

THIS Deed of Agreement is made the day of 2016 between the following Parties:

PARTIES

1. **Ballina Shire Council** of 40 Cherry Street BALLINA NSW 2478 ("Council")
2. **Raymond James Date and Carolyn Joan Date** of 132 Teven Road West Ballina NSW 2478 (owners of Lot 3 DP 749680); **Lynks Pty Limited** of 58 Molesworth Street Lismore NSW 2480 (owner of Lot 2 DP 749680; Lot 5 DP 1031875 and Lot 229 DP 1121079); **Teven Park Pty Ltd** of Unit 33 1 Macquarie Street Sydney NSW 2000 (owner of Lot 228 DP 1121079); **Zeallake Pty Ltd** of 60 Teven Road Ballina NSW 2478 (owner of Lot 227 DP 1121079) and **Montina Pty Ltd** of c/- Collins Hume First Floor 97 Tamar Street Ballina NSW 2478 (owner of Lot 12 DP 1011575) ("Developers")

Background

- A. In early 2014 the Developers requested the Council to initiate a planning proposal to amend Ballina Local Environmental Plan 2012 ("LEP") to alter the Additional Permitted Uses Map Sheet 006A as it applies to the Land.
- B. The purpose of the amendment is to permit *freight transport facilities and warehouse or distribution centre* as additional permitted uses on the Land.
- C. In order to develop the Land for those uses and to minimise flooding impacts it is necessary for site filling and landform modification to be undertaken on the Land in a co-ordinated manner.
- D. The flood modelling which has informed the proposed lot levels of the Land is based on an assumption that a flood relief structure will be constructed under River Street, West Ballina. As a consequence that structure must be constructed prior to any development of the Land for *freight transport facilities or warehouse or distribution centre*.

- E. Each of the Developers is willing to have this Planning Agreement registered on the title of their land until such time as earthworks are undertaken on that land in accordance with this Deed.
- F. Each of the Developers is willing to permit a Restriction as to User pursuant to s.88E *Conveyancing Act* 1919 in favour of the Council to be registered on the title of their land restricting the use of part of that land for drainage and floodway purposes.
- G. In entering into this Agreement the Council does not intend to fetter its discretion with respect to any future development application relating to the Land.

THIS DEED WITNESSES

1. Planning Agreement Under the Act

The Parties agree this Deed is a Planning Agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2. Application of this Deed

The Planning Agreement constituted by this Deed applies to the Land.

3. Operation of this Deed

3.1 Until this Deed operates, this document constitutes the Developers' irrevocable offer to enter into the Deed if the LEP is amended generally in accordance with the Planning Proposal.

3.2 This Deed becomes operative from the date on which the LEP is amended generally in accordance with the Planning Proposal.

4. Definitions and Interpretations

4.1 In this Deed the following definitions apply:

Act means the *Environmental Planning and Assessment Act 1979*.

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering, or otherwise dealing with the Land but does not include the registration of a plan of subdivision relating to the Land.

Developers means Raymond James and Carolyn Joan Date, Lynks Pty Limited, Teven Park Pty Ltd, Zeallake Pty Ltd and Montina Pty Ltd, or their servants, successors, agents or assigns.

Development has the same meaning as in the Act.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Environmental Planning Instrument has the same meaning as in the Act.

Land means:

Lot 2 DP 749680;

Lot 3 DP 749680;

Lot 5 DP 1031875;

Lot 227 DP 1121079;

Lot 228 DP 1121079;

Lot 229 DP 1121079 and

Lot 12 DP 1011575

being land at Teven Road West Ballina

LEP means Ballina Local Environmental Plan 2012.

Material Public Benefit means the material public benefit described in Schedule 1 to this Deed.

Minor Development means development that is exempt development under the provisions of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, changes of use, demolition, interior or exterior building alterations, building extensions and rebuilding proposals which do not increase the gross floor area by more than 10% of the gross floor area of a building as it existed as at the date of this Deed, site filling approved by the Council which does not extend the filled area on any lot by more than 10% of the area filled on that lot as at the date of this Deed, and any other development approved by the Council which, in the Council's opinion, does not compromise flood levels within the flood plain.

Occupation Certificate has the same meaning as in the Act.

Party means a Party to this Deed including its successors and assigns.

Planning Proposal means planning proposal PP_2014_BALLI_001_00 as registered with the New South Wales Department of Planning & Environment in relation to the Land.

Regulation means the *Environmental Planning and Assessment Regulation 2000*.

4.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires.

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- (b) A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.

- (d) A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- (e) A reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment, or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or Government Agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (k) References to the word "include" or "including" are to be construed without limitation.
- (l) A reference to this Deed includes the agreement recorded in this Deed.

(m) A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, and the Parties successors and assigns.

(n) Any Schedules and attachments form part of this Deed.

