

GATEWAY REVIEW

Justification Assessment

- 1. Purpose:** To request that the Independent Planning Commission review the alteration to the Gateway determination of the subject planning proposal, consider the information provided by the proponent, and provide advice.

Dept. Ref. No	PP2021-2262
LGA	City of Newcastle Council
LEP to be Amended	Newcastle Local Environmental Plan 2012
Address / Location	505 Minmi Road, Fletcher. Lot 23 DP1244350
Proposal:	The planning proposal seeks to rezone land at 505 Minmi Road, Fletcher from C4 Environmental Living to R2 Low Density Residential and C2 Environmental Conservation and changes the following associated maps: <ul style="list-style-type: none"> ▪ minimum subdivision lot size ▪ height of building maps ▪ urban release area
Review request made by	<input type="checkbox"/> The Council <input checked="" type="checkbox"/> The proponent, Kingston Minmi Pty Ltd C/- Barr Planning
Reason for review:	<input checked="" type="checkbox"/> A determination has been made that the planning proposal should not proceed. <input type="checkbox"/> A determination has been made that the planning proposal should be resubmitted to the Gateway. <input type="checkbox"/> A determination has been made that had imposed requirements (other than consultation requirements) or makes variations to the proposal that the proponent or council thinks should be reconsidered.

2. Background

The subject planning proposal relates to 505 Minmi Road, Fletcher. The site is vegetated and sits within existing urban residential areas to the north, east and west. Conservation zoned land is located to the northwest of Minmi Road. Summerhill Waste Management Centre is located to the south separated by conservation zoned land. Blue Gum Hills Regional Park is located further south and southwest of the subject land. Otherwise, the site is bounded by residential land to the east, west, north on the opposite side of Minmi Road and the

southwest, albeit separated by a watercourse which is held in conservation zoned land. The site in its surrounding context is shown in the Figure below.

