



# BLACKWATTLE PLANNING

Clause 4.6 Request for variation  
PITTWATER LEP 2014

LIMITED DEVELOPMENT ON  
FORESHORE AREA  
for construction of alterations and  
additions to a dwelling at

**40 Paradise Avenue  
Avalon Beach**

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## 1.0 Introduction

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This Clause 4.6 Request for Variation to the Limited Development on Foreshore Area development standard under Pittwater Local Environmental Plan 2014 (PLEP 2014) is prepared by Blackwattle Planning in support of a Development Application for alterations and additions to a dwelling at 40 Paradise Avenue Avalon Beach submitted to Northern Beaches Council.

The Development Application includes the following components:

### Site

- Demolition of existing garage, driveway, existing deck areas, and existing studio
- No works are proposed to the existing waterfront structures on the site

### Lower Ground Floor

- Construct new driveway leading to double garage, laundry, and existing bedrooms
- Construct new west facing decks with stair access to rear yard
- Construct new stair access to foreshore area on southern side of site
- Construct new stairs/pedestrian ramp from front yards to street level

### Ground Floor

- Construct new living, dining, kitchen over garage
- Construct new main entrance linking living dining with existing floor space to be retained and utilised as lounge area
- Construct new master bedroom walk in robe and ensuite
- New west facing decks between northern and southern wings of the dwelling.
- Construct new home office in place of existing studio in generally the same location

A small portion of the eave and awning on the western elevation of the new northern pavillion is proposed to extend into the foreshore area of the site.

This document demonstrates that compliance with the Limited Development on Foreshore Area Development Standard of PLEP 2014 is unreasonable and unnecessary in the circumstances of this case and that there are sufficient environmental planning grounds to justify the contravention of the development standard.

## 2.0 Pittwater LEP 2014

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No. 40 Paradise Avenue Avalon Beach (the site) falls within the area to which PLEP 2014 applies. The site has water frontage to the Pittwater waterway at its western boundary and contains an existing dwelling over two levels adjacent to Paradise Avenue. The site is known legally as Lot 132 in DP 1010865, and has an area of approximately 1076sqm.

Access to the site is via a driveway at the northern boundary which traverses the neighbouring allotment, Lot 2 DP 635433 known as 40B Paradise Avenue (owned by Northern Beaches Council).

The site is steep, and cut in along the front boundary to allow for appropriate levels for access and building. The western boundary of the site is formed by the mean high water mark of the Pittwater waterway. The land between the dwelling and the waterway is steep and populated quite densely with canopy trees, including spotted gums.

