Environmental
Defender's Office

Submission on the *More local, more accountable plan making* discussion paper

5th May 2012

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- the fundamental role of early engagement in achieving good environmental outcomes
- the importance of indigenous involvement in protection of the environment
- the importance of providing equitable access to EDO services around NSW

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Executive Summary

The Environmental Defender's Office NSW (**EDO**) welcomes the opportunity to provide comment to the NSW Department of Planning & Infrastructure (**Department**) on its discussion paper, *More local, more accountable plan making* (March 2012)(**discussion paper**).[1] The EDO is a community legal centre with over 25 years' experience specialising in public interest environmental and planning law.

The Government's discussion paper puts forward three main proposals:

1) *Delegation of powers to local councils to make and finalise local environmental plans* (**LEPs**) in certain circumstances (rather than the Department doing so). This includes where councils support 'spot rezonings' that are consistent with endorsed strategies or surrounding zones. Several other 'routine delegations' are proposed, including for certain land reclassifications, heritage LEPs and minor error corrections.
2) *'Pre-gateway reviews' – Giving proponents new rights for a review* by a Joint Regional Planning Panel (**JRPP**) or in some cases the Planning Assessment Commission (**PAC**): where a local council decides not to proceed with a proponent's rezoning proposal to the 'gateway' stage, or where the council does not make a decision within 60 days. Proposed reviews of council decisions will need to meet certain Planning Department criteria in order to qualify for a review.[2]
3) *'Gateway reviews' – Giving proponents and councils new rights for review* of a NSW Government 'gateway' decision about whether a draft LEP should proceed, and any conditions in that decision.

The central aims of these proposals are described as:

- to return decision making powers to local councils
- to remove unnecessary departmental oversight of less significant LEP types
- to increase transparency and accountability
- more generally, to restore confidence and integrity in the planning system.[3]

Regarding proposal 1 - delegation to councils - we are concerned that delegation of spot rezoning powers to councils will reduce scrutiny over an already controversial practice. There is merit in considering delegations for very minor LEP amendments such as error corrections. However, removing departmental scrutiny from more significant LEP amendments, such as rezonings, is problematic. Delegations for land reclassification and heritage amendments may also need added oversight.[4]

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[1] On exhibition via www.planning.nsw.gov.au, 27 March to 4 May 2012.

[2] For example, that the proposal is consistent with endorsed local, regional or State planning strategies; and is properly serviced by infrastructure and deliver orderly planning outcomes. See Department of Planning & Infrastructure factsheet, "More local, more accountable plan making" (March 2012). See also the Hon Brad Hazzard, Minister for Planning & Infrastructure, media release, "Feedback sought on rezoning changes", 27/3/2012.

[3] Consistent with the NSW State Plan, *NSW 2021*, Goal 29.

[4] The discussion paper provides limited information on these areas.

The EDO therefore does not support reduced departmental scrutiny of spot rezoning proposals. However, if this proposal proceeds, it is important that there are added safeguards to ensure the final LEP meets community expectations, and takes effect in accordance with legal and policy requirements, including gateway conditions. We recommend the following safeguards around the process, particularly for rezoning proposals:

- prescribe mandatory consultation processes in place of discretionary, case-by-case gateway decisions;
- require councils to consult on draft LEP text before finalising, not just on the planning proposal;
- require an environmental study for rezoning proposals; and
- put in place prudent safeguards where interests such as political donations are declared.

Regarding proposal 2 - pre-gateway review rights - the EDO does not support giving development proponents formal rights of review, either where a local council refuses a proponent's rezoning proposal; or does not make a decision within 60 days. While there are clear benefits to proponents from such a change, the *public* benefit of this proposal has not been demonstrated. In addition, it would conflict with stated policy aims of reducing rezoning proposals, which can undermine strategic planning and increase administrative burden. If the proposed review rights *are* granted, a range of added safeguards would be needed to:

- further limit the scope of decisions for which proponents may seek review;
- ensure departmental criteria for review eligibility are clear, and transparently followed;
- ensure the JRPP or PAC review process is transparent and accessible to the public; and
- allow members of the community to be heard at reviews.