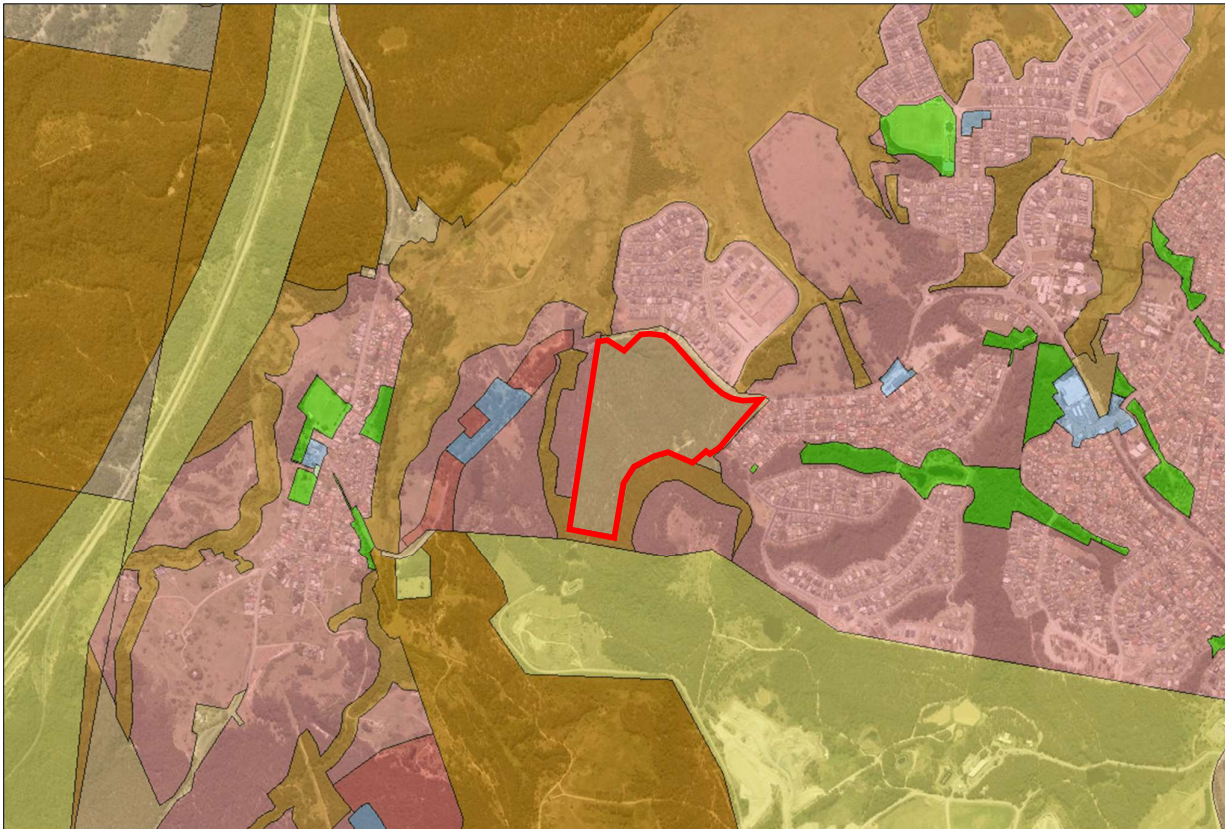


Figure 1: Site Context

The intent of the LEP Amendment would be to amend Newcastle LEP 2012 as outlined in the table below:

Table 2: Proposed changes to Newcastle LEP 2012

Amendment Applies to	Explanation of Provisions
Land Use Zone Map	Rezone subject land from C4 Environmental Living to R2 Low Density Residential (12.70 ha) and C2 Environmental Conservation (13.54 ha).
Lot Size Map	Amend lot size map to facilitate a minimum lot size of 300m ² in the proposed eastern residential precinct and 450m ² in the proposed western residential precinct.
Height of Building Map	Amend height of building map to indicate a maximum building height of 8.5m within land proposed to be zoned R2 Low Density Residential.

Urban Release Area Map	Amend urban release area map to indicate land proposed to be zoned R2 Low Density Residential as an urban release area.
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It is noted that the area of land to be zoned C2 Environmental Conservation is smaller than the minimum lot size of 40 hectares, however Clause 4.1B of NLEP 2012 would facilitate subdivision of the land provided all of the land within the parent lot zoned C2 is contained within a single lot following the subdivision.

The Planning Proposal was formally accepted by the City of Newcastle (CN) on 1 May 2020. The Planning Proposal was presented at Council’s Ordinary Meeting on 8 December 2020 with a recommendation for support from the staff. The Planning Proposal was not supported by the Councilors outlining the following:

PART A

That Council:

1. Does not endorse the Planning Proposal to rezone 505 Minmi Road Fletcher and maintains current zoning for the site (E4) as per the Newcastle Local Environment Plan 2012.
2. Prior to being presented with any further planning proposals for this site, requires all required environmental studies and analysis be undertaken to: “address the inherent constraints and hazards of the land and the interdependent analysis of these constraints ... [as these studies] may result in significant amendments to the Planning Proposal” (Officers report, paragraphs 16-18).

PART B

That Council:

1. Notes correspondence from the NSW Minister for the Environment, The Hon Matt Kean MP, seeking Council’s advice on land that may have strategic potential to be acquired by the State for inclusion as part of the NSW National Parks Estate.
2. Writes to Minister Kean and DPIE recommending that the NSW Government considers the inclusion 505 Minmi Road into the National Parks estate, noting the property’s strategic importance to the Green Corridor, and its proximity to the existing Blue Gum Hills Regional Park and Hexham Wetlands National Park.

PART C

That Council:

1. Amends the adopted Local Strategic Planning Statement (LSPS) to remove references to 505 Minmi Road as a 'Housing Release Area', by reverting all references relating to 505 Minmi Road to those contained within the draft Plan.

It should be noted that the resolution to remove the references to 505 Minmi Road as a ‘Housing Release Area’ failed to follow statutory public consultation process under the Environmental Planning and Assessment Act 1979 (EP&A Act). Advice received from McCullough Robertson Lawyers, provided under separate cover, states that the Council “resolved to amend the Newcastle LSPS with absolute disregard for the statutory public

consultation process that Council was required to follow”. Subsequent to the resolution no attempt was made to exhibit the amendment to comply with the provisions of the EP&A Act.

Following the Council resolution to not endorse the Planning Proposal, Barr Planning lodged a rezoning review request with the Hunter and Central Coast Joint Regional Planning Panel on 29 January 2021. The review commenced the 05 March 2021. After deliberation, the Regional Planning Panel determined that the Planning Proposal should proceed to Gateway with conditions on 10 January 2023. Further work was undertaken to address the conditions of Gateway. This included the preparation of:

- Amended Planning Proposal Report
- Response to Agency submissions
- Flooding Advice
- Aboriginal Cultural Heritage Assessment Report
- Site Specific Development Control Plan
- Amendment to the Biodiversity Certification Assessment Report and zoning boundary through consultation with the Biodiversity, Conservation and Science Division.

