



BLACKWATTLE **PLANNING**

Clause 4.6 Request for variation
PITTWATER LEP 2014

LIMITED DEVELOPMENT ON
FORESHORE AREA
for construction of a shared
inclinator ancillary to two dwellings
at

31-33 Sturdee Lane
Elvina Bay

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1.0 Introduction

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 construction of a new shared inclinor at No.s 31-33 Sturdee Lane Elvina Bay submitted to Northern Beaches Council.

The Development Application includes the following components:

- Construct inclined lift and rail within existing easement straddling the property boundary with associated winch motor
- Excavate and provide retaining walls to facilitate landing No. 1 adjacent to the existing boatsheds for No.s 31 and 33 Sturdee Lane
- Remove stake and board retaining wall and construct new concrete retaining wall in its place adjoining MHWL of 33 Sturdee Lane
- Widening of existing waterway access stairs adjoining MHWL for No. 31 Sturdee Lane
- Small extension of waterway access stairs for No. 33 Sturdee Lane
- Construct landing No. 2 with associated platforms for access on both 31 and 33 Sturdee Lane

The new inclinor rail, Landing No. 1, waterway access stairs, and associated retaining walls extend into the foreshore area of each site.

The accompanying survey information identifies an easement providing inclinor access, which straddles the boundary between No. 31 and 33 Sturdee Lane. This instrument permits access via an inclinor for each property. The easement extends the full length of the shared boundary of the properties running south to north, and includes land in the foreshore area extending to the southern boundary.

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

No.s 31-33 Sturdee Lane Elvina Bay (the site) fall within the area to which PLEP 2014 applies. Both sites have water frontage to the Pittwater waterway at their southern boundary (MHWL) and contain an existing dwelling sited at the higher levels of the land.

Being located on the western foreshores of Pittwater, both landholdings are water only access. Each site holds a permissive occupancy applying to existing boat sheds and deck structures constructed on crown land beyond the southern boundary of each property. Each of these boat sheds are substantial structures and are listed as items of environmental heritage in Pittwater PLEP 2014. No work is proposed to the cottages or beyond the boundary identified by MHWL.

Under **Clause 2.2** of PLEP 2014, the site is zoned C3 Environmental Management as shown in Figure 1 below. The proposal to construct an inclinor ancillary to an existing dwelling is permissible with consent in the C3 Zone.



Figure 1: The site outlined blue indicating zone C3 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 southern portion of each site, and runs across the face of the existing dwelling at No. 31 Sturdee Lane. The land below the foreshore building line on each site accommodates waterway access stairs, retaining walls, pathways, and for each property a boatshed together with associated decking and waterway structures. Also within the FBL is the existing approved easement for inclinor access on the site which extends to the southern boundary of each property at MHWL.

Clause 7.8(2) requires that:

- (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).*

The replacement of the existing stake and board retaining wall adjoining MHWL on 33 Sturdee Lane with a **new concrete retaining wall** will occur within the existing footprint of the structure that is ancillary to a dwelling and is therefore permitted with development consent under subclause (2)(a) above.

New or extended **waterway access stairs** on both 31 and 33 Sturdee Lane are a listed purpose under subclause (2)(b) and therefore are permitted with development consent.

The **retaining walls** supporting the excavation for landing No. 1, the **No. 1 landing** itself, and the **inclinor rail, supports and carriage** extending seaward of the FBL are new elements within the foreshore area, and Northern Beaches Council takes the view that these structures are not permitted as they are not included in the list of permitted purposes under subclause (2)(b).

Additionally, as these elements are not part of the existing footprint of a dwelling (or its associated ancillary structures) for either property, we are advised Northern Beaches Council requires a Clause 4.6 request for variation to the development standard for their extension into the foreshore area.

4.0 **Clause 4.6 Exceptions to Development standards**

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 location of works proposed within the foreshore area is predominantly within already disturbed land and in some respects heavily modified landform. Being above MHW and located directly behind the existing boatshed, natural foreshore processes will remain unaffected. The open nature of the Landing 1 area and structure permits ingress and egress of water without obstruction, should inundation to the Estuarine Planning level occur.

Being aligned behind the boatshed to No. 33 Sturdee Lane, there can be no visibility of the structure or excavated area from the water. This ensures that virtually no change arises to the visual catchment of the site from the construction of Landing No. 1, its associated retaining walls, and the final 3m length of inclinorail. The upper portions of the inclinorail are set within an enhanced landscaped context, and will be constructed using recessive colours and materials, and close to ground level. Due to these measures, the significance of the foreshore and its visual amenity will not be adversely impacted.

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

Comment: No change to private or public access will occur as a result of the proposed works. The landform between the existing boat sheds and the FBL is extremely steep and access along the foreshore will remain via the decking areas at the curtilage of the boat sheds, which are almost entirely on Crown Land.

