

# **STATEMENT OF ENVIRONMENTAL EFFECTS**

Construction of a New  
Dwelling

24 Cabarita Road,  
Avalon Beach

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# Statement of Environmental Effects

## Construction of a New Dwelling at 24 Cabarita Road, Avalon Beach

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## APPENDIX ONE: CLAUSE 4.6 REQUEST TO VARY THE FORESHORE BUILDING LINE

## 1 Introduction

This Statement of Environmental Effects (SEE) has been prepared in support of a development application proposing the demolition of the existing dwelling and the construction of a new dwelling at 24 Cabarita Road, Avalon Beach. The proposed new dwelling is a superior architectural design that is appropriately responsive to the constraints of the site and the desired future character of the Avalon Beach Locality. The proposed new dwelling provides a high level of amenity for future occupants of the dwelling, with minimal impact upon the amenity of adjoining properties.

In addition to this SEE, the application is also accompanied by the following:

- Architectural Plans by Corben Architects
- Survey by ATS Land & Engineering Surveyors Pty Ltd
- Landscape Plans by Spirit Level Designs Pty Ltd
- Stormwater Management Plans by ITM Design Pty Ltd
- Arboricultural Impact Assessment Report by Treerepairs
- Estuarine Risk Management Report by Salients Pty Limited
- Geotechnical Report by Green Geotechnics
- BASIX Certificate
- Waste Management Plan

In preparation of this document, consideration has been given to the following:

- Environmental Planning and Assessment Act 1979 (**EP&A Act**),
- Environmental Planning and Assessment Regulation 2021,
- State Environmental Planning Policy (Biodiversity and Conservation) 2021
- State Environmental Planning Policy (Resilience and Hazards) 2021,
- Pittwater Local Environmental Plan 2014 (**PLEP 2014**), and
- Pittwater 21 Development Control Plan 2012 (**P21 DCP**).

Whilst the proposal requires the consent authority to give favourable consideration to a variation to the foreshore building line development standard, strict compliance has been found to be unreasonable and unnecessary in this instance as the development is otherwise consistent with the objectives of these development standards and sufficient environmental planning grounds exist to support the variations (as outlined in the attached Clause 4.6 Variation Requests).

The identified non-compliances with the garage width, inclinator, building envelope, landscaped area and fencing controls have been acknowledged and appropriately justified. Such variations succeed pursuant to section 4.15(3A)(b) of the EP&A Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15(1) of the EP&A Act. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent.

## 2 Site Analysis

### 2.1 Site Description and location

#### 2.1.1 The Site

The site has a legal description of Lot 9 in DP 17704 and is commonly referred to as 24 Cabarita Road, Avalon Beach. The site is slightly irregular in shape, with a 12.19m wide frontage to Cabarita Road, an irregular boundary along the MHW of the Pittwater Waterway, a maximum depth of 43.435m and a total area of 619.7m<sup>2</sup>.

An aerial location photograph is at Figure 1 below.



**Figure 1: Aerial photograph of the subject site**

The site currently contains a two storey dwelling house located on the upper, western portion of the site, in close proximity to the street. A boatshed with bathroom is located in the south-east corner of the site, adjacent to the waterway. An inclinor path runs along the northern side boundary, connecting the dwelling to the waterfront. A reclaimed area separates the subject site from the waterway, with a boat ramp, jetty and pontoon below MHW.

Vehicular and pedestrian access is gained via the driveway to Cabarita Road to the west. The site has a fall of approximately 19.94m from the street frontage down to the waterway, with a maximum slope of approximately 46%. The site does not contain any significant canopy trees or vegetation. The physical and topographical characteristics of the site are depicted on the site survey by ATS Land & Engineering Surveyors Pty Ltd.

The site is located within Geotechnical Hazard Area H1 and is subject to landslip. The site is also bisected by the foreshore building line.





**Figure 2: Subject property as viewed from Cabarita Road**

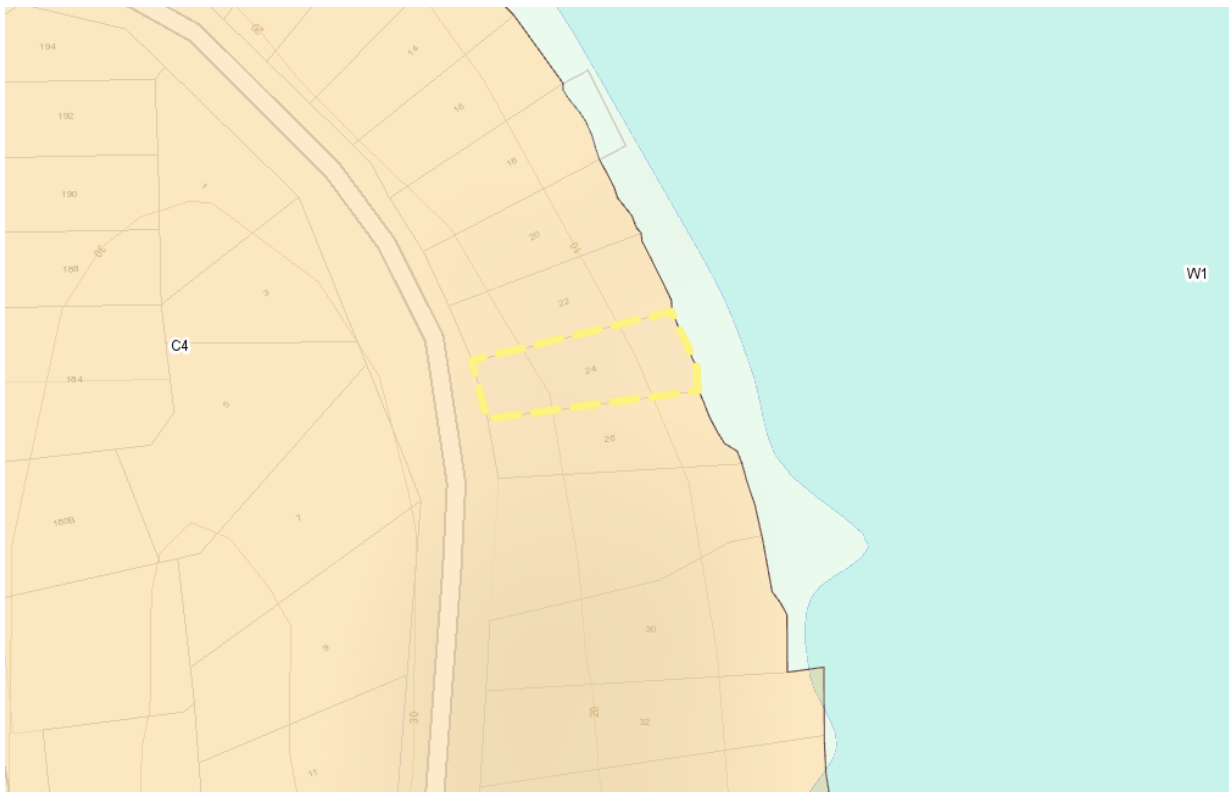


**Figure 3: Subject property as seen from the Pittwater Waterway**

### 2.1.2 The Locality

The site is zoned C4 Environmental Living under the provisions of PLEP 2014, as shown on the extract of the Zoning Map at Figure 4, below. Land to the north, south and west is also zoned C4 Environmental Living and comprises dwelling houses of varied architectural style and age. As evident in Figure 3, surrounding dwelling houses typically comprise 3-4 levels that step down the slope of the land. Boatsheds, jetties and other water recreation structures are also prevalent along the foreshore.