4.3 In the interpretation of this Deed terms defined in the Act or the LEP have the same meaning as in these instruments unless elsewhere defined in this Deed.

5. Material Public Benefit to be Provided under this Deed

The Parties agree that:

5.1 Prior to the issue of any Occupation Certificate for any Development for *freight transport facilities or warehouse or distribution centre*, other than Minor Development as defined in this Deed, the Developers will provide the Material Public Benefit set out in Schedule 1 of this Deed.

5.2 The Developers agree to register a Restriction as to User pursuant to s.88E *Conveyancing Act 1919* in favour of the Council to be registered on the title of their land restricting the use of part of that land for drainage and floodway purposes.

5.3 No Development for *freight transport facilities or warehouse or distribution centre*, other than Minor Development as defined in this Deed, shall take place on the Land until the flood relief structure has been constructed under River Street, West Ballina.

6. Registration of this Deed

This Deed is required to be registered.

7. Assignment and Dealings

The Developers or any of them shall not sell, transfer, assign or novate or similarly deal with ("Dealing") their right, title or interest in the Land (if any) or any of their rights or obligations under this Deed, or allow any interest in them to arise or be varied unless the Developer(s):

7.1 Gives the Council no less than 28 days' notice in writing of the proposed

Dealing; and

7.2 Procures that the transferee, assignee or novatee executes and delivers to the Council prior to any such dealing taking effect a deed in favour of the Council in form and substance acceptable to the Council, acting reasonable whereby the transferee, assignee or novatee becomes contractually bound with the Council to perform all of the Developer's obligations and have the benefit of the Developer's rights under this Deed.

8. Review of this Deed

Any amendment or revocation of this Deed shall be by agreement in writing and in compliance with section 93G of the Act.

9. Dispute Resolution

9.1 Notice of dispute

If a Party claims that a dispute has arisen under this Deed ("Claimant"), it must give written notice to the other Party ("Respondent") stating the matters in dispute and designating as its representative a person to negotiate the dispute ("Claim Notice").

No Party may start Court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause.

9.2 Response to notice

Within ten business days of receiving the claim notice, the respondent must notify the Claimant of its representative to negotiate the dispute.

9.3 The nominated representative must:

- (i) Meet to discuss the matter in good faith within five business days after services by the Respondent of notice of its representatives;

- (ii) Use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

9.4 Further notice if not settled

If the dispute is not resolved within 15 business days after the nominated representatives have met, either Party may give to the other a written notice calling for determination of the dispute ("Dispute Notice") by mediation under clause 10.5 or by expert determination under clause 10.6.

9.5 Mediation

If a Party gives a Dispute Notice calling for the dispute to be mediated:

- (i) The Parties must agree to the terms of reference of the mediation within five business days of the receipt of the Dispute Notice (the terms shall include a requirement that the mediation rules and the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (ii) The mediator will be agreed between the Parties, or failing agreement within five business days of receipt of the Dispute Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (iii) The mediator appointed pursuant to this Clause 10.5 must;
 - (a) Have reasonable qualifications and practical experience in the area of disputes; and
 - (b) Have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;

- (iv) The mediator shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (v) The Parties must within five business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation.
- (vi) The Parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement.
- (vii) In relation to costs and expenses
 - (a) Each Party will bear their own professional and expert costs incurred in connection with the mediation; and
 - (b) The cost for the mediator will be shared equally by the Parties unless the mediator determines a Party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full cost of the mediation to be borne by that Party.

9.6 Expert Determination

If the dispute is not resolved under clause 10.3 or 10.5 the dispute may, by agreement between the Parties, both acting reasonably having regard to the nature of the dispute, be resolved by expert determination, in which event:

- (i) The dispute must be determined by an independent expert in the relevant field:
 - (a) Agreed upon and appointed jointly by the Council and the Developer; or

- (b) In the event that no agreement is reached or appointment made within 30 business days, appointed on application of a Party by the then current President of the Law Society of New South Wales;
- (ii) The expert must be appointed in writing and terms of the appointment must not be inconsistent with this clause;
- (iii) The determination of the dispute by such expert will be made as an expert and not as an arbitrator and will be in writing and containing reasons for the determination;
- (iv) The expert will determine the rules of the conduct for the process, but must conduct the process in accordance with the rules of natural justice;
- (v) Each Party will bear its own costs in connection with the process and the determination by the expert together with an equal proportion of the expert's fees and costs; and
- (vi) Any determination made by an expert pursuant to this clause is final and binding upon the Parties except where the determination is in respect of, or relates to, termination or purported termination of this Deed by any Party, in which event the expert is deemed to be giving a non-binding appraisal and any Party may commence litigation in relation to the dispute if it has not been resolved within 20 business days of the expert giving his or her decision.

