

W. J. GRACE & CO.

S O L I C I T O R S

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PRINCIPAL

William J. Grace
BA.LLB.
Accredited Specialist
Local Government
& Planning Law

Our Ref: WJG:VR:140007

Your Ref: DA No. 2013/385

26 February 2014

Mr. Peter Craig
Senior Building Surveyor
Development and Environmental Health Group
Ballina Shire Council
PO Box 450
BALLINA NSW 2478
BY EMAIL: reghelpdesk@ballina.nsw.gov.au

Dear Peter

**RE: DA 2013/385 – LOT 1 DP 856017 NO. 59 TEAKWOOD DRIVE,
ALSTONVILLE**

Thank you for your letter of 5 February 2014 seeking legal advice in respect of the Development Application referred to above.

We note Resolution 8.2 of Council's Ordinary Meeting of 23 January 2014 is "that Development Application 2013/385 be deferred to seek legal advice".

You state that the legal advice sought is in relation to the relevance for Council of any private covenants on the subject lot. You stipulate four questions requiring clarification in respect of which we advise as follows:-

1. **WHAT, IF ANY, ARE THE CURRENT PRIVATE COVENANTS AFFECTING THE LAND?**

The private covenants affecting the land are found in the Section 88B Instrument registered in Deposited Plan 856017 on 8 January 1996.

The land is subject to restrictions as to user set out in items 10 and 11 of the Section 88B Instrument (copies attached).



Suite 4
160 River Street
Ballina NSW 2478

Mailing Address
PO Box 875
Ballina
NSW 2478

Tel: (02) 66 811 811
Fax: (02) 66 860 165
Email: mail@wjgrace.com.au



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Those objecting to the development application specifically refer to three paragraphs of item 10 of the Section 88B Instrument which are set out as follows:-

- “(a) No building including any garage or other outbuilding appurtenant thereto shall be erected on any lot having exterior walls constructed of any material other than clay brick and split concrete blocks **PROVIDED HOWEVER** that one colorbond shed may be erected within each lot provided the design, type of construction and location of such shed shall be approved by Hendrik Hoekstra and Betty Margaret Hoekstra and Ballina Shire Council. No building or shed as hereinbefore referred to shall be of any other colour than subdued or earthy tones which are not prominent against the background. Sections of feature panel above, beside and below windows and doors may be constructed in non-masonry type materials as approved by Ballina Shire Council. Constructions shall be deemed to include alterations or additions.

- (m) No shed, basement, tent, shack, garage, trailer, camper, caravan or any outbuilding erected or placed on any lot shall be used at any time as a permanent or seasonal dwelling.

- (q) No dwelling shall be occupied unless the access to such dwelling is by way of sealed access road, driveway or carriageway of hot mix, bitumen, asphalt, concrete or other similar material as may be approved by Hendrik Hoekstra and Betty Margaret Hoekstra their executors and assigns whilst ever they own a lot within the subdivision and thereafter the Council of the Shire of Ballina.”

Item 11 of the Section 88B Instrument relevantly provides that no building shall be erected on Lot 1 having a roof ridge height higher than 123.6 metres Australian Height Datum.

Insofar as there are two buildings on the lot including the 2 storey colorbond shed and a storage shed there is a breach of Item 10(a) of the Section 88B

Instrument assuming that Mr. Hendrik Hoekstra and Betty Margaret Hoekstra own a lot in the subdivision and have not approved a second shed.

We note that Ballina Shire Council approved the construction of the 2 storey colorbond shed and that the second shed comprises exempt development under the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

2. ARE THE CURRENT PRIVATE COVENANTS RELEVANT TO THE PROPOSAL?

Whilst they are not specifically set out as relevant matters for consideration under Section 79C(1) they are arguably a relevant matter for the Council to consider if Council is of the view they are otherwise relevant (see *Challister v Blacktown CC (1992) 76LGRA10*).

They are relevant insofar as both the Environmental Planning & Assessment Act 1979 ("EP&A Act") and the Local Government Act 1993 in general terms confer responsibility on a local Council to regulate the general amenity of the neighbourhood as stated by Justice Sheahan J in *Marcus William Conomos and Stella Conomos v Judith Alicia Chrysochoides No. 40269 of 1996 [1997] NSWLEC 163*.

Section 79C of the Environmental Planning Assessment Act 1979 includes in those matters the Council is to take into consideration when determining a development application certain matters which are relevant to the development including the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality, the suitability of the site for the development, any submissions made in accordance with the E P & A Act and Regulations, and the public interest.

The private covenants affecting this land impose certain restrictions as to user with the aim of maintaining a certain level of desired amenity in the neighbourhood.

3. DOES THE COUNCIL HAVE RESPONSIBILITY TO ENFORCE RELEVANT PRIVATE COVENANTS?

No the Council does not have responsibility to enforce relevant private covenants.

Both Section 28 of the E P & A Act 1979 and regulation 1.9A of the Ballina Local Environmental Plan 2012 ("BLEP 2012") suspend the operation of the private covenants to enable development of the type proposed to be carried out if it is otherwise in accordance with the requirements of the BLEP 2012 or a consent granted by the Council under the E P & A Act. In short the private covenants affecting this land do not prevent Council from consenting to the proposed development application.

Section 28 and regulation 1.9A give Council the power to over-ride these restrictive covenants.

In *Ludwig v Coshott* (1994) 83 LGEAR 22, Bryson J of the New South Wales Supreme Court held that clause 32 of the Woollahra Local Environmental Plan (LEP) No. 27 had the effect of over-riding a restrictive covenant for the purposes of enabling development to be carried out. The terms of restriction in this case were relevantly "that any main building erected on the land hereby transferred shall be a cottage with brick external walls which shall not be rough casted but may be cement covered". The development proposed was the construction of an unroofed terrace on the western side of the house to which Woollahra Council had given development consent. It was common ground between the parties that the word "cottage" in its usage in New South Wales meant a small single storey house at that time. Wadell CJ upheld submissions to the effect that to make the alterations as proposed would result in a substantially larger building than the one which then existed and the building which would be thus created would not be a cottage. Bryson J held that a body of judicial opinion in the Land and Environment Court supported giving provisions of planning

instruments made under Section 28 "wide operation for the purpose of enabling development to be carried out in accordance with development consent."

Bryson J's reasoning was up-held on appeal in *Coshott & Anor v Ludwig & Anor (1997) NSW CONVR 55-810*. Marr J.A, with whom Giles JA and Simos AJA agreed, and held that the self-evident purpose of Section 28 and the relevant clause in the Local Environmental Plan was to nullify and remove all obstacles to the planning principles decided on by the Council or the Minister.

The decision in *Coshott* was not disturbed by the more recent decision of the High Court in *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd [2011] HCA 27* in which case Dalcross Properties owned a private hospital on lot 101 and proposed to extend that activity to an adjoining lot 103. Lot 103 was subject to a restrictive covenant which prevented it from being used for hospital purposes and benefited the adjoining lot 1 owned by Cumerlong Holdings. The development was approved by Ku-ring-gai Municipal Council. Cumerlong sought an injunction and claimed in the NSW Supreme Court that the covenant was invalid because it breached the restrictive covenant. The majority of the NSW Court of Appeal refused to grant an injunction to enforce the restrictive covenant because effect was given to the development consent by the terms of clause 68(2) of the Ku-ring-gai Planning Scheme Ordinance as it stood after the changes to the relevant zoning of the land made by Ku-ring-gai Local Development Plan No. 194 which plan had been gazetted. That is because of a clause similar to BLEP 2012-regulation 1.9A.