Proposal 3 - 'gateway review' rights - similarly gives development proponents and councils new opportunities to have refusals reversed, or conditions on planning proposals altered, where they are dissatisfied. Again, the proposed review rights increase proponents' ability to question government decisions, without any such rights for the community whose interests those governments represent. This proposal also increases uncertainty and complexity of the plan making process without any clear public benefit.

Overall, the discussion paper's proposed reforms have the potential to reduce important scrutiny over certain LEP amendments, while increasing opportunities for developers to use review rights to push through rezoning proposals that are rejected by council or the gateway process. None of the proposed reforms directly increase the community's ability to have a say over local plan making, nor do they provide equivalent rights to community members to have decisions reviewed. As such, they would not achieve the aims of increased transparency, accountability or public confidence in the planning system. We provide more detailed comments on these issues below.

1) Delegation of powers to local councils to make certain amending LEPs

The proposed changes would reduce oversight of LEP amendments

The discussion paper proposes to routinely delegate powers to local councils to make a range of amendments to local environmental plans (LEPs). Under the current process, the Department or Minister has a checking and finalising role regarding the making of such LEPs. For example, the Minister 'may' make an LEP following community consultation; may decide not to make the proposed LEP; or may specify further procedures before the draft LEP will be reconsidered.[5]

By delegating this role to the council itself (which has prepared the draft), there will be no independent or substantive oversight to ensure the final LEP meets community expectations, and takes effect in accordance with legal and policy requirements, including any 'gateway' conditions.[6] This may be acceptable for very minor amending LEPs. We are not convinced this is appropriate for other amendments, particularly spot rezoning, which is often the subject of community debate and controversy.

The need for safeguards around rezoning

In 2008-09 the EP&A Act was amended in a way that fundamentally altered the process for making LEPs and 'spot rezonings'. The process for making LEPs is currently controlled by the Planning Minister (or a delegate). This process is subject to considerable discretion, including regarding the requirements for public consultation.[7]

It is understood that one of the aims of delegating LEP making powers to local councils is to remove unnecessary departmental oversight of less significant LEP types.[8] However, if powers are delegated to councils to make and finalise LEPs – particularly for 'spot rezoning' proposals – it is important that there are sufficient safeguards to ensure that the final LEP: meets community expectations and is of public benefit; satisfies legal and policy requirements (such as gateway conditions), and takes effect appropriately and as intended, as noted above.

Such safeguards align with the Government's State Plan commitments:

> *To restore public confidence, timely decision making and greater certainty for investors and communities, the implementation of a new planning system will centre on merit and public interest.*[9]

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[5] See section 59, *Environmental Planning & Assessment Act 1979* (NSW).
[6] See Department of Planning factsheet (March 2012), p 1: "The [department] will generally play no further role in the process once the LEP is delegated to a council [post-Gateway], other than routine monitoring… to ensure that Gateway determination timeframes are met." See also EP&A Act, ss 56 and 59.
[7] See EDO factsheet 2.1.3 –LEPs and SEPPs, at www.edo.org.au/edonsw/site/factsh/fs02_1_3.php. See also NSW Independent Commission Against Corruption (ICAC), *Anti-corruption risks and the NSW planning system* (February 2012), p 37.
[8] The Hon Brad Hazzard, media release, 27/3/12: "For many LEP types, there's no reason for the NSW Government to make the final decision and therefore we are proposing to hand back approval powers".
[9] NSW Government State Plan, *NSW 2021* (2011), Goal 29, p 56, at www.2021.nsw.gov.au.

If the Department's 'checking and finalising' role is to be delegated to councils themselves, it is not clear what safeguards will ensure the LEP finalisation process for spot rezoning is 'transparent', 'accountable' and 'restores public confidence'.

