

EVERICK HERITAGE

08 December 2021

Our Ref: EV.1391

Lex Tall
SW Rocks Development Pty Ltd
PO Box 872
MONA VALE NSW 1660

Dear Lex,

RE: (DRAFT) PART LOT 35 DP 124499 (PREVIOUSLY DP1167775) WAIANBAR AVENUE SOUTH WEST ROCKS, NSW ABORIGINAL CULTURAL HERITAGE ASSESSMENT ADDENDUM

Thank you for your request for advice regarding Aboriginal Cultural Heritage Assessment ('ACHA') requirements for the Seabreeze residential proposal at Wainabar Avenue, South West Rocks, New South Wales ('NSW') (see Appendix 1). It is understood the addendum advice will be submitted to Kempsey Shire Council ('KSC') as part of a Gateway Determination for a planning proposal to provide for rezoning of the land from RU2 to R1 general residential (minimum Lot size 500m²). The project has previously been subject to the below assessments:

- Robert, L. 2015 Aboriginal Heritage Due Diligence Assessment Lot 35 DP1167775 Wainabar Avenue South West Rocks, NSW. Unpublished report to Geoff Smyth and Associates.
- Collins, J. 2004 Local Environmental Study Phillip Drive, South West Rocks NSW Mid-North Coast. Aboriginal Heritage Assessment. Unpublished report to Connell Wagner

We note that the below advice is primarily based on the Collins (2004) archaeological investigation of Lot 35 and adjacent lands.

We have included the following:

- **Appendix 1** – Project Area mapping
- **Appendix 2** – Legislative review and planning context

- **Appendix 3** – Results of Aboriginal Heritage Information Management System (AHIMS) and Kempsey Local Environment Management Plan
- **Appendix 4** – Landform and disturbance analysis
- **Appendix 5** – Previous archaeological assessment (Collins 2004)
- **Appendix 6** – AHIMS extensive search results.
- **Appendix 7** – Birrooguns Grave Location (AHIMS Site Record Form)

The below comments are provided in relation to the requirement for consultation in accordance with the Aboriginal Cultural Heritage Consultation Requirements for Proponents ('ACHCRP') and archaeological excavation in accordance with the Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales ('CoPAI'):

- The Project Area does not contain any declared Aboriginal Places or Places of Aboriginal heritage significance on the Kempsey LEP. The Collins (2004) assessment included 'intangible' cultural values associated with Birrooguns Grave and Saltwater Creek and it was considered that residential development along Phillip Drive/ Lot 35 would not significantly impact on the cultural value of the sites. Additionally, the consultation with the Aboriginal community representatives identified that the loss of access to land for cultural practices from residential development would not be substantial. The protection of natural landscapes and resource use areas within Hat Head and Arakoon National Parks would provide adequate space for the continued practice of Aboriginal culture, including Saltwater Lagoon. As such it is not considered that a future residential development would significantly impact on ceremonial and or contemporary resource use sites.
- No Aboriginal archaeological sites are known to occur within Lot 35 and no sites are known to occur within the adjacent lands including the dune along Phillip Drive. The centroid for Birroogun's Grave (22-4-0035) located to the west on the golf course is not accurate due to mapping methods and datum conversion issues. However, based on the AHIMS site record form the site is located within the South West Rocks golf course approximately 400 metres south of the club house (see Appendix 7).
- Based on the plates and calculations of survey coverage it is considered that the survey methodology undertaken would have located archaeological sites should they be present within Lot 35 (Collins 2004).
- Collin (2004:19) made specific statements on the potential for archaeological values on the elevated dunes in the north-east corner of the then Study Area adjacent to Phillip Drive and residual forest south of the sewerage treatment plan. However, the report does not specifically recommend archaeological test excavation, which is addressed in Section 11.1 and 11.2 of the Collins report. Neither of these locations is within the area identified for the Seabreeze residential project.

- The CoPAI makes the following comment on the requirement for archaeological excavation:
 - i. *Archaeological test excavation will be necessary when (regardless of whether or not there are objects present on the ground surface) it can be demonstrated through Requirements 1, 2, 3, 4, and 5 that sub-surface Aboriginal objects with potential conservation value have a high probability of being present in an area, and the area cannot be substantially avoided by the proposed activity.*
 - ii. Based on the conclusions of the Collins (2004) report and Everick's experience within the South West Rocks Lot 35 does *not* have a "high probability" for archaeological sites. The bushland on the elevated dune near Phillip Drive is not part of Lot 35 and the remnant woodland south-south east of the sewerage treatment was identified as having only 'some' potential for sub-surface archaeological sites.
- The recommendation (Collins 2004 Section 11.3) for use of Aboriginal sites monitors is specifically in relation to the elevated dune along Phillip Drive which comprises Lot 509 DP850963. As such this recommendation does not apply to Lot 35. The Collins report concludes that standard unexpected finds procedures are an appropriate management response for Lot 35.

