

Addendum Report

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**REPORTS THROUGH THE GENERAL MANAGER**

**REPORTS FROM THE DIRECTOR PLANNING AND REGULATION**

**b11 [PR-CM] Development Application DA03/0445.02 for an Amendment to Development Consent DA03/0445 for Use of an Existing Stock & Domestic Water Bore for the Purpose of a Rural Industry Comprising the Harvesting & Bottling of Mineral Water at Lot 1 DP 735658 No 477 Urliup Road, Bilambil**

**SUBMITTED BY: Development Assessment and Compliance**

**FILE REFERENCE: DA03/0445 Pt2**

Valid



**Civic Leadership**

**LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:**

- 1 Civic Leadership
  - 1.2 Improve decision making by engaging stakeholders and taking into account community input
  - 1.2.1 Council will be underpinned by good governance and transparency in its decision making process
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**SUMMARY OF REPORT:**

Council is in receipt of a Section 96 application for an amendment to DA03/0445 for a rural industry, comprising the harvesting and bottling of mineral water off Urliup Road, Urliup.

A report on this application was initially submitted at 5 February 2015 Planning Committee Meeting, at which Council resolved:

*"That Development Application DA03/0445.02 for an Amendment to Development Consent DA03/0445 for Use of an Existing Stock & Domestic Water Bore for the Purpose of a Rural Industry Comprising the Harvesting & Bottling of Mineral Water at Lot 1 DP 735658 No. 477 Urliup Road, Bilambil:*

- 1. Be deferred for consideration of the application to allow the applicant to supply information necessary to complete the assessment and a report be brought back to 9 April 2015 Planning Committee meeting.*
  - 2. Hold a Councillor Workshop on this application.*
  - 3. That the proponent is to comply with the conditions of existing consent and if there is non-compliance that Council officers to act on this."*
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Council further considered this application at an Extraordinary Meeting held on 12 February 2015, at which the previous resolution was updated through the following:

**"RESOLVED** that Part 3 of Minute No. 47 (Planning Committee Minute No. P2) of 5 February 2015 *"under Development Application DA03/0445.02 for an amendment to Development Consent DA03/0445 for use of an existing stock & domestic water bore for the purpose of a rural industry comprising the harvesting & bottling of mineral water at Lot 1 DP 735658 No. 477 Urliup Road, Bilambil:*

.....

3. *That the proponent is to comply with the conditions of existing consent and if there is non-compliance that Council officers to act on this.*

**be rescinded."**

and

**"RESOLVED** that Development Application DA03/0445.02 for an amendment to Development Consent DA03/0445 for use of an existing stock & domestic water bore for the purpose of a rural industry comprising the harvesting & bottling of mineral water at Lot 1 DP 735658 No. 477 Urliup Road, Bilambil:

1. *Be deferred for consideration of the application to allow the applicant to supply information necessary to complete the assessment and a report be brought back to 9 April 2015 Planning Committee meeting.*
2. *Hold a Councillor Workshop on this application.*
3. *That the proponent be allowed a maximum of eight (8) trips per day for delivery movement using the current sized (six (6) metres) delivery vehicles as a temporary measure, up until Council's determination of Section 96 application DA03/0445.02."*

Following the receipt of legal advice, Council further resolved at its 5 March 2015 Planning Committee Meeting:

*"That in respect of Development Application DA03/0445.02 for an Amendment to Development Consent DA03/0445 for Use of an Existing Stock & Domestic Water Bore for the Purpose of a Rural Industry Comprising the Harvesting & Bottling of Mineral Water at Lot 1 DP 735658 No. 477 Urliup Road, Bilambil:*

1. *On 5 February 2015 Council determined in respect of DA03/0445.02 a number of actions including the deferral of the matter to enable the applicant to submit further information and that a Councillors Workshop be held. At an Extraordinary Meeting held on 12 February, 2015 Council subsequently resolved to consider a Rescission Motion in relation to Point 3 of the resolution from the 5 February 2015 meeting, and a subsequent Notice of Motion for a new Point 3 to allow an increase in the number of daily truck movements of the current business.*
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2. *Council notes that the purported approval on 12 February 2015 at Extraordinary Council Meeting Minute Number 54 relating to DA03/0445.02 was beyond power and wishes to correct the public record.*

*DA03/0455.02 remains on foot, as determined by way of Council's original resolution of 5 February 2015 (Planning Committee Minute Number P2).*

3. *Council notifies all relevant parties of its error and clarifies that DA03/0445.02 remains on foot as per Council's determination of 5 February 2015."*

In response to the above actions, Council received correspondence from the applicant on 5 March 2015 seeking to update the current Section 96 application to amend condition 4 of the original consent only in relation to the number of trips per day. The proponent has undertaken to submit a further Section 96 application for amendments to the hours of operation and the size of the trucks to service the development.

The original application (DA03/0445) was approved by Council on 14 August 2003 with Condition 4 restricting the delivery movements to two trips per day.

The latest Section 96 application seeks to modify Condition 4 to allow a maximum of 10 trips per day (5 trips in and 5 trips out of the site).

As a result of this proposed modification, a new condition requiring payment of Section 94 contributions is also recommended for the additional trips.

