



Planning Proposal BSCPP 13/010

February 2014

Building Height Allowance Provision (Clause 4.3A)

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INTRODUCTION

Summary of Planning Proposal

This planning proposal relates to the application of *Clause 4.3A Exceptions to height of buildings* under the Ballina Local Environmental Plan 2012 (BLEP 2012).

The drafting of the BLEP 2012 included a provision designed to allow building height in flood prone areas to be referenced from a defined fill height rather than existing ground level. The provision was incorporated into the LEP so that landholders who are required to fill land to meet Council's flood policy are not unreasonably disadvantaged in terms of overall building height.

However, it appears that there is ambiguity in the clause providing for the height allowance that has been adopted into the BLEP 2012. This may lead to outcomes that are not consistent with the Council's intent (i.e. the Council's envisaged building height standard may be exceeded in certain circumstances).

This planning proposal seeks to reinforce the Council's original intent in relation to building height policy in the LEP by amending Clause 4.3A and the *Building Height Allowance Map* such that the Council's original intent is clarified.

The Department of Planning and Infrastructure has issued a Gateway determination under cover of their letter dated 14 November 2013. A copy of the letter and determination forms Appendix C to this report.

The Gateway determination required that the planning proposal be publically exhibited for a minimum period of 14 days and specified a 6 month time period for completing the LEP.

The planning proposal was exhibited from 18 December 2013 until 24 January 2014. One submission was received which proposed an alternative drafting of clause 4.3A to that contained in the planning proposal.

Planning Context

In preparing the BLEP 2012, Council sought to include a provision to allow building height in flood prone areas to be referenced from a defined fill height rather than existing ground level. The provision was incorporated into the LEP so that landholders who are required to fill land to meet Council's flood policy are not unreasonably disadvantaged in terms of overall building height.

Box 1 provides an example circumstance for the application of the provision, as originally intended.

Box 1: Example Application of LEP Based Building Height Standards

Scenario: Lot of land on Ballina Island where existing ground level is 1.5m Australian Height Datum (AHD), Council's stipulated minimum flood fill level is 2.0m AHD and maximum building height as per the LEP is 8.5m.

Under the Standard Instrument LEP (without Council's additional building height allowance clause), building height is measured from existing ground level, meaning the overall height of the building is not to exceed 1.5m AHD (ground level) plus 8.5m (maximum building height), equating to 10m AHD.

However, when taking into account minimum filling requirements, the height of the building is reduced to 8.0m to meet the 10m AHD standard as identified above (that is, 1.5m AHD (ground level) plus 0.5m for fill to reach 2.0m AHD, leaving 8.0m to remain within the 10m AHD standard for the lot). Essentially, the difference between required fill height and ground level must be absorbed into the building height in this case.

*With the application of Council's building height allowance clause, as intended, the landholder would be allowed to increase the overall height referenced to AHD to 10.5m AHD as follows:
1.5m AHD (ground level) plus 0.5m for fill to reach 2.0m AHD, plus 8.5m (maximum building height), equating to 10.5m AHD.*

The provision was designed to be a common sense approach to building height in areas subject to flood mitigation by way of filling, with a principal aim being to allow construction of two storey dwellings on flood prone lots of land within the LEP building height standard.

However, it appears that there is some ambiguity in the clause providing for the height allowance that has been adopted into the BLEP 2012 which may lead to outcomes that are not consistent with the Council's intent (i.e. the Council's envisaged building height standard may be exceeded in certain circumstances).

In relation to the establishment of the provision in the adopted BLEP 2012, the Council endorsed a building height allowance provision in December 2011. Council subsequently corresponded with the Department of Planning and Infrastructure in September 2012 to clarify and confirm the intent in relation to the clause.

In November 2012, Council was provided with an opportunity to review the consolidated Draft Ballina LEP 2012 as prepared by the Parliamentary Counsel Office. Although the wording of the building height allowance clause in the November draft differed from Council's original drafting, the provision was considered consistent with Council's intent. At this point, Council considered the building height allowance clause to be settled.

It appears that between Council's November 2012 feedback and the finalisation of the plan, the building height allowance provision was altered. Copies of the key iterations of the provision are contained in Appendix A.

The potential for the provision as adopted into the BLEP 2012 to be applied in a manner inconsistent with the Council's original intent, in terms of both the clause itself and overall building height standards, warrants modification to the LEP.

This planning proposal seeks to amend the BLEP 2012 by modifying clause 4.3A *Exceptions to height of buildings* to provide improved clarity with respect to Council's intent. In addition the planning proposal seeks to insert a reference to Australian Height Datum (AHD) within the legend contained within the *Building Height Allowance Map*.

Annexure D contains details of the manner in which clause 4.3A and the map legend are proposed to be modified.

PART 1 – OBJECTIVES OR INTENDED OUTCOMES

The objective of this planning proposal is:

- to reinforce the Council's intended building height planning policy under the BLEP 2012 by providing for the referencing of building height in flood prone areas from a defined fill height rather than ground level.

PART 2 – EXPLANATION OF THE PROPOSAL

This planning proposal proposes that clause 4.3A *Exceptions to height of buildings* and the legend contained within the *Building Height Allowance Map* be modified to provide improved clarity with respect to the Council's intent.

Background

Clause 4.3A *Exceptions to height of buildings* provides as follows:

4.3A Exceptions to height of buildings

(1) *The objective of this clause is to align building height and flood planning provisions and provide for a consistent point of reference for the measurement of building heights in flood prone areas.*

(2) *This clause applies to land identified as "Minimum fill level" on the Building Height Allowance Map.*

(3) *The height of a building on land to which this clause applies is not to exceed the maximum height shown for that land on the Height of Buildings Map plus the minimum fill level shown for that land on the Building Height Allowance Map.*

Clauses 4.3A (2) and 4.3A (3) contain ambiguities which may result in differing interpretations to those intended when the clauses were originally drafted.

Clause 4.3A (2) and associated Building Height Allowance Maps

The levels shown on each *Building Height Allowance Map* are levels to Australian Height Datum (AHD) which approximate the 1:100 ARI (average recurrent interval) flood. To clarify that these are levels to AHD this term should be used within the legend contained in each *Building Height Allowance Map*.

The reference to "fill" within the legend contained in each *Building Height Allowance Map* and within clause 4.3A (2) is also superfluous and to some extent misleading. This is because not all sites are required to be "filled" to the degree nominated on the map. Existing site levels may mean that filling of a lesser amount is required to meet the nominated AHD level.

Redrafting of clause 4.3A(2) to clarify that a minimum AHD level is applicable, as opposed to a minimum filling level, would be beneficial to reinforce the intended reference point for building height on flood prone land. It is proposed that clause 4.3A (2) be redrafted as follows:

(2) *This clause applies to land identified as "Minimum Level Australian Height Datum (AHD)" on the Building Height Allowance Map.*

The redrafted clause 4.3A (2) will also create additional flexibility to consider non filling solutions such as raised slab, pier and beam and elevated frame construction techniques. These building techniques would be available for incorporation in building designs. This is opposed to the current inference that the additional height allowance is only able to be obtained if the site is filled.

Clause 4.3A (3)

Clause 4.3A (3) is ambiguous as it is capable of being interpreted to permit a building height equivalent to the height shown on *the Height of Buildings Map* plus the additional height shown on the *Building Height Allowance Map* above existing ground levels.

In the case where a site has already been subject to filling, or there is little difference between existing ground level and the required fill level for flood management, the resultant building height may be significantly higher than an adjoining site which has not been filled. That is there would be no absorbing of the existing site level when calculating the maximum permitted height.

Box 2 provides an example of the manner in which clause 4.3A (3) may be interpreted to produce an unintended outcome.

Box 2: Unintended Consequence Example - Application of LEP Based Building Height Standards

Scenario: Lot of land on Ballina Island where existing ground level is 2.0m Australian Height Datum (AHD), Council's stipulated minimum flood fill level is 2.0m AHD and maximum building height as per the LEP is 8.5m.

Clause 4.3A (3) is interpreted to permit a building height of 8.5m, as per the LEP Building Height Map, plus an additional 2.0m as per the Building Height Allowance Map, above the 2.0m AHD filled site level.

The resultant building would then have a height of 12.5m AHD instead of the intended 10.5 m AHD.

The intent of clause 4.3A (3) as originally drafted by Council was that the height allowance would be based on the difference between the minimum fill level (AHD) and existing ground level (AHD) not the minimum fill level itself.

The additional height achieved through the above interpretation of Clause 4.3A may at the extreme result in an additional storey within a building. The building of 3 storey dwelling houses or 6 storey mixed use buildings may result. Such a result is contrary to Council's strategic height policy position for the shire. The potential policy impacts of the above interpretation are most evident in relation to Ballina Island, but the implications are not limited to this area.

Redrafting clause 4.3A (3)

Redrafting clause 4.3A (3) so that it is generally consistent with the drafting as endorsed by Council in November 2012 is the preferred outcome.

Amending clause 4.3A (3) as follows would maintain the integrity of the BLEP 2012 as well as removing the ambiguity evident in the clause as it currently exists:

(3) The maximum height of a building on land to which this clause applies is to be measured from the top of the minimum AHD level permitted for that land as shown on the Building Height Allowance Map.

Preferred Building Height Allowance Provisions

Amendments to clause 4.3A (2) and (3) as well the *Building Height Allowance Map* legend are required to ensure Council's original policy intent with respect to maximum building heights within the floodplain is achieved.

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Appendix D provides details of the drafting changes recommended to BLEP 2012 to achieve Council's original building height policy intent.