Everick does not consider that additional community consultation and archaeological excavation is required prior to determination of the planning proposal. However, consistent with the provisions of Section 5.10 of the Kempsey LEP consultation with the Kempsey Local Aboriginal Land Council prior to determination of future development applications would assist in identifying appropriate construction methodologies to ensure that the recommendations of the previous studies (Roberts 2015 and Collins 2004) can be implemented during ground works. This includes provisions for cultural inductions, unexpected archaeological finds procedures and mechanisms to manage Aboriginal skeletal remains should they be found.

Please contact Principal Archaeologist (Coffs Harbour) Tim Hill on 0422 309 822 or at t.hill@everick.net.au should you wish to discuss this advice further.

Yours faithfully,



Tim Robins
Managing Director
Everick Heritage Pty Ltd

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APPENDIX 1: PROJECT AREA MAPPING & PLANS

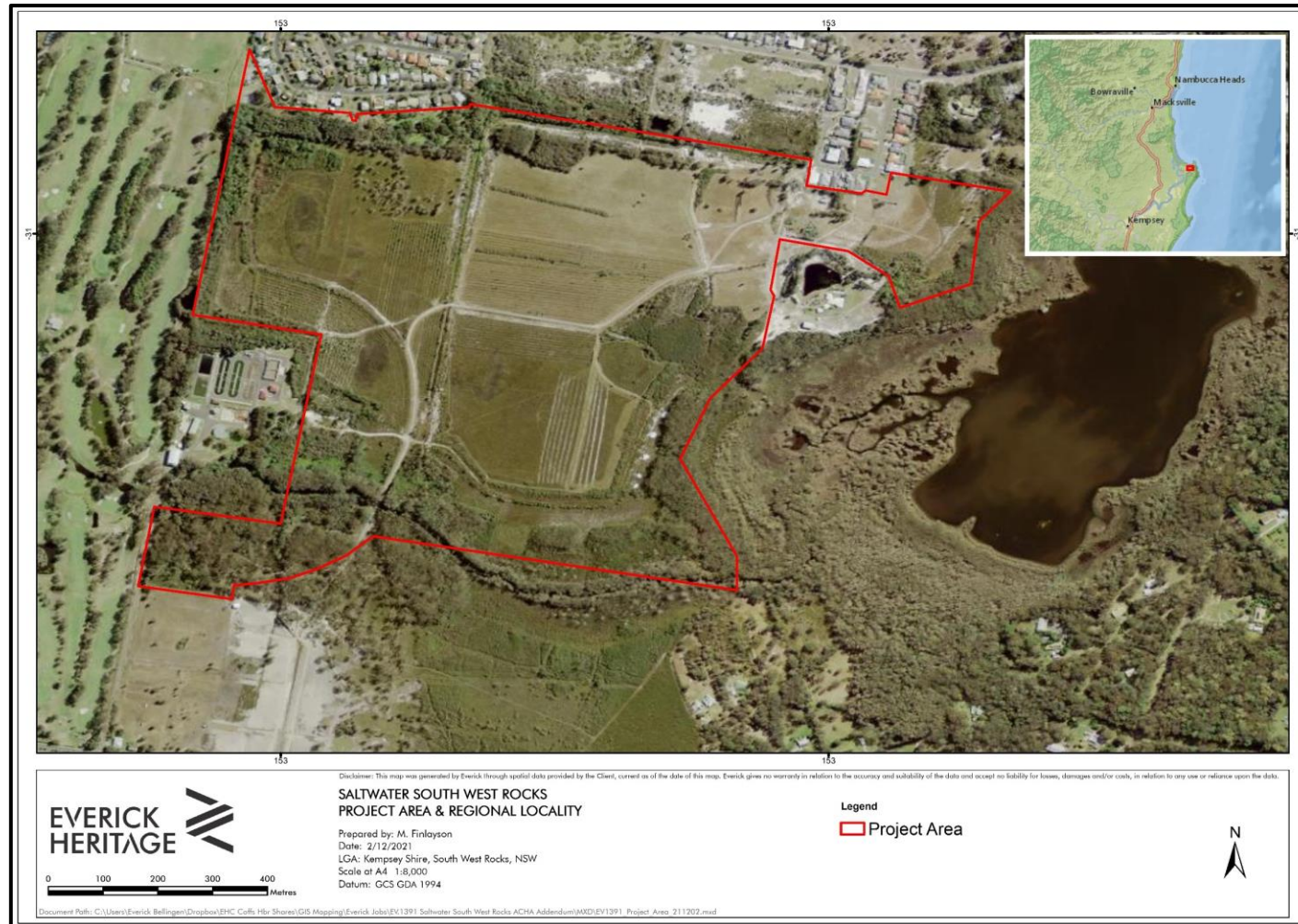


Figure 1: Project Area map (Lot 35 DP124499)

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Figure 2: Seabreeze Masterplan (Source Biodiversity Australia 2021)

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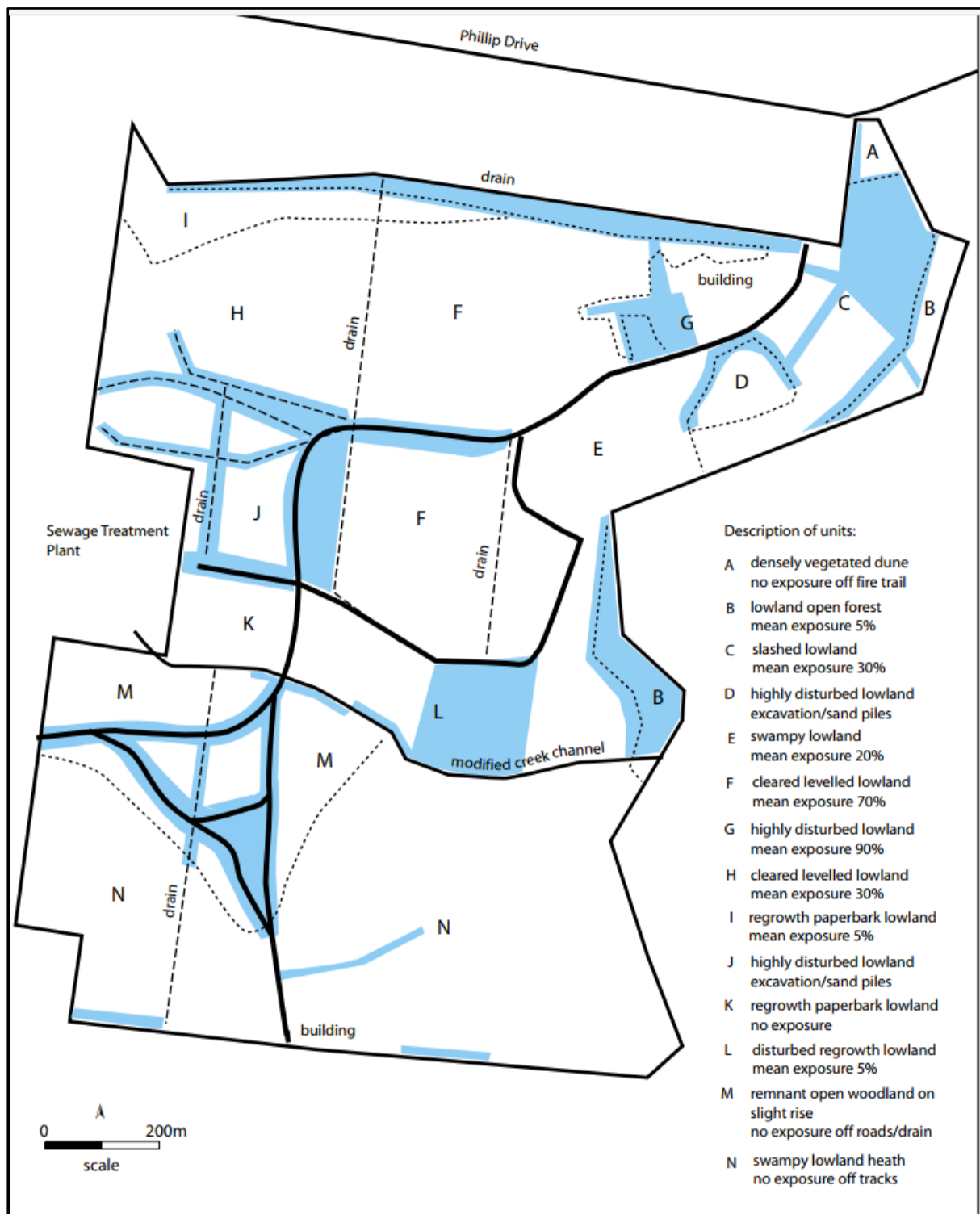


Figure 3: Survey units and coverage (Collins 2004).