On 12 December 2023 CN resolved to write to the Minister of Planning to request the Planning Proposal to not proceed. The Department of Planning, Housing and Infrastructure altered the Gateway Determination on 22 March 2024 read as follows:

1. *Amend:
condition 5(c)
and replace with:
a new condition 5(c): “exhibition must commence by 30 April 2024”.*

2. *Amend:
condition 7
and replace with:
a new condition 7: “The timeframe for completing the LEP is on or before 23 November 2024.”*

The letter to Council also noted that should Council not meet the exhibition timeframe, the Department will recommend the appointment of an alternative planning proposal authority under Section 3.32 of the Environmental Planning and Assessment Act 1979.

The Planning Proposal and Biodiversity Certification Assessment Report went on exhibition concurrently between 22 April 2024 and 21 May 2024. As part of the exhibition process CN notified over 2,000 properties. During the exhibition of the Planning Proposal, the EPA requested an extension of time to lodge a submission which was granted by CN. Council received the EPA submission on 27 May 2024. The EPA submission raised concern around land use conflict and recommended further assessment be conducted for the following:

- Noise and Vibration

- Air Quality and Odour
- Land Contamination including subsurface gas monitoring resultant from land fill or mine workings
- Water Management

As a result of the recommendations set out by the EPA, Council wrote to the Minister of Planning on 8 July 2024 requesting the Planning Proposal not proceed as the timing to complete additional studies could not be completed prior to the date set under Condition 7 of the altered Gateway determination (22 March 2024). Council's estimated timeframes to complete the studies was in excess of 12 months. On 28 July 2024 the Department of Planning, Housing and Infrastructure agreed to discontinue the Planning Proposal considering the likely time to prepare a Preliminary Site Investigation to confirm that there is no risk of harm to human health, as well as the length of time since the issue of a Gateway determination in January 2023.

It is noteworthy that the Alteration of Gateway determination report – PP 2021-2262 states the following:

The Department considers that further detailed studies in relation to odour, air, noise and vibration and water are more the responsibility of Council as the operator of the SWMC than the proponent. However, land contamination is a fundamental consideration in the planning proposal process to reduce the risk of harm to human health and the environment. As the proposal involves the intensification of land uses on the subject site it is considered the responsibility of the proponent to demonstrate that the land is suitable for human habitation as part of the planning proposal process.

Accordingly, the key concern is related to the time required to deliver a Preliminary Site Investigation Report considering the risks associated with sub-surface landfill gases generated by SWMC and gases associated with coal mine workings.

It is important to note that a Preliminary Site Investigation was submitted with the Planning Proposal. There have been no issues raised with the investigation or its findings, however the investigation did not consider whether there was gas coming from the waste transfer station that would impact on the property.

3. Response to Gateway Determination Issue

The altered Gateway Determination subject to this review reads as follows:

1. *Delete paragraph 2:*

"I, the A/Executive Director, Local and Regional Planning at the Department of Planning and Environment, as delegate of the Minister for Planning, have determined under section 3.34(2) of the Environmental Planning and Assessment Act 1979 (the Act) that an amendment to the Newcastle Local Environmental Plan 2012 to facilitate residential development should proceed subject to the following conditions:"

and replace with a new paragraph 2:

“I, the Acting Executive Director, Local Planning and Council Support at the Department of Planning, Housing and Infrastructure, as delegate of the Minister for Planning and Public Spaces, have determined under section 3.34(2) of the Environmental Planning and Assessment Act 1979 (the Act) that an amendment to the Newcastle Local Environmental Plan 2012 to facilitate residential development at 505 Minmi Road, Fletcher should not proceed.”

2. Delete conditions 1 to 7.

As detailed in the Alteration of Gateway Determination Report – PP 2021-2262, dated 11 July 2024, the Department of Planning, Housing and Infrastructure made the following recommendation:

Considering the correspondence from the NSW EPA, the likely timeframe required to prepare an updated preliminary site investigation for contamination to confirm that there is no risk of harm to human health, and the length of time since the issue of a Gateway determination in January 2023, it is considered inappropriate that the proposal continue at the present time.