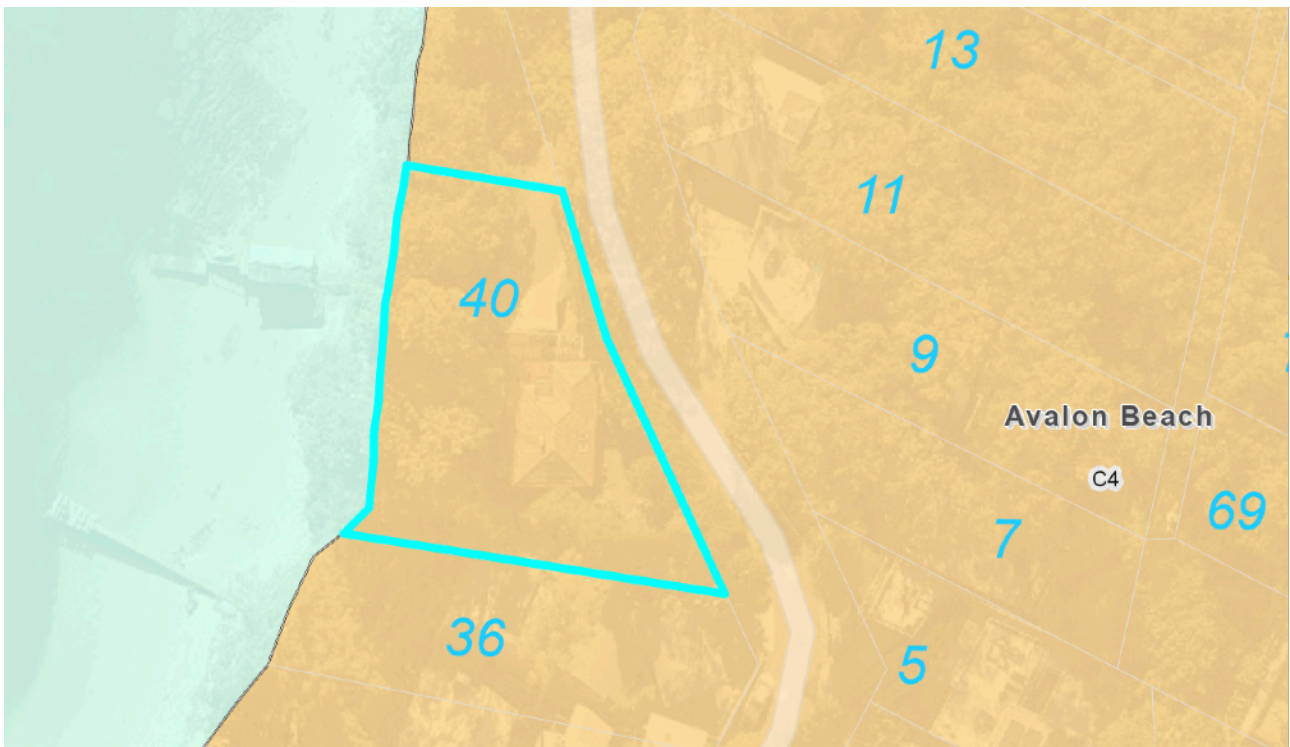
Under **Clause 2.2** of PLEP 2014, the site is zoned C4 Environmental Living as shown in Figure 1 below. The proposal to construct additions to the existing dwelling is permissible with consent in the C4 Zone.



**Figure 1:** The site outlined blue indicating zone C4 Environmental Living,  
**Source:** Northern Beaches Online Mapping

**Clause 7.8** of PLEP 2014 restricts development on the site in the foreshore area in accordance with the Land below the Foreshore Building Line Map (at Figure 2 below). Clause 7.8 is a development standard.





**Figure 2:** The site (outlined blue), with the Land below the Foreshore Building Line in pink  
**Source:** Northern Beaches Online Mapping

**Clause 4.6** of PLEP 2014 enables the consent authority to grant consent to development even though the development does not comply with a development standard. The purpose of the Clause is to allow flexibility in the application of certain development standards which may in turn result in better outcomes.

### 3.0 Variation to Clause 7.8 Limited Development on Foreshore Area

This written request seeks to justify the variation to Clause 7.8 Limited Development on Foreshore Area development standard in PLEP 2014.

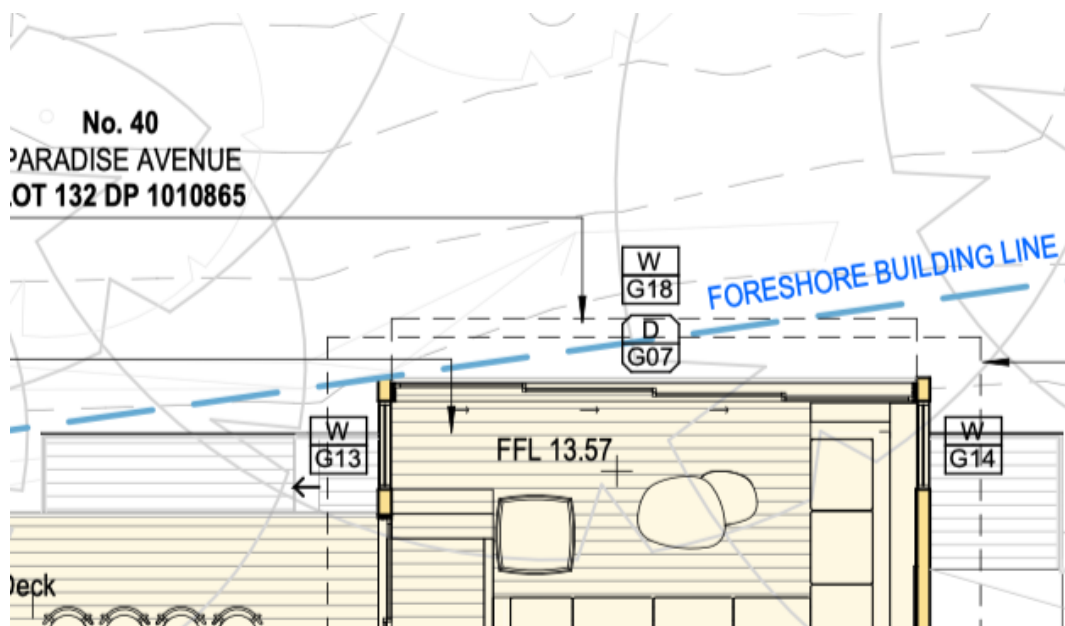
PLEP 2014 defines the foreshore area as follows:

**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](#).

The foreshore building line (FBL) traverses the western portion of the site, at the lower levels. The land below the foreshore building line accommodates waterfront access stairs and pathways which are proposed to be retained where possible, or partly replaced with a timber boardwalk where necessary to ensure safe access. All works will maintain the footprint of the existing stairs and pathways. Some existing retaining walls in the foreshore area will be repaired or reinstated with the same footprint as existing.

The existing dwelling and driveway are located outside of the foreshore area. The proposed additions are also entirely behind the foreshore building line, except for a very minor portion of the new eave and awning extending to a negligible degree beyond the foreshore building line.

The minor extent of the projection into the foreshore area is shown in the plan view below:



**Figure 3:** Structure of the proposed addition is compliant with the foreshore building line. A small portion of the eave and awning below projects into the foreshore area. **Source:** Tanner Kibble Denton Architects

Clause 7.8 of PLEP 2014 requires the following:

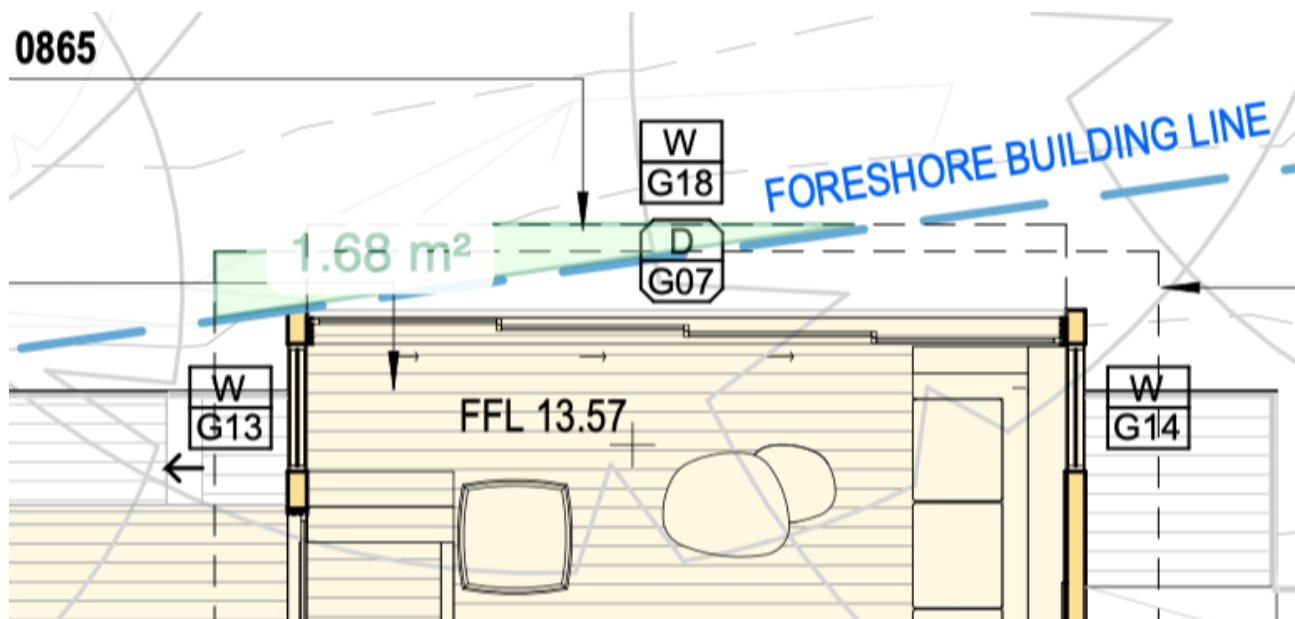
- (2) *Development consent must not be granted for development on land in the foreshore area except for the following purposes—*
  - (a) *the extension, alteration or rebuilding of an existing building wholly or partly in the foreshore area, but only if the development will not result in the footprint 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).*