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 C3 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*

The new inclinator and landings will be well screened from the waterway due to the existing and proposed additional vegetation. A substantial portion of the inclinator rail and its associated landings, will be difficult to view from the waterway due to the location width, and height of the boatshed in front of it.

Overall, the open nature of the landings and low levels of both the landings and the rail/ railcar above ground level will ensure the proposed structures are compatible with the general pattern of development in the foreshore along this part of Pittwater waterway, which typically includes access structures, boat sheds, water access facilities, and inclinators. The lower landing, rail, and rail car will be close to the existing stairs, boatshed and associated decks, ensuring that structures remain appropriately clustered but still remain viewed in a vegetated context.

In relation to compatibility with the surrounding area, we note that inclined lifts extending to the foreshore are an established purpose and structure in the vicinity. An example of this is readily apparent at properties to the west, one of which is seen in the below photograph:



Figure 3: An approved and constructed inclinator within the foreshore area upon a nearby neighbour's land to the west.

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

(i) pollution or siltation of the waterway, or

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

The intertidal area below mean high water mark will not be impacted by the proposed development. No adverse impacts upon the use of the waterway or adjoining properties is anticipated. Fauna and flora habitats are not impacted. An accompanying arborist report recommends the removal of one low retention value tree to facilitate the inclinator. The tree *Stenocarpus sinuatus* exhibits advanced decay in the lower stems, and is already

impacted by the very close proximity of the existing staircase. The arborist has recommended replacement planting, which will be incorporated into the landscape works proposed.

(iii) an adverse effect on drainage patterns, or

No impact is anticipated as a result of the proposed works upon the drainage or disposal of stormwater on the site. The open nature of structures proposed will allow overland flow to drain unimpeded along its natural course.

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

No removal of or adverse impact upon riparian vegetation is proposed. Under the guidance of an arborist, all canopy trees of moderate and high retention value can be safely retained and protected during construction. One tree exhibiting poor structure and advanced decay will be removed to allow the inclinator, however a replacement specimen will be planted in an appropriate location where it can thrive.

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

No increase in intensity of use is proposed, and the waterfront properties will remain occupied each by a single dwelling. No conflict with the users of the waterway is anticipated. No other open space areas adjoin the sites.

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

The proposed structures in the foreshore area are designed to ensure that access to the foreshore is maintained. The setback of the inclinator and lower landing from the mean high water mark is similar to the existing lower retaining wall. This ensures access to the foreshore from the waterway is maintained on the site as existing. The proposed development ensures that access is provided 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

The natural and aesthetic significance of the land and waterway will be maintained. It is noted that the location of the inclinator and lower landing is within already heavily disturbed areas. It will also be improved by the provision of new plantings to provide screening as viewed from the water. The inclinator rail maintains a very minimal height above the ground line, and both the rail and rail car are to be finished in medium to dark colours to ensure the structures remain recessive in the landscape as viewed from the waterway.

- (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 amenity and aesthetic appearance of the land and waterway will not be adversely due to:

- the proposed low level of the inclinator rail and car; and,
- the additional and improved landscaping to be provided in the foreshore area; and,
- The medium to dark colours used for the inclinator that allow the structure to be recessive in the vegetated context.

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

The inclinator location is well above the level of Pittwater waterway and the retaining wall adjoining the existing deck area at MHWL. The open structures are 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. Structure proposed below the EPL is designed to ensure no impact to natural processes, and is engineered to consider impacts of future sea level rise, including waterproofing of electrical connections.

- (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,*

The proposal maintains public access to and along the foreshore by providing an appropriate setback from the mean high water mark to the inclinator rail and landing No. 1, for functional access to the foreshore area as is essential for its maintenance.

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

No existing or proposed open space is accessed from the site.

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

The site is not publicly accessible, however the land below mean high water mark is 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,*

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 is of a gradient that is prohibitive for public access. As is the case for the majority of waterfront land on the western foreshores, public access is not a legal right under the current title.

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

The character of the foreshore area will be maintained as an intertidal area with structures that are essential to the use of the waterfront land including in association with the existing boatsheds.

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 length of the newly proposed inclinator and one of the associated landings. The environmental planning grounds that justify the exceedance of the development standard are as follows:

Water access only sites

Both 31 and 33 Sturdee Lane are water only access properties, being located on the Western foreshores of Pittwater. Northern Beaches Council has previously recognised that properties such as these experience challenging access arrangements and that facilitation of assisted access in these circumstances must be considered in deciding whether a variation to the development standard is warranted.

Distance and steep topography of the sites from the foreshore

- Both sites are burdened by a particularly steep frontage to the waterway. The gradient between the boat sheds at the southern boundary and the FBL is 60%. The inclinator will rise approximately 9m over the 15m length to the FBL.
- The travel distance for No. 33 Sturdee Lane is also excessive at over 50m from the waterway. The inclinator provides needed assisted access over the steepest of this distance.