APPENDIX 2: LEGISLATIVE AND PLANNING CONTEXT

The primary State legislation concerning cultural heritage in NSW is the National Parks and Wildlife Act 1974 (NSW) (NPW Act) and Local Environment Plans (LEP) made under the Environmental Planning & Assessment Act 1979 (NSW). The Commonwealth also has a role in the protection of nationally significant cultural heritage through the Environmental Protection and Biodiversity Conservation Act 1999 (Cth), The Protection of Movable Cultural Heritage Act 1986 (Cth) and the Historic Shipwrecks Act 1976 (Cth).

The National Parks and Wildlife Act 1974 (NSW)

The NPW Act is the primary legislation concerning the identification and protection of Aboriginal cultural heritage. It provides for the management of both Aboriginal Objects and Aboriginal Places. Under the NPW Act, an Aboriginal Object is any deposit, object, or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area, regardless of whether the evidence of habitation occurred before or after non-Aboriginal settlement of the land. This means that every Aboriginal Object, regardless of its size or seeming isolation from other Objects, is protected under the Act.

An Aboriginal Place is an area of particular significance to Aboriginal people which has been declared an Aboriginal Place by the Minister. The drafting of this legislation reflects the traditional focus on Objects, rather than on areas of significance such as story places and ceremonial grounds. However, a gradual shift in cultural heritage management practices is occurring towards recognising the value of identifying the significance of areas to Indigenous peoples beyond their physical attributes. With the introduction of the National Parks and Wildlife Amendment Act 2010 (NSW) the former offence provisions under Section 86 of 'disturbing', 'moving', 'removing' or 'taking possession' of Aboriginal Objects or Places have been replaced by the new offence of 'harming or desecrating'. The definition of 'harm' is 'destroying, defacing or damaging an Object'. Importantly, in the context of the management recommendations in this assessment, harm to an Object that is 'trivial or negligible' will not constitute an offence.

The amendments also significantly strengthen the penalty provisions. The issue of intent to harm Aboriginal cultural heritage has been formally addressed by separating it from inadvertent harm. The penalty for individuals who inadvertently harm Aboriginal Objects has been set at up to \$55,000, while for corporations it is \$220,000. Also introduced is the concept of 'circumstances of aggravation' which allows for harsher penalties (up to \$110,000) for individuals who inadvertently harm Aboriginal heritage while undertaking a commercial activity or have a record for committing similar offences. For those who knowingly harm Aboriginal cultural heritage, the penalty will rise substantially. The maximum penalty will

be set at \$275,000 or one year imprisonment for individuals, while for corporations it will rise to \$1,100,000.

Where a land user has or is likely to undertake activities that will harm Aboriginal Objects, the Director General of the Heritage NSW has a range of enforcement powers, including stop work orders, interim protection orders and remediation orders. The amended regulations also allow for several penalties in support of these provisions. The NPW Act also now includes a range of defence provisions for unintentionally harming Aboriginal Objects:

- a) Undertaking activities that are prescribed as 'Low Impact'.
- b) Acting in accordance with the Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW (the 'Due Diligence Code') (DEECW 2010a).
- c) Using a consulting archaeologist who correctly applies the Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales ('CoPAI') (DEECW 2010b).
- d) Acting in accordance with an Aboriginal Heritage Impact Permit (AHIP).

The regulations allow for a range of low impact activities to be undertaken without the need to consult the OEH or a consulting archaeologist. Generally, those who undertake activities of this nature will not be committing an offence, even if they inadvertently harm Aboriginal Objects. For the purposes of this assessment, it is not considered that the proposed management works are 'low impact activities'.

Due Diligence Code

The Due Diligence Code operates by posing a series of questions for land users before they commence development. These questions are based around assessing the potential for an area of land to contain Aboriginal Objects and previous ground disturbance. An activity will generally be unlikely to harm Aboriginal Objects where it:

- a) will cause no additional ground disturbance; or
- b) is in a developed area; or
- c) in a significantly disturbed area.

Where these criteria are not fulfilled, further assessment for Aboriginal cultural heritage will typically be required prior to commencing the activity.

The ACHCRP Guidelines (2010) and Community Consultation.