The High Court however found that the procedure set out in Section 28 was not observed when LEP 194 was created. In particular Section 28 had not been approved by the Governor.

The High Court held that because LEP 194 had not been approved by the Governor the provision in it which permitted the over-riding of a restrictive covenant had not come into effect.

Sub-Section 4 of Ballina Local Environmental Plan 2012 – regulation 1.9A however provides that the Governor has approved of subclauses 1-3 which provides for the suspension of the restrictive covenants in this case.

4. IS THE COUNCIL EMPOWERED TO VARY ANY CURRENT COVENANTS?

No. The Section 88B Instrument applied to the subject land provides that Hendrik Hoekstra and Betty Margaret Hoekstra whilst ever they own a lot in the subdivision have the power to release vary or modify these restrictions on use. A title search of Lot 8 in Deposited Plan 856017 reveals that Mr. and Mrs. Hoekstra are the current owners of Lot 8 in the subdivision.

The Section 88B Instrument further provides that the Council of the Shire of Ballina will be empowered to release vary or modify the terms of the restrictions on use in circumstances where Mr. and Mrs. Hoekstra do not own a lot in the subdivision.

In summary the Council is empowered to grant consent to this development application and can effectively ignore the private covenants imposing restrictions as to user.

If you require any further advice please do not hesitate to contact the writer.

Yours faithfully
W J GRACE & CO

Per: W J Grace
Encs



8.1 DA 2013/385- 59 Teakwood Drive, Alstonville.DOC

Req:R034801 /Doc:DP 0856017 B /Rev:10-Jan-1996 /Sts:OK.OK /Prt:21-Feb-2014 10:18 /Pgs:ALL /Seq:11 of 16
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**INSTRUMENT SETTING OUT TERMS OF EASEMENTS AND RESTRICTIONS
AS TO USER INTENDED TO BE CREATED PURSUANT TO SECTION 88B
CONVEYANCING ACT, 1919**

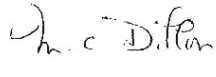
Lengths are in metres (Sheet 11 of 16 Sheets)

Plan No. DP 856017

10. Terms of Restrictions as to User Tenthly
referred to in the abovementioned Plan:

- (a) No building including any garage or other outbuilding appurtenant thereto shall be erected on any lot having exterior walls constructed of any material other than clay brick and split concrete blocks **PROVIDED HOWEVER** that one colorbond shed may be erected within each lot provided the design, type of construction and location of such shed shall be approved by Hendrik Hoekstra and Betty Margaret Hoekstra and Ballina Shire Council. No building or shed as hereinbefore referred to shall be of any other colour than subdued or earthy tones which are not prominent against the background. Sections of feature panel above, beside and below windows and doors may be constructed in non-masonry type materials as approved by Ballina Shire Council. Constructions shall be deemed to include alterations or additions.
- (b) No dividing fence shall be erected on any of the subject land to divide it from any adjoining lot owned by Hendrik Hoekstra and Betty Margaret Hoekstra without the written consent of the said Hendrik Hoekstra and Betty Margaret Hoekstra. Such consent shall not be withheld if such fence shall be erected without expense to the said Hendrik Hoekstra and Betty Margaret Hoekstra and be of a type and construction approved by the said Hendrik Hoekstra and Betty Margaret Hoekstra.
- (c) No single dwelling house erected upon the subject land shall have a floor space (excluding carports, garages, covered porches and outbuildings) of less than 120 sq. mtrs.
- (d) No part of the subject land shall be used for any industrial manufacturing or retailing purposes and no offensive or noisy trade or activity shall be carried out on any part thereof.
- (e) No fence shall be erected on the subject land having a height exceeding two (2) metres.


Betty Margaret Hoekstra
Honi


J. C. Dillon

8.1 DA 2013/385- 59 Teakwood Drive, Alstonville.DOC

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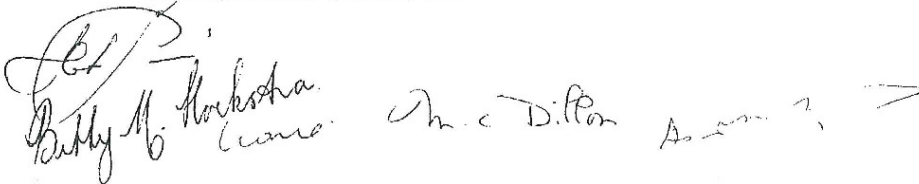
INSTRUMENT SETTING OUT TERMS OF EASEMENTS AND RESTRICTIONS
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CONVEYANCING ACT, 1919

Lengths are in metres

(Sheet 12 of 16 Sheets)

Plan No. DP 856017

- (f) Not more than one main building intended to be used for a residence shall be permitted to be erected on each separate Lot in the subdivision covered by this Instrument.
- (g) No Flats, Home Units or multi unit dwellings shall be constructed, erected, altered, remodelled, placed or maintained on the subject land.
- (g) No buildings of pole house construction shall be permitted.
- (i) No building erected on the subject land shall have a roof of a material other than a material of a non-reflective nature and no roof shall be of corrugated iron, white colourbond steel, fibrous cement or similar materials.
- (j) No animals, livestock, poultry or birds of any kind shall be raised, bred or kept upon the subject land or any part thereof, other than household pets (but expressly excluding cats and dogs) and birds may be kept provided these are not kept, bred or maintained for any commercial purpose.
- (k) All grass and other vegetation growing upon the subject land shall be regularly maintained and the subject land shall be kept free of all rubbish, refuse or garbage. No waste shall be kept thereon except in sanitary containers.
- (l) No person shall erect or cause or permit to be erected upon the subject land or any part thereof any advertisement, hoarding or similar structure and shall not permit the subject land or any part thereof or any building or structure erected thereon to be used for the display of any advertisement or notice except those that relate solely to the selling or letting of the subject land or any part thereof or any building erected thereon.
- (m) No shed, basement, tent, shack, garage, trailer, camper, caravan or any outbuilding erected or placed on any lot shall be used at any time as a permanent or seasonal dwelling.
- (n) No second hand materials or materials from any other previously erected dwelling or structure shall be used in the construction or any dwelling or building erected upon any Lot.


