

Clause 4.6 Exceptions to Development Standards – Foreshore Building Line 71 Wimbledon Avenue North Narrabeen

Clause 4.6 of the Pittwater Local Environmental Plan 2014 permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* being:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (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,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The aims and objectives of the Pittwater LEP 2014 Clause 4.6 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.

Commencing on 1 November 2023 Clause 4.6(3) and (4) of the PLEP 2014, state that development consent, that contravenes a development standard, must not be granted unless the consent authority is satisfied the applicant has demonstrated that:

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

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

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

1. Environmental Planning Instrument Details

1.1 What is the name of the environmental planning instrument that applies to the land?

Pittwater Local Environmental Plan 2014

1.2 What is the zoning of the land?

C4 – Environmental Living

1.3 What are the objectives of the zone?

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

1.4 What is the development standard being varied?

Cl 7.8 – Limited development on foreshore area

1.5 Under what clause is the development standard listed in the environmental planning instrument?

Cl. 7.8 of the Pittwater Local Environmental Plan 2014

1.6 What are the objectives of the development standard?

(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.*

1.7 What is the numeric value of the development standard in the environmental planning instrument?

The foreshore building line is not a numerical control. The mapped foreshore building line and proposed variation is illustrated on the plan extracts below.

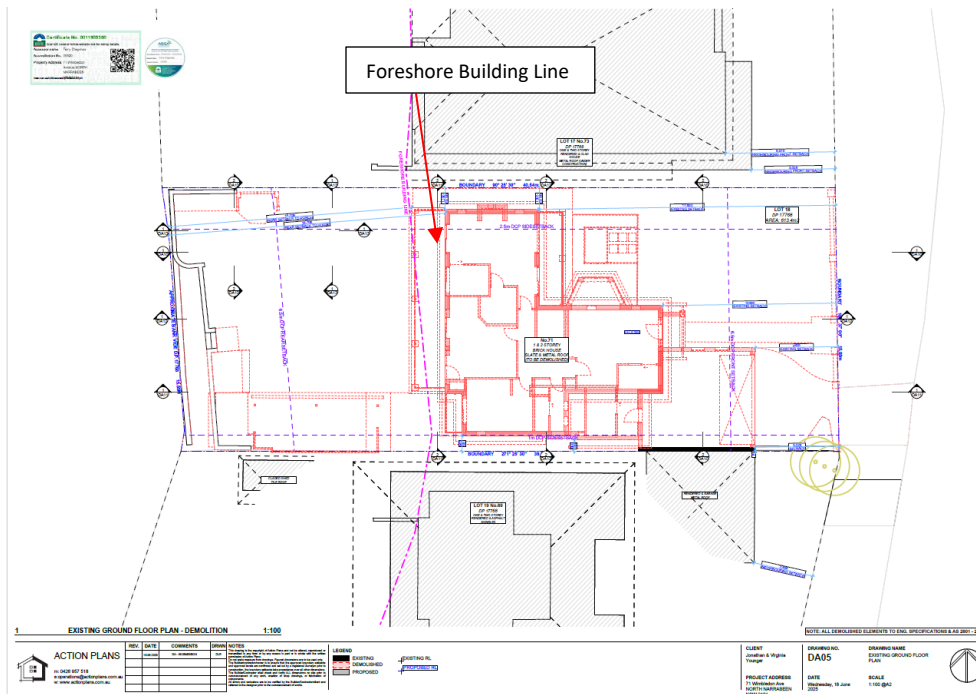


Figure 1: Plan Extract: Existing Dwelling (to be demolished), illustrating the existing encroachment of deck into the foreshore building line.

