



Date: 25 September 2013
Our Ref: 11/033

General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Dear Sir,

**Re: Section 96AB – Review of Section 96 Determination
Development Application 2011/105
Lot 20 DP 1051208 – 1188 Teven Road, Alstonville.**

Newton Denny Chapelle has been instructed to submit a Section 96AB application requesting Council to review the determination (refusal) under Section 96 associated with the approved bulk store (scaffold business) located at 1188 Teven Road, Alstonville.

Background

The modification application came before the Council meeting on 27 June 2013. A report was prepared for Council's consideration. That report noted the following matters:

- Pursuant to the consent, all plant associated with the bulk store was to be stored within the shed.
- The proposed modifications to the consent would result in substantially the same development as that originally approved.
- The Property is now zoned RU1 pursuant to the Ballina Local Environmental Plan 2012 (which commenced on 4 February 2013) (2012 LEP).
- There is no definition of a "bulk store" in the 2012 LEP. The report characterised the use as being for a "Depot" - and use of the Property for the purposes of a "Depot" is prohibited in the RU1 zone.
- The use of the Property for the purposes of a "Depot" is permissible pursuant to existing use rights - and the modification of the consent can be approved.
- No objections had been lodged in response to the modification application - and no complaints had been received for the use of the Property for the purposes of a "bulk store" (or "Depot").
- The report recommended that the modification application be approved.

Ballina Shire Council having deferred the matter and upon receipt of additional information from the applicant determined to refuse the Section 96 Application lodged on behalf of Wiggins Hire Pty Ltd at the Ordinary Council meeting held on 22 August 2013.

JOHN NEWTON B. Surv. M.I.S. Aust. TONY DENNY B. Surv. (Hons) M.I.S. Aust. DAMIAN CHAPELLE eIP CPP
Office: Suite 1, 31 Carrington Street, Lismore. Postal Address: PO Box 1138 Lismore NSW 2480
Phone (02) 6622 1011 Fax (02) 6622 4088 Email office@newtondennychapelle.com.au
Also at: Cassino Court, 100 Barker Street, Cassino NSW 2470 Phone/Fax (02) 6662 5000

Council's refusal of the Section 96 was based on the following reason.

That the Section 96 1(A) application seeking to amend DA 2011/105 by the creation of an additional hard stand area to be used for the purpose of storage and the establishment of a new vehicular access onto Teven Road on Lot 20 DP 1051208, No 1188 Teven Road, Alstonville be REFUSED as it is prohibited by the provisions of the Ballina Local Environmental Plan 2012 and as per the contents of Option Two within the report.

This application pursuant to Section 96AB of the EP&A Act seeks Council's review of the above referenced refusal and also outlines a further amendment to the application.

Proposed Amendment

The Wiggins would like to formally amend the application previously determined by Council. In this respect, the application is amended so as to delete the proposed second vehicular access from Teven Road. The proposal will therefore rely on the existing access driveway servicing the approved land use, whilst providing scope to undertake further planting along the Teven Road boundary.

The removal of the second Teven Road access driveway and associate hardstand area results in a decrease in gravel area from 2,238m² to 2,001m² (-237m²) and an increase in landscaped area from 1,652m² to 1,889m² (+237m²). Accordingly, the total gravel hardstand area for the development is further reduced to represent 5.3% of the 3.742 hectare lot size.

The balance of the proposal remains unchanged from that assessed by Council at its meeting on 22 August 2013.

Grounds for Section 96AB Review

1. Existing Use Rights

We submit for Council's review the fact that the use of the Property for the purposes of a "bulk store" (or "depot") is now a prohibited use under the 2012 LEP is statutorily addressed through existing use rights provisions under the EP&A Act. Indeed the relevant provisions provides that a use being lawfully carried out, although now prohibited under the relevant planning instrument, being the Ballina LEP 2012, can be (amongst other things) modified and the use intensified.

