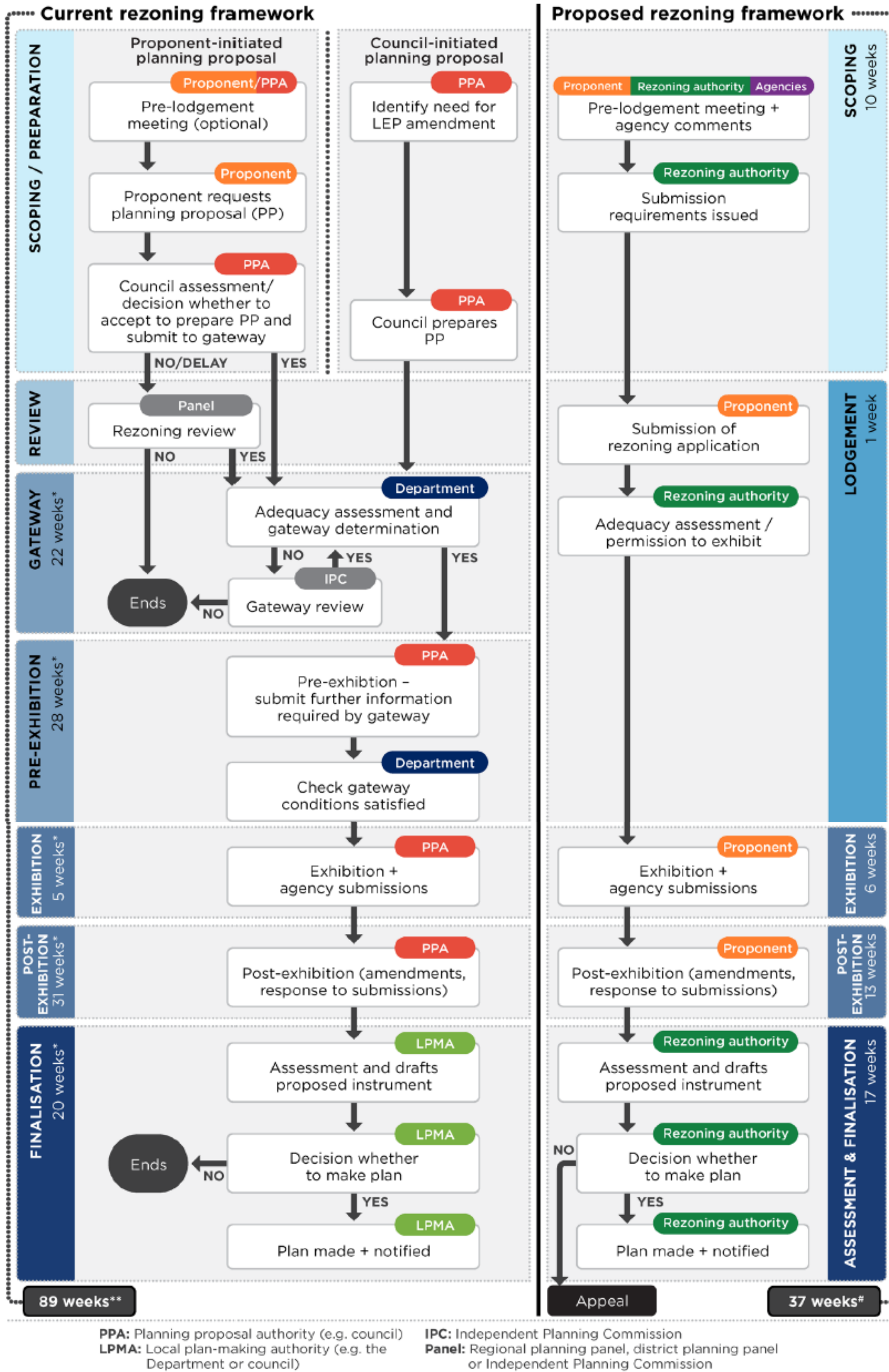

Figure 1 - Comparing the current and proposed rezoning frameworks (source: DPE)

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3 New Terminology

The proposed changes to terminology, as outlined in the discussion paper, are shown in the following table.

Table 1 - Current and proposed terminology (source: DPE)

Current	Proposed	Description of proposed role
Rezoning request/planning proposal	Rezoning application	An application to make or amend an LEP.
• Private proponent (not recognised) • Public authority proponent (not recognised) • PPA ('owner' of the planning proposal, usually council)	Proponent (private, public authority or council)	A rezoning application lodged by a: • private individual or corporation • public authority, including a state-owned corporation • council for changes to their LEP.
LPMA (makes the LEP)	Rezoning authority	The party responsible for assessing and determining the rezoning application. This could be a council or the minister, depending on the type of rezoning application.
Gateway	N/A	Included in the rezoning authority function.

The intention to change the terminology is supported, particularly in relation to the difference between the PPA and LPMA, which is often misunderstood, or difficult to explain to the community.

The community and developers understand and generally refer to any changes to the LEP as a "rezoning" and therefore the proposed terminology could help to reduce confusion with the community and councils using the same terminology (rather than referring to the current generic term "planning proposals"). Whilst changes to the terminology may be of benefit, the proposed change of terminology for the overarching process to 'rezoning application' does have the potential to result in some confusion, especially in circumstances where applications do not propose changes to zoning, or in instances where applications propose changes to not only zoning, but also to other principal development standards (such as height, floor space ratio, permitted uses, etc.)

4 New Categories and Timeframes

4.1 New Categories

The discussion paper proposes four different categories specific to different types of applications. It is noted that these categories have already been implemented through the new LEP Making Guidelines which came into effect on 15 December 2021.

The categories are listed in the below table.

Table 2 – New categories and descriptions (source: DPE)

Category	Description
Category 1 (Basic)	Administrative, housekeeping and minor local matters such as: • listing a local heritage item, supported by a study endorsed by the department's Environment, Energy and Science group • reclassifying land where the Governor of NSW's approval is not required • attaining consistency with an endorsed local strategy, such as a local housing strategy • attaining consistency with section 3.22 (fast-tracked changes of environmental planning instruments of the EP&A Act).
Category 2 (Standard)	Site-specific rezoning applications seeking a change in planning controls consistent with strategic planning, such as: • changing the land-use zone if a proposal is consistent with the objectives identified in the LEP for that proposed zone • altering the principal development standards of the LEP • adding a permissible land use or uses and/or any conditional arrangements under Schedule 1 Additional Permitted Uses of the LEP • ensuring consistency with an endorsed strategic planning or local strategic planning statement • classifying or reclassifying public land through the LEP.
Category 3 (Complex)	Applications that may be not consistent with strategic planning, including any LEP amendment not captured under category 1 or 2. Examples include: • changing the land use zone and/or the principal development standards of the LEP, which would increase demand for infrastructure and require an amendment to or preparation of a development contribution plan • responding to a change in circumstances, such as the investment in new infrastructure or changing demographic trends • requiring a significant amendment to or preparation of a development contribution plan or a related infrastructure strategy • making amendments that aren't captured as principal LEP, standard or basic planning proposal categories.
Category 4 (Principal LEP)	A comprehensive or housekeeping rezoning application led by council, proposing broadscale policy change to the LEP for the whole LGA.

Prior to the recent changes, there was no consistency relating to different types of planning proposals in different LGAs in NSW and the changes brought forward in the LEP Making Guideline aim to make for consistency in specifying different categories and types of applications across the state. SSROC is supportive of the intention of the DPE in doing this, however, recommends that the DPE should engage with stakeholders in the short- to medium-term following the implementation of the changes, to obtain feedback as to whether the new categories have been deemed to have been an effective and practical change, especially as the categories are intended to come with assessment timeframes (and potential penalties for not meeting them).

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SSROC recommends further refinement of Category 3 (Complex). There may be questions regarding how a zoning application is "not consistent with strategic planning" but can still pass a "strategic merit" test.