Prescribe mandatory consultation processes in place of discretionary, case-by-case gateway decisions

The current gateway approach allows upfront refusal of obviously inappropriate plans before resources are expended and the community is consulted.[10] However, as noted, the gateway process is more discretionary than the previous system, with less of the procedure stated in law. This places a lot of power in the hands of the Minister and Director-General for Planning.[11] For example, the provisions of the current LEP-making process do not guarantee public participation or a minimum timeframe for it. The degree of consultation required is left to the Minister to decide on a case-by-case basis in the gateway determination.[12]

To enhance public transparency, accountability and public confidence, the Government should require minimum standards for public consultation on draft LEPs and rezoning proposals (for example, exhibition and timeframe requirements). The most clear, certain and effective way to require such standards would be in the Act or regulations.[13] ICAC has made similar suggestions in its 2012 report on *Anti-corruption safeguards and the NSW planning system*. It recommends "That the standard community consultation requirements for draft local environmental plans be given statutory backing."[14]

The Department's policy statement should then articulate the regulatory requirements for minimum consultation requirements for rezoning proposals – instead of relying on case by case discretion at the gateway stage.

Require councils to consult on draft LEP text before finalising

Another way to improve transparency, accountability and public confidence under the new process would be to require an additional stage of public consultation for rezoning LEPs. An ongoing criticism of the current system is that consultation only occurs at the 'planning proposal' stage, not on the LEP once drafted. While engaging with the public at an early stage is encouraged, it should not replace consultation on the draft LEP itself. The draft text may vary markedly from what the community first commented on at the proposal stage. There will be even less scrutiny of rezoning LEPs under the Government's proposals, because councils will be able to finalise LEPs themselves.

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[10] See EDO factsheet, The New LEP Making Process (The 'Gateway' Process), at http://www.edo.org.au/edonsw/site/factsh/fs02_1_3a.php, para 2.1.3a.1.2.

[11] See, for example, NSW Independent Commission Against Corruption (ICAC), *Anti-corruption risks and the NSW planning system* (February 2012), p 37. Also, this case-by-case discretion makes it more difficult to challenge the LEP by demonstrating that the correct legal procedure was not followed.

[12] The relevant planning authority (ie, council) must include details of proposed consultation in the planning proposal (EP&A Act s 55(2)(e)). The Minister or delegate then determines what community consultation is required (s 56(2)(c)). In some cases no consultation may be required (ss 56(3) and s 73A).

[13] The EP&A Act (s 56(4)) already allows the regulations to prescribe 'standard community consultations requirements' for categories of planning proposals, but standard requirements have not been prescribed.

[14] NSW Independent Commission Against Corruption (ICAC), *Anti-corruption risks and the NSW planning system* (February 2012), recommendation 14.

To address this gap in scrutiny of rezoning proposals, the Government should commit to increased public transparency by more explicitly requiring councils to:

- consult on the draft LEP itself (not just the planning proposal);
- publish submissions received on the planning proposal and the draft LEP;[15]
- properly take into account submissions from the public in finalising the LEP;
- publish the report of any public hearing;[16] and
- give reasons for why changes to the draft LEP did or did not occur.

Require an environmental study for rezoning proposals

A further way to increase transparency, accountability and public confidence would be to require that environmental impact studies be prepared wherever rezoning (or land reclassification) is proposed. Such studies would go beyond the requirements in the *Guide to preparing planning proposals*,[17] and would be proportionate to potential impacts. This would better inform the relevant authorities to make sound decisions. It also provides the community and other stakeholders with valuable information about the environmental effects of a planning proposal.

