

**212 HUDSON PARADE, CLAREVILLE
CONSTRUCTION OF AN INCLINATOR ANCILLARY TO AN APPROVED DWELLING**

**VARIATION OF A DEVELOPMENT STANDARD REGARDING DEVELOPMENT IN
THE FORESHORE AREA AS DETAILED IN CLAUSE 7.8(2) OF THE PITTWATER
ENVIRONMENTAL PLAN 2014**

For: Construction of an Inclinator Ancillary to an Approved Dwelling
At: 212 Hudson Parade, Clareville
Owner: Victor & Jayne Micallef
Applicant: Victor & Jayne Micallef

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Pittwater Local Environmental Plan 2014. In this regard, it is requested Council support a variation with respect to compliance with the development in the foreshore area development standard as described in Clause 7.8(2) of the Pittwater Local Environmental Plan 2014 (PLEP 2014).

2.0 Background

Clause 7.8(2) of PLEP sets out the standards for development on the foreshore area as follows:

- (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 proposal provides for a passenger inclinator within the foreshore building area. Inclinator is not specifically identified as being permissible in the foreshore area.

Is Clause 4.3 of the LEP a development standard?

The definition of “development standard” in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of the development and includes:

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

The foreshore area control is a fixed standard relating to the siting of buildings on a site, consistent with the definition of a development standard, as defined by the EP&A Act. As such, the provisions of clause 4.6 of PLEP 2014 can be applied. Pursuant to clause 4.6(2) of PLEP 2014, consent may be granted for development even though the proposal contravenes a development standard prescribed by an environmental planning instrument. Whilst this clause does not apply to those standards expressly excluded from this clause, the foreshore building line development standard of clause 7.8 of PLEP 2014 is not expressly excluded and thus, the provisions of clause 4.6 can be applied in this instance.

3.0 Purpose of Clause 4.6

The Pittwater Local Environmental Plan 2014 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the Standard Instrument should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 118 have been relied on in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in ***RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51]** where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In

particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”.

If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of the LEP provides:

- (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.*

Clause 7.8 (the Limited Development on Foreshore Area Control) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

Clause 4.6(3) of the LEP provides:

- (3) *Development consent must not be granted for 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 contravening the development standard.*

The proposed development does not comply with the ‘Limited Development on Foreshore Area’ development standard pursuant to Clause 7.8 of PLEP which limits the type of development in the foreshore area.

The proposal provides for a new inclinor within the foreshore area.

The non-compliance with the foreshore area development standard is a result of the need to provide equitable access for the residents of the site to the waterway and existing jetty and associated development.

Strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

In *Initial Action* the Court found that clause 4.6(3) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority.

The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

The second precondition requires the consent authority to be satisfied that that the concurrence of the Planning Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) has been repealed. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) has been repealed. Clause 4.6(8) is only relevant so as to note that it does not exclude Clause 4.3 of the LEP from the operation of clause 4.6.

The specific objectives of Clause 4.6 are as follows:

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

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

The development will provide for a passenger inclinator ancillary to an approved dwelling. The non-compliance is a direct result of the need to provide access for the ageing residents to the foreshore area and existing boatshed, jetty and ancillary structures. It is considered that allowing for flexibility in this instance is reasonable as current access is via a set of steep and winding stairs which does not meet the requirements of the residents/owners.

The non-compliance results in a development that is compatible with the existing surrounding development in this portion of Hudson Parade and which is consistent with the stated Objectives of the C4 Environmental Living Zone, which are noted as:

- *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.*

5.0 The Nature and Extent of the Variation

- 5.1 This request seeks a variation to the development in the foreshore area standard contained in Clause 7.8 of PLEP.
- 5.2 Clause 7.8 of PLEP limits development in the foreshore area.
- 5.3 The proposal provides for an inclinator ancillary to an approved dwelling. The works proposed result in a development that is compatible with the existing surrounding development and does not detract from the character of the locality. The non-compliance is necessary to ensure equitable access to the foreshore, existing jetty, boatshed and associated structures.

6.0 Relevant Caselaw

- 6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

17. *The first and 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: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46]*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

- 6.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is Clause 7.8 of PLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of Clause 4.3 and the objectives for development for in the C4 Environmental Living zone?

7.0. Request for Variation

7.1 Is compliance with Clause 4.3 unreasonable or unnecessary?

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the development in the foreshore area development standard, as outlined under Clause 7.8, and reasoning why compliance is unreasonable or unnecessary, is set out below:
 - (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,*

The proposed inclinor will not impact on the foreshore processes. The inclinor is a lightweight structure which does not require the removal of any protected vegetation. The structure will be finished in dark and earthy tones to blend with the natural environment and minimise visual impact as seen from the waterway.

