

# GATEWAY REVIEW

## Justification Assessment

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

<b>DPHI Ref. No:</b>	Gateway Review to PP-2021-2262
<b>LGA:</b>	City of Newcastle
<b>LEP to be amended:</b>	Newcastle Local Environmental Plan 2012
<b>Address / location:</b>	505 Minmi Road, Fletcher (Lot 23 DP 1244350)
<b>Proposal:</b>	To facilitate residential development and secure biodiversity conservation outcomes at 505 Minmi Road, Fletcher (140 – 150 new dwelling lots)
<b>Review request made by:</b>	<input type="checkbox"/> The Council <input checked="" type="checkbox"/> A proponent
<b>Reason for review:</b>	<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 has imposed requirements (other than consultation requirements) or makes variations to the proposal that council thinks should be reconsidered

### Background information

**Details of the planning proposal**

Explanation of provisions

The planning proposal (**Attachment A**) seeks to amend the Newcastle LEP 2012 as follows:

Control	Current	Proposed
Zone	C4 Environmental Living	R2 Low Density Residential (12.7ha) C2 Environmental Conservation (13.54ha)
Maximum height of buildings	N/A	R2 Low Density Residential: 8.5m
Minimum lot size	40ha	R2 Low Density Residential: 300m <sup>2</sup> & 450m <sup>2</sup> C2 Environmental Conservation: 40ha
Urban release area	N/A	Identify proposed R2 Low Density Residential zone areas as an Urban Release Area under Part 8 of the LEP

Although the land to be zoned C2 Environmental Conservation is smaller than the minimum lot size of 40 hectares, its subdivision would be permissible pursuant to clause 4.1B of the Newcastle LEP 2012.

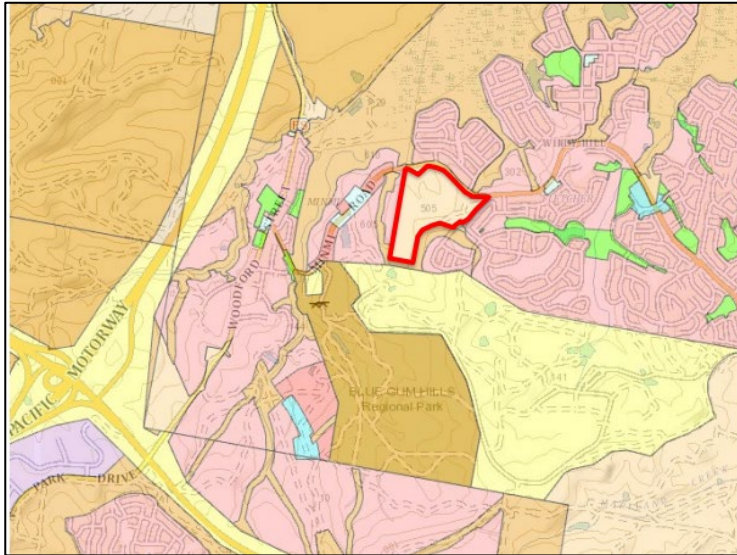


Figure 1 - Current land zoning and site context (Source: Planning proposal)

