



28 February 2022

Ms Paulina Wythes
Director, Planning Legislative Reform
Department of Planning and Environment
Locked Bag 5022
Parramatta NSW 2124

Dear Ms Wythes

Thank you for the opportunity to provide feedback on the discussion paper *A new approach to rezonings*.

The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy and affordable dispute resolution services across NSW.

The Commission's role includes:

- Encouraging government agencies and larger businesses to enter productive working relationships with small businesses.
- Facilitating and encouraging the fair treatment of small businesses.
- Promoting a fair operating environment in which small businesses can flourish.

Small businesses have reported that environmental land zoning can be a barrier when seeking approval for new business activities. There are perceived inconsistencies in what activities are permissible in particular zones with some activities permitted but similar or related activities not permitted.

There are also instances where zoning guidelines are applied differently across different Local Government Areas. Businesses have found no clear or reasonable way of challenging these limitations on activity types or the zoning itself. Businesses believe existing pathways to alter zonings are too complex and expensive or are unaware that such pathways exist. Together these attributes constrain small businesses' ability to grow and innovate.

The Commission is supportive of initiatives that will simplify and improve rezoning application processes and create certainty and consistency for applicants. In particular, the Commission welcomes the recognition of the role and rights of proponents and the establishment of clear timeframes, fee structures and application categories. We provide the following comments on the issues addressed in the discussion paper.

Categories and timeframes

The NSW Department of Planning and Environment's (the Department) discussion paper outlines four categories differentiating the complexity and scale of the application (Basic, Standard, Complex and Principal LEP). The Commission welcomes the introduction of these proposed application categories with the table of defined benchmark timeframes for each stage of the new approach. Providing clear guidance as to potential timeframes will assist small businesses to plan effectively, however it is important all parties have processes in place to meet the deadline for each stage.



Private proponent rights

Currently small businesses landowners (as private proponents) can initiate rezoning applications at their own cost but are not considered the applicant and have little control over the progress of or any alternations to the proposal. The Commission welcomes the proposed recognition of private proponents as applicants and their rights to consult with rezoning authorities and submit applications for public exhibition and assessment.

Small businesses have shared situations where a council and local business community cannot come to agreement on appropriate ways to encourage local development. The ability for private proponents to fully undertake rezoning applications (and appeal decisions made) should provide a more appropriate methodology for navigating these circumstances.

The Commission also welcomes the introduction of a mandatory pre-lodgement 'scoping' stage for standard, complex and principal LEP rezoning applications. Early feedback and an indication of likelihood of success should save private proponents time, effort and cost during the application process. The Commission is especially supportive of publicly available standardised information requirements so all proponents can understand their rights, responsibilities and information requirements upfront.

Rezoning authorities should engage early with proponents about the likelihood of success (where there are known impediments) to discourage proponents investing time in unviable projects. All proponents should have the opportunity to submit fully formed proposals for exhibition and assessment, even if they are potentially inconsistent with strategic plans, to ensure proposals cannot be dismissed without due consideration.

Lodgement

The discussion paper notes the potential for duplication of assessment to give rise to delays and complexity where planning proposals are reviewed at several stages by different parties. Given the proposed implementation of upfront mandatory scoping and ability for proponents to make amendments to their application before the final assessment, the Commission is supportive of the merit assessment process moving to after the exhibition stage as this should save proponents time and reduce the amount of duplicative assessment.

Information requests

Small businesses have expressed frustrations about delays to various types of planning applications due to unnecessary requests for information, especially where the requested information has already been provided. The discussion paper suggests requests for information will be discouraged as mandatory scoping will establish required information and proponents can make changes prior to final assessment. The Commission supports the discouragement of late and changing requests for information and would welcome a post-implementation review to determine if these strategies have been successful or further interventions are required.

Fees

The Commission notes the discussion paper's concern for the stretched resources and time of Councils. The Commission notes that small businesses are similarly stretched for time and resources and that their economic opportunity can be hamstrung if subjected to a

suboptimal zoning arrangement. It is therefore important that any fee structure creates the right incentives for Councils to consider rezoning applications at a reasonable cost.