The ACHCRP Guidelines provide an acceptable framework for conducting Aboriginal community consultation in preparation for impacts to Aboriginal cultural heritage. Proponents are required to follow them where a Project is likely to impact on cultural heritage and where they require an AHIP. However, it has been standard practice to undertake consultation with Aboriginal sites officers from the Local Aboriginal Land Council ('LALC') to assist the proponent to understand their requirements for additional consultation which may include Elders Groups, native title applicant groups or other knowledge holders who might have a particular type of knowledge about an area.

The ACHCRP Guidelines typically take a minimum of 90 days to complete. However, in complicated Projects this period may need to be extended by several months. The Guidelines require public notice of the assessment, preparation of a proposed methodology, undertaking site meetings and excavations where required, the production of a draft report, which is distributed to the registered Aboriginal parties and the production of a final report.

Although not strictly required, a thorough consultation process will treat the ACHCRP Guidelines as a minimum standard of community consultation where impacts to Aboriginal objects cannot reasonably be avoided. Generally, consultants must go to further effort to identify the significance of a given site to the Aboriginal community. This will likely include undertaking additional site inspections if requested by Aboriginal stakeholders, fully resourcing the community by providing copies of past archaeological and environmental assessments in the region and meeting with community members to seek their opinions of the site.

The Kempsey Local Environmental Plan 2013

The Kempsey Local Environmental Plan (LEP) 2013 provides statutory protection for items already listed as being of heritage significance (Schedule 5), items that fall under the ambit of the Heritage Act 1977 (NSW) and Aboriginal Objects under the NPW Act 1974 (NSW). It aims to ensure best practice components of the heritage decision making process are followed.

With respect to Aboriginal heritage significance Kempsey Shire Council as consent authority must, before granting consent in a place of Aboriginal heritage significance:

- a) consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place by means of an adequate investigation and assessment (which may involve consideration of a heritage impact statement), and

- b) notify the local Aboriginal communities, in writing or in such other manner as may be appropriate, about the application and take into consideration any response received within 28 days after the notice is sent.



APPENDIX 3: RESULTS OF AHIMS AND NSW HERITAGE DATABASE SEARCHES

An 'Extensive' search was undertaken of the Aboriginal Heritage Information Management System (AHIMS) database (Reference: 644096) on 2 December 2021 (Appendix 6). The search area Included Lot 35 DP 1214499 with a buffer of 1000 meters. Six (6) previously recorded Aboriginal sites were identified within the search area however no sites have been previously recorded within Lot 35 (Table 1, Figure 4 and Appendix 6). The closest of these sites is the Birrogun's Grave Trial Bay (22-4-0035) site which is identified to the west of the Project Area on the Golf Course. However, the Birrogun's Grave site has been recorded in AGD format using old topographic mapping. As such, the site centroid for Birrogun's Grave can be reliably inferred to be inaccurate up to 1 km.

Table 1: AHIMS Registered Sites in proximity to the Project Area (Client ID 644096).

Site ID	Site Name	Datum	Easting	Northing	Site Feature
22-4-0133	SWR – Ryan Street Canoe Tree	AGD	506380	6582682	Not a Site
22-4-0135	RPS SWR 1	AGD	503796	6581015	Modified Tree (Carved or Scarred)
22-4-0090	Spencerville	AGD	503900	6581700	Shell, Burial, Artefact
22-4-0035	Birrogun's Grave Trial Bay A	AGD	504300	6581900	Aboriginal Ceremony and Dreaming
22-4-0008	Lagger's Point; Trial Bay	AGD	506100	6582700	Shell, Artefact

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Site ID	Site Name	Datum	Easting	Northing	Site Feature
22-4-0106	Honey Tree	AGD	504156	6582779	Modified Tree (Carved or Scarred)

Kempsey Local Environmental Plan 2013

A search of the Kempsey Local Environmental Plan 2013 for nearby local heritage items was undertaken on 02 December 2021. No places of historic or Aboriginal cultural heritage significance are listed under the Kempsey LEP 2013 as being in close proximity to Lot 35 (Figure 5).



