

APPENDIX 2
CLAUSE 4.6 – FORESHORE BUILDING LINE

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

5 SURFVIEW ROAD, MONA VALE

FOR ADDITIONS AND ALTERATIONS TO AN EXISTING DWELLING INCLUDING NEW DOUBLE CARPORT

**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 to an existing dwelling
At: 5 Surfview Road, Mona Vale
Owner: Lex & Belinda Pedersen
Applicant: Lex & Belinda Pedersen
C/- Vaughan Milligan Development Consulting

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, eastern 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 existing rear terrace on the subject site encroaches on the foreshore building line, and the proposal seeks to provide for the construction of alterations and additions to the existing dwelling, including amendments to the existing rear paved 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 a new 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 alterations and additions to an existing dwelling to meet the housing needs of the dwelling's occupants.

The existing dwelling falls within the foreshore area, and the works will seek to replace the rear patio and provide a retaining wall, thereby presenting a minor encroachment on 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 locality.

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 foreshore building line control, the proposed alterations and additions to the existing dwelling 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.***

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 Surfview Road, with the frontage to Mona Vale Basin is considered to be an area of special visual and aesthetic value.

The proposal will maintain the existing overall height of the existing dwelling.

The proposal will be consistent with and complement the existing varied residential development within the locality and will not be a visually element in the area.

The only portion of the dwelling which falls within the foreshore area comprises the existing rear terrace and retaining wall. The building itself remains outside the foreshore area.

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

The design prepared by MHDP Architects has been prepared to meet the client brief, together with ensuring that the visual bulk and overall height of the dwelling is effectively managed.

The design is considered to be an improvement in terms of the building's appearance and visual impact and for these reasons, the development does not result in an adverse impact on the special aesthetic values of the site.

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

The existing dwelling contains three levels, including a basement garage which is largely sited below existing ground level.

The proposal provides for a stair void to the front of the dwelling within a contemporary roof form.

As the design utilises a recessive colour palette which emphasises the lower level and ensures the new works are visually recessive, the building respects the predominant building scale in the area.

The setbacks are compatible with the existing surrounding development and the proposal does not have an adverse impact on long distance views.

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 zone objectives.

Precondition 2 - Consistency with the objectives of the standard

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

- (1) to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area,*
- (2) 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 for the following reasons:

- (1) 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 proposed new works are largely contained within the footprint of the existing building, and have been designed to minimise potential impacts on the foreshore area. The proposal is accompanied by a Coastline Risk Management Report prepared by Horton Coastal Engineering, dated 16 March 2023, which concludes that the proposal does not significantly increase the consequences of coastal hazards.

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

The proposed alterations and additions are wholly contained within the subject site and will not result in the removal of any public access.

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 variation to the foreshore building line results from the siting of the existing dwelling. The proposed works will not see any further encroachment on the rear building line. The works will maintain and enhance the presentation of the dwelling to the foreshore area.

- The development does not result in a significant bulk when viewed from the foreshore area, street or the neighbouring properties.
- The development will maintain a compatible scale relationship with the existing residential development in the area. The proposal will reflect a positive contribution to the streetscape and 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 existing dwelling falls within the foreshore area. The proposal will see alterations and additions to the existing dwelling.

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 design of the building facilitates ecologically sustainable development through the retention and adaptation of the existing dwelling and re-use as a dwelling (1.3(b)).
- The proposal promotes the orderly and economic use and development of land through the efficient use of the existing infrastructure to meet the housing needs of the community (1.3(c)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants whilst reducing the height and envelope visible from the street to minimise the impacts of bulk and scale and maintain and create views over and past the building from the public domain. These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the maximum building height control.

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 demolished the existing built form in order to simply observe the foreshore building line setback. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

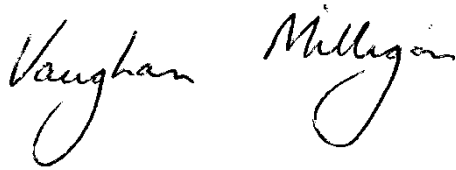
7.0 Conclusion

This development proposes a departure from the foreshore building line standard, with the proposed alterations and additions to the existing dwelling to occur within the foreshore area.

This variation occurs as a result of the siting of the existing development on 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.

Handwritten signature of Vaughan Milligan in black ink.

VAUGHAN MILLIGAN
Town Planner