

17 October 2024

Craig Diss
Acting Director, Hunter and Northern Region
NSW Department of Planning, Housing and Infrastructure

Email: [REDACTED]

Dear Craig

Gateway review application for PP-2021-2262

City of Newcastle (CN) thank you for the invitation (dated 19 September 2024) to comment on the gateway review application for PP-2021-2262 relating to land at 505 Minmi Road, Fletcher. We acknowledge the Local Environmental Plan Making Guideline requires comments within 21 calendar days. CN requests this letter with **Attachment A** be recognised as our formal response to the gateway review application (the application) and submitted to the Independent Planning Commission (IPC) for consideration.

On 8 July 2024, CN requested the Department of Planning, Housing and Infrastructure (Department) withdraw the planning proposal (**Attachment B**). This was due to matters raised in submissions to the exhibited planning proposal. This included the Environmental Protection Authority (EPA) submission, and reasons previously outlined in our 8 January 2024 request to the Minister of Planning to not proceed with this proposal (**Attachment C**).

The EPA submission of 27 May 2024 (**Attachment D**) raised land use conflict concerns due to proximity of the proposed residential land use zone to Summerhill Waste Management Centre (SWMC). The EPA recommends additional assessment to inform appropriate future land uses, transitional zonings, buffer distances, and designs. CN understands this will take a minimum of 12 months to meet relevant EPA guideline assessment requirements.

The department approved CN's request and determined the planning proposal should not proceed due to the EPA matters raised, time required to address matters and lack of certainty around these matters.

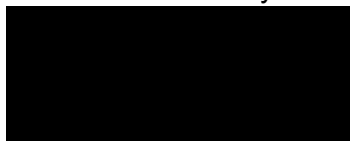
The proponent is seeking the IPC to recommend reinstating the original gateway determination conditions 1–6, with condition 7 altered to extend the finalisation date. The proponent's justification to alter the gateway determination is inconsistent with EPA guidelines, advice from CN's Environmental Health officers, and the proponent's original response to the EPA's submission dated 12 July 2024 (**Attachment E**).

CN's response detailed in **Attachment A** comments on the main issues raised by the proponent with regards to the EPAs recommendations, requirements and timeframes. It also further details the inadequacy of the information submitted with the proposal to date.

The proponent requested the IPC recommend an alternative PPA. CN advises that we take our role as PPA seriously, and the proponent has had sufficient time and multiple opportunities to adequately respond to outstanding matters. CN does not support an alternative PPA, nor consider it to be a reasonable outcome given the inadequacy of the information submitted with the proposal to date.

Should you wish to discuss this further or have any questions, please contact me on 02 4974 2892 or scross@ncc.nsw.gov.au, or Jonathon Christie, Senior Strategic Planner on [REDACTED] or [REDACTED]

Yours faithfully



Sam Cross
STRATEGIC PLANNING SECTION MANAGER

ATTACHMENT A – RESPONSE TO APPLICATION FOR GATEWAY REVIEW

Gateway determination timeframe

The Department of Planning, Housing and Infrastructure (department) first issued gateway determination on 10 January 2023. Under Section 3.34(2)(f) of the *Environmental Planning and Assessment Act 1979* (the Act), the Minister is to determine timeframes for the various stages to be completed to make the proposed instrument. The original gateway determination required the planning proposal be exhibited within 90 days of the determination and completed by 20 January 2024.

By December 2023 several key matters remained unresolved. On 8 January 2024, CN requested the Minister to determine that the planning proposal not proceed. The department declined CN's request and issued an Alteration of Gateway Determination amending the exhibition timeframe to commence by 30 April 2024. The finalisation deadline was to be on or before 23 November 2024. Consequently, the planning proposal exhibition started on 21 April 2024 with key matters unresolved on biodiversity, flooding and proximity to the Summerhill Waste Management Centre (SWMC).

Environmental Protection Authority recommendations

The EPA submission raised a range of contamination issues including risks from subsurface gas associated with both the SWMC landfill gas and coal mine workings. The EPA recommends additional assessments be undertaken including:

- Noise and vibration assessment
- Air quality and odour impact assessments
- An updated contaminated land assessment.

CN's Environmental Health Officers advised that a detailed site investigation (DSI) would be required given the subsurface gas monitoring results. These showed elevated levels of carbon dioxide in proximity to the capped construction and demolition landfill cell from February 2024. The capped construction and demolition landfill cell is south of the proposed residential zone. The requirement for a DSI is consistent with a similar proposal to the south of SWMC. Preliminary advice from the proponent's contamination experts notes that there is potential for sub-surface gas contamination and further testing would be required.

