



Gunnedah Shire Council  
PO Box 63  
Gunnedah NSW 2380

Attn: Wade Hudson  
Senior Development Officer

02 June 2021

**Re: Response to Request for Additional Information - Development Application No. 2021/016  
Proposed Gunnedah Koala Sanctuary - 3130 Oxley Highway, Gunnedah**

Dear Wade,

We refer to your letter of 23 March 2021 in relation to the abovementioned Development Application. We also refer to the letter from Heritage NSW dated 17 March 2021 requesting additional information.

We have reviewed your request for further information and amendments to DA 2021/016 and provide the following documents for your consideration:

- Architectural Plans: drawing DA01-02 Rev D, "Site Plans" and drawing DA01-08 Rev B, "Indigenous Cultural Centre", prepared by Dunn and Hillam Architects;
- Signage Drawings (two sheets) prepared by Stewart Surveys, dated 31 March 2021, Issue A;
- Letter regarding proposed signage prepared by Stewart Surveys dated 31 March 2021;
- Copy of Site Remediation and Validation report prepared by SMK Consultants, Version 01, dated April 2021;
- Clause 4.6 Statement prepared by SJB Planning;
- Gunnedah DCP Assessment Table prepared by SJB Planning;
- Letter from AREA Environmental & Heritage Consultants (AREA) date 19 May 2021;
- Amended Aboriginal Due Diligence Assessment (Version 3.2) prepared by AREA and dated 25 May 2021;
- Copy of the Deposited Plan (i.e. Lot 1, DP 1273331) and Plan Registration Notice.

Further to the abovementioned submitted documents, we provide the attached detailed response to each of the issues raised in Council's letter and the letter from Heritage NSW.

The amendments as described in the additional information are sought in accordance with Clause 55 of the Environmental Planning and Assessment (EP&A) Regulation 2000.

The amendments include the provision of detailed drawings relating to the Indigenous Cultural Centre, the reconfiguration/relocation of the proposed caravan sites and clarification of other aspects of the proposed development.

We trust that the additional information and amended documentation addresses the issues raised and is sufficient to enable you to complete your assessment and determination of the application.

Should you wish to discuss any of the above matters, please do not hesitate to contact me on (02) 9380 9911 or by email at [sgordon@sjb.com.au](mailto:sgordon@sjb.com.au).

Yours sincerely

A handwritten signature in black ink, reading "Stuart Gordon". The signature is fluid and cursive, with the first name "Stuart" and last name "Gordon" clearly distinguishable.

Stuart Gordon  
Associate

Encl.

## Response to Issues Raised

### Gunnedah Koala Sanctuary - 3130 Oxley Highway, Gunnedah – (DA 2021/016)

#### Issue 1

##### **“1.1 Clarify Land Use**

*Clarify the land use for which development consent is being sought, as Council's staff have identified a number of the possible land uses as being prohibited within the RU1 Primary Production and E3 Environmental Management zones. The land use of **Caravan Park** is listed as being prohibited within these zones.*

*The proposed building identified to be used for staff accommodation may be considered as either **Hotel or Motel Accommodation** or **Boarding House** dependent on the specific details of the activity and length of accommodation sought, and is not considered as an ancillary use to any of the permissible land uses. These uses are both prohibited within the RU1 and E3 zones. It may be concluded that this component of the development may not be appropriate for the development site based on prohibited land use.*

**hotel or motel accommodation** means a building or place (whether or not licensed premises under the Liquor Act 2007) that provides temporary or short-term accommodation on a commercial basis and that—

- (a) comprises rooms or self-contained suites, and
- (b) may provide meals to guests or the general public and facilities for the parking of guests' vehicles,

*but does not include backpackers' accommodation, a boarding house, bed and breakfast accommodation or farm stay accommodation.*

**Note**— Hotel or motel accommodation is a type of **tourist and visitor accommodation**—see the definition of that term in this Dictionary.

