

## **Clause 4.6 Variation Request**

### **Clause 7.8 of Pittwater Local Environmental Plan 2014**

#### ***Limited development on foreshore area***

122, 126 & 128 Crescent Road and 55 & 57 The Avenue, Newport

## 1.0 Introduction

This is a written request that has been prepared in accordance with Clause 4.6 (cl 4.6) of the Pittwater Local Environmental Plan 2014 (LEP 2014) to support a Development Application (DA) submitted to Northern Beaches Council for demolition works and subdivision of land into 9 lots including tree removal and infrastructure work at 122, 126 & 128 Crescent Road and 55 & 57 The Avenue, Newport ('the site').

The purpose of this cl 4.6 variation request is to address a variation to Clause 7.8 'Limited development on foreshore area' under the LEP 2014. Specifically, this request seeks permit infrastructure works within the mapped foreshore area to provide for and facilitate permissible development within the C4 Environmental Living Zone.

The objectives of cl 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

This request has been prepared having regard to the following considerations:

- The Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011);
- The objectives of Clause 7.8 of the LEP 2014, being the development standard to which a variation is sought – and the objective of the land use zone
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe*.

It is noted that the proposed works may be capable of obtaining approval under *State Environmental Planning Policy (Transport and Infrastructure) 2021*. Notwithstanding, this Clause 4.6 variation has been provided.

## 2.0 Clause 4.6 Exceptions to Development standards

Clause 4.6(2) of the LEP 2014 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the LEP 2014, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and*
- b) *there are sufficient environmental planning grounds to justify contravening the development standard.*

In accordance with clause 4.6(3) the applicant requests that the Limited development on foreshore area development standard be varied.

## 3.0 What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the Pittwater Local Environmental Plan 2014 (LEP 2014).

## 4.0 What is the zoning of the land?

The site and located of works which relate to this clause 4.6 variation is zoned C4- Environmental Living and W2 – Recreational Waterways under Pittwater LEP 2014. The proposed usage is permitted with consent in the zone (s).

## 5.0 What is the development standard being varied?

The development standard sought to be varied is Clause 7.8 of the LEP 2014 – Limited development on foreshore area. Subclause (2) of the clause is the part of the clause to which a variation is being sought.

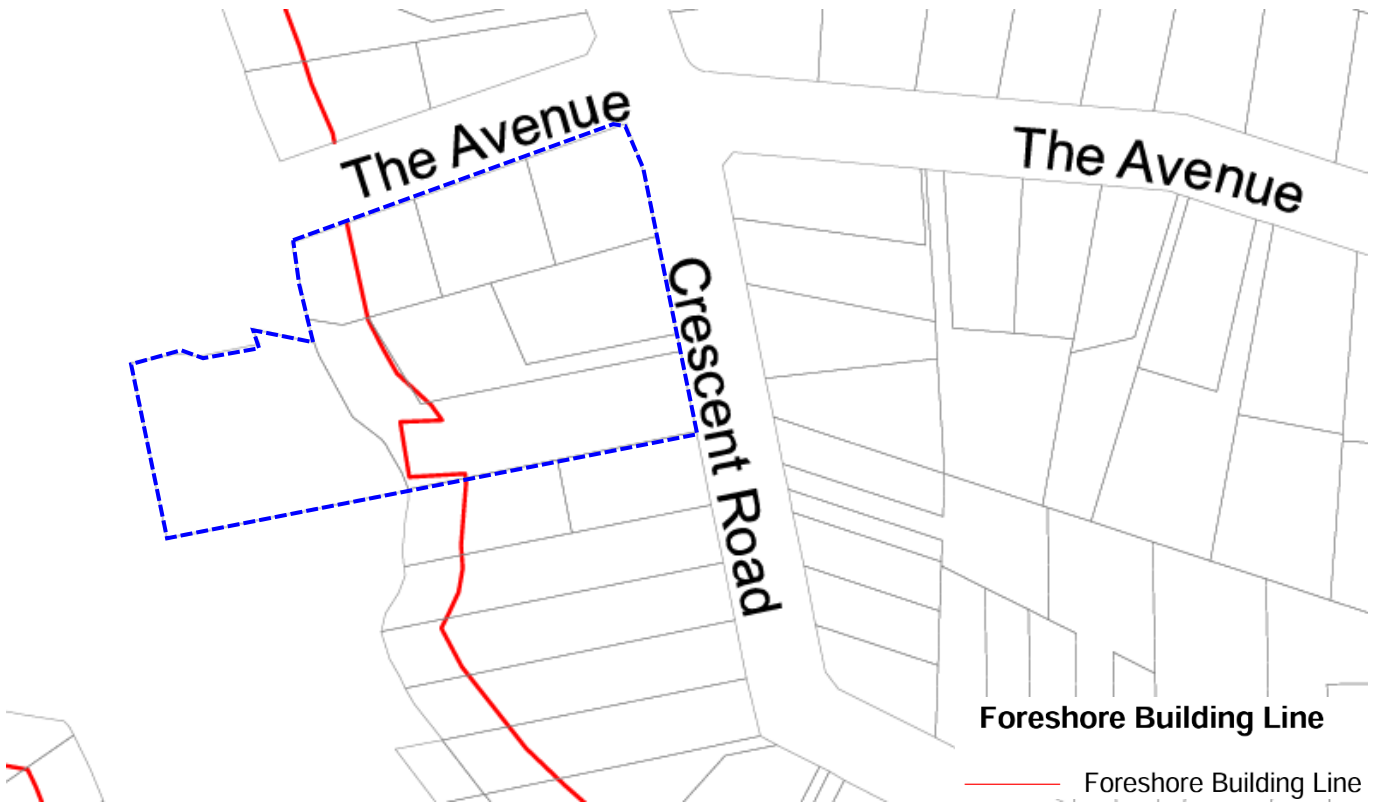
### 7.8 Limited development on foreshore area