These assessments, which include the monitoring of sub-surface gas migration are required to comply with the relevant EPA guidelines. The EPA's guidelines recommend between 6 and 12 monitoring events over two to 24 months with the key requirement to capture the worst-case meteorological scenario. The guidelines note that because NSW has relatively infrequent, slow-moving weather systems compared with the UK, a longer period of monitoring for each risk setting is needed to capture the worst-case scenario.

CN's experience with gas monitoring and reporting indicates a timeframe between 12 and 24 months would be required. A recent development application (DA2022/00468) where this issue arose, looked at six discrete monitoring events over a seven month period, as well as some continuous monitoring data. However, importantly this was **not a sensitive development** and in this example, the auditor's reporting was 12 months after the first round of discrete sub surface gas monitoring.

Due to the complex contamination investigation matters raised by the NSW EPA, the risk of harm to human health, and potential impact this proposal has on the on-going operation of SWMC, CN require the proponent to engage an accredited site auditor.

Proponent's response to EPA submission

The proponent was notified on 14 May 2024 of the EPA's intent to submit comments and request an extension to the submission period. The proponent's response to the EPA's involvement, was to lodge a complaint with the department stating CN "were engaging in matters outside of the gateway requirements and raising new issues which is further

delaying the progress of the LEP amendment and potentially frustrating the delivery of housing on the site" (**Attachment F**). While CN did not refer the matter to the EPA, they are a listed authority to consult in the *LEP Making Guidelines Attachment B*. The guidelines outline the criteria requiring pre-lodgment engagement which include:

1. The planning proposal facilitates development for a purpose that has the potential to pose a significant risk to the environment, human health and amenity due to pollution or waste
2. The planning proposal seeks approval for residential uses and / or other sensitive land uses on land within proximity to:
 - notified or regulated contaminated sites,
 - existing heavy industrial uses and/or
 - other existing activities which have a current environment protection licence to operate
3. The planning proposal seeks approval for industrial uses within proximity to:
 - notified or regulated contaminated sites, residential uses and/or other sensitive land uses.

CN notes the guidelines were introduced after CN accepted the planning proposal in 2020 and pre-lodgment engagement was not a prerequisite to accepting a planning proposal for assessment. CN supports the EPAs involvement given the potentially significant risk to human health and amenity for future residents.

The proponent's response to the EPAs submission dated 12 July 2024 (**Attachment E**) states the additional studies were unreasonable and unnecessary. It included the following:

1. In respect to existing residential development: "there would appear to be greater concern for the safety of the existing residences that adjoin the SWMC northern boundary. To this end, if there is no safety risk to existing residences that adjoin the SWMC, there would be less risk to future residences which are located 150m away from the same boundary"
2. It is the responsibility of the operator and the regulator of the facility to ensure adverse impacts are mitigated to ensure the safety of the community.

CN does not accept the justification that past development approvals negate the need for additional assessments. CN raised concerns about the encroachment of residential development (DA/2087/2018). However, at the time of the rezoning to facilitate the existing development, the EPA's guidelines recommended a buffer of 400m. Those guidelines now recommend a buffer of 1000m for a landfill site the size of SWMC.

SWMC is a key asset in the delivery of waste management services to CN and the broader community. CN invests at SWMC into cells, the resource recovery center, organics recycling facility, metal recovery facility, landfill gas-capture, environmental site management, onsite power generation, and a 5MW solar farm is transforming SWMC as a resource recovery and green energy precinct. The importance of this facility to CN and the wider Hunter region for the State and Commonwealth waste and energy objectives cannot be understated. As the EPA note in their submission, "SWMC provides an important waste management service for the community of Newcastle. Waste management facilities like SWMC emit odour, sub-surface gas, noise and air emissions. Controls are used to mitigate these issues, but even with these in place, it can be difficult to prevent adverse impacts beyond the boundary. Thus, locating residential receivers in close proximity to SWMC may lead to community complaint, increase regulatory oversight and pressure on the operator of SWMC to mitigate adverse impacts".

The Hunter Regional Plan 2041 reiterates the importance of existing waste management centres requiring local strategic planning to consider the location of circular economy facilities and existing waste management centres, and ensure sensitive land uses do not encroach on these areas or limit their future expansion. CN's [Development Control Plan 2023](#) includes provisions which establish effective separation distances to minimise

adverse effects on sensitive land uses. The proponent was required to update the planning proposal with an assessment against the Hunter Regional Plan 2041, Condition 1a Gateway determination dated 10 January 2023. Potential contamination impacts from SWMC should have been part of the proponent's post-gateway assessment response.