The land below MHWL is zoned W1 Natural Waterways.



**Figure 4: Extract of Zoning Map**



### 3 Description of Proposed Development

#### 3.1 Details of the proposed development

The proposed new dwelling is depicted in the architectural plans prepared by Corben Architects. Specifically, this application provides for the following works:

- Demolition of the existing dwelling, including the boatshed and inclinator,
- Construction of a new dwelling comprising:
  - Level 1: Boatshed (with bath and store) and inclinator landing,
  - Level 2: Pool plant, building plant and rainwater tank,
  - Level 3: Three bedrooms, two with ensuites, laundry, gym, media room, bathroom, terrace, internal stairs and lift, and inclinator landing,
  - Level 4: Open plan kitchen/living/dining, pantry, cellar, study, WC, terrace, internal stairs and lift,
  - Level 5: Master bedroom with ensuite, dressing room and terrace, double garage, entry, store, internal stairs and lift,
- Inclinator,
- Swimming pool,
- Internal driveway,
- Bin store,
- Front fence and pedestrian access gate,
- Landscaping, and
- Waterway access stairs.

The architectural plans are complemented by a high-quality landscape design, as shown on the Landscape Plans by Spirit Level Designs Pty Ltd.

Stormwater Management Plans prepared by ITM Design Pty Ltd demonstrate a water management solution consistent with Councils' Water Management Policy.

The application is supported by a Geotechnical Risk Management Report by Green Geotechnics that confirms that the proposed works can be constructed to be safe from the geotechnical hazard that affects the site. An Estuarine Risk Management Report prepared by Salients Pty Limited is also provided, confirming that the proposed works within the foreshore area can be constructed to be safe from the estuarine hazard that affects the site.

An Arboricultural Impact Assessment Report has been prepared by Treerepairs to confirm that the proposed works will not result in any adverse impacts upon trees on the neighbouring property to the south, with recommendations to ensure against adverse impacts associated with construction.

A BASIX Certificate supports the application confirming that the building performs well with regard to sustainability and meets and/or exceeds relevant industry standards.

Finally, the application is supported by a Construction and Demolition Waste Management Plan detailing how waste is to be managed during construction.

## 4 Statutory Planning Framework

The following section of the report will assess the proposed development having regard to the statutory planning framework and matters for consideration pursuant to Section 4.15 of the EP&A Act, as amended. Those matters which are required to be addressed are outlined, and any steps to mitigate against any potential adverse environmental impacts are discussed below.

### 4.1 Pittwater Local Environmental Plan 2014

An assessment of the relevant provisions of PLEP 2014 is undertaken, below.

#### 4.1.1 Zoning

PLEP 2014 applies to the subject site and this development proposal. The subject site is located within the C4 Environmental Living zone and dwelling houses are permissible with consent.

The objectives of the C4 Environmental Living zone are considered as follows:

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

Comment: The proposed development is of a form and scale that is compatible with the surrounding urban environment and is an appropriate contextual fit in the streetscape. The proposal does not result in any adverse impacts upon the natural environment, with a high-quality landscaped outcome that will soften and screen the built form as seen from the waterway. The proposed development is a low-impact residential development.

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

Comment: The proposed development is highly articulated and is stepped to respond to the natural fall of the land. The development is to be finished in earthy finishes to ensure that it blends with the surrounding natural environment and will be secondary to landscaping within the foreshore area. The proposed development is entirely commensurate with surrounding built form and will not have an adverse impact upon the special values of the site.

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

Comment: The proposed development comprises a single dwelling house that is integrated into the slope of the land. The scale of the development is consistent with the desired future character of the Avalon Beach Locality and is compatible with surrounding and nearby development.

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

Comment: The proposed development will result in a significant enhancement to the quantity and quality of landscaping on the site, as demonstrated on the accompanying Landscape Plans by Spirit Level Designs. At present, the site contains only 3 trees of

low significance in the front south-western corner of the site. The proposed development seeks to introduce 13 canopy trees to the site, with an extensive array of screen planting, low planting, groundcovers and climbers.

Council can be satisfied that the proposed works are consistent with the objectives of the zone. Accordingly, there is no statutory zoning or zone objective impediment to the granting of approval to the proposed development.

#### 4.1.2 Height of Buildings

Pursuant to clause 4.3(2) and the Height of Buildings Map of PLEP 2014, the site has a maximum building height limit of 8.5m.

The objectives of this control are considered as follows:

- a) *to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,*

Comment: The desired future character for the Avalon Beach Locality prescribes that development should predominantly be two storeys in height, stepped in response to the fall of the land and maintained below surrounding canopy trees.

The proposed dwelling is generally limited to two storeys in height above existing ground levels, with the upper floor set well back from the levels below in response to the fall of the land and to minimise the apparent size of the dwelling. When viewed from both the street and the waterway, the proposed dwelling will be maintained below the height of existing and proposed canopy trees.

- b) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

Comment: Surrounding dwellings comprise 3-4 levels that stagger down the slope of the land. The ridgeline of the proposed new dwelling is generally consistent with that of the existing dwelling and is maintained below that of the adjoining dwelling to the south at 26 Cabarita Road. As evident in the East and West Elevations by Corben Architects, the height and scale of the proposed dwelling will be compatible with surrounding development.

- c) *to minimise any overshadowing of neighbouring properties,*

Comment: The application is supported by Shadow Diagrams and Isometric Sun Path Diagrams by Corben Architects to confirm that direct sunlight will be retained to the living room windows and areas of private open space of the adjoining dwelling at 26 Cabarita Road for 3 hours between 9am and 3pm in midwinter, consistent with the provisions of clause C1.4 of P21 DCP. The proposed development will not result in any unreasonable overshadowing of adjoining properties.

- d) *to allow for the reasonable sharing of views,*

Comment: The proposed development extends further seaward compared to the existing dwelling, and as such, the proposal will impact upon views of the Pittwater Waterway currently gained across the subject site from windows along the northern elevation of the adjoining dwelling at 26 Cabarita Road. However, primary views to Pittwater in an easterly direction will remain unimpeded.

The impact to these secondary views obtained over the side boundary are not unreasonable and the impact does not arise due to the height of the development proposed.

