

APPENDIX 2
CLAUSE 4.6 – FORESHORE BUILDING LINE

March 2024

**WRITTEN OBJECTION PURSUANT TO CLAUSE 4.6 OF PITTWATER LOCAL ENVIRONMENTAL PLAN
2014**

52 REDNAL STREET, MONA VALE

FOR THE CONSTRUCTION OF ALTERATIONS AND ADDITIONS TO THE EXISTING DWELLING

**VARIATION OF A DEVELOPMENT STANDARD REGARDING THE WORKS WITHIN COUNCIL'S RESOLVED
FORESHORE AREA AS DETAILED IN CLAUSE 7.8 OF THE PITTWATER
LOCAL ENVIRONMENTAL PLAN 2014**

For: For proposed alterations and additions
At: 52 Rednal Street, Mona Vale
Owner: John & Anna Virgona
Applicant: John & Anna Virgona
C/- VMDC Planning

Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Pittwater Local Environmental Plan 2014. In this regard it is requested Council support a variation with respect to compliance with the foreshore building line as described in Clause 7.8 of the Pittwater Local Environmental Plan 2014 (PLEP 2014).

2.0 Background

Clause 7.8 restricts the development within the foreshore area and refers to the foreshore building line noted within the "*Foreshore Building Line Map.*"

The site is affected by the foreshore building line within the rear portion of the site and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposal seeks to provide for the construction of minor additions and alterations the dwelling, which include a small portion where an existing parapet is raised in height to provide sufficient depth to sustain low-level planting, which will enhance and soften the appearance of the building to the foreshore.

Whilst the works are predominantly a landscape feature, they are not specifically addressed within the list of anticipated development considered under clause 7.8(2) (b). As the works do not extend the existing minor encroachment of the foreshore building line which comprises the existing leading edge of the dwelling roof which encroaches the FSBL by up to 470mm as it faces the waterway, the proposal is considered to be consistent with clause 7.8(2)(a), as a works will not see any increase in the footprint of the building extending further into the foreshore area.

The controls of Clause 7.8 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

3.0 Purpose of Clause 4.6

The Pittwater Local Environmental Plan 2014 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The development will achieve a better outcome in this instance as the site will provide for the construction of alterations and additions to the existing dwelling, which is consistent with the stated Objectives of the C4 Environmental Living Zone, which are noted as:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore. To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

As sought by the zone objectives, the proposal will provide for construction of minor alterations and additions comprising the raising of an existing low-level roof parapet and lower deck level to provide planters which will assist in screening in softening the visual form of the building when viewed from the waterway. (see **Figure 1 & Figure 2**).

The significant majority of the existing dwelling does not fall within the foreshore area. However, the proposed works which seek to provide for the raising of an existing roof parapet to form a low level

roof planter and a planter to the lower deck level which will be up to 470 mm forward of the foreshore building line.

The new works are modest in height and scale, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the waterways and locality.

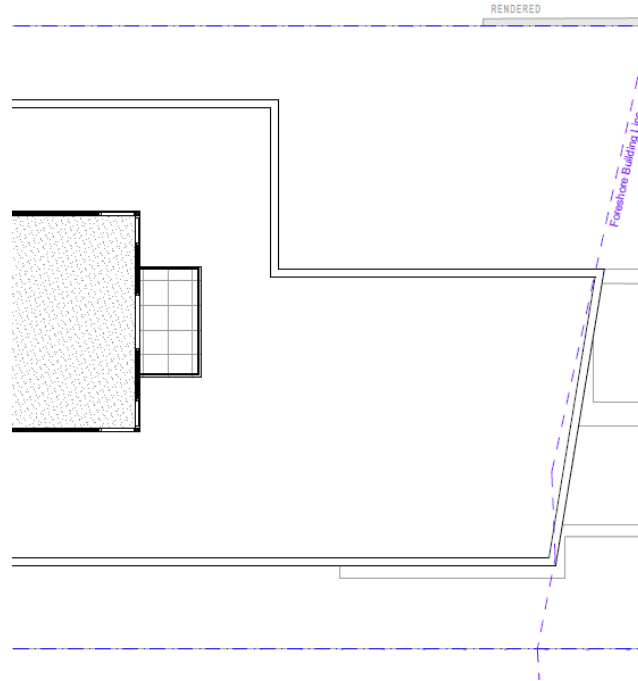


Figure 1: Extent of existing works below the Foreshore Building Line (max 470mm)