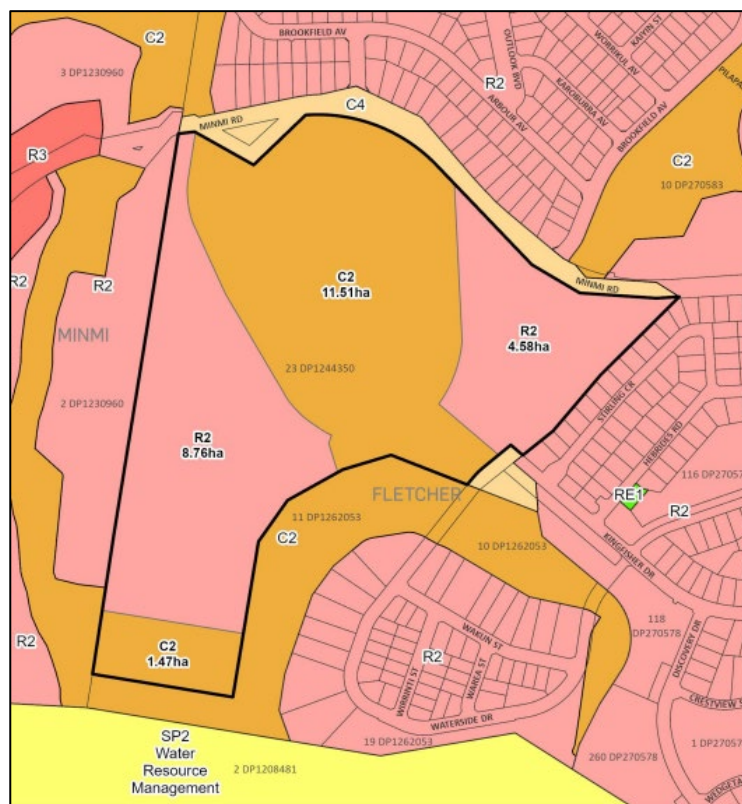


Figure 2 - Proposed land zoning (Source: Planning proposal)

### Proposal objectives

The objective of the planning proposal is to undertake LEP map changes to facilitate the future delivery of approximately 140 – 150 new dwelling lots and secure biodiversity conservation outcomes at 505 Minmi Road, Fletcher (Lot 23 DP 1244350).

### Site description and surrounding area

The site is 26.2 hectares in area and is bounded by residential development to the north and east. The Winten residential estate is currently under development to the west of the subject allotment. The Summerhill Waste Management Centre (SWMC) is located to the south and is the primary waste management facility for Newcastle.

Conservation lands are located further north of the site and form part of the Stockton to Watagans regional conservation corridor.



Figure 3 - Aerial image of the subject land (Source: SIX Maps)

**Gateway determination history**

The planning proposal was reported to City of Newcastle Council on 8 December 2020 recommending that the application be forwarded to the Department for a Gateway determination. Council resolved not to support the proposal and the proponent initiated a rezoning review process.

At the time of the lodgment of the planning proposal, the subject land was identified as a housing release area by the Newcastle Local Strategic Planning Statement (LSPS 2020). A Council resolution in December 2020 resulted in an amendment to the LSPS in 2021 to identify the subject land for environmental and open space purposes (LSPS 2021). The land continues to be identified for residential purposes by the Hunter Regional Plan 2041 and is part of the National Pinch Point regionally significant growth area.

The Hunter and Central Coast Planning Panel undertook the rezoning review process and recommended on 20 September 2021 that the proposal be submitted for a Gateway determination as there was strategic and site-specific merit.

A Gateway determination was issued by the Department on 10 January 2023 subject to conditions (**Attachment B**) and included a due date of 20 January 2024 and Council was appointed as the planning proposal authority.

On 8 January 2024 Council requested that the Minister not proceed with the proposal as it was believed that the proponent had not satisfied the Department's Gateway determination conditions.

The Department issued an Alteration of Gateway determination (**Attachment C**) on 22 March 2024 which extended the timeframe for completion to 'on or before 23 November 2024' and included a new condition requiring the commencement of exhibition by 30 April 2024.

The public exhibition period occurred from 22 April 2024 to 21 May 2024. The Biodiversity Certification Assessment Report (BCAR) prepared in relation to the proposed development was exhibited concurrently to the planning proposal.

During exhibition of the planning proposal, Council received correspondence from the NSW Environment Protection Authority (EPA) (**Attachment D**) which raised potential land contamination and land use conflict concerns because of the site's proximity to the SWMC as well as former underground coal workings.

Due to the EPA advice, Council requested on 8 July 2024 that the proposal not proceed as a timeframe of a minimum of 12 months would be needed to undertake studies that would meet assessment requirements under the relevant EPA guidelines.

The Department issued an Alteration of Gateway determination (**Attachment E**) on 28 July 2024 discontinuing the planning proposal.

