



**Clause 4.6 Variation
To Development Application
For
30 Utingu Place
Bayview
NSW
For
Hannah Bee & Peter Goodall**

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1 INTRODUCTION

This report pertaining to Clause 4.6 Variation accompanies the Development Application for the proposed alterations & additions at 209 Headland Road, North Curl Curl

1.1 Site

The residence is located on the North Western side of Utingu Place in the residential neighbourhood of Bayview.

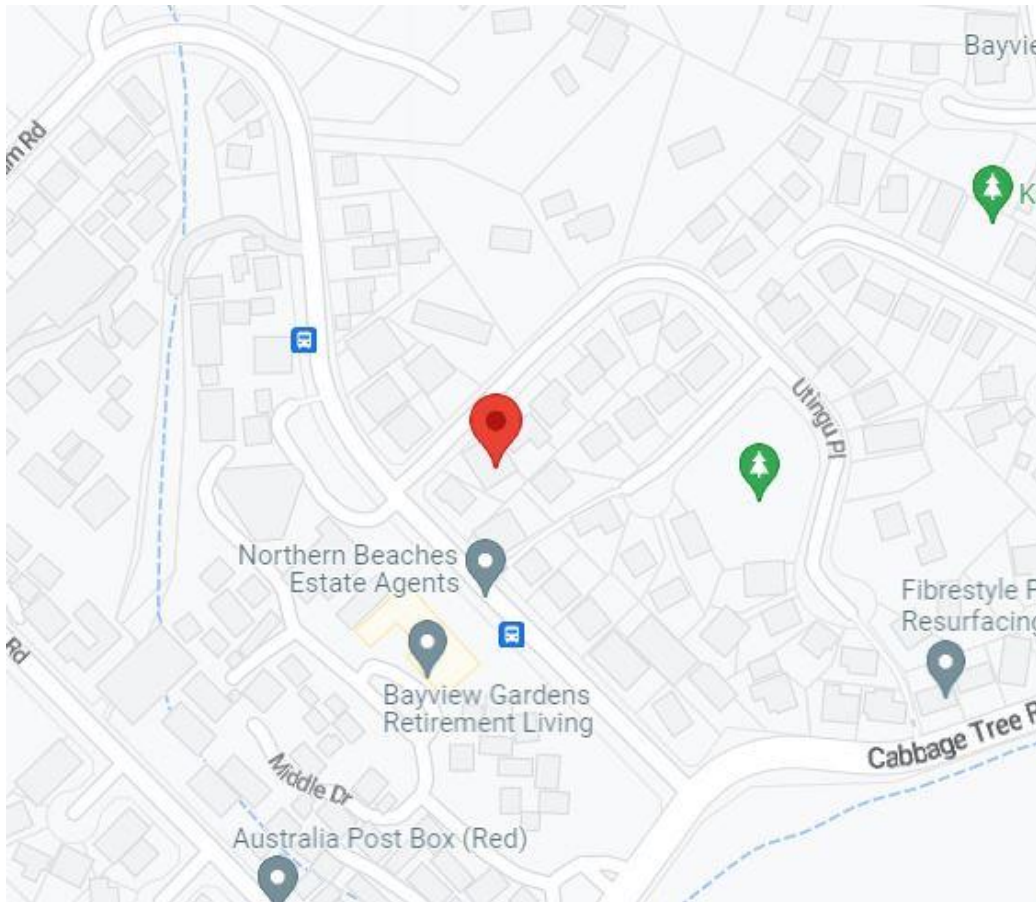


FIGURE 1: LOCATION PLAN 30 Utingu Place, Bayview ¹ Source Google Maps.

