

**TWEED SHIRE COUNCIL  
MEETING TASK SHEET**

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**Action Item - PLANNING MEETING**

Action for Item as per the Committee Decision outlined below.

**ATTENTION:**

**PLEASE NOTE THE ADOPTION OF THE COMMITTEE RECOMMENDATIONS BY  
COUNCIL AT ITS MEETING HELD TUESDAY 21 APRIL 2009:**

71

**Cr D Holdom  
Cr K Skinner**

**RESOLVED** that the recommendations of the Planning Committee held Tuesday, 21 April 2009 be adopted.

The Motion was **Carried**

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TITLE: [PR-PC] Development Application DA05/0824.07 for modification to DA05/0824 for multi dwelling housing comprising four (4) units at Lot 4 Section 2 DP 7309, No. 26 Seaview Street Kingscliff

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The following persons addressed the meeting of the Planning Committee on this matter.

Dr Austin Sterne  
Mrs Sterne  
Mr Ian Tremewem

**Cr D Holdom  
Cr K Skinner**

**RECOMMENDED** that this item be deferred pending further advice and a report from the Director Planning & Regulation.

The Motion was **Carried**

***FOR VOTE - Unanimous***

## Agenda Report

TITLE: [PR-PC] Development Application DA05/0824.07 for modification to DA05/0824 for multi dwelling housing comprising four (4) units at Lot 4 Section 2 DP 7309, No. 26 Seaview Street Kingscliff

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ORIGIN:

### **Development Assessment**

**FILE NO: DA05/0824 Pt3**

SUMMARY OF REPORT:

An amended Section 96 application has been received in respect of the above premises, primarily to rectify a breach of the approved height for the building under construction, as well as other minor design changes, pursuant to the approved DA05/0824.

Following Council's refusal of an earlier Section 96 application at its meeting of 16 December 2008, Council officers engaged solicitors to investigate and act upon the unauthorised building works for this site, via Class 4 proceedings in the Land and Environment Court.

The applicant acknowledges in their report for the amended Section 96 application DA05/0824.07 that the constructed building to date exceeds the maximum height at various points of the proposed roofline as measured on the approved plans. To rectify the non-compliance, the applicant proposes to remove and re-construct the roof to a height no greater than what was originally approved. Whilst the non-compliance has greatly been rectified through the latest plans, it has been identified that the height of a centrally located dividing wall still appears to be up to 500mm higher than the approved plans. A condition of approval has been recommended to require this wall to be lowered to the approved level.

A number of objections have been submitted in respect of the latest amended plans, identifying issues including view loss and safety issues regarding the wall building height, new proposed landscaping, the retention of two existing Norfolk Pine trees, and the height of the front fencing.

Given the applicant's agreement to alter the current unauthorised building works to conform to the height levels of the approved original development application, and further assessment of the proposed retention of the existing Norfolk Pine trees, it is considered that the current Section 96 modification is suitable for approval.

The officers have also recommended that Penalty Infringement Notice (PIN) be issued in respect of the unauthorised works. The officers have also provided information on further criminal proceedings that can be pursued should Council consider it to be appropriate.

RECOMMENDATION:

**That:**

- A. Council approve this Section 96 application subject to the following modified condition 1A and the following additional conditions 6.1 and 76.1;**

**1A The development shall be completed in accordance with the Statement of Environmental Effects and Plan Nos 62531 sheet 1 prepared by Gordon Brismire and dated 11/03/09 Plan Nos 62531 sheet 2-5 inclusive prepared by Gordon Brismire and dated 24/02/09 Plan Nos 62531 sheet 1 prepared by Gordon Brismire and dated 09/03/09 Plan Nos LP01 prepared by BoydsBay Landscape & Environmental and dated 11.03.09 (as amended in Red on the approved plans) except where varied by the conditions of this consent.**

[GEN0005]

**6.1 The two Norfolk Pines (within the front setback adjacent to Seaview Street) are permitted to remain whilst it can be demonstrated the potential risk of harm to public safety is appropriately assessed. This shall be determined through the landowner(s) submitting to Council 6 monthly assessments by a suitably qualified Arborist (minimum Australian Qualification Framework Level 5) for a period of 2 years. The first report is to be submitted within 6 months of the date of this amended consent. A section 88B restriction is to be placed on the title of Lot 4 Section 2 DP 7309 giving effect to the terms of this condition.**

