

Iwan Davies
Department of Planning and Environment
GPO Box 39
Sydney NSW 2001



6 October 2022

Dear Iwan,

Re: Ungula Wind Farm (SSD 6687) – Modification 2

Ungula Wind Farm Pty Ltd (UWF) is writing to the Department of Planning and Environment (DPE) to provide details of an application to modify development consent #SSD 6687 (the Consent) for the Ungula Wind Farm under section 4.55(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) (Modification 2).

Modification 2 proposes to replace the figures in Appendix 5 of the Consent that set out the Subdivision Plans for the Ungula Wind Farm. These Subdivision Plans included some inadvertent style errors when those plans were updated for the purposes of Modification 1 of the Consent, which was approved on 21 April 2022.. Modification 2 proposes to replace the figures in Appendix 5 of the Consent with the figures from the Consent as originally granted, with the correct style, but also incorporating the approved changes from Modification 1. The correction of the figures in Appendix 5 is therefore a matter of style and formatting only to correct a minor error or misdescription with respect to those figures when Modification 1 was granted.

UWF's position is that it is appropriate to submit the modification application under Section 4.55 (1) of the EP&A Act as:

- The modifications proposed by Modification 2 are to correct inadvertent and minor errors or misdescriptions in the relevant figures in the Consent following the grant of Modification 1; and
- The development and the impacts of the Ungula Wind Farm development as authorised by the Consent, as modified by Modification 1, are unchanged, such that modification under s 4.55(1A) of the EP&A Act is not required.

UWF has obtained legal advice from Norton Rose Fulbright Australia (NRFA) to confirm that the modifications to the Consent proposed by Modification 2 can be dealt with under s 4.55(1) of the EP&A Act. NRFA's advice confirming that Modification 2 falls within the scope of s 4.55(1) of the EP&A Act is included in Attachment 1 to this letter.

Attachment 2 contains the revised plans which are required to be inserted into the modified Consent if Modification 2 is granted.

Attachment 3 contains those plans annotated with marked-up changes. In summary, the proposed changes to the figures include:

- Reinstatement of the dashed black outline for all lease areas for the Wind Turbine Generators, the external overhead transmission line, the compound, battery and substation blocks;

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- Reverting to yellow colouring only to identify the Crown Roads and Waterways and changing the relevant label in the legend to Crown Roads/Waterways;
- Removal of indication of Crown Land;
- Reinstatement of the orange colouring that identifies Council Road Reserves;
- Changing the colour shading of Lot 11 DP622801 to reflect a change to property ownership that has occurred since the original consent was granted (common colour shading indicates common land ownership); and
- Removing the red batching plant from the Subdivision Plan Sheet 2 so that it is consistent with the Project Layout and Subdivision Plans as approved in the original consent.

We would welcome your feedback as to the next steps in order to progress the assessment and determination of Modification 2. If you would like to discuss Modification 2 or any of the issues raised in this letter, please contact me at the landline numbers listed in the document footer.

Yours sincerely,



Matthew Flower
Senior Project Manager
CWP Renewables

Attachment 1 – Legal advice

12 August 2022

BY EMAIL

Mr Matthew Flower
Senior Project Manager
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Newcastle NSW 2300

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Email
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Your reference:
Our reference:
4025036

Dear Matthew

Uungula Wind Farm – Modification 2 to Development Consent SSD-6687

1 Introduction

- 1.1 You have instructed us that Uungula Wind Farm Pty Ltd (**UWFPL**) intends to submit a second application (**MOD 2**) to modify development consent #SSD-6687 (the **Consent**) for the Uungula Wind Farm (**Wind Farm**).
- 1.2 You have asked us to provide you with advice on whether the modifications to the Consent proposed by MOD 2 could be made under section 4.55(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).
- 1.3 The Consent was granted on 7 May 2021 and last modified on 21 April 2022 (**MOD 1**). MOD 1 involved the removal of four wind turbines and some waterway crossings from the Wind Farm and a reduction in overall access track length and clearing required for the Wind Farm.
- 1.4 UWFPL has now identified that the maps in Appendix 5 of the Consent, as modified by MOD1, contain a small number of drawing errors. MOD 2 is proposed to correct these errors and reinstate these items as set out in the original Consent.

