

23 July 2021

Jeremy Gray  
Director Northern Region, Planning and Assessment  
Department of Planning, Infrastructure and Environment  
Level 3, 49 Victoria Street,  
Grafton NSW 2460

Dear Jeremy,

**Planning Proposal: Taminda Industrial Area, Tamworth (PP2022-1229)**

This letter has been prepared on behalf of Chan Abby Holdings Pty Ltd to support a formal Rezoning Review of the decision by Tamworth Regional Council (Council) not to support the Planning Proposal referenced above. The Rezoning Review should relate only to the proposal that is current. However, in this case, the Planning Proposal was relodged having previously been considered by Council, initially supported to Gateway, received the concurrence and support from agencies, exhibited and in the final report to Council the recommendations was that the proposal not proceed. There were no reasons for the refusal to support the proposal in the recommendation to the Council Ordinary Meeting 10 August 2021 Item 7.1. On this basis, it is difficult to separate the first Planning Proposal process from the subsequent one.

In circumstances where the Council does not support a proposal, the rezoning review request requirements include the proponent's written justification of the strategic and site specific merit to confirm why a review is warranted.

As noted above, the Planning Proposal was relodged having previously been considered by Council and supported. This occurred only after the proponent, at that time, had lodged (but not commenced) a Rezoning Review and Council staff had assured the proponent that the matter would be considered by Council with a recommendation to support the proposal. This resolution was made on 22 October 2019 and a Gateway Determination subsequently issued.

As the Department is aware, the Rezoning Review process is not available in circumstances where Council subsequently changes its mind about a proposal during the finalisation of the plan. The only remedy in such a case is to relodge the proposal again. The circumstances of this Rezoning Review, are therefore, extraordinary and the starting point of the strategic merit assessment is to reflect and repeat the initial assessment of the Planning Proposal by Council in 2019 at which time that assessment concluded, unequivocally, that the proposal had merit. A copy of this assessment is **Attachment B**. Rather than strategic merit, it was the inability of Council to satisfactorily negotiate and secure an easement across land owned by the proponent relating to the future construction of a bypass road that ultimately led to the withdrawal of support for the Planning Proposal.

Reasons for refusal in the recommendation are not spelt out in the assessment report.

The merit assessment of the Council is that **the previous proposal was rejected so this one should be too**. To our mind this brings the entire previous proposal back into play and reference to the earlier assessment report becomes relevant. Again, Council supported the previous proposal stating that:

*The planning proposal is in accordance with the Tamworth Regional Development Strategy 2008, which specifically states on page 46 that Council would "Encourage the expansion of the Taminda Industrial areas following the completion of levy banks." In 2008, Council commissioned the Taminda Revitalisation and Economic Development Strategy (TREDS) to ensure that Taminda is maintained as a regionally significant industrial precinct and to protect the ongoing economic viability of the area. This strategy identified six development precincts in a master plan that Council anticipated would be rezoned for employment purposes over a period of time. The subject land is part of Precinct 6 and is identified as "suitable for both bulky goods retailing and industrial uses" subject to resolution of issues such as flooding. Inclusion of the subject land in a strategy agreed to by the Department of Planning, Industry and Environment (DPIE) makes the planning proposal consistent with the New England North West Regional Plan. Ordinary Meeting Item 7.1 22 October 2021.*

The Post Exhibition Report dated 10 August 2021, like the 28 June 2022 report to which this review relates, was scant in its reasons for refusing the application. The recommendation of 28 June reads as follows:

*RECOMMENDATION That in relation to the report "Taminda Planning Proposal", Council: (i) not support the Taminda planning proposal due to its lack of strategic merit and the significant issues relating to flooding, site serviceability, access and economic viability; and (ii) upload its decision to the Department of Planning and Environment Planning Portal.*

The matters are considered below.

### **Site Serviceability**

The sewer issue was resolved to the satisfaction of Council prior to the public exhibition of the original Planning Proposal consistent with the options provided by Council including that the upgrade to infrastructure be at no cost to Council. The initial assessment report states as follows:

*Reticulated sewerage to the site is plausible although options for sewerage need to be further considered as the trunk main that traverses the site has no capacity during wet weather and the site is low lying making gravity feed difficult. Options suggested by the applicant are expensive and will only be acceptable if the infrastructure (e.g. new pump stations) is **installed and maintained by the developer and remains in private ownership**. Therefore, Council will only support this re-zoning if the cost of the sewer infrastructure is **fully funded by the developer at the time of development and maintenance of this infrastructure remains the responsibility of the developer**. Acceptance of this condition will be required prior to public exhibition of the planning proposal. The development will require reticulation of a minimum 150mm water main to provide adequate service and fire-fighting capabilities. Ordinary Meeting Item 7.1 22 October 2019.*