Table 3 provides justification against the recommendation to enable the alteration of the Gateway to reinstate Conditions 1 to 7 which include the former alteration to extend the LEP making date to 23 November 2024.

Table 3: Justification against recommendation

Recommendation	Response
<p><i>Considering the correspondence from the NSW EPA, the likely timeframe required to prepare an updated preliminary site investigation for contamination to confirm that there is no risk of harm to human health ... it is considered inappropriate that the proposal continue at the present time.</i></p>	<p>Barr Planning note that the Department of Planning, Housing and Infrastructure state:</p> <p><i>The Department considers that further detailed studies in relation to odour, air, noise and vibration and water are more the responsibility of Council as the operator of the SWMC than the proponent.</i></p> <p>Accordingly, as provided in the background of the Gateway Justification Report and the recommendation provided in the Alteration of Gateway determination report – PP 2021-2262, the key issue is the timeframe to prepare and provide a Preliminary Site Investigation which assesses the risks associated with sub-surface landfill gases generated by SWMC and gases associated with coal mine workings.</p> <p>A Preliminary Site Investigation was provided with the Planning Proposal documentation. The Preliminary Site Investigation identified that the site was subject to fill along with the dumping of a vehicle which could have resulted in elevated levels of hydrocarbons. The assessment recommended that validation testing beneath the vehicle along with testing of the fill to confirm ENM status was required. The assessment</p>

concluded that based on the findings and the limited previous analytical testing undertaken, no indication of gross contamination has been identified on the site. The consultant determined that the site would be suitable for residential development from a contamination perspective. The Report was prepared in 2014 and is therefore 10 years old. The site is a secured vacant block of land, as such no significant change to the contamination risk was identified when preparing the current Planning Proposal in 2020. Furthermore, the surrounding, conservation land, residential subdivision and dwelling houses did not indicate migration of significant contamination would occur from adjoining sites. Accordingly, it is considered that the current PSI suitably addresses the following EPA recommendation:

The PSI should:

consider any recent activities that may have impacted the Proposal area (including illegal dumping or migration of contaminants from adjacent sites).

The EPA Submission raises concern regarding sub-surface gas emissions from the Summerhill Waste Management Centre and from historic coal mine workings. The submission received from Subsidence Advisory NSW (SA NSW) noted the presence of shallow mine workings and shafts are present under the subject site. It is shown on the Planning Portal that the southern corner of the land is mapped for underground coal mining, see image below. The mapping for underground mine workings extends across existing residential property to the southeast and extensively across Newcastle generally.

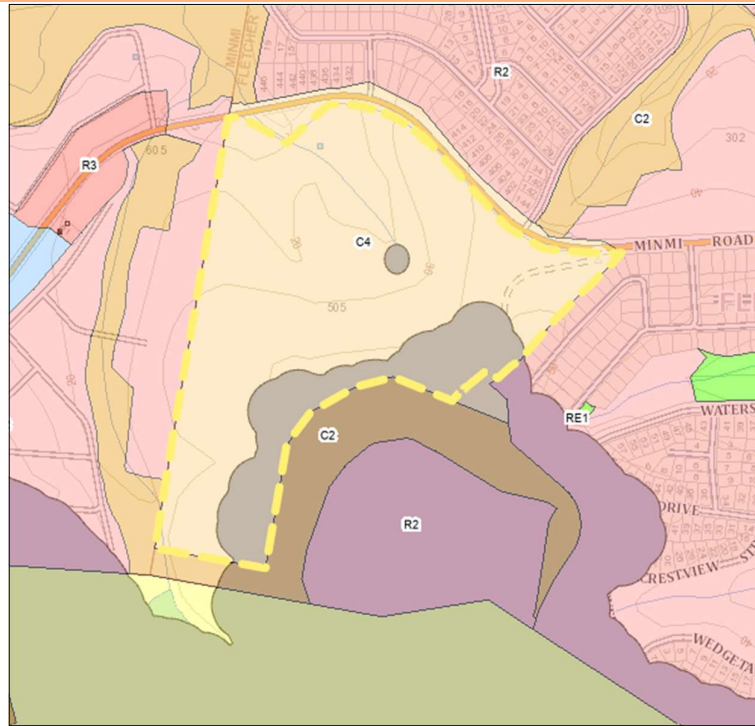


Figure 2: Underground coal mining map. Source: ePlanning Spatial Viewer, August 2024

Further information related to the historic coal mining workings across the site was requested from SA NSW via email on 27 August 2024. The advice from SA NSW noted that records indicate shallow workings at less than 15m depth of cover in the Borehole Seam within parts of the shaded area shown above; drifts and shafts are also present. SA NSW could not advise on sub-surface gases associated with coal mine workings.