1.2 Local Authority

The local authority for this site is:
Northern Beaches Council (Pittwater)

[https://www.google.com/maps/place/30+Utingu+Pl,+Bayview+NSW+2104/@-](https://www.google.com/maps/place/30+Utingu+Pl,+Bayview+NSW+2104/@-33.6657666,151.2958482,19.46z/data=!4m6!3m5!1s0x6b0d549d8dd75ee7:0x30022be6726030fd!8m2!3d-33.6658712!4d151.2959164!16s%2Fg%2F11c4v1wrxt)

[33.6657666,151.2958482,19.46z/data=!4m6!3m5!1s0x6b0d549d8dd75ee7:0x30022be6726030fd!8m2!3d-](https://www.google.com/maps/place/30+Utingu+Pl,+Bayview+NSW+2104/@-33.6657666,151.2958482,19.46z/data=!4m6!3m5!1s0x6b0d549d8dd75ee7:0x30022be6726030fd!8m2!3d-33.6658712!4d151.2959164!16s%2Fg%2F11c4v1wrxt)

[33.6658712!4d151.2959164!16s%2Fg%2F11c4v1wrxt](https://www.google.com/maps/place/30+Utingu+Pl,+Bayview+NSW+2104/@-33.6657666,151.2958482,19.46z/data=!4m6!3m5!1s0x6b0d549d8dd75ee7:0x30022be6726030fd!8m2!3d-33.6658712!4d151.2959164!16s%2Fg%2F11c4v1wrxt)

Civic Centre, 725 Pittwater Road,
Dee Why NSW 2099
DX 9118 Dee Why
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1.3 Environmental Planning Instrument that Applies to the Land

Pittwater Local Environment Plan 2014

1.4 Zoning of the land

C4 Environmental Living

1.5 Objectives of the Zone

- To provide for the housing needs of the community within a low-density, environmental living residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah

Comment:

It is considered that the proposed development meets the objectives of the Zone C4 Environmental Living. This opinion is justified on the basis that this application provides for the owner's housing needs within the environmental living area that is consistent with surrounding properties elevated developments. The proposal allows currently unusable areas to be usable for the owners to assist in day to day living without adversely impacting the low-density environmental aspects as no substantial vegetation is proposed for removal. The works proposed will significantly improve the design and aesthetic quality of the site with the built form outcome complimenting properties along Utingu place.

There are no statutory zoning or zone objectives that are an impediment to the granting of approval to the proposed development.

2 Clause 4.6 Variation to Development Application

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.*

2.1 Development Standard Being Varied

After reviewing Pittwater LEP 2014 we advised that a Clause 4.6 Exception to Development Standard is required due to:

- This development is classified as a non-complying development. This is due to the excavated external levels and level located within the existing excavated lower ground floor and sub-floor void being over the 8.5m building height
- The favourable option for Council is a Development Application with a Clause 4.6 Variation for the structures to be considered for approval.

2.2 Clause of the Development Standard listed in the Environmental Planning Instrument

- Pittwater LEP 2014 Part 4 4.3 Height of Buildings

2.3 Objectives of the Development Standard

- to ensure that buildings are compatible with the height and scale of surrounding and nearby development.
- to minimise visual impact, disruption of views, loss of privacy and loss of solar access.
- to minimise any adverse impact of development on the scenic quality of Pittwater's coastal and bush environments
- to manage the visual impact of development when viewed from public places such as parks and reserves, roads, and community facilities.

Comment:

It is considered that the proposed development meets the objectives of the height of buildings development standard. This opinion is justified on the basis that this application is compatible with surrounding properties that have similar height & scale. The visual impacts are minimised as there is existing vegetation used to soften the streetscape from the public domain as well “tiering” the stories to articulate each floor from Utingu Place. With the existing location of the subject & adjacent dwellings enjoying an elevated position there is no adverse impact of view lines with privacy improved as well as the shadow cast from the proposed works having only a minor impact on the adjacent properties. The visual impacts are minimised as existing construction has been excavated reducing overall height along Utingu Place. This provides a stepping down the site following the existing topography, this assisting in maintaining the scenic quality & built form of the Bayview area.

2.4 Numeric value of the development standard in the environmental planning instrument

LEP2014 Height = 8.5m

2.5 Proposed numeric value of the development standard in your development application

Proposed Height = 9.647m Existing Excavated Ground (Measured at the highest point - Southwest edge of roof ridge of upper floor)

Proposed Height = 8.046m Natural Ground level. (Measured from the highest point - Southwest edge of roof ridge of upper floor.

