

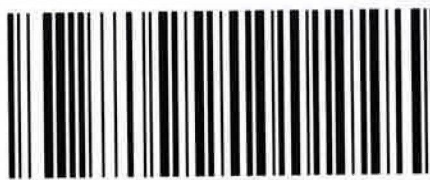
enquiries refer
Matthew Wood

in reply please quote

Planning Proposal – Building Height Allowance Provision (13/65558)



29 October 2013



PGF001995

Mr Steve Murray
Regional Director, North Coast
Department of Planning & Infrastructure
Locked Bag 9022
GRAFTON NSW 2460



Dear Mr Murray

Re: Planning Proposal – Building Height Allowance Provision – Ballina LEP 2012

Council has resolved to progress a planning proposal to amend the Ballina Local Environmental Plan 2012 to either remove or modify Clause 4.3A – Exceptions to height of buildings. Specifically, Council has resolved as follows:

1. *That Council submit the planning proposal relating to the modification or repeal of Clause 4.3A Exceptions to height of buildings under the Ballina Local Environmental Plan 2012 (as contained in Attachment One) to the NSW Department of Planning & Infrastructure for review and Gateway determination.*
2. *That upon an affirmative Gateway determination being received from the Department of Planning & Infrastructure, Council staff will carry out the procedural steps associated with the progress of the planning proposal, including public exhibition.*
3. *That this matter be reported back for further consideration by the Council following the mandatory public exhibition period.*

The purpose of the proposed LEP amendment is to reinforce Council's building height planning policy.

In accordance with Council's resolution, please find enclosed a copy of the planning proposal for Gateway determination in accordance with Section 56 of the *Environmental Planning & Assessment Act 1979*. Council requests that the Gateway Panel considers application of a 14 day public exhibition period for this proposal as it relates to the consolidation of an established local policy.

I look forward to the consideration of this matter by the Gateway Panel. In the meantime, if you have any enquiries please contact me on telephone 6686 1284.

Yours faithfully

Matthew Wood
**Manager Strategic Planning
Strategic and Community Facilities Group**

Encl: Planning Proposal – Building Height Allowance Provision (Council Report/Gateway).

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Planning Proposal

October 2013

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 Ballina LEP 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 Ballina LEP 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).

This planning proposal seeks to reinforce the Council's original intent in relation to building height policy in the LEP by either repealing Clause 4.3A or modifying it such that the Council's original intent is clarified.

Planning Context

In preparing the Ballina LEP 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, 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 within the planning proposal contained in Appendix A.

The potential for the provision as adopted into the Ballina LEP 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 LEP by either removing clause 4.3A Exceptions to height of buildings from the LEP in favour of addressing variations to height standards in flood prone areas due to filling via Council's Ballina Shire Development Control Plan 2012, or modifying the clause to provide improved clarity with respect to Council's intent. If the planning proposal proceeds, it is intended that the above options for addressing the issue will be examined in further detail and be publicly exhibited prior to further reporting to the Council.

Importantly, in amending the LEP to remove the building height allowance clause, the LEP would still include a mechanism to enable variations to building height standards through the general exceptions to development standards provision which is a mandatory part of Standard Instrument LEPs.

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.

PART 2 – EXPLANATION OF THE PROPOSAL

This planning proposal will result in the amendment of the BLEP 2012 to either:

- remove clause 4.3A Exceptions to height of buildings from the LEP in favour of addressing variations to height standards in flood prone areas due to filling via Council's Ballina Shire Development Control Plan 2012, or
- modify clause 4.3A Exceptions to height of buildings to provide improved clarity with respect to the Council's intent.

The above options will be examined in further detail prior to and in association with the public exhibition of the planning proposal in order to identify the preferred approach to reinforcing the Council's intended building height policy.

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 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

- 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. The proposal will not result in amendments to any of the maps associated with the BLEP 2012, although if it is determined that the optimal approach is to repeal Clause 4.3A Exceptions to height of buildings, then the Height of Buildings Map will also be repealed.

PART 5 – COMMUNITY CONSULTATION

No community consultation has been undertaken to date with regard to this planning proposal. It is intended that this proposal will be exhibited for a period of 14 days or otherwise in accordance with the Department of Planning and Infrastructure's Gateway determination.

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 (Anticipated)	November 2013
Public Exhibition Period	December 2013
Public Hearing (if required)	N/A
Submissions Assessment	January 2014
RPA Assessment of Planning Proposal and Exhibition Outcomes	February 2014
Submission of Endorsed LEP to DP&I for Finalisation	February 2014
RPA Decision to Make the LEP Amendment (if delegation accepted)	N/A

Plan Making Step	Estimated Completion (before end of)
Forwarding of LEP Amendment to DP&I for Notification (if delegation accepted)	N/A

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.
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.