<p><b>Reason for the Gateway alteration determination to discontinue the proposal</b></p>	<p>The Department issued the Alteration of Gateway determination on 28 July 2024 to discontinue the planning proposal due to correspondence from the NSW EPA, the uncertainty over the 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 the original Gateway determination in January 2023.</p> <p><u>Correspondence from the NSW EPA</u></p> <p>The EPA noted that the preliminary contamination assessment completed for the proposal, which found that the land is suitable for residential development, is not adequate as the assessment is over 10 years old and did not consider the risks associated with sub-surface landfill gases generated by the SWMC and gases associated with coal mine workings. The EPA recommended that prior to finalising the proposed rezoning, Council require the proponent to submit an updated preliminary site investigation for contamination for the entire planning area. This investigation should:</p> <ul style="list-style-type: none"> <li>• consider the presence of the SWMC and any mine workings in the area and investigate any risks associated with hazardous sub-surface gas in the planning area;</li> <li>• consider any recent activities that may have impacted the planning area (including illegal dumping or migration of contaminants from adjacent sites); and</li> <li>• be drafted in accordance with the <i>Consultants reporting on contaminated land - Contaminated Land Guidelines</i> (EPA, 2020) and other relevant guidelines made or approved by the EPA under section 105 of the <i>Contaminated Land Management Act 1997</i>.</li> </ul> <p>The EPA also recommended additional assessment of the impacts from existing land uses to inform appropriate future land uses, transitional zonings, buffer distances and design choices. Further detailed studies in relation to odour, air, noise and vibration and water were suggested.</p> <p>The Department concluded that further detailed studies in relation to odour, air, noise and vibration and water are the responsibility of Council as the operator of the SWMC rather 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 for residential purposes it was considered the responsibility of the proponent to demonstrate that the land is suitable for human habitation as part of the planning proposal process. It was determined that it would be inappropriate to proceed without an updated preliminary site investigation for contamination for the entire planning area as recommended by the EPA.</p> <p><u>The likely timeframe to prepare an updated preliminary site investigation for contamination to confirm that there is no risk of harm to human health</u></p> <p>Council anticipated a timeframe of a minimum of 12 months to meet assessment requirements under the relevant EPA guidelines including <i>Consultants reporting on contaminated land: Contaminated Land Guidelines</i> (EPA 2020) and the <i>Assessment and management of hazardous ground gases: Contaminated Land Guidelines</i> (EPA 2020). Completing the LEP by the due date of 23 November 2024 was not possible.</p> <p>Further details of the Department's Gateway assessment are provided in the Department's Gateway alteration assessment report (<b>Attachment F</b>).</p>															
<p><b>Material</b></p>	<table border="1"> <thead> <tr> <th>Attachment</th> <th>Title</th> </tr> </thead> <tbody> <tr> <td>A</td> <td>Exhibited planning proposal</td> </tr> <tr> <td>B</td> <td>Gateway determination dated 10 January 2023</td> </tr> <tr> <td>C</td> <td>Alteration of Gateway determination dated 22 March 2024</td> </tr> <tr> <td>D</td> <td>Correspondence from the NSW EPA dated 27 May 2024</td> </tr> <tr> <td>E</td> <td>Alteration of Gateway determination dated 28 July 2024</td> </tr> <tr> <td>F</td> <td>Department's Gateway alteration assessment report</td> </tr> </tbody> </table>	Attachment	Title	A	Exhibited planning proposal	B	Gateway determination dated 10 January 2023	C	Alteration of Gateway determination dated 22 March 2024	D	Correspondence from the NSW EPA dated 27 May 2024	E	Alteration of Gateway determination dated 28 July 2024	F	Department's Gateway alteration assessment report	
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## Proponent views

### Justification

The proponent's review application form is attached as **Attachment G** and their justification assessment is included as **Attachment H**. The proponent's full application and supporting appendices were provided to the IPC via email on 19 September 2024.

#### Correspondence from the NSW EPA

The proponent refers to the submission received from Subsidence Advisory NSW (SA NSW) (**Attachment I**) which notes the presence of shallow mine workings and shafts under the subject site.

SA NSW records indicate shallow workings at less than 15m depth of cover in the Borehole Seam within parts of the shaded area in Figure 4 and that drifts and shafts are also present. SA NSW could not advise on sub-surface gases associated with coal mine workings.