The recent report to Council dated 28 June 2022 (Item 7.2) recommending the refusal of the proposal failed to provide an assessment of the sewer servicing option, rather stating that it would not be economically viable. It is contended that this is not a matter for a merit assessment. As nothing has altered between the acceptance of the sewer option in 2020 and subsequent exhibition of the original Planning Proposal and the sewer strategy in the relodged Planning Proposal, it is difficult to draw a conclusion other than that Council showed concern for the financial burden this may have on the developer, which is a matter that is outside their concern and not a relevant planning merit consideration. Nonetheless, confirmation of the servicing strategy has been provided by Kelley Covey Group as supporting technical documentation to the Planning Proposal.

### **Flooding**

The manner in which flooding impacts are determined and assessed is well established and technical. The Planning Proposal provides a robust assessment of the potential for flooding and

mitigation proposed based on the flood planning level adopted by Council. The flood modelling methodology is accepted and has demonstrated that the risk can be managed within the current acceptable flood planning guidelines.

Again, Council, fail provide an assessment of the flooding impact and information provided in support of the proposal. In the final assessment of the first Planning Proposal, Council appear to have set the technical report aside in favour of hearsay and undocumented comments from land owners in the area. The original assessment report stated:

*The site is flood prone but **modelling undertaken by the applicant shows that it can either be filled or leveed with acceptable impacts on surrounding land.***

And

*The **planning proposal is consistent with most of the relevant Section 9.1 Directions**, and where inconsistencies occur they can be justified.* Ordinary Meeting Item 7.1 22 October 2019.

It is noted that the department accepted the flood assessment. The assessment of flooding impacts in the report to Council on the resubmitted Planning Proposal relies only on reference to the recent flooding in NSW and a leading statement that would allude to a pending decision by the NSW Government reconsidering the permissibility of development in floodplains. The report fails to address the supporting information provided in the Planning Proposal or draw the attention of the Councillors who are responsible for making this decision to the relevant supporting documentation.

In relation to flooding, that Planning Proposal states:

*Tooker and Associates' prepared a Flood Impact and Riparian Corridor Assessment (see Appendix) describes the site as '...being affected by local flood flows down the Timbumburi Creek and the interaction with the regional flooding in the Peel River'.*

*The behaviour of flood waters in the existing scenario do not follow a particular strategy or best practices. The provision of this development gives the opportunity to review, plan and model a new planning and flood concept design. The flood modelling showed that with the implementation of various measures, flood protected land was able to be provided for with no significant impacts to be borne by surrounding land.*

*An earlier iteration of the flood concept design was previously endorsed by the Biodiversity and Conservation Division of DPIE. The flood concept design submitted as part of this Planning Proposal is largely the same and seeks to offset the filling of the proposed 9ha development site by providing compensatory cut and grading of land at Lot 60, DP1227482 to offset filling of the 9ha site to the required flood planning level. Lot 60, DP1227482 is known as Somerset Farm and is owned by the proponent of this Planning Proposal. The proposed flood concept design therefore does not rely on any external parties that the proponent does not control. Some minor cut of land at the setback locations on the west and north west zones is also proposed to further improve flood impacts, including ensuring any impacts are of minor significance.*

*The flood concept design does not seek to provide any conveyance of flows across Wallamore Road. The flood concept design does not rely on any grading or earthworks to the Council owned 6ha land, though any grading (by others) to support the bypass road could see some benefit to the overall strategy and impacts of high rain fall events in this location.*

*The flood modelling shows that the provision of the above activities will result in the ability to provide flood free land for employment purposes across the 9ha site.*

Access

The concerns as to access referenced in the recommendation are not clearly stated. The Planning Proposal demonstrates the opportunity for site access as part of the development of the site.