During the assessment of the original Section 96 application the officers expressed concern that Urliup Road may not have the capacity to safely accommodate a 14m long truck. In the latest application the applicant has confirmed that the development will continue to utilise a 6m truck as originally approved, to service the proposed amendment to increase the number of trips per day from 2 to 10. The officers consider that the use of a 6m truck will not generate any immediate need for the upgrade of parts of Urliup Road, as earlier envisaged.

It should also be noted that the original approved hours of operation will not change as a result of this amendment. The use is to be conducted outside of the regular school bus service hours of operation (Condition 2 of the original consent), and operate within the stated hours of the submitted application, 8.30 to 5.00pm, Monday to Friday (Condition 1 of the original consent).

Based on the information provided in the latest Section 96 application, Council officers consider that the planning merits warrant support of the proposed amendment to the original condition 4.

### **RECOMMENDATION:**

**That Development Application DA03/0445.02 for an amendment to Development Consent DA03/0445 for use of an existing stock & domestic water bore for the purpose of a rural industry comprising the harvesting & bottling of mineral water at Lot 1 DP 735658; No. 477 Urliup Road, Bilambil be approved and the consent be amended as follows:**

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**1. Delete Condition No. 4 and replace with Condition No. 4A which reads as follows:**

4A. Daily delivery movements are restricted to ten (10) trips per day (weekday only).  
[GENNS03]

**2. Insert new Condition 15 as follows:**

**15. Section 94 Contributions**

Payment of the following contributions pursuant to Section 94 of the Act and the relevant Section 94 Plan.

Prior to the commencement of the increased daily operation, all Section 94 Contributions must have been paid in full and the Certifying Authority must have sighted Council's "Contribution Sheet" signed by an authorised officer of Council.

**A CURRENT COPY OF THE CONTRIBUTION FEE SHEET ATTACHED TO THIS CONSENT MUST BE PROVIDED AT THE TIME OF PAYMENT.**

These charges include indexation provided for in the S94 Plan and will remain fixed for a period of 12 months from the date of this consent and thereafter in accordance with the rates applicable in the current version/edition of the relevant Section 94 Plan current at the time of the payment.

A copy of the Section 94 contribution plans may be inspected at the Civic and Cultural Centres, Tumbulgum Road, Murwillumbah and Brett Street, Tweed Heads.

(a) Tweed Road Contribution Plan:	
4.8 Trips @ \$3065 per Trips	\$14,712
(\$2,928 base rate + \$137 indexation)	
S94 Plan No. 4	
Sector12a_4	

[POC0395/PSC0175]

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**REPORT:**

**Applicant:** L Karlos  
**Owner:** Eniflat Pty Ltd  
**Location:** Lot 1 DP 735658 No. 477 Urliup Road, Bilambil  
**Zoning:** 1(a) Rural  
**Cost:** Not Applicable to Section 96

**Background:**

Site Details

The property is described as Lot 1 DP 735658, No. 477 Urliup Road, Bilambil. The land has an area of 14.41 hectares and has a frontage of approximately 110 metres to Urliup Road.

The land is relatively flat adjacent to Urliup Road, rising steeply to the south-east. An existing dwelling is sited on the lower portion of the site and is surrounded by ancillary buildings. Surrounding land uses comprise rural land holdings used primarily for cattle grazing and a small number of residences.

In relation to the existing water bore operation, the applicant has provided a copy of the existing license (30BL185414) from the NSW Office of Water which is valid until 3 June 2018. This license allows the applicant to extract 55 Megalitres of water in any 12 month period commencing 1 July. This will not change as a result of this application.



**Subject Site**

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Urliup Road is located approximately 9km west of the Pacific Motorway at Tweed Heads. To get to Urliup Road a truck would generally travel west along Kennedy Drive, Gollan Drive, Scenic Drive, Bilambil Road and then turn onto Urliup Road.

### History

The original application DA03/0445 was approved on 14 August 2003 which involved the use of an existing stock & domestic water bore for the purpose of a rural industry comprising the harvesting & bottling of mineral water.

As a part of the original approval the following information was received from the applicant in relation to the road use:

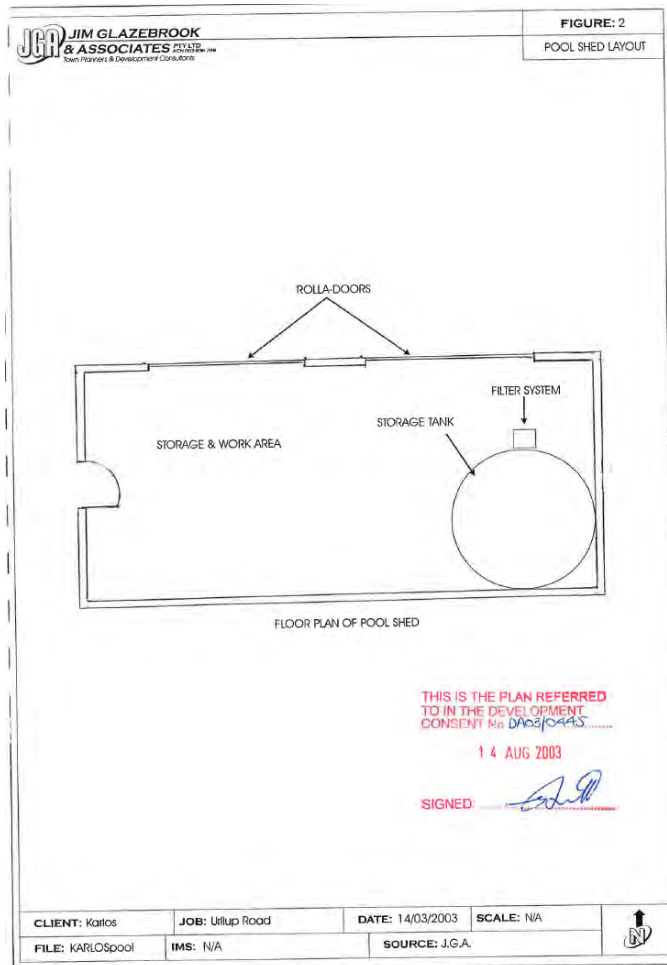
- *The only vehicle involved in deliveries will be the Karlos' family Toyota Landcruiser. I required a two wheel trailer (approximate length 4m) will be attached to this vehicle.*
- *It is expected that deliveries will only occur on a basis of one to two times a week.*
- *Delivery times will be co-ordinated so as to not interfere with the school bus which services Urliup Road.*

As such, the following condition was placed within the consent:

3. *Delivery trucks are limited to six (6) metres in length, unless prior written approval is obtained from Council's Director - Development Services.*

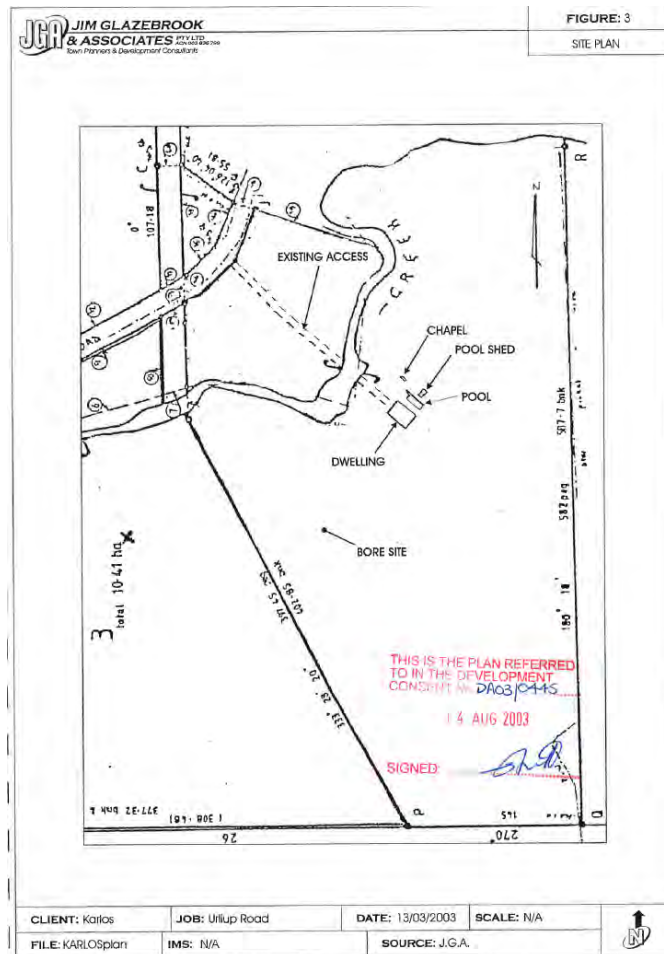
[GENNS02]

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Approved Storage Area

Addendum Report



Approved Site Plan

A previous Section 96 amendment was received on 20 April 2006 to allow the subject premises to receive water via a poly pipe from a bore on the neighbouring property. This application was withdrawn on 24 August 2012 as it was determined that a Section 96 application could not include a new property within an amended consent.

Council's Development Compliance Officer was notified of a possible breach of conditions in relation to the existing approved development on 13 September 2012, in particular, conditions 3 and 4 as shown above. Council's Development Compliance officer sent a letter to the owner on 30 October 2012 in relation to additional water truck movements and the size of the water truck.

An email received on 5 November 2012 outlined that a Section 96 would be submitted in order to rectify the situation.

On 25 December 2012 further complaints were made to Council in regards to the amount of water being extracted by the owner. The complainant was notified that whilst Council was the consent authority for the water extraction industry, it is the New South Wales Department of Primary Industries - Office of Water that is responsible for managing the State's groundwater and surface water resources. It was recommended that the complainant should contact the Office of Water directly to relay their concerns in relation to the over extraction of water.



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The current Section 96 application was submitted on 25 November 2013 with the history available within the Council Planning Committee Meeting which was held on 5 February 2015. As this application has now been amended, the assessment only relates to an increase in the number of trips. This information was referred to Council's Traffic Engineer who advised the following:

*"The original consent allowed the use of a 6m length vehicle without further road upgrades required. Whilst, this Section 96 increases the frequency of the trips it is not considered to have an impact on the capacity of the road."*

Based on the information provided by the applicant and the assessment by Council's Traffic Engineer it is considered that the amended condition should be supported in this instance.