The EPA submission raises concern regarding elevated carbon dioxide levels at the boundary of the Summerhill Waste Management Center and the potential for migration of gas off-site. The EPA has noted that the Council has advised the elevated carbon dioxide levels to be resultant from coal seam sources. However, despite the source, i.e. landfill gas emission or coal mine workings, the EPA recommend:

The PSI should:

consider the presence of SWMC and any mine workings in the area and investigate any risks associated with hazardous sub-surface gas at the Proposal area.

In communication received from CN’s Environmental Specialist within the Waste Services Business Unit, “there are no non-compliances in relation to adjoining residential properties” with respect to the monitoring of the facility. Considering the facility is required to complete a Landfill Gas Risk Assessment under EPA License 5897, the impacts should be satisfactorily addressed and managed. It is further noted that:

- The subject site is outside all EPA recommended distances in the guidelines for potential impacts.
- There is no evidence of exceedances from the monitoring publicly available that suggest that there is a requirement to assess the site.
- The adjoining site to the west was only recently approved for residential development. This land shares a boundary with our site and the waste management facility, and
- The Environmental Impact Statement for the facility assesses the environmental impacts of the facility and concludes there will be no impacts on local residential receivers.

Considering the facility is to be managed in accordance with EPA License 5897, the impacts associated with the migration of sub-surface gases from the Summerhill Waste Management Centre across the boundary, despite the source, should be the responsibility of the operator being City of Newcastle Council.

To this extent, if there are no non-compliances with residences in closer proximity to the facility, it is unlikely that there is a risk associated with landfill sub-surface gas migration to the subject site.

To this extent, the investigation into sub-surface gas monitoring is limited to the historic coal mine workings mapped within the southern corner of the subject site. It is accepted that a new Preliminary Site Investigation is warranted to address this matter and any associated risks to human health, and formally assess whether site conditions have altered in the past 10 years from a contamination perspective. This is discussed further below.

City of Newcastle Council raised concern regarding the extensive time (over 12 months) required to prepare the Preliminary Site Investigation with the Department of Planning, Housing and Infrastructure. Barr

	<p>Planning strongly refute that the preparation of the Preliminary Site Investigation would take in excess of 12 months. Consultation and engagement of contamination specialists, Qualtest, has begun. Detailed in the letter of advice, provided under separate cover, Qualtest have outlined the timeframe to prepare the preliminary site investigation is 4 weeks with a subsequent 8-16 weeks to complete a detailed site investigation, depending on atmospheric conditions. A summary of the preliminary findings is provided below.</p> <p>Preliminary Contamination Findings</p> <p>Qualtest have commenced the preliminary site investigation. An interim letter of advice is provided and details the investigation completed to date. The investigation includes:</p> <ul style="list-style-type: none"> ▪ desktop assessment ▪ site inspection ▪ literature review ▪ preparation of a conceptual site model <p>The outcomes of the desktop assessment identified that there is the potential for sub-surface gas contamination. Whilst the preliminary findings indicate that there is a low to very low risk for sub-surface gas emissions, further testing is recommended. As identified in the advice letter the remediation of coal mine workings by SA NSW, will limit potential migration pathways to the site.</p>
<p><i>...and the length of time since the issue of a Gateway determination in January 2023, it is considered inappropriate that the proposal continue at the present time.</i></p>	<p>Initial timeframe to commence exhibition within 90 days under Condition 5(c) was unreasonable considering Condition 1 required an updated Aboriginal cultural heritage assessment which require minimum statutory timeframes for consultation with Registered Aboriginal Parties. As such the exhibition timeframe could not be met when needing to adhere to legislation under the National Parks and Wildlife Act 1974.</p> <p>The initial Gateway did not fully consider the legislative process under the Biodiversity Conservation Act 2016 for the Biodiversity Certification of the land. Request for further information delayed the Biodiversity Certification Assessment Report (BCAR) from going onto public exhibition. Resolving the request for further information to the satisfaction of the Department of Biodiversity, Conservation and Science (BCS) required further targeted survey and amendment to the zone boundary footprint prior to the exhibition of the BCAR. BCS requested that the Biocertification</p>

application progress to consultation in February 2024. The BCAR was formally exhibited between 22 April 2024 and 21 May 2024.