The final catch-all dot point of Category 3 referring to amendments that are not Category 1, 2 or 4 could be deleted as it invites speculative rezoning applications that are not strategic, do not respond to a change in circumstances and are likely to include small, single sites that would be more suitable for a DA pathway and unsuitable for a rezoning application.

Alternatively two new sub-categories could be created to cover the two types of Category 3 (complex) that are deemed as:

a. Consistent with Ministerial directions and Council's strategic planning directions
b. Major inconsistency with Ministerial directions and Council's strategic planning directions.

4.2 New timeframes

In addition to the new categories, the discussion paper also proposes benchmark timeframes against each of the categories, specifying maximum time frames for each of the following stages:

1. Scoping
2. Lodgement
3. Exhibition
4. Post-exhibition
5. Assessment and finalization

A summary of the proposed timeframes is specified in the table below.

Table 3 - Proposed categories and benchmark timeframes (source: DPE)

Stage	Category 1 (Basic)	Category 2 (Standard)	Category 3 (Complex)	Category 4 (Principal LEP)
Scoping	6 weeks	10 weeks	12 weeks	10 weeks
Lodgement	1 week	1 week	1 week	1 week
Exhibition	4 weeks	6 weeks	8 weeks	6 weeks
Post-exhibition	10 weeks	13 weeks	15 weeks	17 weeks
Assessment and finalisation	11 weeks	17 weeks	24 weeks	26 weeks
Total, excluding scoping*	**26 weeks**	**37 weeks**	**48 weeks**	**50 weeks**

*The total timeframe does not include the scoping stage, which occurs before lodgement.

Discussion paper question: Do you think benchmark timeframes create greater efficiency and will lead to time savings?

Assigning benchmark timeframes may result in perceived time savings and efficiencies in the process. However, any incentives or disincentives implemented to achieve timeframes (such as deemed refusal or refund of planning fees) need to be considered carefully as they may result in perverse policy outcomes, such as lengthy timeframes in appeals processes, which would not be recorded in the measured timeframes, and/or poorer quality planning outcomes.

It is vitally important that any timeframes placed on different parts of the process have fully factored in an appropriate length of time for each of the stages. The real time taken from initiation to finalisation might remain the same, but the formal time between lodgement and finalisation would be less, as there would be more time spent in the scoping/preparation phase.

Delays can result from:

- Responses to requests for information from private proponents taking longer than anticipated,
- Unsatisfactory or insufficient information being provided by private proponents either at pre-Gateway or post-Gateway (under the current gateway process),
- Proponents not taking on initial advice provided as part of the scoping or pre-lodgement phase,
- Requests from the community and elected members for extensions of exhibition periods, due to the substantial nature of many proposals,
- Delays in reporting to Council, due to changes in meeting schedules,
- Delays with gateway assessment and determination,
- Delays in receiving responses from State Agencies.

SSROC does not support restrictive timeframes placed on these processes which, if not met, could result in a penalty for Council. Furthermore, the proposed timeframes do not allow enough consideration of the varied resourcing across different LGAs, the nature of public exhibition and reporting these matters to decision makers, as well as other abovementioned issues.

The lack of resourcing in smaller councils may mean that strategic planning staff are consistently delaying strategic planning projects to meet deadlines for reactive spot rezonings. This would be particularly acute when Councils update their LSPS and associated strategic studies every five years in response to the GSC District Plans, or as required in order to implement NSW Government reform packages.

SSROC urges the DPE to reconsider and provide guiding timeframes that stakeholders should work towards, Alternatively, the DPE should consider stop-the-clock provisions where both the Council and developer agree it is appropriate.

5 New Roles

The discussion paper proposes changing the roles of the different stakeholders involved in the rezoning process. The new proposed roles are specified in the below table.

Table 3 - The roles of councils and the Department under the new approach

Type of rezoning	Department role	Department level of involvement	Council role
Public authority proponent	Assesses and determines	Department assesses and determines	Consultation
Council proponent (category 3 and 4)	Assesses and determines	Department assesses and determines	Proponent
Council proponent (Category 1 and 2)	Conducts scoping and adequacy at lodgement	Department has limited involvement	Proponent + assess and determines after permission to exhibit

Type of rezoning	Department role	Department level of involvement	Council role
Private proponent (categories 1,2 and 3) – inconsistent with specified s9.1 direction/s	Given notice and opportunity to comment given during exhibition	Department has limited involvement	Assesses and determines
Private proponent (categories 1,2 and 3) – consistent with s9.1 directions	Department has no involvement	No involvement in assessment except support, case management and monitoring	Assesses and determines

5.1 Proponents

Councils, rather than private proponents, usually make changes to LEPs to ensure that LEPs give effect to strategic plans. The current rezoning request process means that Council is responsible in progressing a planning proposal, with costs covered by the private proponent. This means that the private proponent is not considered to be the applicant.

The proposed approach in the discussion paper aims to recognise private proponents as applicants, as they are in the development application process. These changes would result in the proponent being able to:

- meet with the rezoning authority to discuss a potential request,
- submit a rezoning application and have it assessed and determined after public exhibition, and
- appeal a decision made about a rezoning application because of a delay or dissatisfaction with a decision (discussed later in this submission).

In addition, the discussion paper specifies that the private proponent will be responsible for all fees, meeting information requirements, consulting with state agencies, and reviewing and responding to any submissions received during consultation.

A private proponent will only be able to lodge a rezoning application if they are the owner of the land or have obtained the consent of the landowner to which the application relates. It is noted that under the current process, private proponents do not have to be the owner of the land or have landowners' consent to lodge a planning proposal with Council.

SSROC understands that the discussion paper proposes elevating the role of private proponents to give them more active participation and responsibilities throughout the process.

SSROC supports the requirement for a private proponent to only be able to lodge a rezoning application if they are the owner of the land or have obtained landowners consent for all relevant lots.

However, the changes proposed would result in the proponent more actively engaged in the rezoning application process, essentially leading the consultation process and given the responsibility of receiving, reviewing and responding to submissions as part of the public exhibition process. These tasks are better placed within the remit of a local council to ensure the exhibition and consultation process is more objective, genuine and meaningful for those who provide submissions. It has been reported that there have been occasions when council officers have been invited to join proponents privately run engagement activities, and that the proponent's summary of engagement lodged with Council, did not accurately reflect the feedback from the community. The proposed process sets up an inherent conflict of interest.

The new proposed process may create significant angst and confusion in the community if a rezoning application is advertised and believed to be supported by Council, especially if the exhibition and engagement references Council involvement in the scoping phase[3].

Further discussion is provided in more detail relating to these matters throughout the submission. Special consideration needs to be given for Category 3 (complex) applications where there are major inconsistencies with strategic planning directions have been identified.

5.2 Councils

Councils will continue to have a role in all rezoning applications, whether this is as a proponent, or in an assessment and determination or consultation role. The new approach aims to empower councils to make decisions about their local area without unnecessary DPE intervention.

This means that for private proponent rezoning applications, councils will have full control of the process, including giving permission to exhibit, which is currently given by a gateway determination. Councils will also review any changes after exhibition and make the final decision. To support this expanded role, the DPE believes that councils will be better resourced through a new fee scheme that will compensate councils for the full cost of assessing a rezoning application, while also enabling them to invest in staff and better systems. Further discussion regarding Council's role in the process is provided throughout the submission.

According to the discussion paper, the DPE would still be available to offer support and assistance where needed, as well as education and training. If a council is the proponent of a rezoning application, they would continue to be appointed as the rezoning authority after scoping and once the department has given permission to exhibit.

It is also proposed that the type of council-proponent rezoning applications that a council can determine will also be streamlined to include all category 1 and 2 applications (unless there is a conflict of interest).

Discussion paper question*: *What do you think about giving councils greater autonomy over rezoning decisions?