2 Summary of advice

- 2.1 We are of the view that MOD 2 meets the requirement for exercise of the modification power under section 4.55(1) of the EP&A Act.
- 2.2 This is because the changes proposed by MOD 2 are mere changes to errors in the Consent only, which arose from an administrative error in the granting of MOD 1. There is no change in the nature of the development that has been consented to. The grant of consent to MOD 2 will restore the relevant items corrected to reflect the position set out in Appendix 5 of the original Consent.
- 2.3 Accordingly, the application for MOD 2 can appropriately be determined by the consent authority under section 4.55(1) of the EP&A Act.

3 Scope of modification power

- 3.1 Section 4.55(1) of the EP&A Act provides:

APAC-#302525312-v3

4.55 **Modification of consents—generally (cf previous s 96)**

(1) Modifications involving minor error, misdescription or miscalculation A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify a development consent granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5) and (6) and Part 8 do not apply to such a modification.

Note—

Section 380AA of the Mining Act 1992 provides that an application for modification of development consent to mine for coal can only be made by or with the consent of the holder of an authority under that Act in respect of coal and the land concerned.

- 3.2 Section 4.55(1) does not expressly describe the power as enabling the modification of a consent, but instead describes the limited modifications enabled by the exercise of the power as being “to correct a minor error, misdescription or miscalculation”.¹
- 3.3 The power under section 4.55(1) is not subject to the constraints and pre-conditions that apply to other modification powers, such as the power under section 4.55(1A), which requires the consent authority to be satisfied, among other things, that the development as modified is substantially the same for which consent was originally granted.
- 3.4 The only constraint on section 4.55(1) is that the proposed modification must be to correct a minor error, misdescription or miscalculation in the development consent itself.² We note that section 4.55(1) has also been said to be a form of, or similar in purpose and operation to, the “*slip rule*”, commonly available to correct minor errors in Court judgments.³ That is, the power in section 4.55(1) enables a modification of an error in the Consent itself, rather than a modification of the development the subject of the Consent.

4 **Scope of MOD 2**

- 4.1 The modifications to the Consent proposed by MOD 2 are to correct the following errors in Appendix 5 of the Consent:

Error or misdescription	Correction
No outline for proposed subdivision areas	Reinstate the dashed black outline for all lease areas for the Wind Turbine Generators, the external overhead transmission line, the compound, battery and substation blocks
Crown waterways identified as Crown roads	Revert to yellow only for the Crown Roads and Waterways, change label in legend to Crown Roads/Waterways
Crown land included in map legend	Remove Crown land from map legend
Council Road reserve miscoloured	Reinstate the orange colouring as Council Road Reserve
Property schedule colour blocks inconsistent across common ownership	Change property schedule colour blocks to match the common ownership (the Lot 11 of the Zell land is currently a different colour to the rest of the Zell land)

¹ *Intrapac Skennars Head Pty Ltd v Ballina Shire Council* [2021] NSWLEC 83, per Preston CJ at [32].

² *Ibid*, at [35].

³ *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177, per Basten and Payne JJA, at [10].