[GENNS03]

**6.2 The maximum height of the proposed central dividing fin wall (which separates the two main northern and southern portions of the proposed building) be lowered to the maximum height limit of the approved plans of DA05/0824, as determined by Council at its meeting of 15 August, 2006.**

**76.1 Prior to the issue of an occupation certificate a surveyor's report prepared by a registered surveyor is to be submitted to Council detailing the height of the building at all relevant points as detailed on the approved plan 62531 sheet 5 of 7 prepared by Gordon Brismire dated 11/03/09, to the satisfaction of Council or delegate. All levels are to be provided in Australian Height Datum.**

[POCNS03]

- B. Penalty Infringement Notices for non-compliance with Development Consent be issued.**
- C. The applicant be advised that if the rectification works have not commenced within 30 days from the date of this amended consent Council will commence Class 5 Criminal proceedings in the Land and Environment Court. Any additional breaches of the development consent as amended will result in Council commencing Class 5 Criminal proceedings in the Land and Environment Court**

REPORT:

**Applicant:** Jeanleighmac Developments Pty Ltd, Mr GF Bismire and Mr WC Engwirda

**Owner:** Mr GF Bismire, DM Househam, WC Engwirda and Jeanleighmac Pty Ltd

**Location:** Lot 4 Section 2 DP 7309, No. 26 Seaview Street Kingscliff

**Zoning:** 2(b) Medium Density Residential

**Cost:** \$1,100,000.00

**BACKGROUND:**

Development application DA05/0824 was approved on the 15 August 2006 for the construction of a two storey multi-dwelling housing development containing four units. The main issues of contention in this original application related to the proposed building height and view loss for adjoining and surrounding properties particularly for the southern property, No. 28 Seaview Street.

Council received a Section 96 application (DA05/0824.01) on the 27 March 2008 following complaints that the building under construction had exceeded the previous approved maximum height levels. This application was refused by Council at its meeting held 16 December 2008 for the following reason:

1. *The unauthorised increase in building height will create an unacceptable visual impact/view loss on the neighbouring property No. 28 Seaview Street Kingscliff.*

Council also resolved as follows: -

- "B. Council's solicitors be engaged as soon as possible to commence appropriate action for unauthorised building works.*
- C. Council will not issue an Occupation Certificate until such breaches are rectified."*

Council's solicitors advised the applicant via letter dated 12 January 2009 to immediately cease construction and to rectify the unauthorised building works within 28 days of the date of the letter, or otherwise Council would commence proceedings in Class 4 of the Land and Environment Court.

The applicant lodged a second Section 96 application (DA05/0824.07) on the 8 January 2009, to rectify the breach in building height, amend the landscaping plan, amend the front fence and other building elements. In accordance with advice from Council's Solicitors, legal proceedings were deferred until the determination of the S96 is finalised.

Below is a timeline that reflects activities related to this application from this original determination.

15 August 2006.	Development Application DA05/0824 was determined
28 March 2008	Information relating to condition 71 (Colours and materials to be approved by Council prior to the issue of a Construction Certificate) of development consent received. Considered unsatisfactory.
28 March 2008	Information relating to condition 9 (landscaping to be approved