SSROC supports the greater autonomy for Councils outlined in the discussion paper over rezoning decisions. As the primary stakeholder involved in undertaking local strategic planning, Councils are best placed to consider any changes to its LEP.

It is noted that there is currently limited mention of what the role the Local Planning Panel (LPP) would play in any new process. Under the current existing process, planning proposals are required to be reported to the LPP. The retention of the LPP in the reporting/decision making process is supported in ensuring that an independent review of the application can occur, and Council believes rezoning applications should be reported to the LPP prior to being reported to Council and a final determination being given.

It should be noted that, despite councils being granted a greater autonomy, (as is discussed later in this submission) this should not be undermined by changes to the appeals process. In some instances, the new process actually limits Council's autonomy. Under the current approach, once Council has LPMA and decides to alter or refuse a planning proposal, there is no recourse for appeal for a private proponent. Under the proposed changes outlined in the discussion paper, the ability for a private proponent to appeal any final Council determination on any rezoning application type, limits the autonomy of a council. Ensuring that any new process cannot be viewed by private proponents as simply a step on the way to an appeals process should be an important measure taken by the DPE as part of any changes to the process. This is further discussed under the appeals section of this submission.

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[3] This problem could be reduced by requiring private proponents to make it clear that they are acting alone and without Council endorsement.

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***Discussion paper question: what additional support could we give councils to enable high-quality and efficient rezoning decisions*?**

To ensure high-quality and efficient rezoning decisions under a potentially higher-pressure, higher-stakes structure as is proposed in this discussion paper, councils need a well-designed rezoning process and adequate resources. A well-designed process would limit the amount of speculative and non-strategically aligned planning proposals to assist Councils in dealing with these matters swiftly. The process must reduce the ability for appeal rights and increase council determination powers, to avoid Council's, private proponents and the DPE and other state agency's time, money and resources being wasted on speculative planning proposals. The continued involvement of LPP can also provide additional independent oversight in the decision-making process as has been outlined earlier in this submission.

Furthermore, the DPE could give Councils additional financial support, particularly in assisting during the first few years of any changes, while Council's are still trying to gain an understanding as to what a typical volume of rezoning applications would look like. Additional financial support could be provided, for example in the form of non-contestable grant funding which is guaranteed for a number of years (i.e., 3-year terms) to bolster Council's ability to provide adequate staff resources. It is noted the DPE, and other State Government agencies already provide these sorts of grants for councils to implement priority projects in other areas (for example Environment and Waste grants) and therefore, given the strong importance placed by the community and State Government on matters relating to strategic planning in NSW, it is not unreasonable to extend this type of program to support these changes.

Discussion paper question: what changes can be made to the Department's role and processes to improve the assessment and determination of council-led rezonings?

SSROC recommends the following:

- Increase internal delegation so that rezoning applications requiring the DPE to determine the outcome do not get delayed awaiting sign-off from senior executives.
- Internal DPE timeframes should be met. Consideration should be given for Council to progress their application through to the next stages on the presumption of approval when no advice is provided.
- Their newly defined role as outlined in the discussion paper should be implemented.

5.3 Department of Planning and Environment

Under the new process, Departmental resources will be refocused to state-led, strategic and collaborative planning. The stated aim of this is so that the DPE can focus on the plan-led system and on matters of state and regional significance. The type of rezoning applications no longer assessed or determined by the minister through the department will include:

- private proponent rezoning applications (notice to the department may be needed if the rezoning application is inconsistent with a s. 9.1 direction),
- council proponent rezoning applications where the council is the rezoning authority (for example, mapping alterations, listing local heritage items, strategically consistent spot rezonings).

The minister, through the department, will assess and determine:

- rezoning applications initiated by public authorities
- rezoning applications accompanying a state-significant development application
- council proponent rezoning applications
- rezoning applications that propose to amend a SEPP
- rezoning applications that are state or regionally significant. The department will also continue to lead state-led rezonings, which will be generally carried out through a SEPP process and not through our proposed new approach.

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The Department's Planning Delivery Unit was established in 2020 to progress priority development applications and planning proposals that are stuck in the system. Under the proposed new approach, the unit's role will continue, and the department's regional teams will continue to assist councils, state agencies and private proponents at either the scoping stage or to help resolve issues after lodgement. All rezoning applications would be lodged and progressed through the NSW Planning Portal.

Discussion paper question: is there enough supervision of the rezoning process? What else could we do to minimise the risk of corruption and encourage good decision-making?

The continued involvement of the LPP is a suitable way of limiting corruption and providing independent involvement in the decision-making process. If there is a conflict between the decision of the LPP and Council (for example the LPP says no and Council says yes) then this has the potential to provide an opportunity for the DPE to review the process that has occurred up until the decision-making part of the process, to ensure no conflicts of interest have occurred throughout the process.

Discussion paper question: Do you think the new approach and the department's proposed new role strikes the right balance between what councils should determine and what the Department should determine?

The new approach provides Councils and the community with greater certainty over who will be the assessing and determining body, in comparison to the current system where Council is unlikely to be given the role of PMA, if the planning proposal has been through the rezoning review process.

The role of the DPE in council led rezoning applications (where council is the proponent) could be more clearly defined than is in the discussion paper. Council believes that in relation to Category 1 and 2 applications where council is the proponent and where the DPE is responsible for conducting scoping and adequacy at lodgement (and providing permission to exhibit), that the role of the DPE is limited to ensuring proposed changes are consistent with the relevant legislation (i.e., EP&A Act, relevant SEPPs) and the strategic framework of both councils and the State Government. Council does not believe a comprehensive merit assessment (as is conducted in the current gateway process) is relevant for the DPE to undertake in this instance, otherwise the proposed removal of the gateway process would become meaningless.

There are also questions regarding the involvement of the DPE in the scoping phases. It is noted in the Scoping part of the discussion paper, it outlines that 'state agencies' will be involved; however, it is unclear if this also includes the DPE. It would be particularly important to have the DPE involved in circumstances where an application is inconstant with ministerial directions, as the DPE would be best placed to advise Council whether these inconsistencies warrant the application not proceeding to exhibition.

It is important to note that with the DPE absolving itself of many of its responsibilities in the current process, any additional work for councils should be reflected in the way fees are structured, to ensure that councils are not worse off financially under any changes.

5.4 Public authorities

State agencies

The discussion paper proposes changes to the agency referral process for rezoning applications.

Currently, the DPE considers that providing input into rezonings can be resource-intensive for agencies and has the potential to delay assessment, especially if feedback comes late in the process and requires fundamental changes to a proposal.

The revised role of state agencies is discussed in more detail throughout this submission and essentially sees the role of states agencies participating in:

- Scoping of the rezoning application, prior to lodgement.
- Exhibition of the planning proposal, by providing feedback as necessary prior to the assessment of the rezoning application by the rezoning authority.

Public authority proponents

There are also circumstances where public authorities that are holders of infrastructure and other assets are also proponents in the rezoning process. Under the proposed new approach, if a rezoning application is initiated by a public authority, the application will be lodged with and determined by the DPE rather than a council.

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

The current proposed approach would provide state agencies with a more active role in the process, and SSROC is supportive of this. In the past, state agencies have often sought extensions or been unable to provide submissions during the public exhibition of planning proposals, which has resulted in the absence of important information and feedback being received.

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

The most appropriate central body to co-ordinate agency involvement should be the DPE. The DPE, as a state agency itself should take the lead approach in assisting the rezoning authority to gain adequate agency involvement.

***Discussion paper question:* 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?**

Any new process should be set in a way that allows for extensions of timeframes for exhibition, particularly in relation to state agency feedback, particularly if state agency feedback is of critical importance.

5.5 Inconsistencies with section 9.1 ministerial directions

Currently, the approval of the DPE secretary may be required if a planning proposal is inconsistent with a s. 9.1 direction. Section 9.1 directions cover the following categories:

- employment and resources
- environment and heritage
- housing, infrastructure and urban development
- hazard and risk
- regional planning
- local plan making
- metropolitan planning.

