

TITLE: [PR-PC] Development Application DA03/0445.04 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

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

SUMMARY OF REPORT:

Council is in receipt of a Section 96 modification application seeking an amendment to DA03/0445 which granted approval to a rural industry, comprising the harvesting & bottling of mineral water off Urliup Road, Urliup.

The original approval for DA03/0445 was issued in August 2003 with conditions imposed that related to deliveries not being permitted during school bus hours of operation on Urliup Road, trucks being no greater than 6m in length, and delivery movements being restricted to two trips per day. The business appeared to operate without incident until 2012 when Council started receiving complaints that large articulated vehicles were being used for water deliveries from the subject site more frequently than authorised by the consent.

Subsequently Council received the last S96 Modification (DA03/0445.02) on 25 November 2013 which sought to modify two conditions of consent to allow a delivery truck size of 14 metres, and a maximum of 12 trips per day (6 trips in and 6 trips out of the site). The use of the articulated trucks on Urliup Road raised great concern as Urliup Road is restricted in its configuration. Subsequently that modification was originally recommended for refusal (5 February 2015 Planning Committee Meeting). However throughout the assessment of DA03/0445.02 the applicant amended their application to utilise a 6m truck as originally approved but to increase the number of trips per day from 2 to 10. This amended application was recommended for approval and was ultimately approved by Council at its meeting held 19 March 2015 for a 12 month trial period from 20 March 2015 to 20 March 2016.

That trial period (approved within DA03/0445.02) has now lapsed and the application that Council is being asked to consider in this report is DA03/0445.04 seeks approval to:

- Permit operations between the times of 6am and 6pm seven days per week (which requires modification of conditions 2A, and 4A)

- Permit a maximum of 6 deliveries (i.e. 12 trips) per day (which requires modification to condition 4A)
- Delete the trial period restriction relating to the number of deliveries per day (which requires modification to condition 4A)

There are two other related applications also currently before Council (as detailed below), however these will be reported to Council at a later date when additional information has been provided from the applicant to enable a proper assessment of the applications to be made.

1. DA03/0445.03 seeks to increase the size of the trucks from 6m to 14m.
2. DA15/0664 seeks approval to undertake vegetation removal works to enable road improvement works to Urliup Road to accommodate the proposed 14m articulated vehicles as per DA03/0445.03.

To reiterate DA03/0445.03 and DA15/0664 are not being assessed within this report and will be reported back to Council under a separate assessment at a future date.

DA03/0445.04 the modification the subject of this assessment has attracted 32 objection letters, however, some of the objection letters raise objections to matters raised in the other two applications. A breakdown of the reasons for objection is included in this report.

A S96 Modification is not an opportunity to revisit the assessment of the entire application. Rather it needs to be a focussed review of the modifications being sought by the applicant. In this regard the applicant is requesting two principal changes to the consent:

- Increased hours of operation and
- Increased truck deliveries

Council needs to review these proposed modifications in the context of the S961(A) legislation which requires Council to be satisfied that the amendments being sought are of minimal environmental impact, and that the modifications are substantially the same development as the development for which the consent was originally granted. Furthermore the consent authority must consider the submissions made concerning the proposed modifications and must consider any 79C Matter for Consideration (legislation or merit consideration) that is of relevance to the proposed modification.

The NSW Land & Environment Court has also provided much advice on what matters can be determined within the scope of S96 Modifications and the following key principles apply:

- The comparison is undertaken at a general level rather than between detail;
- The question is whether the development as a whole is essentially or materially similar to the originally approved development;
- If the impacts of the modifications are minor, the modified development is more likely to be essentially or materially the same development;
- It is relevant to consider the magnitude of any physical changes to the development and any changes to the use of the land.

The following report discussing the above legislative and threshold tests and concludes that:

- The proposal remains for a rural industry, comprising the harvesting & bottling of mineral water.

- The modification maintains the same business model with only modified hours and modified delivery numbers.
- The proposed modification will not alter the statutory or policy compliance of the proposal, create any other material difference and does not give rise to any significant environmental impacts.
- The proposed modification will make no physical change to the development or change to the land on which the consent is to operate from.

For these reasons the proposed modification (DA03/0445.04) to increase the hours of operation to 6am to 6pm seven days a week and increase the number of deliveries per day to 6 deliveries (12 truck movements a day) is recommended for approval.

The application is being reported to Council as a result of the previous modification (DA03/0445.02) being determined by Council and given the number of objections received it was considered in the public interest to have the matter determined by Council.

RECOMMENDATION:

That Development Application DA03/0445.04 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 amended as follows:

- 1. Delete Condition 2A and replace it with Condition 2B which reads as follows:**

2B. The hours of operation and deliveries are:

- **Monday to Friday 7.00am to 6.00pm.**
- **Saturday and Sunday 8.00am – 6.00pm**

[GENNS01]

- 2. Delete Condition 4A and replace it with Condition 4B which reads as follows:**

4B. Daily delivery movements are restricted to 12 trips per day.

[GENNS03]

- 3. Delete Condition 15 and replace it with Condition 15A which reads as follows:**

15A. 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 the original 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) DA03/0445.02 Paid

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

(b) DA03/0445.04 (to be paid prior to operating in accordance with this modification)

Tweed Road Contribution Plan:	
1.2 Trips @ \$3080 per Trips	\$3,696
(\$2,928 base rate + \$152 indexation)	
S94 Plan No. 4	
Sector12a_4	

[POC0395/PSC0175]

REPORT:

Applicant: L Karlos
Owner: Eniflat Pty Ltd
Location: Lot 1 DP 735658; No. 477 Urliup Road, Bilambil
Zoning: RU2 Rural Landscape
Est Cost: N/A S96 (1A) Modification

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 existing license (30BL185414) from the NSW Office of Water is valid until 3 June 2018. This license allows the applicant to extract 60 Megalitres of water in any 12 month period commencing 1 July. This will not change as a result of this application.