2.6 Percentage variation between the proposal and the environmental planning instrument

Proposed Height = 13% (Existing Ground Level)

Proposed Height = 8.046m (Natural Ground Level = Compliant)

2.7 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The variation in this case is unreasonable as its reference is to the excavated

lower ground floor area level and sub-floor void. If the method of measuring from the natural ground level were to be used, we would have a compliant dwelling in terms of height. Ref, *Bettar v Council of City of Sydney* [2014] NSWLEC 1070 is adopted using the natural ground levels located on the western and southern elevation, we would also see compliance reached with the remainder of the roof clear of the height limit.

This variation is considered moderate in comparison to other recent developments along Utingu Place. This application is in keeping with a environmental living residential environment desired by Council in this area as well as the objectives of the zone. The development has no negative consequence of significance as a result of this noncompliance, further it meets the objectives of the development standard, and therefore strict compliance with the development standard would be unreasonable and unnecessary.

In this circumstance, it is unreasonable and unnecessary to strictly comply with the building height standard given that the resulting development will be absent of any negative environmental or planning outcomes. The proposal would be indiscernible to a development that strictly complied with the numerical control. For the reasons stated above, it is argued that a variation be supported as it ultimately results in an improved planning outcome for the streetscape and general locality along Utingu Place.

- *Streetscape* – The visual quality of the streetscape is to be enhanced with the alterations to the property in keeping with the adjacent property with the proposed landscaping maintained improving the streetscape to complement the existing built form along Utingu Place. The height encroachment for the upper floor is to the rear of the block, with the intention for the rear addition to the dwelling to match the existing and surrounding designs & present a dwelling that is consistent front to back. The proposed roof increases the height slightly but does not detract from the streetscape along Utingu Place. The proposed additions provide a generally consistent pattern of development with regard to adjoining building setbacks, and as such, the proposal will not result in any visually prominent element that will result in an unreasonable impact on the streetscape & is not out of character for the neighbourhood. These characteristics for the building height conform to the C4 Environmental Living residential requirements for the Bayview area & modifying the structure would, in our opinion, contravene the C4 zoning

objectives by adversely affecting the streetscape along Utingu Place & the desired future character of the area.

- *Bulk & Scale* is maintained for the area. Although the bulk & scale of the building is slightly increased, the overall size & bulk in relation to the surrounding neighbourhood is to be maintained throughout the development as shown by the similar development on the adjacent northeastern property below



FIGURE 2: Adjacent property, 29 Utingu Place, Bayview ² Source Google Maps.

And;



FIGURE 3: Adjacent property, 1 Utingu Place, Bayview ³ Source Google Maps.

There is no adverse visual impact with surrounding developments to maintain their existing visual amenity. The new roof that has been added to the design matches the existing to prevent the design from visually dwarfing surrounding properties as the roof height is only 0.047m higher than the north easterly dwellings roof at its highest point. It is in our opinion that the pitched roof design allows for a seamless finish and for a more appealing streetscape, with the design in keeping with other properties along Utingu Place.

The existing topography & built form prevents the proposed ridges from adhering to the 8.5m building height. This is largely due to the existing dwelling being previously excavated on a sloping site. The proposal is a design option that supports a preferred planning outcome to compliment other dwellings in the Bayview area, as well as complimenting the existing dwelling & the surrounding neighbourhood.

In addition, the proposed works are justified as the addition is barely visible from the street as it is set back well behind the boundary line & provides for existing vegetation to the front of the property, this visually maintains the bulk of the upper

portion of the dwelling without adversely affecting the streetscape. The intention is to provide a balance between the proposed additions to the existing built form with the majority of the improvements to the rear of the property.

- **Openness** - A sense of openness has been created with landscaping to the front of the property with the proposed new decks to integrate in with the existing topography. The proposed design to the upper portion of the dwelling allows the low levels to create flow between the internal & open space areas for the owners with minor elements of the proposal over the height limit due to the excavated areas, to continue to allow for a sense of openness to support the desired future character of the Bayview environmental living area. The openness to the front of the property is maintained with the landscaped area & access to compliment the proposed structures to assist in adequate usable outdoor recreation space & water infiltration.
- **Site Access & Circulation** is improved with vehicular access provided to Utingu Place to allow for parking & the pedestrian access and a path and grassed area to the front door. It is anticipated that the proposed development will have no detrimental impact on traffic flow.
- **Planting** – There has been generous amount of area maintained for the provision of planting in the front & rear areas of the property. The proposal enhances the amenity of the site by providing a usable garden space that softens the visual amenity of the front of the property. The proposed works to the front of the property are in keeping with the adjacent properties. The existing vegetation softens the streetscape & allows the development to blend in with the existing environment along Utingu Place.