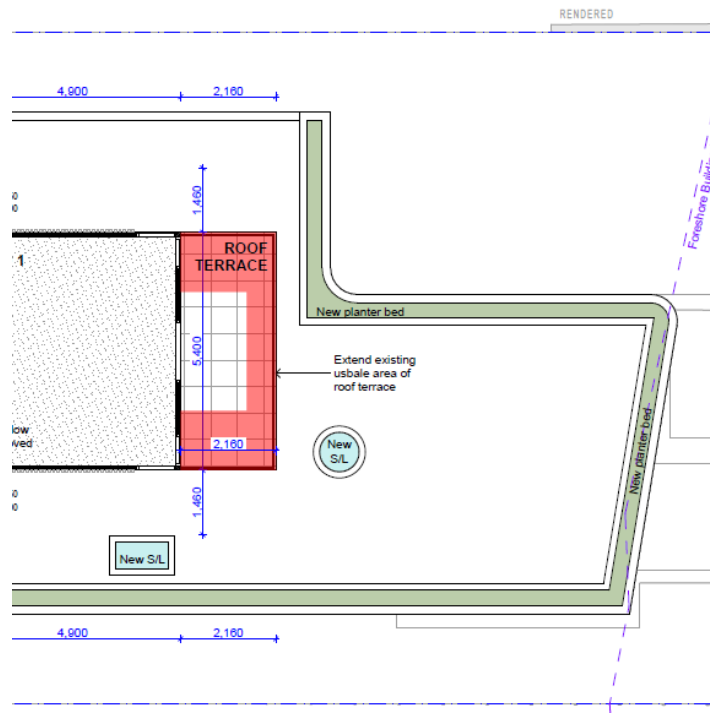


Figure 2: Non-compliant landscape planter within the existing parapet which will be raised and stands within the foreshore area



Figure 3: Views of the proposed planter and landscape treatment of the building façade

5.0 Onus on Applicant

Clause 4.6(3) provides that:

Consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) That there are sufficient environmental planning grounds to justify contravening the development standard.*

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 11 *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the *Samadi* judgement states:

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl

4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

Precondition 1 - Consistency with zone objectives

The site is located in the C4 Environmental Living Zone. The objectives of the C4 zone are noted as:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To provide for residential development of a low density and scale integrated with the landform and landscape.*
- *To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors*

Comments

It is considered that notwithstanding the non-compliance with the proposed landscape planter within the foreshore building line control, the proposed works, including a minor raising of the existing parapet will be consistent with the individual Objectives of the C4 Environmental Living zone for the following reasons:

- ***To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.***

Comment:

The proposal provides for a modest alterations and additions in a manner which will retain the single dwelling character of the site and the immediate area.

The site and its location in Rednal Street, with the rear frontage to Pittwater Waterway is considered to be an area of special visual and aesthetic value. The dwelling itself remains outside the foreshore area.

The proposed landscape planter to the leading edge of the existing roof and to a lower deck level facing the waterway is a form of residential development, that is of a low profile and scale, appropriately located and integrated with the landform and landscape, including the adjacent waterway. The works provide a low-impact development ancillary to the dwelling house compatible with the other foreshore interface structures within the visual catchment.

- ***To ensure that residential development does not have an adverse effect on those values.***

Comment:

It is considered the proposed works, including the minor raising of the existing parapet and inclusion of a planter to the roof and a lower deck level is considered to be an appropriate development on the site which, supported by technical reports that accompanying this application, demonstrates that the works do not give rise to any unacceptable ecological, scientific, or aesthetic impacts.