Red batching plant included in a set location	Remove the red batching plant
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- 4.2 These changes are proposed to correct minor errors and misdescriptions in the maps forming Appendix 5 to the Consent. We are instructed that these errors are a drawing, or clerical mistake only, were unintended and were inadvertently represented at the time of the grant of consent to MOD1. On that basis, the maps in Appendix 5 of the currently modified Consent do not accurately reflect the scope of the development that has been consented to.
- 4.3 As such, these errors fall within the scope of the slip rule as they involve the correction of a clerical mistake or error arising from an accidental slip or omission⁴.
- 4.4 For the purposes of section 4.55(1) of the EP&A Act, the modifications to the Consent proposed by MOD 2 do not modify the development in any way, nor result in any additional impacts or matters that have not already been assessed and determined either by way of the Consent or MOD 1. They can be properly characterised as minor errors or misdescriptions.
- 4.5 Previous case law has confirmed that errors and/or misdescriptions of this nature are within the scope of section 4.55(1).⁵ Case law has also confirmed that where the correction of such errors results in a modification to the development itself, that correction is outside the scope of section 4.55(1).⁶ As set out above, there is no proposed modification to the development itself, merely a restoration of certain items in the maps forming Appendix 5 to the position as set out in the original Consent.
- 4.6 As such, we are of the view that MOD 2 meets the requirements for exercise of the modification power under section 4.55(1) of the EP&A Act and can be dealt with by the consent authority under that section.
- 4.7 If you have any questions regarding this advice or would like to discuss any matters raised in this advice, please contact us.