Subject Site

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, Golan Drive, Scenic Drive, Bilambil Road and then turn onto Urliup Road.

Urliup Road is a rural low volume road with varying seal widths, several creek crossings, tight radius curves and a 100km/h posted speed limit.

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. It 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 conditions were placed within the consent:

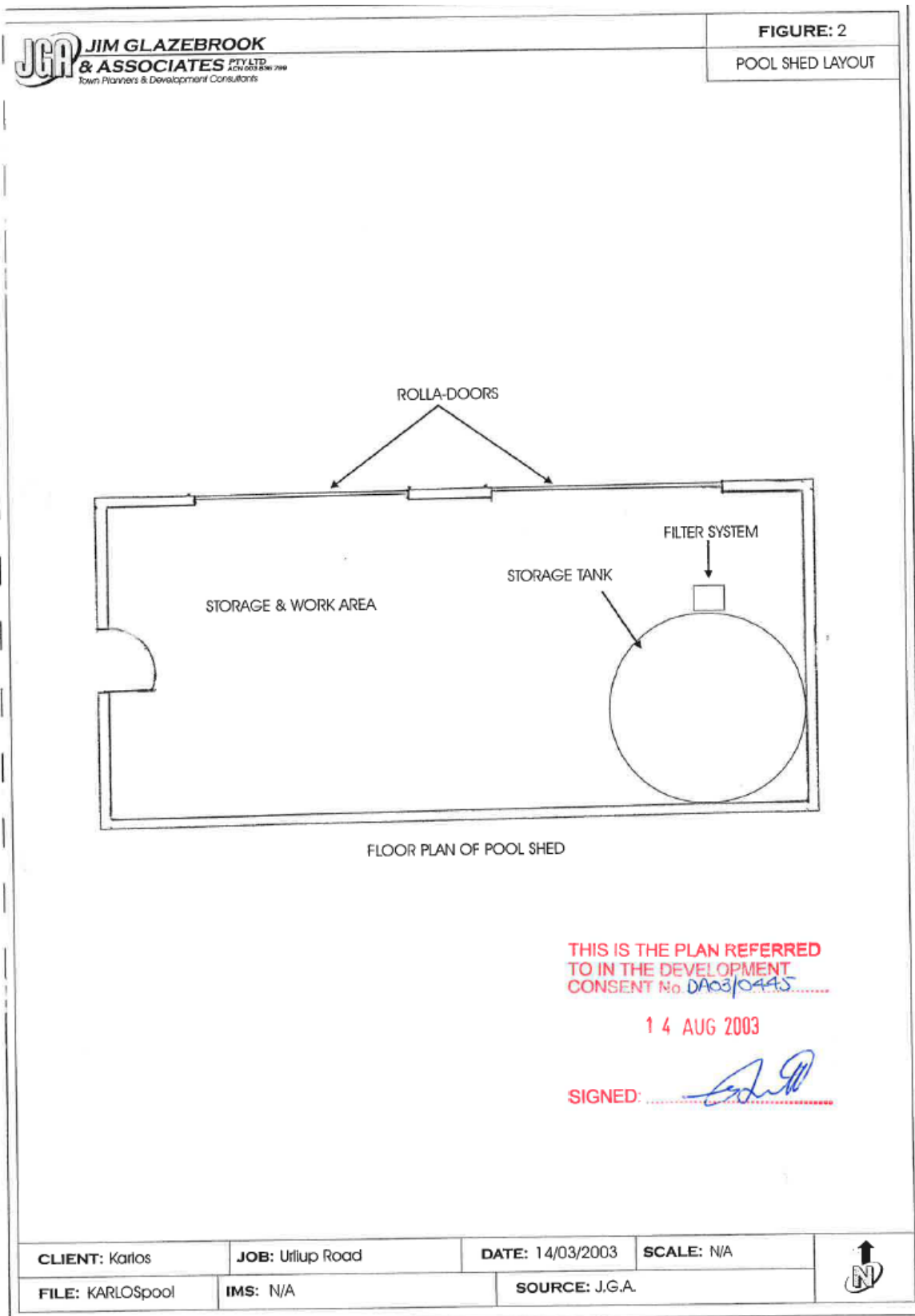
3. *Delivery trucks are limited to six (6) metres in length, unless prior written approval is obtained from Council's Director - Development Services.*

[GENNS02]