**boarding house** means a building that— (a) is wholly or partly let in lodgings, and (b) provides lodgers with a principal place of residence for 3 months or more, and (c) may have shared facilities, such as a communal living room, bathroom, kitchen or laundry, and (d) has rooms, some or all of which may have private kitchen and bathroom facilities, that accommodate one or more lodgers,

*but does not include backpackers' accommodation, a group home, hotel or motel accommodation, seniors housing or a serviced apartment.*

**Note**— Boarding houses are a type of **residential accommodation**—see the definition of that term in this Dictionary.

*Council does not consider the **Caravan Park** as being an ancillary use to the **Veterinary Hospital** as the two land uses are unassociated and not bound to the other activity for the sole activity to occur. Any activities prohibited as per the definition of **Caravan Park** within the Gunnedah Local Environmental Plan 2012 is unable to be supported as part of this development.*

**Note:** **Forestry** is permitted without consent within the RU1 Primary Production zone. The works included in this application for Forestry have already been conducted. Consideration should be made for the need for these works to be included within the development proposal.”

## **Response**

There are several matters within the one issue and these are addressed below. It is noted that this is a planning opinion and not a legal opinion, although case law has been reviewed in the preparation of this planning opinion.

### ***Clarify Land Use - Caravan Park***

The definition of a Caravan Park in accordance with the GLEP 2012 is as follows:

*“caravan park means land (including a camping ground) on which caravans (or caravans and other moveable dwellings) are, or are to be, installed or placed.*

The proposal seeks consent for an area that includes 14 powered sites that could each accommodate a caravan (and other mobile camper van and recreational vehicles). In this regard a caravan could be placed on each of the 14 sites and therefore that aspect of the proposal could be categorised as a “caravan park” in accordance with the above definition.

In accordance with the provisions of the GLEP 2012 Land Use Table caravan parks are prohibited within the RU1 Primary Production zone.

Notwithstanding the apparent prohibition, under certain circumstances, a person who is entitled to use land for a particular legal purpose may also be able to use that land for another, secondary or ancillary purpose (as it is legally known). Specifically, environmental planning law recognises the existence of what is known as an ‘ancillary use’, that is, a use may be ancillary to some other, more dominant, use.

The rationale being that a particular activity may not fall completely or literally within a specified ‘purpose’. For a use to be considered ‘ancillary’ to some other use, the first mentioned use must ordinarily subserve an otherwise permissible use. In other words, for a use to be ancillary it must be ‘incidental’ to or be subservient to the primary purpose.

The secondary or ancillary purpose may not necessarily be a legal one. For example, an ancillary use may include the use of land for an industrial use where only retail uses are permitted, as was the case in *Mollica v Marrickville Municipal Council ((1969) 19 LGRA 24)*.

In the above situation, the secondary use can only occur if (and only if) the industrial use remains “ancillary” to the retail use and does not become an independent, dominant or separate use. The law recognises that lawful ancillary development to a dominant use of land can be one that is otherwise prohibited in the zone. Such that, land uses that would ordinarily be prohibited according to the relevant planning controls on their own, but which are incidental or ancillary to an approved dominant purpose, can sometimes lawfully be carried out on the land.

It is considered that authority for the above proposition is set out in the case of *Foodbarn Pty Ltd & Ors v Solicitor General ((1975) 32 LGRA 157)*. The High Court confirmed, in *Lizzio v Ryde Municipal Council (1984) 155 CLR 211* the finding of Glass JA in the Foodbarn case.

Such that it was held in the Foodbarn case that the ancillary purpose must not serve an “*independent purpose which does not subserve*” the dominant purpose for which the land is being used.

What is ‘ancillary’ is a question of fact and degree, and regard may need to be had to a number of factors none of which is determinative in itself (e.g. size, area of land used for the respective uses, the degree (if any) of integration, respective sales and income generation, and so forth) in order to determine whether a use is truly ancillary. The Foodbarn case effectively found that:

- where a part of land is used for the purpose which is subservient to the purpose for which another part is used:

- the whole of the land is regarded as being used for the dominant purpose, and
- the subservient purpose is merely incidental or ancillary to the dominant purpose;
- where the whole of the land is used for more than one purpose, but the other purpose or purposes are subservient, the whole of the land is regarded as being used for the dominant purpose; and
- where the whole of the land is used for more than one purpose, none of which subserves the others:
  - it is irrelevant to ask which of the purposes is dominant, and
  - if any one of the purposes is operating in a way which is independent and not merely incidental to others and it is prohibited, it is immaterial that it is overshadowed by others.