Yours sincerely



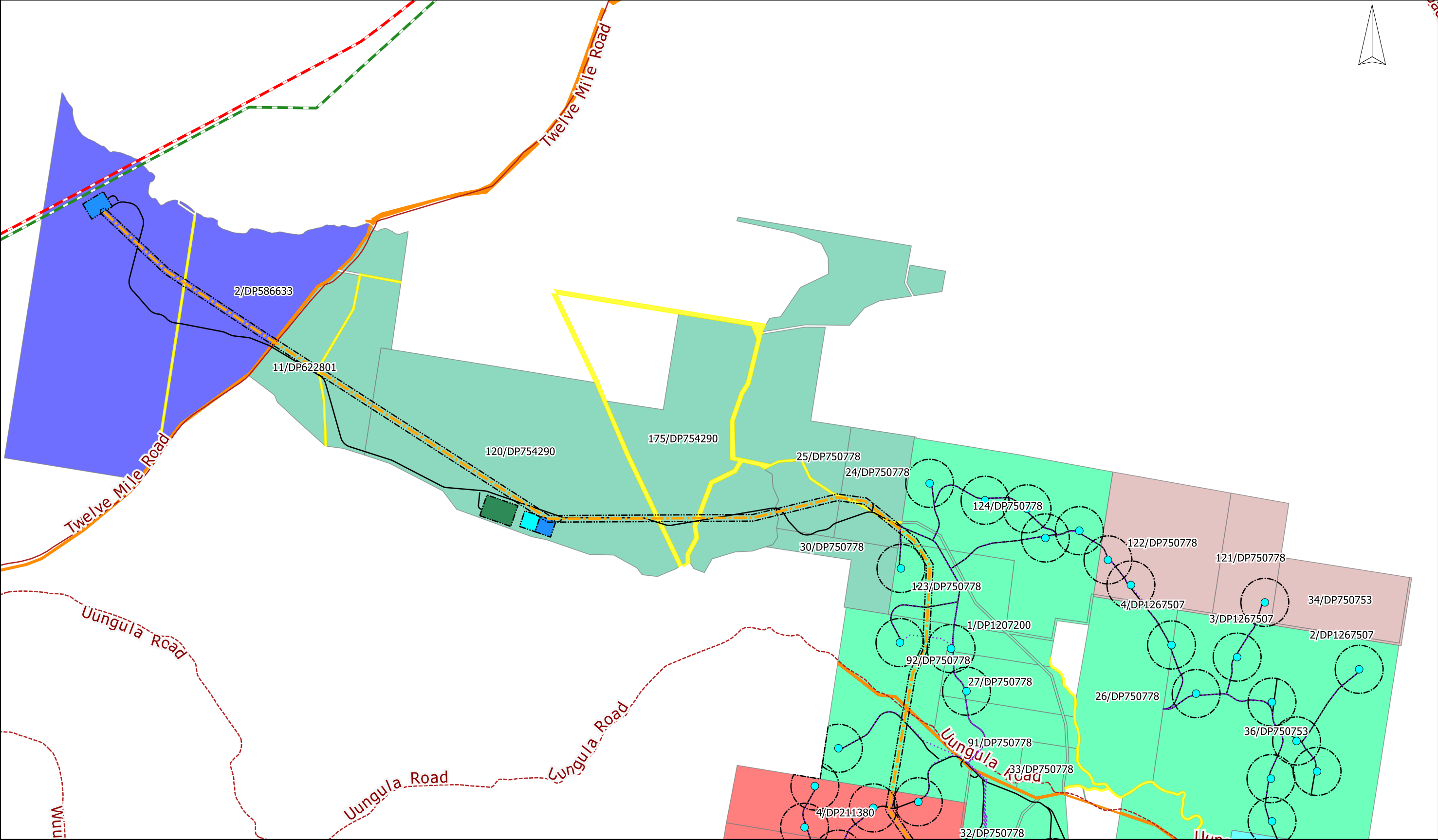
Noni Shannon

⁴ *El Boustani v The Minister administering the Environmental Planning and Assessment Act 1979 (No 2)* [2014] NSWCA 114, per Beazley P, Gleeson JA and Preston CJ of LEC, at [5].

⁵ *King, Marwick, Taylor v Bathurst Regional Council* [2006] NSWLEC 505, per Jagot J, at [52]. For example in *Micro Nest No 1 Pty Ltd on behalf of Micro Nest Ashfield Trust v Inner West Council* [2019] NSWLEC 1320, the Court relied on s 4.55(1) to correct a condition limiting the number of occupants permitted in a boarding house that resulted from a miscalculation and misreading of tables/figures in the development consent; In *The Satellite Group (Ultimo) Pty Ltd v Sydney City Council* [1999] NSWLEC 248 (Satellite Group), the Court relied on s 96(1) (now s 4.55(1)) to correct a minor error in a development consent where there was inconsistency between elevation and plan drawings for a multi-unit development.