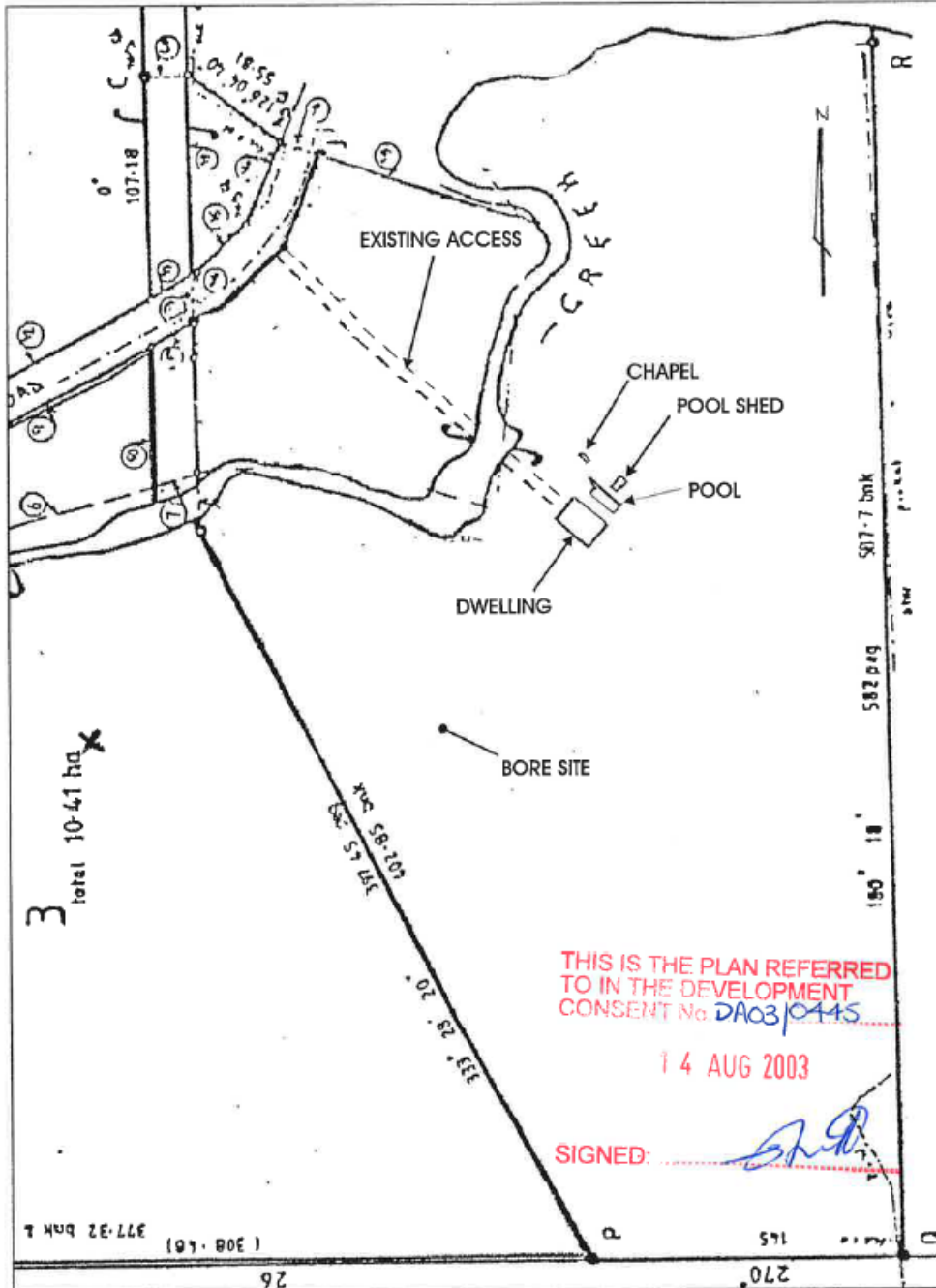
4. *Daily delivery movements are restricted to two (2) trips per day.*

[GENNS03]

The original plans approved under DA03/0445 are as follows:



Approved Storage Area



CLIENT: Karlos	JOB: Urilup Road	DATE: 13/03/2003	SCALE: N/A	
FILE: KARLOSplan	IMS: N/A	SOURCE: J.G.A.		

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.

Subsequently Council received the previous S96 Modification (DA03/0445.02) on 25 November 2013 which sought to modify two conditions of consent to allow a delivery truck size of 14 metres, and a maximum of 12 trips per day (6 trips in and 6 trips out of the site).

The use of the articulated trucks on Urliup Road was of great concern as Urliup Road is restricted in its configuration. Subsequently that modification was originally recommended for refusal (5 February 2015 Planning Committee Meeting). However throughout the assessment of DA03/0445.02 the applicant amended their application to utilise a 6m truck as originally approved but to increase the number of trips per day from 2 to 10. This amended application was recommended for approval and was ultimately approved at the Council meeting held 19 March 2015 (for a 12 month trial period from 20 March 2015 to 20 March 2016).

History of Compliance

During the operation of the existing use a number of residents have raised concerns in relation to a number of items. These objections outlined have been from various forms of communication being email, telephone and letters. Some telephone conversations may not have been recorded other than notifying Council's Compliance Officer. The main points of objections and the action taken have been outlined below:

Date	Complainant	TSC Action
26/04/2012	N/A	DA12/0167 was submitted 26/4/2012 for 447 and 483 Urliup Road for water extraction
14/05/2012	Resident	Sent to applicant in information request to address 12/07/2012
02/07/2012	Resident	Sent to applicant in information request to address 12/07/2012
20/07/2012	Resident	Sent to applicant in information request to address 12/07/2012
31/07/2012	Resident	Sent to applicant in information request to address 12/07/2012