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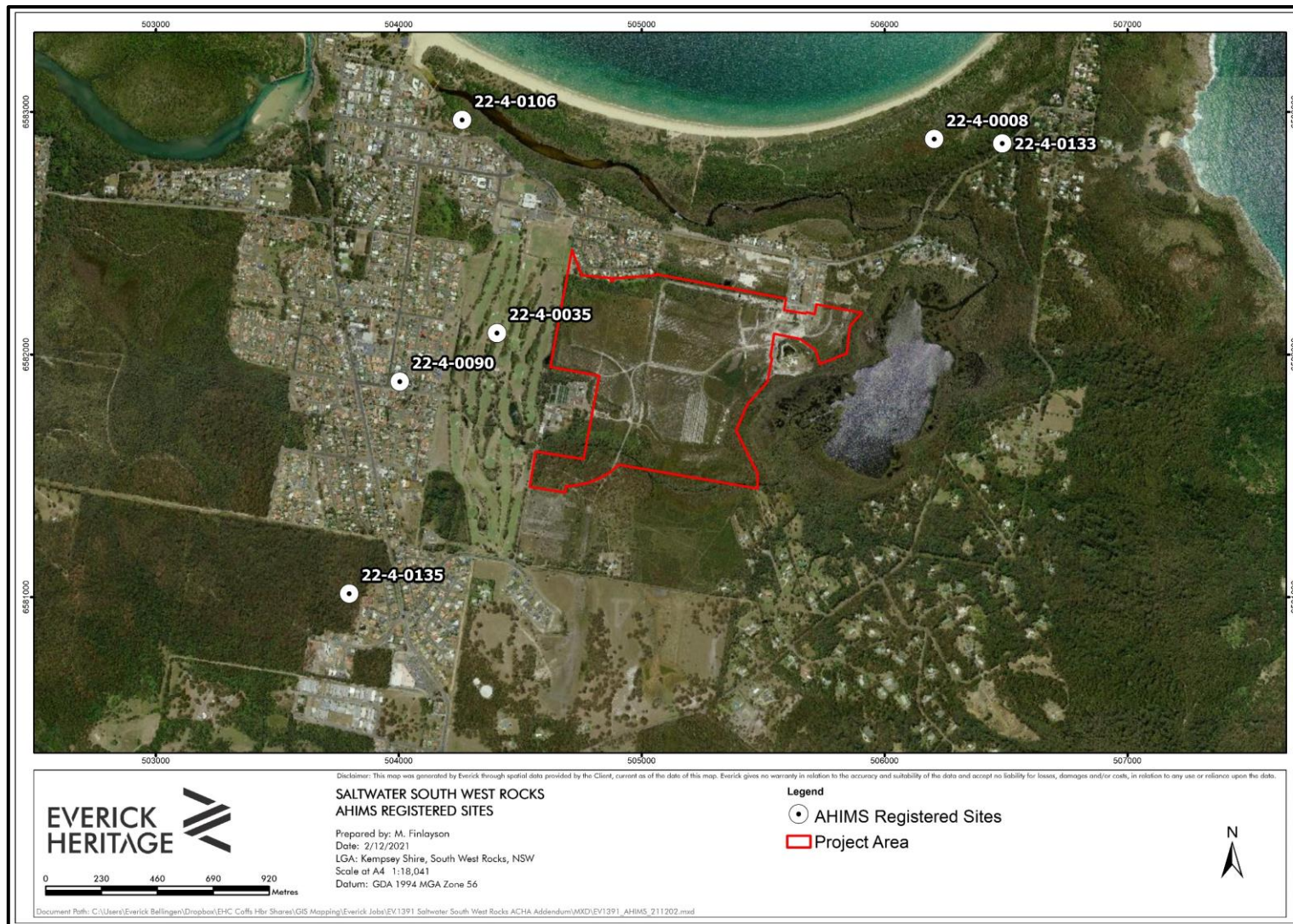


Figure 4: AHIMS Registered Sites (Client Search ID: 644096).

APPENDIX 4: LANDFORM ANALYSIS & DISTURBANCE HISTORY

The Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales (DECCW 2010a:12) identifies broad types of 'landscape features' which are consistently associated with Aboriginal Objects. These include areas:

- a) "Within 200 metres (m) of water; or
- b) located within a sand dune system; or
- c) located on a ridge top, ridge line or headland; or
- d) located within 200 m below or above a cliff face; or
- e) within 20 m of, or in a cave, rock shelter or cave mouth".

The area of Proposed Works sits to the south of a large archaic sand dune that runs roughly parallel to Phillip rive between South West Rocks and Arakoon. The increased potential for archaeological sites within sand dunes is noted, however in coastal environments proximity to shell resources is a more significant determinate of archaeological potential. At South West Rocks this includes the open beach front at Trial Bay and the rocky shelf habitats around Arakoon and Smoky Cape.

While Saltwater Lagoon would have provided access to a range of freshwater and wetland resources it was likely that the dune to the north of Lot 35 would have provided a pathway but not a campsite. This would account for the absence of archaeological material associated with the Phillip Drive infrastructure and neighbouring residential subdivisions.

