

Northern Beaches Council  
275 Pittwater Road,  
Dee Why NSW 2099

9<sup>th</sup> July 2025

## CLAUSE 4.6 – VARIATION for Clause 4.3 Maximum Height 14 Loquat Valley Road, Bayview

Lot 15 Sec B DP 30382

### Introduction

The variation statement has been prepared in accordance with Clause 4.6 of Pittwater Local Environment Plan (PLEP 2014) to accompany the development application for additions and alterations at 14 Loquat Valley Road, Bayview. It is requested that council support a variation with respect to compliance with the maximum height of a building development standard as described in Clause 4.3 of Pittwater Local Environment Plan (PLEP 2014).

### Background

PLEP Clause 4.3 of PLEP states that;

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

(2D) Despite subclause (2), development on land that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map may exceed a height of 8.5 metres, but not be more than 10.0 metres if—

- (a) the consent authority is satisfied that the portion of the building above the maximum height shown for that land on the Height of Buildings Map is minor, and
- (b) the objectives of this clause are achieved, and
- (c) the building footprint is situated on a slope that is in excess of 16.7 degrees (that is, 30%), and
- (d) the buildings are sited and designed to take into account the slope of the land to minimise the need for cut and fill by designs that allow the building to step down the slope.

**building height (or height of building) means—**

*(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*

*(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

For the site this is 8.5m as a maximum building height. The slope is 26%.

Pittwater Local Environment Plan 2014 contains a variation clause, Clause 4.6 that allows a departure from a development standard;

#### **PLEP 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) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

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

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

### **Environmental Planning and Assessment Act 1979 203**

Defines Development Standards as;

**development standards** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of—

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

(b) the proportion or percentage of the area of a site which a building or work may occupy,

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

(d) the cubic content or floor space of a building,

(e) the intensity or density of the use of any land, building or work,

(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,

(g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,

(h) the volume, nature and type of traffic generated by the development,

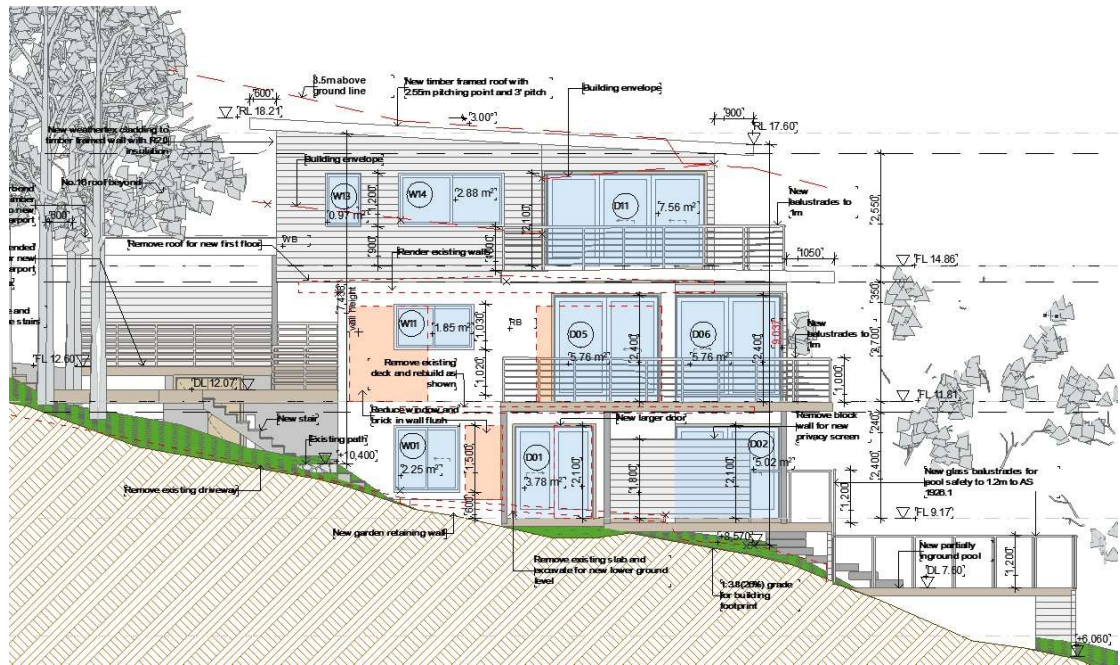
(i) road patterns,

### **Proposed Variation to Development Standard PLEP 2014, Clause 4.6**

As indicated in the elevations the height of the proposed dwelling is 9.037m measured from the existing lower ground level vertically to the top of the new roof. The steep topography of the site (26%) and the location of the existing home results in part of the new first floor exceeding the maximum 8.5m. Due to the highest point being 9.037m this equates to a numerical variation of 0.537m, or 6.3% requested.

The main factors driving this non-compliance are;

- The steep topography of the site(26%)
- The large number of existing canopy trees being retained
- Proposed consistent height with neighbouring dwellings, strengthening the streetscape



North East Elevation

### Underlying Objectives to Clause 4.6 Variation;

- a) *to provide an appropriate degree of flexibility in applying certain development standards to a particular development,*

In response the proposal seeks a 6.3% variation to the numerical height compliance of 8.5m for 9.037m, which is only for a small proportion of the roof area of the proposed development. The new roof and first floor is offset from the low side of the site and towards the middle of the site, sitting behind multiple decks and flat roof structures.

- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

In response the existing home is located in the centre of the site, surrounded by large canopy trees. The location of this first floor addition allows three mature Grey Ironbark trees and a Grey Gum in the frontyard to be retained along with a Grey Gum and two Cabbage Tree Palms in the backyard.