PART 3 – JUSTIFICATION

Section A - Need for the Planning Proposal

1. **Is the planning proposal a result of any strategic study or report?**

The planning proposal is the result of an internal review of the application of Clause 4.3A of the BLEP 2012.

2. **Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?**

The planning proposal is the best means for reinforcing the Council's building height policy. Other approaches, such as DCP-based policy will not likely provide the clarity and consistency in the application of the provision that is sought by Council.

Section B - Relationship to the Strategic Planning Framework

3. **Is the planning proposal consistent with the objectives and actions contained within the applicable regional or sub-regional strategy (including the Sydney Metropolitan Strategy and exhibited draft strategies)?**

The proposal to adjust the building height allowance provision in the BLEP 2012 is consistent with the objectives and actions in the Far North Coast Regional Strategy.

4. **Is the planning proposal consistent with the local council's Community Strategic Plan, or other local strategic plans?**

The planning proposal seeks to reinforce the Council's intended building height policy in its LEP. This is consistent with Council's expectations arising from the preparation of the Standard Instrument LEP in relation to the built environment in Ballina Shire.

5. **Is the planning proposal consistent with applicable state environmental planning policies?**

The proposal is consistent with the State Environmental Planning Policy (SEPP) provisions relating to plan making.

6. **Is the planning proposal consistent with applicable Ministerial Directions (s.117 directions)?**

The proposal is consistent with the relevant Section 117 Directions as detailed in the Section 117 Direction Checklist contained in Appendix B.

Section C - Environmental, Social and Economic Impact

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7. **Is there any likelihood that critical habitat or threatened species, populations or ecological communities, or their habitats will be adversely affected as a result of the proposal?**

The planning proposal will not result in direct impacts on critical habitat or threatened species, populations or ecological communities or their habitats.

8. **Are there any other likely environmental effects as a result of the planning proposals and how are they proposed to be managed?**

Aside from reinforcing the Council's intended building height policy in relation to the built environment, no other likely environmental effects are expected.

9. **How has the planning proposal adequately addressed any social and economic effects?**

The planning proposal seeks to provide improved clarity in relation to building height provisions in the LEP and reinforce the Council's original intent with respect to building height and the associated consideration of flood planning requirements. Consistency in the application of the Council's policy is expected to be positive from a social and economic perspective.

Section D - State and Commonwealth interests.

10. **Is there adequate public infrastructure for the planning proposal?**

The planning proposal will not create any need for public infrastructure.

11. **What are the views of State and Commonwealth public authorities consulted in accordance with the gateway determination?**

No engagement with State or Commonwealth public authorities has been undertaken as part of the preparation of this planning proposal.

PART 4 – MAPPING

The planning proposal relates to the modification of a clause in the written LEP instrument and an amendment to the legend contained within each *Building Height Allowance Map* associated with BLEP 2012.

The amendment to the legend contained within each of the 13 *Building Height Allowance Maps* deletes the words "Minimum Fill Level (m)" and replace it with the words "Minimum Level Australian Height Datum (AHD)".

Annexure E contains the series of amended *Building Height Allowance Maps*.

PART 5 – COMMUNITY CONSULTATION

The planning proposal was publically exhibited, in accordance with the Gateway determination from 18 December 2013 until 24 January 2014.

In response to the public exhibition one submission was received which provided suggestions for an alternative approach to the determination of the additional height proposed to be allowed for buildings on flood prone land. A summary of the issues contained within the submission is detailed below:

Planners North, Stephen Connelly, provided the following comments and suggestions:

- The clause as currently drafted is very much at odds with the intent of the clause as described in the planning proposal.
- Clause 4.3A should not be abandoned but work in harmony with Council's DCP (which it does not do) but also with the provisions of s733 of the *Local Government Act 1993* and the associated *Floodplain Development Manual 2005 (FDM 2005)*.
- Proposes that the terms '*flood prone land*' and '*flood planning level*' be inserted into clause 4.3A(2) and be given the same meaning as they have in the FDM 2005.
- Proposes that clause 4.3A(3) be redrafted so as to provide that the height of a building on flood prone land is not to exceed the maximum height shown for that land on the *Height of Buildings Map* as measured from ground level (existing) or the flood planning level, whichever is the greater.
- The suggested approach would see the removal of the *Building Height Allowance Map* from BLEP 2012. It would allow Council to manage the flood planning levels without the need for flood planning levels to be gazette as part of BLEP 2012.

PART 6 – TIMELINE

The proposed timeline for completion of the planning proposal is as follows:

Plan Making Step	Estimated Completion (before end of)
Gateway Determination	November 2013
Public Exhibition Period	January 2014
Public Hearing (if required)	N/A
Submissions Assessment	February 2014
RPA Assessment of Planning Proposal and Exhibition Outcomes	February 2014
Submission of Endorsed LEP to DP&I for Finalisation	Not Required (delegated)
RPA Decision to Make the LEP Amendment (if delegation accepted)	February 2014
Forwarding of LEP Amendment to DP&I for Notification (if delegated)	March 2014

APPENDICES

Appendix A – Key Iterations – Building Height Allowance Provision

Council Endorsed Provision – December 2011

4.3 Height of buildings [optional]

- (1) The objectives of this clause are as follows:
 - (a) to ensure that the height of buildings is compatible with the bulk, scale and character of the locality, and
 - (b) to minimise adverse impacts on existing or future amenity of adjoining properties and the scenic or landscape quality of the locality, and
 - (c) to protect significant views from public places.
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.
- (3) Notwithstanding the provisions of subclause (2), for land subject to minimum fill levels on the Building Height Allowance Map and where ground level (existing) is less than the specified minimum fill level, the difference (measured in metres) between ground level (existing) and the minimum fill level is added to the maximum building height on the Height of Buildings Map to determine the maximum height of a building on such land.

Note. Where ground level (existing) is equal to or higher than the minimum fill level, the maximum building height on the Height of Buildings Map applies.

Council Reviewed Provision – November 2012

4.3A Exceptions to height of buildings

- (1) The objective of this clause is to align building height and flood planning provisions and provide for a consistent point of reference for the measurement of building heights in flood prone areas.
- (2) This clause applies to land identified as “Minimum fill” on the Building Height Allowance Map.
- (3) The maximum height of a building on land to which this clause applies is to be measured from the top of the minimum fill height permitted for that land by that map.

Adopted Provision – February 2013

4.3A Exceptions to height of buildings

- (1) The objective of this clause is to align building height and flood planning provisions and provide for a consistent point of reference for the measurement of building heights in flood prone areas.
- (2) This clause applies to land identified as “Minimum fill level” on the Building Height Allowance Map.
- (3) The height of a building on land to which this clause applies is not to exceed the maximum height shown for that land on the Height of Buildings Map plus the minimum fill level shown for that land on the Building Height Allowance Map.

Appendix B – Section 117 Direction Checklist

Section 117 Direction Checklist	
Planning Proposal – Building Height Allowance Provision	
Direction No.	Compliance of Planning Proposal
1. Employment and Resources	
1.1 Business and Industrial Zones	Consistent. The planning proposal seeks to reinforce the Council's intended policy with respect to building height by removing ambiguity associated with Clause 4.3A.
1.2 Rural Zones	Consistent. The planning proposal does not alter zoning or density provisions on rural zoned land.
1.3 Mining, Petroleum Production and Extractive Industries	Does not apply to planning proposal.
1.4 Oyster Aquaculture	Does not apply to planning proposal.
1.5 Rural Land	Consistent. The planning proposal does not raise any inconsistencies with the Rural Planning Principles contained in State Environmental Planning Policy (Rural Lands) 2008.
2. Environment and Heritage	
2.1 Environmental Protection Zones	Consistent. The planning proposal does not involve any direct impacts on environmental protection outcomes in environmental protection zones.
2.2 Coastal Protection	Consistent. The planning proposal seeks to reinforce the Council's intended building height provisions. These provisions were developed with regard for coastal management policies.
2.3 Heritage Conservation	Consistent. The planning proposal does not have any direct implications for items of environmental heritage that are listed in Council's LEP.
2.4 Recreation Vehicle Areas	Consistent. The planning proposal will not enable the land to be developed for a recreational vehicle area.
3. Housing, Infrastructure and Urban Development	
3.1 Residential Zones	Consistent. The planning proposal seeks to reinforce the Council's intended building height policy and does not adversely impact on services or permitted residential density.
3.2 Caravan Parks and Manufactured Home Estates	Consistent. The planning proposal seeks to reinforce the Council's intended building height policy and does not adversely impact on opportunities for provision of caravan parks and manufactured housing estates.
3.3 Home Occupations	Consistent. The permissibility of home occupations in dwelling houses without development consent is not impacted by the planning proposal.
3.4 Integrated Land Use and Transport	Consistent. The planning proposal does not impact on transport and accessibility outcomes.
3.5 Development Near Licensed Aerodromes	Consistent. The planning proposal seeks to reinforce the Council's intended building height policy, including standards developed having regard for the operation of the Ballina/Byron Gateway Airport.
3.6 Shooting Ranges	Does not apply to planning proposal.
4. Hazard and Risk	
4.1 Acid Sulphate Soils	Consistent. The planning proposal does not have any direct implications in relation to acid sulphate soils.
4.2 Mine Subsidence and Unstable Land	Does not apply to planning proposal.