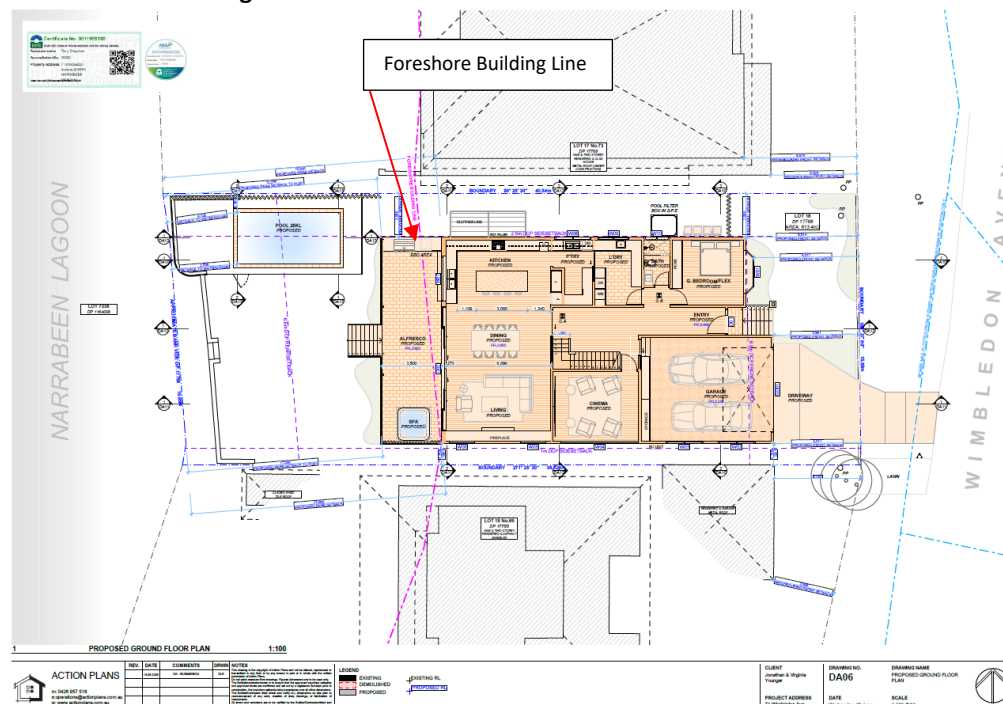


Figure 2: Plan Extract: Proposed Dwelling, illustrating the proposed encroachment of deck into the foreshore building line.

1.8 What is proposed numeric value of the development standard in your development application?

Only the deck sits forward of the foreshore building line.

1.9 What is the percentage variation (between your proposal and the environmental planning instrument)?

As there is no numeric standard, this can not be measured.

2. NSW Land and Environment Court Case Law

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

2.1 Wehbe v Pittwater [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe v Pittwater [2007] NSW LEC 827*, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*
- 2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*
- 3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*
- 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 (Fourth Way).*
- 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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).*

In the Micaul decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in *Wehbe*) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

2.2 Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential.

3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

4 Zhang v City of Ryde

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;
2. The consent authority must be satisfied that the proposed development will be consistent

with the objects of the standard which is not met; and

3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to *four2five*, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

5. Action Pty Ltd v Woollahra Municipal Council [2018]

In *Action Pty Ltd v Woollahra Municipal Council*, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.

3. Consideration

The following section addresses the provisions of clause 4.6 of LEP 2014 together with principles established in the NSW Land and Environment Court Case Law outlined above.

Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered:

The five ways outlined in *Wehbe* include:

3.1 Five (5) Part Test - Wehbe v Pittwater

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*

The objectives of the standard are:

(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,

Comment

Consistent. The proposed dwelling on the site sits entirely behind the foreshore building line, with only the low level deck sitting within the area.

The proposed rear setback remains consistent with other dwellings and decks in the locality and all works are located entirely within the boundary of the existing residential lot. The development will have no impact on views, solar access or privacy between dwellings.

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

Comment

Consistent. The variation for the low level deck will not alter existing public access along the foreshore or to the waterway, as the works are located entirely within the boundary of the subject site. A minimum rear setback of 11.397 metres is proposed, retaining ample area for access to the foreshore and waterway beyond.

In addition, the development meets the additional controls set out in clause 7.8, as discussed below:

(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,

The proposed development is for the demolition of the existing dwelling and the construction of a new dwelling house on the site. As described and illustrated above, the existing dwelling deck also encroaches beyond the foreshore building line and the new dwelling retain only a small encroachment for the low level deck.

In accordance with this clause, the development will only allow for a low level open area, remaining compliant with the LEP.

(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).

Not relevant, the abovementioned land uses are not proposed.

(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

The objectives of Zone C4 are:

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

The proposed development for the demolition of the existing dwelling and the construction of a new dwelling house, remains consistent with the objectives of the zone, as the existing single residential dwelling density will be retained.

As described above, the new dwelling is located on the already disturbed area of the site and will improve the existing non-compliant foreshore encroachment, by increasing the rear setback on the site. The proposal will have no significant impact on riparian and foreshore vegetation or wildlife corridors.

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

The proposed new dwelling on the site is architecturally designed and presents with a two storey scale from the street and the waterway. The dwelling is designed to present with an appropriate scale and character from the waterway and the foreshore area.

The foreshore area in this location is characterised by the encroachment of dwelling houses, decks and swimming pools into the foreshore area, as illustrated below. As the new dwelling is consistent with the existing non-compliance with only the decking sitting within the foreshore area, and is considered consistent and compatible with the surrounding area.



Figure 3: Extract from the Northern beaches mapping Foreshore Building Line Map immediately adjacent.

(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*

The new dwelling is located on the already disturbed area of the site. The proposal will not cause environmental harm as no vegetation removal is proposed and stormwater will be managed in accordance with Councils controls.

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

The dwelling will not result in congestion or generate conflict between people using open space or the waterway.

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

The proposed development will not alter existing public access along the foreshore or to the waterway.

(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

There will be no impact as the site is not identified to contain the abovementioned features.

(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

The appearance of the proposed alterations and additions from both the waterway and foreshore area is of a scale consistent with the existing dwelling and other dwellings in the locality. The new dwelling with the low level deck is consistent with similar structures on surrounding properties in this location.