Date	Complainant	TSC Action
30/10/2012	N/A	Breach of Conditions letter sent to owner
5/11/2012	N/A	Email received advising S96 would be submitted
8/11/2012	N/A	DA12/0167 withdrawn from Council
25/12/2012	Resident	Email received relating to water extraction amount
16/01/2013	N/A	Council responded to complainant advising that the New South Wales Department of Primary Industries - Office of Water is responsible for managing the State's groundwater and surface water resources. It was advised that they contact the Office of Water directly to relay their concerns in relation to the over extraction of water.
28/11/2013	Resident	Complaint received via telephone call in regards to truck movements
29/11/2013	N/A	Council sent letter to owner advising that a Penalty Infringement Notice (PIN) would be issued unless measures were taken to resolve the issues. However, Council's Compliance Officer was advised that the application had been submitted on 25/11/2013 to try to rectify the situation.
4/07/2014	Resident	Complaint received via telephone call in regards to truck numbers
7/07/2014	N/A	Council sent warning letter to owner advising that a Penalty Infringement Notice (PIN) would be issued if operation continued to breach conditions.
8/10/2014	Resident	Complaint received via telephone call in regards to truck numbers continuing to operate
8/10/2014	N/A	Penalty Infringement Notice Issued (\$1500) following complaints about the size of trucks and numbers of trips.
16/10/2014	Resident	Complaint received via telephone call in regards to size of truck and number of trips
10/11/2014	Resident	Complaint received in relation to water extraction and truck size
13/11/2014	N/A	Development Assessment Officer phoned Julie Kabealo in regards to S96 submitted. Advised that submissions were being taken into consideration when assessing the application. Application will go to February 2015 Planning Committee Meeting. Also advised in regards to Community Access Meeting.
26/11/2014	Resident	Complaint received in relation to size of truck and water extraction.
2/12/2014	Resident	Complaint received via telephone call in regards to truck numbers continuing to operate.
5/12/2014	N/A	Compliance Officer emailed response to complainant
11/12/2014	Resident	Photos received showing size of trucks.
11/12/2014	N/A	Penalty Infringement Notice Issued (\$1500) following complaints about the size of trucks and numbers of trips.
19/12/2014	Residents	A meeting was held between Tweed Shire Council Officers and a number of the objectors. In this meeting the residents raised their concerns in relation to the ongoing operation in breach of conditions. Council officers outlined that the objections are being taken into account and that the proposal would be reported to the February Planning Committee Meeting which would assess the proposal and take into consideration the concerns. It was also advised that

Date	Complainant	TSC Action
		Council would be monitoring the continuing use and taking appropriate action as it sees fit.
19/12/2014	Resident	Complaint received outlining size of the truck, number of trips and hours of operation and noise. Accompanied by a spreadsheet with times and instances and photos of the trucks
28/12/2014	Resident	Email received outlining disappointment in Council.
2/01/2015	Resident	Email received outlining issues with size of truck and number of trips and that the February meeting was too far away.
6/01/2015	N/A	Council officer telephoned objector and advised them of the meeting that Council officers had with the concerned residents held in December and that their concerns were being taken into consideration and that these concerns would go within the report that will go to Council.
12/01/2015	Resident	Email received in relation to truck size being 18 metres in length.
12/01/2015	N/A	Resident notified via email that the concerns were being taken into account and that the proposal would be reported to the February Planning Committee Meeting.
12/01/2015	Resident	Email received requesting access to documents and the time of Council Meetings
14/01/2015	N/A	Council officers advised resident of the date and time of the meeting and the process to speak at meetings.
14/01/2015	N/A	Council's Traffic Engineer met with concerned residents on site to go through issues.
14/01/2015	Resident	Resident advised that School Bus was run off the road by the water trucks.
14/01/2015	N/A	Council officers contacted Bus company and they advised that it was actually a 4x4 that ran them off the road and they had no issues with the water trucks.
1/06/2015	Resident	Who is going to monitor compliance with new conditions, the residents can't be watching all the time
1/06/2016	N/A	Council Officers spoke to the applicant and advised them of their obligations to comply with the modified consent.

Note: Separate objection letters to DA03/0445.03 and DA03/0445.04 and DA15/0664 will be addressed within the relevant assessment reports.

Proposal

The application that Council is being asked to consider in this report is DA03/0445.04 seeks approval to:

1. Permit operations between the times of 6am and 6pm seven days per week.
2. Permit a maximum of 6 deliveries (i.e. 12 trips) per day.
3. Delete the trial period restriction relating to the number of deliveries per day.

The applicant has stated that:

"With respect to the proposed operational times it is noted that the only expressed limitations in the consent are those contained in conditions 2A and 4A which restrict deliveries to weekdays only excluding during bus hours on Urliup Road (ie. 7.30 am - 8.30 am and 3.30 pm - 4.30 pm, Monday to Friday). There is otherwise no specific mention of hours however the application form submitted with the original development application nominated operational hours as being 8.30 am to 5.30 pm Monday to Friday and by virtue of the operation of condition 1 of the consent (and otherwise the EP & A Act 1979) the business is restricted to those operational hours."

Therefore to enact the changes **as requested by the applicant** the following changes would need to be made to the consent:

Existing Condition 2A which reads as follows:

2A. *Deliveries are not permitted during bus hours of operation on Urliup Road, which are 7.30-8.30am and 3.30-4.30pm, Monday to Friday.*

[GENNS01]

Would need to be **deleted** and **replaced** with a new Condition 2B which reads as follows:

2B. The hours of operation and deliveries are 6am to 6pm, seven days a week.

[GENNS01]

Existing Condition 4A which reads as follows:

4A. *Daily delivery movements are restricted to ten (10) trips per day (weekdays only) for twelve (12) months (trial period) from the date of this amended consent. Upon cessation of the trial period the daily delivery movements revert back to two (2) trips per day (weekdays only). The proponent may lodge a further Section 96 amended application prior to the cessation of the trial period seeking a further amended trip rate.*

[GENNS03]

Would need to be **deleted** and **replaced** with a new Condition 4B which reads as follows:

4B. Daily delivery movements are restricted to twelve (12) trips per day.

[GENNS03]

In addition to accommodate the addition trips from that considered under DA03/0445.02 Condition 15 would need to be modified to charge the applicant under Section 94 Plan No. 4 Tweed Road Contribution Plan.

DA03/0445 approved 2 trips within Plan No. 4.