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4.3 Flood Prone Land	Consistent. The planning proposal seeks to reinforce the Council's intended policy relating to building height and flood filling, consistent with the approach taken during the preparation of Council's Standard Instrument LEP.
4.4 Planning for Bushfire Protection	Consistent. The planning proposal does not have any direct implications in relation to bushfire hazards.
5. Regional Planning	
5.1 Implementation of Regional Strategies	Consistent. The planning proposal is consistent with the outcomes envisaged under the Far North Coast Regional Strategy.
5.2 Sydney Drinking Water Catchments	Does not apply to Ballina Shire.
5.3 Farmland of State and Regional Significance on the NSW Far North Coast	Consistent. The planning proposal does not have any direct implications in relation to significant farmland (as defined in this Direction).
5.4 Commercial and Retail Development	Consistent. The planning proposal does not have any direct implications in relation to the location of commercial centres along the Pacific Highway.
5.5 Development in the vicinity of Ellalong Paxton and Millfield (Cessnock LGA).	Repealed
5.6 Sydney to Canberra Corridor (Revoked 10 July 2008. See amended Direction 5.1)	Repealed
5.7 Central Coast (Revoked 10 July 2008. See amended Direction 5.1)	Repealed
5.8 Second Sydney Airport: Badgerys Creek	Does not apply to Ballina Shire
6. Local Plan Making	
6.1 Approval and Referral Requirements	Consistent. The planning proposal does not introduce any new concurrence or consultation provisions or any additional designated development types.
6.2 Reserving Land for Public Purposes	Consistent. The planning proposal does not have any direct impacts on the reservation of land for public purposes.
6.3 Site Specific Provisions	Does not apply to planning proposal.
7. Metropolitan Planning	
7.1 Implementation of the Metropolitan Strategy	Does not apply to Ballina Shire.

Appendix C – Gateway Determination



Mr P Hickey
General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Our ref: PP_2013_BALL_010_00 (13/18181)
Your ref: 13/65508



Dear Mr Hickey

Planning proposal to amend Ballina Local Environmental Plan 2012

I am writing in response to your Council's letter dated 29 October 2013 requesting a Gateway determination under section 56 of the Environmental Planning and Assessment Act 1979 ("EP&A Act") in respect of the planning proposal to clarify building height allowance provisions of clause 4.3A, Ballina Local Environmental Plan 2012.

As delegate of the Minister for Planning and Infrastructure, I have now determined the planning proposal should proceed subject to the conditions in the attached Gateway determination.

The Gateway determination includes a condition that Ballina LEP 2012 Building Height Allowance Map be amended as required to support the intent of the planning proposal. This condition acknowledges a map change may be required to achieve the proposal's outcomes. A further condition is imposed that the planning proposal when exhibited should clearly outline, through the objectives and explanation of the provisions, that the intended outcome is to allow building height in flood-prone areas to be referenced from a defined fill height rather than existing ground level.

The Minister delegated his plan making powers to councils in October 2012. It is noted that Council has requested to be issued with delegation for this planning proposal. I have considered the nature of Council's planning proposal and have decided to issue an authorisation for Council to exercise delegation to make this plan.

The amending Local Environmental Plan (LEP) is to be finalised within 6 months of the week following the date of the Gateway determination. Council should aim to commence the exhibition of the planning proposal as soon as possible. Council's request to draft and finalise the LEP should be made directly to Parliamentary Counsel's Office 6 weeks prior to the projected publication date. A copy of the request should be forwarded to the department for administrative purposes.


Bridge Street Office: 23-33 Bridge Street, Sydney NSW 2000 GPO Box 36 Sydney NSW 2001 DX 23 Sydney
Telephone: (02) 9228 8111 Facsimile: (02) 9228 8455 Website: www.planning.nsw.gov.au

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The State Government is committed to reducing the time taken to complete LEPs by tailoring the steps in the process to the complexity of the proposal, and by providing clear and publicly available justification for each plan at an early stage. In order to meet these commitments, the Minister may take action under section 54(2)(d) of the EP&A Act if the time frames outlined in this determination are not met.

Should you have any queries in regard to this matter, please contact Claire Purvis of the regional office of the department on (02) 6641 6611.

Yours sincerely

 14 November 2013
Stephen Murray
Regional Director
Northern Region
Planning Operations and Regional Delivery



**Planning &
Infrastructure**

Gateway Determination

Planning proposal (Department Ref: PP_2013_BALL1_010_00): to clarify building height allowance provisions of clause 4.3A.

I, the Regional Director, Northern Region at the Department of Planning and Infrastructure as delegate of the Minister for Planning and Infrastructure, have determined under section 56(2) of the EP&A Act that an amendment to the Ballina Local Environmental Plan (LEP) 2012 to clarify building height allowance provisions of clause 4.3A should proceed subject to the following conditions:

1. Community consultation is required under sections 56(2)(c) and 57 of the Environmental Planning and Assessment Act 1979 ("EP&A Act") as follows:
 - (a) the planning proposal is classified as low impact as described in *A Guide to Preparing LEPs (Department of Planning & Infrastructure 2013)* and must be made publicly available for a minimum of **14 days**; and
 - (b) the relevant planning authority must comply with the notice requirements for public exhibition of planning proposals and the specifications for material that must be made publicly available along with planning proposals as identified in section 5.5.2 of *A Guide to Preparing LEPs (Department of Planning & Infrastructure 2013)*.
2. No consultation is required with public authorities under section 56(2)(d) of the EP&A Act.
3. A public hearing is not required to be held into the matter by any person or body under section 56(2)(e) of the EP&A Act. This does not discharge Council from any obligation it may otherwise have to conduct a public hearing (for example, in response to a submission or if reclassifying land).
4. The timeframe for completing the LEP is to be 6 months from the week following the date of the Gateway determination.
5. The Ballina LEP 2012 Building Height Allowance Map should be amended as required to support the intent of the planning proposal.
6. The planning proposal is to be amended prior to exhibition to clearly outline, through the objectives and explanation of the provisions that the intent of the planning proposal is to allow building height in flood-prone areas to be referenced from a defined fill height rather than existing ground level.

Dated *14th* day of *November* 2013.


Stephen Murray
 Regional Director
 Northern Region
 Planning Operations and Regional Delivery
 Department of Planning and Infrastructure

 Delegate of the Minister for Planning and
 Infrastructure

BALLINA_PP_2013_BALL1_010_00 (13/18181)



WRITTEN AUTHORISATION TO EXERCISE DELEGATION

Ballina Council is authorised to exercise the functions of the Minister for Planning and Infrastructure under section 59 of the *Environmental Planning and Assessment Act 1979* that are delegated to it by instrument of delegation dated 14 October 2012, in relation to the following planning proposal:

Number	Name
PP_2013_BALLI_010_00	Planning proposal to clarify building height allowance provisions of clause 4.3A (Amendment No 9)

In exercising the Minister's functions under section 59, the Council must comply with the Department's "A guide to preparing local environmental plans" and "A guide to preparing planning proposals".

Dated *14th November* 2013


Stephen Murray
 Regional Director
 Northern Region
 Planning Operations and Regional Delivery
 Department of Planning and Infrastructure

Appendix D –Building Height Provisions

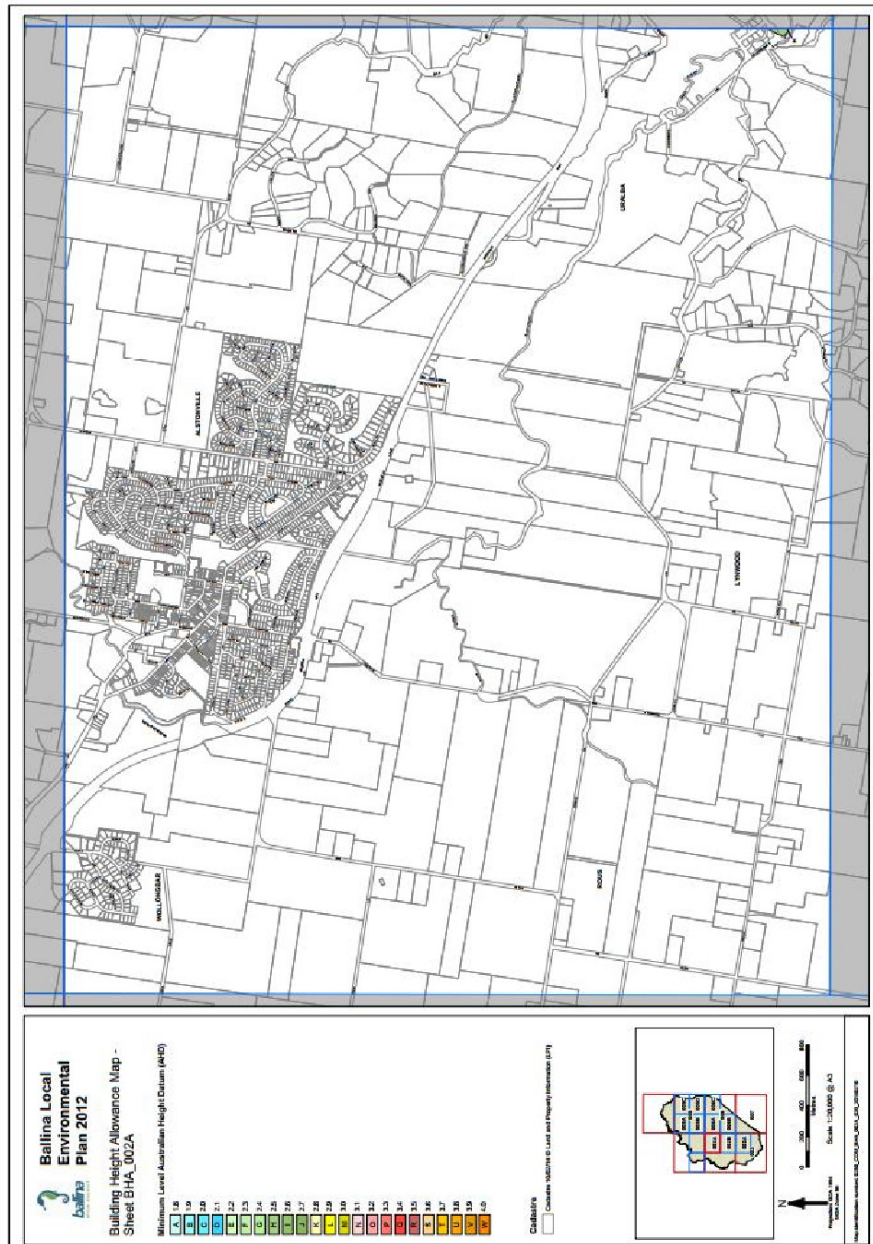
Potential amendments to clause 4.3A and the *Building Height Allowance Maps* to achieve the objectives of this planning proposal are shown below in red.

