

## ANNEXURE D

### Clause 4.6 Variation Statement - Limited Development in Foreshore Area



## CLAUSE 4.6 VARIATION STATEMENT – LIMITED DEVELOPMENT IN FORESHORE AREA (CLAUSE 7.8(2))

### 1. INTRODUCTION

Although the proposed development will be located within the foreshore area, these works will essentially stand upon the existing building footprint of the Club which includes a swimming pool and surrounds, permanent shade structures, a BBQ hut building, retaining walls and carparking area. For this reason, it is argued that the proposed development is both an extension and alteration of an existing building and will not result in the footprint of the Club buildings and structures further into the foreshore area. Despite this, a Clause 4.6 variation request has been prepared should Council have a differing view on this issue.

Clause 7.8(2) of *Pittwater Local Environmental Plan 2014* applies to the site.

The Clause states as follows:

*“(2) 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)”.*

*(5) In this clause—*

**foreshore area** means the land between the foreshore building line and the mean high water mark of the nearest natural waterbody shown on the Foreshore Building Line Map.

**foreshore building line** means the line shown as the foreshore building line on the Foreshore Building Line Map.

The relevant map Foreshore Building Line Map identifies the site as being subject to a Foreshore Building Line (FBL) within the Foreshore Area located between the FBL and the rear boundary. The FBL applying to the site varies as indicated in **Figure 1**.

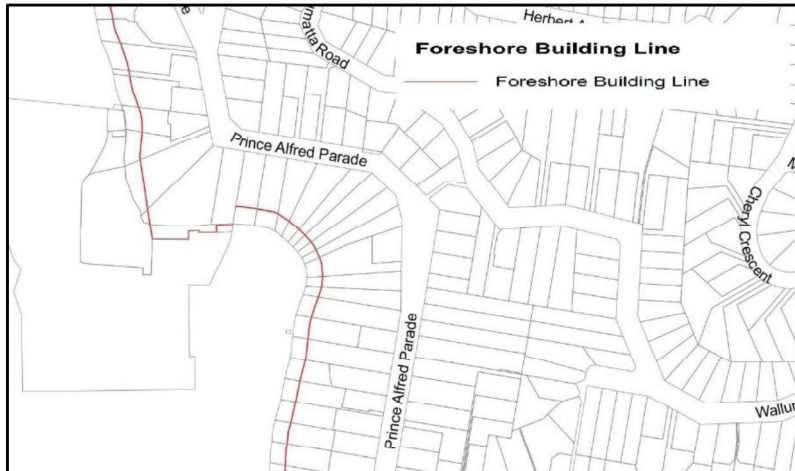


Figure 1 Extract from Pittwater LEP 2014 Foreshore Building Line Map

## 2. Proposed Variation

The proposal involves new building works forward of the FSBL as indicated in **Figure 2**.

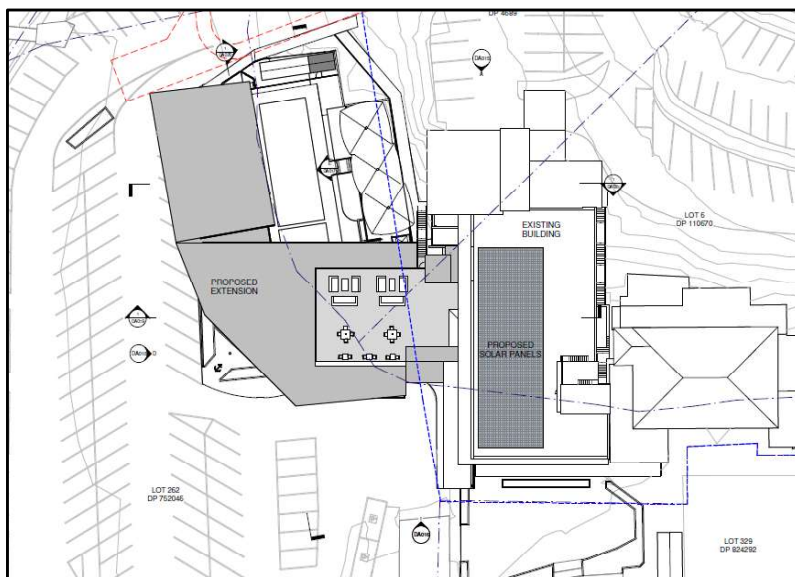


Figure 2 Site plan indication location of FBL (blue line) and foreshore area

## 3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of Clause 4.6 of PLEP 2014 are relevantly as follows:

### 4.6 Exceptions to development standards

(1) *The objectives of this clause are as follows—*

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

(2) 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.

