

A NEW APPROACH TO REZONINGS



Discussion Paper

NSW DPIE

NEW SOUTH WALES CHAPTER

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ABOUT THE INSTITUTE

The Australian Institute of Architects (the Institute) is the peak body for the architectural profession in Australia. It is an independent, national member organisation with around 12,000 members across Australia and overseas.

The Institute exists to advance the interests of members, their professional standards and contemporary practice, and expand and advocate the value of architects and architecture to the sustainable growth of our communities, economy and culture.

The Institute actively works to maintain and improve the quality of our built environment by promoting better, responsible and environmental design.

PURPOSE

- This submission is made by the Australian Institute of Architects (the Institute) to provide input on the Discussion Paper – A New Approach to Rezoning
- At the time of this submission the NSW Chapter President is Laura Cockburn, the NSW State Manager is Joanna McAndrew and the NSW Policy and Advocacy Manager is Lisa King.

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A NEW APPROACH TO REZONINGS

The planning system in NSW needs to be both strategic and nimble. Sound strategic planning is important to set a long-term strategic vision creating certainty and providing direction. Simultaneously, the system needs to be nimble enough to ensure the rules are appropriate and relevant in order to achieve the strategic aims while enabling opportunities to be taken which may not have been considered at the time the higher-level strategy was prepared.

Thank you for the opportunity to provide this response to the discussion paper, *A New Approach to Rezonings*. The Australian Institute of Architects (the Institute) supports continued reform to the planning system and recognises the significant time and resources that are required to make changes to the local environmental plans. Please find our comments and recommendations below.

Terminology: Re-zoning vs Planning Proposal

We do not support the change in terminology to ‘rezoning’. In many instances there is no change in the zoning as result of these applications. What is being sought is a change in the planning controls that apply to the land – eg. height, FSR or an additional land use. Both terms ‘planning proposal’ and ‘rezoning application’ are either confusing or misleading to members of the general public. ‘Planning proposal’ suggests much wider considerations are the focus, while ‘rezoning’ suggests a change in zoning is taking place.

A suggested alternative could be “LEP amendment application”. This would avoid confusion as it clearly describes the purpose of the application – to amend a Local Environmental Plan (LEP).

Recommendations

Use of the term “LEP amendment application” ensures the purpose and function of the application is clear.

New Categories and Timeframes

The creation of different categories of application is appropriate where it can ensure a better use of resources in the preparation and assessment of applications.

The benchmark timeframes are only as good as the process that supports them. Critical to this is the proposed new Scoping and Preparation Phase. Although we agree that reaching these timeframes should be a goal, as statutory timeframes we are concerned they are too ambitious.

Recommendations

Creation of new categories should be pursued where there are distinctly different processes for different amendments.

Adequate resourcing and support must be provided to councils for strategic planning.

New Roles

We support the reduced involvement of the Department in the assessment and determination of private planning proposals only where councils are provided with sufficient resources to do so. There is a significant role for the Department in case management, support and monitoring the amendments of LEPs and ensuring consistency of process across different councils. The Department should be responsible for ensuring the proposal maintains consistency with the s9.1 directions, District and Regional Plans and as a conduit to other public authorities and state agencies.

Recommendations

The Department should maintain oversight of the process.

The Department should ensure that councils have sufficient resources to assess the applications and undertake their strategic planning functions.

The Department should ensure appropriate consistency with higher level strategies.

New Scoping / Preparation Phase

The Institute supports the new mandatory pre-lodgement stage called Scoping. The Scoping phase of an application is critically important for both the applicant and the council.

Undertaking this review prior to the application being made is more efficient and effective than undertaking this review at Gateway stage in the current framework.

It is at this early stage a particular proposal can be provided with:

- Support to proceed,
- Encouragement to discontinue undesirable proposals,
- An understanding of information necessary for the future application
- Initial feedback from other relevant authorities and agencies

We recommend that the Scoping meeting be a formal process where the Department is the Secretariat. This will provide consistency across all councils. There should be pre-determined content required for the meeting which is sufficient to describe the proposal and identify its opportunities and constraints. It should not necessarily require detailed reports. An application may require one or more pre-application meetings depending on the complexity of the proposal.