- e) *to encourage buildings that are designed to respond sensitively to the natural topography,*

Comment: The proposed development is stepped in response to the fall of the land. Whilst excavation is proposed to accommodate the lower levels, the degree of excavation proposed is not excessive and is entirely commensurate with that proposed/approved on other sloping sites within the C4 zone.

The proposed excavation does not necessitate the removal of any significant canopy trees or vegetation, and the application is accompanied by a Geotechnical Report to confirm that the works can be undertaken safely.

- f) *to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.*

Comment: The subject site does not contain any known items of heritage significance and is not located within the vicinity of any. The proposed development is highly articulated and is complemented by a superior landscaped solution to ensure that the development does not result in any adverse impacts upon the natural setting.

Building height is defined as follows:

***building height*** (or height of building) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

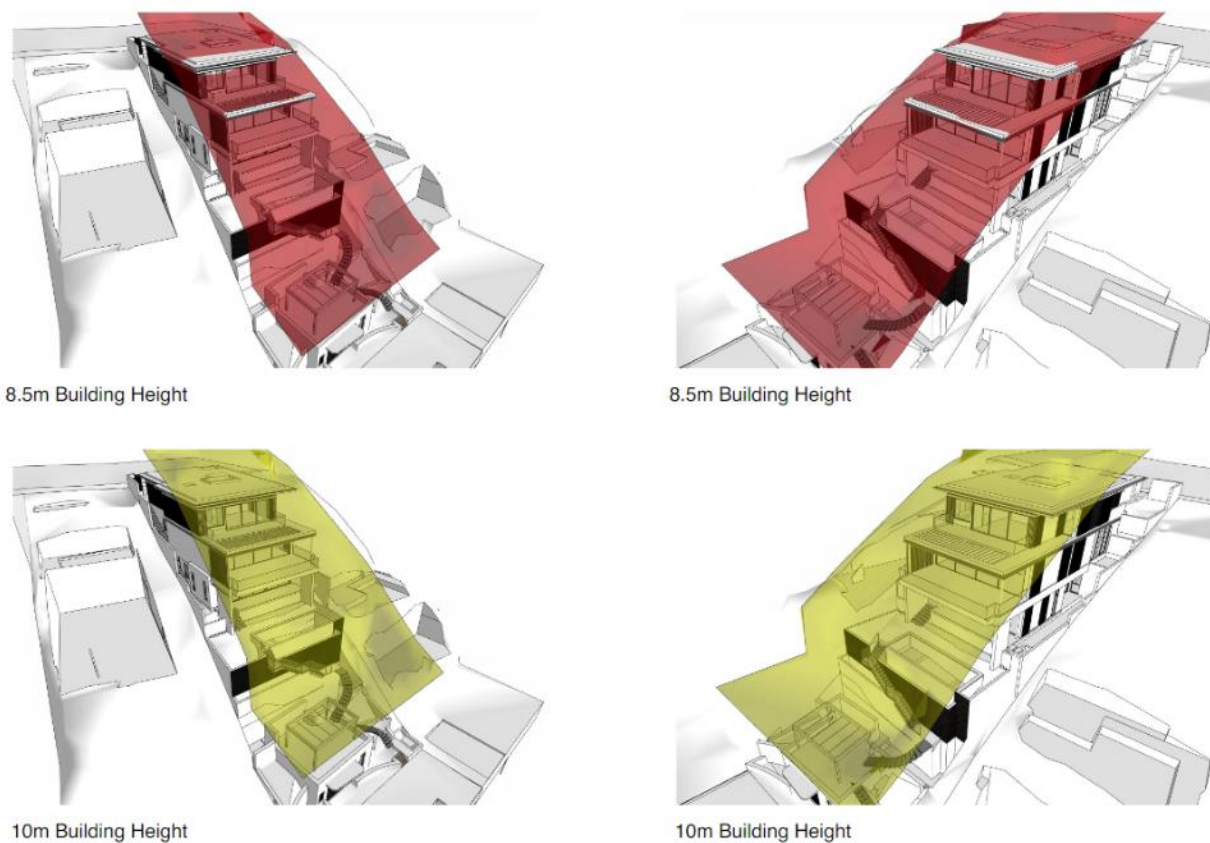
Clause 4.3(2D) of PLEP 2014 provides that development on land that has a maximum height of 8.5m shown for that land on the Height of Buildings Map may exceed a height of 8.5m, but not be more than 10m if the proposal meets the criteria listed.

The proposed development reaches a maximum height of 9.46m and seeks to rely upon the provisions of clause 4.3(2D) of PLEP 2014. Height blanket diagrams showing the buildings compliance relative to the 8.5 m and 10 m concessional building height standards are at Figure 5 over page. The application of the variation up to 10m in height is warranted in the circumstances of the subject application, as the proposal is consistent with the listed criteria, as follows:

- (a) *the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and*

Comment: The portions of the proposed dwelling above the 8.5m are limited to the eastern most ends of the Level 4 and 5 roof forms, as shown in Figures 5 and 6 on the following page. In consideration of the scale of the building as a whole, the portions that exceed the 8.5m height plane are reasonably described as minor.





**Figure 5: 8.5 metre and 10 metre concessional building height blanket diagrams**

*(b) the objectives of this clause are achieved, and*

Comment: As above, the proposed development is consistent with the objectives of the building height control.

*(c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and*

Comment: The slope below the footprint of the proposed dwelling is approximately 35%.

*(d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.*

Comment: The proposed development is stepped in response to the fall of the land. Whilst excavation is proposed to accommodate the lower levels, the degree of excavation proposed is not excessive and is entirely commensurate with that proposed/approved on other sloping sites within the C4 zone.

The proposed excavation does not necessitate the removal of any significant canopy trees or vegetation, and the application is accompanied by a Geotechnical Report to confirm that the works can be undertaken safely.

#### 4.1.3 Acid Sulfate Soils

The site is identified within Class 5 on the Acid Sulfate Soils Map of PLEP 2014. The proposed development does not involve works within 500 metres of adjacent Class 1, 2, 3 or 4 land that is below 5 metres Australian Height Datum and by which the watertable is likely to be lowered below 1 metre Australian Height Datum on adjacent Class 1, 2, 3 or 4 land.

#### 4.1.4 Earthworks

The consent authority can be satisfied that the excavation proposed to accommodate the new dwelling will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land, consistent with the provisions of clause 7.2 of PLEP 2014.

#### 4.1.5 Biodiversity

The site is identified as “Biodiversity” on the Biodiversity Map of PLEP 2014. The consent authority can be satisfied that the proposed development has been designed, sited and will be managed to avoid any significant adverse environmental impact, consistent with the provisions of clause 6.7 of PLEP 2014.

#### 4.1.6 Geotechnical Hazards

The site is identified as being within Geotechnical Hazard H1 on the Geotechnical Hazard Map of PLEP 2014. The application is supported by a Geotechnical Risk Management Report that considers each of the matters prescribed by clause 7.7(3) of PLEP 2014, and confirms that the development has been design, sited and will be constructed to minimise risk, consistent with the provisions of clause 7.7(4) of PLEP 2014.