4.3A Exceptions to height of buildings

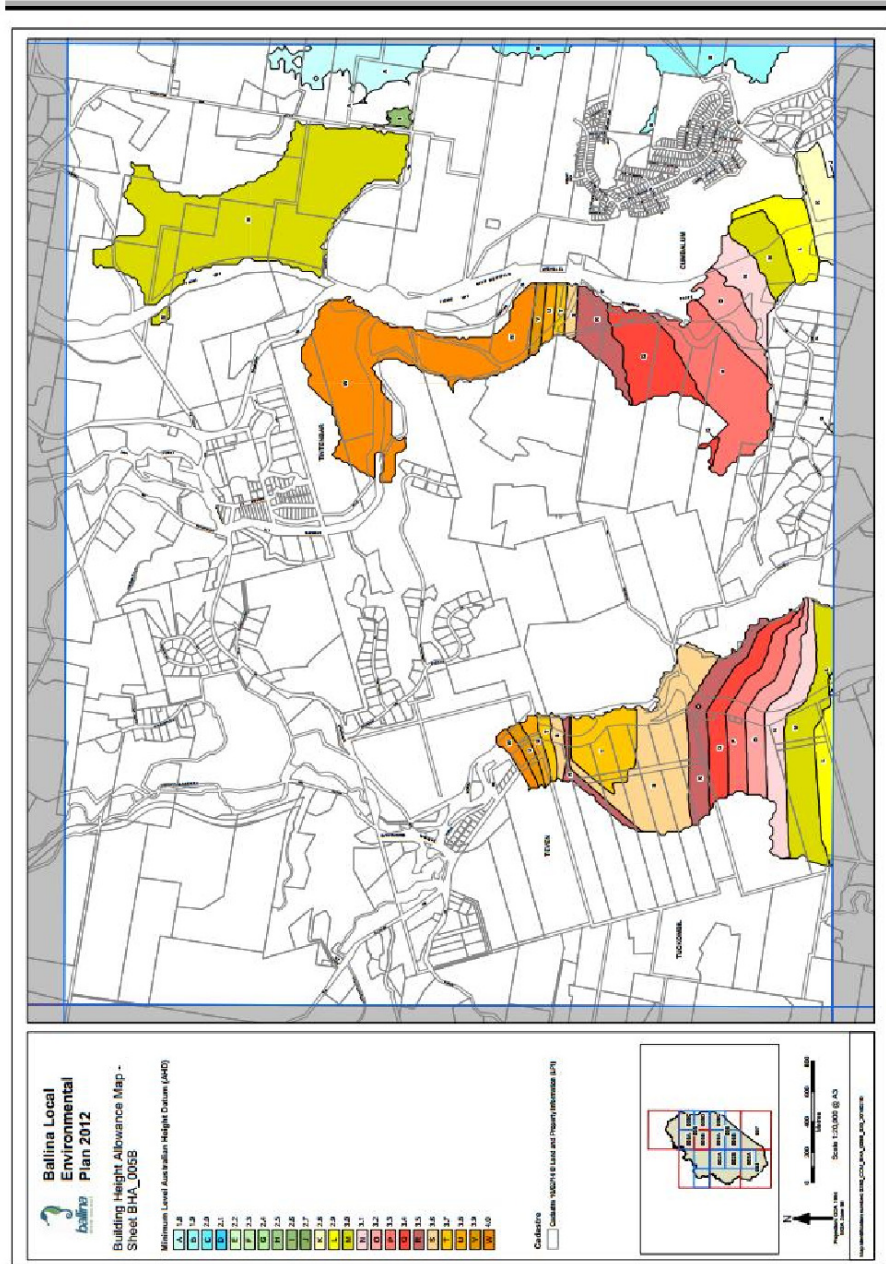
- (1) *The objective of this clause is to align building height and flood planning provisions and provide for a consistent point of reference for the measurement of building heights in flood prone areas.*
- (2) *This clause applies to land identified as "Minimum Level Australian Height Datum (AHD)" on the Building Height Allowance Map.*
- (3) *The maximum height of a building on land to which this clause applies is to be measured from the top of the minimum AHD level permitted for that land as shown on the Building Height Allowance Map.*

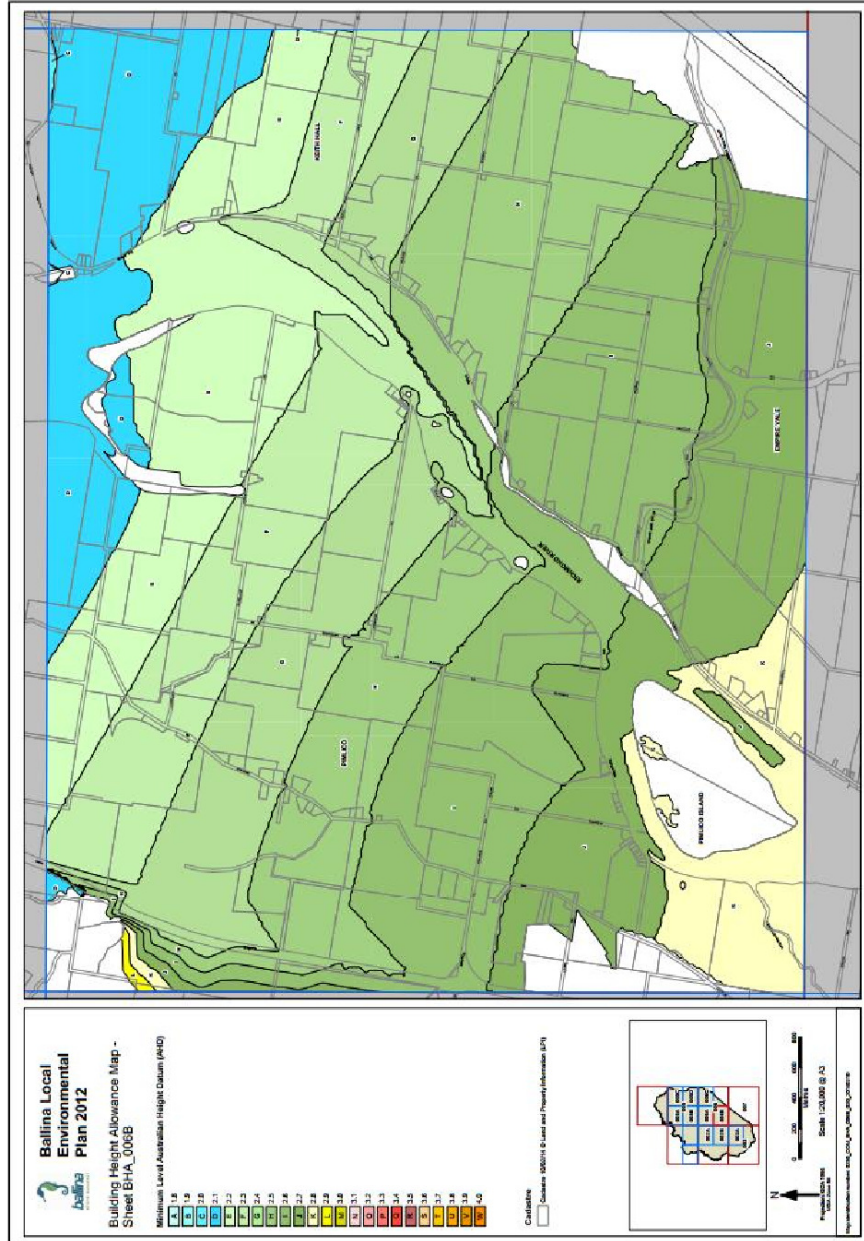
In addition to the above drafting changes to clause 4.3A (2) and (3), the legend contained within the *Building Height Allowance Maps* is proposed to be amended to delete the words "Minimum Fill Level (m)" and insert the words "*Minimum Level Australian Height Datum (AHD)*".