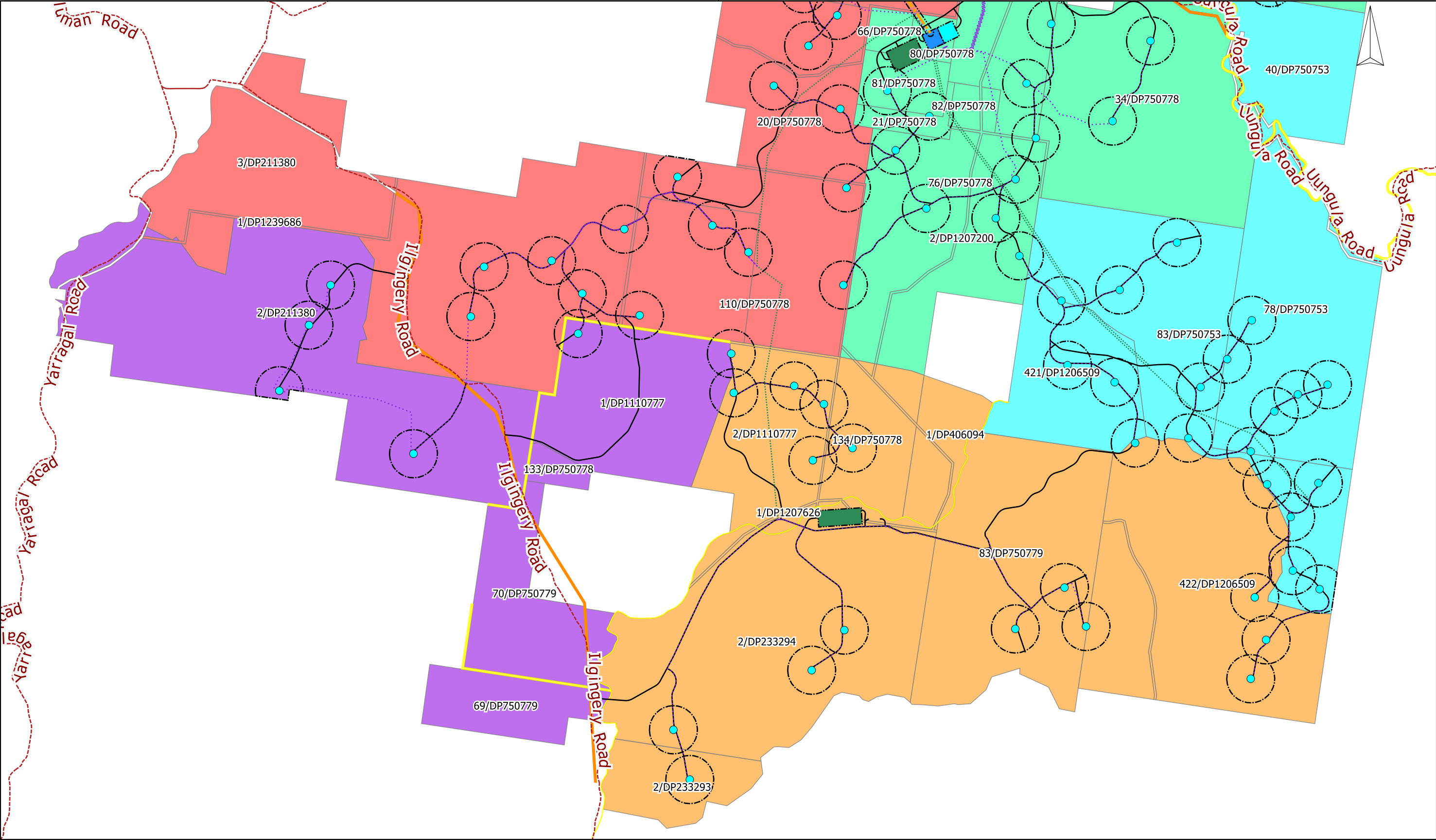
⁶ For example, in *SHMH Properties Australia Pty Ltd v City of Sydney Council* [2018] NSWLEC 66, the Court refused an appeal against Council's refusal of a modification application, that relied on s 96(1), that sought deletion of deferred commencement conditions that required provision of a BASIX certificate on the basis that the proposed deletion of the conditions did not amount to correction of a minor error, misdescription or miscalculation. Preston CJ held the development was BASIX development, hence the deferred commencement condition was not only valid but also critical to regulation of the development.

Attachment 2 – Replacement Appendix 5 Subdivision Plans



LEGEND					COMPANY UUNGULA WIND FARM PTY LTD				
Land: ○ Area to be leased 1/DP123 Lot/DP labels Freehold Land (Various colours) Crown road/waterway Council road corridor Existing Unsealed Road Existing Sealed Road					TITLE Indicative site layout with areas to be leased				
Proposed infrastructure: ● Wind Turbine Generator Wind farm access tracks Site Compound Substation Energy Storage Facility					DATE 15/08/2022				
Existing Powerlines: 132kV 330kV Proposed Powerlines: Underground (medium to low voltage) Overhead (medium to low voltage) Overhead (high voltage)					SCALE 1:40000				
SCALE BAR 0 5 km					DWG NO UWF-065				
DRAWN BY B KRONENBERG					REV C				
CHECKED BY M FLOWER					VER 1				
					SHEET 1 OF 2				
					JOB NO 110247				
					SIZE A3				





<div>LEGEND</div> <div><div><div>Land:</div><div><div><div><div><div></div></div></div><div>Area to be leased</div></div><div><div><div>1/DP123</div></div></div><div>Lot/DP labels</div></div><div><div><div></div></div></div><div>Freehold Land (Various colours)</div></div><div><div><div></div></div></div><div>Crown road/waterway</div></div> <div><div><div></div></div></div> <div>Council road corridor</div>
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Existing Unsealed Road