Applicants should have the opportunity to present the proposal to the Scoping Panel. The Panel should consist of the following:

- Council strategic planning
- Department Regional team / GSC
- Relevant Agency representation

- Independent planning advisor
- Independent urban design advisor

An excellent model is the Gosford Design Advisory Panel where the Department is the Secretariat. Under the cl 8.4 Gosford SEPP, applicants can put forward proposals that are inconsistent with the planning controls (height, FSR, use etc) and have the DA endorsed prior to it being submitted.

This process provides applicants with certainty as to the likely success of a proposal, ensures that feedback and advice is provided from agencies at an early stage, considers the strategic implications and integrity and enables appropriate detail to be provided as part of the application.

An application should not be able to proceed unless it has endorsement from the Scoping Panel.

This process enables a critical review of the strategic basis of the application to ensure that there is strategic merit (even if in detail it departs from an adopted existing strategy). This form of design review enables a collaborative discussion about the issues and opportunities at an early stage to assist both the applicant and the assessment team in understanding the best outcomes for the site.

By including independent planning and urban design advice, it provides a broader review of the project in its context and encourages design-based thinking where alternatives can be interrogated and considered.

Independent panel members could be sourced from the State Design Review Panel.

Recommendations

Provide a formal Scoping application process as a pre-requisite to making an application to amend the LEP.

The Department should provide the Secretariat function.

The Scoping Panel should have representatives of state and local government, agencies and also independent planning and urban design expertise

The panel makes recommendations on whether the application should proceed and what information is required to support the application.

New Appeals Pathway

The ability to appeal a decision made by an administration is an important component of good governance. The nature of a planning proposal is that it is converting higher level strategy into development standards that enable or restrict development on the land. It is a process of converting strategy into rules.

In the new pathway there are two milestones that would either enable or restrict the planning proposal.

- Scoping – should the proposal proceed to lodgement?
- Final determination to make the plan

We support the right of appeal at both milestones.

We do not support a ‘deemed refusal’ appeal pathway.

We do not consider it appropriate to provide an appeal pathway to the Land & Environment court for merits review of a decision at either of these checkpoints. It may be appropriate to provide a path for judicial review where the legality of the process is in question.

The Land & Environment Court, the Commissioners, barristers and experts are trained in applying the rules. A planning proposal results in creating new rules. The decision does not seek conformity with existing planning documents. The court does not provide the appropriate forum for such an application.

There are few Commissioners with expertise in strategic planning, and even fewer barristers. Although the decisions of Commissioners in a merits review are not binding on future decisions, in practice they do tend to inform the future decision-making of the Court. Previous decisions and reasoning by Commissioners are used widely as a way to interpret current planning documents. This often has unexpected outcomes and could be a significant barrier to the efficient operation of the planning proposal process.

The Independent Planning Commission remains the most qualified body to conduct such merits reviews. Criticism of the IPC is often founded in the particular members of the panel not having the appropriate expertise. This should be an easy issue to resolve. The IPC already has a diverse range of panel members. Should further panel members be needed, they should have the appropriate expertise required. An IPC review is flexible, fast and sufficiently independent. A decision made by the IPC is unlikely to establish a precedent.

Land & Environment court proceedings can be costly and lengthy.

Recommendations

Allow appeals at the scoping stage and final determination.

Appeals can be made to the Independent Planning Commission (IPC).

Ensure that the IPC has members with appropriate skills to review these applications.

Implementation

One of the critical barriers to the timely completion of planning proposals is delay created by lack of capacity, particularly at the local government level. We note that much of the process will involve increased involvement by local government. It is critical that additional support and capacity is provided to local government to support timely strategic planning.

Additional considerations

Many simple planning proposals could be avoided if greater flexibility was provided under the Standard Instrument LEP. The culture and case law around cl.4.6, in particular, has

reduced the ability to seek variations to existing standards in the LEP. Where large variations to existing controls are sought, these are generally not supported by council and planning panels using cl 4.6 of the SI LEP. This has resulted in a greater number of planning proposal where existing site conditions or constraints may offer better solutions by varying existing controls.

Recommendations

Amend cl 4.6 to allow variations of planning controls where they have strategic merit – independent of the scale of variation.

CONCLUSION

The Institute supports a rational, linear, design-based planning system, where good strategic planning underpins development controls that can lead to predictable outcomes for development assessment. We also support a nimble planning system that ensures the development controls applicable to a site remain relevant.