At present, after preparing a draft planning proposal, the planning authority (ie, council) submits the proposal to the Planning Minister for 'gateway determination'. At this time, the Minister or Department can send the planning proposal back to the council for further revision or for further studies.[18] At this point the Planning Minister could require an environmental study to be undertaken, but that is at the discretion of the Minister and is not guaranteed.[19]

The EDO would support clear, robust requirements for environmental studies to apply where a spot rezoning is proposed; particularly noting the lesser role proposed for the Department in scrutinising rezoning proposals, and the proposed review rights for proponents where a gateway determination requires resubmission with further studies.[20]

Amendments for land reclassifications and heritage LEPs

The discussion paper provides little detail regarding the breadth of other proposed LEP delegations, including for land reclassifications and heritage LEPs.[21] This is understood to

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[15] Subject to personal privacy considerations. Publication is currently discretionary under s 57(4).
[16] Publication is currently discretionary under s 57(7).
[17] Department of Planning, *A guide to preparing planning proposals* (July 2009).
[18] EP&A Act, s 56(2)(b).
[19] See EDO factsheet, The New LEP Making Process (The 'Gateway' Process), at http://www.edo.org.au/edonsw/site/factsh/fs02_1_3a.php, para 2.1.3a.2.4. Prior to July 2009, the EP&A Act required an environmental study to be prepared before a draft LEP is made. See former s 57(1): "Where a council decides to prepare a draft local environmental plan or is directed to do so by the Minister under section 55, it shall prepare an environmental study of the land to which the draft local environmental plan is intended to apply." This requirement only applied to *amending* LEPs if the Director-General directed this (former s 74(2)(b)).
[20] See the discussion paper, p 4, 'Independent reviews – Gateway reviews'.
[21] See discussion paper, p 1. For example, that the proposal is consistent with endorsed local, regional or State planning strategies; and is properly serviced by infrastructure and deliver orderly planning outcomes. See Department of Planning & Infrastructure factsheet, "More local, more accountable plan making"

include, for example, reclassification of council land from 'community' to 'operational' status, in order to allow the land to be sold – which can be controversial for local residents. Currently local communities benefit from clear and consultative public processes for community land, (for example regarding Plans of Management) that are not the same for operational land. Similar to the concerns regarding delegating rezonings discussed above, the EDO submits there is a need to retain Ministerial oversight and community input, especially in relation to conversions of community land and also in relation to heritage areas.

Prudent safeguards where interests such as political donations are declared.

Under the discussion paper's proposals 2 and 3, proponents and councils seeking review of a decision must disclose any reportable political donations as part of supporting information given to the Department.[22] Political donations are not mentioned in the context of proposal 1 on LEP delegations, although existing legal obligations apply. It should be further considered whether, in the case of rezoning and other LEP delegations, additional decision making safeguards are needed where political donations have been received, to ensure arms-length decision making. This may improve public confidence and reduce perceptions and risks of potential corruption.

2) 'Pre-gateway reviews' for proponents

This proposal would give development proponents new rights for a review (by a JRPP or PAC) where a local council decides not to proceed with a proponent's rezoning proposal, or where the council does not make a decision on the proposal within 60 days. Proposed reviews of council decisions will need to meet certain Planning Department criteria in order to qualify for a review.[23]

The EDO does not support the proposal to give development proponents formal rights of review in either of these circumstances. While there are clear benefits to proponents from such a change, the *public* benefit of this proposal has not been demonstrated. Our further reasons are as follows:

- *Review rights for proponents would undermine policy intent to reduce spot rezoning*
  The proposal appears to conflict with the Department's previously stated aim to reduce the number of rezoning amendments, as it is likely to have the opposite effect. The Planning Department has previously expressed an objective 'to reduce the number of spot rezonings', citing two main reasons:

  > *Firstly… to encourage a planning approach which is fair and transparent, deals with all like cases consistently, and provides for planning decisions with a clear strategic basis.*

(March 2012). See also the Hon Brad Hazzard, Minister for Planning & Infrastructure, media release, "Feedback sought on rezoning changes", 27/3/2012.

[22] Pursuant to s 147 of the EP&A Act. See discussion paper, p 4.