Under the new approach proposed in the discussion paper it is proposed that:

- in some circumstances, a council can approve an inconsistency, rather than notifying the department and seeking approval from the Secretary
- in other circumstances, the department will be given the opportunity to comment and/or approve an inconsistency.

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

Major inconsistencies with s.91 directions should be addressed in the scoping process where in which the rezoning authority (if council) should discuss the matter with the DPE, as s.91 directions relate specifically to the DPE and the relevant minister. If the DPE takes issue with any

inconsistencies present, then councils should have the ability to refuse the application from proceeding any further toward exhibition and assessment. Should the DPE deem the inconsistencies acceptable, then council could have the opportunity to progress the application, provided it meets all the other criteria for permission to exhibit.

Minor inconsistencies can likely be addressed throughout the process, and it is expected that the DPE would provide comment to this effect during the exhibition period, which would feed into any assessment undertaken by Council, when considering the ministerial directions as part of a broader assessment against other criteria.

6 New Steps

6.1 Scoping

The new approach includes a mandatory pre-lodgement stage for the standard, complex and principal LEP rezoning applications (optional for the basic applications) called scoping. The scoping process is the same as that set out in the new LEP Guideline, which are already in effect, except that under the new approach, mandatory scoping is proposed.

The intent of the Scoping stage is to allow relevant parties to come together early in the process to discuss the project and provide feedback and direction before detailed work has progressed.

Proponents will not be able to lodge a rezoning application without progressing through the scoping process. Under the proposed approach, failure to provide the information required in the study requirements may lead to rejection of a rezoning application at lodgement or refusal at the end of the process.

Study requirements will be valid for 18 months. If a rezoning application is not submitted in this timeframe, the scoping process will need to start again with new study requirements issued.

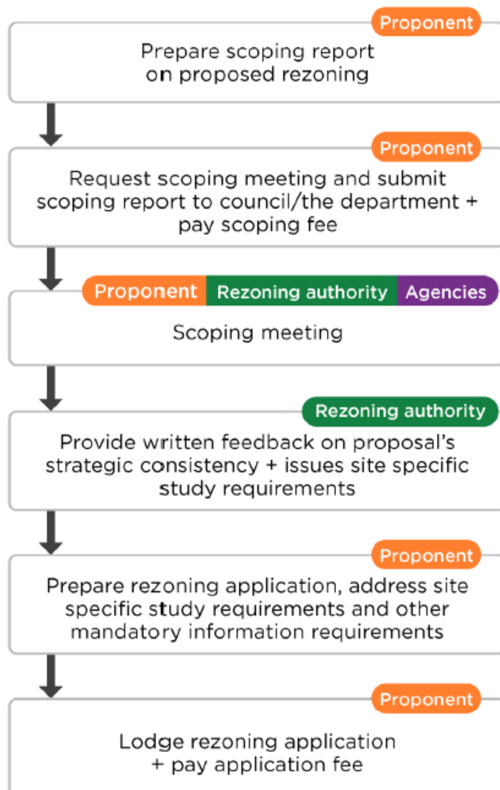

Figure 2 – Proposed framework for scoping (source: DPE)

Scoping report

The production of a high-level scoping report prepared by the proponent that overviews the proposal, how it aligns with the strategic context, any planning or site-specific issues, and any required studies.

Scoping meeting

A scoping meeting would be held between the proponent and the rezoning authority and other relevant parties (including state agencies) to discuss the scoping report and provide preliminary feedback. It is intended that early agency input will allow agencies to shape proposals early on and avoid problems later in the assessment process by allowing proponents to adapt or change their proposal to address agency issues at the outset.

Written feedback

The rezoning authority will provide written feedback that indicates:

- the rezoning application's consistency with strategic planning,
- agency feedback,
- any recommended changes to the rezoning proposal, and
- the nominated rezoning application category.

This written feedback will also set out the standard information that should accompany the rezoning application including:

- intended objectives and outcomes of the proposal,
- broad justification/case for change – need, strategic merit and site-specific merit of the proposal,
- high-level evaluation against strategic planning (including any relevant SEPPs or s. 9.1 directions),
- any study requirements such as technical reports that demonstrate strategic and site-specific merit (the rezoning authority should seek input from relevant state agencies when determining these requirements), and
- whether a section 7.11 infrastructure contributions plan is needed (consistent with ministerial directions).

Although the rezoning authority will provide feedback on whether the rezoning proposal is likely to be consistent with strategic plans, <u>the proposed approach specifies that the rezoning authority will not be able to prevent the proponent from lodging an application</u>. [Underlining is SSROC emphasis]. Study requirements must still be issued, and a proponent may still lodge a rezoning application, and have it assessed and determined.

It is noted that the new LEP Making Guideline already contains information to support proponents, councils and state agencies throughout the new optional scoping process which is proposed as mandatory in the discussion paper.

SSROC considers that the proposed scoping process provides a good opportunity for multiple stakeholders to discuss the application. But is insufficient as it lacks a further review/confirmation relating to the site-specific study requirements and other mandatory information requirements.

As outlined in **Figure 2**, there would be no feedback process in between when the rezoning authority provides feedback relating to the proposal's strategic consistency and site-specific study requirements and the application being lodged by the proponent. It is noted that checking to ensure the application adequately meets the study requirements issued by the rezoning application is currently proposed during the lodgement phase (after lodgement). SSROC proposes that this part of the process should instead be undertaken prior to lodgement to maintain public confidence in the planning system.

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It is also noted that the Scoping stage should address matters related to the rezoning application itself, and not a proposed future development scheme. Planning proposals are received with building schemes developed to a development application level. This is a waste of the proponent's time and resources, as well as irrelevant for Council to consider, as the planning proposal seeks to amend only the development standards and controls, rather than seek approval for a specific development. Clarification from the DPE about the correct nature of a Scoping Report is recommended, which emphasises urban design and the demonstration of a range of potential built form outcomes under any proposed development standards and controls, rather than a nominated concept scheme.

Discussion paper question: Should a council or the department be able to refuse to issue study requirements at the scoping stage if a rezoning application is clearly inconsistent with strategic plans? Or should all proponents have the opportunity to submit a fully formed proposal for exhibition and assessment?

If proposals are clearly inconsistent with strategic plans and it is evident that support for the application would be unlikely, it does not make sense for an application and supporting studies to be prepared and to proceed to public exhibition. However:

- that would be a waste of a Council's resources and community time in providing feedback if the proposal is clearly not aligned with Council's strategic plans.
- Councils should have the discretion to stop rezoning applications that clearly fail strategic and site-specific merit. Potentially LPPs could independently verify this conclusion.
- alternatively, the DPE should have criteria if the potential rezoning application is inconsistent with strategic planning (LSPS, s9.1 Directions, etc.) and is not responding to a change in circumstances (such as major investment in public transport), then it should not proceed past the Scoping stage.

Accordingly, a Scoping stage merit test is required, to assess whether a proposal has enough merit to warrant the investment of public resources into the assessment following public exhibition. The discussion paper does not provide enough detail surrounding what would prevent a rezoning application from being placed on exhibition.

If the proponent elects to step away from the established strategies for a place in a major way and then the application fails to demonstrate merit at the Scoping stage to an independent party, there should not be guarantees made for lodgement of this type of rezoning application.

6.2 Lodgement

Rezoning applications will be lodged on the NSW Planning Portal, the NSW Government's online planning system. The rezoning authority will check that the application is adequate and have seven days to confirm that study requirements have been met.

The intention of the abovementioned changes is to align with the development application process, enabling greater opportunities to lodge concurrent rezoning applications and development applications.

Meeting requirements would trigger exhibition of the rezoning application, the application would go live on the portal and the formal exhibition period begin. This is a significant change from the existing process, with exhibition determined as part of the gateway determination, when the adequacy of information and the proposal's strategic alignment is assessed. A proposal might not proceed if it is found to be inadequate.