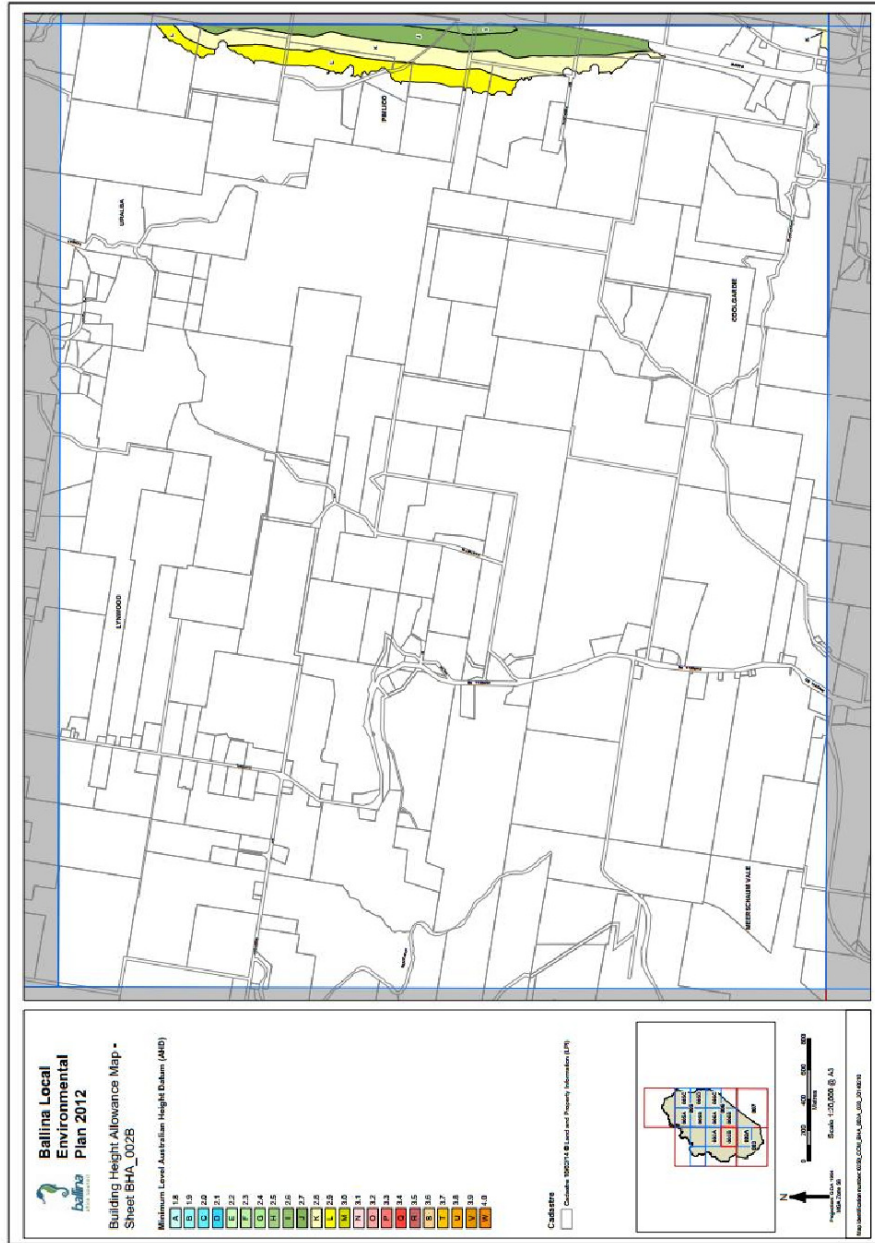
Appendix E – Building Height Allowance Maps

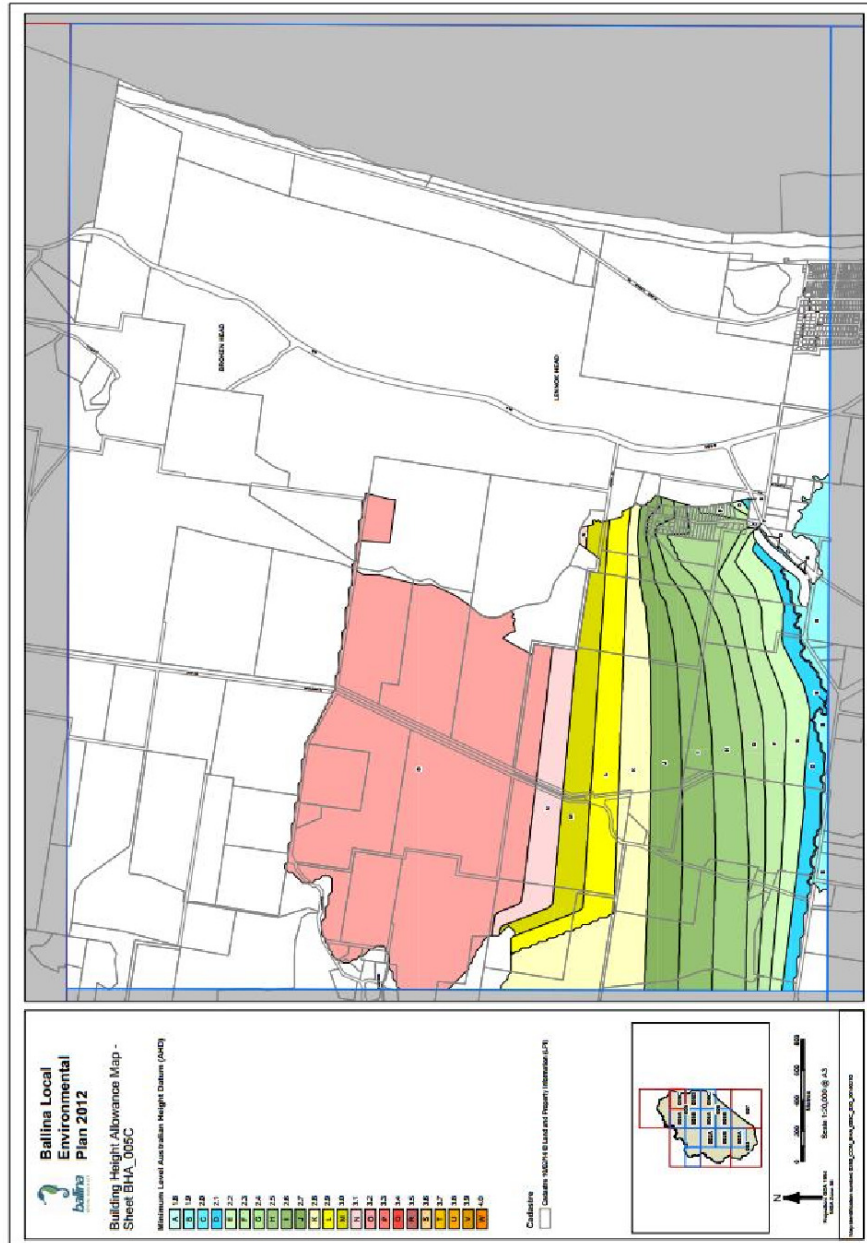


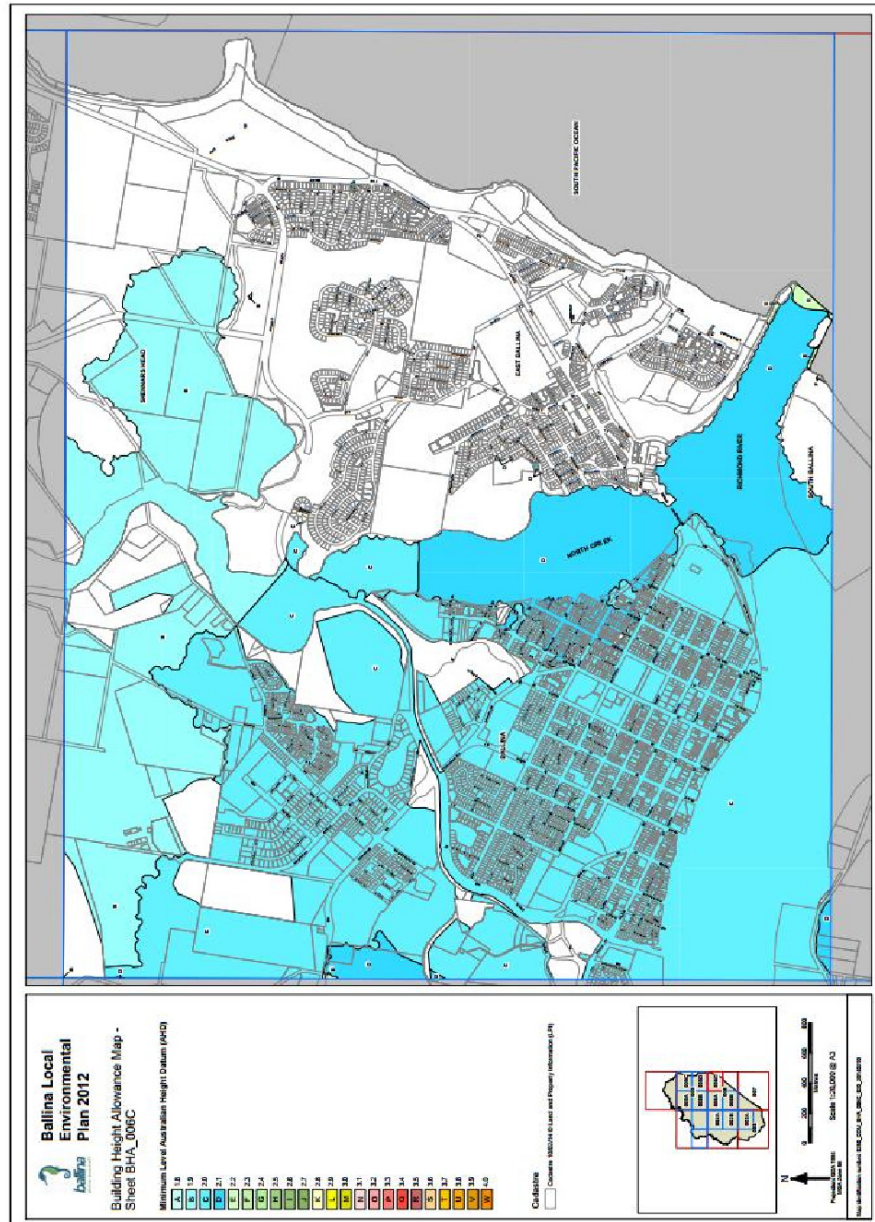
Planning Proposal – February 2014
 Building Height Allowance Clause