In addition, it is possible for a consent authority to constrain the intensity of the ancillary use that is being approved in a DA by imposing conditions of consent. This is evidenced by the Land and Environment Court's approach in *The Benevolent Society v Waverly Council* [2010] NSWLEC 1082. In that case, the Land and Environment Court approved prohibited commercial uses within a residential zone, including a convenience store and a café, as ancillary uses within a residential aged care development. The uses were considered ancillary as they were intended to serve the aged care community within the permissible residential aged care development, and their carers and visitors.

In the subject proposed development, the dominant purpose is that of a koala sanctuary, such that the land is proposed to be used as a place for the medical care and rehabilitation of sick and or injured koalas, and to educate and inform the public about koalas, their care and rehabilitation.

The dominant purpose is correctly or legally categorised as a veterinary hospital and an information and education facility having regard to the GLEP 2012 defined land uses.

These defined land uses are permissible with consent on the land in accordance with GLEP 2012.

The proposed caravan park is ancillary to the dominant purpose of the land, i.e. the koala sanctuary.

Specifically, the caravan park is subservient to the koala sanctuary, such that the sole purpose of the caravan park is to serve as a form of accommodation for people who are visiting the koala sanctuary. The caravan park would not exist, if not for the existence of the dominant use, the koala sanctuary.

The subservient nature of the caravan park to the dominant use is clearly demonstrated by the fact that the caravan sites will only be for the use of people that are visiting the koala sanctuary. No one will be able to use the caravan park unless they have pre-purchased a ticket of entry to the koala sanctuary for every day that they use the caravan park. It is proposed that this operational aspect of the proposal form a condition of development consent. This would ensure the caravan park is subservient to the dominant use.

As a consequence of the need to purchase an entry ticket to the koala sanctuary each day, it is reasonably expected that the length of use of a caravan site by visitors will be in the order of one to three nights, further reflecting the subservient nature of the caravan park to the dominant use.

It is considered that the short-term length of stay that will inevitably be involved with the caravan sites is reflective of the fact that the caravan sites are inconsistent with a traditional "caravan park" which typically allows for an indefinite length of stay.

For abundant clarity, and in addition to the proposed condition of consent requiring a koala sanctuary entry ticket to be purchased for every night that a person uses a caravan site on the land, it is open to the consent authority to also impose a condition of consent that would limit the length of stay at the caravan sites to no more than 4 nights continuously.

This again would further reinforce the caravan park as a subservient purpose to the dominant purpose and not, in the circumstances, an independent land use not associated with the proposed koala sanctuary.

In summary, it is evident that the caravan park use of the configuration proposed, is subservient to the dominant purpose of the proposed development, being a koala sanctuary.

The caravan park will not operate independently of the koala sanctuary and this will be ensured through the proposed operating conditions. The use of the 14 sites within the caravan park will all be reserved for the sole use by visitors attending the koala sanctuary. The caravan park element of the application is bound and subservient to the dominant use of the site as a koala sanctuary. For that reason, the caravan park is permissible as ancillary development to the koala sanctuary.

#### **Clarify Land Use – Volunteer’s accommodation**

The proposed volunteer staff accommodation does not fall under the definition of “hotel or motel accommodation” or a “*boarding house*”. The volunteer staff accommodation does not fall under any of the definitions under the group term of “*residential accommodation*”. The proposed staff accommodation is not separately defined and therefore is considered to be an innominate land use.

Specifically, the staff accommodation building is not *hotel or motel accommodation* as the building will not provide temporary or short-term accommodation on a commercial basis. Only volunteer staff of the koala sanctuary will be able to stay within the staff accommodation building and those volunteer staff will be able to stay free of charge and will not have to enter into any commercial agreement (be that as a lease or rental agreement or payment for nightly accommodation).