It is not clear to SSROC what would prevent an application from proceeding to exhibition. The discussion paper outlines that "the rezoning authority will check that the application is adequate and have 7 days to confirm that study requirements have been met". A timeframe of 7 days is unlikely to be enough time for a Council to thoroughly ensure that all study requirements have been met, particularly as applications will likely involve multiple departments who will be referred to

for comment on things outside of the speciality of the nominated assessing officer for matters such as traffic reports, arborist reports, heritage conservation management plans etc.

As the detailed process seeks to empower councils and elevate their role in the rezoning application process, councils should have a strong remit to refuse an application being placed on exhibition should an application not be deemed satisfactory to proceed.

Discussion paper question: 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 new proposed process may create significant concern and confusion in the community if a rezoning application is advertised and believed to be supported by Council; especially if the exhibition and engagement references Council involvement in the Scoping stage.

A clear discussion and explanation of the process is required if a new approach to rezonings is implemented. The DPE should work with Councils to implement effective communications around the changes, in order to ensure the community properly informed and educated. It should also clearly indicate that this is a new NSW government requirement that local councils are required to comply with and provide clear complaints processes that nominate the appropriate accountabilities in NSW State Government.

Template key messages and other materials (such as fact sheets on the processes) would be beneficial for councils to utilise in their communications, as well as for consistency of messaging across different LGAs. A series of educational videos prepared by the DPE would be useful to clarify the process of exhibition, and that the rezoning application has not yet been thoroughly assessed. If the DPE is to prepare this, a similar video that explains the development application process, and how development applications are different to rezoning applications, would also be helpful for the community.

Furthermore, general communications to the public, relating to changes to the planning system (which have been frequent and substantial in recent years) should be improved.

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

Removing the opportunity for a merit assessment would present a high risk of inadequate proposals going to public exhibition. There is opportunity for a merit assessment to occur after exhibition (as is the case with Development Applications) only if appropriate measures are put in place to ensure Council is satisfied that the proposal has undertaken the appropriate studies and documentation, has passed an initial Scoping stage merit test, and is of a standard to be exhibited. As has been discussed throughout this submission, SSROC considers that there must be an opportunity the exhibition of applications to be refused if they are deemed insufficient of clearly inconsistent with strategic plans.

If the process proceeds in its current form, clear communication will be required to explain the new process to the public (as mentioned in above discussion).

Discussion paper question: Should the public have the opportunity to comment on a rezoning application before it is assessed?

Allowing the public to provide comment on a rezoning application before it is assessed could be both beneficial and problematic. If what is being proposed is unlikely to be approved by Council and/or may be controversial, the proposed process could result in a substantial number of submissions and concern from both the community and Councillors. As a result, substantially more administration may be required by council officers in responding to enquiries and submissions received. If the process proceeds in its current form, these issues must be factored into the proposed fee structure and time frames.

Under the current system, whilst the above situation may occur in some certain circumstances, as Council has more closely vetted the planning proposal and it has also been through the Gateway process, it is more likely that documents placed on exhibition are more appropriate in relation to the types of proposals the community may expect in the respective LGA.

On the other hand, a benefit of having upfront feedback from the community would be that council officers can consider these views in their assessment process. Notwithstanding, we reiterate the earlier point raised that Council is best placed to consider and weigh community feedback, rather than having this mediated by the private proponent, whose interests may lie in downplaying any community concerns, in order to progress the application.

6.3 Exhibition

The discussion paper proposes a standard public exhibition period of between 14 and 42 days, depending on the category of rezoning application (as is currently the case, there could be circumstances where no exhibition is required).

A key shift in the new approach is to exhibit the rezoning application as soon as possible after lodgement. The discussion argues that currently, there can be a considerable lag between issuing a gateway determination that allows exhibition and the start of the exhibition, however it should also be noted that the DPE has recently set a maximum timeframe requirement for when in which councils have to exhibit, report and/or finalise planning proposals, as part of the Gateway Determination.

The proposed new approach would mean:

- The exhibition period automatically begins when the rezoning authority considers the rezoning application adequate, and the rezoning application is visible on the NSW Planning Portal.
- Exhibition periods are determined according to the category of rezoning application (with an additional week included to allow the rezoning authority to send notification letters).
- Exhibition processes are automated as much as possible through the portal or, potentially, through integration with the Service NSW app.
- Proponents must provide a short, plain English summary of the proposal, its intent and justification and how it aligns with strategic plans, to be attached to notification letters.

The proposed public exhibition period is justified in the discussion paper by what the DPE sees as current exhibitions for planning proposals either taking too long to commence or being inefficient in nature. But the discussion paper fails to recognise Council's role in facilitating exhibition and responding to questions and concerns from the community and Councillors. Importantly, the current process allows councils to place planning proposals on exhibition at the most appropriate time for Council, given limited resources, reporting requirements and frequency of Council meetings.

In addition, the proposed timeframes for exhibition do not provide councils with enough flexibility in providing extensions, should more time be requested by one or more stakeholders. It is also important to note is that in Council's experience, state agencies often request extensions beyond the minimum 28-day exhibition period. If the DPE plans to set maximum timeframes for exhibition, it must work with state agencies to ensure they have adequate resources to provide comment on applications within the timeframe.

Discussion paper question: What other opportunities are there to engage the community in strategic planning in a meaningful and accessible way?

The most meaningful way to engage the community in strategic planning in relation to the rezoning application process is ensuring that exhibition periods are long enough, and feedback from the community raised in the public exhibition period is properly considered and responded to in any post-exhibition assessment and decision-making.

In addition, encouraging the community to be involved in a council's strategic planning processes in the future, will continue to prioritise the relevance and importance of strategic plans, and reiterate that applications must align with these plans.

Discussion paper question: do you have any suggestions on how we could streamline or automate the exhibition process further?

SSROC has no comments relating to the streamlining, since it appears to conflate streamlining with reducing timeframes rather than with efficiency, effectiveness or transparency.

Local communities may sometimes require longer periods to enable them to meet and discuss the implications of the application, where major negative impacts are predicted, such as the displacement of communities, poorer amenity and congestion on a broad scale. Information may require translation into community languages. Such instances are most likely to occur when the rezoning application departs significantly from the established strategic directions for the particular place.

Changes after exhibition

Following exhibition, it is proposed that the proponent must both summarise and respond to submissions received, including working with state agencies to resolve any objections. This would help the rezoning authority in its final assessment, while also giving the proponent the opportunity to respond to issues raised. Those who provided submissions will know the proponent's response to their submissions. As part of the response, the proponent will need to submit any changes or amendments to the rezoning application before final assessment.

Once the response to submissions and any amended rezoning application has been forwarded to the rezoning authority, assessment will begin. At this point, it is proposed the assessment 'clock' will start. The assessment clock is the time allowed for the rezoning authority to assess, finalise and determine a rezoning application before a proponent can:

- appeal (based on a decision that is deemed to be refused, a 'deemed refusal') and/or
- access a fee refund through a planning guarantee.

The deemed refusal and planning guarantee concepts are addressed in more detail in the next sections.

SSROC considers that the proposed approach to responding to submissions is one of the most problematic elements of the proposed new framework and approach of the rezoning application process.

The discussion paper highlights that part of the intention of the changes is to align the process more closely with that of the Development Application process. The proposed framework for dealing with post-exhibition changes conflicts with this intent. Under the Development Application process, councils (equivalent to the rezoning authority) have the ability to review submissions received, investigate issues raised by the community and subsequently request the proponent to respond to these issues or provide further information. The approach proposed in the discussion paper does not align with this, rather it puts the impetus on the proponent to only respond by updating the application if deemed necessary prior to assessment.