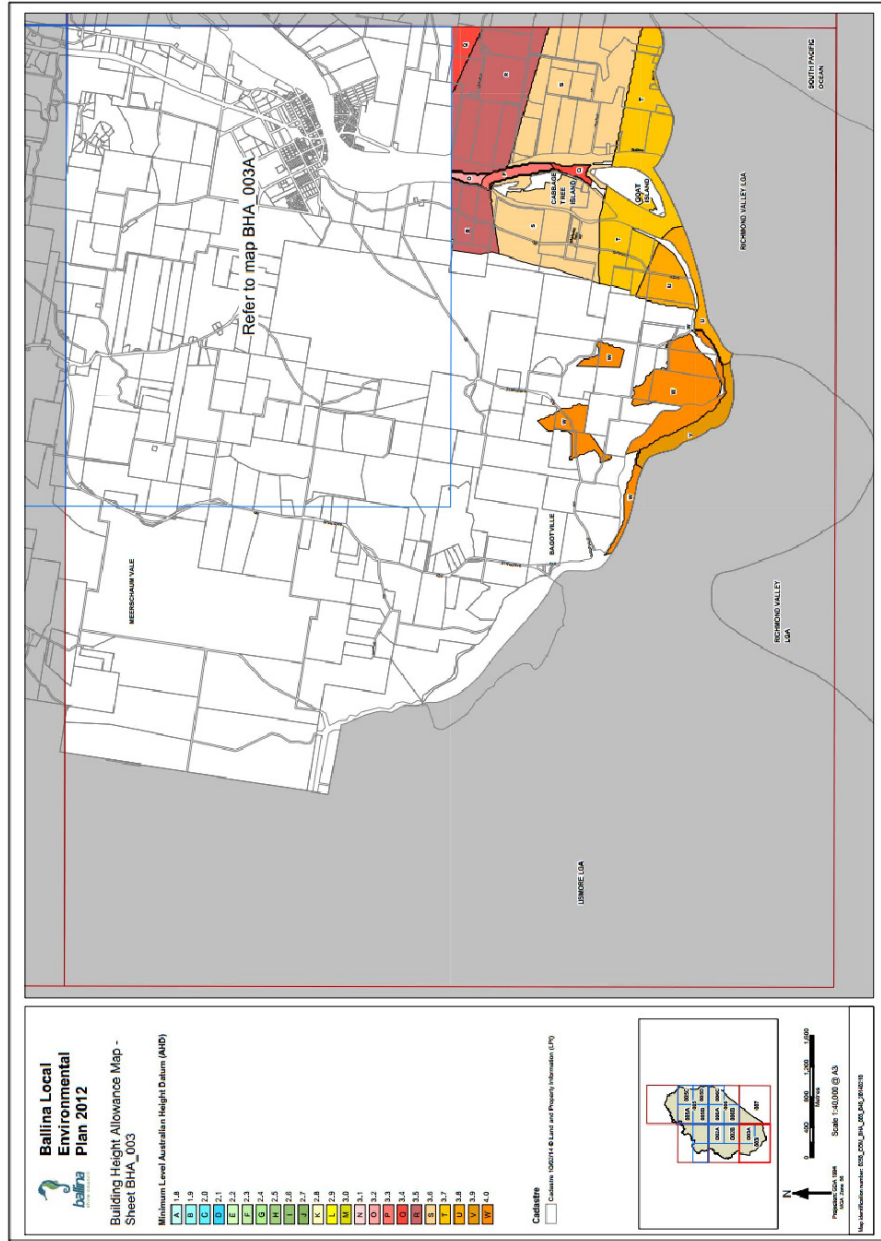






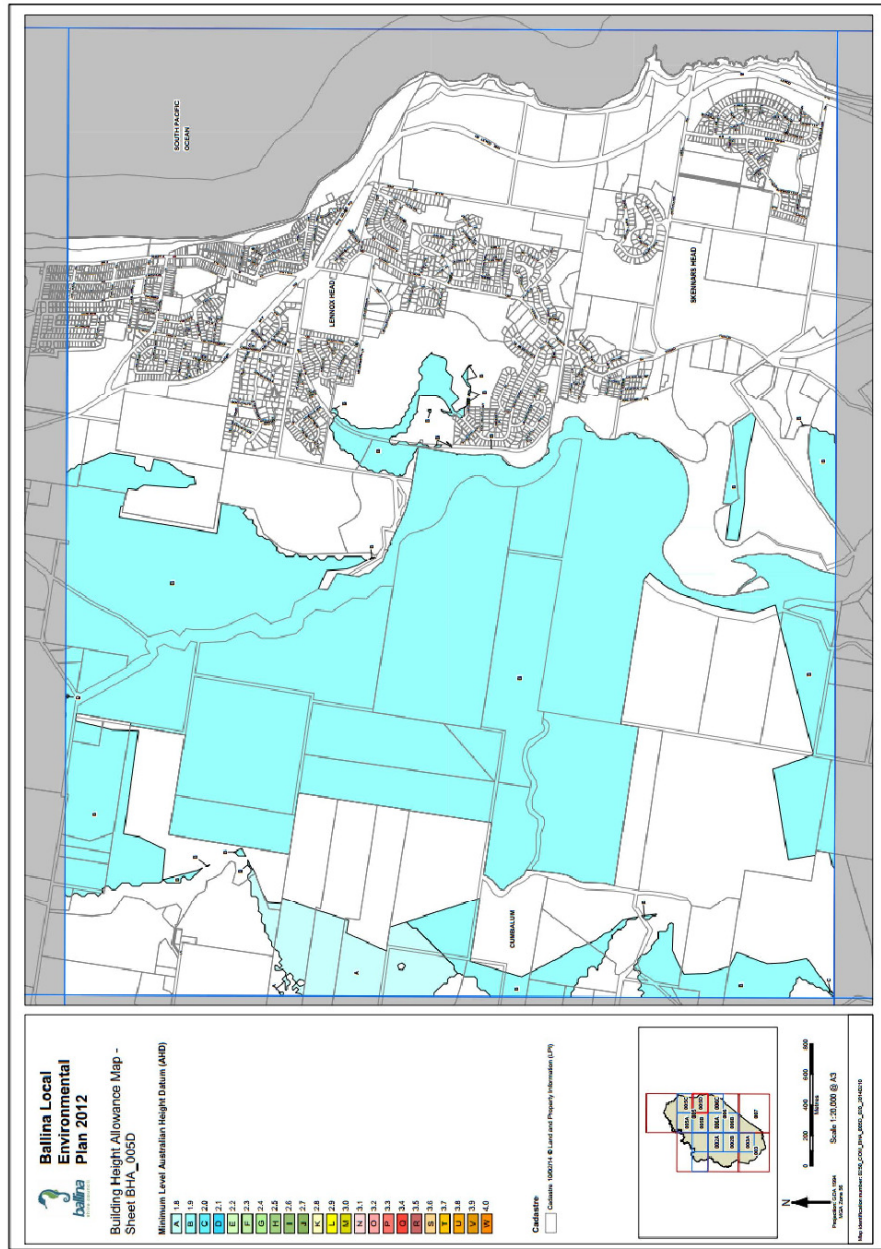


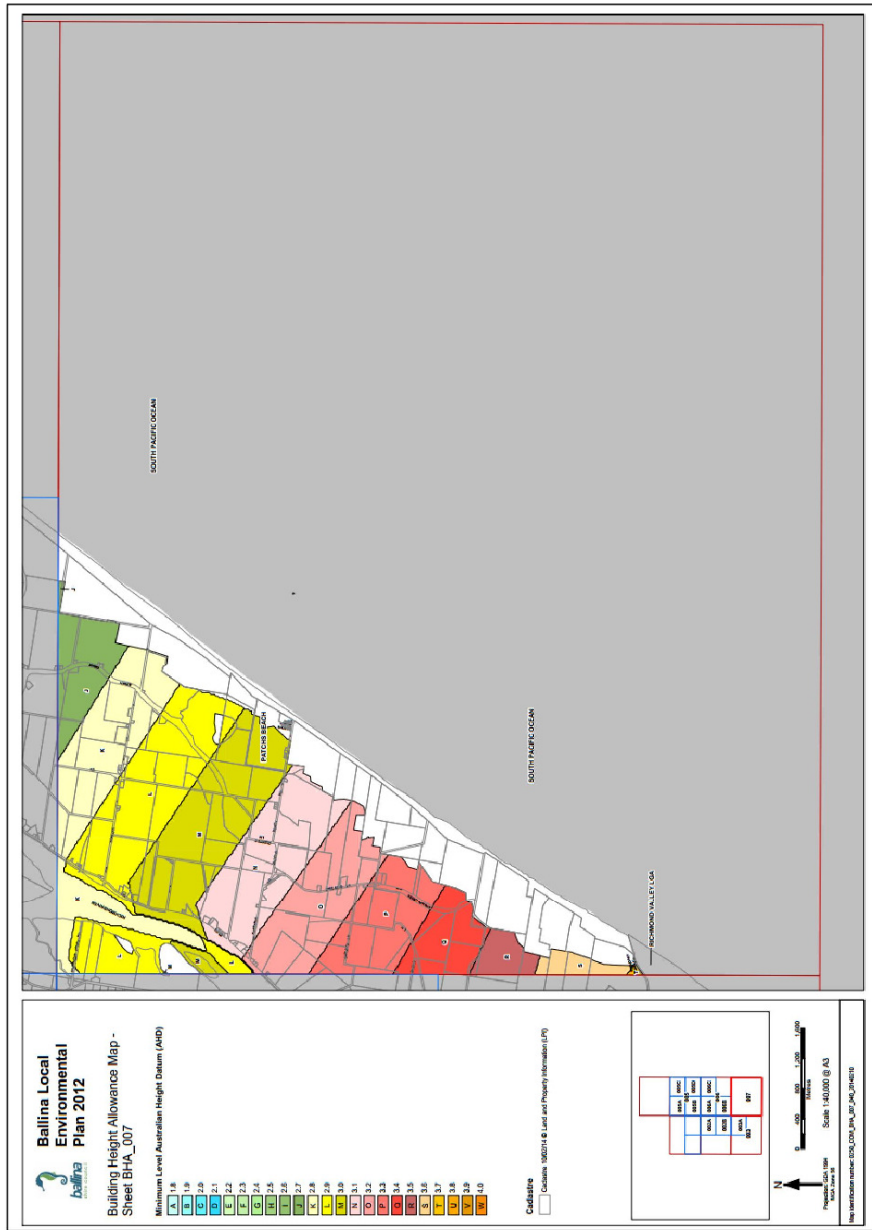




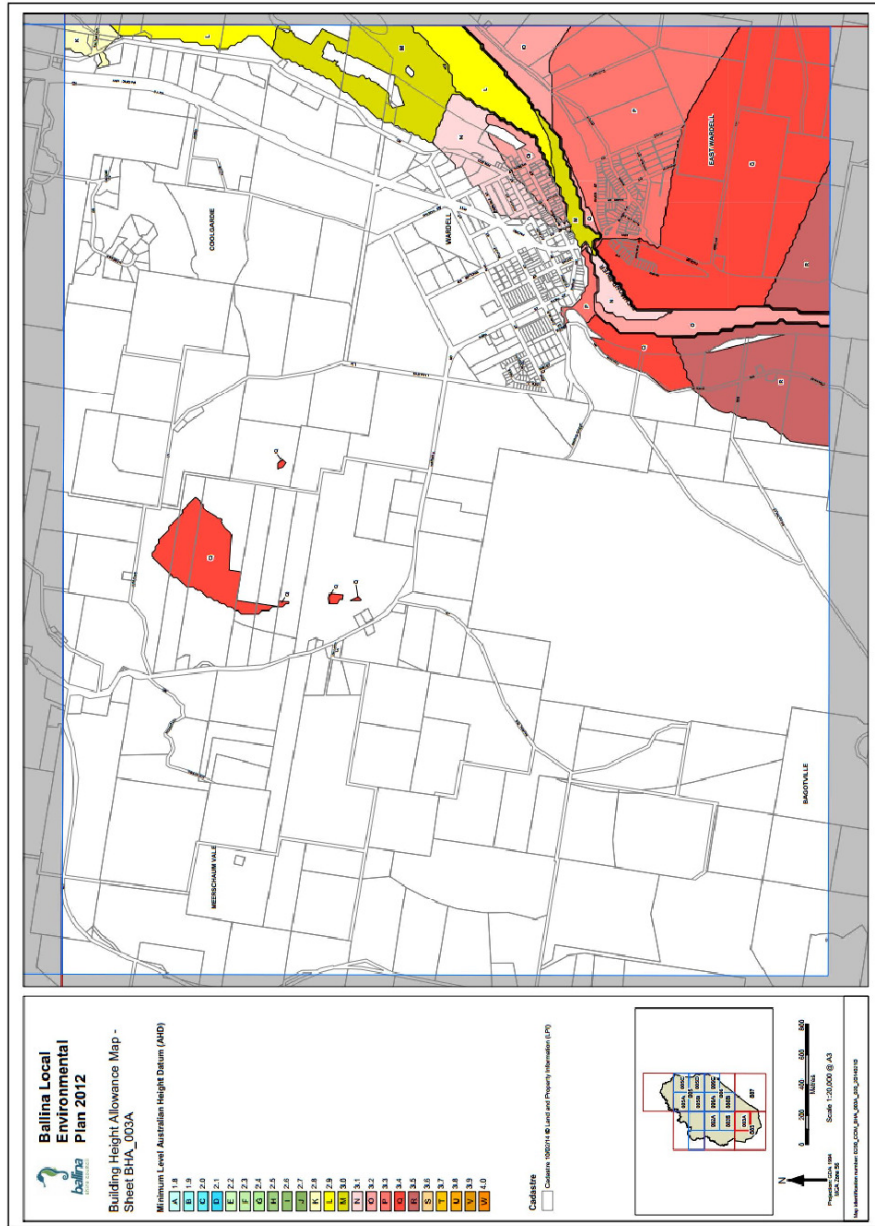