DA03/0445.02 approved an increase to 10 trips (an additional 8 trips) within Plan No. 4. Despite this approval only apply for a 12 month trial period the applicant was levied and paid for permanent trip allocations for 8 additional trips less the Employment Generating Development Discount of 40% = 4.8 trips for which the applicant paid \$14,712.

DA03/0445.04 if approved would need to be levied for two additional trips less 40% employment generating discount (1.2 trips chargeable) being the increase from 10 trips as levied in DA003/0445.02 to the 12 trips proposed as part of DA03/0445.04.

Therefore Condition 15 would need to be **modified** to have a new part (b) added that reads as shown in bold below:

15A. 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 the original 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) DA03/0445.02 - Paid

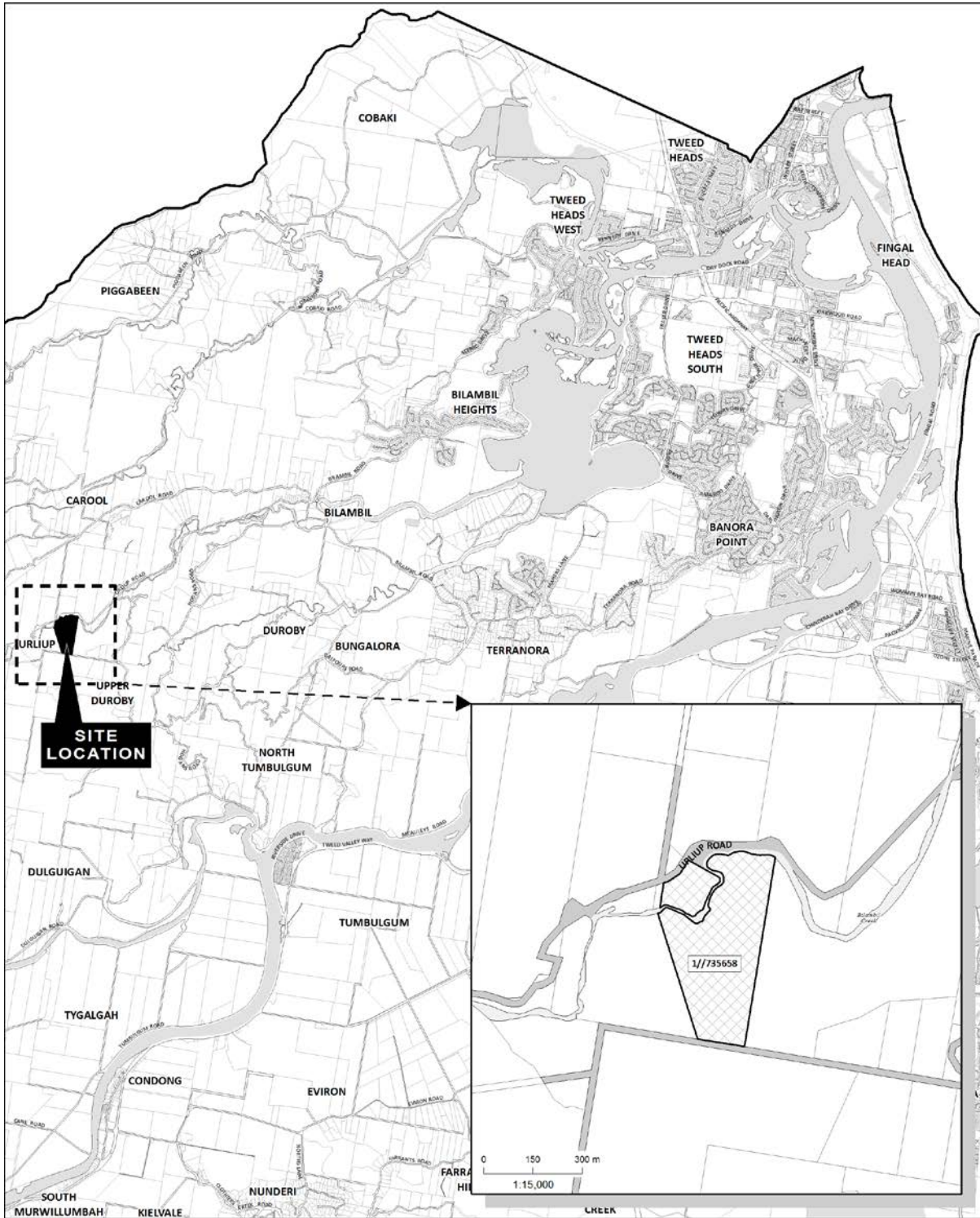
Tweed Road Contribution Plan:	
4.8 Trips @ \$3065 per Trips	\$14,712
(\$2,928 base rate + \$137 indexation)	
S94 Plan No. 4	
Sector12a_4	

(b) **DA03/0445.04 (to be paid prior to operating in accordance with this modification)**

Tweed Road Contribution Plan:	
1.2 Trips @ \$3080 per Trips	\$3,696
(\$2,928 base rate + \$152 indexation)	
S94 Plan No. 4	
Sector12a_4	

[POC0395/PSC0175]

SITE DIAGRAM:



Locality Plan
 Lot 1 DP 735658
 No. 477 Urlup Road, Urlup

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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.

Tweed LEP 2014 has since been gazetted (April 2014) and is now the applicable planning instrument. This LEP has zoned the land RU2 - Rural Landscape in 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.*

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.