- ***To provide for residential development of a low density and scale integrated with the landform and landscape.***

Comment:

The proposed works are located appropriately upon the land in terms of its topographical features noting the falling site levels towards water way and the location of the foreshore building line which results in a minor portion of the existing building sitting forward of the foreshore building line.

The proposed minor works to provide for a landscape feature by raising the existing parapet at the waterway façade of the dwelling and also to introduce a planter to the lower deck level responds to the physical and environmental constraints of the site, and does not give rise to any unacceptable ecological, scientific, or aesthetic impacts.

- ***To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors***

Comment:

The proposed development in responds to the topographical physical and environmental constraints of the land by locating the proposed structures over the existing disturbed footprint and in a manner which will not require any further modification to the site.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed foreshore building line control, whilst maintaining consistency with the relevant zone objectives.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 7.8 are articulated at Clause 7.8(1):

- (a) to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area,*
- (b) to ensure continuous public access along the foreshore area and to the waterway.*

Comments

Despite the minor variation to the foreshore building line control, the proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 7.8(1)(a)(b) for the following reasons:

- (a) to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area,***

The works, including the minor raising of the existing parapet to the waterway façade and the introduction of a planter, with a similar planter to the lower deck level will not detrimentally impact upon riparian, foreshore vegetation, or established wildlife corridors. The works are wholly contained over the existing built footprint and do not require any further site disturbance.

(b) to ensure continuous public access along the foreshore area and to the waterway.

Presently there is no public access along this area of the foreshore. There are no planning provisions within the Pittwater LEP to create public access along the foreshore. The proposed landscape features to the roof and lower deck level will not compromise future opportunities to provide continuous public access along the foreshore and to the waterway if required in the future.

The proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 7.8(3) for the following reasons:

(a) the development will contribute to achieving the objectives for the zone in which the land is located, and

As stated above, the works including the introduction of the planters will achieve the objectives of the zone.

(b) the appearance of any proposed structure, from both the waterway and adjacent foreshore areas, will be compatible with the surrounding area, and

The introduction of the new roof and lower deck level planters will visually soften the building and are consistent with the character of the area which provides for dwellings within landscaped settings. The proposed landscape features to the roof level and lower deck level facing the waterway will not be seen as visually offensive or jarring when viewed from the waterway or adjacent foreshore areas.

(c) the development will not cause environmental harm such as—

(i) pollution or siltation of the waterway, or

(ii) an adverse effect on surrounding uses, marine habitat, wetland areas, fauna and flora habitats, or

(iii) an adverse effect on drainage patterns, or

(iv) the removal or disturbance of remnant riparian vegetation, and

The proposed landscape features are over the existing built footprint and will not give rise to any unacceptable environmental impacts.

It is considered the proposed works, including the new landscape features to the roof and lower deck level of the waterway façade of the dwelling do not give rise to any unacceptable ecological, scientific, or aesthetic impacts.

Appropriate siltation control measures will be employed so as not to harm existing marine vegetation, stormwater is unchanged and will continue to be directly discharged to the waterway in accordance with Council's requirements and the proposal is not likely to cause detrimental increases in coastal risks to other development or properties.

(d) the development will not cause congestion or generate conflict between people using open space areas or the waterway, and

The proposed minor alterations and additions to the dwelling will not cause congestion or generate conflict between people using open space areas or the waterway.

(e) opportunities to provide continuous public access along the foreshore and to the waterway will not be compromised, and

Presently there is no public access along the foreshore. The proposed landscape features will not compromise future opportunities to provide continuous public access along the foreshore and to the waterway.

(f) any historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance of the land on which the development is to be carried out and of surrounding land will be maintained, and

Given the minor nature of the works, being at the existing roof and lower deck level of the building without further encroachment within the foreshore area, there are no unreasonable impacts on the historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance of the land associated with the proposed structure's location.

(g) in the case of development for the alteration or rebuilding of an existing building wholly or partly in the foreshore area, the alteration or rebuilding will not have an adverse impact on the amenity or aesthetic appearance of the foreshore, and

No development is proposed for the alteration or rebuilding of an existing form of development to which clause 7.8 (2) (a) applies.