### Previous Council Reports

This application has been the subject of a number of recent Council Meetings as outlined below:

At the Planning Committee Meeting of 5 February 2015 Council resolved:

*"that Development Application DA03/0445.02 for an Amendment to Development Consent DA03/0445 for Use of an Existing Stock & Domestic Water Bore for the Purpose of a Rural Industry Comprising the Harvesting & Bottling of Mineral Water at Lot 1 DP 735658 No. 477 Urliup Road, Bilambil:*

- 1. Be deferred for consideration of the application to allow the applicant to supply information necessary to complete the assessment and a report be brought back to 9 April 2015 Planning Committee meeting.*
- 2. Hold a Councillor Workshop on this application.*
- 3. That the proponent is to comply with the conditions of existing consent and if there is non-compliance that Council officers to act on this."*

An Extraordinary Council Meeting was held on 12 February 2015 where Council further resolved to rescind point 3 above and replace with the following:

- 3. That the proponent be allowed a maximum of eight (8) trips per day for delivery movement using the current sized (six (6) metres) delivery vehicles as a temporary measure, up until Council's determination of Section 96 application DA03/0445.02.*

The officers interpreted this decision to allow the proponent to continue operating on an interim basis, to using a 6 metre length truck (in accordance with Condition No. 3 of the original development consent DA03/0445), conducting truck deliveries along Urliup Road outside of the operations of the regular school bus service (Condition 2 of the original consent), and operating within the stated hours of the submitted application, 8.30 to 5.00pm, Monday to Friday (Condition 1 of the original consent).

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The proponent was advised of Council's decision, and of the interim operating arrangements.

Since the meeting Council has received a number of submissions from local residents alleging that the proponent is operating outside of the approved interim arrangements.

At a Councillors Workshop held on 26 February 2015 in respect of this matter, the officers advised Councillors of the submissions received, and their interpretation of the resolved interim operating arrangements. It was agreed at the Workshop that these arrangements needed to be clarified through a further report to the March Planning Committee Meeting.

At the Council Meeting held on 5 March 2015 Council carried the following recommendation:

**RECOMMENDED** that in respect of Development Application DA03/0445.02 for an Amendment to Development Consent DA03/0445 for Use of an Existing Stock & Domestic Water Bore for the Purpose of a Rural Industry Comprising the Harvesting & Bottling of Mineral Water at Lot 1 DP 735658 No. 477 Uriup Road, Bilambil:

1. On 5 February 2015 Council determined in respect of DA03/0445.02 a number of actions including the deferral of the matter to enable the applicant to submit further information and that a Councillors Workshop be held. At an Extraordinary Meeting held on 12 February, 2015 Council subsequently resolved to consider a Rescission Motion in relation to Point 3 of the resolution from the 5 February 2015 meeting, and a subsequent Notice of Motion for a new Point 3 to allow an increase in the number of daily truck movements of the current business.
2. Council notes that the purported approval on 12 February 2015 at Extraordinary Council Meeting Minute Number 54 relating to DA03/0445.02 was beyond power and wishes to correct the public record.

*DA03/0455.02 remains on foot, as determined by way of Council's original resolution of 5 February 2015 (Planning Committee Minute Number P2).*

3. Council notifies all relevant parties of its error and clarifies that DA03/0445.02 remains on foot as per Council's determination of 5 February 2015.

As a result of this Council Meeting, the applicant amended the application to allow for an increase in the number of daily trips from 2 to 10 with all other issues to be subject to a future Section 96 application.

### Proposed Amendment

The applicant has submitted this Section 96 to amend the conditions to allow the approved 6 metre truck to have 10 trips per day. No works are required within the road reserve to accommodate the increase in number of trips per day.

Currently, condition 4 reads as follows:

4. Daily delivery movements are restricted to two (2) trips per day.

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The applicant has requested the daily movements be increased to 10 trips per day. As such it is considered appropriate to amend the condition to read as follows:

4A. *Daily delivery movements are restricted to ten (10) trips per day (weekday only).*

[GENNS03]

As a result of the additional trips it is considered that the proposal attracts Developer Contributions in the form of Section 94 Plan No. 4 - Tweed Road Contribution Plan. The original application approved 2 trips within Plan No. 4 and it is considered that the increase of trips from 2 to 10 should incur an additional 8 trips.

It should also be noted that the proposed trips are subject to the Employment Generating Development Discount of 40%. It is therefore considered that a total of 4.8 trips are chargeable for the development and the following condition shall be placed in the recommendations:

15. **Section 94 Contributions**

Payment of the following contributions pursuant to Section 94 of the Act and the relevant Section 94 Plan.

Prior to the commencement of the increased daily operation, all Section 94 Contributions must have been paid in full and the Certifying Authority must have sighted Council's "Contribution Sheet" signed by an authorised officer of Council.