- 1) *The objectives of this clause 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.*
- 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).*
- 3) *Development consent must not be granted under this clause unless the consent authority is satisfied that—*
  - a) *the development will contribute to achieving the objectives for the zone in which the land is located, and*
  - b) *the appearance of any proposed structure, from both the waterway and adjacent foreshore areas, will be compatible with the surrounding area, and*
  - c) *the development will not cause environmental harm such as—*
    - i. *pollution or siltation of the waterway, or*
    - ii. *an adverse effect on surrounding uses, marine habitat, wetland areas, fauna and flora habitats, or*
    - iii. *an adverse effect on drainage patterns, or*
    - iv. *the removal or disturbance of remnant riparian vegetation, and*
  - d) *the development will not cause congestion or generate conflict between people using open space areas or the waterway, and*
  - e) *opportunities to provide continuous public access along the foreshore and to the waterway will not be compromised, and*
  - f) *any historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance of the land on which the development is to be carried out and of surrounding land will be maintained, and*
  - g) *in the case of development for the alteration or rebuilding of an existing building wholly or partly in the foreshore area, the alteration or rebuilding will not have an adverse impact on the amenity or aesthetic appearance of the foreshore, and*
  - h) *sea level rise, coastal erosion and recession, or change of flooding patterns as a result of climate change, have been considered.*
- 4) *In deciding whether to grant consent for development in the foreshore area, the consent authority must consider whether and to what extent the development would encourage the following—*
  - a) *continuous public access to and along the foreshore through or adjacent to the proposed development,*
  - b) *public access to link with existing or proposed open space,*
  - c) *public access to be secured by appropriate covenants, agreements or other instruments registered on the title to land,*
  - d) *public access to be located above mean high water mark,*
  - e) *the reinforcing of the foreshore character and respect for existing environmental conditions.*

- 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](#).



**Figure 1:** Foreshore Building Line Map of LEP 2014 (site shown in blue dashed line)

## 6.0 Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8) of the LEP 2014. Given the standard is not identified under subclause 4.6(8), it is therefore not specifically excluded from the operation of cl 4.6 of LEP 2014.

## 7.0 The site and its context

The subject site of 122-128 Crescent Road & 55-57 The Avenue is located in Newport on the western side of Crescent Road in the Northern Beaches LGA. The combined site area is approximately 6,520sqm and comprises seven individual lots. The proposal seeks approval for:

- Demolition of the existing commercial and residential structures on site above the mean high water mark;
- Subdivision of the site into nine residential lots;
- Removal of 46 exempt, dead or hazardous trees on site; and
- Associated servicing and stormwater drainage works, including:
  - Undergrounding existing high voltage electricity lines above part of the sites;
  - Driveway and access works for each lot, including easements and Right of Way;
  - Easements and works for sewer, stormwater, and gas; and
  - Communications / NBN servicing.

## 8.0 Extent of Variation to the Development Standard

The extent of variation of the development standard relates to enabling stormwater works which are not expressly included as a purpose to which Council may grant development consent for within the foreshore area.

As set out in Council RFI letter of 19 May 2023, “Stormwater works are not permitted within the foreshore area pursuant to LEP 2014 Clause 7.8. Clause 7.8 is a development standard that can be varied under Clause 4.6.” As such, this Clause 4.6 request has been prepared.

## 9.0 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the five-set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In *Wehbe v Pittwater Council* [2007] 156 LGERA 446 [42] – [51] (“*Wehbe*”) and repeated in Initial Action [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii).

The 5 ways in *Wehbe* are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's actions in granting consents departing from the standard and hence the standard is unreason
5. The zoning of the land is unreasonable or inappropriate. The five ways are not exhaustive, and it may be sufficient to establish only one.

For completeness, this request addresses the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 is provided, with the methods that are identified appropriate to demonstrate that compliance with the development standard is unreasonable and unnecessary in the circumstances of this particularly application (the case).