In relation to structures within the foreshore are, the maintenance and renewal works to the stairs and pathways in the foreshore area are permitted in the foreshore area in accordance with subclause (b) above, as they are defined as *waterway access stairs* and *walking trails*. Even so, new work to the stairs and pathways will maintain the existing footprint of these structures.

Retaining walls within the foreshore area are to be rebuilt where necessary, maintaining their existing footprint and thereby complying with subclause 2(a) of Clause 7.8.

The proposed variation to Clause 7.8 involves the projection of part of the proposed eave and awning of the northern pavillion over the foreshore building line. As the existing dwelling is entirely behind the FBL, the proposed extension of eave and awning does not comply with Clause 7.8(2)(a).

The maximum projection of the new structure (the awning) seaward of the FBL is 630mm. The total area of the structure seaward of the FBL is 1.68sqm, as shown in the below plan excerpt:



**Figure 4:** Plan showing very minor (1.68sqm) projection of structure into the Foreshore Area **Source:** Tanner Kibble Denton. **Annotation:** Blackwattle Planning

As the total area of the *foreshore area* is 366sqm, the extent of works projecting into the foreshore area, and therefore the magnitude of the variation sought, is 0.46% of the development standard.

## 4.0 Clause 4.6 Exceptions to Development standards

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The objectives of Clause 4.6 are set out in subclause (1) 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.*

Decisions of the NSW Land and Environment Court have established that Clause 4.6(1) is not an operational clause.

Clause 4.6(2) is the enabling clause that permits development consent to be granted to a development that contravenes a development standard imposed by PLEP 2014. As the Limited Development on Foreshore Area is a development standard and is not expressly excluded from the operation of the clause, a variation may be granted, subject to the remaining subclauses of Clause 4.6 being satisfied.

4.1 Clause 4.6(3) of PLEP 2014 provides 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 circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

This written request addresses these requirements in turn, having regard for relevant key decisions of the NSW Land and Environment Court that have informed the approach to the application of Clause 4.6

### 4.2 **Clause 4.6(3)(a) demonstrating that *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case***

The decision in *Wehbe v Pittwater Council 2007* establishes five ways that an applicant may commonly demonstrate that this clause is achieved. The decision also establishes that it may be sufficient to establish only one way.

The first of those pathways is to demonstrate that *the objectives of the development standard are achieved notwithstanding non-compliance with the standard*. This request relies on this pathway.



The objectives of the Limited Development on Foreshore Area development standard are set out below, together with a discussion of how the objectives are met by the proposal, notwithstanding the variation to the standard.

4.2.1 (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,*

**Comment:** The eave and awning that project into the foreshore area have a horizontal distance of 7.82m from MHWM. The land is very strip in the foreshore area, rising over 7m from the boundary to the ground level underneath the eave and awning ie, having a gradient of nearly 1:1. The horizontal and vertical distance of the breaching elements from the waterway ensure that there will be no adverse impacts on foreshore processes.

Additionally, the breaches occur above ground level such that the structure of the additions at ground level are entirely compliant. No site disturbance occurs because of the breaching elements. As the primary facade and deck areas of the addition are entirely compliant, the location of the eave and awning will be read as compliant as a result. Additionally, the eave and awning as viewed from the beach and waterway will be partially obscured by vegetation and canopy.