[23] For example, that the proposal is consistent with endorsed local, regional or State planning strategies; and is properly serviced by infrastructure and deliver orderly planning outcomes – see the Hon Brad Hazzard, Minister for Planning and Infrastructure, media release, 27/3/12, "Feedback sought on rezoning changes".

Secondly, reducing the number of amending LEPs… reduces the administrative load for councils, the Department and the Parliamentary Counsel.[24]

By contrast, increasing proponents' review rights is likely to increase the number of rezoning proposals and amending LEPs. This is because proponents may be more likely to put forward rezoning proposals if they know they have a review right should the council reject the proposal. Furthermore, while currently councils may reject some rezoning proposals at first instance, review rights would give proponents a second opportunity for approval (by the Minister on advice of a JRPP or PAC) to proceed to the gateway.

The Department's statements above note two benefits of reducing the number of spot rezonings. If increasing review rights *does* lead to increased rezoning activity, this will detract from transparency, certainty and consistency of the system (through more ad hoc decisions). It will also increase the administrative burden on local and State governments, as well as JRPPs (diverting resources to participating in proponent-driven reviews, and potentially preparing more LEP amendments).

- *Review rights would give greater influence to proponents, rather than the community*
  While review rights are proposed as an additional accountability measure, such review rights would increase the influence to proponents, rather than the community, over local development decisions. While the private benefit of review rights to proponents is clear, the public benefit is questionable.

- *No proposal to include the community in the review process*
  There is no proposal to improve transparency, accountability or public participation by including the community in the review process, or giving them equivalent review rights. Rather, review rights would be exercised unilaterally by a proponent (with eligibility decided by the Department) prior to any public involvement, in order to progress a rezoning proposal to the 'gateway' stage. Community members are therefore excluded from the review processes proposed.[25] There are two proposals for transparency of Department and JRPP findings by way of website publication,[26] but no opportunity for actual community *input* on the review such as submissions or public hearings. If review rights are granted to proponents, there should be explicit opportunities for community participation in such reviews.

- *The criteria to be eligible for review are broad and unclear*
  We note the criteria for proponents to be eligible for a review are broad and unclear. The criteria in the discussion paper are divided into two categories: a) achieving

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[24] Department of Planning, Planning Circular PS 06-005, 'Spot rezoning' (15 June 2006)
[25] In brief, the discussion paper proposes that (p 3): a proponent applies to the department for a review; the department decides whether criteria are satisfied, and prepares and publishes a report; a regional panel considers the Department's report and any additional submissions from council/proponent; and a regional panel advises Minister on whether proposed instrument should be submitted to gateway.
[26] First, it is proposed that the department 'will place the proponent's review request and the department's eligibility assessment on [its] website within five days.' (It is not clear whether the 'eligibility assessment' is separate to the report provided to the regional panel – if so, this report should be published too.) Second, the regional panel's advice to the Minister on whether the proposal should be submitted to the Gateway 'will be placed on the department's website within five days.' (discussion paper, p 3).

appropriate orderly planning outcomes; and b) consistency with strategic outcomes (pp 2-3).

Under (a), one criterion is that key environmental agencies are 'likely' to agree that appropriate environmental management outcomes 'can' be achieved. This is unclear and should be more definitive. For example, it is not clear on what basis the proponent would demonstrate 'likely agreement'; the reference to 'appropriate environmental management outcomes' is unclear;[27] and the proponent should have to demonstrate how environmental outcomes 'will' be achieved.

Under (b), the proponent needs to demonstrate consistency with local, regional *or* state strategies. This is overly broad and unclear. As these are listed in the alternative, it seems possible that a rezoning proposal would be eligible for review even if it is inconsistent with local and regional strategies, provided it is consistent with 'other relevant regional or State strategic plans or policies'. This can be problematic and controversial as illustrated by recent cases brought by concerned local community groups where rezoning was justified on the basis of state policies.[28]

- *The threat of review could affect decisions on whether to agree to proposals*
  Granting review rights to proponents where a council refuses a rezoning application could potentially influence initial council decisions, simply by the 'threat' of having to expend further council resources if the proponent seeks a JRPP or PAC review. This could result in increased approval of rezoning and development that does not align with development controls or community expectations.