The discussion paper also proposes that the proponent responds directly to those who have who provided a submission via the planning portal. It is SSROC's opinion that this process will not result in sufficient responses to submissions from proponents and that as a result, further feedback will be provided to councils via other channels and further complicate the process.

In considering the above it is argued that submissions received during exhibition should be reviewed by the rezoning authority who reviews and raises the issues with the proponent and subsequently provides a response to the submissions once the assessment has been completed.

It should also be noted that in some cases, an exhibition period may highlight an additional study or report that is required, and the timeframe proposed may not be adequate to prepare a quality study.

Discussion paper question: do you think the assessment clock should start sooner than final submission for assessment, or is the proposed approach streamlined enough to manage potential delays that may happen earlier?

It is recommended that if any 'assessment clock' is adopted as part of any new rezoning application process, that it only starts at the point in which exhibition has concluded and all required information has been received.

Information requests

In the discussion paper, it is argued that ongoing requests for more information cause delays throughout the rezoning application process and create uncertainty for all parties to the process.

The discussion paper specifies that requests for more information will be discouraged in the new approach and will only permitted to:

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

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

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

Discussion paper question: Do you think requests for more information should be allowed?

Requests for more information should be allowed. It is important that the rezoning authority be able to request more information in response to any submissions provided during the public exhibition period. This is essential for bona fide community consultations.

6.4 Assessment and finalisation

Following exhibition and any amendments which are made, it is proposed that the rezoning authority will assess the rezoning application. The application may need to be exhibited again if changes made after the first exhibition are extensive – this will be determined by the rezoning authority.

If re-exhibition is not required and a rezoning application is supported, the rezoning authority will engage with the Parliamentary Counsel's Office to draft the instrument and mapping can be prepared.

As is currently the case, the rezoning authority can vary or defer any aspect of an amended LEP, if appropriate.

In assessing a rezoning application, all decision-makers need to address the same considerations when determining if a plan should be made. Decisions will also need to be published on the NSW Planning Portal and with the reasons for the decision clearly communicated.

Rather than different assessment processes at gateway determination and finalisation, the DPE is proposing to standardise matters of consideration, as relevant to the final decision made by the rezoning authority. These standard matters will also inform advice given during scoping.

Matters that could be considered include:

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- whether the proposal has strategic merit.
- provisions of any relevant SEPP or section 9.1 directions (including the Minister's Planning Principles).
- whether the proposal has site-specific merit.
- submissions made by the public or state agencies.
- public interest.

In considering strategic merit, the rezoning authority would also have to consider whether the rezoning application:

- gives effect to the relevant strategic planning documents,
- is consistent with the relevant local strategic planning statement or supporting strategy, and responds to a change in circumstances not yet recognised under the existing planning framework.

In considering site-specific merit, the rezoning authority would consider:

- the natural environment, built environment, and social and economic conditions,
- existing, approved or likely future uses of land near the land subject to the application, the services and infrastructure that are or will be available to meet demand arising from the rezoning application and any proposed financial arrangements for infrastructure provision.

These matters for consideration are supported, and it should be clear that a rezoning application is able to meet these matters at the Scoping stage, before proceeding to exhibition. The alignment of these matters of consideration at all stages is strongly supported.

Discussion paper question: are there any other changes that we could make to streamline the assessment and finalisation process more? What roadblocks do you currently face at this stage of the process?

Local councils' planning instruments have been developed over time with continuous feedback from their communities. The LEP represents the community's view on how their area should develop and gives certainty to the community and development industry. It is in this context and framing of the issue, that planning proposals (rezoning applications) can reinforce communities' views that the planning system can promote narrow private interests over the broader public interest, notwithstanding that the LEP and development standards are a relatively blunt instrument and that each site is different. If a proponent wants to increase the development standards and controls, then the burden of proof should be set high. For example, if the standard height of the R3 Medium Density Residential zone is 12.5m across the entire LGA, why should a single site, or collection of sites, request an 18m height in this zone? Proponents should demonstrate that there is something inherently wrong with the existing development standards (i.e., that they don't facilitate the objectives of the LEP, they are wholly unreasonable, etc.).

Currently, the Strategic Merit Test is too high-level and broad that many, if not most, proponents can argue that their planning proposal has 'strategic merit'. The Strategic Merit Test should be clearly extended to include the aims and objectives of the LSPS as well as the aims of the LEP and potentially the DCP where it outlines the future vision or desired future character for an area. The current framing of the Strategic Merit Test relies on very high level and broad strategies and objectives.

Under the current system a planning proposal can contravene all the desired future character objectives for an area outlined in the DCP, but still meet the Strategic Merit Test. Similarly, a planning proposal can contravene the aims of an LEP – which are the organising principles upon which all the details hang - or objectives of the LSPS, but still 'pass' the Strategic Merit Test.

If development standards have only been recently reviewed as part of a comprehensive LEP update, rezoning applications should not be able to pass the Strategic Merit Test. In the past, the approach has been that there will be a presumption against a Rezoning Review request that seeks

to amend LEP controls that are less than 5 years old. It is recommended that this presumption be continued and embedded into any new process to reflect those controls may have been reviewed but left unchanged due to appropriateness and therefore should not pass the Strategic Merit Test regardless of whether the zoning or development standards have changed. It should also be broadened to include a presumption against an appeal if a rezoning application is inconsistent with an endorsed strategic study for the area that is less than 5 years old.

Discussion paper question: do you think the public interest is a necessary consideration, or is it covered by the other proposed considerations?

The public interest is a necessary consideration; however, this is largely implicitly included in the other considerations. It would be beneficial to clarify and draw out a Strategic Merit test question that defines and relates specifically to the public interest. Public interest can be broadly defined and adapted to suit any argument, and thus a definition would be helpful in this instance.

Discussion paper question: are there any additional matters that are relevant to determining whether a plan should be made?

Increasingly, members of the community are concerned with overdevelopment, and increasing pressures on traffic, services, and infrastructure. DPE should consider how to help councils undertake ongoing social impact assessments and cumulative development impacts on localities, that will likely result from plan making changes.

6.5 Conflicts of interest

The discussion paper raises the possibility that a conflict of interest may arise from certain voluntary planning agreements (VPA) or if council land is included in the rezoning application. This is separate to conflict-of-interest obligations on councillors under local government legislation.

The DPE outlines that it believes that some of these potential conflicts of interest will be addressed in reforms to the NSW infrastructure contributions system, which funds the local and regional infrastructure needed to support new development. As part of the reforms, infrastructure contributions plans will be encouraged to be prepared alongside rezonings, minimising the need for VPAs.

The discussion paper argues that a council with a conflict of interest should not assess and determine a proposal. Under the new approach, it is proposed that if a conflict of interest is unavoidable, the relevant local planning panel (or regional panel where no local panel exists) should determine the rezoning application.

Discussion paper question: do you think a body other than the council (such as a panel) should determine rezoning applications where there is a VPA?

Councils should be able to determine rezoning applications where there is a VPA involved, to ensure that the VPA addresses a direct need or public benefit in the community. These may not always be financial and may involve the allocation of space for community purposes, affordable housing, or other perceived and real benefits, which require the ongoing negotiation of terms to arrive at a resolution.

7 New Fee Structure

The discussion paper outlines that currently, fees vary across different Councils in Greater Sydney and as a result, the DPE is considering a variety of approaches toward the structuring of fees with the following objectives in mind:

- reasonableness for proponents (fees aligned with actual rezoning authority costs, including refund of fees not expended)
- transparency and predictability (proponents able to easily estimate fees with councils able to budget for quality staff and system improvements)

ease of administration (administration minimised by limiting discretion, estimation or recording of assessment time by a rezoning authority).

Options proposed for fees have been detailed based on the scoping and assessment phases.

7.1 Scoping

Any scoping fee structure would require a proponent to pay a fixed fee based on the application category (if known) when the scoping meeting is requested, and a scoping report is submitted to the rezoning authority for preliminary feedback. Alternatively, the fee would be payable when the rezoning authority confirms the category.