	by Council prior to the issue of a Construction Certificate) of development consent received. Considered unsatisfactory. Minor changes requested by Council's planner/ecologist.
31 March 2008.	Section 96 application to modify the consent received DA05/0824.01.
22 April 2008	Further information request, for enhanced colours and materials, in order to adequately assess and address the condition number 71 of the development consent. Prior to the issue of a Construction Certificate.
29 April 2008	Further information letter requesting amendments to the submitted landscape plan. The changes were requested by Council's planner/ecologist. Prior to the issue of a Construction Certificate
7 May 2008	Further information letter requesting colours and materials, in order to adequately assess and address the condition number 71 of the development consent. Prior to the issue of a Construction Certificate.
12 May 2008	Letter to applicant advising that the amended landscape had been approved, satisfying condition number 9. Including the two existing Norfolk trees located adjacent to Seaview Street.
13 May 2008	Construction Certificate issued by Mark Thomas Private Certifier.
22 August 2008.	A further information letter was sent to the applicant requesting more detail of the proposed changes in order to adequately assess the Section 96 application.
14 November 2008.	Neighbours of the subject site contacted Council to advise that the construction of the development at 26 Seaview Street is not in accordance with the approved plans.
20 November 2008	Site inspection undertaken by Council officer. Advised the builder/applicant/owner of complaint and advised that any/all building works that did not have approval were to cease, and that the Section 96 application had not been determined.
21 November 2008	A further information letter was sent to the applicant advising the applicant that the Section 96 application has not been determined and condition number 69 :- <i>The proponent shall submit to Council at each stage of construction a surveyors certificate specifying the RL levels for the basement/ground floor, and each and every subsequent floor and roof height level within one (1) week of the construction component being completed.</i> Had not been addressed, and that the information requested on the 22 August 2008, regarding the Section 96 is still outstanding and that condition number 71 had still not been satisfied.
24 November 2008.	Two letters were sent to the applicant and the owners of the development advising them that; <ul style="list-style-type: none"> <li>○ Council had been advised that the building works are not in accordance with the approved plans and that all illegal building works are to cease immediately.</li> <li>○ Information is also to be provided illustrating all of the floor and roof levels of the building in RL metres</li> </ul>

	<p>AHD.</p> <ul style="list-style-type: none"> <li>○ Information requested relating to the Section 96 application is still required to be submitted.</li> </ul>
27 November 2008	<p>Meeting with applicant and the certifying authority to receive the further information. During the meeting it was identified that the information received was not satisfactory. It was clearly discussed what was required from them.</p> <ul style="list-style-type: none"> <li>• RL AHD levels for all floor levels and all roof levels (where ever there is a change in roof height).</li> <li>• 3 copies of elevation drawings clearly depicting colours (prior to Construction Certificate condition 71).</li> <li>• 3 copies of plans clearly identifying all of the proposed changes.</li> <li>• A cover letter that clearly describes all of the proposed changes.</li> </ul>
28 November 2008	<p>Telephone conversation with applicant/builder/owner advising that any building works associated with areas of the building not approved or not in accordance with the approved plans are to cease. The applicant advised me that the building works associated with these areas of concern had stopped on the 27 November 2008.</p> <p>The applicant advised that the information requested would be provided on the 1 December 2008, and that a revised roof design may be applied for through the current Section 96.</p> <p>I advised the applicant that the Section 96 would be required to be notified when Council had received all relevant and satisfactory information.</p> <p>I also advised the applicant that the section 96 application would be reported to Council.</p>
2 December 2008	<p>Information received from the applicant regarding:-</p> <ul style="list-style-type: none"> <li>• Cover letter listing proposed changes</li> <li>• Roof levels</li> <li>• Floor levels</li> <li>• Colours</li> <li>• Elevation drawing identifying proposed changes</li> </ul> <p>An assessment of the submitted information identified that:-</p> <ul style="list-style-type: none"> <li>• The cover letter did not list all changes (the roof height and shape has changed this was not listed)</li> <li>• Roof levels were not provided for the entire roof.</li> <li>• Floor levels provided for 3 out of the 4 floor levels.</li> <li>• Colours appear to be satisfactory.</li> <li>• Elevations are incorrect.</li> </ul> <p>It was identified from the survey levels that the constructed roof is higher then the approved (in some areas up to 82cm for a length of 7.7metres).</p>
4 December 2008	<p>Meeting with the applicant, Manager of Development Assessment and Development Assessment officer, to discuss:-</p> <ul style="list-style-type: none"> <li>• The variation between the approved building heights and the constructed building height.</li> <li>• Floor levels</li> </ul>


