



northern
beaches
council

MEMORANDUM

DATE: 6 June 2023

TO: Northern Beaches Local Planning Panel (NBLPP)

CC: Peter Robinson, Executive Manager Development Assessment

FROM: Adam Richardson

SUBJECT: Item No. 4.2 – DA2022/1548 – 137 Riverview Road, Avalon Beach

TRIM REFERENCE: 2023/359832

The purpose of this memo is to provide a response to the Panel in relation a letter addressed to the Panel from Northern Beaches Planning dated 5 June 2023. It is noted that Northern Beaches Planning are not the applicants for DA2022/1548 and have had no involvement with the application to date.

The letter of 5 June 2023 essentially seeks deferral of the application for the preparation of a further written Clause 4.6 variation request and that the plans are amended so that no part of the inclinor encroaches into the W1 zone. The letter asserts that deferral is reasonable for the following reasons:

- *At no time during the 7-month assessment process has Council raised concerns in relation to either the W1 zoning or obstruction of public access within the foreshore area (confirmed at Pages 67-68 of the Assessment Report)*

Response: The assessment report raises no in principle issue with the works in the W1 zone – as reflected within the reasons for refusal, the written Clause 4.6 variation request does not address the W1 zone objectives, which it is requested to do amongst other requirements for it to be well founded. The need for and adequacy of a written Clause 4.6 variation request was identified in Council's preliminary assessment letter of 19 January 2023.

- *My clients have had no opportunity to respond to the issues now said to warrant the refusal of the application*

Response: Council within the issues letter of 19 January 2023 identified the absence of a written Clause 4.6 variation request and the likelihood of such a request being successful. The letter also clearly states that applicants are given one opportunity to address the issues. The applicant's response of 13 February 2023 is considered to constitute that opportunity to resolve the issues.

- *Council requested the provision of additional information (attached) at a not insignificant cost to my clients yet failed to raise concerns in relation to the fundamental issues now conveyed in the Assessment Report, including a threshold issue of permissibility, and*

Response: The threshold of permissibility is linked to a written Clause 4.6 variation request, which was clearly articulated within Council's letter of 19 January 2023.

- *My clients were given no warning of the recommendation of refusal, and with the exception of the letter advising of the NBLPP meeting, have had no communication from Council staff since submitting the requested additional information in February 2023.*

Response: Council's letter of 19 January clearly establishes that multiple attempts or an ongoing dialogue in relation to the issues is not something that Council entertains, in the interest in effective and efficient assessment of applications.

Furthermore, I have since reviewed a number of recent approvals for inclinators along this stretch of the Pittwater Waterway and can appreciate my client's confusion regarding the requirements for northern beaches planning 2 inclinators within the foreshore area. Despite no change to the provisions of clause 7.8 of PLEP 2014, Council's approach to the assessment and determination of inclinators within the foreshore area has been historically inconsistent, as follows:

- *On 17 March 2023, Mod2022/0342 approved the construction of an inclinator within the foreshore area on the adjoining site at 135 Riverview Road that when combined with pre-existing retaining walls, obstructs the entire depth of the foreshore area. Despite this clear obstruction, the Assessment Report asserts that public access along the foreshore is provided.*

Response: That application related to an existing inclinator and it was setback from the MHW, allowing public access between the inclinator and the foreshore.

- *On 2 June 2022, DA2022/0281 approved the construction of an inclinator within the foreshore area at 167 Riverview Road that extends the majority of the depth of the foreshore area, without a clause 4.6 request.*

Response: At that time, Council was in receipt of now superseded advice that inclinators constituted water access stairs and consistent with the exemption permitted by Clause 7.8.

- *On 25 March 2022, DA2021/1522 approved the construction of an inclinator within the foreshore area at 189 Riverview Road that extends the entire depth of the foreshore area. The provisions of clause 7.8 of PLEP 2014 were not addressed in detail, however the compliance table confirmed that it complied with the requirements and objectives of the control. The application was not supported by a clause 4.6 request.*

Response: At that time, Council was in receipt of now superseded advice that inclinators constituted water access stairs and consistent with the exemption permitted by Clause 7.8.

- *On 29 June 2021, DA2021/0256 approved the construction of an inclinator within the foreshore area at 26A Hudson Parade without a clause 4.6 request.*

Response: At that time, Council was in receipt of now superseded advice that inclinators constituted water access stairs and consistent with the exemption permitted by Clause 7.8.

- On 26 August 2019, DA2019/0565 approved the construction of an inclinator within the foreshore area at 129 Riverview Road that resulted in the obstruction of the entire depth of the foreshore area without a clause 4.6 request. The Assessment Report confirmed consistency with the provisions of clause 7.8 of PLEP 2014.

Response: At that time, Council was in receipt of now superseded advice that inclinators constituted water access stairs and consistent with the exemption permitted by Clause 7.8.

- Of relevance, it should also be noted that the most recent inclinator approved by Council in DA2022/1048 extended the full depth of the foreshore area, however Council was satisfied that this did not impede upon public access along the foreshore as public access was maintained below MHW. Further, in the assessment of foreshore works approved in relation to DA2022/1972 and DA2022/0133, public access was said to be maintained simply because the works were maintained on private property.

Response: The inclinator approved under DA2022/1048 was positioned behind a seawall, and as such public access along the foreshore between the MHW and the seawall was available. DA2022/1072 did not approve any inclinator and DA2022/0133 positioned the base of the inclinator well within the boundaries of the property allowing for access along the foreshore.

The Assessment Report also states that the submitted clause 4.6 request does not provide sufficient environmental planning grounds to warrant contravention of the foreshore building line development standard. Whilst general amenity and ease of foreshore access has been deemed to constitute sufficient environmental planning grounds by Council in relation to the construction of inclinators on other sites (most recently in DA2022/0133), I would suggest that an amended clause 4.6 request would also proffer the following grounds:

Orderly development

Council has regularly and consistently approved the installation of inclinators within the foreshore area across the LGA, including 5 within 1 km of the subject site within the last 4 years. In addition to these recent approvals, a review of Council's DA Tracker and an inspection of the site confirmed the presence of at least 10 more existing inclinators within the foreshore area within 500m of the subject site. Subject to the minor amendments proposed to address foreshore access and permissibility, approval of the proposed inclinator reflects the orderly development of the land, as it provides access to the foreshore that is commensurate with surrounding properties and promotes the consistent decision making of Council in relation to inclinators within the foreshore building line.

Minor departure and lack of impact

*Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [2021] NSWLEC northern beaches planning 31242, the particularly small departure from the standard and absence of impacts consequential of the departure constitute environmental planning grounds, as they promote the good design and amenity of the development in accordance with the objects of the EP&A Act.*

Response: This is noted however is subject to further assessment upon such an opportunity to provide an updated written Clause 4.6 variation request being provided. The adequacy of such arguments must be evaluated in accordance with an entire written Clause 4.6 variation request, not just a snapshot of what maybe advanced. To consider the adequacy of such arguments without a full document, amounts to hearsay.

Recommendation

That the Northern Beaches Local Planning Panel refuse the application in accordance with the recommendation of the Officers assessment report.