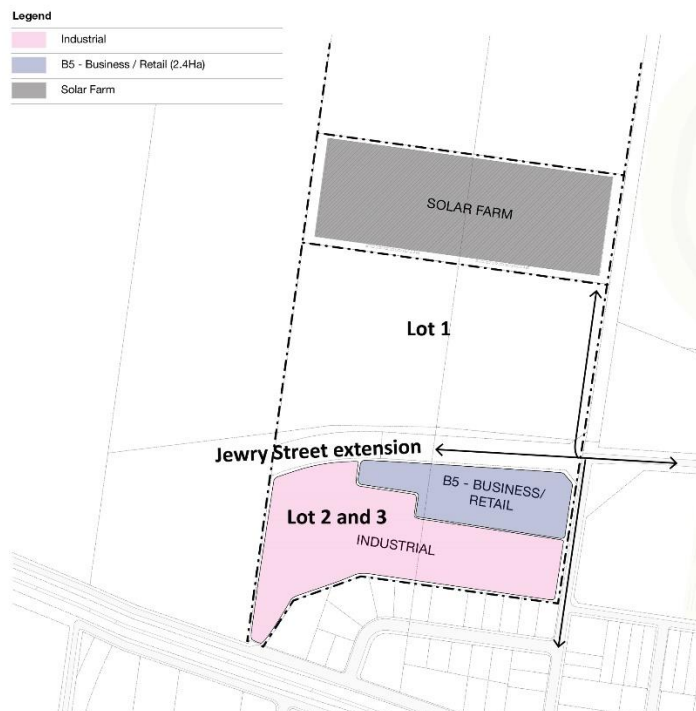
## Economic viability

As noted above, the only reference to economic viability appears to be a reference to the cost of servicing and infrastructure. It was clear in the earlier proposal that Council would not support a proposal unless the development accepted the burden of the cost of augmentation of infrastructure. This is a reasonable and position and accepted by the proponent. The viability in not a planning merit consideration. The rezoning of the site will have significant positive economic impacts for the city and the wider region.

To assist in the review process, a detailed chronology of events is provided at **Attachment A**. It is noted that:

1. The original Planning Proposal was lodged with Council on 12 March 2019. In June 2019 Council advised the applicant that it did not have sufficient strategic planning staff to resource the Planning Proposal. Following payment by the applicant for an external contractor to assess the Planning Proposal, it was reported to Council on 22 October 2019 (7 months after lodgement).
2. The applicant provided extensive information to demonstrate that flood impacts from the Planning Proposal can be adequately addressed in satisfaction of the requirements of Direction 4.3 Flood Prone Land. However, Council suggested that an easement for overland flow that benefits *Council* - over a site (Lot 1) which is owned by the same entity that owns the Planning Proposal site (Lots 2 and 3) – see **Figure 1** below – would be required to satisfy Council of compliance with the Direction. We disagree and failure to sign this agreement resulted in Council withdrawing support for the Planning Proposal. We would content that this is not a valid merit consideration and the relodged Planning Proposal does not include such an easement or result in the need for one.

**Figure 1 – Site Map**



3. The Planning Proposal was refused by Council on 10 August 2021 despite having the support of agencies and DPE up to that point. There is not appeal or review process in this circumstance and relodging the Planning Proposal was the only option. Additional information in support of the proposal, particularly relating to clarification of flooding and servicing was provided. It was the planning controls proposed to be amended that remained the same.

4. Council failed to provide an assessment of the Planning Proposal as a new application relying instead on it's previous assessment. The previous assessment report was undertaken on 22 October 2019 and supported the proposal. It was only the post exhibition report on 10 August 2021 following the failure of the parties to reach an agreement on the need for and terms of an easement. This final report provides little substance or reason as to why the proposal, at first determined to be acceptable, should now be not so.
5. Planning Proposal uploaded to Planning Portal 6 April 2022. Council initiates the lodgement of the Planning Proposal on 10 May 2022.
6. Council makes a decision on 28 June 2022 not to support the Planning Proposal without undertaking a reasonable assessment of the proposal.

Based on the circumstances outline above, we request, on behalf of the applicant, that the Department initial the Rezoning Review of the Planning Proposal. Should you require any further information, please contact me on 0438 744 384 or via email [lizdensley@8mileplanning.com.au](mailto:lizdensley@8mileplanning.com.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Liz Densley', written in a cursive style.

Liz Densley  
Director – Eight Mile Planning

## Attachment A: Chronology of events

### As the Council refusal refers to and relies on the first version of the Planning Proposal the chronology includes both processes