**Figure 5:** Vegetation will obscure the new additions as viewed from the foreshore area

**Source:** Blackwattle Planning

Finally, we believe there will be no impact upon the significance or amenity of the foreshore area as a result of the structure forward of the FBL because the very minor projection of 630mm will not readily be perceived when viewed from Paradise Beach, the waterway, or the foreshore area itself. No adverse impact to the significance or amenity of the foreshore area will arise as a result.

4.2.2 (b) *to ensure continuous public access along the foreshore area and to the waterway.*

**Comment:** The existing public access along the foreshore and to the waterway is entirely unaffected and unchanged by the proposed negligible variation.

#### 4.2.3

In addition to the stated objectives of the Development Standard, Clause 7.8 contains other provisions which must be met in order for Council to grant consent. These provisions are responded to below:

(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*

An assessment of the development against the objectives of the C4 Zone is provided further in this document.

(b) *the appearance of any proposed structure, from both the waterway and adjacent foreshore areas, will be compatible with the surrounding area, and*

**Comment:** The proposed additions will be compatible with and contribute positively to the character of the area by restricting its footprint largely to that of the existing dwelling and driveway and by offering a design that integrates well with the form and design of the original cottage.

Greater modulation of the western elevation, including the recessing of structure behind open deck areas and utilising shading components provides visual interest without substantial bulk or scale. The new roof form remains low and below the level of the existing roof ensuring that the scale of the dwelling remains below the substantial canopy surrounding it.

(c) *the development will not cause environmental harm such as—*

(i) *pollution or siltation of the waterway, or*

**Comment:** Appropriate pollution and sedimentation controls will be employed during construction, and the residential use of the site is such that no ongoing pollution or siltation of the waterway is anticipated.

(ii) *an adverse effect on surrounding uses, marine habitat, wetland areas, fauna and flora habitats, or*

**Comment:** The intertidal area below mean high water mark will not be impacted by the proposed development. The very minor structures do not result in any site disturbance

ensuring no adverse impacts upon the use of the waterway, the marine habitat, or adjoining residential properties is anticipated.

*(iii) an adverse effect on drainage patterns, or*

**Comment:** No impact is anticipated as a result of the proposed works upon the drainage or disposal of stormwater on the site. A stormwater management plan in accordance with Council's policy is proposed.

*(iv) the removal or disturbance of remnant riparian vegetation, and*

**Comment:** No removal of or adverse impact upon riparian vegetation is proposed. Under the guidance of an arborist, locally native canopy trees can be safely retained and protected during construction.

*(d) the development will not cause congestion or generate conflict between people using open space areas or the waterway, and*

**Comment:** No increase in intensity of use is proposed, and the waterfront property will remain occupied by a single dwelling. No conflict with the users of the waterway is anticipated or nearby open space areas.

*(e) opportunities to provide continuous public access along the foreshore and to the waterway will not be compromised, and*

**Comment:** The proposed eave and awning extending into the foreshore area do not occur at ground level and are substantially removed from areas of public access and the waterway. In general terms, the proposed development ensures that access is retained to the foreshore on the site and that such access is not compromised should circumstances on adjoining sites change in the future.

*(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*

**Comment:** The natural and aesthetic significance of the land and waterway will be maintained. The landform itself will not be disturbed by the structures breaching the FBL.

*(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*

**Comment:** The existing cottage does not currently extend beyond the FBL. This clause therefore does not strictly apply to the breaching elements of eave and awning. To the extent that the rebuilding of retaining walls in the foreshore area are considered part of the dwelling, we note that the minor reconstruction of existing retaining walls is appropriate and encouraged to ensure the ongoing stability of the steep land within the foreshore area. Additional locally native plantings are proposed which will improve the amenity and aesthetic appearance of the foreshore area.



- (h) sea level rise, coastal erosion and recession, or change of flooding patterns as a result of climate change, have been considered.*

**Comment:** The location of the existing dwelling and proposed additions is well above the level of Pittwater waterway. The horizontal and vertical distance from the waterway is such that the consequences of climate change by way of sea level rise, coastal erosion, or overland flow will not impact the development or create impacts on the land.