The proposed staff accommodation building is not a *boarding house*, that is, the building will not be wholly or partly let and will not act as a principal place of residence for 3 months or more to any person.

As an innominate land use the proposed volunteers staff accommodation is permissible under the GLEP 2012 Land Use Table for the Zone RU1 Primary Production. Specifically, the use is not prohibited under Item 4 (Prohibited) of the RU1 land use table and is therefore permissible under Item 3 (Permitted with Consent) of the land use table as “*Any other development not specified in item 2 or 4*”.

Further, the proposed staff accommodation is permissible with consent as ancillary development to the koala sanctuary. The proposed staff accommodation is purely proposed to serve the dominant land use and is clearly subservient to and dependent upon, the dominant use.

#### **Clarify Land Use – Forestry**

Under the SLEP 2012 the definition of forestry means “*forestry operations within the meaning of the Forestry Act 2012 or Part 5B of the Local Land Services Act 2013*.”

In accordance with the definition of forestry operations under the *Forestry Act 2012* forestry operations means —

- “(a) logging operations, namely, the cutting and removal of timber from land for the purpose of timber production, or*
- (b) the harvesting of forest products, or*
- (c) ongoing forest management operations, namely, activities relating to the management of land for timber production such as thinning, burning and other silvicultural activities and bush fire hazard reduction, or*
- (d) ancillary activities to enable or assist in the above operations such as the provision of roads, snig tracks, waterway crossings and temporary timber storage facilities.”*

The proposed eucalyptus planation is for the purpose of harvesting leaves for food for the koalas within the koala sanctuary. That element of the proposal can be defined as forestry, that is it involves the harvesting of forest products.

Forestry is permitted without consent within the RU1 Primary Production zone and given works relating to the setting up of the plantation have been undertaken, it is proposed to amend the DA to remove the request for consent for the eucalyptus plantation.

## **Issue 2**

### ***“1.2 Detailed Development Plans***

*Provide detailed developments plans consistent with Schedule 1 of the Environmental Planning and Assessment Regulations 2000 for:*

*1.2.1 The proposed Aboriginal Cultural Centre, including the intended development activity, addressing the parking demand generated by this activity; &*

*1.2.2 The proposed signage structure indicated as ‘M’ on Site Plan, prepared by Dunn & Hiram Architects, dated 18 December 2020. These plans should indicate the full dimensions of the structure and display any proposed imagery where required.”*

## **Response**

### ***Aboriginal Cultural Centre***

The architectural drawing package has been amended to include plans detailing the Aboriginal Culture Centre (refer to attached amended drawings prepared by prepared by Dunn and Hiram Architects).

It is noted that the Aboriginal Cultural Centre is an unenclosed outdoor shelter and is proposed to be used in conjunction with the koala sanctuary. It is proposed to be used from time to time by the operators of the koala sanctuary (and only during opening hours of the koala sanctuary) for the purpose of demonstration of Aboriginal cultural activities and or displays (such as demonstrations of Aboriginal spear throwing for example). As such the Aboriginal Cultural Centre will not of itself generate any additional traffic or require any additional on-site parking spaces. It is proposed to be part of the offering of the koala sanctuary (similar to the wildlife sanctuary walk, the petting zoo and the pond and picnic area).

### ***Signage***

The details of the proposed signage indicated on the Site Plan has been provided within the attached Signage Drawings (two sheets) prepared by Stewart Surveys, dated 31 March 2021, Issue A.

The drawings are supported with a letter prepared by Stewart Surveys dated 31 March 2021 detailing assessment of the proposed signage against the provisions of the GDCP and SEPP 64.