An "existing use" is defined in s.106 of the EP&A Act. I do not repeat here the definition in full; it is sufficient to note that an existing use will arise in circumstances where land is used for a lawful purpose (such as pursuant to a consent) immediately before the commencement of an environmental planning instrument (EPI) (such as an LEP) which would have the effect of prohibiting that use.

Section 107 provides that nothing in the EP&A Act or in an EPI can prevent the continuance of an existing use.

The Environmental Planning Assessment Regulation 2000 contains the law that is relevant to the regulation of an existing use. I note the following extracts from clause 41 of the Regulation:

*41 Certain development allowed
(cf clause 39 of EP&A Regulation 1994)*

(1) An existing use may, subject to this Division:

- (a) be enlarged, expanded or intensified, or*
- (b) be altered or extended, or*
- (c) be rebuilt...*

Development consent is required for any enlargement, expansion or intensification of an existing use (cl.42(1)). In circumstances where consent has already been granted to the use, the appropriate way to obtain "approval" to enlarge, expand or intensify the existing use is by way of a modification application (s.96 EP&A Act).

We submit the effect of these provisions qualifies the current use as an existing use (as defined) and therefore the use of that land for the prohibited use can continue subject to the control of the EP&A Act and the Regulations. We note Council's report confirms the use enjoys existing use rights as provided below:

"On 4 February 2013 Ballina Local Environmental Plan 2012 came into effect which prohibited Bulk Stores or similar within the applicable RU1 zone. Thus making the development, a use granted development consent before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use. Therefore the use is an "existing use".

Furthermore the provisions provide scope for Council to lawfully modify a consent to enlarge or expand that use even in circumstances where that use is prohibited pursuant to the current LEP. Again this position has been supported by Council's technical staff within the June business paper as provided below.

"It is considered that the application complies with the relevant sections of the EP&A Act 1979 and the EP&A Regulations 2000, as they relate to Existing Uses.

The proposed amendments are therefore permissible by virtue of "existing use rights"

2. Precedent

This proposal will not create a precedent for the commencement of bulk stores upon rural zoned land under the Ballina LEP 2012. As outlined within this submission, the proposal is reliant on existing use rights for which Council's technical staff has agreed relate to this project. Accordingly, with the introduction of the Ballina LEP 2012, this land use is only capable of occurring should existing use rights apply.

3. Section 96 Assessment

Council's technical assessment as contained within the June 2013 report concurred the proposed amendment is substantially the same development as that originally approved given the total area of the land and the relative size of areas allocated to different uses within the site.

4. Environmental Impact

It is considered the proposed change will be of minimal environmental impact, as it will result in an unused area of the property being filled to a maximum height of 400mm so as to provide a hard stand area for storage purposes.

The main environmental impact will be from an increase in water run off. It is considered that this will be mitigated as the water will run into a seven metre wide grassed buffer area.

The other aspect to the proposed change, being the storage of equipment on the proposed hardstand area as opposed to being stored within the shed, will have minimal environmental impact as the site is not visible from Teven Road due to the existence of a line of mature trees along the Teven Road frontage of the site. This will be further ensured through the planting of additional screening plants along the southern boundary.

5. Public Exhibition

As Council will be aware, the Section 96 Application was placed on public exhibition in accordance with Council's Policy. **No submissions of objection** were received following exhibition.

Whilst five (5) adjoining property owners had signed a prepared letter of support for the proposed amendment, we now attach letters from a further two (2) landowners outlining their support for the project, whilst the proponent has also held discussions with Mr B Morrow who adjoins the subject land to the south.

We note issues associated with the second access had been raised by Mr Morrow in a letter to Council and during discussions with the proponent. Though the proponent had already resolved to remove the second access these discussions further reassured the proponent their decision would ensure full community support is obtained given the family also resides on the property and are part of the local community. As outlined earlier, the removal of the second access will permit a greater landscape buffer to be provided to Teven Road and thus result in an enhanced screening from the public domain of the land use.