9.7 Litigation

If the dispute is not finally resolved in accordance with this clause 10, either Party is at liberty to litigate the dispute.

9.8 Continue to Perform Obligations

Each Party must continue to perform its obligations under this Deed, notwithstanding the existence of a dispute.

10. Enforcement

Nothing in this Deed prevents either Party from exercising any function under the Act or any other Act or Law relating to the enforcement of any aspect of this Deed or any matter to which this Agreement relates.

11. Notices

11.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:

- (a) Delivered or posted to that Party at its address set out below;
- (b) Faxed to that Party at its fax number set out below;
- (c) Emailed to that Party at its email address set out below.

Council

Attention: General Manager

Address: 40 Cherry Street BALLINA NSW 2478

Fax Number: 02 6686 7035

Developers

Attention: Damian Chapelle

Address: Newton Denny Chapelle Suite 1 31 Carrington Street
LISMORE 2480

Fax Number: 02 6622 4088

11.2 If a Party gives the other Party three business days' notice of a change of its address or fax number, any notice, consent, information, application or requests is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

11.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) If it is delivered, when it is left at the relevant address.
- (b) If it is sent by post, 2 business days after it is posted.
- (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

11.4 If any notice, consent, information, application or request is delivered, or any error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5:00pm on that day in the place of the Party to whom it is sent, it is to be treated as being given or made at the beginning of the next business day.

12. Approvals and Consent

Accept as otherwise set out in this Deed, and subject to any Statutory obligations, a Party may give or withhold an approval or consent to be given under this Deed in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

13. Assignment and Dealings

Until the Material Public Benefit is provided in full, the Developer cannot sell, transfer, assign, novate, charge, encumber or otherwise deal with the Land or attempt or purport to do so unless the Developer:

- 13.1 Gives Council no less than ten (10) Business Days' notice in writing of the proposed sale, transfer, assignment, novation, charge, encumbrance or other dealing with its rights in respect of the Land;
- 13.2 Procures that any buyer, transferee, assignee or novatee promptly executes a Deed in favour of Council whereby the buyer, transferee,

assignee or novatee becomes contractually bound with Council to perform the Developer's obligations under this Deed.

14. Costs

Council's costs of and incidental to the preparation and execution of this Deed and any related documents and registration of same shall be borne by the Developer.

15. Entire Deed

This Deed contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Deed was executed, except as permitted by law.

16. Further acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Deed and all transactions incidental to it.

17. Governing law and jurisdiction

This Deed is governed by the law of New South Wales. The Parties submit to the nonexclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

18. Joint and individual liability and benefits

Except as otherwise set out in this Deed, any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

19. No fetter

Nothing in this Deed shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

20. Representations and warranties

The Parties represent and warrant that they have power to enter into this Deed and comply with their obligations under the Deed and that entry into this Deed will not result in the breach of any law.

21. Severability

If a clause or part of a clause of this Deed can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal.

22. Modification

No modification of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed.

23. Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

EXECUTED by the Parties as a Deed.

EXECUTED BY **THE COUNCIL OF THE**)
SHIRE OF BALLINA)
)
 Date.....)
)
)

EXECUTED BY **RAYMOND JAMES**)
DATE and CAROLYN JOAN DATE)
)
 Date.....)
)
)
)

EXECUTED BY **LYNKS PTY LIMITED**)
)
 Date.....)
)
)
 Director / Secretary)

EXECUTED BY **TEVEN PARK PTY LTD**)
)
 Date.....)
)
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 Director / Secretary)

EXECUTED BY **ZEALLAKE PTY LTD**)
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 Date.....)
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 Director / Secretary)

EXECUTED BY **MONTINA PTY LTD**)
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Date.....)
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.....)
Director / Secretary