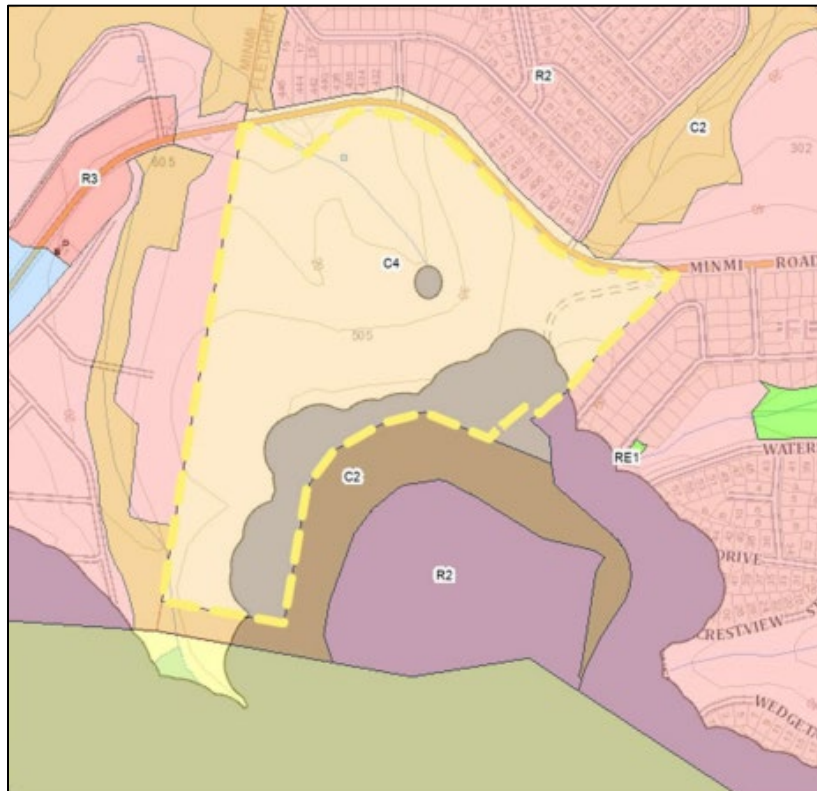


Figure 4 - Underground coal mining map (Source: Proponent's justification assessment report)

In communication received by the proponent 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. The proponent states that considering the facility is required to complete a Landfill Gas Risk Assessment under EPA License 5897, the impacts should be satisfactorily addressed and managed.

The proponent further notes 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 SWMC assesses the environmental impacts of the facility and concludes there will be no impacts on local residential receivers.

The proponent states that 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 SWMC across the boundary, despite the source, should be the responsibility of the operator being City of Newcastle Council.

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 proponent believes that investigation into sub-surface gas monitoring should be limited to the historic coal mine workings mapped within the southern corner of the subject site (Figure 4). The proponent accepts that a new preliminary site investigation is warranted to address this matter and any associated risks to human health, and to formally assess whether site conditions have altered in the past 10 years from a contamination perspective.

To support their position, the proponent has submitted legal advice from Sparke Helmore (**Attachment K**). This advice states that emissions from the SWMC can be considered in making planning decisions but only if those emissions are lawful. EPA License 5897 requires the monitoring of subsurface gas at a number of locations and there are no thresholds for gas emissions set in the EPA License. Therefore, the advice concludes that the License does not provide any lawful basis for emissions of offensive odour, sub-surface gas, or noise from the SWMC onto the subject land.

Sparke Helmore note that unlawful emissions cannot provide a reason to prevent the proposal for the land progressing and that the issues raised by the EPA cannot lawfully be used to prevent the planning proposal from proceeding.

*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*

The proponent refutes that the preparation of the preliminary site investigation would take in excess of 12 months as advised by Council. Detailed in the letter of advice from the proponent's contamination consultant (**Attachment J**), it is expected that 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.

The proponent has advised in their justification assessment (**Attachment H**), that the contamination consultant has commenced the preliminary site investigation and 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.

*Length of time since the issue of a Gateway determination in January 2023*

The proponent states that the initial time to make the LEP by 20 January 2024 under Condition 7 of the Gateway determination 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 biodiversity 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.

The proponent believes that 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 and states that the timeframe as advised by the contamination consultant is reasonable to allow the progression of the planning proposal.

*Alternate planning proposal authority request*

As part of this Gateway Review the proponent requests that the IPC appoint the Department as the planning proposal authority due to a perceived conflict of interest of Council.

*Conclusion*

The proponent disagrees with the assessment made by the Department 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, the proponent requests a review of the Gateway determination to reinstate Conditions 1 – 7.

Considering the time lost as a result of the altered Gateway determination and subsequent review, the proponent requests 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 the Department be appointed as the planning proposal authority for the application to provide certainty on meeting the proposed timeframe.