Betty M. Horkosha
M. C. Dillon

8.1 DA 2013/385- 59 Teakwood Drive, Alstonville.DOC

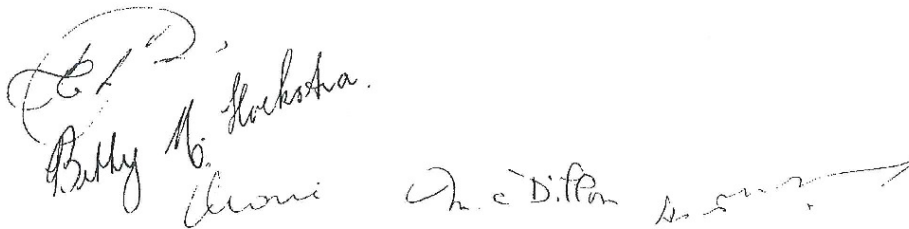
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**INSTRUMENT SETTING OUT TERMS OF EASEMENTS AND RESTRICTIONS
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Lengths are in metres (Sheet 13 of 16 Sheets)

Plan No. DP 856017

- (o) The construction or erection of any building being erected on any lot shall be prosecuted diligently and continuously from the commencement of that construction or erection until the exterior of such building is completed and painted or otherwise suitably finished. Such construction or erection is to be completed within a period of twelve (12) months from the date of commencement.
- (p) No water storage tanks shall be placed aboveground level unless with the written consent of Hendrik Hoekstra and Betty Hoekstra their executors and assigns whilst ever they own a lot within the subdivision and thereafter the Council of the Shire of Ballina is obtained prior to installation.
- (q) No dwelling shall be occupied unless the access to such dwelling is by way of sealed access road, driveway or carriageway of hot mix, bitumen, asphalt, concrete or other similar material as may be approved by Hendrik Hoekstra and Betty Margaret Hoekstra their executors and assigns whilst ever they own a lot within the subdivision and thereafter the Council of the Shire of Ballina.
- (r) No native trees shall be removed from any lot without the prior consent of Ballina Shire Council.
- (s) No lot shall be transferred unless the contract for such sale shall include a copy of Notice to Applicant of Determination of a Development Application from Ballina Shire Council to David Ardill & Associates Pty. Limited dated 27th April, 1995 in respect of Development Application No. 1995/190.


Betty Hoekstra
David Ardill

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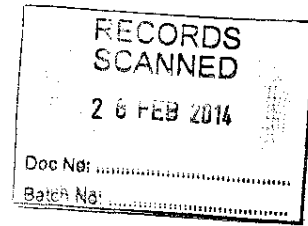
11. Terms of Restrictions as to User Eleventhly
referred to in the abovementioned Plan:

No building shall be erected on any lot having a roof ridge height higher than the level set out in the following schedule:

<u>Lot No.</u>	<u>Maximum Roof Height Level in Metres Australian Height Datum</u>
1	123.6
2	132.7
3	138.7
4	143.9
5	139.0
6	131.1
8	137.4
9	134.2
10	121.5
11	111.5

62/2
Betty M. Hochscha.
Kevin *John Dillon* *James*

The General Manager
Ballina Shire Council
DX27789
BALLINA



Dear General Manager,

re- 59 Teakwood Drive Alstonville: conversion of existing shed to dwelling (DA 2013/385).

Attached, for the information of Councillors and staff, is legal advice obtained on behalf of the objectors to the above DA.

The objectors propose to provide Council with full written submissions substantiating their objections, based on the legal advice, with the intent that those submissions be made available to Councillors and staff.

Would you kindly advise as to when it is intended that the matter return to Council.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Ralph James".

Ralph James
48 Teakwood Drive Alstonville.

McCartney Young Lawyers

Directors: Michelle McCartney & Michael Young

Our Ref: MY:20140054

Your Ref:

17 February 2014

Mr R James & Ms S Austin
48 Teakwood Drive
ALSTONVILLE NSW 2477

Dear Ralph & Sue

**59 Teakwood Drive Alstonville: conversion of existing shed to dwelling
(DA 2013/385)**

I refer to your instructions in this matter.

Instructions

A development application has been lodged with respect to a property in Teakwood Drive Alstonville (DA 2013/385). You own and occupy a residential dwelling near the property the subject of the DA.

As part of your instructions you have kindly provided to me a number of documents. Those documents include the Report prepared for the consideration of the Council meeting on 23 January 2014 which addresses DA 2013/385. That Report notes that DA 2013/385 seeks consent for a "change of use" of an approved farm shed to a dwelling. The Report notes the relevant planning framework, the issues that arise with respect to the assessment of DA 2013/385 (including public submissions) and draws conclusions and makes recommendations for the disposition of DA 2013/385.

Two matters are of particular concern to you:

1. Easements and Restrictions have been created with respect to various properties in Teakwood Drive. These easements and restrictions have been created pursuant to section 88B of the *Conveyancing Act 1919* (DP 856017). If consent is granted to DA 2013/385 that will result in a breach of a number of the easements and restrictions including:
 - (a) the construction materials that are permitted for the erection of a building (10(a));
 - (b) the requirement that no shed or any outbuilding erected on any lot shall be used at any time as a permanent or seasonal dwelling (10(m)); and
 - (c) the requirement that any dwelling is to be accessed by way of a sealed access road and/or driveway (10(q)).



Level 1 Suite 10/31 Cherry Street Ballina NSW | PO Box 183 Ballina NSW 2478
Phone: 02 6683 5566 | DX 27660 BALLINA | Fax: 02 6683 5544
Email: info@my-lawyers.com.au | Web: www.my-lawyers.com.au
McCartney Young Lawyers Pty Limited incorporated legal practice
ABN: 66 134 784 062



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& PLANNING LAW

The combined effect of these various non-compliances will result in the effective approval of a dwelling that is out of character with the neighbourhood and will render void and of no effect the covenants that have been entered into by the proponent and other residents in the neighbourhood.

2. Notwithstanding the summary of the matters above (which I think is both fair and accurate) the Report recommends to Council that consent be granted to DA 2013/385. That is, the report recommends that Council grant consent to DA 2013/385 in circumstances where such consent will make permanent these breaches of the covenant

Having regard to the circumstance noted above you have sought my advice.

The interaction of the covenant and the Ballina LEP

The Ballina Local Environmental Plan 2012 (Ballina LEP) includes clause 1.9A(1) which is in the following terms:

1.9A Suspension of covenants, agreements and instruments

- (1) For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.

This clause is included in the Ballina LEP in accordance with the powers created under section 28 of the Environmental Planning and Assessment act 1979 and in particular ss28(2):

28 Suspension of laws etc by environmental planning instruments

...

- (2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.

(A "regulatory instrument" is defined to include a covenant: ss28(1).)

The effect of these legislative provisions is to ensure that a Council, consistent with its powers and obligations under planning law, is given the authority and discretion to determine what development is lawful and can be carried out. These provisions effectively limit the operation of any private agreement (covenant) which might have the effect of prohibiting lawful development.

There are a number of authorities that have considered these legislative provisions: *Lennard v Jessica Estates Pty Limited* ([2008] NSWCA 121; (2008) 159 LGERA 420); *Barry Edward and Thelma June Harrington v Greenwood Grove Estate Pty Ltd* ([2011] NSWSC 833) (in which I appeared). The case that is often cited on this issue is *Coshott v Ludwig* ([1977] NSW Conv R 55-810) a decision of the Court of Appeal:

"The self-evident purpose of s28 of the Act and cl32 of LEP27 is to nullify and remove all obstacles to the planning principles decided on by the Council or the Minister. In this

context s28 of the Act is stating, in effect, "an environmental planning instrument may state what documents should be disregarded", and cl32 of LEP27 is stating that one type of document to be disregarded is a document creating a restrictive covenant. As to the argument about the words "by or under whatever authority made", I am of the view that, although chosen without conspicuous felicity, they mean no more than "howsoever created".