	<ul style="list-style-type: none"> <li>• Roof levels.</li> <li>• Errors in elevations and labelling.</li> <li>• Cover letter listing proposed changes</li> </ul> <p>The applicant acknowledged the building has been constructed higher than what was approved. The applicant stated that:-</p> <ul style="list-style-type: none"> <li>• A proposed amended roof design to reduce the height of the roof would be submitted.</li> <li>• Amended elevations providing correct labelling and levels of floor and roof would be submitted.</li> <li>• Amended cover letter including the proposed roof changes would be submitted.</li> </ul>
16 December 2008	<p>Council at its meeting held 16 December 2008 resolved to refuse the application for the reasons;</p> <p>1. The unauthorised increase in building height will create an unacceptable visual impact/view loss on the neighbouring property No. 28 Seaview Street Kingscliff.</p> <p>Council also resolved as follows: -</p> <p><i>"B. Council's solicitors be engaged as soon as possible to commence appropriate action for unauthorised building works.</i></p> <p><i>C. Council will not issue an Occupation Certificate until such breaches are rectified."</i></p>
8 January 2009	S96 Applicant received DA05/0824.07.
12 January 2009	Letter from Council's solicitors to applicant/builder requesting that the applicant/builder cease construction and rectify the unauthorised building works.
28 January 2009	S96 notified for a period of 14 days 28/1/09 – 11/02/09
19 January 2009	Letter from Council's solicitors advising Council to determine the current S96 application prior to commencing Class 4 proceedings against the applicant.
4 March 2009	<p>Information received from Planit consulting stating;</p> <ul style="list-style-type: none"> <li>• Roof level 30.3m AHD in the original DA report is in error.</li> <li>• Further acknowledgement the works were done not in accordance with the approved plans and all building works associated with the unauthorised building areas has ceased.</li> <li>• Amended plans detailing compliance with roof line adjacent to Orient Lane.</li> <li>• Clarification of how the proponent seeks to rectify the unauthorised works, via physical removal of the entire roof structure with new/modified and compliant roof structure constructed.</li> <li>• Landscape plan provided. Objection received to the approval of the planting of "Tuckeroo" which could lead to view loss.</li> </ul>



	<ul style="list-style-type: none"><li>• Telephone discussions with proponent in relation to the "Tuckeroo" agrees to Council removing all "Tuckeroo" planting from the landscape plan. The Norfolk Pines are identified on the plan.</li></ul>
24 March 2009	Further information received from Planit consulting; <ul style="list-style-type: none"><li>• Amended plans showing front fence 1.2m rendered brick</li><li>• Amended roof details</li></ul>