<b>Material provided in support of application</b>	<b>Attachment</b>	<b>Title</b>
	G	Proponent's Gateway review application form
	H	Proponent's justification assessment
	I	Submission received from Subsidence Advisory NSW dated 3 February 2023
	J	Letter of advice prepared by the proponent's contamination consultant Qualtest
	K	Letter of advice prepared by Sparke Helmore

<b>Council views</b>	
<b>Justification</b>	<p>Council's response to the proponent's justification assessment is included as <b>Attachment L</b> with the appendices attached as <b>Attachment M</b>.</p> <p><u><i>Correspondence from the NSW EPA and 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</i></u></p> <p>Council's Environmental Health Officers advised that a detailed site investigation would be required as recent gas monitoring from February 2024 in proximity to the site indicates elevated levels of carbon dioxide. The exact source of this contamination is unknown; however, preliminary advice from the proponent's contamination experts notes that there is potential for sub-surface gas contamination and further testing would be required.</p> <p>Such assessments are required to comply with the relevant EPA guidelines. The 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.</p> <p>Council's experience with gas monitoring and reporting indicates a timeframe between 12 and 24 months would be required.</p>

The proponent:

- has commenced the preliminary site investigation (since Council's letter to the Department in July 2024 requesting that the application be withdrawn);
- needs a further month to complete the preliminary site investigation;
- needs a further 8–16 weeks for the detailed site investigation, depending on atmospheric conditions.

Council states that these timeframes suggest 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 the investigations can be done simultaneously and again depending on atmospheric conditions (i.e., approximately 5–7 months from the letter in July 2024). Two additional unknown factors include:

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

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

Council does not accept the proponent's justification that past development approvals for residences in closer proximity to the facility negate the need for additional assessments, nor does it accept that 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.

SWMC is a key asset in the delivery of waste management services to Council and the broader community. The importance of this facility to Council and the wider Hunter region for the State and Commonwealth waste and energy objectives cannot be understated.

The Hunter Regional Plan 2041 reiterates the importance of existing waste management centres. It requires local strategic planning to consider the location of circular economy facilities and existing waste management centres to ensure that sensitive land uses do not encroach on these areas or limit their future expansion. The proponent was required to update the planning proposal with an assessment against the Hunter Regional Plan 2041 in accordance with Condition 1a of the Gateway determination dated 10 January 2023. Potential contamination impacts from SWMC should have been part of the proponent's post-gateway assessment response.

With regard to the legal advice prepared by the proponent arguing that issues raised by the EPA cannot lawfully be used to prevent the planning proposal from proceeding, Council does not consider the advice relevant given the distinct difference between the making and amendment of environmental planning instruments (Part 3 of the *Environmental Planning and Assessment Act 1979*) and the assessment and consent of development applications (Part 4 of the *Environmental Planning and Assessment Act 1979*).

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.

Council 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.



	<p><u>Alternate planning proposal authority request</u></p> <p>Council states that they take their role as PPA seriously and believe that the proponent has had sufficient time and multiple opportunities to adequately respond to outstanding matters. Council 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. In addition to matters raised by the EPA, there are several issues to be addressed before finalization, including biodiversity and flooding.</p> <p><u>Conclusion</u></p> <p>The potential risk to human health and 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, Council does not consider it appropriate to reinstate the planning proposal with a revised finalisation date.</p>	
<p><b>Material provided in support of application</b></p>	<p><b>Attachment</b></p>	<p><b>Title</b></p>
	<p>L</p>	<p>Council Gateway review justification</p>
	<p>M</p>	<p>Council review appendices</p>

<p><b>Assessment summary</b></p>	
<p><b>Department assessment</b></p>	<p><u>Correspondence from the NSW EPA and 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</u></p> <p>The proponent's position that impacts associated with the migration of sub-surface gases from the SWMC across the boundary should be the responsibility of the operator (being Council) is noted, as is their position that their investigation into sub-surface gas monitoring be limited to the historic coal mine workings mapped within the southern corner of the subject site.</p> <p>However, it is considered the responsibility of the proponent to demonstrate that the subject land is suitable for intensified residential development and appropriate that an updated preliminary site investigation be submitted for the entire planning area which addresses all potential contamination issues to support the proposal.</p> <p>While the extent / study area of the preliminary site investigation and detailed site investigation is unclear from the letter of advice prepared by the proponent's contamination consultant (<b>Attachment J</b>), an approximate timeframe of 4 weeks for a preliminary site investigation and 8 – 16 weeks for a detailed site investigation is provided. However, the consultant notes that further time may be required for gas monitoring depending on atmospheric pressure conditions, gas concentrations and flow rates recorded. To this end, a timeframe for the completion of the contamination investigations cannot be predicted with any certainty.</p> <p>The proponent notes in their assessment report that the preliminary findings of their contamination consultant indicates that there is potential for sub-surface gas contamination on the subject land. As such, any argument that further investigations are not warranted as the subject site is outside all EPA recommended separation distances for potential impacts is invalid.</p> <p>The findings of the proponent's contamination consultant therefore also indicate that it would be erroneous to assume that residential development is suitable on the subject land as adjoining sites have recently been approved for residential development. It is considered appropriate that thorough investigations be</p>

undertaken at the rezoning stage by the proponent specific to the subject land. The focus of such investigations is to prevent harm to human health rather than manage impacts after they have occurred.