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *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.**

It is reasonable to allow for a modest first floor addition to create the appearance of a two storey dwelling from the street, however due to the existing circumstances of the sites topography and built form, it is unreasonable to require strict compliance with the code. It is also shown that objectives of the standard are achieved even though there is a non-compliance with the standard.

**Compliance Unreasonable or Unnecessary** - Clause 4.6, Exceptions to Development standards for the variation to Clause 4.3 – Height of Building development standard PLEP 2014.

Using NSW Caselaw established in *Wehbe V Pittwater Council*(2207) NSW LEC 827 for the relevance to Clause 4.6(3a), Preston CJ sets out ways of establishing the compliance with a development standard is unreasonable or unnecessary.

*“ An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”*

*It also states that;*

*“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”*

Also in the judgement the view that was expressed was that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation):

**1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;**

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

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

*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;*

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

## Environmental Planning Grounds

In regards to Clause 4.6(3)(b) there is a need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

*The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*

The assessment of this numerical non-compliance is also guided by the recent decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 where Justice Pain ratified the original decision of Commissioner Pearson.

The following grounds are submitted to justify the building height non-compliance;

- The site has an established dense tree canopy that will be retained with the proposed first floor addition, conserving the environmental value of the site.
- It achieves consistency with the streetscape that has two to three storey dwellings with consistent setbacks from the street.
- Consistent with the heights of surrounding properties.
- Responds to the topography by stepping down the hill.
- Achieves an equal amenity to solar access, privacy and views.
- By retaining the footprint of the house it retains the views across the site from the street levels, and



- Preserving the large established trees on site also maintains the visual dominance of the natural environment, with open space maximized to allow for the built environment to be secondary when viewed from public spaces



*Streetview with large Canopy trees*

### **Underlying Objectives to Clause 4.3 PLEP Height of Buildings;**

- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,**

The neighbouring dwellings are also in a similar situation with the precipitous terrain and have stepped two to three storey developments to accommodate the topography. The proposal is compatible with the height and scale of surrounding properties.

When looking at the bulk and scale of the development the wall height and wall setback should be looked at in unison. When doing this we can see that the generous first floor wall setbacks, combined with the new larger flat roofs and eaves, all sit below the tree canopy and are consistent with the character of the locality.

- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,,**

The proposed new roof height is RL18.21, which is 5.5m above the street level in the centre of the site. The neighbouring home at number 16 has a roof height of RL 17.58. The homes have a two storey appearance from the street due to the steep fall from the road to the front of the homes.

- (c) to minimise any overshadowing of neighbouring properties—**

The design has the proposed first floor addition located in the centre of the site, more than 6m from the Western neighbour at No.16, and 4.5m from the Eastern neighbour at No.12 Loquat Valley Road. The 9am morning Winter Solstice shadows will fall on the eastern wall of no.16 but will disappear by 12 noon.(see image below). Lunchtime shadows will fall on the rock platforms and trees facing Loquat

Valley Road with afternoon shadows falling mainly within the site itself, a small part of the neighbours front yard at number 12.



*View looking at number 16 Eastern wall at Midday during the Winter Solstice*



*Backyard View, Looking West from No.14*

**(d) to allow for the reasonable sharing of views,**

In response the primary views are towards the North West facing the valley, and due to the steep topography can be seen over multiple levels. The design has been positioned on the centre of the site under the canopy of numerous existing trees. Views to the West for number 16 will be retained, as will



those from number 12, due to the existing dense canopy of trees that already occupies view corridors across this part of the site. (see photos above and below of the backyard)



*Backyard View, Looking East from No.14*

***e) to encourage buildings that are designed to respond sensitively to the natural topography,***

The existing carport and driveway is to be removed due to the precipitous terrain and relocated to the higher flatter side of the site. The design proposed has a stepped two to three storey home that follows the topography and creates new landscaped terraced areas to connect with the existing landscape of the site.

***(f) to ensure the height and bulk of any proposed building or structure in a recreation or conservation zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.***

The proposal retains four large canopy trees in the front yard and three in the back, and proposes eleven more along the side boundaries, that will soften the built form from street and neighbouring properties. Retaining the vegetation and rock outcrops means the existing flora and fauna can flourish on the site with no impact from the proposed first floor or elevated decks.





Loquat Valley Road View



View from Existing Ground floor deck looking North West

## **R2 Low Density Development PLEP**

### *1 Objectives of zone*

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.*

The proposal is for a five bedroom home, with a home office and associated living spaces which meets the objectives of the low density area. It is proposed to be a single detached dwelling

within a landscaped setting which is in keeping with the surrounding developments, and so satisfies the objectives of the zoning.

## Conclusion

We request a variation to the development standard in respect to the maximum height as we believe it unreasonable due to the nature of the sloping site, location of the existing dwelling and retention of rock outcrops and established large gum trees on site.

The proposal is in keeping with the aims and objectives of the R2 Low Density zoning and Pittwater LEP 2014, compatible with surrounding developments, and does not cause an unreasonable impact on views, solar access, or amenity of neighbouring properties.

The proposal is in the public interest as strict adherence would result in a larger ground floor footprint that would require the removal of large canopy trees and cover natural features such as rock outcrops and create more bulk when viewed from the public spaces. The proposed first floor and new roof location towards the centre of the house footprint creates a new maximum height of 9.037m that has been shown to be consistent with councils PLEP 2014 4.3 Height of Buildings objectives.

As the proposal satisfies all the requirements of Clause 4.6 MLEP 2013, we believe the exception to the development standard is reasonable and appropriate in this circumstance.

*Sheralee Hogan*

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**SITE SPECIFIC DESIGNS**

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