**A CURRENT COPY OF THE CONTRIBUTION FEE SHEET ATTACHED TO THIS CONSENT MUST BE PROVIDED AT THE TIME OF PAYMENT.**

These charges include indexation provided for in the S94 Plan and will remain fixed for a period of 12 months from the date of this consent and thereafter in accordance with the rates applicable in the current version/edition of the relevant Section 94 Plan current at the time of the payment.

A copy of the Section 94 contribution plans may be inspected at the Civic and Cultural Centres, Tumbulgum Road, Murwillumbah and Brett Street, Tweed Heads.

(a) Tweed Road Contribution Plan:

4.8 Trips @ \$3065 per Trips \$14,712

(\$2,928 base rate + \$137 indexation)

S94 Plan No. 4

Sector12a\_4

[POC0395/PSC0175]

Additionally, Clause 2.9 of Plan No. 4 outlines that Council may consider an application to defer the contributions where:

(i) *compliance with the provisions relating to when contributions are payable is unreasonable or unnecessary in the circumstances of the case; and*

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- (ii) *non-compliance with the terms of this clause will not prejudice the timing or the manner of the provision of road facilities for which the contribution was required as outlined in the Works Schedule; and*
- (iii) *where the applicant intends to make a contribution by way of a planning agreement, works-in-kind or land dedication in lieu of a cash contribution and council and the applicant have a legally binding agreement for the provision of the works or land dedication,*
- (iv) *there are circumstances justifying the deferred or periodic payment of the contribution.*

Council officers do not support a deferred or periodic payment of the contributions as it is considered that the infrastructure charges are not unreasonable or unnecessary in the proposed development.

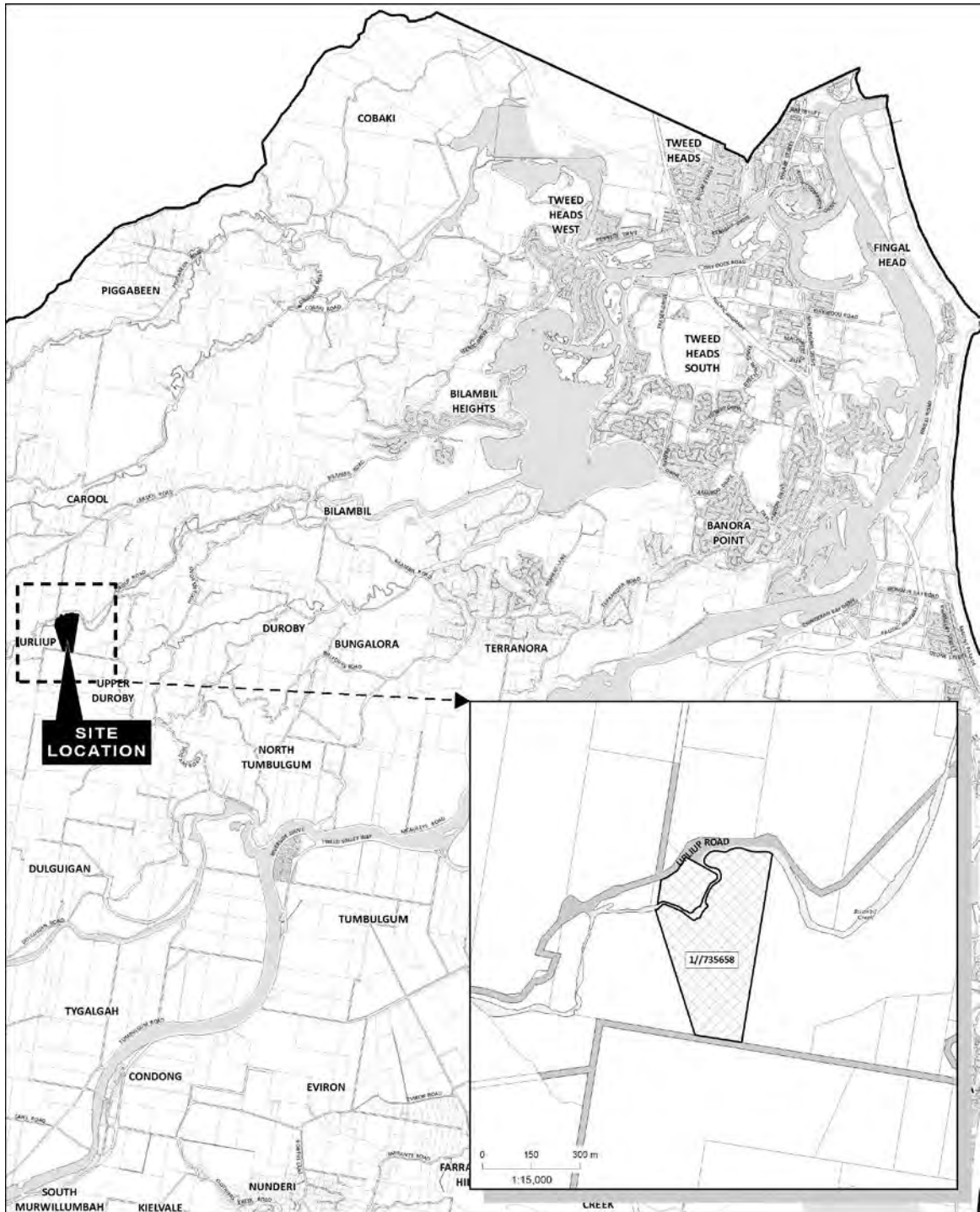
The use of the deferred or periodic payment of contributions is essentially to assist start up businesses, who are contending with high establishment costs. The subject development already has established the infrastructure required and has contracts in place to service the development. It is therefore considered that there is no justification for deferral under the clause.