The broad statements of principle ("...nullify and remove all obstacles to the planning principles decided on by the Council...") need to be understood in their legislative context. By way of example, the Court of Appeal in *Lennard v Jessica Estates Pty Limited* considered the effect of cl.6(1) of the Singleton LEP that provided:

If any agreement, covenant or similar instrument prohibits a land use allowed by this plan, then it shall not apply to that land use (to the extent necessary to allow that land use)

The development that was the subject of the proceedings was the construction of a building to be converted into a duplex (thus creating more than one dwelling on the lot) with the subsequent subdivision of the land. The relevant instrument (covenant) provided (in summary):

"Unless the Registered Proprietor obtains the prior written consent of Jessica the Registered Proprietor shall not:

- (i) construct more than one dwelling on the Lot Burdened,
- (ii) construct any building of the nature known as semi-detached duplex on the Lot Burdened,
- ...
- (v) subdivide the Lot Burdened..."

The developer of the land (Jessica) sought to enforce the covenant which it created. It alleged that the development was inconsistent with ("breached") the covenant that applied to the land.

The decision of the Court was given by Tobias JA. His Honour observed that the language of the covenant was, at planning law, a "prohibition". That is, the requirement under a covenant to obtain the written consent of another party, such consent being at the absolute discretion of that party, satisfies the definition of prohibition of planning law (at [28]). His Honour also considered whether the development proposed was a "land use" and particularly focused on where the subdivision was such a use (noting authority to the effect that subdivision per se is not a use: *Young v Gosford City Council* [2001] NSWLEC 191; (2001) 120 LGERA 243).

On the question of land use and the construction of a building his Honour readily came to the following conclusion:

In my opinion, therefore, as a matter of logic the expression "a land use" in cl 6(1) of the LEP extends not only to the use of land for a particular purpose but also to the erection of buildings to enable that use to be carried out. Such a construction is perfectly consistent with its planning context and, as will appear, with the implementation of the aims and objectives of the LEP with respect to the land uses identified therein as permissible with the Council's consent.

(at [51])

His Honour recognised that whether the "prohibition" on subdivision provided in the covenant was "trumped" by the LEP was "more problematic". However, given the purposive and logical construction that his Honour applied to the LEP the covenant could not prevent the subdivision in circumstances where consent had been obtained for that development and subdivision:

In the present case, the Council granted its consent to a strata plan of subdivision of the duplex to enable it to be separately used and occupied as two dwellings. In these circumstances I see no reason why the subdivision or strata subdivision of Lot 122 in the present case was not a subdivision for the purpose of enabling its use for two dwellings and so constituted "a land use" within the meaning of cl 6(1).

Such a construction accords with common sense and the language of cl 6(1) is not so intractable as to deny its adoption. It would in my opinion border on the irrational to exclude the strata subdivision of the duplex where otherwise the duplex may be constructed and used for the purpose of separate dwellings.

Again, if cl 6(1) is to take its meaning from the intention of the draughtsperson as expressed in cl 3(g) of the LEP, it follows that in accordance with the principles of construction to which I have referred, the expression "a land use" in cl 6(1) is capable of including the subdivision of the land for a purpose allowed by the LEP. Thus his Honour ought to have included [the clause of the covenant on subdivision - (v)] as a restriction on the use of land noted in the Instrument which prohibited a land use allowed by the LEP.

(at [62] to [64])

What is important to note from this decision is the way in which the language of the covenant, together with the language of the LEP, needed to be carefully considered and interpreted.

Applying the law to the current facts

The first observation to make about clause 1.9A is that it will operate in a manner generally consistent with similar provisions in other LEPs: the intention of the clause is to ensure that a private agreement (such as a covenant) does not prevent lawful development ("restrict the carrying out of that development").

Therefore, and the first observation to make, is that in circumstances where a lawful development application is made seeking consent for permissible development the covenant cannot be used by Council as a reason to refuse that development. Importantly, and noting the decision in *Lennard v Jessica Estates*, the provisions of the statute will be an effective answer to any private action taken by the developer or the party with the benefit of the covenant.

The effect of the law in the current circumstances should be well understood. Insofar as DA 2013/385 seeks consent for a "change of use" (of an approved farm shed to a dwelling), "use of land" is development (as defined in s.4 of the EP&A Act). Development of land in the RU1 zone for the purpose of a dwelling house is permissible with consent. The covenant cannot restrict that development - it cannot be relied on as a reason for refusal for consent and proceedings cannot be taken by any individual that would have the effect of preventing the carrying out of that development.

The second observation to make is that the provisions of the covenant can be set aside for "the purpose of enabling development on land in any zone"; and the provisions of the covenant are to be set aside "to the extent necessary to serve that purpose".

The third and associated observation is that provisions of the covenant can be set aside in order to permit development "to be carried out in accordance with this Plan" – the LEP. It is therefore necessary to consider whether the development will be "carried out" in accordance with the provisions of the LEP and the associated planning documents including the DCP.

This begs the question: what are the purposes of the Plan? The effect of clause 1.9A is not to "set at naught" Council's planning regime in its entirety. Rather the effect of clause 1.9A is to ensure that the covenant does not impede development that is proposed to be carried out in accordance with the Plan.

The Council is obliged to consider the objectives the development in the zone when determining a development application in respect of land within the zone (cls.2.3(2) Ballina LEP). Therefore, and with respect to DA 2013/385, the Council must:

- be satisfied that the development will maintain the rural, cultural and landscape character of the locality, and
- grant consent to development that is compatible with the rural and environmental nature of the land

(Zone RU1, clause 1, "Objectives of zone")

The Council must also, of course, have regard to any relevant provisions of the Ballina Shire Development Control Plan 2012. The Council will be familiar with the decision of the Court of Appeal in *Zhang v Canterbury City Council* ((2001) 115 LGERA 373; [2001] NSWCA 167 DCP): the DCP is a focal point in the decision making process. That decision was recently considered by Senior Commissioner Moore:

As to the emphasis I should give to the DCP, Zhang v Canterbury City Council [2001] NSWCA 167; (2001) 115 LGERA 373 deals, inter alia, with the issue of consideration of relevant provisions of a DCP in determining whether to grant development consent. From what was said in Zhang by Spigelman CJ at para 75, three propositions emerge. First, although the Court has a wide-ranging discretion, the discretion is not at large and is not unfettered. Secondly the provisions of a DCP are to be considered as a fundamental element in, or a focal point to, the decision-making process particularly, if there are no issues relating to compliance with the Local Environmental Plan. Thirdly, a provision of the DCP directly pertinent to the application is entitled to significant weight in the decision making process but it is not in itself determinative.

(*Davies v Penrith City Council* [2013] NSWLEC 1141 at [106])

The Ballina DCP has a number of "overarching objectives" which include:

- "a. Ensure that applicable considerations are taken into account in the siting and design of development;
- b. Ensure that development is undertaken in a manner that is compatible with the physical and environmental characteristics of land..."

(Ballina DCP Chapter 2 Part 2)

There are a number of particular provisions that are designed to give effect to these overarching objectives. For example: development is to be designed

"...to be compatible an appearance with the natural environment and scenic qualities of the land and the immediate locality"; and

"Building materials and colours are to mitigate potential adverse visual impacts. Materials should be non-reflective and earthy colours and tones are to be used

(Chapter 2, Section 3.2.2 Developer Controls).