(3) 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.

(4) 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.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

**Note** — When this Plan was made it did not include all of these zones.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5.

The development standard in Clause 7.8 of PLEP 2014 is not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit the proposed works within the foreshore area.

#### **4. Matters required by Clause 4.6(3) are required to be adequately demonstrated, (Clause 4.6(4)(a)(i))**

Of relevance to Clause 4.6(3)(a), in *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

*“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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.”*

The Judgment goes on to state that:

*“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”*

Preston CJ in the Judgment then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

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

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

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

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;*

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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone."*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to Wehbe and states:

*"...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."*

Clause 4.6(3)(a) requires the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- The development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- There are no additional significant adverse impacts arising from the proposed non-compliance;

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

## **5. Sufficient Environmental Planning Grounds, (Clause 4.6(3)(b))**

Having regard to Clause 4.6 (3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, Preston CJ in *Initial Action Pty Ltd V Woollahra Municipal Council* [2018] NSW LEC 118 (paragraph 24) states:

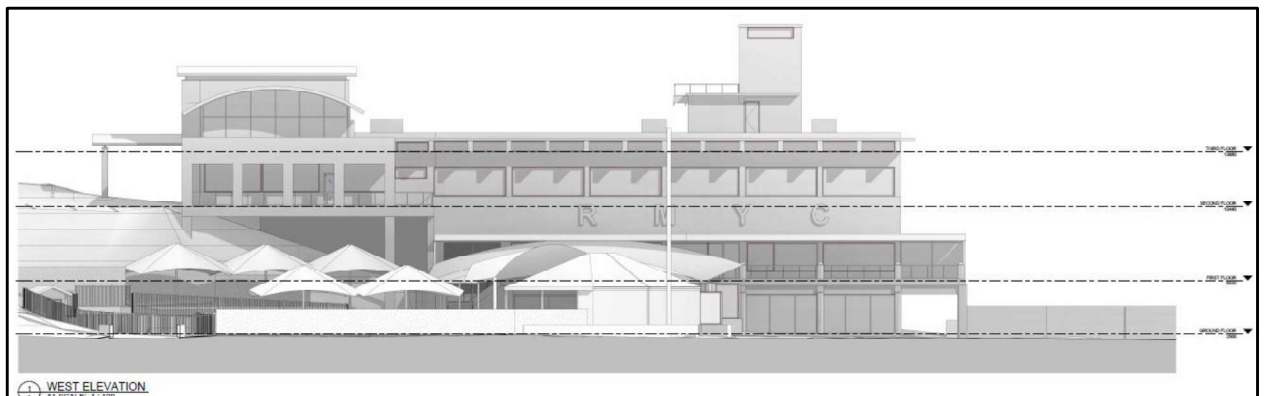
*"The environmental planning grounds relied on in the written request under cl. 4.6 must be "sufficient". There are two respects in which the written request need to be "sufficient". First the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of clause 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 clause 4.6(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC 90 at [31].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSW CA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify the contravention of the foreshore area development standard:

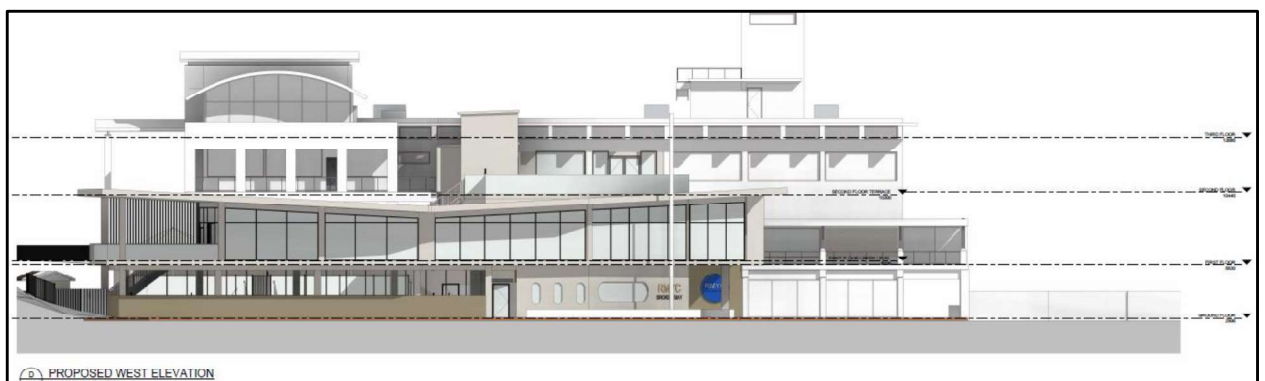
1. The proposed works within the foreshore area are ancillary to an existing recreation facility (outdoor) and are a type of development listed in Clause 7.8(2)(b) which permits the following within the foreshore area: *(b) boat sheds, walking trails, picnic facilities or other recreation facilities (outdoors).*

- The proposed works extend over existing permanent structures and buildings within the foreshore area and are ancillary to, and part of, the clubhouse building. The area that these works will occupy does not contain or contribute to the natural environment or natural areas of the foreshore. The type of works proposed are anticipated to be undertaken in the foreshore area as specified in Clause 7.8(2)(a) as follows: *“(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”*.

