



*request to vary
a development standard*



REQUEST TO VARY A DEVELOPMENT STANDARD

15 THE CHASE

LOVETT BAY NSW 2105

October 2022

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introduction

This request to vary a development standard is made by Northern Beaches Planning on behalf of Barbara Messerle & Edward Curry-Hyde in relation to a development application for alterations and additions to the existing dwelling at 15 The Chase, Lovett Bay. This request is made pursuant to clause 4.6 of Pittwater Local Environmental Plan (**PLEP 2014**) and with regard to relevant case law.

standard to be varied

The foreshore building line bisects the site at a distance of approximately 15m from the MHWL, as shown on the Foreshore Building Line Map of PLEP 2014.

Clause 7.8(2) of PLEP 2014 states that development consent must not be granted for development on land within the foreshore area (being the land between the foreshore building line and the mean high water mark) except for the following purposes:

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

The foreshore area control is a fixed standard relating to the siting of buildings on a site, consistent with the definition of a development standard, as defined by the EP&A Act. As such, the provisions of clause 4.6 of PLEP 2014 can be applied.

Pursuant to clause 4.6(2) of PLEP 2014, consent may be granted for development even though the proposal contravenes a development standard prescribed by an environmental planning instrument. Whilst this clause does not apply to those standards expressly excluded from this clause, the foreshore building line development standard of clause 7.8 of PLEP 2014 is not expressly excluded and thus, the provisions of clause 4.6 can be applied in this instance.

extent of the proposed breach

The proposed development, specifically the new decking at both the ground level and the basement/subfloor level, extends further forward into the foreshore area by a maximum distance of 3.4m compared to the location of the existing dwelling. An inclinor is also proposed partially within the foreshore area. The proposed development will result in an additional 40m² of non-excluded structures within the foreshore area.

[illegible]

Based on the Foreshore Building Line Map of PLEP 2014, the foreshore area of the subject site is approximately 528m². As such, the extent of the proposed variation is 7.6%.

Pursuant to clause 4.6(4) of PLEP 2014, consent can only be granted if the consent authority is satisfied that the applicant's written request to vary the development standard has addressed the criteria of clause 4.6(3) of PLEP 2014. Clause 4.6(3)(a) of PLEP 2014 requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

In accordance with the decision of the NSW LEC in the matter of *Wehbe v Pittwater Council* [2007] NSWLEC 827, one way in which strict compliance with a development standard may be found to be unreasonable or unnecessary is if it can be demonstrated that the objectives of the standard are achieved, despite non-compliance with the development standard.

The proposed development is consistent with the objectives of the foreshore building line development standard, as prescribed by clause 7.8(1) of PLEP 2014, as follows:

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,*

Comment: The proposed works within the foreshore area the subject of this request is limited to decking immediately adjacent to the existing dwelling and the proposed inclinor. Sufficient spatial separation is maintained between the proposed new structures and the waterway, to ensure that the natural amenity of the foreshore area is not adversely affected.

The works are elevated above existing ground level, well above the Estuarine Planning Level, ensuring that there will be no impact upon tidal processes and wave action. Further, the works have been reviewed with respect to the geotechnical hazard that affects the foreshore area, with certification that the works can be undertaken to avoid unacceptable risk to the foreshore.

The decking and inclinor are to be constructed with pier and post construction, ensuring that site disturbance is minimised and tree retention is maximised, and as outlined in the accompanying Arborist Report, the inclinor does not result in removal or adverse impacts to existing canopy trees. The timber structure of the deck also ensures that water infiltration is maximised.

The proposed materiality also ensures that the structures blend with the surrounding vegetation, which also remains largely unaffected as a consequence of the proposed construction methodology. The proposed decking is maintained within the width of the existing dwelling, and when viewed from the waterway, will not appear as obvious additional structures, and will be screened by foreshore vegetation. The screening provided by the foreshore vegetation that is to be retained is highlighted in Figure 2.

The consent authority can be satisfied that the proposed development within the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area.



Figure 2 – Existing view of the subject site from jetty

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

Comment: The works are maintained wholly within private property and do not impact upon public access along the foreshore. The works are set back from the waters edge and are elevated well above the natural tidal zone and the levelled foreshore area of the subject site.

The proposed inclinor will enhance access between the elevated dwelling and the foreshore, noting that access from the waterway is the primary point of access to this offshore property.

As such, strict compliance with the foreshore building line development standard is unreasonable and unnecessary in the circumstances of this case.

sufficient environmental planning grounds

Clause 4.6(3)(b) of PLEP 2014 requires the applicant to demonstrate that there are sufficient environmental planning grounds to justify contravention of the standard. The specific environmental planning grounds to justify the proposed contravention of the height standard are as follows:

1. Topography

The subject site is extremely steep, with a gradient of approximately 44% beneath the footprint of the dwelling. The decks at the basement/subfloor level are reasonably minimised and simply serve to provide pedestrian access around the footprint of the existing dwelling. If not for the slope of the land, such pathways would be provided at-grade and would not be subject to the limitations of the foreshore building line development standard.