Date	Action
March - July 2018	Request to Tamworth Regional Council (TRC) and submit GIPA request for flood data and model in order to establish baseline flood impact extent and begin the studies and site-specific modelling to inform the suitability of the of the land for rezoning.
Mid July 2018	TRC releases the independent, private consultancy Lyall and Associates to be engaged by the proponent to undertake flood modelling
21 December 2018	Planning Proposal 1 (30ha) lodged with Council to rezone 102ha site at 55 Dampier Street, 21 and 72 Wallamore Road (Lots 1, 2 and 3 DP1234850) under <i>Tamworth Regional Local Environmental Plan 2020</i> (LEP).
February 2019	Council informs proponent verbally that they will not recommend support for the Planning Proposal, but would support a rezoning for a smaller site area consistent with the Taminda Revitalisation and Economic Development Strategy 2008.
4 February 2019	DA2019/0304 for construction and use of a 9MW solar farm at 72 Wallamore Road, Taminda (Lot 1 DP1234850) lodged with Council.
12 March 2019	Planning Proposal 2 lodged with Council. Consistent with Council advice, it seeks to rezone a smaller area - 11.3ha site (effective 9ha) at 55 Dampier Street and 21 Wallamore Road (Lots 2 and 3 in DP1234850) - to extend the Tamworth industrial precinct consistent with the Taminda Revitalisation and Economic Development Strategy 2008.
14 May 2019	Meeting with Council's Executive Director Planning and other council officers to discuss development application and Planning Proposal. Council indicates Planning Proposal and solar farm development application will be considered in July 2019
17 June 2019	Council email informs the applicant that due to strategic planning staffing issues there are insufficient resources to deal with Planning Proposal.
19 July 2019	A rezoning review request is lodged by the applicant in relation to both Planning Proposals.
24 July 2019	Development for 9MW solar farm approved by the Northern Regional Planning Panel.
30 July 2019	Proponent pays for external contracted planner to assess the Planning Proposal before Gateway.
22 October 2019	Planning Proposal 2 reported to Council recommending it be forwarded to DPIE for a Gateway determination, and that, after receipt of the Gateway determination, as well as a revised Traffic Study and sewer serving approach, the Planning Proposal be publicly exhibited. The report to Council noted that the site is food prone but modelling undertaken by the applicant shows that it can either be filled or leveed with acceptable impacts on surrounding land. The recommendation is unanimously adopted.
29 November 2019	Council forwards the Planning Proposal to DPIE and requests that Council be authorised as the local plan-making authority.
12 December 2019	<p>DPIE issues the Gateway Determination with the following relevant conditions:</p> <ul style="list-style-type: none"> <li>» Prior to agency and community consultation the proposal be amended to: <ul style="list-style-type: none"> <li>&gt; clarify that the proposal only applies to part of Lots 2 and 3 DP 1234850 south of the proposed bypass road and not the proposed associated solar farm;</li> <li>&gt; incorporate the matters discussed in the addendum report and the outcomes of a revised traffic impact statement and sewer servicing strategy; and</li> <li>&gt; update mapping, including existing and proposed planning control maps; that accurately identifies the land to which the proposal applies</li> </ul> </li> </ul> <p>The Gateway Assessment Report notes that the proposal must be consistent with Direction 4.3 Flood Prone Land. <u>The Report recommends that this Direction remain unresolved until the NSW Biodiversity and Conservation Division has reviewed and confirmed the suitability of the land in terms of flooding. Condition 3 of the Gateway Determination requires Council to consult with the NSW Biodiversity and Conservation Division.</u></p> <p><b>A 12 month timeframe is applied for completion of the LEP.</b></p>