As a result of this confusion Council received a request from Mount Warning Springwater Company who sought to make permissible with consent on their land the expansion of their current water-bottling facility. Planning Proposal PP15/0004 was lodged and it was revealed that the scope of the planning proposal needed to expand beyond an individual site. Accordingly the scope of the planning proposal was consequently broadened and sought to revert the current LEP prohibition to the earlier condition under the former LEP 2000 by enabling this land-use with development consent. This was intended to apply to the RU1 Primary Production and RU2 Rural Landscape zones.

Following further consideration and debate the proposal's application was scaled back and a revised proposal was referred to the NSW Department of Planning & Environment (DPE) for review. The re-exhibited proposal now excludes the RU1 Primary Production zoned land, as supported by Council at its meeting held 18 February 2016, and which endorsed the this draft enabling clause:

Use of land zoned RU2 Rural Landscape for water extraction & bottling facilities

- (1) This clause applies to any land zoned RU2 Rural Landscape.
- (2) Development for the purposes of water extraction and bottling facilities is permitted with development consent.
- (3) For the purposes of this clause, water extraction and bottling facility is a light industry involving the extraction of groundwater and the handling, treating, production, processing, storage, packing and wholesale removal of groundwater for commercial purposes.
- (4) Despite subclause(2), development consent must not be granted to development for the purposes of water extraction and bottling unless the consent authority is satisfied that the development of the land:
 - i. Will not have a significant or irreversible adverse impact on natural water systems, and
 - ii. Productive farmland capability will not be significantly eroded or sterilised from use in the future, whether in isolation or by aggregation of lands.

At the Planning Committee Meeting of 5 May 2016 Council resolved that

1. The public submission summary and Officer's response is noted.
2. Planning Proposal PP15/0004 for water extraction and bottling facilities, being *Tweed Local Environmental Plan 2014 Amendment No 16*, is approved as amended.
3. Planning Proposal PP15/0004 be referred to the Minister for NSW Planning & Environment with a request that the Plan be made under s.59 of the *Environmental Planning and Assessment Act 1979*, at the earliest time.

Whilst this amendment has not occurred to date it is not considered relevant to the current application as 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 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 (originally) approved development.

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 12 daily trips with no additional works required to cater for the proposal.

In addition the allowable time period to undertake these trips is proposed to be:

Increased from:

- 8.30 – 5.30 Monday to Friday (but not 7.30-8.30 and not 3.30 – 4.30)

This equated to 8 hours in which the two trips could occur.

To:

- 6am – 6pm seven days a week

This equates to 12 hours in which the twelve trips could occur within.

This level of intensity with a 6m truck is not considered to be unreasonable within a rural setting.

Council's Environmental Health Officer has reviewed the application and stated that:

"The activities which are carried out on the site are not considered intrusive. 6 trucks per day will enter the site, be filled with water and leave. Except for engine noise the activity is considered passive.

The use of larger vehicles and road upgrades are subject to separate approval. Many of the concerns expressed in the objections relate to vehicle movements on Uriup Road. Vehicles are permitted to travel on this road unlimited, regardless of this application.

Consideration was given to requiring a noise impact assessment, however this would be restricted to assessing impact from six deliveries (12 vehicle movements) per day.

Therefore, no objection is raised to restricted hours of operation as follows:

- *Monday to Friday 7.00am to 6.00pm.*
- *Saturday and Sunday 8.00am – 6.00pm*

Further, no objection is raised to modification to Condition 4A to remove the reference to the 12 month trial and allowing six (6) deliveries (ie 12 trips) per day."

The applicant has agreed to these modified hours of operation.

Council's Traffic Engineer has also reviewed the application and stated that:

“The bus company operator has previously been contacted and no concerns were raised by the bus driver with the conduct of the operation of the water bottling facility and the use of the road.

The number of trips proposed (12) are able to be accommodated on the Uriup Road and given the condition limiting the size of the delivery vehicle to 6m, there are no road related capacity concerns with the proposal.”

Council Officers asked the applicant to demonstrate what level of assurances exists for compliance with the proposed new conditions of consent given the past instances of non-compliances at the site. In response Council received advice from the applicant that the two trucks presently being used are both under 6m in length specifically the applicant stated:

“The longer nose variant comes in at just under 6 metres. The other truck was about 5.6m.”

Furthermore, the following Statutory Declaration from Matthew Karlos has been received stating that he will personally ensure compliance with the conditions of consent:

Commonwealth of Australia
 STATUTORY DECLARATION
 Statutory Declarations Act 1959

TWEED SHIRE COUNCIL
 RECEIVED
 DATE 18 MAY 2016

1 Insert the name, address and occupation of person making the declaration

I, MATTHEW LAZARUS KARLOS of 477 URLIUP Rd
BILAMBIL NSW 2486, AIRLINE TRAINING CAPTAIN
ATPL # 548326


2 Set out matter declared to in numbered paragraphs

make the following declaration under the *Statutory Declarations Act 1959*:

2 I have resigned full time flying duties in Western Australia with the Airline I was with for 8 years since February 2008 to return to my current address mentioned above in this declaration to focus primarily on the Family's business of selling water from the same address. My role for the family business since September 2015 has been to ensure full compliance with all council regulations + compliance with all NSW water board permits issued are also complied with. I am personally responsible for this role + also personally guarantee that any future adjustments or modifications to the operation are done so via the appropriate channels through council or any other relevant governing body + that operations are maintained until appropriate approvals are given + effective before any change is made. This personal guarantee also includes assurance that only trucks approved for operation are ever used.

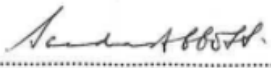
I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959*, and I believe that the statements in this declaration are true in every particular.