Existing Sealed Road

Proposed infrastructure:

Wind Turbine Generator

Wind farm access tracks

Site Compound

Substation

Energy Storage Facility

Existing Powerlines:

132kV

330kV

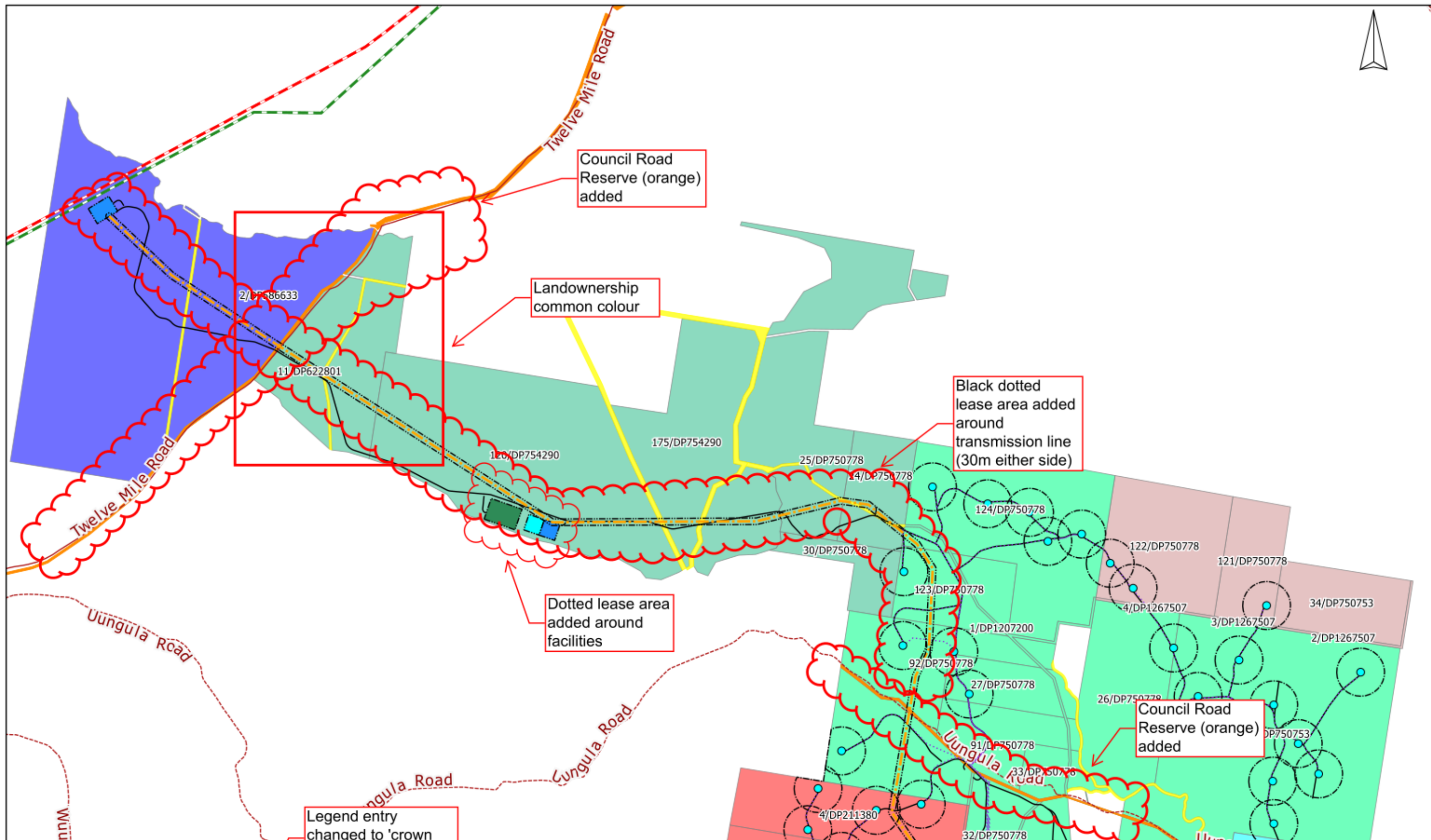
Proposed Powerlines:

Underground (medium to low voltage)

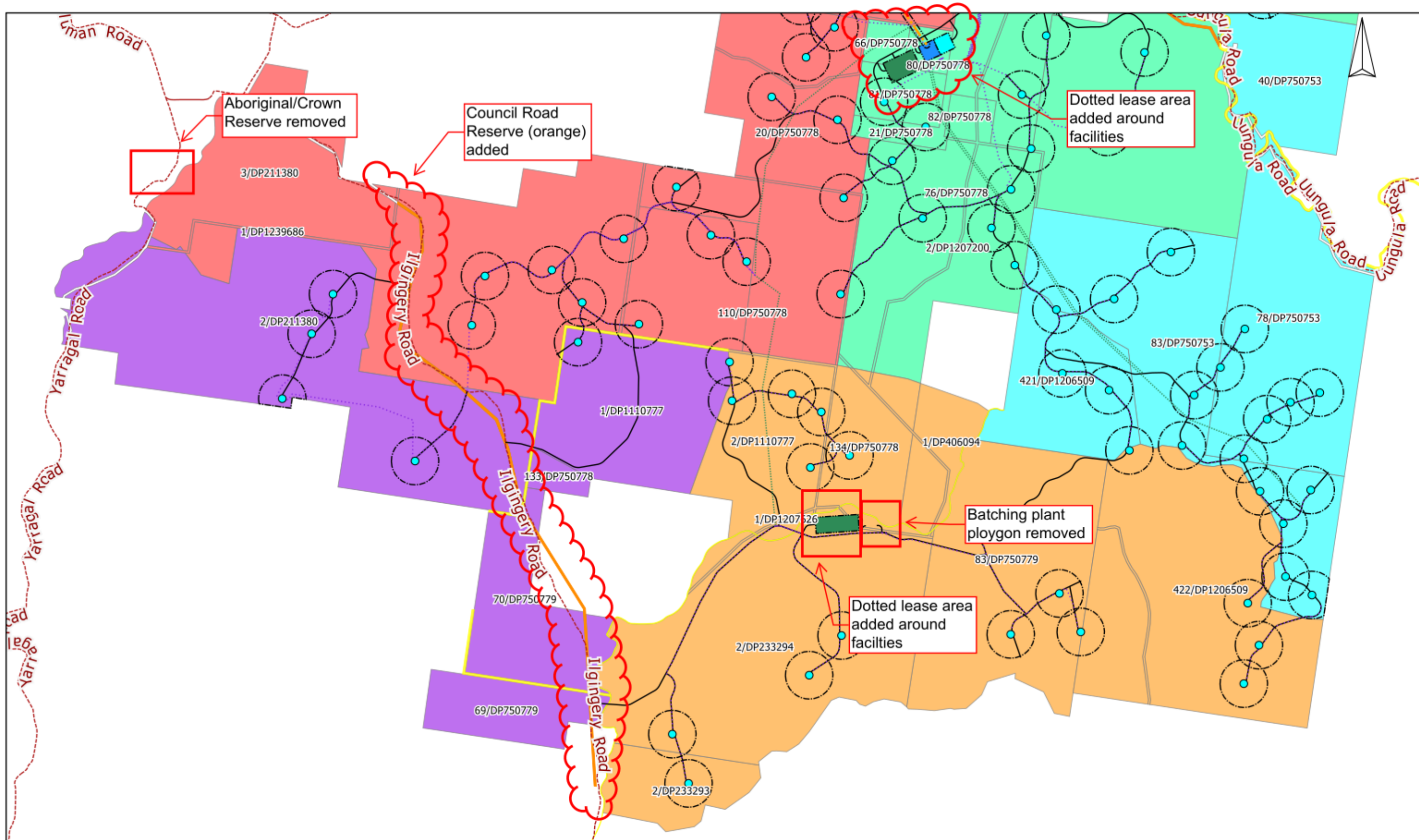
Overhead (medium to low voltage)