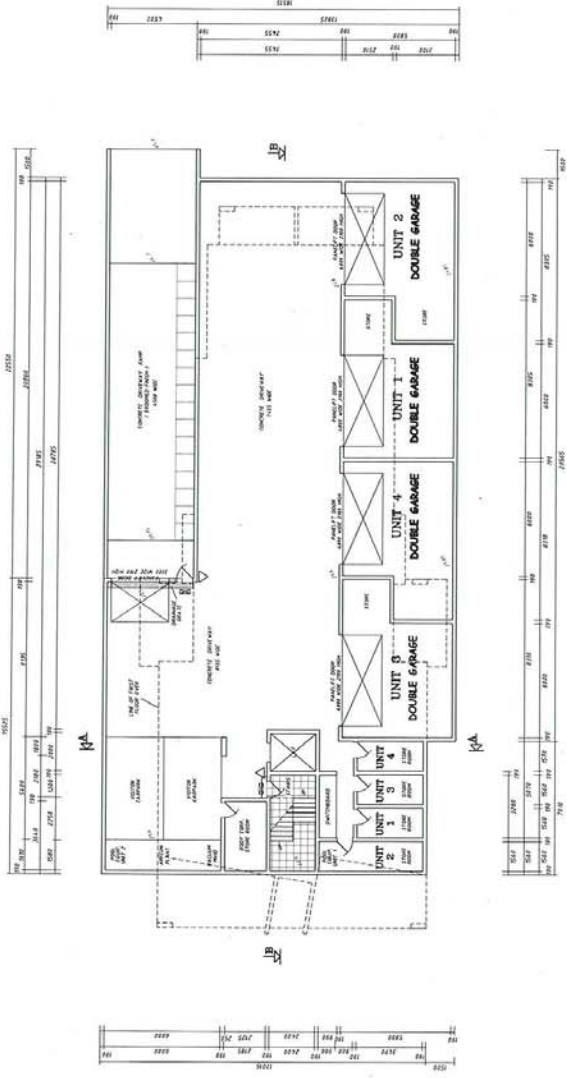
**SITE DIAGRAM:**



<p>© TWEED SHIRE COUNCIL 2008          Although all care has been taken with the production of this map, the TWEED SHIRE COUNCIL, its Employees, Officers and Consultants can not be Responsible for any Errors, Omissions or Inaccuracies in respect to the information supplied in this map.  <b>DO NOT SCALE</b>  <b>COPY ONLY - NOT CERTIFIED</b>          P.O. Box 816 Murrumbidgee, NSW, 2484 Tel: (02) 6670 2409 Fax: (02) 6670 2483</p>	<p><i>Tweed Shire Council</i>  <b>Lot 4 Section 2 DP 7309</b>  <b>No. 26 Seaview Street, Kingscliff</b></p>	<p><b>Site Plan</b>    </p>		
<p>File: Z:\GIS_Jobs\Site Plan.Wor</p>	<p>Author: J. Batchelor</p>	<p>Date: 09/Dec/2008</p>	<p>Scale: 1:5,000</p>	<p>Sheet: 1 of 1</p>







**BASEMENT FLOOR PLAN**

TOTAL BASEMENT AREA - 547.2 m<sup>2</sup>  
 TOTAL GARAGE AND STORE AREA UNIT 1 - 50.4 m<sup>2</sup>  
 TOTAL GARAGE AND STORE AREA UNIT 2 - 47.3 m<sup>2</sup>  
 TOTAL GARAGE AND STORE AREA UNIT 3 - 47.3 m<sup>2</sup>  
 TOTAL GARAGE AND STORE AREA UNIT 4 - 46.0 m<sup>2</sup>

NOTE: ALL BUILDING WORKS SHALL COMPLY WITH THE RELEVANT AUSTRALIAN STANDARDS AND THE REQUIREMENTS OF THE NATIONAL FIRE PROTECTION ASSOCIATION (NFPA). ALL LEVELS ARE IN METRES AND ARE BASED ON AUSTRALIAN HEIGHT DATUM. ALL DIMENSIONS FOR ALL FOUNDATIONS, CONCRETE SLABS, SUSPENDED SLAB PANELS, BEAMS AND STRUCTURAL STEEL.

△ DENOTES PORTABLE FIRE EXTINGUISHER IN ACCORDANCE WITH AS 2444  
 □ DENOTES EMERGENCY EXIT SIGN IN ACCORDANCE WITH AS 1293.1

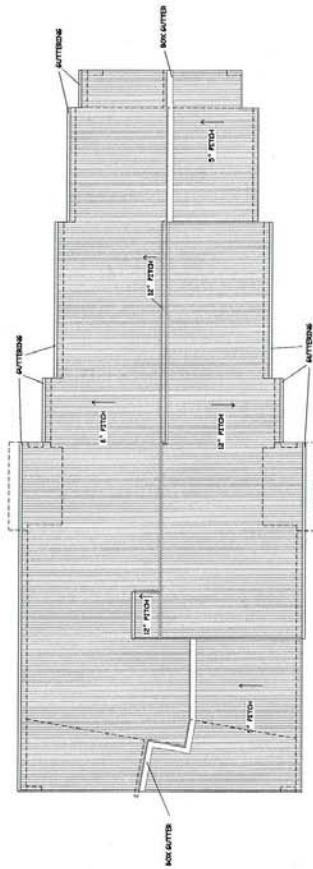
NOTE: ALL DIMENSIONS TO BE COMPLETED BY THE CONTRACTOR TO BE BUILT.

**Gordon Blismire Builder**  
 40/40-007 44 800  
 P.O. BOX 74 100 WINDYBARK QLD 4225

**Bill Emmit**  
 BILLING CONSULTANT  
 P.O. BOX 1009 7400- 02 6274 0266  
 P.O. BOX 204 CUMBERLAND, QLD 4225

**Jenleghmac Developments**  
 4/100-007 44 800  
 P.O. BOX 427 COOLMANTHA, QLD 4225

**PROPOSED 4 RESIDENTIAL UNITS**  
 ON LOT 49 7409  
 10/100-007 44 800  
 10/100-007 44 800  
 CONSULTANT



**ROOF PLAN**

NOTE: ALL BUILDING WORKS SHALL COMPLY WITH THE RELEVANT AUSTRALIAN STANDARDS AND THE REQUIREMENTS OF THE LOCAL COUNCIL. ALL LEVELS ARE IN METRES AND ARE BASED ON AUSTRALIAN MEAN SEA LEVEL.

THIS DRAWING IS THE PROPERTY OF THE ARCHITECT AND IS NOT TO BE REPRODUCED OR COPIED IN ANY MANNER WITHOUT THE WRITTEN CONSENT OF THE ARCHITECT.