We submit the proposed modification to the existing business is well supported by the local residents and business community. That is, Council has been provided letters of support from adjoining residents in addition to business who have previously been offered services by Wiggins Scaffolding such as the Westpac Rescue Helicopter and the Gromfest Surf Competition at Lennox Head.

Conclusion

We submit the details provided to support the review of determination addresses the issues relevant to Council's assessment of this application under Section 96AB of the EP&A Act.

Council can readily conclude that the development, as proposed, to be modified is substantially the same as that for which consent was granted. Council is also advised of the Wiggins support for the inclusion of the proposed conditions of consent contained within the August 2013 business paper should Council see fit to approve the application.

We trust this is the necessary information you require at this time. However, should you have any questions, please do not hesitate contacting Damian Chapelle of this office.

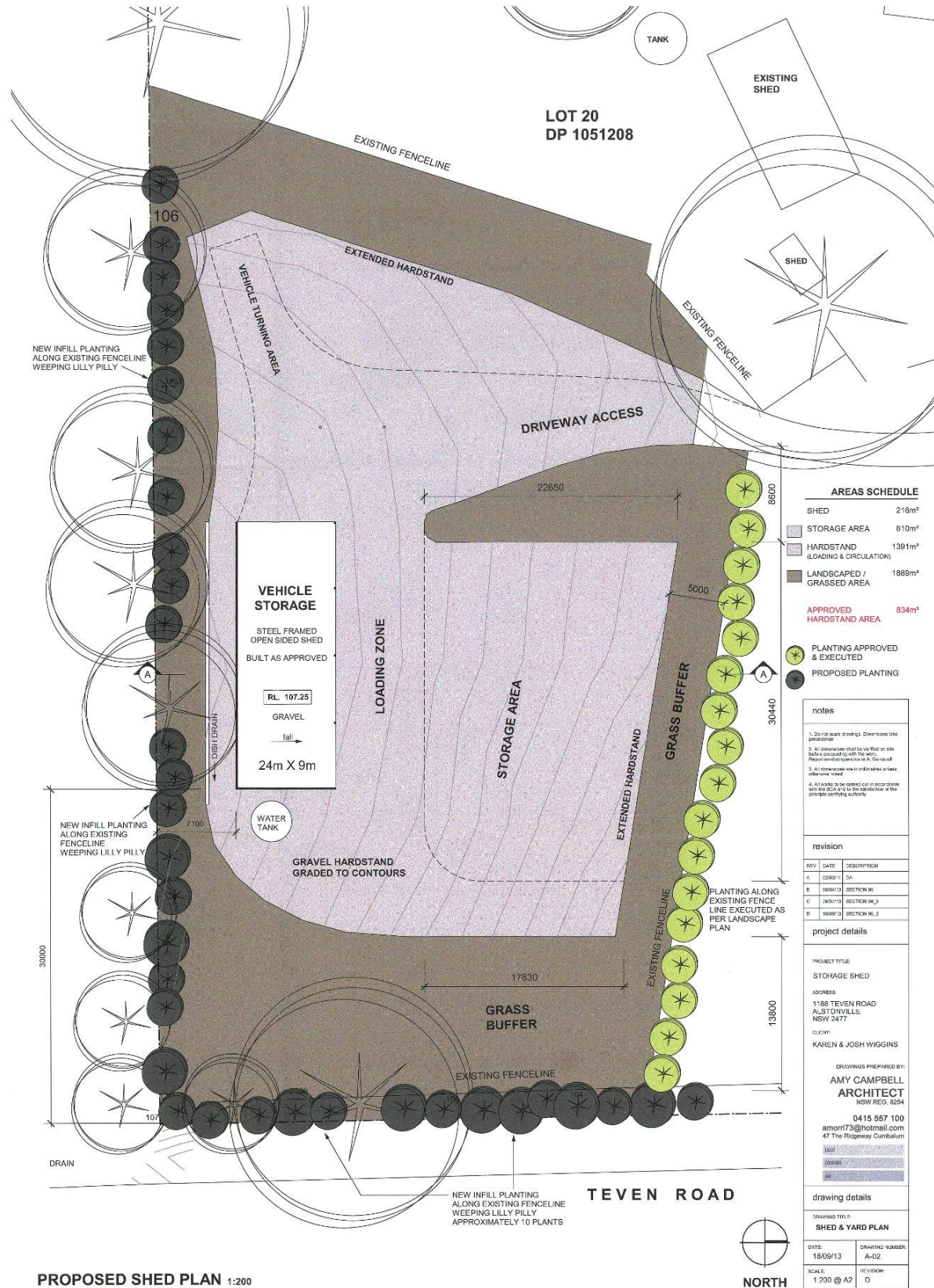
Yours sincerely,

NEWTON DENNY CHAPELLE

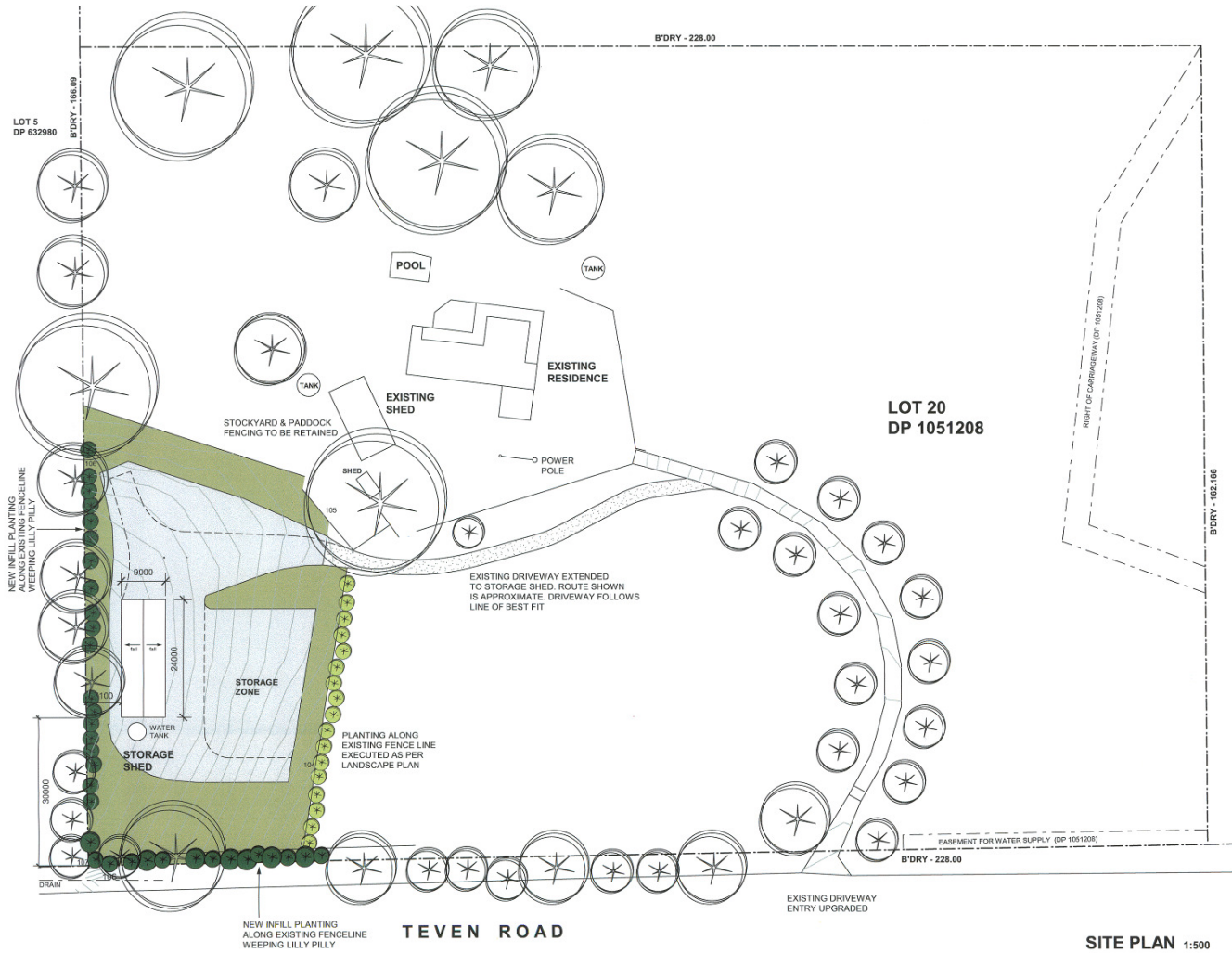


DAMIAN CHAPELLE