The Commission only supports fixed assessment fees (Option 1). Small business consistently indicate that cash flow is one of their key concerns and limitations. Providing certainty over what the process will cost empowers them to accurately assess the benefit of applying for rezoning while ensuring they don't inadvertently harm their business by incurring excessive expenses. Conversely, having a variable option leaves small businesses exposed to an undefined expense which may cause unexpected harm to the business, and that concern might prevent them from lodging an application at all. Option 1 has the added benefit of providing a cost benchmark for Councils to meet so that costs are not unnecessarily high due to redundant or unnecessary council processes.

While the Commission does not support variable assessment fees (Option 2) or a mix of fixed and variable fees (Option 3), should they be established, the requirement for a bank guarantee is strongly opposed. Bank guarantees put undue burden on small businesses where cash is effectively quarantined that could otherwise be used to conduct their business, and the rezoning authority has total control over when the funds will be released. Rezoning authorities should already have established debt recovery processes to use if businesses fail to pay the agreed fees.

Additionally, should a variable fee component be introduced, rezoning authorities should be required to indicate the maximum possible fee upfront and provide assurance this will not be exceeded under any circumstances.

Fee refunds

The Commission supports fee refunds for applications withdrawn after lodgement and suggests this be calculated on a percentage of actual work completed by rezoning authority with the remainder refunded. It would be preferable to publish a clear table indicating what percentage of fees would be refunded at each stage of the process. This provides clarity for all parties upfront and ensures all proponents are treated equitably.

The Commission is also supportive of a fee refund framework for where a rezoning authority exceeds established timeframes to assess and/or progress an application. However, the Commission discourages the use of mitigation measures that may distract from the focus of delivering decisions on time. The Commission instead encourages greater focus on ensuring there are processes to handle unanticipated delays so that issues are resolved in the agreed timeframes.

The Commission does not support measures that would allow a rezoning authority to unilaterally extend the timeframe for reviewing applications but would support mutually agreed extensions.

The Commission suggests establishing a disincentive to reduce the risk that rezoning authorities reject an application simply to meet their required timeframe. One possibility is that, should a rezoning authority reject an application and it be overturned through the appeal process, the proponent would be entitled to a full refund.



Appeals

The Commission supports the strengthening of planning appeals processes. Small businesses have expressed frustration and confusion about their rights and ability to appeal planning decisions. This lack of clarity leads to distrust and complaints, and discourages them from exploring additional entrepreneurial activities. Introducing an appeal mechanism for the end of the rezoning process should give small businesses greater confidence in the decisions and will provide a straightforward pathway where proponents are dissatisfied with the process or outcome. The appeal process should also have published timeframes and costs allowing proponents to accurately weigh the value of appealing.

Permissible activities in zones

Small businesses have expressed frustration where certain business activities are not permissible under their particular zonings, but similar or equivalent activities are permissible. This can be because of outdated or ambiguous definitions in planning instruments or unintended consequences associated with the interaction of different planning instruments. The Commission would encourage the Department to establish a mechanism whereby small businesses can either request an amendment to what is defined as permissible in their zone or seek an exemption for that business activity. This mechanism could reduce the volume of rezoning applications and allow businesses to achieve desired outcomes without undertaking a full rezoning application with its associated time and cost.

Consultation on implementation

The Commission recommends the Department conduct an additional round of consultation, once the implementation mechanisms have been designed, to ensure those mechanisms appropriately address the needs of local businesses and communities. It may also provide ideas for further improvements to the suggested processes.

Development Applications

While out of scope for this consultation, the Commission would welcome a similar review of the Development Application process that considers the same issues outlined in the discussion paper. Small businesses regularly comment on difficulties they face with unclear and inconsistent timeframes, fees and appeals processes. They further complain about delays, late requests for additional information and little upfront knowledge of whether the pathway will be appropriate and practicable for their prospective venture. We would be happy to discuss this idea further with an appropriate member of the Department.

Thank you for the opportunity to make a submission. If you require further information, please contact Megan Bennett, at either megan.bennett@smallbusiness.nsw.gov.au or (02) 9372 8767.

Yours sincerely

Chris Lamont
Commissioner
NSW Small Business Commission