Date	Action
6 April 2020	Applicant submits an amended Planning Proposal responding to Gateway Determination.
Late April 2020	Council raise concerns about sewer servicing responsibilities and traffic queries
May 2020	Applicant provides a response on traffic queries.
26 May 2020	Council adopts Blueprint 100, supporting strategic planning document to complement Council's Local Strategic Planning Statement and Growth Management Strategy. Planning Proposal site is marked as 'Industrial Growth Area'
June – July 2020	Applicant submits updated sewer report and legal confirmation of developer acceptance of responsibility for on-site sewer infrastructure
July 2020	Council writes to the applicant to confirm that the Gateway conditions have been satisfied and that the Planning Proposal can proceed to public exhibition.
August - Sept 2020	The Planning Proposal is publicly exhibited.
September 2020	Council advise that they will halt the Planning Proposal as they furthered the analysis and assessment of the Jewry Street extension project (bypass road)
October 2020	Council commence flood modelling for the bypass road and the 9ha development in a configuration that would save the demolition of the dwelling on Somerset Farm and suggest a cost sharing or apportionment arrangement be undertaken as the Planning Proposal will ultimately need a flood channel in a similar arrangement and location
1 October 2020	Applicant writes to Council expressing concern that the Planning Proposal is not being reported to Council in October 2020 and its progress continues to be delayed due to flooding investigation and road design works related to the proposed construction of the Taminda bypass road. The applicant notes that there is no direct dependency between the road and the site. The Planning Proposal has demonstrated that the site can operate with the necessary flood management, stormwater, access, sewer and water services with or without the bypass road.
2 November 2020	DPIE grants Council an extension until 12 March 2021 to finalise the Planning Proposal.
10 December 2020	Meeting held with Council to discuss the <u>Flood Mitigation for Jewry Street Extension Project as Council's flood mitigation options relies draining flood waters over 72 Wallamore Road (proponent's land).</u>
3 March 2021	Council requests a concept plan that confirms the finished levels of the site.
10 March 2021	Applicant submits conceptual drawing package to Council addressing Council requirements. Meeting held with Council to explain the concept drawings. Council raises the issue of the easement over 72 Wallamore Road at this meeting. However, as this matter does not relate to the Planning Proposal – the applicant requested that this be dealt with at a separate meeting.
31 March 2021	DPIE grants Council an extension until 12 September 2021 to finalise the Planning Proposal.
19 May 2021	Meeting with Council to discuss an easement for a flood mitigation channel for the Jewry Street extension. The applicant makes it clear that, whilst Council's request for an easement will be considered, this should not hold up a decision on the Planning Proposal which is able to be determined on its own merits. Any agreement to an easement will only be finalised following finalisation of the rezoning.
11 June 2021	<p>Council forwards a draft Deed of agreement to the applicant for review, as well as an indicative extent of the easement referenced in the deed of agreement . Council notes as follows:</p> <ul style="list-style-type: none"> <li>» <i>The extension of time to complete the planning proposal concludes on 12 September 2021. Advice from DPIE is that given that the alteration to the Gateway determination will extend the timeframe to complete the LEP to a period nearing two years, no further extensions will be supported.</i></li> <li>» <i>Council planners anticipate reporting the Planning Proposal to Council on 27 July 2021 which is the last Council meeting prior to Council entering Caretaker mode.</i></li> <li>» <i>The Council planning team have arranged for a Councillor Workshop on Tuesday 13 July to brief the Councillors prior to a formal Council report being finalised. Council will need to have the legal agreement signed by all parties (excluding Council) by midday on Tuesday 13 July.</i></li> </ul>
5 July 2021	Applicant's legal representative responds to Council setting out balanced terms and principles that still maintain the overall objective of providing Council with comfort and security that their proposed bypass road's flood impacts could be offset with a flood channel as part of an easement.

Date	Action
9 July 2021	Council states that it agrees with the applicant's clarification regarding the easement being extinguished if the rezoning does not occur.
13 July 2021	Applicant's legal representative provides a draft agreement in line with discussion and negotiations that have taken place since 11 June 2021.
14 July 2021	Council responds stating that the <u>original</u> 'draft Deed of agreement' must be signed by 5pm or the matter would be deemed to have ended.
16 July 2021	Applicant's legal representative writes to Council to advise that the easement is required because the construction of the road extension above the flood level will concentrate the flow of stormwater across the applicant's property. It is inappropriate for Council to withhold making any decision on progressing the Planning Proposal unless the applicant agrees to an easement before the land is rezoned.
16 July 2021	Elton Consulting sends letters to Councillors providing a summary of the situation and an outline of inconsistencies in their dealings and approach with Council officers.
19 July 2021	Elton Consulting sends to DPIE providing a summary of the situation and requesting assistance in resolving the matter.
19 July 2021	Letter from Council's Manager Legal and Property Services received stating that the easement is required to satisfy DPIE that the Direction 4.3 Flood Prone Land is satisfied. Council stated that it is <i>'therefore unable to put the Planning Proposal to DPIE and Council and DPIE cannot be satisfied that there is a solution to the flood issues'</i> .
23 July 2021	Letter from Elton Consulting to DPIE requesting that the Minister use his power to make the Northern Regional Planning Panel the planning proposal authority.
3 August 2021	Letter from DPIE to Elton declining the request at least until the timeframe provided for the finalisation of the proposal be exhausted.
10 August 2021	Council withdraw support for the Planning Proposal in a recommendation made at the Ordinary Meeting 10 August 2021 providing no reasons for doing so in the recommendation.
March 2022	Additional information provided to proponent by Tooker and Associates in the form of Flood and Risk Impact Assessment
March 2022	Detailed Site Servicing Strategy prepared by Kelley Covey Group for the site
4 April 2022	Revised and updated Planning Proposal uploaded to Planning Portal
10 April 2022	Fee Paid
10 May 2022	Notification of Lodgement on Planning Portal
28 June 2022	Proposal considered and refused by Council
4 July 2022	Notification of decision on Planning Portal