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**PROPOSED 4 RESIDENTIAL UNITS**  
 ON LOT 4 OF 7339  
 NANTON STREET,  
 BRISBANE, QUEENSLAND

DATE	10/01/2024
SCALE	AS SHOWN
BY	JEANLEGH MAC DEVELOPMENTS
CHECKED BY	JEANLEGH MAC DEVELOPMENTS
APPROVED BY	JEANLEGH MAC DEVELOPMENTS
DATE	10/01/2024

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

### **PROPOSAL**

The application proposes the following modifications:

1. The swimming pool located on the southern side of the property has been deleted.
2. The skylights on the upper level northern elevation have been deleted.
3. Minor changes to the entry door in the ground floor foyer.
4. The front balcony to Unit 4 (previously known as unit 3) now protrudes across the front elevation, where previously there was a three metre void. This element has been brought about by way of rationalizing the current design and to increase the area of private open space available to the upper level apartment.
5. The glass balustrade to the balcony facing the laneway (east elevation) is to be changed from glass balustrade to a rendered concrete block balustrade. This element has been brought about by way of rationalizing the design, increasing privacy and reducing costs to what is a secondary frontage.
6. The eave overhang adjacent to the lift has been reduced. This element has been brought about by way of design rationalization and a response to the need to maintain building heights around the lift overrun.
7. Minor change to the bathroom layout on the top floor (bath deleted and shower repositioned).
8. Louver windows to the bathroom and laundry in the northern and southern elevations changed to awning windows.
9. Laundry window to the northern and southern windows deleted.
10. Pine trees to the front of the property to be retained.
11. Modification of the built roof to reflect the approved roof form and retention of approved building heights.
12. The front fence is to be constructed of rendered brick with a continuous height of 1200mm. The fence is proposed to run parallel to the finished ground level on the property boundary. The original consent was for a rendered brick fence with varying heights up to 1600mm high.
13. Revised landscaping plan.

### **Assessment under Section 79(c)(1) of the EP&A Act, 1979**

The proposed modification is considered to be in accordance with Section 79(c)(1) Matters for consideration, as the modification is consistent with the planning rationale used to support the original approved DA05/0824 in respect of all relevant Council

environmental planning instruments and development control plans. It is considered that the proposed modifications will not create any significant adverse impact on the natural or built environments or create social or economic impacts on the locality.

Further details of the assessment of these planning issues relating to of the Section 96 application are provided in the next section of this report.

## **ASSESSMENT UNDER SECTION 96 (1A) OF THE EP&A ACT, 1979**

### **(a) Minimal Environmental Impacts**

The proposed modifications (as outlined in the previous section) numbered 1 to 9 are mainly internal modifications and are considered not to create an adverse impact on the natural or built environment.

The proposed modifications numbered 10 to 13 are considered to warrant further assessment, which is provided below;

#### **1. Roof and Building Height**

The applicant has sought to remove the existing roof and proposes to rebuild the roof so the height of the building is not higher than as measured on the approved plans. An appropriate condition is to be applied to the consent requiring a surveyor's report detailing height of the building at all relevant points prior to issue of an occupation certificate.

In assessing the proposed modifications, Council officers relied on the applicant's submission of a qualified surveyor's report on the building constructed to date. This information was further qualified through comparison with an additional surveyor's report provided by one of the objectors to the subject proposal, the owners of No. 28 Seaview street.

The proposed roof contains five (5) main areas with different maximum height levels. These locations have been used as a reference point for the following scenarios:

1. The first level is located adjacent to Seaview Street,
2. The second level is the lift over run,
3. The third level is located within the centre of the building east of the lift over run,
4. The fourth level is located to the east or to the rear of the site,
5. The fifth level is located adjacent to Orient Lane

The roof levels as currently built are;  
(measurements begin from Seaview Street and end at Orient Lane);

1. The first level = 32.70m AHD,
2. The second level = 33.42m AHD,
3. The third level = 33.13m AHD,
4. The fourth level = 32.32m AHD,
5. The fifth level = 32.25m AHD.



As measured on the Council approved plans (DA05/0824) the following roof heights were calculated (measurements begin from Seaview Street and end at Orient Lane);

1. The first level = 31.85m AHD,
2. The second level = 33.2m AHD,
3. The third level = 33.05m AHD,
4. The fourth level = 31.65m AHD,
5. The fifth level = 31.55m AHD.