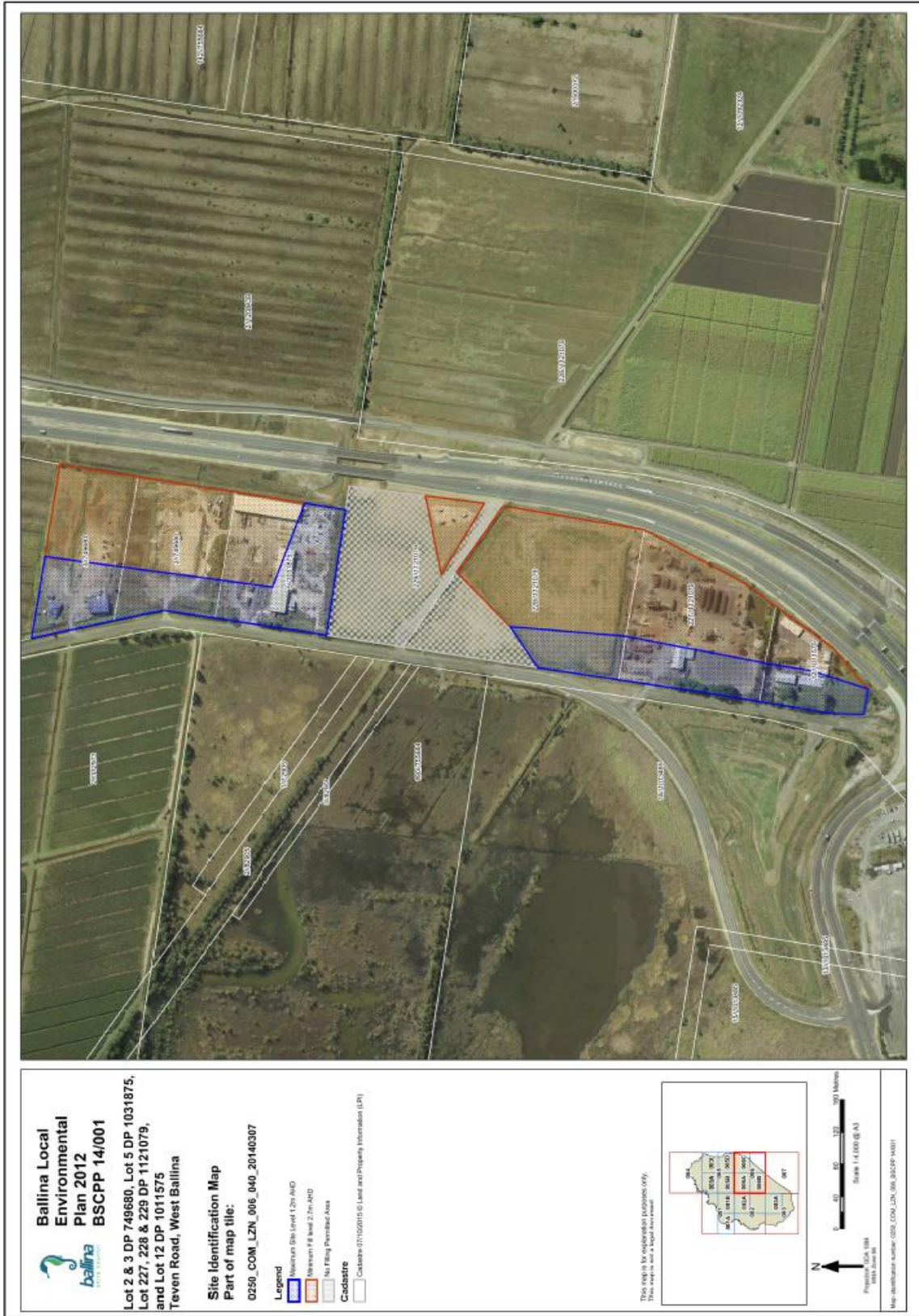
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SCHEDULE 1 – DEVELOPMENT CONTRIBUTIONS SCHEDULE

The Developers agree to provide the following material benefits:

MATERIAL PUBLIC BENEFIT TO BE PROVIDED BY THE DEVELOPERS		
Column 1	Column 2	Column 3
Development Contribution for Material Public Benefit	Intended Use/purpose	Date to be provided by the Developer
1. Grant a Restriction as to User in favour of Council and free of cost to Council pursuant to section 88E <i>Conveyancing Act 1919</i> restricting the use of part of that land for drainage and floodway purposes.	The provision of public infrastructure relating to the Land	Within 6 months of this Deed becoming operative
2. Prior to or as part of any Development for <i>freight transport facilities</i> or <i>warehouse or distribution centre</i> (other than Minor Development as defined in this Deed) being carried out on the Land, earthworks shall be undertaken on the Land (or part of it) to achieve the site levels nominated in the map described as Ballina Local Environmental Plan 2012 BSCPP 14/001 which is Annexure A to this Deed. Such earthworks shall be undertaken in accordance with the sequence described in the table which is Annexure B to this Deed.	The provision of public infrastructure relating to the Land	Earthworks to be undertaken prior to the issue of any Occupation Certificate in respect of the development consent for the Land (or any part of it) for <i>freight transport facilities</i> or <i>warehouse or distribution centre</i> (other than Minor Development as defined in this Deed).

ANNEXURE A - Ballina Local Environmental Plan 2012 BSCPP 14/001



ANNEXURE B - SEQUENCE OF EARTHWORKS

	Site Precincts
	<i>Northern Precinct</i>
1.	Lot 3 DP 749680
2.	Lot 2 DP 749680
3.	Lot 5 DP 1031875
4.	Lot 229 DP 1121079
	<i>Southern Precinct</i>
1.	Lot 228 DP 1121079
2.	Lot 227 DP 1121079
3.	Lot 12 1011575