

TITLE: [PR-CM] Development Application DA08/0755 for a 24 Lot Subdivision (18 Lots into 24) at Lots 1 -18, Section 4 DP 14895, Casuarina Way, Kingscliff

ORIGIN:

Development Assessment

FILE NO: DA08/0755 Pt5

SUMMARY OF REPORT:

DA08/0755 was lodged in June 2008 and sought approval for a 24 lot subdivision (18 lots into 24 lots) within the Seaside City subdivision at Kingscliff.

On 17 June 2009 the Development Assessment Panel resolved to refuse the application for the following reasons:

1. *Pursuant to Section 79 (1) (b) the development proposal has not demonstrated due consideration to the likely impacts on the natural and built environment.*
2. *Pursuant to Section 79C(1)(c) the subject site is not considered suitable for the development as proposed at this point in time.*
3. *The proposal does not meet Clause 15 or Clause 39 of the Tweed LEP.*

Tweed Shire Council was served with a Class 1 Appeal for the refusal of DA08/0755 and subsequently Council resolved at the Council Meeting of 18 August 2009 to:

Defend the Class 1 Appeal (as necessary) for Development Application DA08/0755 for a 24 lot subdivision (18 lots into 24) at Lots 1-18 Section 4 DP 14895 Casuarina Way, Kingscliff.

The Appeal proceeded to a Section 34 Mediation Conference in which the disputed conditions of consent were discussed at length. Following mediation it was resolved that both parties could agree on a set of recommended conditions of consent thus allowing the Court to determine the application by way of approval. The approval notice is **attached** to this agenda.

Throughout the proceedings the interpretation of the following documents were challenged:

- Tweed DCP Section B11 Seaside City;
- Tweed S94 Plan No. 28 Seaside City;
- Seaside City Planning Agreement (S94) between Tweed Shire Council and Richtech Pty Ltd.

Accordingly it is now recommended that Tweed Shire Council amend these documents to reflect the agreements reached in the Court proceedings for DA08/0755. The DCP

and S94 Plan No. 28 will need to have Draft amendments publicly exhibited. The Seaside City Planning Agreement (S94) will need to be amended by way of agreement between Tweed Shire Council staff and Richtech Pty Ltd and then publicly exhibited.

The nature of the changes are discussed in the following report.

RECOMMENDATION:

That:

- 1. The report on Development Application DA08/0755 for a 24 Lot Subdivision (18 Lots into 24) at Lots 1-18 Section 4 DP 14895, Casuarina Way, Kingscliff be received and noted.**
- 2. Council drafts amendments and exhibit Tweed Development Control Plan (TDCP) Section B11 – Seaside City in accordance with Section 74E of the Environmental Planning and Assessment Act 1979 to reflect the negotiated outcomes contained within the NSW Land and Environment Court Determination for DA08/0755.**
- 3. Council drafts amendments and exhibit Tweed Section 94 Plan No. 28 – Seaside City in accordance with Section 94EA of the Environmental Planning and Assessment Act 1979 to reflect the negotiated outcomes contained within the NSW Land and Environment Court Determination for DA08/0755.**
- 4. Council enters into negotiations with Richtech Pty Ltd in regards to the Seaside City Planning Agreement to reflect the negotiated outcomes contained within the NSW Land and Environment Court Determination for DA08/0755.**

REPORT:

Applicant: Seaside City Developments
Owner: Richtech Pty Ltd
Location: Lots 1-18 Section 4 DP 14895 Casuarina Way, Kingscliff
Zoning: Parts 2(e) Residential Tourist, 7(l) Environmental Protection (Habitat)
Cost: N/A

BACKGROUND:

Seaside City comprises a 32 hectare parcel of land. Seaside City was approved for subdivision in the 1920s and comprises 205 titled lots (including the area between Cudgen Creek and the development). Richtech Ltd owned approximately 85% of the lots with the remainder individually owned. Cudgen Creek forms the western edge to the study area and the Pacific Ocean to the east.

The site was never serviced and accordingly development of the site was problematic, specifically given the multiple landowners. The revitalisation of the site occurred when Richtech (the primary land owner) instigated a series of DA's to enable the servicing of the site.