The extension of the decks at the existing ground floor level simply seek to “square up” the existing angled deck area, to provide an ease of access along the frontage of the dwelling, and to provide more usable space immediately adjacent to the primary living areas of the dwelling. The provision of more usable space adjacent to the dwelling is entirely consistent with the provisions of clause C1.7 (Private Open Space) of P21 DCP, which prescribes that dwellings are to be designed so that private open space is directly accessible from living areas enabling it to function as an extension of internal living areas. The proposed decks reach a maximum depth of 2.3m, generally consistent with the 2.4m dimension identified as being of “sufficient” depth to achieve the usability requirement of this clause.

The topography of the land also serves as sufficient justification for the proposed inclinator. The approach to the site is particularly steep and access from the waterway serves as the primary point of access to the subject dwelling.

2. Characterisation of development

The proposed development is appropriately characterised as alterations and additions to the existing dwelling, with only minor works proposed beyond the footprint of the existing dwelling. The proposed works will significantly improve the amenity of the existing dwelling, with little to no impact upon the surrounding natural environment or the amenity of neighbouring properties.

The proposed development is a genuine claim for alterations and additions to the existing dwelling and the proposed non-compliance with the foreshore building line can be equally attributed with the need to work around the footprint of the existing dwelling and the significant slope of the land.

3. Minor nature of breach

The extent of the breach associated with the decks is limited to 6.25% of the foreshore area. The non-compliant elements of the decking do not give rise to any unreasonable impacts upon the amenity of adjoining sites or the wider public domain. The non-compliance will not be readily perceived from the waterway, with sufficient spatial separation and landscaping retained and enhanced forward/seaward of the dwelling house, within the foreshore area.

The extent of the breach associated with the inclinor is limited to 1.35% of the foreshore area. An inclinor connecting dwellings to the waterway is almost characteristic of the off-shore locality, particularly in circumstances where the waterway is the primary point of access to the site.

Despite the suggestion in Council's correspondence that the proposed inclinor directly results in the removal of existing canopy trees, it is confirmed that all trees within the vicinity of the proposed inclinor are to be retained, as outlined in the accompanying Arborist Report by Australis Tree Management.

Allowing for the development to appropriately respond to the Applicant's circumstances and the individual context of the site, including the siting & levels of the existing dwelling and the steep terrain of the site, promotes good design and amenity of the built environment, and the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants, consistent with objects (g) and (h) of the EP&A Act.

Furthermore, allowing for a variation to the foreshore building line that arises as a result of the need/desire to more readily comply with the provisions of Council's DCP promotes the orderly and economic development of the land, consistent with object (c) of the EP&A Act.

Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [202] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

Overall, there are sufficient environmental planning grounds to justify contravention of the foreshore building line development standard in this particular instance.

public interest

Under the provisions of clause 4.6(4)(a) of PLEP 2014, consent must not be granted to a proposal that contravenes a development standard unless the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone in which the development is to be carried out.

As identified above, the proposed development is consistent with the objectives of the foreshore building line development standard. Furthermore, the proposal is consistent with the objectives of the C3 Environmental Management, as follows:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*

Comment: The resultant development appropriately preserves the natural amenity of the site to a degree that is commensurate with surrounding properties and noting that residential development is permitted on the land. The application is supported by a detailed Landscape Plan demonstrating the enhancement of native landscaping to preserve both the ecological and aesthetic values of the land.

- *To provide for a limited range of development that does not have an adverse effect on those values.*

Comment: The proposed alterations and additions to the existing dwelling house will not result in any adverse impacts to the ecological or aesthetic values of the land and are permitted with consent within the C3 zone. The majority of the existing foreshore vegetation is to be retained, and the proposed works will not be readily visible from the waterway (noting the screening that existing foreshore vegetation provides, as shown in Figure 2).

- *To provide for residential development of a low density and scale, integrated with the landform and landscape and not visually prominent.*

Comment: The proposed works are largely maintained within the existing footprint/volume of the existing dwelling. The resultant development is well articulated and is to be finished in natural colours and finishes to ensure the dwelling is secondary to surrounding landscaping. The works are to be constructed on piers and posts, in order to minimise site disturbance and impacts to vegetation. The works are stepped to follow the slope of the land and will be screened by landscaping within the foreshore area.

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

Comment: The proposed development has a “light-touch” on the site, which minimises impacts upon existing vegetation whilst also providing maximum water infiltration and deep soil areas for landscaping. Whilst the site is already well vegetated, the proposed development is supported by a Landscape Plan, which further enhances landscaping across the site, particularly within the foreshore area.

- *To ensure the continued viability of ecological communities and threatened species.*

Comment: The proposed development does not result in any adverse impacts upon ecological communities or threatened species. The proposed Landscape Plan demonstrates the enhancement of vegetation comprising species that are appropriate given the qualities of the site.


Council can be satisfied that the proposal is in the public’s interest, in so far as it is consistent with both the objectives of the zone and the objectives of the foreshore building line.

concurrence

Pursuant to clause 4.6(4) of PLEP 2014, development consent must not be granted to a development that contravenes a development standard unless the concurrence of the Secretary has been obtained. In accordance with the *Variations to Development Standards* Planning Circular issued by the Department of Planning, Industry and Investment on 5 May 2020, the Secretary's concurrence may be assumed as the proposed variation involves a numerical standard, and the extent of variation is less than 10%.

conclusion

Overall, the consent authority can be satisfied that this written request has adequately addressed all relevant matters and that the provisions of clause 4.6 of PLEP 2014 have been met. As such, there is no jurisdictional impediment to the granting of consent in relation to the proposed breach of the foreshore building line development standard.



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