2.8 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The proposal extends the existing built form of the subject property with well-designed additions improving on the ageing dwelling & maintains landscaping onsite. The proposed works add to the already renovated & rebuilt dwellings along Utingu Place and as such strict compliance in this regard would limit the objectives being fully attained. The proposed works provide a more efficient and orderly development on the steeply sloping land that is of high-quality architectural design which

maximises the sites development potential along with providing appropriate housing stock within the locality.

2.9 Is the development standard a performance-based control?

The objectives of the development standard provide the controls to allow a performance-based solution. For the reasons outlined herein, it is demonstrated the proposal meets the objectives of the development standard, therefore Council should consider “compliance to the standard unreasonable in the circumstances of the development”.

2.10 Would strict compliance with the standard be unreasonable or unnecessary?

Yes, please refer to answer in 2.7, 2.8 and 2.9 preceding.

2.11 Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes, Section 4.6 enables a development standard within an LEP to be varied, providing sufficient and compelling arguments based on sound planning rationale and legislation are put forward to support the variation.

1.3 Objects of Act

*(c) to promote the orderly and economic use and development of land,
(g) to promote good design and amenity of the built environment,
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*

The following environmental planning grounds justify contravening the development standard.

- The location of the proposed new works will be mostly hidden from the public domain as it is situated towards the rear of the property and integrated into the existing built form and site topography that slopes away from the street to the south east. When using the *Bettar v Council of City of Sydney* [2014] NSWLEC 1070 at [39]-[41]. The court expressly rejected different heights resulting from the same development standard preferring the natural ground level as this method provides for increased equity and visual consistency.

- The proposed upper floor works are moderate in nature and maintain the existing built form and character of the site. The proposed works will be in keeping with the existing character and the desired future development in the area.
- The design and location of the proposed works are located to the front north eastern portion of the existing dwelling. This location limits the height noncompliance and bulk of the dwelling as viewed from the public domain and maintains the building mass and scale. This option promotes improved amenity and sustainable design capable of maintaining the objectives of the LEP, *Height of Buildings* 4.3, and is compatible with the adjacent dwellings.
- As depicted within the proposal's shadow diagrams, there is minimal impact on the private open space to the adjoining dwellings.
- This style of design limits any potential impacts that a more substantial addition would create, with this design limiting new windows to reduce impacts on views from adjoining dwellings with little impact from the public domain.
- Promoting good sustainable design and reduced costs for construction, this proposal utilizes existing structures and areas of the site. This is far more cost-effective as it uses the existing roof and deck planes to connect to the existing structure.
- The proposal provides improved private open space and landscaping through improved outdoor open space areas that complement the existing deck area, providing access and safety to indoor-outdoor living.
- The proposal provides improved housing in a environmental living environment. The proposed development provides for increased amenity and improved housing development in this environmental living while maintaining the character of the existing dwelling.

Discussion.

The case of *Bettar v Council of City of Sydney* [2014] NSWLEC 1070 at [39]-[41]. The court expressly rejected different heights resulting from the same development standard. The Bettar approach inferred the existing ground level was taken from an extrapolated coordinate of natural ground level prior to excavation that had taken

place on the site. This saw a much more uniform approach and provided for a far better level of equity for owners, and importantly, better outcomes in terms of good planning measures for the preservation of Streetscapes and consistent visual access from the public domain.

The methodology provided for in the Bettar case has been widely used by council(s) as an appropriate way for calculating building height, as it provided for a more uniform outcome of development and made far better sense in terms of building design and planning outcomes.