(h) sea level rise, coastal erosion and recession, or change of flooding patterns as a result of climate change, have been considered.

The works will not require any further disturbance and with the majority of the building being set above the foreshore area, it is not considered likely that the minor works will cause detrimental increases in coastal risks to other development or properties.

The proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 7.8(4) for the following reasons:

(4) In deciding whether to grant consent for development in the foreshore area, the consent authority must consider whether and to what extent the development would encourage the following—

(a) continuous public access to and along the foreshore through or adjacent to the proposed development,

As stated above, there is presently no public access along the foreshore. The proposed once Features will not compromise future opportunities to provide continuous public access along the foreshore and to the waterway.

(b) public access to link with existing or proposed open space,

The proposed landscape planters are technically land based development, wholly contained within the boundaries of the site. The proposed minor extension to the existing parapet and inclusion of landscape feature to the roof and lower deck level will not cause congestion or generate conflict between people using open space areas or the waterway.

(c) public access to be secured by appropriate covenants, agreements or other instruments registered on the title to land,

As stated above, the proposed landscape features are technically land based development, wholly contained within the boundaries of the site. The proposed works will not cause congestion or generate conflict between people using open space areas or the waterway to the extent a covenant or agreement is required.

(d) public access to be located above mean high water mark,

As stated above, there is presently no public access along the foreshore.

(e) the reinforcing of the foreshore character and respect for existing environmental conditions.

It is considered the proposed works, including the introduction of a landscape planters are an appropriate development on the site which do not give rise to any unacceptable ecological, scientific, or aesthetic impacts.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for the alterations and additions to an existing dwelling which is constrained by the nature of the existing development on site.

Council's controls in Clause 7.8 provide a foreshore building line which falls within the site.

It is considered that the proposal achieves the Objectives of Clause 7.8 and that the development is justified in this instance for the following reasons:

- The proposed landscape features will visually soften the building and enhance its contribution to the immediate locality.
- The proposed landscape planters will not result in any further disturbance of the site or create any direct impact to the public's waterway access..

- The development will maintain a compatible scale relationship with the existing waterway development in the area. The proposal will reflect a positive contribution to the foreshore area.

In the *Wehbe* judgment (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy. These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

2. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

Comment: It is considered that the purpose of the standard is relevant but the purpose is satisfied.

3. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Comment: Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

4. *the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

Comment: Not applicable.

5. *the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Comment: The development standard is applicable to and appropriate to the zone.

For the above reasons it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed

Council's controls in Clause 7.8 provide a foreshore building line which falls within the site. The proposal provides for minor landscape features to visually soften the waterway façade of the dwelling, which will not further encroach within the foreshore area

It is therefore considered there are sufficient environmental planning grounds to justify a variation of the development standard for the foreshore building line.

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

There are sufficient environmental planning grounds to justify contravening the development standard. Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for foreshore building line.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed development will facilitate a development that will maintain the general bulk and scale of the existing dwelling in its context and maintains architectural consistency with

the prevailing foreshore development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).

- Similarly, the proposed development will provide for improved amenity within a built form which is compatible with the immediate foreshore area which also promotes the orderly and economic use of the land (cl 1.3(c)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of minor alterations and additions to the building façade which visually and hence the building and improve the visual amenity of the immediate area. These are not simply benefits of the development as a whole but are benefits emanating from the minor works to raise the existing roof parapet, with the structures being located within the foreshore building area.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that proposal will provide for a better planning outcome than a development which simply observed the foreshore building line setback. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.0 Conclusion

This development proposes a departure from the foreshore building line standard, with the proposed landscape planters to the waterway façade of the existing roof and lower deck level to occur within the foreshore area.

This variation occurs as a result of the siting of the foreshore building line on the site.

This objection to the foreshore building line specified in Clause 7.8 of the Pittwater LEP 2014 adequately demonstrates that the objectives of the standard will be met.

Strict compliance with the foreshore building line control would be unreasonable and unnecessary in the circumstances of this case.

VAUGHAN MILLIGAN

Town Planner