The location of these existing structures is indicated in **Figure 3** and these are to be replaced with the new building works as shown in **Figure 4**.



**Figure 3** Existing west elevation



**Figure 4** Proposed west elevation

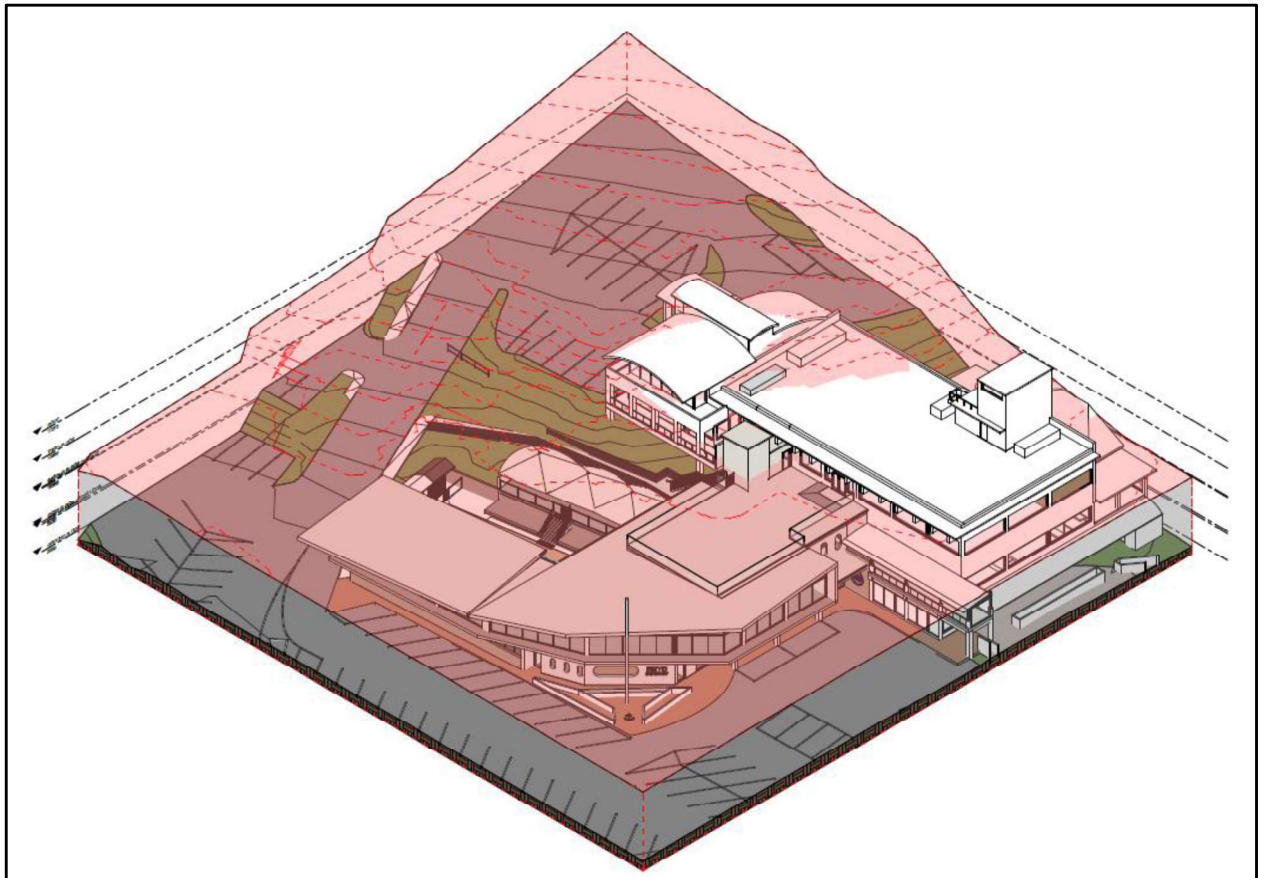
The footprint of the existing extensions and additions do not extend further into the foreshore area than the current footprint of the ancillary structures and buildings of the Club. Buildings and structures of the existing Club include permanent shade structures, a single storey BBQ hut building, swimming pool and surrounds, retaining walls, car parking and administration buildings and offices at the main entry point to the marina (including a two storey building). The works are consistent with Clause 7.7(2)(b) and the provisions of Clause 7.8 do not require the works to comply with both (a) and (b) regardless.