Shared inclinator use via an existing easement specifically for this purpose

- The allotment is unusual in that it purposively provides for an access corridor of approximately 1m width along the whole of the shared boundary between 31 and 33 Sturdee Lane. This corridor has been created for the specific purpose of providing waterfront inclinator access for both properties. The new inclinator will be located entirely within the easement.

No current connecting stair access to dwelling for 33 Sturdee Lane

- The journey from the existing dwellings to the existing boatsheds is over a significant distance and together with the steep land located within the foreshore area warrants a higher quality and more direct level of access than is provided by the existing stairs. It is noted that No. 33 particularly does not benefit from continuous stair access from the foreshore to the dwelling currently and the proposed inclinator partially overcomes this constraint (both in gradient and distance) for the occupants of that dwelling.

Facilitation of use and maintenance of heritage boatsheds

- The land within the foreshore area rises 9m over a distance of 15m, ie, a slope of greater than 1:2 and the existing stair configuration is steep and circuitous. The improved access provided by the inclinator not only facilitates the amenity and recreational value of the foreshore area, but also the maintenance of vegetation, canopy trees, and waterfront structures including the boatsheds. These cottages are heritage listed structures located in an environment that require high levels of maintenance for their conservation. The assistance provided by an inclined lift to ongoing maintenance activities associated with the boatsheds is of great value to their required preservation into the future.
- The combination of gradient and distance has previously justified the construction of inclinator in the vicinity, and provision of that infrastructure in a more sympathetic and functional manner is considered to be not only justified but entirely consistent with the objects of the EP & A Act, which include

(g) to promote good design and amenity of the built environment,

ie, functional and improved access to the foreshore area is maintained from the steep land and distant dwelling through the provision of an inclinator and is a positive improvement to the overall amenity of the built and natural environment in this sensitive waterfront location.

and,

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

ie, improved maintenance of the existing boatshed and associated waterfront structures will be facilitated by the inclinator, together with an increased amenity, health, and safety of the occupants because the inclinator will facilitate greater recreational use and maintenance of the foreshore area and waterway.

The inclinator will also allow the management of vegetation and canopy trees in an efficient way, by allowing greater and more appropriate access for garden and tree maintenance in the vicinity of the foreshore.

and,

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

ie, to promote the ongoing efficient conservation and management of two heritage listed structures being the boatsheds associated with No.s 31-33 Sturdee Lane, noting the vulnerable location of these structures below MHWL and the associated maintenance burdens which are exacerbated by difficult access both from the mainland and from their respective primary dwellings.

- In circumstances where the land is purposively burdened to facilitate inclinator access under an existing approval, and that access is provided via an efficient sharing arrangement and with minimal impacts upon the land, adjoining neighbours, and the amenity of the public domain, it would be unreasonable to not allow such access to be provided by way of the inclinator, which being a shared structure provides for substantially greater efficiency and safety of access over a long distance and steep topography.

Absence of impact

- The proposed new inclinator and associated landing No. 1, notwithstanding that they maintain a breach of the foreshore area, will have negligible impact on the privacy and visual amenity of neighbours, or on the visual amenity as viewed from the public domain of the waterway. The inclinator rail is designed to be as close to the ground line as possible. The sharing of the infrastructure provides a substantial benefit to the environment, including the built environment which includes structures of significant heritage value.
- As viewed from the waterway, the new inclinator and landing will be unobtrusive, and will maintain appropriate access at the foreshore.

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. Overall, the above grounds, together with an absence of impact demonstrates sufficient environmental planning grounds to justify the variation of the standard as proposed.

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 C3 Environmental Management Zone**

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

- *To protect, manage and restore areas with special ecological, scientific cultural or aesthetic values; and,*
- *To provide for a limited range of development that 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 proposed works are substantially hidden behind longstanding historic waterfront structures. The responsive design of the inclinator and associated landing minimises further any adverse impact upon those values by maintaining minimal height above the ground and being of recessive colours and materials set in a landscaped context.

- *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 ancillary to and shared between two single dwellings and the presence of the inclinator will not result in an intensity of use on either site. The inclinator is designed to be low to the ground and unobtrusive in the landscape, and landing structures have been significantly reduced to be minimal in their footprint and visual appearance. Being hidden substantially behind the boatshed, and at low levels in the landform, the inclinator rail that is within the foreshore area and Landing No. 1 will not be visually prominent.

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

Comment: The proposed development maintains existing sensitive foreshore vegetation including moderate and high retention value canopy trees within its immediate vicinity. Minimising structure in the foreshore area is also beneficial to fauna using the riparian zone.

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

Comment: The proposed development does not impact species comprising an EEC. The assisted access provided by the inclinator will facilitate improved property maintenance, including weed removal and enhanced planting in the vicinity.

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,

An inclined lift is not a development to which SEPP Basix applies

(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

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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