Overhead (high voltage)

Attachment 3 – Replacement Appendix 5 Subdivision Plans with
Mark-ups



LEGEND					COMPANY UUNGULA WIND FARM PTY LTD				
Land: <div> <div>Area to be leased</div> <div>Lot/DP labels</div> <div>Freehold Land (Various colours)</div> <div>Crown road/waterway</div> <div>Council road corridor</div> <div>Existing Unsealed Road</div> <div>Existing Sealed Road</div> </div>					Proposed infrastructure: <div> <div>Wind Turbine Generator</div> <div>Wind farm access tracks</div> <div>Site Compound</div> <div>Substation</div> <div>Energy Storage Facility</div> </div>				
Existing Powerlines: <div> <div>132kV</div> <div>330kV</div> </div>					Proposed Powerlines: <div> <div>Underground (medium to low voltage)</div> <div>Overhead (medium to low voltage)</div> <div>Overhead (high voltage)</div> </div>				
SCALE BAR 0 5 km					TITLE Indicative site layout with areas to be leased (edits with mark up)				
DATE 15/08/2022		SCALE 1:40000		DWG NO UWF-065		REV C		VER 1	
DRAWN BY B KRONENBERG		CHECKED BY M FLOWER		SHEET 1 OF 2		JOB NO 110247		SIZE A3	



<div>LEGEND</div> <div><div><div><div><div><div></div><div>1/DP123</div></div><div>Area to be leased</div></div><div><div><div></div><div>Lot/DP labels</div></div></div><div><div><div></div><div>Freehold Land (Various colours)</div></div><div><div><div></div><div>Crown road/waterway</div></div><div><div><div></div><div>Council road corridor</div></div><div><div><div></div><div>Existing Unsealed Road</div></div><div><div><div></div><div>Existing Sealed Road</div></div></div></div></div><div><div><div><div><div></div><div>Wind Turbine Generator</div></div><div><div><div></div><div>Wind farm access tracks</div></div><div><div><div></div><div>Site Compound</div></div><div><div><div></div><div>Substation</div></div><div><div><div></div><div>Energy Storage Facility</div></div></div></div></div><div><div><div><div><div></div><div>132kV</div></div><div><div><div></div><div>330kV</div></div></div><div><div><div><div><div></div><div>Proposed Powerlines:</div></div><div><div><div></div><div>Underground (medium to low voltage)</div></div><div><div><div></div><div>Overhead (medium to low voltage)</div></div><div><div><div></div><div>Overhead (high voltage)</div></div></div></div></div></div></div><div><div>COMPANY</div><div>UUNGULA WIND FARM PTY LTD</div><div><div><div><div></div><div>cwp</div><div>Renewables</div></div></div></div></div><div><div>TITLE</div><div>Indicative site layout with areas to be leased (edits with mark up)</div></div><div><div><div>DATE</div><div>15/08/2022</div></div><div><div>SCALE</div><div>1:40000</div></div><div><div>DWG NO</div><div>UWF-065</div></div><div><div>REV</div><div>C</div></div><div><div>VER</div><div>1</div></div></div><div><div><div>DRAWN BY</div><div>B KRONENBERG</div></div><div><div>CHECKED BY</div><div>M FLOWER</div></div><div><div>SHEET</div><div>2 OF 2</div></div><div><div>JOB NO</div><div>110247</div></div><div><div>SIZE</div><div>A3</div></div></div></div></div><div><div>SCALE BAR</div><div><div><div>0</div><div></div><div>5 km</div></div></div></div></div></div></div></div></div></div></div></div></div></div></div>	
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