The fee would cover the rezoning authority's costs for any activity during scoping, including consultation with state agencies and providing written feedback

7.2 Assessment fees

Any assessment fee structure would require the proponent to pay a fee at lodgement. This would cover the costs of the merit assessment and any associated work to make the plan. The DPE is considering 3 options.

Option 1: Fixed assessment fees

- Assessment fees are fixed by the rezoning authority, based on the category of rezoning application and divided into sub-categories based on the complexity of the rezoning application.
- Sub-categories are based on the extent of change to zoning and/or development standards by location and site area, along with other matters that complicate the assessment process (such as whether a proposal includes a VPA). For example, a standard rezoning application that proposes a zone change and a significant increase in height of building and floor space ratio could attract a higher fee than a standard rezoning application that only seeks an additional permitted use or a minor increase to the height of building and floor space ratio.
- No fees would be charged for any other associated costs such as consultant fees for peer reviews.
- If a rezoning application is withdrawn after lodgement, the proponent could be entitled to a set percentage refund of fees, depending on the stage the rezoning application reaches. This option provides certainty for proponents and lessens the administrative burden for rezoning authorities. However, it may not always result in actual costs being recovered.

Option 2: Variable assessment fees

- Assessment fees are based on the estimated costs a rezoning authority would incur on a case-by-case basis, depending on the category of rezoning application, staff time in scoping meetings and a forward estimate of staff hours required to assess the rezoning application.
- Associated costs would be charged to the proponent based on actual costs incurred.
- If a rezoning application is withdrawn post-lodgement, the proponent could be entitled to a refund of fees not yet expended by the rezoning authority.
This option will achieve actual cost recovery but will be time-consuming to administer and uncertain for proponents.

Option 3: Fixed and variable assessment fees

- Assessment fees have a fixed and variable component. The fixed fee would be charged upfront, based on the category of rezoning application (similar to option 1). In addition, a variable fee is charged once the rezoning application is finalised, based on actual staff hours that exceed the costs covered by the fixed fee.
- To reduce the risk of non-payment of the variable fee component, proponents of complex rezoning applications could be required to provide a bank guarantee at lodgement.

- Associated costs will be charged to the proponent based on the actual costs incurred. This option will achieve actual cost recovery and be less time-consuming to administer and more certain for proponents than option 2.

Discussion paper question: Do we need a consistent structure for rezoning authority fees for rezoning applications?

In considering the possibility of a consistent fee structure, Waverley council officers have researched the variety of fees charged across Greater Sydney. This research accords with the information provided in the discussion paper, which sees fees varying substantially across Greater Sydney. Some councils have rising fee structures dependent on the nature of the proposal, others instead undertake a full cost recovery for certain types of proposal and some councils also charge extra fees for any additional work that may be required to be undertaken throughout the process (such as amending a planning proposal and reviewing any additional studies submitted by a private proponent). While a consistent approach to fees may be appropriate, there are a number of important considerations.

It is standard practise Local Governments charge fees for a variety of services. Fees for services vary substantially across different LGAs in NSW in part due to varying overhead costs with no two organisations the same. While it appears that the DPE is not proposing consistent fees (in terms of actual cost) to be levied across all LGAs, SSROC advises that it would not be equitable to have common, set blanket fees apply in different LGAs. Accordingly, councils should be able to set their respective fees, as they currently do.

Discussion paper question: what cost components need to be incorporated into a fee structure to ensure councils can employ the right staff and apply the right systems to efficiently assess and determine applications?

Fees should be structured in a way that represents the amount of work required to be completed and align the structure with key stages and milestones of the rezoning application process. This will ensure councils are compensated for any work completed and is not worse off, should the proponent seek to withdraw their application.

It should be noted not all councils will have consistent real costs for assessing applications, as all councils have different processes and different levels of on-costs associated.

Discussion paper question: should the fee structure be limited to identifying for what, how and when rezoning authorities can charge fees, or should it extend to establishing a fee schedule?

The structure should be limited to identifying for what, how and when a council can charge fees, and may consider providing an indicative fee schedule only.

Discussion paper question: what is your feedback about the 3 options presented above?

Based on the 3 options presented above, SSROC is most supportive of **Option 3 – fixed and variable assessment fees.** This option provides for both some level of certainty for private proponents, as well as providing for actual cost recovery for councils. While councils attempt to currently charge fees based on what the perceived cost of the entire process will be, planning proposals which extend over a prolonged period (through no fault of council) realistically have the potential to result in the full costs not being recovered.

The discussion paper has also failed to adequately factor in the public exhibition process into the way in which fees are discussed in the discussion paper. Whilst it appears the DPE would prefer all exhibition to occur via the NSW Planning Portal, what the discussion around this issue fails to reflect is that councils will need to undertake advertising and communications of their own, as well as field any specific enquiries from the community. Fees related to these activities must be able to be recouped by the rezoning authority.

In addition, the proposed option for a bank guarantee is supported by SSROC to ensure funds can be drawn upon if the proponent delays payment. It is many local council's experience that on occasion, proponents do not always pay their fees in a timely manner (particularly in the instance when planning proposals have not been supported) and as a result, additional administrative and financial burden is incurred by council.

Discussion paper question: 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?

SSROC does not consider that refunds should be available if a proponent decides not to progress a rezoning application. A more detailed response is below in relation to the Planning Guarantee.

8 Planning Guarantee

A planning guarantee was introduced into the UK planning system in 2013. It provides for a fee refund if councils take too long to assess the equivalent of a development application and works to encourage the timely progress of applications. Even where a fee refund is given, assessment and determination of the application continues.

The discussion paper considers the introduction of a planning guarantee scheme in NSW.

The DPE has developed a potential planning guarantee option by applying the UK model to the NSW system, with the 4 elements aligning with the new approach and potential fee structure options as follows:

- **The assessment clock** starts once the proponent submits the response to submissions and any amended rezoning application to the rezoning authority for assessment and finalisation.
- **Timing** is based on the assessment/finalisation timeframes for that category of rezoning application (see Table 4 – Assessment/finalisation timeframes) and are the same as deemed refusal timeframes discussed under Part C: New appeals pathways.
- **Refund amount**, whether full or a portion and staged, so that the longer a rezoning authority takes, the higher the refund (this could mean, for example, an additional 10% refund for every week the rezoning authority does not meet the determination timeframe).
- **Extensions of Time** (EoT) would be required if it becomes clear that more time is genuinely required. EoT requests and agreements would be in writing and agreed to before the end of the determination timeframe. Only one EoT can be agreed to, and the extension cannot be longer than the original finalisation time for that category of rezoning application.

Discussion paper question: 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?

SSROC does not support a framework that enables proponents to request a fee refund if a rezoning authority takes too long to assess a rezoning application. A Council's resources will still have been used and these need to be compensated by a proponent seeking to change the planning rules. If these costs are refunded, then Council staff time spent on speculative rezoning applications are effectively being funded by the community.

It is also important to recognise that all councils are resourced differently, and many considerations affect Council's ability to assess and determine rezoning applications including:

- Number of concurrent rezoning applications.
- Other key priorities (such as the preparation of plans and strategies which respond to pressing matters as well as other strategies and plans, for example the Community Strategic Plan). Many of these priorities have timeframes prescribed by the NSW Government and are outside a local council's control.

Paying a fee to investigate amending the LEP should be considered a normal part of the development process for a proponent, which ultimately can result in a very significant financial windfall gain or reward.

Providing a refund changes the risk-reward scenario for developers and may increase the number of speculative rezoning applications. Furthermore, private proponent led spot rezonings should not be normalised to be like a Development Application. The DA process regulates a building activity to provide shelter for residents and businesses. The rezoning process is a financial process used by proponents seeking a (often very large) windfall gain; noting that minor variations can be accommodated via the DA process. Seeking to change the LEP, which is established with the community and abided by a significant majority of the development community, should only be facilitated in exceptional circumstances and should not be seen as a riskless activity.