Chapter 7 of the DCP is titled "Rural Living and Activity" and the provisions of this Chapter are to prevail over Chapter 2 to the extent of any inconsistency.

Chapter 7 contains overarching objectives which include:

- "d. Encourage and provide for quality rural development within the shire;
- e. Encourage development of a scale and nature which will not adversely impact on the existing amenity of the area;
- f. Maintain or improve cultural and environmental values of rural land..."

(Chapter 7, Part 2)

Perhaps most importantly Section 3.1.2 of Chapter 7 provides as follows:

3.1.2 Planning Objectives

- a. Encourage building design and locations that have regard for the existing characteristics of the site and locality;
- b. Ensure dwellings are sited to reduce conflict between adjoining agricultural land uses; and
- c. Ensure that new dwellings are located to minimise intrusion on the privacy and amenity of existing dwellings.

Council is entitled to consider how the proposed development meets these planning objectives.

You have provided me with a number of photographs that depict the existing "shed" and the buildings that otherwise characterise residential development in the area. It must be concluded that the existing building, which is proposed to be used as a dwelling, is entirely inconsistent with the character of the locality. Indeed it is because other development has observed the provisions of the covenant that the area has a particular character and quality that the proposed development simply does not meet: it "sticks out like a sore thumb".

The objections to the development from those in the neighbourhood highlight this inconsistency together with the history of the matter and why this development comes before Council. Their objection is entirely consistent with the matters that arise for consideration under the DCP. Their objection should be taken into account by Council as part of the "public interest".

Conclusion

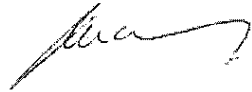
Clause 1.9A of the LEP, together with section 28 of the EP&A Act, have particular operation in this matter. These provisions make it impermissible for Council to refuse DA 2013/385 simply because of the provisions of the covenant.

However, and as the authorities make clear, the Council must apply the planning law relevant to the development. Council's obligations include the application of all provisions of the Ballina LEP together with the relevant provisions of the Ballina DCP.

A proper consideration of DA 2013/385 illustrates significant non-compliances with provisions of the Ballina LEP and the Ballina DCP. It is those non-compliances which would justify refusal of consent in the circumstances of this case.

If you have any questions in relation to this advice I invite you to contact me through my office on the direct line noted below.

Yours faithfully



Michael Young
Direct Line: 02 6683 5560
michael@my-lawyers.com.au

8.1 DA 2013/385- 59 Teakwood Drive, Alstonville.DOC

8.2 DA 2013/385 - 59 Teakwood Drive, Alstonville - Conversion of Existing Shed to Dwelling

8.2 DA 2013/385 - 59 Teakwood Drive, Alstonville - Conversion of Existing Shed to Dwelling

Applicant	W R Moss and J E Burrows-Moss
Property	Lot 1 DP 856017, No. 59 Teakwood Drive, Alstonville
Proposal	Conversion of Existing Shed to Dwelling
Effect of Planning Instrument	The land is zoned RU1 under the provisions of the Ballina LEP
Locality Plan	The subject land is depicted on the locality plan attached

Introduction

Council is in receipt of a development application for the change of use of an approved farm shed to a dwelling. The current farm shed enjoys approved habitable facilities, approved in 2003 when Council granted temporary occupation to the owner whilst their dwelling was under construction.

The development is located within a rural estate commonly referred to as a rural residential estate. The current two storey shed consists of three bedrooms, kitchen, dining and sitting area including garage, storage and workshop area. It is predominantly external colorbond cladding with ground floor walls fronting the street being timber and rendered fibrous cement sheeting.

The subject property is 3.032 hectares in area with manicured lawns and mature gardens and is located on the western side of Teakwood Drive.

Reportable Political Donations

Details of known reportable political donations are as follows:

- Nil

Public Exhibition

The application was notified in writing to the adjoining neighbors with two objections being received, one of which was a petition from a majority of the property owners within Teakwood Drive.

Applicable Planning Instruments

Ballina Local Environmental Plan 2012

The site is zoned RU1 Primary Production with dwellings being permitted with consent. The objectives of the zoning are to:

8.2 DA 2013/385 - 59 Teakwood Drive, Alstonville - Conversion of Existing Shed to Dwelling

- *Encourage sustainable primary industry production by maintaining and enhancing the natural resource base*
- *Encourage diversity in primary industry enterprises and systems appropriate for the area*
- *Minimise the fragmentation and alienation of resource lands*
- *Minimise conflict between land uses within this zone and land uses within adjoining zones*
- *Maintain the rural, cultural and landscape character of the locality*
- *Enable development that is compatible with the rural and environmental nature of the land*
- *Ensure that there is not unreasonable or uneconomic demands for the provision of public infrastructure.*

Having regard to the above objectives, the proposed change of use from farm shed to dwelling is considered to satisfy the criteria. Private covenants are addressed within the LEP as follows:

Clause 1.9A Suspension of covenants, agreements and instruments:

1. *For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.*
2. *This clause does not apply:*
 - (a) *to a covenant imposed by the Council or that the Council requires to be imposed, or*
 - (b) *to any prescribed instrument within the meaning of section 183A of the Crown Lands Act 1989, or*
 - (c) *to any conservation agreement within the meaning of the National Parks and Wildlife Act 1974, or*
 - (d) *to any Trust agreement within the meaning of the Nature Conservation Trust Act 2001, or*
 - (e) *to any property vegetation plan within the meaning of the Native Vegetation Act 2003, or*
 - (f) *to any biobanking agreement within the meaning of Part 7A of the Threatened Species Conservation Act 1995, or*
 - (g) *to any planning agreement within the meaning of Division 6 of Part 4 of the Act.*
3. *This clause does not affect the rights or interests of any public authority under any registered instrument.*
4. *Under section 28 of the Act, the Governor, before the making of this clause, approved of subclauses (1)–(3).*

As identified within this clause it is not Council's role or responsibility to uphold or enforce private covenants not imposed by Council or other government authority. The development does not contravene any Council imposed covenant.

Ballina Shire Council's Combined Development Control Plan

Chapter 7 design principles for rural dwellings:

8.2 DA 2013/385 - 59 Teakwood Drive, Alstonville - Conversion of Existing Shed to Dwelling

- *The design of the dwelling and associated buildings should be in keeping with the rural character of the locality. Traditional construction materials and natural colours are encouraged*
- *Rural dwellings must be designed in a manner which minimises energy and water consumption, and*
- *Buildings associated with dwellings such as a large sheds, greenhouses and other ancillary structures must be designed, located and landscaped to reduce visual impacts on adjoining properties and places.*

Energy and water consumption has been addressed by the submission of the Building Sustainability Index Certificate (BASIX). The siting and design of the dwelling and associated structures to maintain the rural character of the locality and landscaping requirements is considered appropriate to satisfy the design principles.

Report

The current application before Council is to convert temporary residential use of a farm shed to a permanent dwelling. Approval was granted on the 22 April 2003 conditional to the temporary occupation of the shed being for a 12 month period, after which all facilities were to be removed.