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

Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in the table below, the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Justice held, “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

Demonstrating that there will be no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

Summary	Achievement of Standard
<i>(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,</i>	The proposed stormwater works will not unreasonably impact on the natural foreshore processes of affect the significance and amenity of the area. The stormwater system, design, and management (both quantity and quality) have also been assessed by BG&E (see information provided to Council and attached to this Clause 4.6 variation request) to meet the specifications required by Council.
<i>(b) to ensure continuous public access along the foreshore area and to the waterway.</i>	The proposed stormwater works will not impact the ability for the continuous public access along the foreshore area and to the waterway.

Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance.

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

The underlying objective or purpose of the standard is relevant in the circumstance of the case. It is our view that the intent of the clause is to ensure that expansion of development cannot occur into the foreshore building line to undermine the effect of the clause and design intent. The standards acts as an effect building line/foreshore setback, with the exception of minor and minimal works including boatsheds, swimming pools etc (a set out in clause 2(b)).

The proposed works of infrastructure necessary to service permissible uses (and to meet the requirements of Councils design specifications for water quality and quantity) is considered reasonable and appropriate. As demonstrated above, the proposal retains consistency with the objectives of Clause 7.8 of LEP 2014, despite strict non-compliance with the limited development on foreshore area.

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

The underlying objectives or purpose of the standard would be defeated or thwarted if compliance was required.

***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;***

Not relied upon.

***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.***

Not relied upon. The proposed zoning of the land is reasonable and appropriate.

## **Conclusion**

Strict compliance with the “Limited development on foreshore area” development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposal is consistent with the objectives of the “Limited development on foreshore area” development as detailed above.
- The proposed variation does not give rise to an impact on the significance or amenity of the area
- As the proposal is consistent with the objectives of the standard and has been designed to meet standards of Council for water quality and quality, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

## **10.0 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?**

The proposal for subdivision of the land and necessary servicing in order to meet the needs and standards for infrastructure for future dwellings is appropriate. The lack of impact from the proposed works, and the design criteria applied and complied with (as set out in the information provided by BG&E to accompany this Clause 4.6) are considered justification that there are sufficient environmental planning grounds to allow the variation in the circumstances of this site.

The contravention of the standard occurs in so far as that the wording of the clause at 7.8 of LEP 2014 does not expressly provide for development of necessary infrastructure. The necessary heads of consideration that are necessary for the consent authority to consider in subclause (3) are all met.

## **11.0 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)**

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case.

In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

## **12.0 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives**

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest.

The proposal is considered to be in the public interest because it is consistent with the objectives of the development standard (7.8) and the objectives of the zone(s) in which the development is proposed to be carried out.

### **Objective of the Development Standard**

The consistency of the proposed development with the specific objectives of the Limited development on foreshore area development standard is addressed above.

### **Objectives of the Zone**

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the C4 Environmental Living Zone and W2 Recreational Waterways Zone. The objectives of the zones are:

#### **Zone C4 Environmental Living**

Objectives of zone

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

#### **Zone W2 Recreational Waterways**

Objectives of zone

- a) *To protect the ecological, scenic and recreation values of recreational waterways.*
- b) *To allow for water-based recreation and related uses.*
- c) *To provide for sustainable fishing industries and recreational fishing.*
- d) *To provide for amateur and professional recreational yachting or boating clubs and the like that serve Pittwater and the wider region.*
- e) *To ensure development does not adversely impact on the enjoyment and use of the waterway or adjoining land.*
- f) *To provide for a variety of passive and active recreational pursuits and water-based transport while preserving the environmental setting of the waterway.*
- g) *To ensure that public access to the waterway and foreshore areas suitable for public recreational and transport purposes is maintained.*

The subject proposal meets the objectives for the zones in that:

- The proposed development, which includes uses that are permissible with consent in the zones and under LEP 2014
- The subdivision provides for the potential of future residential building that are capable of not adversely impact on the special ecological, scientific and aesthetic values.
- The density and scale, as well as the potential for vegetation and landscaping within the foreshore area is not impacted and is capable of being realised as part of future development
- *The proposed development of stormwater works does not adversely impact on the enjoyment and use of the waterway or adjoining land.*

For the reasons given the proposal is consistent with the objectives of the C4 and W2 zones.

### 13.0 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- 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.*

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility, in this instance, to the development permitted in the foreshore area, and will achieve a better outcome (enabling stability design stormwater works to drain to the watercourse course, this instance in accordance with objective 1(b).

### 14.0 Conclusion

As set out in this clause 4.6 variation set out that strict compliance with the restrictions of the works permitted within clause 7.8 of the *Pittwater Local Environmental Plan 2014* has been found to be unreasonable and unnecessary in the circumstances of the case.

Further, there are sufficient environmental planning grounds to justify the limited development on foreshore area development standard variation. In this regard, it is reasonable and appropriate to vary the development standard to the extent proposed.



**Stephen Gouge**  
Associate Director  
sgouge@ethosurban.com