3 Signature of person making the declaration

3 
 Declared at Coolangella on 17th of May 2016.

4 Place
 5 Day
 6 Month and year

7 Signature of person before whom the declaration is made (see over)

7 

8 Full name, qualification and address of person before whom the declaration is made (in printed letters)

8 Sandra Abbott JP (Qual) 5860P
15 Berkeley St
Steffers
Bustard

Note 1 A person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment for which is imprisonment for a term of 4 years — see section 11 of the *Statutory Declarations Act 1959*.

Note 2 Chapter 2 of the *Criminal Code* applies to all offences against the *Statutory Declarations Act 1959* — see section 5A of the *Statutory Declarations Act 1959*.

Council is satisfied that the applicant intends to comply with the conditions of the proposed modified consent.

In regard to the physical impact on the land it should be noted that 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.

There are no physical changes to the development as originally approved.

For the reasons discussed above the proposed changes to the hours of operation and number of trips overall are considered to represent changes of minimal environmental impact.

(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 12 trips per day. Council's Traffic Engineer has indicated that no additional road works would be 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 advertised and notified for 14 days between Wednesday 4 November 2015 and Wednesday 18 November 2015.

During this period Council received 32 objections which have been summarised into the following matters below:

Issue	Council Assessment
Additional damage to road shoulders	<i>Urilup Road is narrow and it would be expected that when two vehicles albeit, 2 cars or a car and a small truck, the vehicles would need to use the road shoulder to pass safely. The proposed increase in traffic movements would not present a significant change to the current practices.</i>
No submitted traffic assessment to demonstrate how it will not compromise the structural integrity of Urilup Road	<i>Given that the S96 is only a minor increase in the number of traffic movements a traffic assessment is not considered necessary.</i>

Issue	Council Assessment
	<p><i>There is no proposal to increase the weight or size of the delivery vehicle which would necessitate a review of the road's structural integrity.</i></p> <p><i>Council's Traffic Engineer has spoken to (11 May 2016) to Mr Jeffrey Gosel who operates the school bus run on Urliup Road. He is proposing to use a 8.5m metre bus, an increase from the current 7.5m bus which he advised in his opinion is the "maximum size that this particular route can accommodate due to its physical nature of the road." Mr Gosel does not have any concerns with the smaller 6m truck operating on the road. The school bus travels from Bilambil Village along Urliup Road to Dulguigan Road 7:50am – 8:15am and 3:45pm to 4:00pm.</i></p>
<p>History of non-compliance</p>	<p><i>Matthew Karlos acting on behalf of the applicant has provided a statutory declaration giving a personal guarantee to ensuring compliance. An email dated 12 May 2016 from Matthew Karlos provides that the 2 types of trucks currently being used are just under 6 metres and 5.6m in length.</i></p> <p><i>Whilst there has been a history of non-compliance it appears the applicant is trying to abide by the consent now.</i></p>
<p>Use of the road for recreational purposes on the weekend will be compromised</p>	<p><i>There is submitted evidence that the type of road user varies during the weekend and out of normal business hours. Cyclists and horse riding seem common road uses which could be in conflict with truck movements along this rural road. However, this type of usage is not unexpected on any rural road associated with normal rural activities.</i></p>
<p>Was the "trial period" monitored?</p>	<p><i>The proponent has not provided information to confirm that the trial period resulted in positive outcomes given the breach in the size of trucks being used. However, in more recent times the 6m trucks have been used. In addition the applicant has recently engaged Matthew Karlos to manage the business who is ensuring compliance with the consent. Statutory Declarations have been provided and improved communication with Council has occurred.</i></p>
<p>Proposed times are outside normal business operational hours</p>	<p><i>The S96 application is for commercial operations and it is reasonable that those operations are limited to accepted business hours. However, the application represents very low traffic movements which must be taken into account.</i></p> <p><i>Council's Environmental Health Officer has recommended:</i></p> <ul style="list-style-type: none"> <i>• Monday to Friday 7.00am to 6.00pm.</i> <i>• Saturday and Sunday 8.00am – 6.00pm</i>
<p>Unreasonable to extend hours of operation to effectively increase daily movements by only one extra truck (beyond that in the trial)</p>	<p><i>It is Council's understanding that the increased hours is for increased flexibility to accommodate the truck drivers. The increased hours will not mean for trips as the consent will</i></p>