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 Building Height Allowance Clause

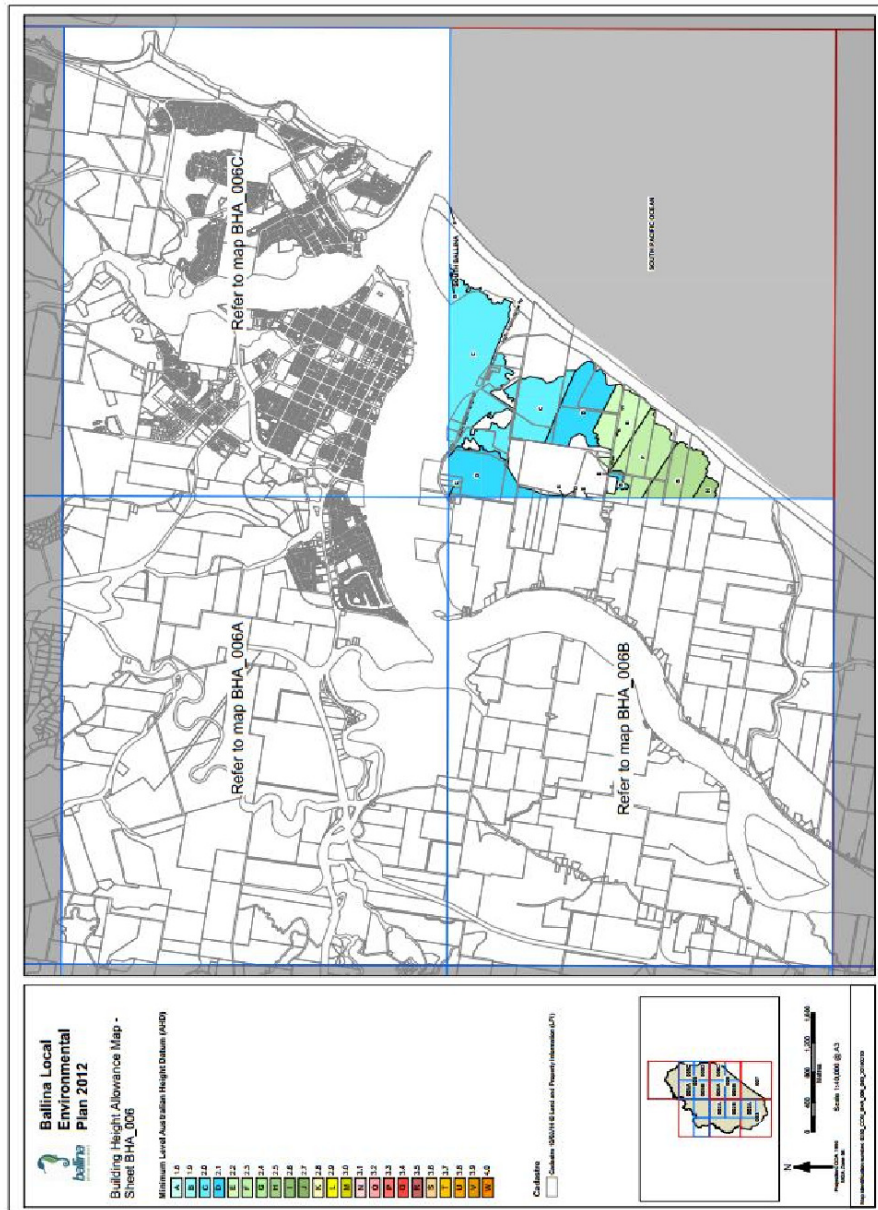
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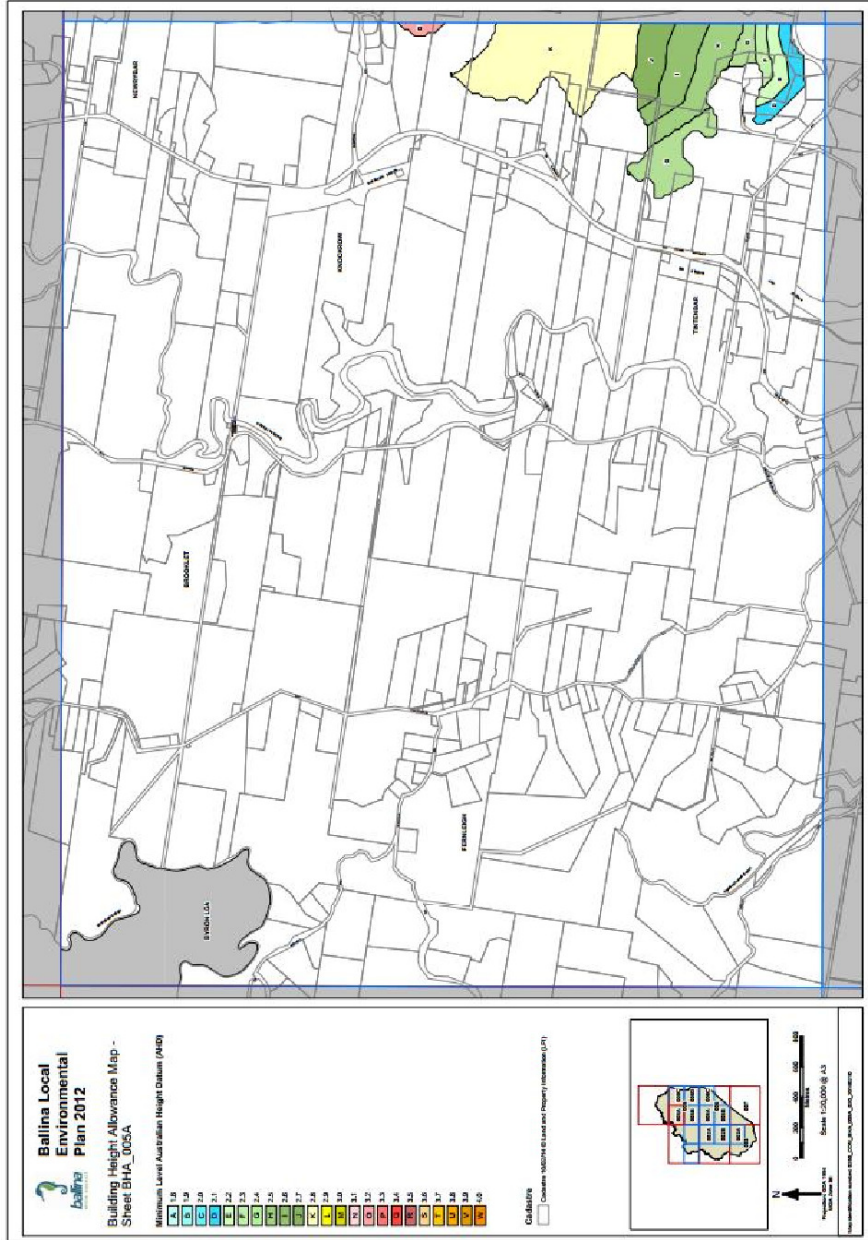


