

MEMORANDUM

DATE: 17 May 2024

TO: Northern Beaches Local Planning Panel (NBLPP)

CC: Peter Robinson, Executive Manager Development Assessment

FROM: Adam Richardson, Manager Development Assessment

SUBJECT: Response to the Panel's deferral of Item 4.3 of 1 May 2024 agenda – construction of an inclinor at 106 Prince Alfred Parade, Newport DA2024/0113

TRIM Reference: 2024/359555

Background

At its meeting of 1 May 2024, the Panel deferred determination of item 4.3 (DA2024/0116 at 106 Prince Alfred Parade, Newport) for the following:

An amended clause 4.6 variation statement which addresses the new material introduced by the applicant in their presentation at the public meeting, especially environmental planning grounds.

In deferring the application, the Panel gave the applicant until 16 May 2024 to supply an amended Clause 4.6 variation request. On 14 May 2024 the applicant submitted to Council through the NSW Planning Portal an amended Clause 4.6 variation request.

Assessment

The amended Clause 4.6 variation request prepared by YSCO Geomatics, Version 3 dated 10 May 2024 follows the same format as the Clause 4.6 variation request that accompanied the DA when it was considered by the Panel. It is noted that the amended Clause 4.6 variation request expands the justification in support of the development, with further and expanded environmental planning grounds provided.

The recommended reasons for refusal for DA2024/0116 were essentially based upon the lack of sufficient environmental planning grounds to justify variation to the development standard. The applicant within the amended Clause 4.6 variation request has recast the environmental planning grounds in an attempt to overcome this deficiency.

The expanded environmental planning grounds have been based primarily against the developments alignment with the objects of the Act specified at Section 1.3, which consistent with the findings of *Initial Action v Woollahra Municipal Council 2018*, establishes that environmental planning grounds

advanced in a Clause 4.6 variation request may relate to the subject matter, scope and purpose of the EP&A Act given the absence of direction as to what is an environmental planning ground. The revised environmental planning grounds as provided by the applicant are replicated, along with an assessment:

- (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.**

Contravention and flexibility in application of the development standard to allow Inclinator installations in situations where there are no specific environmental impacts, will have a positive impact in social and economic terms.

The vast majority of development applications for Inclinator on properties with steep waterfront access, are prepared for ageing residents that wish to continue to own and reside on the properties that they have occupied for many years.

Access to the waterway is a part of life in the local government area of the Northern Beaches and a major reason for the desire to own a property and live in the area. Refusal of applications and the removal of rights for continued ability for safe access when mobility is impaired, particularly in inclement weather, will often mean that older residents will have to relocate.

In this instance the owner of the land has a parent that has reached 90 years of age. Denial of the application will render access to the waterfront of the land virtually impossible for that relative and result in an extremely negative social impact.

While this variation request relates to this development proposal specifically being considered, the creation of a precedent to deny installations forward of the foreshore building line in situations where there are negligible environmental impacts, will have a marked social and economic impact on the ageing demographic of the Northern Beaches local government area. An inability to remain in long held properties, together with uncertainty of approvals for waterfront access ongoing, and uncertainty for prospective property purchasers, could also potentially have a long term impact on property values in the location.

Comment

The above environmental planning ground is not considered to be sufficient to justify variation to the development standard. The essential basis of the environmental planning grounds advanced, is that social and economic benefits occur because of the development. The social and economic benefits that may occur are not for the wider public benefit and are confined to the owners and occupiers of the property. They essentially promote the benefits of the development (the scope of which is subjective) and as such, are not environmental planning grounds, per the findings in *Four2Five Pty Ltd v Ashfield Council 2015*.

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

The land has no significant or special ecological or scientific values and has been landscaped for residential purposes and occupied for that purpose for decades.

Below the mapped Foreshore Building Line, the material of the Inclinator including foundations and rail, will occupy approximately 2.6 square metres of land representing about 0.44% of the total area of the land. Contravention of the development standard for such a minor work will not diminish the aims of this objective in any manner.

Support of all internal Council's internal referral departments is overwhelming and included in

Comment

The size and scale of the development is an irrelevant factor in the context of the development standard. Being a non-numerical development standard, the size of development within the foreshore area is irrelevant, rather, the primary focus of the control is to place restriction on development. As such, development may have an acceptable impact on the terrestrial environment (as is the case in this instance), but still be inconsistent with Clause 7.8. Clause 7.8 is a restrictive control, it seeks to restrict development in the foreshore, not minimise its size or impacts. Those considerations are left to other controls in the PLEP and DCP, to which the development fulfils. This situation is no different to the evaluation of any other development.

As the development is otherwise expected to have an acceptable impact on the terrestrial environment, this ground is not considered to be sufficient to warrant variation to the development standard.

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

Contravention of the development standard to allow the Inclinator to be installed forward of the foreshore building line will enhance the orderly and economic use of the land.

The subject site is steep, with a fall of approximately 10 metres between the lowest habitable floor level of the residence (R.L. 10.7 A.H.D) and the Mean High Water Mark of Pittwater (R.L. 0.6 A.H.D.).

This Inclinator installation will provide an efficient and safe alternative to having to access the waterfront via the existing winding path and stairway that incorporates approximately 60 stair risers.