- The appearance of the site as viewed from the waterway and surrounding properties has been analysed in detail in the Visual Impact Assessment (VIA) submitted with the development application. The VIA demonstrates a positive visual appearance of the new works compared to the existing carparking area, shade structures and single storey BBQ hut.
- The proposed works within the foreshore area will not cause environmental harm such as pollution or siltation of the waterway, adverse impact upon flora and fauna, adverse impact on surrounding uses, or adverse impact upon



drainage patterns. Vegetation to be removed is limited to palm trees which are exempt from prior approval or permits to remove.

5. The proposed works within the foreshore area are consistent with the existing character of this site within the broader foreshore area. The yacht club and moorings have been established on the site since 1927 with various additions, rebuilding and expansion projects to date. A multi-level building is a long term characteristic of the site.
6. The works are consistent and coordinated with the existing clubhouse to provide a higher standard of indoor and outdoor eating and recreation facilities which are uses and activities already established at the site. The proposal does not introduce uses and activities that are uncharacteristic of the long-established use of this section of the foreshore area. The proposal will not result in an uncharacteristic intensification of the existing use.
7. The proposed building footprint does not reduce the amount of quality landscaping within the site. The building footprint occupies an area of the site which is already covered by fixed structures and hard surfaces and retains the areas of landscaping as shown green in **Figure 5**. Therefore the proposal retains existing quality vegetation and also improved on-site stormwater management by capturing roof water and directed it to a controlled system rather than the uncontrolled runoff from exiting impervious outdoor surfaces.



**Figure 5** Three dimensional diagram of the proposal indicating areas of landscaping throughout the site which are to be retained (shaded green).

8. Views of the foreshore and waterway from nearby public places and surrounding private properties are highly valued. The siting of the proposed works has been carefully selected so as not to obstruct views from adjoining private residential properties.



9. Additional shadow to be cast by the proposal is mostly contained within the site projecting onto a small part of the waterway within the marina area where it will have no detrimental environmental impact and the remainder of the additional shadow will impact the existing carpark. The additional shadow will have no detrimental amenity or environmental impacts and will be mostly confined to the car parking area.
10. The proposed works will not reduce carparking capacity within the site.
11. It is considered that there is an absence of any significant material environmental, social and economic impacts of the proposal on the amenity of the site, the locality, future site users and neighbours. Specifically, the proposal:
- Does not result in any adverse amenity impacts such as visual, landform and vegetation impact;
  - Is a type of development anticipated by Clause 7.8(2)(b) within the foreshore area;
  - Does not result in any adverse impacts upon the streetscape given the foreshore area is not visible from the adjacent roadway;
  - The proposed development meets the relevant objectives of Clause 7.8 in that the development does not impact on natural foreshore processes and in fact improves on-site stormwater management by capturing and treating runoff from new roof space which was previously uncontrolled from exposed hard surfaces including car parking;
  - The proposal meets the objectives of the RE2 Private Recreation zone (as further detailed in Section 7 below).
12. Insisting on the extensions to the clubhouse being located outside the foreshore area is likely to result in works on the more elevated areas of the site. This may increase bulk and scale of the building overall and increase the visual impact of the building as viewed from the waterway. Works behind the foreshore building line may result in the removal of vegetation and landscaped areas and may change the appearance of the site as viewed from the street and the waterway.
13. The proposed development achieves the objects in Section 1.3 of the EP&A Act, specifically:
- The proposal promotes the orderly and economic use and development of the land through consistent with the aims and provisions of the Pittwater local environmental plan (1.3(c));
  - The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the topography of the site. The variation allows improved landscaping and amenity within the foreshore area while avoiding and minimising impacts upon landform, having only positive outcomes for the character of the locality including site as viewed from the foreshore.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what items a Clause 4.6(4)(a) does and does not need to satisfy. Importantly, there does not need to be a “better” planning outcome.

*86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*

*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 in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

**6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))**

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in Section 7 below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 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 particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

**7. 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, (Clause 4.6(4)(a)(ii))**

**Limited development on Foreshore Area Objectives**



The objectives of clause 7.8 for a maximum Foreshore Building Line 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.*

In order to address the requirements of subclause 4.6(4)(a)(ii), the objectives of clause 4.3 are addressed in turn below:

**Objective (a):**

Objective (a) seeks to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance amenity of the area.