Prior to the finalisation of the BCAR for public exhibition, the City of Newcastle Council refused to assist in moving the application forward as the zone boundary footprint was not secured with the BCS. This delayed the progression of the Planning Proposal and associated documentation. This delay led to the DPHI extending the Gateway period to November 2024 and threatening to take the planning powers for this project away from the Council once DPHI understood the Planning Proposal documentation required under the Gateway conditions had been met and the BCAR had been recommended to be exhibited. It was only after the directive of DPHI that the Council agreed to exhibit the proposal. The Planning Proposal was formally exhibited between 22 April 2024 and 21 May 2024.

It would appear that the time to make the LEP by 20 January 2024 under Condition 7 did not fully consider the legislative processes under the National Parks and Wildlife Act 1974 and the Biodiversity Conservation Act 2016.

The LEP amendment was delayed through the complexity of having alignment between the certification and the planning proposal, the need to undertake an updated Aboriginal heritage assessment and the delays as a result of Council's unwillingness to engage to move the process forward.

As detailed in the Background of this Gateway Review Justification Report, the Department of Planning, Housing and Infrastructure, identified that significant progress had been made to meet the Gateway conditions to warrant public exhibition and provided an alteration to Condition 7 of the Gateway to 23 November 2024.

Barr Planning has worked consistently with the agencies listed under Condition 3 and Council to address agency matters and prepare the Planning Proposal for exhibition. The EPA was not an agency which required consultation under Condition 3.

It is unreasonable that a submission made during the exhibition period should terminate the Planning Proposal without suitable time to address

	the matters raised within the submission. The timeframe advised in the Qualtest advice letter is reasonable to allow the progression of the Planning Proposal.
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4. Justification with timeframes from consultants

Despite DPHI identifying that the PSI is the only requirement for the applicant to address the EPA submission, should all other Reports recommended by the EPA be required to inform the Planning Proposal the following timeframes have been obtained from required subconsultants.

Table 4: Indicative timeframe for delivery of technical report to support Planning Proposal

Required Report	Status	Timeframe
1. Land uses be informed by current and future operations of the SWMC	An initial email to commence conversation was sent on 20 August 2024. A response was received on 9 September 2024. The response stated that the facility is managed as per the requirements of the NSW EPA and development consent conditions. The response stated that conditions and management practices are in place to minimise risk to surrounding residential properties.	Open to Council’s response
2. Noise and vibration assessment	Quote received	3-4 weeks
3. Air quality and odour impact assessments	Quote received	10 weeks
4. Updated contaminated land assessment	Preliminary Site Investigation Commenced	4 weeks
	Detailed Site Investigation (required)	8-16 weeks
5. Water management strategy	Quote received	4 weeks

The information above demonstrates that the timeframe, being greater than 12 months to prepare the required reports, provided to the DPHI by the Council was substantially incorrect and it is unclear on what this advice was based. Further to this, with the matters raised by the EPA regarding the potential impacts of the nearby waste facility managed by the Council, there are concerns regarding the ability for Council to make an

independent assessment of the Application, this is further exacerbated by the previous response from the Council and the performance of Council which ultimately led to DPHI threatening to take the Council's planning powers away.

As a result, we would as part of this Gateway Review of the Gateway Amendment request that the IPC consider who the Planning Authority should be. This is due to the perceived conflict of interest the Council faces along with the past performance of the Council, so that in the instance that the IPC choose to overturn DPHI's alteration to the Gateway determination to terminate the proposal, that the timeframes nominated in the gateway are given the best chance to be met.

5. Conclusion

Barr Planning strongly disagrees with the assessment made by the Department of Planning, Housing and Infrastructure with respect to the timing for the preparation of a Preliminary Site Investigation, and the resultant alteration of the Gateway determination on this basis. Accordingly, Barr Planning requests a review of the Gateway determination to reinstate Conditions 1 – 7.

Considering the time lost as a result of this altered Gateway determination and subsequent review, it is requested that further time is provided within Condition 7 to provide sufficient time to address the EPA response and finalise the zoning boundary footprint with the Department of Biodiversity, Conservation and Science.

Further, it is requested that DPHI be recommended to be the planning proposal authority for the application to provide certainty on meeting the proposed timeframe.