## **Issue 3**

### ***“1.3 Site Audit Statement***

*Provide to Council a copy of the Site Audit Statement referred to within part 4.5.1 of the submitted Statement of Environmental Effects. The Site Audit Statement should confirm the location and testing results of all contamination remediation works, to confirm to Council’s assessment staff that appropriate remediation works have been undertaken and that the site is remediated or remnant contamination levels of the site are suitable for the intended use in its contaminated state in accordance with the relevant NEPM HIL criteria, as per the requirements of State Environmental Planning Policy No. 55 – Remediation of Land.”*

## **Response**

The amended DA is supported with a Site Remediation and Validation report prepared by SMK Consultants. The report identifies that the remediation of the land was carried out as well as a validation investigation

including soil sampling and the preparation of an Asbestos Management Plan for ongoing use of the property.

The Site Remediation and Validation report is attached to this submission.

#### **Issue 4**

##### ***“1.4 Provide Assessment***

*Provide an assessment in accordance with State Environmental Planning Policy (Koala Habitat Protection) 2020, the report prepared by Stewart Surveys, which accompanied the Statement of Environmental Effects was undertaken in accordance with State Environmental Planning Policy (Koala Habitat Protection) 2019, which has been repealed and is no longer in force.”*

#### **Response**

An updated SEPP (Koala Habitat Protection) 2020 Assessment Report has been prepared to support the amended proposal. The report has been prepared by Stewart Surveys (Reference 5284), is dated 15 April 2021 and is attached to this submission.

#### **Issue 5**

##### ***“1.5 Compliance with Gunnedah LEP 2012***

*Demonstrate compliance with the Gunnedah Local Environmental Plan 2012 (Gunnedah LEP) with regards to the following Clauses:*

*1.5.1 Clause 4.2A – The named ‘Caretakers Residence’ is considered to be a Dwelling House as per the definitions within the Gunnedah LEP and as a result the development triggers assessment in accordance with Clause 4.2A. The development is not considered to be consistent with 4.2A(3)(c) as the lot is not regarded as being a subdivision for which development consent was granted prior to the gazettal of the Gunnedah LEP. Hence, the development site does not satisfy Clause 4.2A(3)(a-d)*

*1.5.2 Clause 4.6 – In the event the development seeks an exception to a development standard, regarding Clause 4.2A for the construction of a dwelling house, a request is to be made in writing demonstrating:*

- 1.5.2.1 That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; &*
- 1.5.2.2 That there are sufficient environmental planning grounds to justify contravening the development standard.”*

#### **Response**

It is unclear whether the lot on which the proposed caretaker’s residence is proposed to be located was subject to a subdivision for which development consent was granted prior to the gazettal of the GLEP 2012 and therefore it is unclear whether the site satisfies Clause 4.2A(3)(a-d) of the GLEP 2012.

Therefore, for abundant certainty, we have provided a statement prepared in accordance with the provisions of Clause 4.6 of the GLEP 2012 which formally requests a variation to the development standard (refer to attached Clause 4.6 Statement prepared by SJB Planning).

#### **Issue 6**

##### ***“1.6 Existing Vehicle Access***



*Address the existing vehicle access from Lot 329 DP 755503 to Oxley Highway and indicate what methods will be implemented to restrict the access to the site from this access. The Traffic Impact Assessment does not identify that vehicle entry or exit from this access point is safe, and has not adequately addressed traffic incidents in the event that patrons to the site utilise this access. Hence, the vehicle access is not to be used as part of the development proposal, without addressing the intersection and any potential intersection upgrades to the Highway."*

### **Response**

The existing vehicle access from Lot 329 DP 755503 to Oxley Highway is proposed to be used for access to and from the caretakers residence and for access to the site by the NSW Rural Fire Brigade. It is proposed that the existing access will not be for public use or use by patrons or other staff of the koala sanctuary.

It is proposed that the gate will be locked, with key access available only for the caretaker of the site and the NSW Rural Fire Brigade. If considered desirable by Council, the applicant is agreeable to the imposition of a condition of consent ensuring these operational aspects are put in place.

### **Issue 7**

#### ***"1.7 Attachment 12: Gunnedah DCP Assessment Table***

*Provide a copy of Attachment 12: Gunnedah DCP Assessment Table prepared by SJB Planning which is indicated as addressing the provisions of the Gunnedah Development Control Plan 2012."*

### **Response**

Refer to the attached Gunnedah DCP Assessment Table prepared by SJB Planning and to the letter prepared by Stewart Surveys dated 31 March 2021 detailing assessment of the proposed signage against the provisions of the GDCP and SEPP 64.