The s96 application proposes to physically remove the existing roof structure and reform the pitch and roof height to the following levels;

1. The first level = 31.7m AHD
2. The second level = 33.1m AHD
3. The third level = 33.0m AHD
4. The fourth level = 31.6m AHD
5. The fifth level = 31.5m AHD

Difference between approved plans and proposed reformed roof heights are;

1. The first level = 0.15m lower
2. The second level = 0.1m lower
3. The third level = 0.05m lower
4. The fourth level = 0.05m lower
5. The fifth level = 0.05m lower

As identified above the S96 proposes a lower building height than previously approved for the five main reference points.

The owners of No 28 Seaview Street have expressed concern that there was a reference to a maximum height level of 30.3AHD in the written text of the Statement of Environmental Effects for the original application. By letter dated 3 March 2009, the applicant has since qualified that this was an error, and that the approved plans indicated a maximum level at this point of 31.8AHD, which has been verified and corrected through the latest amended plans. Furthermore, the applicant's claims that the latest amended plans will allow for "unobstructed views" to the north-east from No 28 Seaview Street, do not appear to be entirely accurate, as there still appears to be some partial obstruction.

The only remaining concern with the proposed building height of the latest application, is that it appears that the height of a centrally located dividing wall still appears to be higher (by up to approximately 0.5m) than a central entry design feature in the original approved plans. A condition of approval has been recommended requiring that the height of the wall be lowered to the level of the approved plans.

On the basis of the above actions it is considered that the building and roof heights revised plans will create no further reduction of the views of the adjoining property owners, No. 28 Seaview Street, and therefore create an impact comparable to the view sharing arrangements of the original proposed DA.

## 2. Landscape plans

The applicant agreed to amend the approved landscape plan which details the deletion of all “Tuckeroo” and “Bangalow Palm” plantings located in areas which may obstruct views afforded to the southern property. This requirement has been addressed through a condition of consent.

3. Retention of two existing “Norfolk Pine” trees

In the original approved plans for this development, it was proposed to remove all five existing Norfolk Pine trees on the subject site, including two located along the front portion of the site. Condition 9 of the development consent required the approval of a landscape plan prior to the issue of a Construction Certificate.

Following the original development consent, the private certifying firm, Coastline, submitted a landscape plan to Council for their approval. At that time, the owners of the property advised that contrary to the original approval, they now sought to retain the two existing Norfolk Pine trees in the front of the subject site. Council's ecologist assessed this proposal, and was of the opinion that the retention of the two trees was a feasible option. A revised landscape plan was thereby approved by Council's officers on that basis.

Following the advertising of the two Section 96 modification applications, strong concerns were raised by the owners of the adjoining property to the south, No. 28 Seaview Street, in respect of the proposed retention of the two Norfolk Pine trees. These owners pointed out that the removal of these trees was an important part of the rationale used to justify the proposed view sharing arrangement of the approved DA plans, and that the proposed retention of the trees would further impact upon their access to views from their property. These owners also queried the veracity of the technical arborist assessment made by the applicant and Council in recommending the retention of the trees. A further concern was raised in respect of the threat to public and private safety that could arise from retaining these trees.

In terms of the assessment of the appropriateness of retaining these trees, the officers have relied on reports undertaken by the following qualified arborists:-

- On behalf of the applicant, Harlock Tree Surgery
- On behalf of the objectors, No. 28 Seaview Street: Terra Ark
- On behalf of Council, an arborist from Council's Recreational Services Unit.

An extract from the advice of Council's Arborist highlights these concerns:

*In conclusion it is of my opinion that due to the lack of consideration for the protection of the two trees during the construction process and the close deep excavation of the root zone these two trees have had their structural integrity compromised. The Araucaria Genus are renowned to be adversely affected by any form of root*

*disturbance including physical damage (severed roots) and environmental damage (soil compaction, ground level changes). Over a period of years I would expect a decline in the health of the trees due to the above factors, the long term stability of the trees has been put into question although I am unable to determine the extent of this due to the root damage being concealed by back filling of the excavation.*

This information was then reviewed by Council's Development Assessment Unit, including Council's qualified ecologist. The further assessment of the DA Unit officers concluded that whilst each of the three arborists identified concerns for the future survival of the trees in respect of the completed and proposed basement construction works, there was no definitive advice that the trees would not survive the remaining construction activity. It was therefore considered appropriate that a condition be imposed to support the immediate retention of the trees, subject to further investigation regarding their health and safety impacts. (See Amended Condition 6.1). It should also be pointed out that the subject trees are not covered by Council's Tree Preservation Order, and theoretically could be removed by the owners of No. 26 Seaview Street without Council approval.'