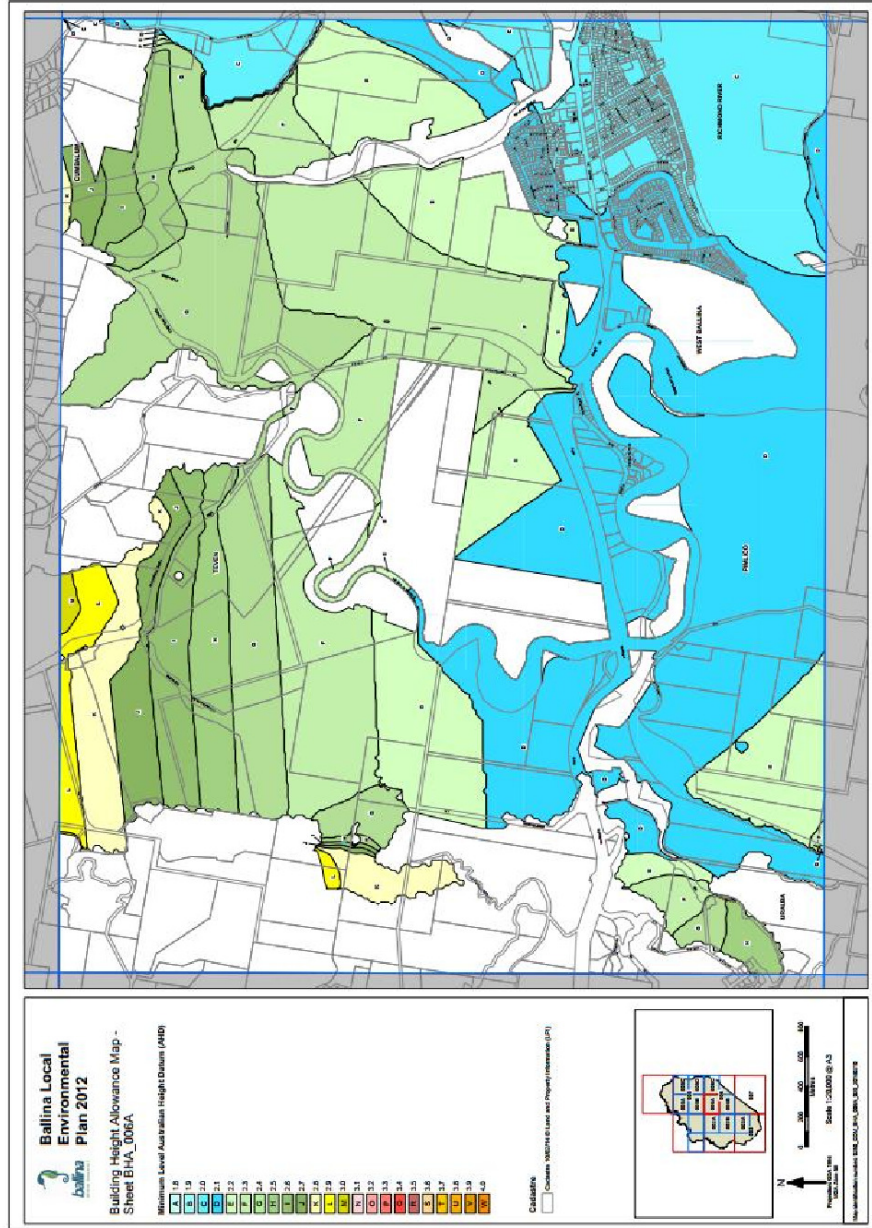


Planning Proposal – February 2014
 Building Height Allowance Clause











abn: 56 291 496 553
6 Byron Street, PO Box 538,
Lennox Head, NSW 2478
Telephone: 1300 66 00 87

14th January 2014
Our reference: 1372-603

The General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Dear Sir

RE: Ballina Shire Council Planning Proposal BSCPP13/010

Council has on exhibition a Planning Proposal relating to the Building Height Allowance provision set out at Clause 4.3A of the Ballina Local Environmental Plan 2012 (BLEP2012). The Planning Proposal describes the intent of Clause 4.3A. Clearly the clause as currently drafted is very much at odds with that intent. The Building Height Allowance Map referenced by Clause 4.3A does not refer to its level as being a level to Australian Height Datum, but instead refers to it as being a minimum "fill" level measured in metres. Under BLEP2012 the term "fill" means *"the depositing of soil, rock or other similar extractive material..."* Thus, the statutory meaning under BLEP2012 of the sentence *"The height of a building ... is not to exceed the maximum height shown ... on the Height of Buildings Map plus the minimum fill level shown ... on the Building Height Allowance Map"* is that a building height cannot exceed the sum of the height and allowance map provisions above the existing surface level.

Clause 4.3A is an important clause in the practical operation of Council's LEP and should not be abandoned. In our view the clause must work in harmony not just with Council's DCP (which it currently does not harmonize with in relation to areas such as Southern Cross Industrial Estate, Ferngrove Estate, Pacific Pines Estate or Ballina Heights Estate) but also with the provisions of Section 733 of the Local Government Act 1993 and the associated Floodplain Development Manual 2005.

To achieve the intent described in the Planning Proposal and harmonize with key flood planning statutes, we respectfully submit the following clause for Council's consideration:

"4.3A Exemptions to Height of Buildings

- (1) *The objective of this clause is to align building height and flood planning provisions and provide for a consistent point of reference for the measurement of building heights concerning flood prone land.*
- (2) *In this clause the terms 'flood prone land' and 'flood planning levels' have the same meaning they have in the NSW Government Floodplain Development Manual (ISBN 0 7347 5426 0) published by the NSW Government in April 2005.*
- (3) *The height of the building on land in a flood prone land is not to exceed the maximum height shown for that land on the Height of Buildings Map as measured from the ground level (existing) or the flood planning level, whichever is the greater."*

Notes to explain Clause Drafting

1. This approach would see the removal of the Building Height Allowance Map from the BLEP 2012.
2. Suggested Clause 4.3A(1) generally replicates the objectives of the clause currently contained within the BLEP2012 but with its language slightly modified to accord with words used in the NSW Government Floodplain Development Manual.

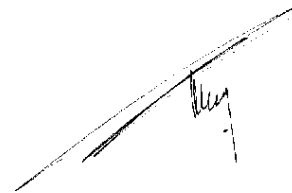
3. Suggested Clause 4.3A(2) seeks to harmonize the BLEP2012 provisions with the Local Government Act /Floodplain Development Manual terminology and methodology. In the Floodplain Development Manual, the term a 'flood prone land' means land susceptible to flooding by the Probable Maximum Flood. The term 'flood planning levels' means *'the combinations of flood levels (derived from significant historical flood events or floods of specific annual exceedance probability) and freeboards selected for floodplain risk management purposes, as determined in management studies and incorporated in management plans...'* In submitting this clause for councils consideration we are aware that historically the Department of Planning and Infrastructure has advised Councils that it is not a good practice to reference external documents, such as the Floodplain Development Manual, in Standard Instrument type plans. However, precedents exists for this approach. A modern example is contained in a draft instrument prepared by the Department. (see http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=3547 - Draft State Environmental Planning Policy Amendment (West Byron Bay) 2013 at Clause 96).
4. Suggested Clause 4.3A(3) utilises the technique adopted by Council pre the making of BLEP2012. This approach allows for the flood planning levels to be defined and managed by Council in an orderly and efficient way without the need for flood planning levels to be gazetted as part of the BLEP2012 instrument. This approach has historically worked well in the Ballina locality and is one which is easily understood and well recognised by the development community in the Shire.

We trust this submission is of help to Council in its finalisation of considerations under the Planning Proposal.

Should Council require any further information in which to clarify any matter raised by this submission, please feel free to contact PLANNERS NORTH at any time.

Yours faithfully,

PLANNERS NORTH



Stephen Connelly FPIA CPP

PARTNERSHIP PRINCIPAL

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