Town Planner. BTP. CPP.

8.1 Review of Determination DA 2011/105 - 1188 Teven Road, Alstonville.DOC



8.1 **Review of Determination DA 2011/105 - 1188 Teven Road, Alstonville.DOC**



AREAS SCHEDULE

PROPERTY	3.74ha
SHEED	216m ²
STORAGE AREA	610m ²
HARDSTAND LOADING & CIRCULATION	1391m ²
LANDSCAPED / GRASSED AREA	1889m ²
TOTAL COVERAGE	2217m²
EXCLUDING GRASSED AREAS	

- APPROVED
HARDSTAND AREA** 834m²
- PLANTING APPROVED & EXECUTED
 - PROPOSED PLANTING

notes

- Do not scale drawings. Dimensions take precedence.
- All dimensions shall be verified on site before proceeding with the work. Report on discrepancies to A. Campbell.
- All dimensions are in millimetres unless otherwise noted.
- All works to be carried out in accordance with the SCC and to the satisfaction of the principle certifying authority.

revision

REV	DATE	DESCRIPTION
A	02/03/11	DA
B	14/03/13	SECTION 96
C	29/03/13	SECTION 96.2
D	18/09/13	SECTION 96.3

project details

PROJECT TITLE:
STORAGE SHED

ADDRESS:
1188 TEVEN ROAD
AL STONVILLE
NSW 2477

CLIENT:
KAREN & JOSH WIGGINS

DRAWINGS PREPARED BY:
AMY CAMPBELL
ARCHITECT