#### 4.1.7 Foreshore Building Line

The site is bisected by the foreshore building line, as shown on the Foreshore Building Line Map of PLEP 2014 and is subject to the provisions of clause 7.8 of PLEP 2014. The application proposes the following works within the foreshore area:

- The north-eastern corner of the Level 4 terrace (0.63m<sup>2</sup>),
- Swimming pool,
- Retaining walls,
- Waterway access stairs,
- Inclinator and the lowest landing,
- Pool plant, building plant and rainwater tanks,
- Boatshed, and
- Landscaping.

The swimming pool, waterway access stairs and the boatshed are anticipated within the foreshore under the provisions of clause 7.8(2)(b) of PLEP 2014. A clause 4.6 request accompanies this application with respect to the remainder of the works proposed within the foreshore area.

#### 4.1.8 Essential Services

Pursuant to clause 7.10 of PLEP 2014, development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required:

- (a) *the supply of water,*
- (b) *the supply of electricity,*
- (c) *the disposal and management of sewage,*
- (d) *stormwater drainage or on-site conservation,*
- (e) *suitable vehicular access.*

The consent authority can be satisfied that these services will be available prior to occupation, and if necessary, conditions of consent can be imposed in this regard.

## 4.2 Pittwater 21 Development Control Plan

### 4.2.1 Avalon Beach Locality

The site is located within the Avalon Beach Locality, which is described as follows:

*Until the early 1900s, Avalon Beach remained a tiny settlement of isolated farms and fishermen's cottages. Developer Arthur J Small sought to create a retreat similar to that of King Arthur at Avalon, Glastonbury, England, and in the early 1920s, land on the northern peninsula of the locality was subdivided, the Avalon Golf Course and Palm Grove Park established, and Norfolk Island Pines planted along the beachfront. Avalon Beach became a popular holiday destination. Early dwellings consisted of weekenders and holiday homes constructed of local rock, fibro and weatherboard. Residential development and permanent occupation of dwellings increased from the 1950s.*

*Since this time, the locality has developed into a predominantly low-density residential area, with dwellings built along valley floor, slopes, and ridges. The locality is characterised mainly by one and two-storey dwelling houses on 600-1,000 square metre allotments (some smaller blocks may exist), increasing to 950-1,600 square metres on the plateau and slopes, and up to 8,000 square metres in Ruskin Rowe. The residential areas are of a diverse style and architecture, a common thread being the landscaped, treed frontages and subdued external finishes. The dominant feature of the Avalon Beach locality is houses setback from the street with low and no front fencing and vegetation used extensively to delineate boundary lines. Medium-density housing is located around the Avalon Beach Commercial Centre and neighbourhood retail centres.*

*The locality is serviced by the Avalon Commercial Centre at the intersection of Old Barrenjoey Road and Avalon Parade, and neighbourhood retail centres at the intersection of Hudson Parade and Hilltop Road, Elvina Avenue, North Avalon Road, and Careel Head Road. The locality also contains Avalon Primary School, Maria Regina Primary School, Barrenjoey High School, Avalon Surf Life Saving Club, Careel Bay Wetlands, and recreational facilities including Hitchcock Park, Avalon Golf Course, tennis courts, beaches, and several bushland reserves.*

*Houses, built structures, and vegetation in the vicinity of Cabarita Road, Chisholm Avenue, Hilltop Road, Palmgrove Road, Old Barrenjoey Road, Whale Beach Road, Avalon Golf Course, and Stapleton Park, indicative of early settlement in the locality, have been identified as heritage items. Land in Ruskin Rowe, primarily the subdivision pattern, domination of vegetation over built form, wildlife corridor and lack of fences, has been gazetted as a heritage conservation area.*

*The locality is characterised by steep slopes to the south, northwest, and east of Careel Bay, leading down to the valley floor. Due to the topography, some significant views can be obtained to the north, east and west. Conversely, the slopes and ridge tops of the locality are visually prominent.*

*Much of the indigenous vegetation has been retained, particularly where there are large areas of open space, and there are significant wildlife habitats and corridors within the locality. The locality is well serviced by areas of open space including several large parks or bushland areas as well as many smaller reserves. These areas vary greatly from structured golf courses and playing fields to beaches, headlands, and natural bushland (such as Angophora Reserve).*

*The natural features of the locality result in a high risk of bushfire, landslip, flood, coastal (bluff) hazard, and estuary wave action and tidal inundation.*

*The major roads within the locality are Barrenjoey Road, Avalon Parade, and Hudson Parade. Barrenjoey Road is the primary access road to the northern suburbs of Pittwater. Many pedestrian links and pathways exist within the locality, including the Bicentennial Coastal Walkway on the headland.*

#### 4.2.2 DCP Compliance Table

A table demonstrating compliance with the relevant provisions of the P21 DCP is detailed as follows:

Control	Requirement	Proposed	Compliance
<b>Part B General Controls</b>			
<b>B3.1 Landslip Hazard</b>	All development on land to which this control applies must comply with the requirements of the Geotechnical Risk Management Policy for Pittwater.	The application is supported by a Geotechnical Risk Management Report by Green Geotechnics, consistent with Council's Geotechnical Risk Management Policy for Pittwater.	Yes
<b>B3.7 Estuarine Hazard</b>	Development is to be protected from the effects of wave action or tidal inundation either by mitigation works to protect the development or ensuring that the floor levels of the development are at or above the Estuarine Planning Level.	The application is supported by an Estuarine Risk Management Report by Salients Pty Limited consistent with Council's Estuarine Risk Management Policy for Development in Pittwater.	Yes
<b>B4.7 Pittwater Spotted Gum Forest</b>	Development shall not have an adverse impact on Pittwater Spotted Gum Endangered Ecological Community.	<p>The proposed development does not result in any impacts upon existing significant vegetation.</p> <p>The application is accompanied by an Arboricultural Impact Assessment Report by Treerepairs, which includes recommendations to ensure the safe retention of trees on the adjoining property to the south.</p>	Yes



Control	Requirement	Proposed	Compliance
<b>B5.15 Water Management</b>	The stormwater drainage systems for all developments are to be designed, installed and maintained in accordance with Council's Water Management for Development Policy.	The application is accompanied by Stormwater Management Plans by ITM Design Pty Ltd which demonstrate consistency with Council's Water Management for Development Policy.	Yes
<b>B6.1 Access Driveways and Works on the Public Road Reserve</b>	Access Driveways include the driveway pavements, gutter crossings, supporting retaining walls, suspended slabs and related structures located on the public road reserve between the road edge and property boundary as illustrated in Appendix 10 -Driveway Profiles.	The existing access driveway is to be maintained.	N/A
<b>B6.2 Internal Driveways</b>	The design of all internal driveways and ramps shall be in accordance with the current edition of the following Australian Standard AS/NZS 2890.1-2004: Parking Facilities - Off-Street Car Parking.	The proposed driveway has been designed in accordance with the relevant provisions of AS2890.1.	Yes
<b>B6.3 Off-Street Vehicle and Parking Requirements</b>	2 spaces (minimum)	2 spaces	Yes