In terms of the additional loss of views created by the retention of the two Norfolk Pine trees, it is acknowledged that their retention will further reduce the views from the adjoining property owners of No. 28 Seaview Street. However, in terms of Council's original DA approval, it is still considered that these adjoining property owners will enjoy a reasonable access of ocean views from the upper level balconies of their existing residence.

#### 4. Fence Height

The application proposes a rendered front brick fence with a constant height of 1200mm parallel to the external finished ground. The original development was approved with a solid fence varying in height up to 1.6m. The revised fence is considered not to adversely impact on the streetscape or impact on view loss.

In conclusion, it is considered that the modified plans will not create any further substantial environmental impact, when compared with the original approval of DA05/0824.

**(b) Substantially the same Development**

The development to which the modification relates is considered to be substantially the same development as the development for which the consent was originally granted.

**(c) Notification**

The application and supporting documentation was on public display at Council's Murwillumbah and Tweed Heads Civic Centres during ordinary office hours and the Kingscliff library during library hours for a period of fourteen (14) days from Wednesday 28 January 2009 to Wednesday 11 February 2009 (public holidays excepted).

**(d) Consideration of Submissions**

Approximately 24 submissions were received in relation to the subject application. Issues raised in the submissions are summarised below;

- Unauthorised building works
- Building Height
- View loss
- Landscape
- Retention of existing "Norfolk Pine" trees, view loss & safety

Please refer to the previous section for a detailed review and comment on these issues of objection.

**(e) Public interest**

The proposed development is considered not to negate the public's interest.

**OPTIONS:**

1. Approve the application subject to the recommended conditions.
2. Refuse the application and provide reasons.
3. Take action in respect of the unauthorised building works.
4. Take no punitive action against the applicant, owners or builders, in respect of the unauthorised building works.

Option 1 is recommend by the officers together with a PIN under Option 3. A PIN is recommended as opposed to prosecution in the Land and Environment Court or the Local Court, as approval of this application will result in the developer removing the roof structure and re-constructing the roof in accordance with the original consent, which is considered sufficient penalty together with a PIN. PINs under the Environmental Planning and Assessment Act range in sums from \$750 to \$1500 relevant to individuals and companies. Council officers will seek further advice from its' solicitors regarding the extent of such fines given that there a multiple number of owners and proponents involved in the development of this site.

In terms of other variations for criminal proceedings under Option3, the officers have sought legal advice from its' solicitors in respect of possible criminal proceedings under Class 5 of the Land and Environment Court, and also the Local Government Act. A copy of the advice is provided in a confidential attachment to this report. Council may wish to proceed with the alternative criminal proceedings, should they deem it to be appropriate.

**LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:**

- If the applicant is dissatisfied with the determination a right of appeal exists in the Land and Environment Court.

As stated above, Council officers have recommended the issue of PINs for the unauthorised building works. Council may wish to consider further prosecution action

stated above, taking account of the costs that may be incurred by Council in carrying out such actions.

It is also considered that Council's earlier decision to commence investigation for Class 4 proceedings under the Land and Environment Court in respect of the unauthorised works be deferred at this stage, given that the applicant has sought to rectify this non-compliance through the amended Section 96 plans.

**POLICY IMPLICATIONS:**

Nil

**CONCLUSION:**

The proposal is considered not to adversely affect the natural or built environments or negate the public's interest.

**UNDER SEPARATE COVER/FURTHER INFORMATION:**

*To view any "**non confidential**" attachments listed below, access the meetings link on Council's website [www.tweed.nsw.gov.au](http://www.tweed.nsw.gov.au) or visit Council's offices at Tweed Heads or Murwillumbah (from Friday the week before the meeting) or Council's libraries (from Monday the week of the meeting).*

1. Legal Advice from Marsdens Law Group. (ECM 2025828)
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