10/11/12/13/14/15/16/17/18/19/20/21/22/23/24/25/26/27/28/29/30/31/32/33/34/35/36/37/38/39/40/41/42/43/44/45/46/47/48/49/50/51/52/53/54/55/56/57/58/59/60/61/62/63/64/65/66/67/68/69/70/71/72/73/74/75/76/77/78/79/80/81/82/83/84/85/86/87/88/89/90/91/92/93/94/95/96/97/98/99/100

0415 557 100
amc@73@hotmail.com
47 The Ridgeway Cumbalum

LEG
CON
RE

drawing details

DRAWING TITLE:
SITE PLAN

DATE:	18/09/13	DRAWING NUMBER:	A-01
SCALE:	1:500 @ A2	REVISION:	D



SITE PLAN 1:500

Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Dear Sir/Madam,

We wish to advise we have been made aware of the Section 96 application lodged on behalf Wiggins Hire Pty Ltd with regard to the existing scaffold storage facility located at 1188 Teven Road, Alstonville.

We understand the proposal involves the following:

- Permission to store scaffold external to the existing shed
- An extended gravel storage area per the attached Shed & Yard Plan (Dwg A-02 Revision B)
- ~~• Alternate driveway access at the southern end of the property~~

Our property is in close proximity or adjacent to the land in question and we have no objection to the proposal in its current form.

Also, we have not been affected by the existing operations and do not believe the rural amenity of the area has been/will be compromised either visually or due to any noise attributable to the operation.