Control	Requirement	Proposed	Compliance
<b>B8.1 Construction and Demolition - Excavation</b>	All development on land to which this control applies must comply with the requirements of the Geotechnical Risk Management Policy for Pittwater.	The application is supported by a Geotechnical Risk Management Report by Green Geotechnics, consistent with Council's Geotechnical Risk Management Policy for Pittwater.	Yes
<b>B8.3 Construction and Demolition – Waste Minimisation</b>	Waste materials generated through demolition, excavation and construction works is to be minimised by reuse on-site, recycling, or disposal at an appropriate waste facility.	The application is supported by a Construction and Demolition Waste Management Plan.	Yes
<b>C1 Design Criteria for Residential Development</b>			
<b>C1.1 Landscaping</b>	A built form softened and complemented by landscaping.  Landscaping that reflects the scale and form of development.	The proposed development will result in a significant enhancement to the quality and quantity of landscaping across the site, as detailed in the accompanying Landscape Plans by Spirit Level Designs Pty Ltd.	Yes
<b>C1.2 Safety and Security</b>	The development is to be designed in accordance with the four CPTED principles.	The dwelling house provides appropriate casual surveillance of the street, with visitors able to be seen before opening the door.	Yes
<b>C1.3 Views</b>	All new development is to be designed to achieve a reasonable sharing of views available from	The proposed development extends further seaward compared to the existing dwelling, and as such, the	Yes

Control	Requirement	Proposed	Compliance
	surrounding and nearby properties.	proposal will impact upon views of the Pittwater Waterway currently gained across the subject site from windows along the northern elevation of the adjoining dwelling at 26 Cabarita Road. However, primary views to Pittwater in an easterly direction will remain unimpeded.	
<b>C1.4 Solar Access</b>	<p>The main private open space of each dwelling and the main private open space of any adjoining dwellings are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21st.</p> <p>Windows to the principal living area of the proposal, and windows to the principal living area of adjoining dwellings, are to receive a minimum of 3 hours of sunlight between 9am and 3pm on June 21st (that is, to at least 50% of the glazed area of those windows).</p>	<p>The application is supported by Shadow Diagrams and Isometric Sun Path Diagrams by Corben Architects to confirm that direct sunlight will be retained to the living room windows and areas of private open space of the adjoining dwelling at 26 Cabarita Road for 3 hours between 9am and 3pm in midwinter, consistent with the provisions of this clause.</p> <p>Furthermore, the Shadow Diagrams and Isometric Sun Path Diagrams also demonstrate that living room windows and areas of private open space of the proposed development will receive in excess of 3 hours of direct sunlight between 9am and 3pm in midwinter.</p>	Yes
<b>C1.5 Visual Privacy</b>	Private open space areas including swimming pools and living rooms of proposed and any existing	The proposed development comprises privacy screens and integrated landscape	Yes

Control	Requirement	Proposed	Compliance
	adjoining dwellings are to be protected from direct overlooking within 9 metres by building layout, landscaping, screening devices or greater spatial separation (measured from a height of 1.7 metres above floor level).	planters to prevent overlooking, where required.  The proposed development achieves an appropriate balance between the obtainment of views and privacy between properties.	
<b>C1.6 Acoustic Privacy</b>	Noise-sensitive rooms, such as bedrooms, should be located away from noise sources, including main roads, parking areas, living areas and communal and private open space areas and the like.	The proposed development is unlikely to result in any adverse acoustic privacy impacts.	Yes
<b>C1.7 Private Open Space</b>	Minimum 80m <sup>2</sup> of private open space per dwelling at ground level, with no dimension less than 3 metres.	More than 80m <sup>2</sup> of private open space is provided across the site.	Yes
<b>C1.17 Swimming Pool Safety</b>	Swimming pool fencing and warning notices (resuscitation chart) shall be manufactured, designed, constructed, located and maintained in accordance with the Swimming Pools Act 1992 and regulations.	The proposed swimming pool has been designed and will be constructed in accordance with the relevant provisions of Swimming Pools Act 1992 and regulations.	Yes
<b>C1.19 Incline Passenger Lifts and Stairways</b>	Incline passenger lifts and stairways shall:	The application seeks to demolish the existing inclinator that runs along the northern side boundary from	No, Acceptable on merit

Control	Requirement	Proposed	Compliance
	<ul style="list-style-type: none"> <li>- be designed and located so they do not involve excessive excavation, or the removal of natural rock or trees, and</li> <li>- be erected as near as possible to the ground level (existing) of the site, and shall not involve the erection of high piers or visible retaining structures, and</li> <li>- be located and designed to minimise the effects of noise from the motor and overlooking of adjoining dwellings, and</li> <li>- be painted to blend in with surrounding vegetation and screened by landscaping and</li> <li>- be set back two (2) metres from the side boundary to the outer face of the carriage</li> <li>- be located wholly on private land, and</li> <li>- have a privacy screen where there is a direct view within 4.5m to a window of a habitable room of another dwelling.</li> </ul>	<p>the front of the existing dwelling to the MHWM. A new inclinator is proposed between the Level 3 terrace and the MHWM, in the approximate location of the existing track.</p> <p>Whilst the outer face of the carriage is not setback 2m from the common side boundary, the proposed setback is considered reasonable in circumstances where it seeks to replace an existing inclinator in the same approximate location.</p>	
<b>Part D1 Avalon Beach Locality</b>			



Control	Requirement	Proposed	Compliance
<b>D1.1 Character as viewed from a public place</b>	<p>The facades of buildings presenting to any public place must address these public places, provide visual interest, have a street presence and incorporate design elements that are compatible with any design themes existing in the immediate vicinity. Blank facades that front public places are not supported.</p> <p>The bulk and scale of buildings must be minimised.</p> <p>Garages, carports and other parking structures including hardstand areas must not be the dominant site feature when viewed from a public place. Parking structures should be located behind the front building line, preferably set back further than the primary building, and be no greater in width than 50% of the lot frontage, or 7.5 metres, whichever is the lesser.</p>	<p>The proposed development is highly articulated and incorporates a palette of natural materials and finishes which will enable the development to blend into the vegetated escarpment which forms a backdrop to the site.</p> <p>The proposed garage is wholly maintained behind the 6.5m front building line and is appropriately integrated into the design of the dwelling.</p> <p>Whilst the width of the garage exceeds 50% of the lot frontage, it is not excessive or overly dominant in the streetscape.</p> <p>The development has a single storey presentation to Cabarita Road, consistent with the height of adjacent and nearby dwellings.</p>	No, Acceptable on merit
<b>D1.5 Building Colours</b>	Dark and earthy tones	The proposed development incorporates natural materials and finishes to blend with the surrounding natural environment.	Yes