The use of the inclinor will not result in any adverse impacts upon the amenity of the foreshore area, or that of adjoining properties. The inclinor is provided with ample setbacks to the side boundaries and the adjoining properties will not be negatively impacted with regards to visual or acoustic privacy. The consent authority can be satisfied that the proposed

development 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.

The works are maintained wholly within private property and do not impact upon public access along the foreshore. The works are set back from the water's edge and are elevated above the natural tidal zone and the levelled foreshore area of the subject site. The proposed inclinor will enhance access between the elevated dwelling and the foreshore, noting that access from the waterway is the primary point of access to this offshore property.

As such, strict compliance with the foreshore building line development standard is unreasonable and unnecessary in the circumstances of this case.

7.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *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].

There are sufficient environmental planning grounds to justify contravening the development standard. The site is constrained by a significant slope with a fall of approximately 6.0m between the rear of the dwelling and the boat shed area.

The proposed inclinator will significantly improve access between the waterway and the dwelling for the ageing residents. Current access is via a steep winding stair and pathway. The proposed inclinator will respond to the applicant's circumstances and the context of the site including providing ample setback to the side boundary and limit the length of the inclinator. The inclinator promotes good design on such steep terrain and will ensure the health and safety of the occupants consistent with objects in Section 1.3 (g) and (h) of the EP & A Act.

The inclinator will permit the residents of the dwelling to age in place, noting the current access arrangements are prohibitive and limited.

Further, the proposed works do not have any detrimental impact on the adjoining properties for the following reasons:

- The proposed inclinator provides for ample setback to the side boundaries of the site and will therefore maintain privacy and amenity of the adjoining properties.
- The inclinator does not require the removal of any protected vegetation.

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the significant slope of the site and the need to provide equitable access to the foreshore. Further, the resultant development and in particular the minor non-compliance with the development standard, being a lightweight structure which promotes good design and amenity.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141]

and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

The area of non-compliance does not result in any detrimental impact and is a direct result of the significant slope of the site. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.4 Is the proposed development consistent with the objectives of Clause 4.3 and the objectives of the C4 Environmental Living Zone?

- (a) Section 4.2 of this written request suggests the 1st test in Wehbe is made good by the development.
- (b) Each of the objectives of the C4 Environmental Living Zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council [2017] NSWLEC 158* where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ also found that “*The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone*”.

In response to *Nessdee*, I have provided the following review of the zone objectives:

It is considered that notwithstanding the variation of to the development in the foreshore area standard, the resultant development as proposed will be consistent with the individual Objectives of the C4 Environmental Living Zone for the following reasons:

- *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.*

The works are to be predominantly constructed on piers and posts, in order to minimise site disturbance and impacts to vegetation and is considered to be low impact. The proposal does not require the removal of any protected vegetation. The inclinator is to be finished in dark recessive colours, to ensure that it blends with the surrounding natural environment and shadows cast by dense overhead canopy. The incorporation of an inclinator on a steeply sloping foreshore site will not be uncharacteristic or jarring in its waterfront setting.

The proposal is considered to be consistent with the above objectives.

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

The proposed lightweight inclinator sits at/near existing ground level and is well setback from the side boundaries. The design of the inclinator ensures minimal impact on the existing landform and the proposal does not require the removal of any protected vegetation.

The proposal achieves this objective.

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

The proposed inclinator does not have any impact on existing foreshore vegetation or wildlife corridors. The proposal achieves this objective.

Accordingly, it is considered that the site may be further developed with a variation to the foreshore area development control, whilst maintaining consistency with the zone objectives.

7.5 Has the Council considered the matters in clause 4.6(5) of PLEP?

- (a) Clause 4.6(5) has been repealed.

8.0 Conclusion

This development proposed a departure from the development within the foreshore area development standard, with the proposed works inclinator not identified as a structure permitted in the foreshore area.

The non-compliance is a result of the significant slope of the site and need to provide access for the ageing residents. The inclinator does not have any impact on public access to the foreshore and does not detract from the character of the locality.

The variation to the development in the foreshore area control does not result in any significant impact on the amenity, views and outlook for the neighbouring properties.

This written request to vary to the development in the foreshore area development standard specified in Clause 7.8 of the Pittwater LEP 2014 adequately demonstrates that that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the development within the foreshore development standard would be unreasonable and unnecessary in the circumstances of this case.

Natalie Nolan
DIRECTOR
Nolan Planning Consultants.