The Roberts (2015) identifies the 'vegetated hind dune adjacent to Phillip Drive (Roberts 2015:7) as having an elevated potential for archaeological sites. The Collins (2004) study identified "the slightly higher land in the south-west, and the north-east hind dune" as having archaeological potential. Collins also noted the potential for middens and burials along creek lines however these features have been subject to a high degree of disturbance within Lot 35. The main Saltwater Lagoon is within Hat Head National Park and would be the most likely location of middens and burials.

The Due Diligence Code of Practice (DECCW 2010) provides the following definition of 'disturbed land':

Land is disturbed if it has been the subject of human activity that has changed the land surface, being changes that remain clear and observable. Examples include ploughing, construction of rural infrastructure (such as dams and fences), construction of roads, trails and tracks (including fire trails and tracks and walking tracks), clearing vegetation, construction of buildings and erection of other structures, construction or installation of utilities and other similar services (such as above or below ground electrical infrastructure, water and sewerage pipelines, stormwater drainage and other similar infrastructure), and construction of earthworks (DECCW 2010a:18).

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Lot 35 has been subject to ground disturbance associated from the historic clearing of native vegetation and subsequent grazing. The previous ACHA assessment (Roberts 2015) has determined that the Project Area has been significantly disturbed as per the definition of disturbance under the Due Diligence Code of Practice (DECCW 2010a). This conclusion is in part based on the rezoning ACHA (Collins 2004) which identified that the Aboriginal community representatives considered that the extent of historic ground disturbance had substantially impacted on the contemporary cultural values of the Study Area.



APPENDIX 5: ABORIGINAL CULTURAL HERITAGE STATEMENTS (COLLINS 2014)

It is Everick's experience that ground disturbance on sandy environments has the effect of increasing the visibility of archaeological sites. As such, any previous investigation by Collins and Roberts would likely identify archaeological sites should they occur within the area. The Collins (2004) investigation included sites officer from Kempsey Local Aboriginal Land Council, Dhungutti Elders Council and the Figtree community. The survey coverage was 35.8% for the sample transects or 5.6% and provide a reasonable sample of the Study Area. The study concluded that:

The majority of the study area comprises extensively disturbed drainage-impaired lowland which is unlikely to have ever been selected for Aboriginal occupation in preference to the nearby coastal dunes and Macleay estuarine system. While it is possible that campsites were established in suitable places along upper Saltwater Creek, the creek channel has been altered and its original banks modified and/or removed in the process (Collins 2004:16)

Due to dense vegetation, survey inspection of the south-west rise was primarily restricted to roadsides and a drain cutting, resulting in the effective coverage of a 920m² sample of the remnant woodland. No archaeological evidence was found and while this result suggests a low overall level of sensitivity, the possibility of undetected sites (middens and burials), particularly in proximity to the creek channel, cannot be entirely ruled out. As shown on Figure 2, much of the woodland would be retained under the auspices of the proposed development structure plan. Providing the ground surface is not modified during understorey clearing, conservation of the woodland would concurrently offer protection to potential undetected archaeological sites.

The hind dune on the north-eastern corner of the study area supports a dense Needlebark stringybark and Banksia woodland with an impenetrable shrubby understorey. A 5m wide 50% exposed fire break behind the houses in Waianbar Avenue provided the only survey visibility. However, cleared parts of the same dune to the immediate west have been previously surveyed without success (Section 5.2), and a number of houses have been built on the higher dune crest to the east. In the absence of adequate survey coverage it nevertheless remains possible that undetected Aboriginal sites, especially burials, may occur on the dune. Given the very dense vegetation and small size and unobtrusive nature of burials, the only method likely to reveal the presence of such sites would be the monitoring of land clearing operations.

The Collins (2004:19) made the following statements on the potential for archaeological sites:

Although isolated artefacts lost or discarded during itinerant resource-gathering activities may occur in any part of the study area, any substantial undetected archaeological evidence is likely

to be restricted in its distribution to the remnant Scribbly gum woodland south and south-east of the Sewage Treatment Plant, and the hind dune adjacent to Phillip Drive in the north-east. Both these areas are well vegetated, offer very little survey exposure, and have some potential to contain undisturbed archaeological sites. Aboriginal occupation sites are also possible on the low sand rise edging Saltwater Lagoon in Hat Head National Park.