The proposed works within the foreshore area will be more than 25m from the foreshore and have no material adverse impacts on natural foreshore processes. The waterway amenity and natural processes will not be compromised by the proposed development which is compatible with the existing development on the site. There will be some improvement to the management of stormwater from the site as rainfall and runoff will be captured and treated prior to discharged whereas runoff from outside impervious surfaces are not directed to stormwater treatment and control systems.

**Objective (b):**

Objective (b) seeks to provide for continuous public access along the foreshore area and to the waterway.

The subject site is not located in an area with continuous public access along the foreshore. The nature of the use of the site as a marina makes public access to the foreshore difficult and there is no public access to land adjacent to the site. However, the proposed development does not prevent any future public access to the foreshore and waterway.

Objectives for Development in Zone RE2 Private Recreation

The objectives for all development in Zone RE2 Private Recreation are set out in Pittwater LEP 2014 and are listed below along with comments demonstrating the ways in which the proposal is consistent with the relevant objectives:

**Objective: “To enable land to be used for private open space or recreational purposes**

The proposed development will supports the continued use of the site for private open space and recreational use in a way that is sympathetic to the character of the surrounding area.

**Objective: To provide a range of recreational settings and activities and compatible land uses.**

The proposal will allow for the provision of facilities that will support the club’s ability to meet the needs of its members.

**Objective: To protect and enhance the natural environment for recreational purposes.**

The proposal provides for an improvement in stormwater runoff entering Pittwater and provide a low rise buffer between the foreshore and the existing club buildings. The proposal will provide for the protection and enhanced of the natural environment surrounding the site. Utilising the proposed building footprint will enable retention of existing landscaped areas within the site. The proposal will enhance the facilities of the Club which promote recreational use of the waterway in a manner which will protect the waterway environment.

**Objective: To allow development of a scale and character that is appropriate to the nature of its recreational use and is integrated with the landform and landscape.**

The proposed development will be of a scale and character that is appropriate to the continued operations of the clubhouse as a recreation facility. The proposal will accommodate for activities and services which are already available at the club but to a higher standard and compliant with accessibility requirements. The siting of the works will have less impact in comparison to extending the building across other areas of the site. Extension of the building across areas of the site landward of the FSBL has the potential to increase the visual impact of built form and reduce landscaped areas by comparison.

## 8. THE PUBLIC INTEREST

During November 2018, Northern Beaches Council released its draft Pittwater Waterways Strategy 2038 for public comment. The draft Strategy was adopted by Council in May 2019. Council is currently working on the implementation of the Strategy.

The proposal for the expansion of the RMYC member's facilities is considered to be consistent with the strategies and directions of the Strategy particularly the following directions:

- Identify appropriate foreshore locations for low-scale cafes and restaurants accessible via sustainable and active transport networks and subject to sensitive development controls,
- Maintain and ensure access to commercial opportunities around the Pittwater waterway,
- Maintain the local economy that is based on the provision of recreational activities.

As such, the proposed development is therefore considered to be in the public interest.

## 9. CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(b))

The issue of the concurrence of the Secretary of the Department of Planning and Environment is dealt with by Planning Circular PS 20-002 'Variations to development standards', dated 5 May 2020. This circular is a notice under 55 of the Environmental Planning and Assessment Regulation 2021. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The circular provides for assumed concurrence.

Concurrence cannot be assumed for a request for a variation to a numerical standard by more than 10 per cent if the function is to be exercised by a delegate of the consent authority. This restriction does not apply to decisions made by local planning panels, who exercise consent authority functions on behalf of councils but are not legally delegates of the council. As such, it is anticipated that the development application will be determined by the local planning panel.

The Secretary can be assumed to have given concurrence to the variation.

Notwithstanding it is our view that the proposal is compliant with clause 7.8 being a form of development allowed in the foreshore area by way of clause 7.8(2)(b).

## 10. CONCLUSION

Having regard to all of the above, it is our opinion that compliance with the objectives Clause 7.8 and Zone RE2 is achieved and that a request for variation of the FBL is not required in this case. Notwithstanding, the proposal has been demonstrated to comply with the objectives of Clause 7.8 and the objectives for development in Zone RE2 with sufficient environmental planning grounds to justify the development within the foreshore area to warrant an appropriate degree of flexibility specific to the circumstances of this development.

On this basis, the requirements of Clause 4.6(3) are satisfied.