Construction issues relating to workmanship and structural adequacy of the principal dwelling under construction resulted in an incomplete building and drawn out legal proceedings. Council became aware of these matters due to the cancellation of the original Principal Certifying Authority (PCA) and the appointment of Council. Due to the construction of the dwelling ceasing and the extended legal proceedings Council did not follow up on the 12 month temporary occupation period and likely would have granted an extension if requested. Following the resolution of court proceedings the owner of the property, Mr Moss, lodged a Development Application with Ballina Shire Council on 15 December 2012 for demolition of the partially completed dwelling. It has subsequently been demolished. The legitimate use of the shed was then raised with Council which, following review of the file, revealed the temporary approval to occupy. Mr Moss was subsequently requested to advise Council of his intentions for the property and the farm shed.

The design and layout of the farm shed has only slightly been altered since the original approval for occupation. The changes consist of partition walls in the upstairs area to create a sitting area and two bedrooms. Downstairs the external walls of the workshop were extended out to incorporate the veranda. Internal partition walls have been constructed to create a separate internal storage and garage area from the workshop.

Inspection disclosed that the shed generally complies with the requirements of the Building Code of Australia for a habitable dwelling. A review of the original Development Application for the shed and subject Section 96 modification for the installation of the habitable facilities revealed the shed underwent all mandatory inspections at the time of construction including a final inspection prior to occupation.

Additional to the building being used as a temporary residence is an existing 12 by 6 metre storage shed. This shed is exempt development under the

8.2 DA 2013/385 - 59 Teakwood Drive, Alstonville - Conversion of Existing Shed to Dwelling

State Environmental Planning Policy Exempt and Complying Development Code.

Issues Raised by Objectors

- (1) The proposal is not in keeping with the design and character of the rural residential subdivision of Teakwood Drive and breaches several private covenants being:
- 10 (a) - No building including any garage or other outbuilding appurtenant thereto shall be erected on any lot having exterior walls constructed of any material other than clay brick and split concrete blocks provided however that one color bond shed may be erected within each lot provided the design, type of construction and location of such shed shall be approved by Hendrik Hoekstra and Betty Margaret Hoekstra and Ballina Shire Council. No building or shed as herein before referred to shall be of any other color than subdued or earthy tones which are not prominent against the background. Sections of feature panel above, beside and below windows and doors may be constructed in non-masonry type materials as approved by Ballina Shire Council. Construction shall be deemed to include alterations and additions.
 - 10 (m) - No shed, basement, tent, shack, garage, trailer, camper, caravan, or any outbuilding erected or placed on any lot shall be used at any time as a permanent or seasonal dwelling.
 - 10 (q) - No dwelling shall be occupied unless the access to such dwelling is by way of sealed access road, driveway or carriage way of hot mix, bitumen, asphalt, concrete or other similar material as may be approved by Hendrik Hoekstra and Betty Margaret Hoekstra their executors and assigns whilst ever they own a lot within the subdivision and thereafter the Council of the Shire of Ballina.

Comment: The shed is not highly visible from the road being located approximately 80 metres from Teakwood Drive on the down hill side of a rock retaining wall with suitable landscape screening. The owner has modified the external cladding to improve the external appearance from the road. As the shed is located within a rural subdivision where the dwellings are situated well away from each other and have established gardens providing partial screening from the road and each other, it is considered that the shed does not overly detract from the streetscape and character of the subdivision.

Clause 1.9a of Ballina Shire Council LEP does not require Council to enforce and maintain private covenants. This responsibility lies with the developer and stakeholder within the subdivision. A new rural dwelling in conflict with the covenants could be lodged and approved by Council within a mandatory 10 days under the State Environmental Planning Policy Exempt and Complying Development for New Dwellings without any initial consultation with adjoining residents.

The current driveway is constructed of compacted crushed aggregate. The original development consent issued for the farm shed and then temporary occupancy did not require the driveway to be sealed and the driveway was satisfactory at the time of the final inspection.

8.2 DA 2013/385 - 59 Teakwood Drive, Alstonville - Conversion of Existing Shed to Dwelling

- (2) There are extensive unauthorised additions to the entire perimeter of the shed including unsafe retaining walls, with no Construction Certificate being issued for the shed, and no building inspections were carried out.

Comment: A Construction Certificate was issued and subsequent building inspections carried out. The retaining of excavation was carried out at the direction of Council subject to the schedule of outstanding items attached to the Interim Occupation Certificate. The rock retaining walls do not appear to be showing any signs of dilapidation or subsidence.

Should the application be approved the consent will be conditioned that a building certificate be obtained to legitimise unauthorised works which have been carried out without Council approval (partition walls and veranda enclosure).

- (3) The objectors considered themselves compassionate and sympathetic towards the applicant by not objecting to the temporary occupancy whilst they were of the belief that the shed would be reverted back to its original state and that following the court case the partially completed dwelling would be completed or a new dwelling constructed. Council should not consider the application as it does not comply with Council regulations and the private covenants, and should not have exhibited the application as it creates animosity amongst neighbours.

Comment: Council has the responsibility to assess and determine development applications in accordance with EP&A Act, Council LEP and DCP. Neighbor notification is part of the process.

- (4) Council is setting a precedent should the application be approved for residents within the shire to construct unauthorised building work without obtaining the necessary building approval and insurances.

Comment: Unauthorised building work is not uncommon and legislation provides an avenue for landholders to have such structures legitimised.

- (5) The approval of the development application would have a direct negative impact on the values of the properties within the subdivision.

Comment: It is not Council's role or responsibility to determine applications with the consideration of the neighbouring property values other than with respect to the public interest. No evidence has been provided to substantiate this claim nor does the application assessment support the contention in this case.

- (6) The developer is the authority that has power to vary or modify the 88B instrument in which case the developer has not consented to the variation of the covenants.

Comment: The developer has the ability to take their own civil action to enforce the 88B instrument, and it is not Council's role to enforce covenants not imposed by Council.

- (7) Approval of this application has the potential to create a situation where in the future a second dwelling could be constructed offending zoning.

8.2 **DA 2013/385 - 59 Teakwood Drive, Alstonville - Conversion of Existing Shed to Dwelling**

Comment: The property is Zoned RU1 under Ballina Council Local Environmental Plan. Attached dual occupancies are permitted.

Conclusions

The farm shed enjoyed temporary approval to be utilised as a dwelling for a 12 month period. During this time issues arose with regard to the construction of the family home which led to drawn out legal proceedings resulting in the demolition of the partially constructed dwelling. Now the owner is seeking approval to continue the use of the shed as a dwelling.

The shed has been constructed to a standard that satisfies the Building Code of Australia (BCA) and relevant Australian Standards, as well as Council's LEP and DCP Chapters. Minor unauthorised work is insignificant and can be regularised through the requirement of the owner to lodge a Building Certificate application.

Under Clause 1.9a of Ballina Shire Council LEP Council has no authority to refuse the application for the sole reason that the building does not comply with the private covenants listed within the 88B instrument. The developer and owners with vested interest within the subdivision have the ability to take their own civil action to enforce the 88b instrument privately if they so wish.

The shed is considered appropriate for conversion to a permanent dwelling, and there are no apparent reasons to justify refusal or modifications.