Conservation of woodland vegetation in these potentially sensitive areas would concurrently offer protection to any undetected archaeological sites, and it is recommended that this factor be taken into account when development control measures are established for the study area. Although only 15.6% of the study area was covered in the field, the survey included all substantial exposures likely to contain significant evidence. Due to the perceived low density of the archaeological resource and poor detection conditions in undisturbed areas, further survey work at Development Application stage would be unlikely to produce positive results. Providing the recommendations of this report are implemented and the legislative requirements of the National Parks and Wildlife Act (1974) are upheld, no further surface survey work is recommended in the study area.

Based on the photographs within the Collins (2004) report it is Everick's opinion that ground coverage did not significantly reduce the effectiveness of the archaeological investigation. It is noted that the elevation dune near Phillip Drive is not within Lot 35 and the remnant bushland south of the sewerage treatment plant will be covered by environmental restrictions.



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PLATE 1: General visibility across cleared lowland, SU F. View south-east to Big Smoky



PLATE 2: General visibility across cleared lowland, SU H. View west to golf course



Figure 6: Plates 1 and 2 showing survey conditions (Collins 2004)

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PLATE 3: General visibility in south-west lowland open woodland, SU M




PLATE 4: General visibility across swampy lowland heath on southern boundary, SU N



Figure 7: Plate 3 and 4 showing survey conditions (Collins 2004)

APPENDIX 6: AHIMS EXTENSIVE SEARCH RESULTS (644096)



AHIMS Web Services (AWS)

Extensive search - Site list report

Your Ref/PO Number : EV1391

Client Service ID : 644096

SiteID	SiteName	Datum	Zone	Easting	Northing	Context	Site Status **	SiteFeatures	SiteTypes	Reports
22-4-0133	SWR - Ryan Street Canoe Tree.	AGD	56	506380	6582682	Open site	Not a Site	Modified Tree (Carved or Scarred) : 1		
<u>Contact</u>		<u>Recorders</u>		<u>Permits</u>						
22-4-0135	RPS SWR 1	GDA	56	503796	6581015	Open site	Valid	Modified Tree (Carved or Scarred) : -		
<u>Contact</u>		<u>Recorders</u>		<u>Permits</u>						
22-4-0090	Spencerville;	AGD	56	503900	6581700	Open site	Valid	Shell : -, Burial : -, Artefact : -	Burial/s,Midden,Open Camp Site	2493
<u>Contact</u>		<u>Recorders</u>		<u>Permits</u>						
22-4-0035	Birrogun's Grave Trial Bay	AGD	56	504300	6581900	Open site	Valid	Aboriginal Ceremony and Dreaming : -	Natural Mythological (Ritual)	1626
<u>Contact</u>		<u>Recorders</u>		<u>Permits</u>						
22-4-0008	Lagger's Point; Trial Bay;	AGD	56	506100	6582700	Open site	Valid	Shell : -, Artefact : -	Midden	1626
<u>Contact</u>		<u>Recorders</u>		<u>Permits</u>						
22-4-0106	Honey Tree	AGD	56	504156	6582779	Open site	Valid	Modified Tree (Carved or Scarred) : 1		
<u>Contact</u>		<u>Recorders</u>		<u>Permits</u>						

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APPENDIOX 7. BIRROOGUNS GRAVE LOCATION (AHIMS SITE RECORD FORM)

ENVIRONMENT AND DESCRIPTION OF THE SITE	
ENVIRONMENT (Geology, Soils, Vegetation and Wildlife)	<p>The site is on low and sandy land subject to occassional inundation which has now been cleared for the local golf course. During these operations, the stone cairn which marked the site of the grave was destroyed and the rocks removed to the swampy ground to the west of the site (see photos page 5).</p> <p>Although called a grave, the site is not thought to contain a burial. Rather, it is the mythical site of the death of the Aboriginal hero, Birroogun and his subsequent burial, and is therefore classified in the Survey records as a 'natural feature of mythological significance' and not a burial ground.</p> <p>Before its destruction some years ago to make way for a fairway on the golf course, the site consisted of a stone cairn, the height of which is shown by Eddie Buchanan in the photograph on page 5 of this report.</p> <p>The site and the circumstances surrounding its destruction will be included in information on all destroyed sacred sites in New South Wales at present being compiled by the Survey team, and scheduled for incorporation in the next edition of the Survey Site List.</p>
DESCRIPTION OF SITE (Type, Size, Formation, Special Features and Condition of Site)	<p>SKETCH MAP SHOWING THE POSITION OF BIRROOGUN'S GRAVE</p>