### **Issue 8**

#### ***"1.8 Compliance with Gunnedah DCP 2012***

*Demonstrate compliance with the Gunnedah Development Control Plan 2012 (Gunnedah DCP) with regards to the following Sections and Clauses:*

- 1.8.1 Section 5 – pertaining to the consolidation/boundary adjustment of development lots;*
- 1.8.2 Clause 6.2 – Parking Requirements;*
- 1.8.3 Clause 6.3 – Landscaping;*
- 1.8.4 Clause 6.4 – Outdoor Lighting;*
- 1.8.5 Clause 6.5 – Outdoor Advertising/Signage; and*
- 1.8.6 Clause 6.6 – Environmental Controls."*

### **Response**

Refer to the attached Gunnedah DCP Assessment Table prepared by SJB Planning and to the letter prepared by Stewart Surveys dated 31 March 2021 detailing assessment of the proposed signage against the provisions of the GDCP and SEPP 64.

It is noted that the proposal does not seek consent for the consolidation of lots or the adjustment of boundaries and as such the provisions of Section 5 of the DCP are not pertinent to the proposed development.

We are informed that since the lodgement of the current Development Application the site has been consolidated from two allotments to one. The new legal description of the site is Lot 1, DP 1273331. Figure 1 below is an extract from SIX Maps which shows an aerial view of the site with a cadastre overlay.