Issue	Council Assessment
	<i>be limited to 12 trips a day (6 deliveries a day) they will just have additional hours to accommodate those trips.</i>
Truck drivers are on deadlines so tend to speed along road	<i>There is no evidence to support this submission and there is no reported crash history on Urliup Road.</i>
Generally amenity of the area is compromised	<p><i>6 deliveries a day in a 6m truck over a 10-12 operating hour day is not considered to represent an unreasonable burden on the amenity of the neighbourhood.</i></p> <p><i>From a traffic engineering perspective this is difficult to quantify as all drivers need to operate within the conditions of the road. It should be noted that the proposed S96 variation still limits the truck usage to a small heavy vehicle and the traffic movements are low.</i></p>
The currently used 6m truck is too big (2.5m wide) for the road	<i>A normal sedan is approximately 1.8m wide. In some sections of Urliup Road, for 2 vehicles to pass safely one, or both of the vehicles need to use the road shoulder.</i>
The 6m truck holds up traffic when travelling up Bilambil Road	<i>Trucks carry more weight by their design and steep grades may result in lower speeds. This is a normal outcome associated with heavy vehicle activity.</i>
Weekend should be truck free	<i>There are many agricultural farms in the area that utilise trucks on the weekend. 6 daily deliveries with a 6m truck is not considered unreasonable. Furthermore, the capacity of the road would not be affected by commercial operations over the weekend, it is not reasonable to limit the operations to accepted business operation hours on road capacity grounds.</i>
Large numbers of horse riders and recreational bicycle riders use the road	<i>Given the very low number of traffic movements associated with the application it is not considered unreasonable for a typical rural road.</i>
Wasting our natural resource which we depend on for stock and household matters.	<i>Council is not the licencing authority for the bore. The subject application makes no changes to the approved licences.</i>
We live here for the peace and quiet and the natural beauty of the area don't spoil it with extra trucks	<i>The subject site already has approval to operate a 6m truck twice a day. The S96 seeks to increase this to 12 times a day (6 deliveries). The minor increase in trucks is not considered unreasonable in the rural setting which would have similar truck movements from agricultural pursuits.</i>
Noise	<i>The activities which are carried out on the site are not considered intrusive. 6 trucks per day will enter the site, be filled with water and leave. Except for engine noise the activity is considered passive.</i>
Failure to comply with Section 96 of the Environmental Planning And Assessment Act	<i>This report demonstrates that the application can comply with S96 of the EP&A Act 1979.</i>
The proposed use is prohibited within the current RU2 Rural Landscape zoning of the subject site.	<i>Section 109B of the EP&A Act 1979 saves the original consent and allows modifications to the consent.</i>
The proposal comprises a significant material change to the 2003 approval and	<i>This report demonstrates that changing the hours of operation and increasing the number</i>

Issue	Council Assessment								
therefore should be the subject of a NEW development application rather than simply a modification to the existing approval.	<i>of trips from 2 to 12 does not represent a significant impact.</i>								
The proposal fails to adequately demonstrate how it will not compromise the structural integrity of Urliup Road, and the existing predominantly residential and rural traffic network of Urliup Road.	<p><i>Given that the S96 is only a minor increase in the number of traffic movements a traffic assessment is not considered necessary.</i></p> <p><i>There is no proposal to increase the weight or size of the delivery vehicle which would necessitate a review of the road's structural integrity.</i></p>								
The applicant has failed to provide adequate supporting material to demonstrate compliance with the relevant planning scheme being the Tweed Local Environmental Plan 2014.	<i>Council's S96 and S79C assessment has concluded that the application is acceptable on merit and can be recommended for approval.</i>								
The approved trial period for an increase in daily deliveries from 2 trips per day to 10 trips per day has failed to demonstrate the suitability of this increase, particularly in regard to traffic and amenity impacts upon the local residents of Urliup Road.	<i>The proponent has not provided information to confirm that the trial period resulted in positive outcomes given the breach in the size of trucks being used. However, in more recent times the 6m trucks have been used. In addition the applicant has recently engaged Matthew Karlos to manage the business who is ensuring compliance with the consent. Statutory Declarations have been provided and improved communication with Council has occurred.</i>								
The applicant has been acting unlawfully outside the bounds of the current planning approval.	<i>The current S96 has been lodged to suit the needs of a growing successful business. The applicant has indicated that non compliances occurred as a result of the success of their business and whilst they should not have operated outside of their consent they are trying to rectify this matter now.</i>								
The proposed intensity of the operation will adversely affect the sustainable tourism economy of the region.	<i>6 deliveries a day is not considered unreasonable in this rural setting.</i>								
<p>The changes are not minimal</p> <table border="0" data-bbox="229 1377 686 1534"> <tr> <td>DA03/0445</td> <td>10 trips per week</td> </tr> <tr> <td>DA03/0445.04</td> <td>84 trips per week</td> </tr> <tr> <td>DA03/0445</td> <td>25 hours week</td> </tr> <tr> <td>DA03/0445.04</td> <td>66 hours week</td> </tr> </table>	DA03/0445	10 trips per week	DA03/0445.04	84 trips per week	DA03/0445	25 hours week	DA03/0445.04	66 hours week	<p><i>As detailed in this report:</i></p> <p>The NSW Land & Environment Court has also provided much advice on what matters can be determined within the scope of S96 Modifications and the following key principles apply:</p> <ul style="list-style-type: none"> • The comparison is undertaken at a general level rather than between detail; • The question is whether the development as a whole is essentially or materially similar to the originally approved development; • If the impacts of the modifications are minor, the modified development is more likely to be essentially or materially the same development; • It is relevant to consider the magnitude of any physical changes to the development and any changes to the use of the land. <p>The following report discussing the above legislative and threshold tests and concludes that:</p> <ul style="list-style-type: none"> • The proposal remains for a rural industry,
DA03/0445	10 trips per week								
DA03/0445.04	84 trips per week								
DA03/0445	25 hours week								
DA03/0445.04	66 hours week								

Issue	Council Assessment
	<p>comprising the harvesting & bottling of mineral water.</p> <ul style="list-style-type: none"> • The modification maintains the same business model with only modified hours and modified delivery numbers. • The proposed modification will not alter the statutory or policy compliance of the proposal, create any other material difference and does not give rise to any significant environmental impacts. • The proposed modification will make no physical change to the development or change to the land on which the consent is to operate from.

Note – Any objections to the 14m trucks have been discounted from this assessment as they do not form part of this S96 Application.

Having regard to the issues raised in the submissions the proposed S96 is considered capable of approval as the modification is considered to meet the S96 threshold tests and the objections to not warrant refusal of this application.

- (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 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,*
 - (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 and hours of operation 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.

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*
 - (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 advertised in accordance with this section of the Development Control Plan. Submissions have been received and considered in relation to the proposed amendment. These submissions are addressed 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.

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 with increased hours of operation. 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.

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:

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 12 trips per day and increasing the hours of operation. 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.