Regards,

Kelly Lowe

Name

23.9.13

Date

11 Upton Pl, Alstonville,

Address

Shore

8.1 DA 2011/105 - Section 96 - Bulk Storage

8.1 DA 2011/105 - Section 96 - Bulk Storage

Applicant	Newton Denny Chapelle
Property	Lot 20 DP 1051208 No. 1188 Teven Road Alstonville
Proposal	Section 96 Application Seeking to Amend DA 2011/105 for the Establishment of a Scaffold Business by Increasing the Hardstand Storage Area and provide a new driveway access onto Teven Road.
Effect of Planning Instrument	The land is zoned RU1 under the provisions of the Ballina LEP 2012
Locality Plan	The subject land is depicted on the locality plan attached

Introduction

Council at the meeting of 27 July 2013 resolved the following:

That the Section 96 1(A) application be deferred particularly in relation to the deletion of Condition 1.5

A copy of the report submitted to the July meeting is attached.

Report

Council's concerns have been discussed with the applicant and the owner of the property, who have provided Council with the additional information reproduced as a further attachment to this report.

The additional information distinguishes the area to be used for storage from that to be used as manoeuvring area. The overall hardstand area has been reduced from that originally proposed by approximately 20% or 159m² with the area deleted from hardstand area being reallocated to the provision of grassed buffer area.

The grassed buffer area adjacent to Teven Road has been increased from 5m wide to 13.8m wide. Infill planting is proposed along the southern and eastern boundaries of the property, to reduce further any visual impact the business may have on those passing the site.

The proposed changes have resulted in the amount of grassed buffer area being increased to 40% (1652m²) of that part of the property used for the scaffolding business. This area is fenced off from the remaining 3.3ha of the property.

The amended plan shows a grassed buffer 5m wide along the northern edge of the hardstand area, where the original application showed a grassed buffer strip 7m wide. If Council is of a mind to grant approval to this amending application, a requirement will be incorporated in the landscaping condition requiring the provision of a 7m wide landscaping strip

8.1 DA 2011/105 - Section 96 - Bulk Storage

Also, one additional condition will be imposed, requiring all proposed plantings to be established to Council's satisfaction prior to any work being undertaken on the additional hardstand area.

It is further proposed that Condition 1.5 be amended rather than deleted as originally proposed. This condition will be amended to restrict the storage of scaffold equipment and associated materials to the previously approved shed and the designated outdoor storage area, thus ensuring that the scaffold equipment and associated materials will be stored within the designated storage area.

Conclusion

It is considered that, with the reduction in the hardstand area and the provision of the additional landscaping, the scaffolding storage area would not be visible from Teven Road.

Options

Council has the following two options in this matter.

1. Council grant approval for the additional filled area of land to be used for an expanded storage area associated with the existing scaffolding business. This is the preferred option as per the information contained within this report and the attached assessment of the original amending application.
2. Council refuse the application to expand the storage area on the site for the storage of plant and equipment for a purpose prohibited by the provisions of Ballina Local Environmental Plan 2012. If this option were to be adopted the current compliance action will proceed which may require the removal of the unauthorised fill. This option is not recommended for the reasons outlined in the attached report assessing the original amending application including that specific legislative provision is made for the expansion of existing land uses.

RECOMMENDATIONS

That the Section 96 1(A) application seeking to amend DA 2011/105 by the creation of an additional hard stand area to be used for the purpose of storage and the establishment of a new vehicular access onto Teven Road on Lot 20 DP 1051208, No 1188 Teven Road, Alstonville be **APPROVED** subject to the following conditions.

1. Condition 1.1 be amended to read
Development being carried out generally in accordance with the plans and associated documentation lodged by, or on behalf of, the applicant, including plans prepared by Amy Campbell, Drawing Nos. A-01 (Site Plan) Revision B, Dated 14 March 2013 and A-02 (Proposed Shed and Yard Plan) Revision C, Dated 26 July 2013, and the plan prepared by Wide Span Sheds, Reference No PB 1102061-1 (Building Layout), Dated 8 February 2011, as amended in red, except as modified by any condition in this consent.