- (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,*

**Comment:** The proposal encourages public access to and along the foreshore by setting back substantially from the mean high water mark. No change to foreshore access will arise as a result.

- (b) public access to link with existing or proposed open space,*

**Comment:** The elements breaching the FBL will have no impact upon public access to link with existing open space areas.

- (c) public access to be secured by appropriate covenants, agreements or other instruments registered on the title to land,*

**Comment:** The site is not publicly accessible, however the land below mean high water mark is physically accessible by the public and no legal instruments are required for this to be maintained.

- (d) public access to be located above mean high water mark,*

**Comment:** The proposed development permits physical access above mean high water mark, although it is noted that the land above mean high water mark is privately held and as is the case for the majority of waterfront land, public access is not a legal right under the current title.

- (e) the reinforcing of the foreshore character and respect for existing environmental conditions.*

**Comment:** The character of the foreshore area will be maintained as a predominantly open intertidal area, with structures that are essential to the use of the waterfront land including in association with the existing boatshed. It is highly unlikely that the negligible 630mm extension of the eave and awning will be noticeable or perceived and the foreshore character and environmental conditions will remain unchanged.

#### 4.2.7 Conclusion under Clause 4.6 (3)(a)

Having regard to the consistency of the proposed development with the objectives of the Limited Development on Foreshore Area development standard, compliance with the standard is found to be unreasonable and unnecessary in the circumstances.

#### 4.3 **Clause 4.6(3)(b) demonstrating that *there are sufficient environmental planning grounds to justify contravening the standard***

Clause 4.6(3)(b) requires that *sufficient environmental planning grounds* be demonstrated to justify contravening the development standard. As established in relevant caselaw, the sufficient grounds must relate to the circumstances of the proposed development and focus on the relevant aspect of the development that contravenes the standard.

In this case, that part of the proposal which exceeds the development standard is a very small portion of the eave and awning of the proposed northern pavillion. The environmental planning grounds that justify the exceedance of the development standard are as follows:

##### **Absence of impact**

- The very minor extension of eave and awning, notwithstanding that they maintain a breach of the foreshore area, will have no impact on the privacy and visual amenity of neighbours, or on the visual amenity as viewed from the public domain of the beach waterway. No excavation is proposed within the foreshore area and the vertical and horizontal distance to the waterway is such that the small breach will be indiscernible.
- The minor projection will not result in additional shadows upon neighbours, and the site itself will enjoy high levels of sunlight and amenity as a result of the proposed roof design.

##### **Negligible extent of breach**

The extent of the breach associated with the proposed eave and awning is very minor and is limited to a projection of 630mm, or an area of 1.68sqm. When compared to the area calculation of the foreshore area itself, the area incursion represents only 0.46% of the development standard. Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council [2021] NSWLEC 1075*, the negligible magnitude of the breach together with the absence of impact as outlined above, is appropriately considered sufficient environmental planning grounds for the purposes of Clause 4.6.

At paragraph 38 of that decision, Commissioner Walsh found that:

*“The fact of the particularly small departure from the actual numerical standard and lack of any material impacts consequential of the departure are sufficient environmental planning grounds to justify contravening the development standard.”*



We note that the magnitude of the breach of the relevant development standard in the above matter was up to 6.5%, which is substantially greater than that proposed under this application.

### **Constraints of the site**

The site is heavily constrained by the following:

- The location of the FBL running through the central portion of the site resulting in a substantially reduced area available for development; and,
- In combination with the above, the shape and width of the site which results in a greater proportion of the land falling within the foreshore area than many other waterfront sites which are generally narrow and running an east west alignment;
- The burden of a 3m wide drainage easement adjoining the southern boundary of the site, which provides a further reduction in developable area on the site; and,
- A substantial stand of spotted gum (*Corymbia Maculata*) species and other vegetation forming the plant community known as the Pittwater Spotted Gum Forest which is an endangered ecological community, is located on the site both within and beyond the foreshore area. The design has successfully avoided any impacts upon these canopy trees and community and restricted its footprint to generally within the existing developed area.
- The overall steep topography (up to 45% slope under the footprint), both from the existing dwelling to the waterway, and between the street and the dwelling. Minimising excavation on the steep land restricts the footprint.