Discussion paper question: 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?

SSROC supports both stop-the-clock provisions and the refusal of applications to avoid a refund.

As noted, a new Category 3(b) is a clear category where applications deemed to be inconsistent with Ministerial and local strategic directions should have no entitlement to a fee refund.

Discussion paper question: if not, what other measures could encourage authorities to process rezoning applications promptly?

SSROC considers that one of the most important measures to be incorporated into any new process should be focused around ensuring that rezoning applications can be thoroughly scoped and vetted at an early stage, to ensure that inadequate or inappropriate applications do not proceed to exhibition and subsequent assessment. It is vitally important that this be strongly considered by the DPE in their review of proposed current process in its currently presented form.

As has been discussed earlier in this submission, in order to encourage Councils to process rezoning applications promptly, the DPE should consider providing councils with additional funding in the form of non-contestable grants, to assist in dealing with any transition to a new process and also in response to the substantially reduced allowable timeframes proposed in this discussion paper. It is critically important that any new process does not result in Councils spending the majority of their time processing rezoning applications, rather than undertaking the other essential functions mentioned above.

Substantial improvements have been achieved without recourse to the imposition of penalties. A decision to exclude rezoning applications that are inconsistent with ministerial and local strategic directions may well see a further improvement in assessment times. There is a strong case for data related to these largely speculative proposals deemed to be outside the planning rules to be excluded from the main data collection and reporting of assessment performance of the system.

9 New Appeals Pathways

Under the current process, there is 2 ways that decisions can be reviewed:

> **A rezoning review** – An appeal to the relevant planning panels where there is delay or a council has decided not to forward a planning proposal for gateway determination
>
> **A gateway review** – An appeal to the Independent Planning Commission where a council or proponent is dissatisfied with the gateway determination.

Both of these reviews are non-statutory in that they are not specifically governed by the EP&A Act. They happen relatively early in the overall rezoning process, which means there is no opportunity for a review or appeal towards or at the end of the process, making the final decision beyond question.

SSROC

The new proposed approach will include a review opportunity for private proponents at the end of the process, if progress has been delayed or if the proponent is dissatisfied with the final decision. Proponents will have a certain timeframe within which to lodge an appeal, similar to the right to appeal a decision about the merit of a development application.

It is noted, whilst Councils can currently request a gateway review based on decisions by the DPE, the new approach is not proposing an appeal mechanism, rather that the Planning Delivery Unit (PDU) could assist in resolving disputes between the DPE and Councils.

Whilst a preferred option for who will be the appropriate body to resolve disputes and appeals is not outlined, the discussion paper proposed two options:

- Land and Environment Court.
  Independent Planning Commission.

It is noted in the discussion paper neither body is currently resourced to undertake appeals of this nature and such, either option would require greater resourcing if selected as the appeals body.

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

Yes, public authorities should have right to appeal in the same way a private proponent has a right to appeal, however, SSROC does not support a right to appeal in each circumstance and seeks to reduce the number of pathways to appeals presented in the discussion paper.

SSROC considers that if the LPP remains integrated in the decision-making process, and a rezoning application has been refused by both the LPP and Council, that there should be no avenue for appeal.

An example of how this could work is illustrated in the below table. Further discussion regarding the role the DPE could play in the process has been outlined earlier in the discussion paper.

Approval	Refusal	Review
Council	Local Planning Panel	DPE review
Local Planning Panel	Council	Right to appeal via IPC
Local Planning Panel, Council	Nil	N/A
Nil	Local Planning Panel, Council	No right to appeal

Table 4 – Potential avenues for appeal

In addition to the above, Council does not support council led rezoning application appeals being presented to the PDU, as the PDU is a unit within the DPE under direction of the Secretary and does not have the independence of the IPC. The current independent appeal process for councils should remain.

Discussion paper question: 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?

<u>Land and Environment Court</u>

Council strongly objects to the Land and Environment Court (LEC) being chosen as the body to hear merit appeals for rezoning applications under the new process. Councils already dedicate substantial time and financial resources to dealing with matters in the LEC, further committing more finances and staff resources from council's strategic planning teams would be of a financial disbenefit to the community and also has the potential to stifle the policy and strategy work which

strategic planners undertake, in implementing key priorities and directions from both Council and the State Government.

It is also likely that if a LEC pathway was chosen, proponents could see the council rezoning application process as less important and may lodge applications solely with the intention of 'forum shopping', seeking to obtain an outcome with an appeals process in mind. The use of the LEC would undermine Council's authority to make decisions for its local area and if the new approach led to an increase in proponents seeking an appeals process, undermine all the strategic planning councils have undertaken to develop existing planning controls, policies and strategies.

<u>Independent Planning Commission (or other non-judicial body)</u>

SSROC wants to advise that utilising the Independent Planning Commission (IPC) or other non-judicial body is the preferred approach in processing appeals and reiterate its opposition to the appointment of the LEC. SSROC considers that the current process where in which appeals made by private proponents go to a Rezoning Review and are currently determined by the relevant District or Regional Panel/appeals made by Council in the form of a gateway review are heard by the Independent Planning Commission is a more effective process than any potential future LEC process.

10 Implementation

The discussion paper outlines the focus in this discussion paper as being to seek feedback on the concepts or principles of the new approach, rather than the means of carrying it out. Once it is clear which of the proposed elements will have the greatest benefit, it is outlined that feedback will be used to determine how any new approach is put into action.

Applying the new approach could involve both legislative and non-legislative changes.

The DPE could implement the proposed new approach using existing legislative provisions, along with other existing mechanisms such as:

- ministerial directions to make assessment considerations more certain
- delegation to empower decision-makers
- departmental secretary's requirements to make application requirements clear
- amendments to the Standard Instrument to standardise common amendments
  new regulations to provide more certainty in the agency engagement process.

It is proposed that this would be supported with other policy and guidance material.

By using the existing statutory framework, the reforms are, necessarily, more limited in scope.

A legislative approach would involve amending the EP&A Act in addition to the mechanisms described above. In addition, legislative change would be needed to allow a rezoning application to be appealed in the Land and Environment Court.

It is proposed that the implementation of the new approach will be supported with policy guidance and education for industry and councils to ensure a smooth transition and minimise disruption and uncertainty. There will also be opportunity for councils to adjust their processes and resourcing.

SSROC supports that any changes to the process as described in the discussion paper should be implemented by amendments and changes to the EP&A Act to ensure the occurrence of proper democratic process and public scrutiny of the process. This particularly important as some of the new processes could be controversial. A legislative approach will give Councils and the general public confidence and clarity around the newly accountable parts of government.

11 Conclusion

Thank you for the opportunity to comment on *A New Approach to Rezoning Discussion Paper*. The breadth of the proposed reforms is ambitious and should continue to be developed with extensive input from Local Councils.

SSROC

SSROC member councils cover a large portion of Greater Sydney and have a direct interest in supporting and advocating for changes to improve rezonings. One of the most important functions councils undertake is the preparation, implementation and review of Council's planning controls, as well as strategies, plans and policies which feed into these controls. These functions are ongoing functions of councils.

Local planning by Councils strives to both adopt and adapt sound planning and design principles to place-making in ways that respond to their local contexts, with their built and natural environments, to better meet community and business needs and aspirations will responding to the challenges of growth and a changing climate.

In order to make this submission within the timeframe for receiving comments, it has not been possible for it to be formally reviewed by councils or to be endorsed by the SSROC. I will contact you further if any issues arise as it is reviewed. If you have any queries, please do not hesitate to contact me or Mark Nutting, SSROC Strategic Planning Manager on 8396 3800.

Again, thank you for the opportunity to provide feedback on *A New Approach to Rezoning Discussion Paper*.

Yours faithfully

Helen Sloan
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