8.1 DA 2011/105 - Section 96 - Bulk Storage

2. Condition 1.5 be amended to read
All scaffold equipment and associated materials are to be stored within the confines of the approved shed and the designated outdoor storage area.
3. Condition 2.4 be amended to read
The provision of stormwater controls on site shall be in accordance with the requirement of Section 3.9 Stormwater Management, of Chapter 2 General and Environmental Considerations of Ballina Development Control Plan 2012, and in accordance with the Site Stormwater Management Plan prepared by Newton Denny Chapelle, dated 7 March 2011, and amended Shed and Yard Plan dated 8 April 2013. This is to include the shaping of driveways and paved areas to drain to vegetated areas.
4. New Condition 2.6A is to be included
Vegetation in the road reserve impairing sight distances to the south of the proposed access driveway is to be pruned. Approval from Council is to be sought in association with an application submitted under the provisions of S138 of the Roads Act 1993 for the construction of the additional roadworks/driveway.
5. Condition 2.8 be amended to read
A landscape plan, prepared by a person competent in the field is to be submitted to Council for approval prior to the issue of the Construction Certificate. The plan shall show the mature height, location, quantity and species of all plantings and should also give details of soil conditions and the planting and maintenance program. The plan is to show the grass buffer area between the hardstand area and the internal fence separating the scaffolding business from the remainder of the property as being not less than 7m wide. All proposed landscape plantings shall be native species endemic to this region.
6. New Condition 2.9A is to be included
Prior to issue of a Construction Certificate where civil construction work is proposed, payment to Council of non-refundable monetary contributions shall be made towards the provision of public services, infrastructure and amenities, which are required as a result of the development in accordance with the following contribution plans prepared under Section 94 of the Environmental Planning & Assessment Act, 1979 :

Contribution Plan/Development Servicing Plan	Adopted
Ballina Shire Contributions Plan 2008	23 October 2008
Ballina Shire Roads Contribution Plan 2010	25 February 2010
Ballina CBD Car Parking Contribution Plan	25 November 2004
Lennox Head Village Centre Car Parking Contribution Plan	12 February 2004
Ballina Shire Heavy Haulage Contribution Plan	27 October 2011

The Contribution Plans provide for the indexing of contribution amounts

8.1 DA 2011/105 - Section 96 - Bulk Storage

and are also subject to amendment. The contribution rates payable will be the rates that are applicable at the time payment is made. Copies of the Contribution Plans may be viewed at Council's Customer Service Centre, Cherry Street, Ballina or on Council's website www.ballina.nsw.gov.au.

7. Condition 3.6 be amended to read
The applicant shall ensure that any additional fill material imported to the site for the proposed development shall only be obtained from fill sources with approved testing. The supplier of the fill material must certify to Council at the completion of the construction of the development that the material was free of contaminants being natural or otherwise.
8. New condition 3.12 is to be included
The plantings shown on plan A-02 revision C are to be planted and established to Council's satisfaction prior to the any additional work proceeding on the provision of the additional hardstand area.
9. All other conditions remain applicable and valid.

Schedule 1

Contribution	Receipt Code	Contribution Unit	Rate per contribution unit	Total contribution units payable	TOTAL COST
Alstonville Roads 2010	5202	equivalent residential allotment	\$10,673.00	1.1938	12,741.43
Roads administration 2010	5203	equivalent residential allotment	\$162.00	1.1938	\$193.40
TOTAL					\$12,934.82

Attachment(s)

1. Report to June 2013 Ordinary meeting
2. DA 2011/105 - Locality Plan
3. DA 2011/105 - Site Plan
4. DA 2011/105 - Submissions
5. DA 2011/105 - Council Meeting Report, May 2011
6. Additional Information from Applicant - Description of amendments
7. Amended Layout Plan
8. Letter of Support
9. Letter of Support
10. Letter of Support