A copy of the Plan Registration Notice and the Deposited Plan are provided

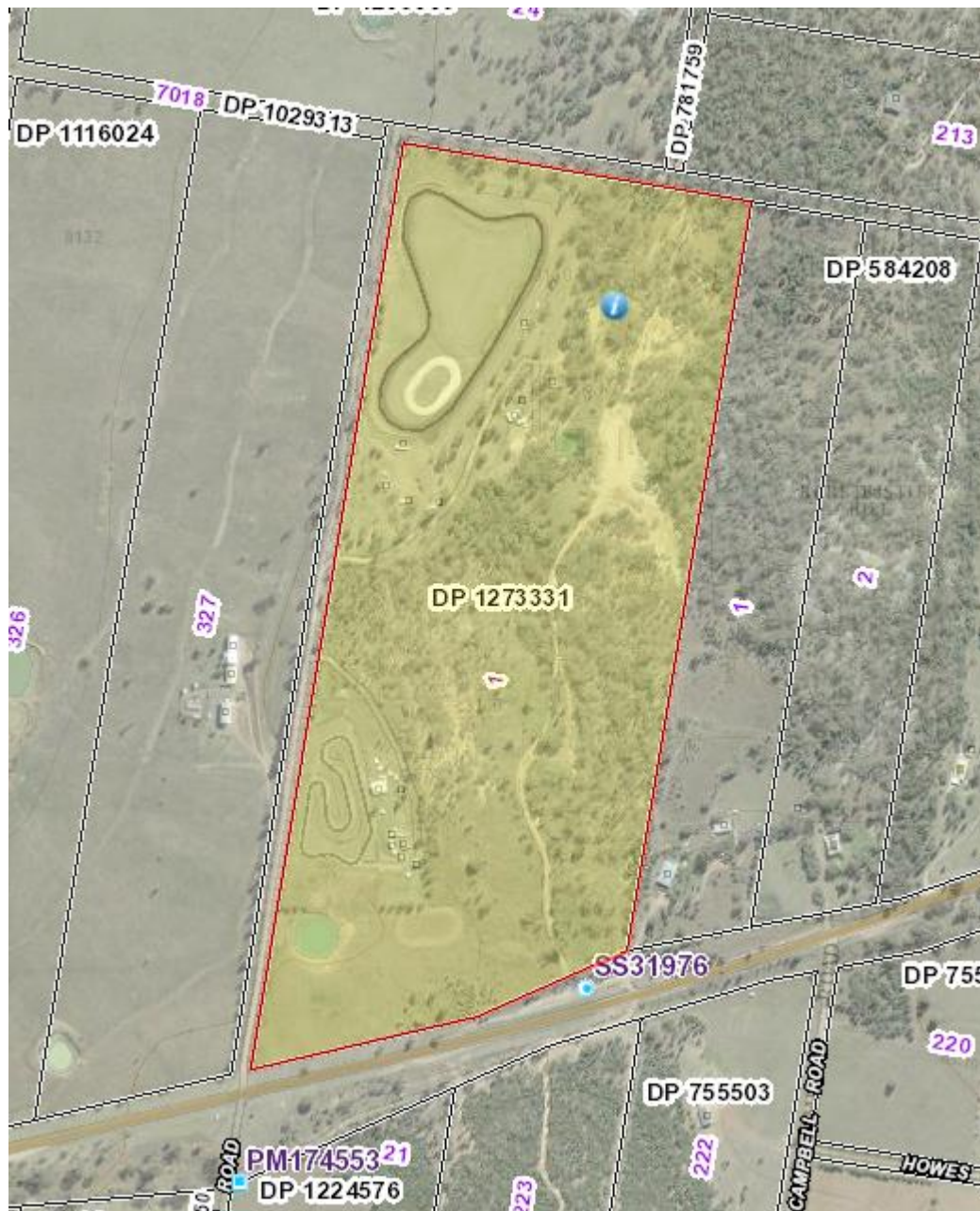


Figure 1: The subject site is identified in yellow as Lot 1 in DP 1273331 (Source: SIX Maps).

**Heritage NSW Issues from letter dated 17 March 2021 requesting additional information.**

**Issue 9**

*“An Aboriginal Cultural Heritage Assessment report has been provided in support of this application. This report did not include community consultation in accordance with the Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010. A complete and final Aboriginal Cultural Heritage Assessment Report is required in support of an IDA application.*

*Accordingly, Heritage NSW as the approval body, requires additional information, as stipulated in Attachment A, to be provided in accordance with Clause 67 of the Environmental Planning and Assessment Regulation*

2000. This is so that the proponent can provide the consent authority with the required information to enable HNSW to properly consider the proposal prior to issuing GTAs

Attachment A:

Heritage NSW requires the following information be provided before the application can be considered for GTAs:

A complete and finalised Aboriginal Cultural Heritage Assessment Report, including archaeological report, that documents the results of an assessment of the proposed development undertaken in accordance with the following:

- *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in New South Wales (OEH 2011).*
- *Consultation with the Aboriginal community undertaken in accordance with the Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010 (DECCW 2010). Full documentation of this process is required.*
- *Satisfy the requirements of the Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW (DECCW 2010) and include the results any archaeological test excavations."*

**Response**

We note that the AREA Environmental & Heritage Consultants (AREA) has provided an updated Aboriginal Due Diligence Assessment. The initial assessment was informed by a field inspection with a suitably qualified and experienced staff member and a Registered Native Title holder. During this assessment three Aboriginal sites were recorded.

The attached updated report reflects a change of design avoiding any direct or indirect impact to cultural heritage sites recorded in the proposal.

Three sites of Aboriginal cultural significance were recorded during the survey fieldwork undertaken for cultural heritage assessment on 12 March 2020. Each of the three sites were stone artefact sites with fewer than five artefacts each.

One of the artefact sites (i.e. site IF1) was close to the proposed caravan park. Following the preparation of the initial Aboriginal Due Diligence Assessment, the position of the proposed caravan park has been amended so that it is now proposed to be set away from (to northeast) the location of IF1.

Consequently, the updated Aboriginal Due Diligence Assessment concludes that "*no Aboriginal heritage sites would be impacted by the proposal as it is designed*".

The updated Aboriginal Due Diligence Assessment confirms that none of the artefact sites are now within the development footprint and the Assessment provides recommended management and mitigation measures to avoid unintentional impacts during construction.

It is considered therefore that an AHIP is not required and further consultation processes according to the *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010* are not required to be initiated.