Water Bore License

Council is not the governing authority for the water extraction portion of the operation however, the NSW Office of Water License (30BL185414) results in 55,000,000 litres per year or 1,057,692 litres per week. A number of complaints received in relation to the amount of water identified approximately 400,000 to 500,000 per week which is under the licensed amount. There are no issues with the water extraction portion of the operation.

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SITE DIAGRAM:



**Locality Plan**  
 Lot 1 DP 735658  
 No. 477 Urluip Road, Urluip

Disclaimer: While every care is taken to ensure the accuracy of this plan, Tweed Shire Council makes no representations or warranties expressed or implied, statutory or otherwise, about its accuracy, reliability, completeness or suitability for any particular purpose and disclaims all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages (including indirect or consequential damage) and costs which may be incurred as a result of data being inaccurate in any way and for any reason. This information is supplied for the general guidance and it is to be considered indicative and diagrammatic only. It should not be used for any other purposes and prior to any decisions a "Dig before you Dig" enquiry must be made by calling 1300. The information contained on this document remains valid for 30 days only from the date of supply.

Cadastral 09/12/2014  
 Land and Property Information (LPI) & Tweed Shire Council.  
 Boundaries shown should be considered approximate only.

Map Projection: Universal Transverse Mercator  
 Horizontal Datum: Geodetic Datum of Australia 1994  
 Vertical Datum: Mean Sea Level  
 Map Grid of Australia, Zone 58

Scale: 1:15,000 @ A4 Portrait  
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**TWEED SHIRE COUNCIL**

Scale 1:15,000 - 09/12/2014

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### General Permissibility & Applicable Planning Legislation

DA03/0445 was approved under Tweed Local Environmental Plan 2000 (LEP 2000) as a rural industry. The land at that time was zoned 1(a) where the rural industry was permissible with development consent.

The current Section 96 Application was lodged on 29 November 2013 (while LEP 2000 was the applicable planning instrument), yet the application is being determined in February 2015 while LEP 2014 is the applicable planning instrument.

Clause 1.8A of the Tweed LEP 2014 does have a savings provision relating to development applications which states:

*"If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced."*

Given the Tweed LEP 2014 has been gazetted (April 2014) and commenced before determination of the modification application it would not be saved by the savings provision as the savings provision only saves Development Applications and not modification applications pursuant to Section 96. Therefore the modification application will need to be dealt with according to the law as it applies at the time of determination.

The current law applicable to the Section 96 is Tweed LEP 2014. This LEP has zoned the land RU2 - Rural Landscape which rural industries are permitted with consent. Rural Industries however have changed in definition and do not include water extraction. A rural industry is now defined as follows:

**rural industry** means the handling, treating, production, processing, storage or packing of animal or plant agricultural products for commercial purposes, and includes any of the following:

- (a) agricultural produce industries,
- (b) livestock processing industries,
- (c) composting facilities and works (including the production of mushroom substrate),
- (d) sawmill or log processing works,
- (e) stock and sale yards,
- (f) the regular servicing or repairing of plant or equipment used for the purposes of a rural enterprise.

Within the Tweed Local Environmental Plan 2014 the use could be defined as either a commercial premise or extractive industry. A commercial premise is prohibited within the RU2 zone and is defined as follows:

**commercial premises** means any of the following:

- (a) business premises,
- (b) office premises,
- (c) retail premises.

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An extractive industry is permitted with consent within the RU2 zone although the definition may be open to interpretation as to whether water extraction could be considered an extractive industry. Extractive Industry is defined as follows:

***extractive industry*** means the winning or removal of extractive materials (otherwise than from a mine) by methods such as excavating, dredging, tunnelling or quarrying, including the storing, stockpiling or processing of extractive materials by methods such as recycling, washing, crushing, sawing or separating, but does not include turf farming.

Regardless of the current definition of the use, it is considered that Section 109B of the Environmental Planning & Assessment Act 1979 applies and states that:

- (1) Nothing in an environmental planning instrument prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.
- (2) This section:
  - (a) applies to consents lawfully granted before or after the commencement of this Act, and
  - (b) does not prevent the lapsing, revocation or modification, in accordance with this Act, of a consent, and
  - (c) has effect despite anything to the contrary in section 107 or 109.
- (3) This section is taken to have commenced on the commencement of this Act.

So long as there is an existing development consent in force s109B of the EP&A Act authorises the carrying out of the development in accordance with that consent. The subject Section 96 Application would be amenable to modification in accordance with the Act under Section 96 by operation of section 109B(2)(b).