The above factors have precluded development on much of the site that would otherwise be available for building. The design has also sought a sustainable approach by utilising as much as possible the existing dwelling, rather than proposing demolition. Working with the existing structure has also limited the extent to which the resultant design has been able to achieve strict compliance.

Notwithstanding the above, the proposed design is highly compliance and results in only a very negligible breach which bears no material impact on the environment, the foreshore, or the adjoining and nearby community.

#### **4.3.2 Conclusion under Clause 4.6(3)(b)**

We believe the above environmental planning grounds are sufficient to justify the exceedance of the Limited Development on Foreshore Area development standard in these specific circumstances.

#### 4.4 **Clause 4.6(4)(a)(i) The written request *adequately addresses the matters required to be demonstrated by subclause (3)***

This written request comprehensively addresses the matters required to be demonstrated by subclause (3).

#### 4.5 **Consistency with objectives of the C4 Environmental Living Zone**

The objectives of this zone and the manner in which the objectives are achieved by the proposed development are as follows:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values; and,*
- *To ensure that residential development does not have an adverse effect on those values.*

**Comment:** The site has significant aesthetic value in the visual catchment of Pittwater waterway and the waterfront location. The development maintains a predominantly open foreshore area, dominated by the canopy trees and appropriate and permissible waterfront structures. The improved design of the dwelling contributes positively to these values and extends the life of a low impact development and provides improved access to the foreshore area and its ecological and aesthetic values.

The proposal provides for additional floor space whilst minimising environmental impacts upon the land. The modest design retains valued view lines for neighbours and the public. The additions are sited in an already disturbed area and within a bushland context with a focus on retention of substantial existing native canopy. The proposal will not have adverse impacts upon the landscape context or the scenic qualities and view lines enjoyed by residents.

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

**Comment:** The design works as much as possible with the existing structure on the site and proposes minimal excavation and land disturbance whilst providing the necessary floor space for the dwelling. The scale of the dwelling as viewed from the street, adjoining sites, and from the broader locality is modest as compared to the neighbouring dwelling at 36 Paradise Avenue and dwellings opposite the site, which sit higher and wider in the land and streetscape, and present substantially greater scale and bulk.

A landscape plan is provided demonstrating the integration achieved, with landscaping focusing on native plantings. Restricting new work largely to the existing dwelling and driveway footprint ensures that the substantial canopy on the site is retained as an integral part of the dwelling design and living experience.

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

**Comment:** The new pavillion occupies part of the existing dwelling footprint and driveway, extending a short distance down the site. The new works are approximately 8m from the western boundary adjoining the beach reserve. Native canopy is retained in this undeveloped area, except where of low retention value or exempt species.

**4.6 Clause 4.6(4) The consent authority must keep a record of its assessment carried out under subclause (3).**

Noted

**4.7 Clause 4.6(6) Development consent must not be granted under this clause for a subdivision of land in certain Zones.**

Not Applicable. No subdivision is proposed.

**4.8 Clause 4.6(8) Development consent must not be granted under this clause for development that would contravene any of the following—**

*(a) a development standard for complying development,*

No such development standards are contravened by the proposed 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,*

No such development standards are contravened by the proposed development

*(c) clause 5.4,*

The uses listed in Clause 5.4 are not proposed as part of this application.

*(caa) clause 5.5.*

The application does not propose the construction or use of a Secondary Dwelling.

## 5.0 Conclusion

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This document demonstrates that the required tests contained in Clause 4.6 have been met by the proposed development. In particular, that:

- Compliance with the Limited Development on Foreshore Area development standard is unreasonable and unnecessary in the circumstances of the case given that the objectives of Clause 7.8 Limited Development on Foreshore Area have been met; and,
- Sufficient environmental planning grounds have been demonstrated to justify the contravention of the development standard; and,

In these circumstances the consent authority can be satisfied that it is appropriate to apply the flexibility permitted under Clause 4.6 of PLEP 2014 to vary the Limited Development on Foreshore Area development standard of PLEP 2014 to the extent proposed.

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