The legal advice from Sparke Helmore (**Attachment K**) is noted, particularly their position that unlawful emissions cannot provide a reason to prevent the proposal for the land progressing. As outlined within this assessment report as well as the alteration of Gateway determination dated 28 July 2024 (**Attachment E**) and the Department's Gateway alteration assessment report (**Attachment F**), the planning proposal was discontinued as updated investigations for contamination on the subject land are required to support the planning proposal. There is no mention of contamination in the Sparke Helmore advice and the proponent's own contamination consultant notes that further investigations in relation to this matter are required.

*Length of time since the issue of a Gateway determination in January 2023*

The Department's LEP Making Guideline details categories of planning proposals and benchmark timeframes to prepare, progress and determine a planning proposal to provide certainty to stakeholders and the community.

For a complex planning proposal, a benchmark timeframe of 255 working days (approximately 12 months) from the issue of a Gateway determination to finalisation is provided. Such timeframes aim to ensure that the LEP making process is efficient, transparent, accountable and outcomes focused, thereby avoiding delays to development and setting clear expectations on decision making.

The timeframes also ensure that the documentation assessed and relied upon at the time of the Gateway determination remains current and reflective of the legislation in force at the time the LEP is finalized and gazette.

*Alternate planning proposal authority request*

Section 3.32 of the *Environmental Planning and Assessment Act 1979* states that the Minister may direct that the Planning Secretary (or any such panel, person or body) as the planning proposal authority for a proposed instrument in various circumstances.

It is considered appropriate that the decision regarding the planning proposal authority for this proposal be made by the Minister as part of a separate process, should the Commission recommend that the application proceed.

*Conclusion*

The Department has considered the submissions by the proponent and Council in relation to this Gateway review and our position remains unchanged.

Potential land contamination is a fundamental consideration that must be addressed at the rezoning stage. While the proponent has provided an indication that the timeframe to complete the additional investigations to support the planning proposal and satisfy the requirements of the EPA is 4 weeks with a subsequent 8 – 16 weeks to complete a detailed site investigation, the actual timeframe is still relatively unknown as the atmospheric pressure conditions, gas concentrations and flow rates recorded cannot be predicted (as noted by the proponent's consultant).

It is also noted that the proponent has requested an extension of time to address the EPA response as well as finalise the zoning boundary footprint with the Department of Biodiversity, Conservation and Science. An indicative timeframe to address all issues is not provided.

It is considered inappropriate to continually extend the Gateway determination timeframe as this leads to uncertainty for stakeholders and the community regarding the process or the future use of land. Continued extensions of time also have implications for the currency of supporting documentation and its

	<p>compliance with legislation in force at the time of finalisation of the plan.</p> <p>Considering the above, it is the Department's recommendation that the Gateway alteration determination remain unchanged, and that the proponent be invited to resubmit their application once all outstanding matters have been resolved.</p>
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<b>Attachments</b>	
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L	Council Gateway review justification
M	Council review appendices

<b>Appendices to the planning proposal</b>	
1	Subsidence Advisory letter
2	Strategic bushfire study
3	Preliminary contamination assessment report
4	Biodiversity certification assessment report
5	Traffic impact assessment
6	Visual impact assessment
7	Aboriginal cultural heritage report
8	Panel meeting outcome
9	Rezoning review record of decision
10	Servicing strategy
11	Urban design study
12	Site specific DCP draft
13	Flood impact advice letter

<b>COMMISSION'S RECOMMENDATION</b>
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**Reason for review: A determination has been made that the planning proposal should not proceed**

<b>Recommendation</b>	<input type="checkbox"/>	The Gateway alteration to discontinue the proposal should apply without amendment
	<input type="checkbox"/>	The Gateway alteration to discontinue the proposal should apply with amendments suggested to the determination
	<input type="checkbox"/>	The Gateway alteration should be amended to reactivate the planning proposal with no other amendments suggested
	<input type="checkbox"/>	The Gateway alteration should be amended to reactivate the planning proposal with amendments suggested

**Any additional comments:**