The Council (or Court on appeal) can only grant consent to the modification if certain matters are met, the main matter being satisfaction under s96(1A)(b) that:

*it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all)*

The relevant satisfaction required by s96(1A)(b) to be found to exist in order that the modification power be available involves an ultimate finding of fact based upon the primary facts found. That is, *Council must be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted.*

The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the

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comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted).

The following assessment undertakes this test and concludes the proposed Section 96 will result in a development which is considered to be "essentially or materially" the same as the (currently) approved development. The information provided by the applicant is now adequate to undertake a full and proper assessment.

**CONSIDERATIONS UNDER SECTION 96 & 79C OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:**

Section 96 (Modification of consents-generally) 1A

**“(1A) Modifications involving minimal environmental impact**

*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 the consent if:*

*(a) it is satisfied that the proposed modification is of minimal environmental impact, and*

The proposed development will have minimal environmental impact. The amendment relates to increasing the number of daily trips from 2 daily trips to 10 daily trips with no additional works required to cater for the proposal. The NSW Office of Water License (30BL185414) results in 55,000,000 litres per year or 1,057,692 litres per week. There are no issues with the water extraction portion of the operation as the license will not be amended as a result of the increase in trips.

As there are no physical changes to the development as originally approved there will be minimal impact upon the environment as a result. It is therefore considered that the proposed amendment should be granted in this instance.

*(b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*

The proposed development is considered to be substantially the same development. The use will not change as a result of this application. The original application was approved as a Rural Industry and the development will continue to operate as a Rural Industry. The amendment relates to an increase in the number of daily trips from 2 trips per day to 10 trips per day. Council's Traffic Engineer has indicated that no additional road works would be

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required to accommodate the additional daily trips. It is therefore considered that the minor increase in daily trips is considered to be substantially the same development as originally approved.

- (c) *it has notified the application in accordance with:*
  - (i) *the regulations, if the regulations so require, or*
  - (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
- (d) *it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*

*Subsections (1), (2) and (5) do not apply to such a modification.*

The Section 96 Application was not required to be notified. However, due to compliance issues a number of submissions were received for the original proposed amendments. As the proposal was amended which resulted in the applicant only requesting Condition 4 be amended to increase the number of trips from 2 to 10 it was considered that the proposal would not require notification. Previous submissions were addressed in the Council Planning Committee Meeting Report on 5 February 2015. There was concern from the residents in regards to the number of trips requested. This has been addressed further below.

- (3) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 79C (1) as are of relevance to the development the subject of the application.*
- (4) *The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified."*

### Section 79C(1) (Evaluation)

- (1) *Matters for consideration-general in determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:*
  - (a) *the provisions of:*
    - (i) *any environmental planning instrument, and*
    - (ii) *any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority (unless the Director-General has notified the consent authority that*

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*the making of the draft instrument has been deferred indefinitely or has not been approved), and*

*(iii) any development control plan, and*

*(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and*

*(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), that apply to the land to which the development application relates,*

Comment:

**Tweed Local Environmental Plan 2014**

Clause 1.2 – Aims of the Plan

The aims of this plan as set out under Section 1.2 of this plan are as follows:

- (1) This Plan aims to make local environmental planning provisions for land in Tweed in accordance with the relevant standard environmental planning instrument under section 33A of the Act.*
- (2) The particular aims of this Plan are as follows:*
  - (a) to give effect to the desired outcomes, strategic principles, policies and actions contained in the Council's adopted strategic planning documents, including, but not limited to, consistency with local indigenous cultural values, and the national and international significance of the Tweed Caldera,*
  - (b) to encourage a sustainable, local economy, small business, employment, agriculture, affordable housing, recreational, arts, social, cultural, tourism and sustainable industry opportunities appropriate to Tweed Shire,*
  - (c) to promote the responsible sustainable management and conservation of Tweed's natural and environmentally sensitive areas and waterways, visual amenity and scenic routes, the built environment, and cultural heritage,*
  - (d) to promote development that is consistent with the principles of ecologically sustainable development and to implement appropriate action on climate change,*
  - (e) to promote building design which considers food security, water conservation, energy efficiency and waste reduction,*
  - (f) to promote the sustainable use of natural resources and facilitate the transition from fossil fuels to renewable energy,*

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- (g) *to conserve or enhance the biological diversity, scenic quality, geological and ecological integrity of the Tweed,*
- (h) *to promote the management and appropriate use of land that is contiguous to or interdependent on land declared a World Heritage site under the Convention Concerning the Protection of World Cultural and Natural Heritage, and to protect or enhance the environmental significance of that land,*
- (i) *to conserve or enhance areas of defined high ecological value,*
- (j) *to provide special protection and suitable habitat for the recovery of the Tweed coastal Koala.*

The proposed amendment of the approved rural industry by increasing the number of trips per day is not an opportunity to revisit the entire application but rather only consider the amendment being sought. Given the application before Council does not seek to extract additional material rather just increase the number of daily trips applicable, it is considered that this portion of the development is consistent with the aims of the Plan.

It is therefore considered that the proposed development is consistent with the aims of the Tweed LEP 2014. As such the proposed amendment to the original development is recommended for approval in this instance.