Control	Requirement	Proposed	Compliance
<b>D1.8 Front Building Line</b>	6.5m	6.5m	Yes
<b>D1.9 Side and Rear Building Lines</b>	1m to one side, 2.5m to the other.  FSBL to rear – see clause 7.8 of PLEP 2014	South: 1m (minimum)  North: 2.5m (minimum)	Yes
<b>D1.11 Building envelope</b>	Development is to be maintained below planes projected at 45 degrees from a height of 3.5 metres above ground level (existing) at the side boundaries to the maximum building height.	<p>The proposed development protrudes beyond the prescribed building envelope, as shown on the Building Envelope Analysis Plan (DA17) by Corben Architects.</p> <p>Clause D1.11 of P21 DCP provides that variations will be considered on merit where the building footprint is situated on a slope in excess of 30%.</p> <p>The application of this variation is warranted as the land below the footprint of the building exceeds 30%, and as the non-compliance does not detract from consistency with the outcomes of the building envelope control.</p> <p>Specifically, despite non-compliance with the envelope prescribed, the development is maintained below the height of surrounding canopy trees and is of a bulk and scale that is contextually appropriate. The development is highly articulated, with shading devices and varied materiality, to ensure that bulk and scale is minimised.</p>	No, Acceptable on merit

Control	Requirement	Proposed	Compliance
		Furthermore, the non-compliance does not result in any unreasonable or adverse impacts upon the amenity of adjoining properties.	
<b>D1.14 Landscaped Area – Environmentally Sensitive Land</b>	60% minimum	<p>298.5 Square metres of 48%.</p> <p>Whilst not strictly in accordance with the 60% control, the landscape outcome on the site is both quantitatively and qualitatively enhanced with the site landscaping contributing to the biodiversity of the local area, as detailed on the accompanying Landscape Plans.</p> <p>We also note that with the inclusion of landscaping located below and above structure with minimum soil depths satisfying clause C1.1 of P21DCP the proposal provides for a total area available to be appropriately landscaped of 364.4 m<sup>2</sup> or 59% of the site area.</p> <p>The landscaped area proposed will also ensure the development will sit within a landscaped setting and is consistent with the desired</p>	No, Acceptable on merit

Control	Requirement	Proposed	Compliance
		<p>future character of the Avalon Beach Locality.</p> <p>Such variation succeeds pursuant to section 4.15(3A)(b) of the Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of controls/standards for dealing with that aspect of the development.</p>	
<b>D1.16 Fences</b>	<p>Front and side fences (within the front building setback) shall not exceed a maximum height of 1 metre above existing ground level, shall be compatible with the streetscape character, and not obstruct views available from the road.</p> <p>Fencing is permitted along the rear and side boundaries (other than within the front building setback) to a maximum height of 1.8 metres.</p>	<p>The application seeks consent for a new front fence reaching up to 1.6m in height, and side fencing up to 3m in height.</p> <p>The front fencing is generally consistent with the height of the fence on the adjoining property at 26 Cabarita Road and is generally consistent with the height of the existing fence at the subject site.</p> <p>The fencing has been designed in response to the fall of the land and to maintain appropriate privacy where there is a difference in levels between properties.</p>	No, Acceptable on merit
<b>D15.15 Waterfront Development</b>	<p>Boatsheds shall be located above mean high water mark on freehold land.</p> <p>Boatsheds shall be one storey and no greater than 4.5 metres in building height above the</p>	<p>The proposed boatshed in wholly maintained within the subject site.</p> <p>The dimensions of the proposed boatshed slightly exceed those prescribed by this control however the proposed boatshed remains</p>	No, Acceptable on merit

Control	Requirement	Proposed	Compliance
	platform on which it is built, 4.0 metres in width and 6.0 metres in length.	<p>smaller than the existing by approximately 8m<sup>2</sup>.</p> <p>We note that the existing boatshed has bathroom facilities which are reinstated to the proposed boatshed as a component of this application.</p> <p>The proposed boatshed is integrated into the design of the retaining walls and landscaped terraces within the foreshore area such that the visual prominence of the boatshed is appropriately minimised.</p>	



### 4.3 State Environmental Planning Policy (Biodiversity and Conservation) 2021

#### 4.3.1 Vegetation in non-rural areas

The provisions of Chapter 2 of this policy are applicable to all non-rural land across the state and aim to protect the biodiversity values of trees and other vegetation in non-rural areas and to preserve the amenity of non-rural areas through the preservation of trees and other vegetation.

The proposed development does not seek consent for the removal of any significant trees or vegetation, with tree removal limited to low value trees in the south-west corner of the site. The proposal is consistent with the requirements and objectives of Chapter 2 of SEPP (Biodiversity and Conservation).

### 4.4 State Environmental Planning Policy (Resilience and Hazards) 2021

#### 4.4.1 Coastal Hazard

Chapter 2 of SEPP (Resilience and Hazards) aims to promote an integrated and co-ordinated approach to land use planning in the coastal zone in a manner that is consistent with the objects of the *Coastal Management Act 2016*.

The site is identified as “coastal use area” on the Coastal Use Area Map and as “coastal environment area” on the Coastal Environment Area Map and the provisions of Chapter 2 of this policy are applicable to the proposal.

The proposed development will not create an adverse impact on the biophysical, hydrological or ecological environment, and has been designed to withstand coastal processes. The development will not impact upon marine vegetation, fauna or their habitats, with no works proposed in the vicinity of undeveloped headlands or rock platforms. The proposed development is consistent with the provisions of clause 2.10 of this policy.

The proposed development will not result in any adverse impacts upon access along the foreshore, overshadowing of the foreshore, the visual amenity of the coastline, or any items of heritage significance. Further, the proposal will not result in any adverse impacts upon views to the foreshore.

The application has considered the surrounding coastal and built environment, and the bulk, scale and size of the proposed development, with a high-quality architectural solution that appropriately responds to the context of the site. The proposed development is consistent with the provisions of clause 2.11 of this policy.

Clause 2.12 of SEPP (Resilience and Hazards) prescribes that development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land. The proposed development is not likely to cause increased risk at the site or for adjoining land, and the consent authority can be satisfied in this regard.

#### 4.4.2 Remediation of Land

Chapter 4 of SEPP (Resilience and Hazards) applies to all land and aims to provide for a state-wide planning approach to the remediation of contaminated land.

Clause 4.6(1)(a) of this policy requires the consent authority to consider whether land is contaminated. The existing site has been used for residential purposes for an extended period of time with no prior known land uses. Council can be reasonably satisfied that there is no contamination risk, subject to the imposition of suitable conditions relating to demolition.

Overall, the proposed development is consistent with the relevant provisions of SEPP (Resilience and Hazards).

#### 4.5 Matters for Consideration pursuant to section 4.15(1) of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15(1) of the EP&A Act (as amended):

(i) *any environmental planning instrument*

The proposed dwelling is permissible and consistent with the objectives of PLEP 2014 and P21 DCP as they are reasonably applied to the proposed works given the constraints imposed by the site's location, environmental and topographical characteristics.