On 18 June 2024, CN received a recommendation from the department that "Council may wish to consider withdrawing the planning proposal until such time as information that satisfies the EPA's correspondence and confirms that the land is suitable for its intended future use can be prepared" (see **Attachment G**). On 8 July 2024, CN requested the department withdraw the planning proposal. This was considered the most appropriate course of action given the proponent's initial response to the EPA's submission, advice from CNs Environmental Health Officers and EPA, and uncertainty around timeframes.

CN did not receive documentation from the proponent indicating their intent to address matters raised by the EPA until receiving the application for gateway review. They dispute the timeframe CN suggested for the preparation of report(s) noting they:

- commenced the preliminary site investigation (PSI) (since our letter in July 2024)
- need a further month to complete the PSI
- need a further 8–16 weeks for the DSI, depending on atmospheric conditions.

This suggests that the earliest this work may be completed is likely to be late November 2024 (i.e., two months from now) or up to late January 2025 (i.e., 4 months from now) assuming these investigations can be done simultaneously and again depending on atmospheric conditions. (i.e., approximately 5–7 months from our letter in July 2024). Two additional factors we don't know include:

- atmospheric conditions
- engagement of a site auditor by the applicant to review and confirm the findings of these additional investigations, noting they have not engaged an accredited auditor.

As noted above, CNs previous experience with gas monitoring indicates the timeframes suggested by the proponent are inadequate.

Additional outstanding matters that are required to be addressed before finalisation

In addition to matters raised by the EPA, there are several issues to be addressed before finalisation, including biodiversity and flooding.

Flooding

To date, the proponent has failed to provide a hydrological assessment report as required by Condition 2 of the original gateway determination. Condition 2 requires clarification on the probable maximum flood event peak flood depths and level contours as well as peak flood velocities and volumetric check analysis of potential loss of flood storage where fill is proposed. CN issued a request for additional information on 26 May 2023 (see Attachment H) which noted the flood advice letter prepared by Northrop dated 22 March 2023 does not address Condition 2 and requires an analysis of the Probable Maximum Flood (PMF) event. A detailed flood study is required by an appropriately qualified flood specialist before finalisation.

Biodiversity

On 21 March 2024, CN provided a submission on the Biodiversity Certification Application (see **Attachment I**). CN raised concern that the application for biodiversity certification does not comply with section 6.4 of the *Biodiversity Conservation Act 2016* as the proponent has not taken all necessary steps to avoid or minimise the loss of native vegetation with biodiversity values. The biodiversity certification application was exhibited concurrently with the planning proposal which attracted 361 submissions. The majority of submissions raised biodiversity and infrastructure concerns. Considerable work is still required to address issues related to biodiversity and while the Biodiversity Conservation and Science unit

progressed the biodiversity certification application to exhibition, it did not by any means endorse the proposed footprint or confer biodiversity certification for the site.

Late legal advice

CN received legal advice prepared on behalf of the proponent (**Attachment J**) on 1 October 2024. Citing recent decisions by the NSW Land and Environment Court in relation to development applications the letter argues issues raised by the EPA cannot lawfully be used to prevent the planning proposal from proceeding. CN does not consider the advice relevant given the distinct difference between the making and amendment of environmental planning instruments (Part 3 of the Act), and the assessment and consent of development applications (Part 4 of the Act). Providing examples of case law on development applications is not a suitable means to inform an LEP amendment, where strategic and site-specific merit is the primary focus to ensure suitable future development. In addition, the legal advice fails to address the concerns raised by the EPA in relation to contamination.

A key consideration when establishing site-specific merit is contamination (see Ministerial Direction 4.4 Remediation of Contaminated Land). Recent gas monitoring in proximity to the site indicates elevated levels of carbon dioxide—the exact source of this contamination is unknown. However, as the EPA note, regardless of the source of the gas, further consideration of carbon dioxide is required prior to rezoning.

CN requests the IPC disregard the legal advice due to the false premise that case-law is applicable in the planning proposal process, and their failure to adequately address contamination.

Conclusion

The potential risk to human health the environment is a significant concern. Expediting the contamination assessments to meet revised deadlines only increases that risk. Due to the significant matters that remain unresolved and uncertainty regarding the timeframe for completing the additional assessments it is not appropriate to reinstate the planning proposal with a revised finalisation date.