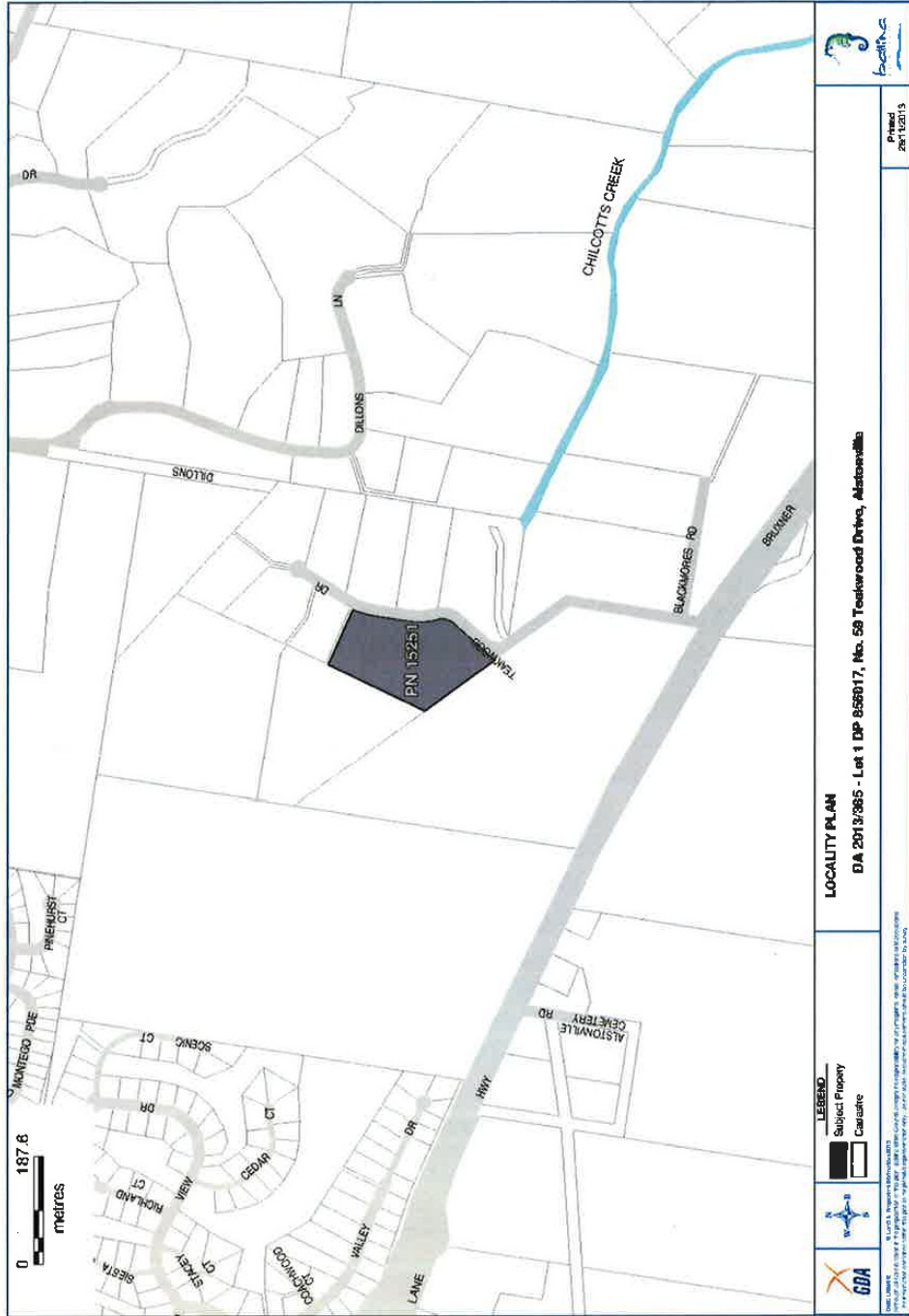
RECOMMENDATIONS

That Development Application 2013/385 for the Change of Use of the farm shed to a dwelling at 59 Teakwood Drive, Alstonville, be APPROVED, subject to appropriate conditions of approval.

Attachment(s)

1. DA 2013/385 Locality Plan
2. Photo - Dwelling and Shed Southern Elevation
3. Photo - Street View
4. Photo - East Elevation
5. Photo - South East Elevation
6. Photo - West Elevation
7. Photo - North Elevation
8. Photo - Shed North Eastern Elevation
9. Photo - Internal
10. Photo - Internal
11. Photo - Internal
12. Photo - Internal

8.2 DA 2013/385 - 59 Teakwood Drive, Alstonville - Conversion of Existing Shed to Dwelling.DOC



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<p>RECORDS SCANNED</p> <p>7 NOV 2013</p> <p>Doc No.....</p> <p>Batch No.....</p>

RECEIVED
6 NOV 2013
COUNTER

Teakwood Dve
Alstonville NSW 2477

2 November 2013

Mr Rod Willis
Group Manager
Development and Environmental Health
PO Box 450
Ballina NSW 2478

**Re: DA2013/385 – Mr W.R. Moss and Mrs J.E. Burrows-Moss, Lot 1, DP 856017,
59 Teakwood Dve, Alstonville, Conversion of an existing shed to a dwelling.**

As both neighbours and residents of Teakwood Dve, Alstonville, we wish to object to the above development application (DA) for the reasons outlined below. We the undersigned do not consider that the proposal is in keeping with the intended character and design of the rural residential subdivision of Teakwood Dve as required in DP856017 for this subdivision. We believe the DA is in breach of several covenants in DP856017 which are explained in Attachment A.

We note that Council's website shows no DA for the additions made to the perimeter of the storage shed post its original construction in 1999 or thereabouts. The owners of this property completed extensive additions to the entire perimeter of this shed at the time of "temporary occupancy" several years ago, which has essentially doubled the size of the footprint of the shed. This was done while their partially built residential dwelling was subject to lengthy legal proceedings.

As neighbours, we were sympathetic to the owners' situation at the time, and did not object to the temporary occupancy of the original shed. We believe the subsequent additions to the shed that followed were in contradiction to this temporary arrangement, but assumed this would be dealt with under the terms of the "temporary occupancy" approval, whereby the shed would be returned to its original size, state and footprint.

On compassionate grounds, Teakwood Drive residents did not object to the temporary occupancy on the understanding that after the conclusion of legal proceedings, a residential dwelling, either the completion of the partially constructed dwelling or an entirely new residence, would be constructed, which would also comply with building codes and the subdivision covenants in DP856017. For more than a decade, during the lengthy legal disputes, residents have been patient with the impact the unfinished dwelling, subsequent demolition and additions to the shed have had on them and the aesthetics of the street. However, it now appears the proponents had every intention of using the shed as a primary dwelling with no intention of completing their partially built house or constructing a new dwelling on the same property.

We are also concerned that the alterations to the shed were never issued a construction certificate and building inspections were never conducted to ensure compliance obligations were maintained. We also contest that retaining walls constructed adjacent to the shed perimeter walls may not be compliant and may pose a potential safety hazard.

The intended original dwelling house on this lot was partially constructed pre-2001 and was demolished in 2012 and we understand this was at the owner's discretion. The decision to not complete the construction, or construction of a new dwelling, should not be a contributing factor pertaining to the occupancy status of the storage shed. The original demolished house site still has exposed underground electricity mains, which represent yet another safety hazard and is in contravention to SAA wiring rules and/or Supply Authority regulations.