(ii) *Any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*

There are no draft instruments that are applicable in relation to the proposed development.

(iii) *Any development control plan*

P21 DCP applies and the relevant provisions have been considered in this statement.

(iiia) *Any Planning Agreement that has been entered into under section 7.4 or any draft planning agreement that a developer has offered to enter into under Section 7.4, and*

N/A

(iv) *The Regulations (to the extent that they prescribe matters for the purposes of this paragraph), and*

N/A

(v) *Any Coastal Zone Management Plan (within the meaning of the Coastal Protection Act 1979)*

N/A

- (b) *The likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality,*

[The assessment considers the Guidelines (in italics) prepared by the Department of Planning and Environment in this regard].

#### *Context and Setting*

- i. *What is the relationship to the region and local context in terms of:*

- *The scenic qualities and features of the landscape*
- *The character and amenity of the locality and streetscape*
- *The scale, bulk, height, mass, form, character, density and design of development in the locality*
- *The previous and existing land uses and activities in the locality*

These matters have been discussed in the body of this report.

- ii. *What are the potential impacts on adjacent properties in terms of:*

- *Relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)*
- *visual and acoustic privacy*
- *views and vistas*
- *edge conditions such as boundary treatments and fencing*

These matters have been discussed in detail earlier in this report.

#### *Access, transport and traffic:*

*Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:*

- *Travel Demand*
- *dependency on motor vehicles*
- *traffic generation and the capacity of the local and arterial road network*
- *public transport availability and use (including freight rail where relevant)*
- *conflicts within and between transport modes*

- *Traffic management schemes*
- *Vehicular parking spaces*

The development provides adequate carparking facilities in conformity with the objectives of P21 DCP.

#### *Public Domain*

The proposed development will have no adverse impact on the public domain.

#### *Utilities*

This matter has been discussed in detail in the body of this report.

#### *Flora and Fauna*

The proposal will result not result in any unreasonable impacts upon flora and fauna.

#### *Waste Collection*

The proposed development provides appropriate onsite waste storage, will waste to be collected from the street weekly by Council's contractors.

#### *Natural hazards*

N/A

#### *Economic Impact in the locality*

The proposed development will generate temporary employment during construction, which is appropriate given the residential nature of the site.

#### *Site Design and Internal Design*

- i) *Is the development design sensitive to environmental considerations and site attributes including:*
- *size, shape and design of allotments*
  - *The proportion of site covered by buildings*
  - *the position of buildings*
  - *the size (bulk, height, mass), form, appearance and design of buildings*
  - *the amount, location, design, use and management of private and communal open space*
  - *Landscaping*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be minimal and within the scope of the general principles, desired future character and built form controls.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation*
- *building fire risk – prevention and suppression*
- *building materials and finishes*
- *a common wall structure and design*
- *access and facilities for the disabled*
- *likely compliance with the Building Code of Australia*

The proposed development will comply with the provisions of the Building Code of Australia. The proposal complies with the relevant standards pertaining to health and safety and will not have any detrimental effect on the occupants.

#### *Construction*

i) *What would be the impacts of construction activities in terms of:*

- *The environmental planning issues listed above*
- *Site safety*

Normal site safety measures and procedures will ensure that no safety or environmental impacts will arise during construction.

(c) *The suitability of the site for the development*

- *Does the proposal fit in the locality*
- *Are the constraints posed by adjacent development prohibitive*
- *Would development lead to unmanageable transport demands and are there adequate transport facilities in the area*
- *Are utilities and services available to the site adequate for the development*
- *Are the site attributes conducive to development*

The adjacent development does not impose any unusual or impossible development constraints. The site is well located with regards to utility services. The development will not cause excessive or unmanageable levels of transport demand.

The development responds to the topography and constraints of the site, is of adequate area, and is a suitable design solution for the context of the site.

(d) *Any submissions received in accordance with this act or regulations*

It is envisaged that Council will appropriately consider any submissions received during the notification period.

(e) *The public interest*

The proposed works are permissible and consistent with the intent of the PLEP 2014 and P21 DCP standards and controls as they are reasonably applied to the proposed development. The development would not be contrary to the public interest.



## 5 Conclusion

The proposal is permissible and in conformity with the objectives of PLEP 2014 as they reasonably relate to this form of development on this particular site, and the guidelines contained within the P21 DCP.

The proposed development responds positively to the desired future character of the Avalon Beach Locality and is appropriately located on the site. The works will provide a high level of amenity for occupants of the dwelling, without any adverse impacts upon the amenity of adjoining residences.

Whilst the proposal requires the consent authority to give favourable consideration to a variation to the foreshore building line development standard, strict compliance has been found to be unreasonable and unnecessary in this instance as the development is otherwise consistent with the objectives of these development standards and sufficient environmental planning grounds exist to support the variations (as outlined in the attached Clause 4.6 Variation Requests).

The identified non-compliances with the garage width, inclinator, building envelope, landscaped area and fencing controls have been acknowledged and appropriately justified. Such variations succeed pursuant to section 4.15(3A)(b) of the Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.

Having given due consideration to the matters pursuant to Section 4.15(1) of the EP&A Act as amended, it is considered that there are no matters which would prevent Council from granting consent to this proposal in this instance, and that the development is appropriate on merit and worthy of approval.

**Boston Blyth Fleming Pty Limited**

A handwritten signature in black ink, appearing to read 'Greg Boston', with a stylized flourish at the end.

**Greg Boston**

**Director**

## Clause 4.6 Variation Request – Foreshore Building Line

### 1.1 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

### 1.2 Pittwater Local Environmental Plan 2014 (PLEP 2014)

#### 1.2.1 Clause 7.8 – Foreshore Building Line

Pursuant to clause 7.8(2) of PLEP 2014, development consent must not be granted for development on land in the foreshore area except for the following purposes –

- (a) *the extension, alteration or rebuilding of an existing building wholly or partly in the foreshore area, but only if the development will not result in the footprint of the building extending further into the foreshore area,*
- (b) *boat sheds, sea retaining walls, wharves, slipways, jetties, waterway access stairs, swimming pools, fences, cycleways, walking trails, picnic facilities or other recreation facilities (outdoors).*

The objectives of foreshore building line control are as follows:

- (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.*

The application seeks consent for works within the foreshore area including:

- The north-eastern corner of the Level 4 terrace (0.63m<sup>2</sup>),
- Swimming pool,
- Retaining walls,
- Waterway access stairs,
- Inclinator and the lowest landing,
- Pool plant, building plant and rainwater tanks,
- Boatshed, and
- Landscaping.

The works within the foreshore area are detailed in the Architectural Plans by Corben Architects and are demonstrated on the extract of the Site Plan in Figure 1 on the following page.