  An analogy can be drawn with proponents' automatic appeal rights at the development assessment stage. A City of Sydney report (2001) suggests developer appeal rights can result in "Councils attempting to second-guess decisions of the Land & Environment Court – often resulting in the approval of projects that they do not support and which breach their own policies."[29]

  As the proposals outline no additional review rights for community members, new review rights for proponents will add to perceptions that the planning system is geared towards developers, at the expense of the community's vision and orderly land use planning.

Safeguards are needed if proposed review rights are granted

While we do not support the proposed review rights for proponents, if such rights were granted there are a number of additional safeguards that would be needed:

- *Further limit the scope of decisions for which proponents may seek review*
  For example, proponents should not have review rights available where rezoning proposals are inconsistent with endorsed local strategies. The scope of 'relevant

[27] As distinct from, for example, an 'improve or maintain' environmental outcomes standard.
[28] See: *Huntlee Pty Ltd v Sweetwater Action Group Inc; Minister for Planning and Infrastructure v Sweetwater Action Group Inc* [2011] NSWCA 378.
[29] City of Sydney, *Unwanted Legacies of the Land & Environment Court of NSW* (2001), Foreword by Councillor Frank Sartor, then Lord Mayor of Sydney.

regional or State strategic plans or policies' also needs to be clear and limited. This is more consistent with returning planning powers to local communities.

- *Ensure department's criteria for review eligibility are clear, and transparently followed*
  The criteria for eligibility for review rights should be tightened to address the matters noted above. This would be consistent with reducing the number of rezoning proposals, and ensuring proponents' rights do not undermine local development controls and decision-making. If certain reviews are permitted, all associated reports and reasons for decisions should be published accessibly and in a timely fashion.

- *Ensure the JRPP or PAC review process is transparent and accessible to the public*
  The discussion paper's proposed process for review should be amended to provide for rights for community participation.

3) 'Gateway review' rights for proponents and councils

This proposal would give proponents and councils new rights for review of a NSW Government 'gateway' decision about whether a draft LEP should proceed, and any conditions in that decision.

As with the pre-gateway review, this proposal is geared towards giving development proponents new opportunities to have a decision about a planning proposal reversed, or conditions altered, where they are dissatisfied. The proposed review rights increase proponents' ability to question government decisions, without any such rights for the community whose interests those governments are elected to represent. This increases uncertainty and complexity of the plan making process without any clear public benefit.

Proponents' review rights would arise, for example, where the gateway rejects a rezoning proposal as inappropriate; requires resubmission with further studies or information; or requires certain environmental studies to be undertaken.[30] This would give developers the chance to weaken proposed scrutiny and safeguards around their planning proposals. It would also lessen transparency by giving proponents further input prior to any public consultation.

We note the proposal provides review rights to councils regarding gateway decisions in the same circumstances as proponents above. Significantly, no council review rights are proposed to challenge a gateway determination to *allow* a planning proposal to proceed, where council considers the proposal inappropriate. This bears out the analysis that the proposal is one-sided, rather than in the public interest.

While the review rights are put forward as a 'transparency and accountability' measure, this proposal again provides no opportunity for the community to initiate or engage in a review (for example, where a community group, or indeed the council, opposes a gateway

[30] See discussion paper, p 4, points a)-c). While 'consultation requirements' are excluded from review, it is not clear this also excludes a proponent from challenging gateway requirements for a public hearing. That would pre-emptively curtail public input and transparency.

decision to allow a planning proposal). This would further disenfranchise the community from ensuring appropriate rezoning and development.

For further information on this submission please contact Mr Nari Sahukar, Policy & Law Reform Solicitor, EDO NSW, on (02) 9262 6989 or nari.sahukar@edo.org.au