It defies belief that Council would even consider the current DA to convert an apparently non-complying shed to a permanent dwelling. We note the DA submission refers to the shed, on more than one occasion, as "existing". As noted above, the shed includes unapproved extensive modifications, which appear to have not been inspected for compliance with building or other required standards and is certainly not "existing", with reference to the original storage shed approved for construction in 1999. It has been added to without the same rigour of building inspections and assessment that a "dwelling" is required to comply with, yet this DA is intended to legitimise the construction.

If Council approve such a DA, they are setting a precedent and saying to all Shire residents that Council's building and environmental assessment regulations no longer have to be adhered to. A DA will no longer be required to be lodged prior to construction. Building certificates, Home Owners Warranty insurance and Building Inspections to ensure building codes are met will no longer be required.

It is arguable that Council should not have allowed this DA to be exhibited, as it does not appear to comply with Council's regulations and the associated subdivision covenants. The exhibition is forcing local residents to make written objections, which have the potential to cause animosity and/or conflict between neighbours, and which are unnecessary if Council had ensured the DA complies before exhibition.

The majority of residents of Teakwood Dve, excluding the proponent, have purchased their properties and/or complied with the covenants in DP856017 which were clearly intended to require that dwellings were to be of high quality, in keeping with the character of the subdivision, and were to comply with restrictions on the design and construction materials to be used for both dwellings and sheds in the subdivision.

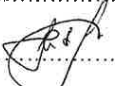
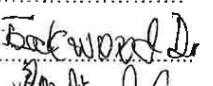
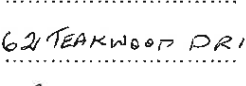

As the proposal does not comply with the covenants in DP856017 for a dwelling, we the undersigned believe that the proposal is therefore likely to have a significant social and economic impact on the marketability of the direct neighbours and the subdivision in total



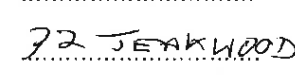


and is not in the best interest of the other residents in this street. The undersigned and the other residents of Teakwood Dve decided to move to this street and build our dwellings and sheds in compliance with the covenants in DP856017 as they were generally superior to the average in the Shire and were in keeping with the intended quality residences intended for this subdivision. As such, the undersigned and other residents of Teakwood Dve paid a premium for the land and associated dwellings when initially purchasing our respective properties. We therefore believe the conversion of this storage shed to a residence on a permanent basis, will have a direct negative impact to the value of the street and all the individual properties.

We ask that Council consider this submission in its entirety, including Attachment A, in determining this DA and uphold the development standards outlined in DP856017 and other relevant building standards that are applicable to this rural residential subdivision.

We also note that we have no reasons to disclose any reportable donations or gifts to any local Councillor or to Council as outlined in your letter dated 22 October 2013.

Yours sincerely

HANK HOGKSTRA	PAUL A HOULAHAN	JEANETTE HOULAHAN
		
76 TEAKWOOD DR	62 TEAKWOOD DR	62 TEAKWOOD DRIVE
		J. Houlahan

Sarah Fairfull	PAUL FAIRFULL	BILL SILVESTER
		
63 Teakwood Dve	63 TEAKWOOD DVE	72 TEAKWOOD DVE
75 Teakwood Dve	48 Teakwood Drive	Bill Silvester
Anne Valder	RACHEL JAMES	48 Teakwood Drive
J. F. Valder	Rachel James	Sue Austin
		

Ash Woolley
A woolly
71 TEAKWOOD DR

Sue Woolley
Woolley
71 Teakwood Drive

Manfrinus
77 Teakwood Drive
Alstonville 2477

Attachment A:

We the undersigned do not consider that the proposal is in keeping with the intended character and design of the rural residential subdivision of Teakwood Dve as outlined in DP856017 for this subdivision and noted:

- Clause 10(a) notes that only one colourbond shed can be erected on any lot – the design, type of construction and location of such shed to be approved by Mr and Mrs Hoeskstra and Ballina Shire Council. As objectors to this proposal, we note that there are currently two colourbond sheds constructed on the proponent's property and contest that neither have been approved in full in accordance with this instrument (DP856017) or any other approval as permanent sheds or dwellings on this property.
- Clause 10(m) states that no shed or any outbuilding erected or placed on any lot of the subdivision shall be used as a permanent or seasonal dwelling. We the undersigned argue that this DA is in direct conflict with this clause as it proposes to allow a shed to be used as a permanent dwelling.
- Clause 10(q) notes that no dwelling shall be occupied unless the access to such dwelling is by way of sealed access road, driveway or carriageway of hot mix, bitumen, asphalt, concrete or similar material as approved under this clause. As objectors we note that the driveway to the proposed dwelling does not meet this requirement at all.

As neighbours and residents of the subdivision – we have complied with this requirement for the access road to our residence which significantly added to the cost of our residential dwelling during their construction. We believe it is therefore unfair that our neighbours should not have to comply with this clause for their dwelling.

Re W.R. Moss and J.E. Burrows-Moss DA2013/385

This objection is intended to be supplementary to that lodged by the bulk of the residents of Teakwood Drive.

This objection is focused on the Restriction as to User created pursuant to Section 88B of the Conveyancing Act in respect of DP 856017. It is also focused on the zoning of the area.

It is recognised that Ballina Shire Council is not required to uphold or enforce restrictive covenants over land. On the *Ballina Development Control Plan 2012*, it states that Council is not required to uphold or enforce these additional controls in accordance with Clause 1.9A of the BLEP 2012.

This is supported by *Coshott's Case* which states affirms that s28 of the *Environmental Planning and Assessment Act* allows planning instruments such as LEP's to override, amongst other things, restrictive covenants.

Therefore, whilst a submission may be made to Council objecting to the change of use and may be supported by the existence of the restrictive covenant, Council is not restricted in its approval of the DA by the restrictive covenant.

Nevertheless the existence of a Restriction as to User or a restrictive covenant can be used as persuasive argument in advancing an objection.

By the 88B instrument the developer (Mr and Mrs Hoekstra) is the authority that has power to vary or modify whilst ever they own a lot in the subdivision. If they no longer own a lot in the subdivision then the power to modify falls to Council.

Mr and Mrs Hoekstra have not consented to the variation or modification of the instrument and, indeed, they have specifically objected to the application.

The intent or purpose of the instrument must, it is submitted, be considered by Council when considering the objection and determining the application.

The application proposes a development which is specifically contrary to terms (a), (m) and (q) of Restriction 10. The terms of those Restrictions are abundantly clear and have been put in place for a reason which will be obvious to Council and which has been addressed in the joint residents submission.

Council should not depart from standard set by those Restrictions and should apply the terms of the restrictions consistently. To do otherwise would permit and encourage ad hoc development.

The application relates to a property in a Zone RU1 "Primary Production". This does not permit secondary dwellings under the SEPP (Affordable rental housing)

Consistent with the North Coast REP which requires only attached dual occupancies the Ballina LEP requires the same (with development consent).

Approval of the application has the potential to create a situation where, in the future, a second dwelling might be constructed on the property thereby offending zoning.

Should Council consider granting of development consent the applicant ought be required to surrender any dwelling entitlement beyond that relating to the shed.

*Letter of Objection - Ralph James and
Sue Austin*