**Figure 1:** Extract of Site Plan with the Foreshore Building Line in pink

### 1.2.2 Clause 4.6 – Exceptions to Development Standards

The objectives of clause 4.6 of PLEP 2014 are:

- (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 decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("*Initial Action*") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by clause 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of PLEP 2014 provides:

*Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

This clause applies to the foreshore building line development standard in clause 7.8 of PLEP 2014.

Clause 4.6(3) of PLEP 2014 provides:

*Development 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.*

The proposed development does not comply with the foreshore building line provision at clause 7.8 of PLEP 2014. However, strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of PLEP 2014 provides:

*Development consent must not be granted for development that contravenes a development standard unless:*

- (a) the consent authority is satisfied that:*
  - (i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

(ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) *the concurrence of the Planning Secretary has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority.

The first positive opinion of satisfaction (clause 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]).

The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

The 'Local Planning Panels Direction – Development Applications and Applications to Modify Development Consents' issued by the Minister for Planning and Public Spaces dated 30 June 2020 confirms that the Local Planning Panel can assume the concurrence of the Secretary in relation to development that contravenes a non-numerical development standard.

Clause 4.6(5), which relates to matters that must be considered by the Secretary in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 7.8 of PLEP 2014 from the operation of clause 4.6.

### **1.3 Relevant Case Law**

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

*The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*

*A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*

*A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*

*A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*

*A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

*These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 7.8 of PLEP 2014 a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 7.8 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?



5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 7.8 of PLEP 2014?

## **1.4 Request for variation**

### **1.4.1 Is clause 7.8 of PLEP 2014 a development standard?**

Clause 7.8 prescribes a provisions that seeks to limit the extent of development within the foreshore area and accordingly is considered to be a development standard to which clause 4.6 applies.

### **1.4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary**

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

### **Consistency with objectives of the foreshore building line standard**

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

- (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,*

Comment: The proposed development within the foreshore area will not result in any unreasonable or adverse impacts upon natural foreshore processes. The land below MHWL has been reclaimed and provides a buffer between the proposed development and the waters edge. Furthermore, the application is supported by an Estuarine Risk Management Report which confirms that the foreshore works are designed in accordance with Council's Estuarine Risk Management Policy for Development in Pittwater.

The application proposes extensive landscaping across the site, resulting in a significant enhancement to the quality and quantity of landscaping within the foreshore area. The proposed landscaping not only enhances the natural state of the foreshore area but ensures that the proposed works will not result in any adverse impacts upon the foreshore area.

I am satisfied that the non-compliant portion of the building will not impact on natural foreshore processes or affect the significance and amenity of the area. This objective is achieved notwithstanding the foreshore building line breaching elements.

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

Comment: The proposed development is wholly maintained within private property and will not impact upon public access along the foreshore. However, the proposed development will provide enhanced access to the waterway for occupants of the proposed dwelling.

This objective is achieved notwithstanding the foreshore building line breaching elements.

### **Consistency with zone objectives**

The subject property is zoned C4 Environmental Living pursuant to PLEP 2014. The proposal is consistent with the stated objectives of the C4 zone, as follows:

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

Comment: The proposed development is of a form and scale that is compatible with the surrounding urban environment and is an appropriate contextual fit in the streetscape. The proposal does not result in any adverse impacts upon the natural environment, with a high-quality landscaped outcome that will soften and screen the built form as seen from the waterway. The proposed development is a low-impact residential development.

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

Comment: The proposed development is highly articulated and is stepped to respond to the natural fall of the land. The development is to be finished in earthy finishes to ensure that it blends with the surrounding natural environment and will be secondary to landscaping within the foreshore area. The proposed development is entirely commensurate with surrounding built form and will not have an adverse impact upon the special values of the site.

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

Comment: The proposed development comprises a single dwelling house that is integrated into the slope of the land. The scale of the development is consistent with the desired future character of the Avalon Beach Locality and is compatible with surrounding and nearby development.

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

Comment: The proposed development will result in a significant enhancement to the quantity and quality of landscaping on the site, as demonstrated on the accompanying Landscape Plans by Spirit Level Designs. At present, the site contains only 3 trees of low significance in the front south-western corner of the site. The proposed development seeks to introduce at least 13 canopy trees to the site, with an extensive array of screen planting, low planting, groundcovers and climbers.

Despite non-compliance with the foreshore building line control prescribed by clause 7.8 of PLEP 2014, the proposal is consistent with the objectives of the zone and the foreshore building line development standard. Adopting the first option in *Wehbe*, strict compliance with the foreshore building line standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

#### **1.4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

In *Initial Action* the Court found at [23]-[25] that:

*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.*

*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].*

#### **Sufficient environmental planning grounds**

In my opinion, there are sufficient environmental planning grounds to justify the variation:

- The breach associated with north-eastern corner of the Level 4 terrace (0.63m<sup>2</sup>) arises due to the irregular alignment of the MHWL and in turn the foreshore building line itself. The deck is behind the foreshore building line to a greater degree than it is forward of the foreshore building line, representing an orderly approach to the development of the land.
- The alignment of the Level 4 terrace is consistent with that of neighbouring buildings, with the dwelling at 26 Cabarita Road also forward of the foreshore building line to a similar degree. Given the siting of neighbouring buildings, the breach associated with the north-eastern corner of the Level 4 terrace will not be perceived as a non-compliance.

- The presence of retaining walls and terracing within the foreshore area is characteristic of the area and are reflective of the considerable slope of the land.
- The proposed inclinator seeks to replace an existing inclinator in the same approximate location within the foreshore area and is a reasonable inclusion on the site in light of the slope of the land.
- The inclusion of plant storage and water tanks below the proposed swimming pool is an appropriate use of space, that will not be readily perceived from the public domain.

The development within the foreshore is entirely commensurate with that on surrounding foreshore sites and is complemented by a superior landscaped outcome that significantly enhances landscaping within the foreshore area, compared to that which currently exists. The proposed variation facilitates an outcome that is compatible with the foreshore context, consistent with Objective 1.3(g) of the Act.

The absence of impacts consequential of the departure also constitutes environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

#### **1.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 7.8 and the objectives of the C4 Environmental Living zone**

The consent authority needs to be satisfied that the proposed development will be in the public interest. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

*The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.*

*It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).*

As demonstrated in this request, the proposed development is consistent with the objectives of the foreshore building line development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest.

#### **1.4.5 Secretary's concurrence**

The 'Local Planning Panels Direction – Development Applications and Applications to Modify Development Consents' issued by the Minister for Planning and Public Spaces dated 30 June 2020 confirms that the Local Planning Panel can assume the concurrence of the Secretary in relation to development that contravenes a non-numerical development standard.

Concurrence of the Secretary can therefore be assumed in this case.

#### **1.5 Conclusion**

Pursuant to clause 4.6(4)(a) of PLEP 2014, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a variation to the foreshore building line in this instance.

**Boston Blyth Fleming Pty Limited**



**Greg Boston**

B Urb & Reg Plan (UNE) MPIA

**Director**