Accordingly, in 2005 Council received and considered three Development Applications (DA05/0775, DA05/0793 and DA05/1464) which all sought approval for the carrying out of works for the purposes of land clearing, earthworks, construction of roads and other services in preparation of the further development of the existing lots.

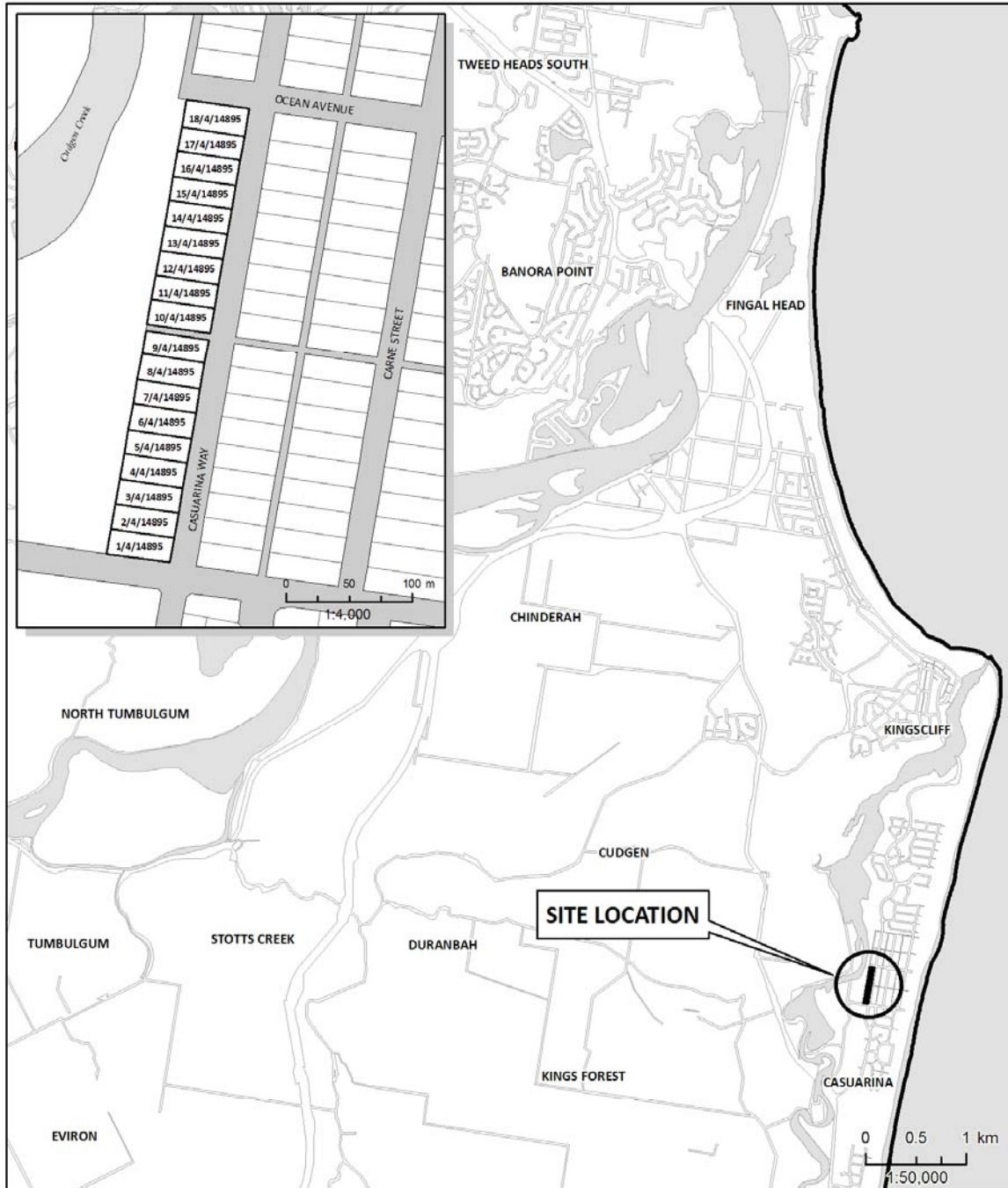
DA05/1464 was considered and ultimately determined by the NSW Land & Environment Court, while DA05/0775 and DA05/0793 were consequently approved by Council.