As described above, the development proposes the demolition of the existing dwelling and the construction of a new dwelling house on the site.

The dwelling is designed to present appropriately from the waterway and the foreshore area. The foreshore in this location is characterised by the encroachment of dwelling houses, decks and swimming pools into the mapped area, as illustrated above. As the proposed new dwelling improves the existing non-compliance and increases the rear setback, it is considered consistent and compatible with the surrounding area.

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

There will be no impact.

(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.

The proposed development will not alter existing public access along the foreshore or to the waterway. The new dwelling design and location is consistent with the character of the foreshore in this location and respectful of environmental conditions.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*

This exception to development standards request does not rely on this reason.

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*

This exception to development standards request does not rely on this reason.

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 (Fourth Way).*

This exception to development standards request does not rely on this reason.

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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).*

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the foreshore building line pursuant to the First Way outlined in Wehbe.

Thus, it is considered that compliance with Clause 4.6(3)(a) is satisfied.

3.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient grounds to permit the variation of the development standard. The development has been considered below with particular reference to the Objects of the Environmental Planning and Assessment Act 1979, which are accepted as the best gauge of *environmental planning grounds*. In particular:

Context

- The existing dwelling encroaches beyond the foreshore building line and the new dwelling be sited similarly,
- The foreshore area in this location is characterised by the encroachment of dwelling houses, decks and swimming pools into the mapped area,
- The proposed rear setback of 11.397 metres remains consistent with the setbacks of other dwellings in the locality and allows for the retention of ample area for access to the foreshore and waterway,
- The vast majority of dwellings on the western side of Wimbledon Avenue site within the building foreshore line. The control could be considered abandoned in this instance given the degree of variation that exists. The development that is proposed by this application will be reasonable and comparable when considered against its surrounds, neighbours and the context of the immediate locality.
- As such, the varied foreshore building line is considered to be reasonable and is consistent with clause 1.3(c), (d) and (g).

Future Development

- The new dwelling proposes a structure that remains consistent with other dwellings in the locality. The new dwelling will not hinder future development on the site,
- The new dwelling demonstrates fulfillment of clause 1.3(a), (b), (c) and (g).

Consistent with Zone Objectives

- The extent of the variation is considered to be in the public interest, as the proposal remains consistent with the objectives of the zone, allowing for the replacement of the existing dwelling, with an improved structure.
- Compliance with the foreshore building line standard based on this would be unreasonable, with clause 1.3(c) demonstrated as fulfilled.

Natural Environment

- The natural environment is unaffected by the departure to the development standard and it would be unreasonable for the development to be refused on this basis with CI 1.3(b) satisfied.

Social and Economic Welfare

- The variation to the foreshore building line will have a positive social impact, as it will allow for the replacement of the aging dwelling house on the site, with a modern, aesthetically pleasing dwelling house,
- All services are existing, satisfying CI1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.

Appropriate Environmental Planning Outcome

- The works proposed will not result in an overdevelopment of the site and satisfies the objectives of the zone and the objectives of the development standard, as detailed within this report,
- The variation does not result in a dwelling with excessive bulk or scale,
- The development is comparable with neighbouring development and is consistent with the setback that has been adopted in this specific location being the western side of Wimbledon Avenue,
- The variation will have no unreasonable amenity impact on neighbours and the surrounds.

The sufficient environmental planning grounds stipulated above demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the foreshore building line variation.

Clause 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*

Will the proposed development be in the public interest?

It is considered that the construction of a new dwelling house on the subject site, does not raise any matters contrary to the public interest.

How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

(c) to promote the orderly and economic use and development of land,

(d) to promote the delivery and maintenance of affordable housing,

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

(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,

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

(j) to provide increased opportunity for community participation in environmental planning and assessment.

Strict compliance with the foreshore building line development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, promoting good design and amenity of the built environment and promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

Conclusion

The proposed development is for the demolition of the existing dwelling and the construction of a new dwelling house on land zoned C4 – Environmental Living.

As stated above, the development proposes a variation to the foreshore building line of 11.397 metres (for the decking) is consistent with the locality.

The variation does not result in any unreasonable impacts in regard to view loss, loss of privacy or increase in shadowing for neighbouring properties and will result in a rear setback consistent with other dwellings in the locality.

Strict compliance is considered to be unreasonable and unnecessary given that the proposed variation is consistent with the underlying objectives of the control despite the variation of which have been reasonably satisfied under the provisions of Clause 4.6.

The vast majority of dwellings along Wimbledon Avenue do not sit outside the foreshore building line and compliance with this development standard is an unreasonable requirement, that would harshly disadvantage the development opportunities for the site. The precedent is clearly set in this location, and the proposed development maintains and improves on what has long been considered by Council as appropriate setbacks on the western side of Wimbledon Avenue.

The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 7.8, and therefore the merits of the proposed variation are considered to be worthy of approval.