### Clause 2.3 – Zone objectives and Land use table

The RU2 Rural Landscape zone objectives are:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To maintain the rural landscape character of the land.*
- *To provide for a range of compatible land uses, including extensive agriculture.*
- *To provide for a range of tourist and visitor accommodation-based land uses, including agri-tourism, eco-tourism and any other like tourism that is linked to an environmental, agricultural or rural industry use of the land.*

As outlined above, the definition of rural industry does not include water extraction within the Tweed LEP 2014. It was considered that the use could be defined as either a commercial premise which is prohibited or an extractive industry which is permitted with consent. Legal advice may be required to be sought for any future applications.

Despite the zone objectives his application must be assessed under Section 109B of the Environmental Planning & Assessment Act 1979 applies and states that:

- (1) *Nothing in an environmental planning instrument prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.*
  - (2) *This section:*
    - (a) *applies to consents lawfully granted before or after the commencement of this Act, and*
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- (b) *does not prevent the lapsing, revocation or modification, in accordance with this Act, of a consent, and*
- (c) *has effect despite anything to the contrary in section 107 or 109.*

(3) *This section is taken to have commenced on the commencement of this Act.*

So long as there is an existing development consent in force s109B of the EP&A Act authorises the carrying out of the development in accordance with that consent. The subject Section 96 Application would be amenable to modification in accordance with Act under Section 96 by operation of section 109B(2)(b).

### Clause 7.1 - Acid sulfate soils

The subject site is mapped as a Class 5 Acid Sulfate Soils area.

The proposed S96 Application does not seek approval for any additional works that would be within 500 metres of adjacent Class 1, 2, 3 or 4 land that is below 5 metres Australian Height Datum and by which the water table is likely to be lowered below 1 metre Australian Height Datum on adjacent Class 1, 2, 3 or 4 land.

Clause 7.1 is considered satisfied.

### Tweed Development Control Plan

#### A2-Site Access and Parking Code

The proposed development was referred to Council's Traffic Engineer in relation to the access. The Traffic Engineer provided:

*The original consent allowed the use of a 6m length vehicle without further road upgrades required. Whilst, this Section 96 increases the frequency of the trips it is not considered to have an impact on the capacity of the road.*

It is therefore considered that the proposed development will not impact upon site access or parking. This Section of the DCP is considered to be complied with.

#### A11-Public Notification of Development Proposals

The proposed S96 application was not required to be advertised in accordance with this section of the Development Control Plan. However, submissions have been received in relation to the proposed amendment. These submissions are addressed later in this report.

### State Environmental Planning Policies

There are no State Environmental Planning Policies which apply to the subject proposal.

### Minimal Environmental Impact

The above 79C Assessment demonstrated that the proposed modification does not result in a negative environmental impact.

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Concerns were raised in relation to the water extraction currently taking place on the site. It should be noted that Council is not the governing authority for the water extraction portion of the operation. The NSW Office of Water is the relevant authority who have granted a license (30BL185414) to the owner of the land for the extraction of 55 Megalitres per year which is valid until 3 June 2018. The proposal complies with this license.

**Substantially the Same Development**

It was considered that the amendment can be supported in this instance as there are no works required for the proposed amendment. The use will continue to be for a Rural Industry with an increase in the number of daily trips to cater for the proposal. Council's Traffic Engineer has advised that there are no significant impacts upon traffic in the locality as a result of the amendment. It is therefore considered that the proposed amendment can be classified as being substantially the same development in this instance. The proposal is therefore recommended for approval.

**Submissions**

The S96 Application was not required to be notified. However, due to compliance issues a number of submissions have been received throughout the process. The history of compliance which has been undertaken is located within the summary of the Council Planning Committee Meeting report from 5 February 2015. As the proposed development has been amended it is considered that the following submission is the only applicable submission in relation to the proposal.

The issue raised in the submissions are detailed as follows:

<b>Issue</b>	<b>Assessment</b>
<p><u>Number of trips</u></p> <p>Numerous complaints have been received in relation to the number of trips per day being over the allowed 2 trips per day from the original consent.</p>	<p>The proposed increase in traffic movements is not considered to be of concern as Urliup Road carries very low traffic volumes and the proposed movements are not significant. It is therefore considered that the proposed amendment does not warrant refusal in this instance.</p>

**OPTIONS:**

That Council:

1. Approves the Section 96 application in accordance with the recommendations within this report; or
2. Refuses the Section 96 application with reasons.

The Officers recommend Option 1.

**CONCLUSION:**

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The subject application seeks the amendment of an existing approved rural industry. The proposed amendment involves increasing the number of daily trips from 2 to 10 trips per day. It is considered that the proposed amendment to the original consent is minor in nature and should be supported in this instance. The above assessment is considered to demonstrate that the proposal is generally acceptable with respect to the appropriate legislative considerations.

As such, the proposed development is recommended for approval in this instance.

**COUNCIL IMPLICATIONS:**

**a. Policy:**

Corporate Policy Not Applicable

**b. Budget/Long Term Financial Plan:**

Not Applicable.

**c. Legal:**

Not Applicable.

**d. Communication/Engagement:**

Not Applicable.

**UNDER SEPARATE COVER/FURTHER INFORMATION:**

Nil.

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