As part of the approvals a site specific Development Control Plan (Tweed DCP Section B11) and site specific S94 Plan (Tweed S94 Plan No. 28) was created in relation to the Seaside City Development. Additionally a specific Planning Agreement was created between Tweed Shire Council and Richtech Pty Ltd to allow Tweed Shire Council to collect funds on behalf of Richtech from non Richtech owned land to contribute to the cost of the bulk earthworks and servicing across the site.



DA08/0755 was the first application to test the new planning controls. The DA sought to re-subdivide 18 existing allotments into 24 allotments on the western side Casuarina Way. Initially the application was refused by Tweed Shire Council staff as the relevant Construction Certificate (CC) was not issued. However, the applicant appealed this decision and supplied additional information (after the CC was issued) to the Court as part of the appeal process.

The details of the appeal are discussed later in this report and form the grounds for the recommended changes to the applicable planning instruments.

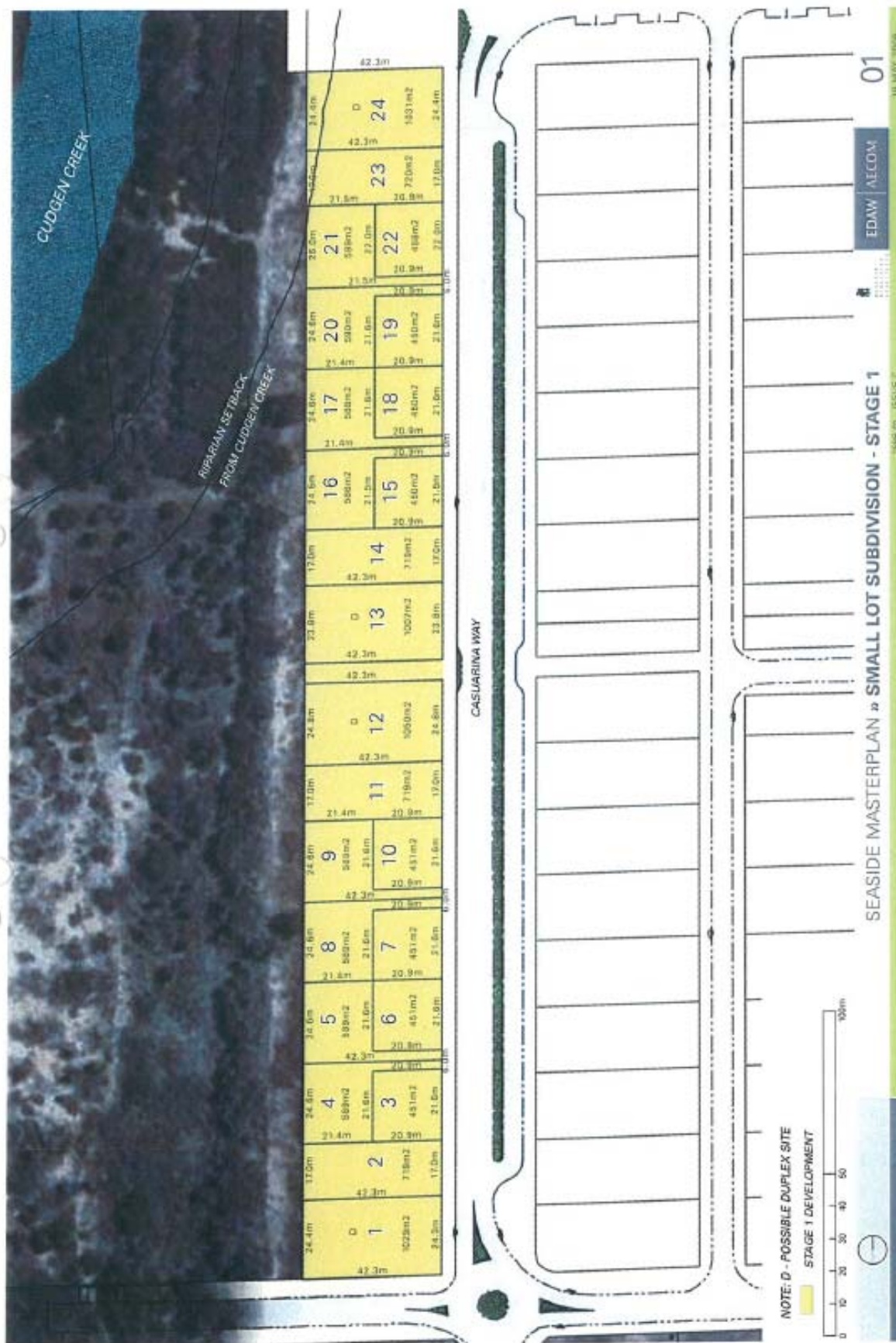
SITE DIAGRAM:



LOCALITY PLAN
 Lots 1-18 Section 4 DP 14895
 Casuarina Way, Kingscliff

<p>Filename: z:\esr\planning\mxd\A4P_B&W SitePlan.mxd</p> <p>Author: J.Batchelor - Planning Reforms Unit</p> <p>Date Printed: August 06, 2009</p>	<p>Disclaimer: While every care is taken to ensure the accuracy of this data, Tweed Shire Council makes no representations or warranties expressed or implied, statutory or otherwise, about its accuracy, reliability, completeness or suitability for any particular purpose and disclaims all responsibility and liability (including without limitation, liability in negligence) for all expenses, losses, damages (including indirect or consequential damage) and costs which may be incurred as a result of data being inaccurate in any way and for any reason. This information is supplied for the general guidance and is to be considered indicative and diagrammatic only. It should not be used for survey or construction purposes and prior to any excavations a "Dial before You Dig" enquiry must be made by calling 1100. The information contained on this document remains valid for 30 days only from the date of supply.</p>	<p> Cadastre August 06, 2009 © Dept. of Lands & Tweed Shire Council</p> <p>Coordinate System - MGA Zone 56 Datum - GDA 94</p> <p>DO NOT SCALE COPY ONLY - NOT CERTIFIED</p>	<p> Tweed Shire Council</p> <p>PO Box 816, Murwillumbah NSW 2484</p> <p>Tel: (02) 6670 2409 Fax: (02) 6670 2483</p>
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DEVELOPMENT PLAN:



REPORT:DA08/0755 Summary Appeal Result

In regard to DA08/0755 the original subdivision pattern (as approved in 1927) catered for 18 allotments all approximately 43m long (running east to west) x 20m wide (running north to south). This created 18 allotments each approximately 1000m². The proposed subdivision layout catered for 24 allotments by reducing the size of each allotment and creating 8 battleaxe allotments.

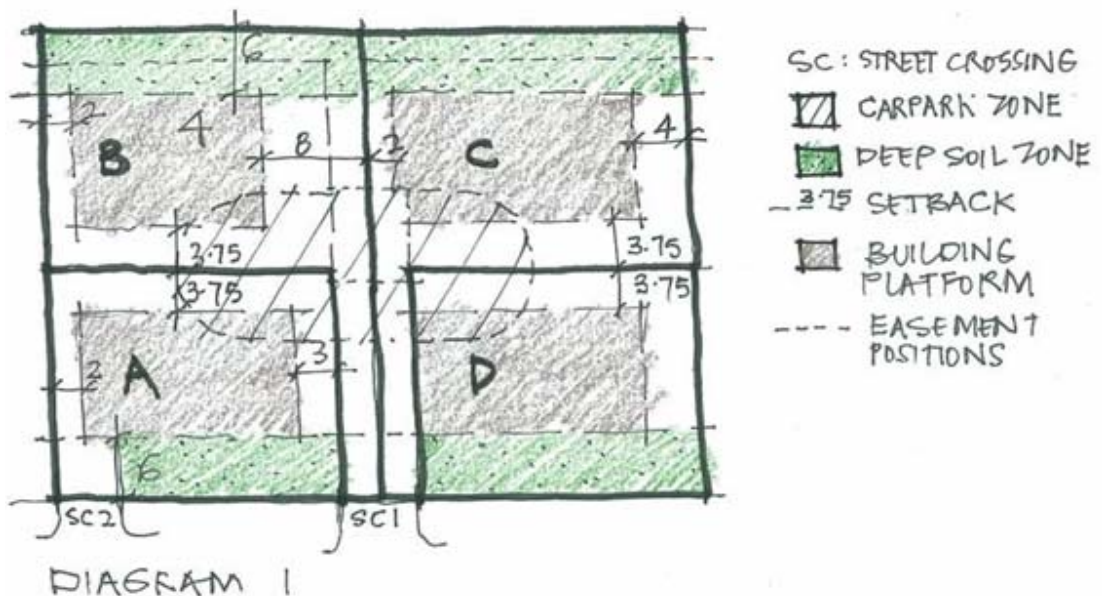
At the s34 Mediation Conference Council Staff and the applicant had opposing points of view in regards to the following primary issues:

1. Draft Conditions of Consent that required building envelopes for the allotments given the small size of the allotments (smallest lot 450m²), and the constrained nature of site (Asset Protection Zones);
2. A Draft Condition of Consent that outlined the applicable S94 Contributions;
3. Draft Conditions of Consent relating to contaminated land across the site; and
4. Draft Conditions of Consent relating to the required engineering specifications for the site.

Matter 1 was resolved by the applicant agreeing to a condition of consent (Condition 75) that specified the type of housing permitted within the battle axe allotments based on a design outcome that was agreed between the parties as follows:

PROPOSED CLUSTER / BATTLEAXE ALLOTMENT PROVISIONS

75. The battleaxe allotments will be developed in accordance with the principles illustrated in Diagram 1 below:



The above design ensures:

- only two driveways are permissible for the four allotments affected by the battleaxe provisions.

- suitable rear setbacks to satisfy the NSW Rural Fire Service Asset Protections Zones and to meet Council's deep soil provisions.
- suitable side and front setbacks to comply with Council's controls.
- suitable separation distances between dwellings and a central driveway.
- adequate solar access for each allotment.

Tweed DCP Section B11 – Seaside City will need to be amended to authorise this type of redevelopment based on conditions of consent for each respective development to comply with the same general principals contained within this diagram.

Matter 2 in regards to Contributions was heavily contested between the parties.

The applicant initially argued that the Seaside City Planning Agreement negated the need for the developer to pay any other applicable S94 Contributions. This was based on the applicant's interpretation of Clause 7(c) of the Seaside City Planning Agreement that stated:

- (c) *The Developer and Council agree that there will be no other contributions required under Part 4, Division 6 of the Act in respect of the land in connection with the Works or related matters*

Tweed Shire Council staff adamantly opposed this proposition as the Seaside City Planning Agreement was only created to assist Richtech collect funds from non Richtech land owners for a contribution to the cost of undertaking the bulk earthworks. Tweed Shire Council was to act as a bank by collecting funds from non Richtech land owners and pass this on to Richtech. The Planning Agreement was never to replace all existing S94 Contributions but rather add to the applicable contributions for non Richtech land owners. The reference to "the Works" related back to a defined table within the Seaside City Planning agreement which nominated the works non Richtech land owners had to contribute to

Following the first mediation conference the applicant amended their argument and focussed on a revised set of arguments to reduce the applicable Contributions.

The first argument the applicant put forward related to the suitability of charging contributions for open space as specified in Clause 7(d) of the Seaside City Planning Agreement:

- (d) The Developer and Council agree that there will be no other contributions required under Part 4, Division 6 of the Act in respect of the Land in connection with the provisions of open space for structure, passive or conservation purposes, unless there is an increase in the population of the land. Any increase in the population may require further areas of structured open space to be provided beyond the boundaries of Seaside City. However, any increase in population requiring additional passive open space must be provided within the boundaries of Seaside City. Any further additional areas will be based on Council's standard of 2.83 hectares per 1,000 persons as follows: 1.7 Structured Open Space and 1.13 Passive Open Space adjusted for permanent/tourist use.

The applicant argued that this Clause negated the need for the applicant to pay all open space contributions including 94 Plan No. 26 which relates to Regional Open Space, and S94 Plan under Plan No. 28 which relates to Local Structured Open Space.