However, the current case in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC1582 has also addressed the issues of determining maximum heights of buildings. Although the *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC1582, case did not apply the Bettar decision but instead said at [73] that⁴

- the existing level of the site at a point **beneath** the existing building is the level of the land at that point.
- and
- the 'ground level (existing)' within the footprint of the **existing** building is the existing excavated ground level on the site.

The result was the Court found the new building was over the maximum height control based on the above, but there was also an environmental planning ground that may justify the noncompliance under a section 4.6 variation to the standard, importantly in terms of the findings of the court in the case. The clause 4.6 submitted with the case was upheld and the development consent was subsequently granted.

There is limited explanations as to why the Bettar approach was not used in the Merman case, possibly it was not applied as the floor levels excavated in the Merman case did not use the same characteristics. This may also be further explained with the first point of the Merman conclusion noting that the case at [138] was not to be used as a precedence.

⁴ Referenced from Lexology October 10, 2021.

Extract from; Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC1582 [138]

“The granting of consent to the proposal does not create a planning precedent, because the characteristics of the site and the merits of the proposal are unique.”

From [145]

(2) The appeal is upheld.

(3) Development Application No. 325/2020/1 for the demolition of all the existing structures, removal of existing vegetation, excavation to accommodate two levels of basement parking and construction of a three and four storey residential flat building comprising four apartments, a plunge pool for one apartment and associated landscaping, is approved, subject to the conditions of consent at Annexure A.

The preceding information and the following environmental planning grounds justify contravening the development standard. Furthermore, that also add the following.

- The proposal provides a more environmentally friendly dwelling.
- The proposal utilizes existing services.
- The proposal provides private open space and landscaping.
- The proposal provides onsite parking.
- The proposal provides improved housing in a low-density environment.

The variation to the maximum building height requirements is, in our opinion, acceptable and there are appropriate planning grounds in support of the non-compliance.

As noted above, strict compliance with the building height is unreasonable as the proposed works are of a moderate nature and have been designed to limit the environmental planning impacts of the development through the use of the existing floor areas to create the new space that vastly improves the amenity of the dwelling.

Clause 4.6 allows for strict compliance with the development standard to be varied if unreasonable or unnecessary in the circumstance of the case. *Wehbe v Pittwater Council* [2007] NSW LEC 827 expressed that there are five different methods in which a variation of the development standard may be considered unreasonable or unnecessary. Only one of the five methods is sufficient to demonstrate that adherence is unnecessary or unreasonable (Ref *Wehbe v Pittwater*).

As detailed within section 2.7 of this clause 4.6, the development utilizes the existing areas of the dwelling. This is far more cost-effective in terms of construction as it uses the existing structural walls below to connect to the existing structure and provides for a more environmentally effective dwelling. As increased shading is provided to the dwelling, specifically to the eaves that protect the wall facades and glazed components of the structure.

Furthermore, and most importantly, the proposed development provides for increased amenity and greatly improved housing development in this environmental living area in keeping with the locality and the objectives of the environmental living controls.

The nature of the proposed works is of little significance to the bulk and scale of the dwelling, with the proposed works providing for the increased articulation of the existing dwelling. These works have minimal impact on the surrounding neighbours with minimal effect on view lines, access to outdoor visual volume, and shadow lines.

As detailed above, the objective of the standards is achieved throughout the development, despite not strictly achieving compliance with the height requirements. Therefore, in this circumstance, the standards are unreasonable and unnecessary with the variation to the maximum building height requirements, in our opinion, acceptable, noting that there are appropriate planning grounds as detailed above in support of the noncompliance.

CONCLUSION

2.12 Summary

The resulting development has been designed to enhance the existing residential building by improving the amenity for the residents while maintaining, where possible, the conditions set out by Pittwater Local Environment Plan 2014. The proposed works included in this report are, in our opinion, reasonable in relation to the existing built works, & do not adversely impact the surrounding properties, whilst justifying the environmental planning grounds for Northern Beaches Council. We consider that

when applying both the of *Bettar v Council of City of Sydney* [2014] NSWLEC 1070 and the *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC1582 [138], the proposal will impose generally comply and will have minimal impact, improves the streetscape and character of the neighbourhood and request that council support the Clause 4.6 Variation of the Development Application.