TSC interprets the site specific S94 Developer Contributions Plan and the standard Shire S94 Developer Contributions Plans together in conjunction with the Voluntary Planning Agreement and accordingly believes that the applicant has credit for the existing 204 residential allotments BUT any increase in allotments gets charged for the standard Shire Wide plans and regional open space. This is demonstrated in the following table:

<u>Applicable Plan</u>	<u>Monetary Amount Per Lot</u>	<u>Monetary Amount for Anticipated Population of Seaside City</u> Anticipated population 2000 people (565 ET) less 530 people credit for existing 204 allotments
S94 Plan No. 4 – TRCP	\$6207	\$3,506,955
S94 Plan No. 11 – Libraries	\$374	\$211,310
S94 Plan No. 13 – Cemeteries	\$131	\$74,015
S94 Plan No. 15 – Community Facilities	\$492	\$277,980
S94 Plan No. 16 – Life Saving	\$200	\$113,000
S94 Plan No. 18 – Council Admin	\$1996.80	\$1,128,192
S94 Plan No. 26 – Regional Open Space	\$855 (Cas) \$2327 (Struc)	\$483,075 \$1,314,755
S94 Plan No. 28 – Seaside City	\$3585 Structured Open Space Only	\$2,025,525
<u>TOTAL</u>	<u>\$16,167.80</u>	<u>\$9,134,807</u>

Following the S34 Mediation Conference and given the ambiguity of Clause 7(d) the applicant offered Council an offer in which they agreed to pay all S94 Plans as listed in Council's table above excluding the \$3182 under S94 Plan No. 26 Regional Open Space which contributes to things like the Jack Evens Boat Harbour.

\$3182 would have equated to a maximum of \$1.8M over the life of Seaside City as a whole.

The applicant's argument as why allotments at Seaside City do not lawfully have to for this S94 Plan is partly their interpretation of Clause 7(d) of the Voluntary Planning Agreement and partly financial limitations for their project.

Following discussion with Councillors at a workshop this offer was accepted as it was considered imperative to get S94 Plan No. 28 fee's for Structured Open Space to assist Council in funding the Depot Road sports fields.

Had Council challenged this matter further additional contributions may not have been levied as per the above table.

Accordingly this offer will be effective for any future redevelopment of the site and needs to be reflected in an amended Voluntary Planning Agreement, and an amended S94 Plan No. 28 – Seaside City to ensure all lots within Seaside City are handled consistently.

It is recommended that Tweed DCP Section B11 – Seaside City be amended to allow integrated housing types as detailed in the above diagram provided the application meets the principals achieved by the above diagram.

Tweed S94 Plan No. 28 – Seaside City

As detailed above the interpretation of this document was challenged specifically in relationship to its position with regard to the Seaside City Voluntary Planning Agreement, additional Clauses are required to clarify the disputed matters as discussed above.

The Voluntary Seaside City Planning Agreement between TSC and Richtech Pty Ltd

As detailed above the interpretation of this document was challenged specifically in relationship to its position with regard to the S94 Plan No. 28 Seaside City and all other applicable Contributions Plans, additional Clauses are required to clarify the disputed matters as discussed above. In this regard it is recommended that Council resolve to negotiate such changes directly with Richtech Pty Ltd before placing the document on public exhibition. This will incur additional legal expenses as such changes will be conducted through the parties relative solicitors.

OPTIONS:

1. Receives and notes the Court Determination of DA08/0755 and make the necessary amendments to the relevant DCP and S94 plans.
2. Receives and notes the Court Determination of DA08/0755 and make no changes to the relevant DCP and S94 plans.

LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:

Council incurred significant costs in regard to DA08/0755. To avoid further litigation for re-development proposals at Seaside City it is recommended that Council amend the relevant planning instruments as detailed within this report.

Amending the Voluntary Planning Agreement will incur additional legal expenses as such changes will be conducted through the parties relative solicitors. However, this is considered necessary to avoid any future litigation.

POLICY IMPLICATIONS:

To maintain the integrity of the planning instruments applicable at Seaside City it is recommended that the applicable instruments be amended in accordance with the negotiated outcomes established in DA08/0755.

CONCLUSION:

DA08/0755 was the first of many applications for the redevelopment of land at Seaside City. It was imperative that the varying interpretations of the applicable planning instruments were debated to ensure a consistent application is applied into the future. To better facilitate this, the planning instruments need to be amended to afford clarity to their interpretations.

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 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. DA08/0755 Determination Notice (ECM 15932091)
 2. The current Tweed DCP Section B11 Seaside City (ECM 15933133)
 3. The current Tweed S94 Plan No. 28 Seaside City (ECM 15933168)
 4. The current Seaside City Planning Agreement (ECM 15933183)
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