The installation will maximise the potential and efficiency in maintaining the property as a whole and in the foreshore area. Maintenance of landscaped areas requires clean up of trimmed vegetation and maintenance of and upkeep of waterfront built structures and marine vessels, requires movement of materials and equipment up and down slope. These processes would be extremely difficult and almost impossible where having to negotiate approximately 60 steps from the lowest living area. Efficient access will also enable regular access to clean up any water borne debris that may accumulate on the waterfront following storms and other inclement weather. This is a benefit not only to the owner's of the property but also to the wider community and the waterway of Pittwater.

While there is road access to the property from Prince Alfred Parade, access from the waterway to the dwelling is still of major importance and a very high priority for the owners of this property and other owners across the local government area that have water frontage. This is not only for recreational purposes but also as stated, for the delivery of goods and materials for households and property maintenance purposes.

The proposed Inclinator development allows the land to be used to its full orderly and economic use and responds to the circumstances of the owner.

Comment

Whilst this ground has merit, no information or evidence has been supported which demonstrates that the inclinator will facilitate the orderly and economic use of the land. Whilst the inclinator provides for an improved ease of access, it has not been demonstrated as to why it is essential to maintain the use of the land as a whole. It is important to recognise that the provision of the inclinator is not fundamental to the residential occupation of the land, which has occurred for an extended period without an inclinator. It is not considered that this ground is sufficient to warrant departure to the development standard.

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

Not applicable.

Comment

Noted.

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

Contravention of the development standard and installation of the Inclinator will have no environmental impacts.

All internal Council referrals throughout the development assessment process highlight full support with or without conditions and concur that there will be no significant impacts on the foreshore area or the aesthetics of the waterway of Pittwater. (Refer to Appendix No.2).

Comment

This is not considered to be an environmental planning ground, as the other controls of the LEP and DCP obligate the satisfaction of this object of the Act. Development must be found to have an acceptable impact on the environment as a whole and by simply achieving this does not justify varying a development standard, the purpose of which is to restrain development rather than manage it impacts.

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

There are no items of cultural or aboriginal heritage.

Comment

Noted.

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

The development proposal responds to the applicants requirements for continued safe waterfront access and use of the land and is also designed to fit with the existing terraced landscape with minimal additional site disturbance or excavation. As detailed in development application, the proposed Inclinator and its associated structures are to be of an earthy toned colour that ensures minimal visibility from public areas or adjoining properties.

The inclinator represents an ancillary use of the land for residential purposes which will significantly improve the amenity of the existing residents, whilst not resulting in any adverse or unreasonable amenity and environmental impacts on the foreshore area that has been disturbed, landscaped and occupied for residential use for decades.

In the case of Eather v Randwick City Council[2021] NSW LEC 1075, Commissioner Walsh cites the following, 'The fact of the particularly small departure from the standard and lack of any material impacts consequential of the departure are sufficient environmental planning grounds to justify contravening the development standard'.[38]

It is noted that swimming pools are included in clause 7.8 2(b) of Pittwater LEP, 2014, 'Limited development on the foreshore', as a structure for which development approval can be granted.

A swimming pool of typical dimension would typically have a concrete surface area of between approximately 40 to 50 square metres. As a point of comparison, this Inclinator rail and foundations

will have a footprint occupying less than 3 square metres, be of limited visibility and will perform an ongoing vital function of providing waterfront access for a range of recreational and land maintenance purposes.

*The installation of the Inclinator based on an approval for departure from the development standard in this instance will have no impact on adjoining residents or the waterway of Pittwater. Accordingly, the principle of the findings in *Eather v Randwick City Council* of minimal environmental impacts should provide 'a further environmental planning ground justifying the contravention of the standard'. [39] Inclined passenger lifts are a common structure that have been installed on properties in the Newport Locality as defined in the 'Pittwater 21 Development Control Plan and the wider Northern Beaches local government area for decades. Numerous Inclinator have been installed on properties on the Western side of Prince Alfred Parade to provide access between a residence and the High Water boundary. The appearance of this structure will be commensurate with adjoining and nearby properties and will not impact on foreshore processes.*

However, a refusal will have a significant negative impact, both in social and economic terms, on the owner of the land.

Comment

The grounds in this instance promote the benefits of the inclinator to the residents of the subject site. As was found in *Four2Five Pty Ltd V Ashfield Council 2015*, such circumstance are not grounds which can be used for environmental planning grounds within the Clause 4.6 variation request. It is considered that despite the recessive design, the proposal represents additional built form within the foreshore, which is contrary to the purpose of the controls.

The applicant argues that swimming pools are allowed for in the foreshore area. These structures are typically at or just above ground level and are not readily identifiable within the foreshore area. Whilst the inclinator rail would have a similar impact as a swimming pool relative to ground level, the inclinator car would not and is of a scope and type of built form which adds visual bulk to the foreshore area.

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

Contravention of the development standard will promote efficient occupation of the land, enable safe and efficient access to the waterfront and also the ability to maintain waterfront improvements and buildings.

Comment

There is no evidence to support this ground. It is not known how an inclinator promotes the construction or maintenance of buildings or the health and safety of the site's occupants.

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

Not relevant to this application for minor work.

Comment

Noted.

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

Statutory process has been followed.

This summary of environmental grounds pursuant to the objectives of clause 1.3 of the Environmental Planning and Assessment Act, 1979, provides sufficient justification for acceptance of this Sec.4.6 variation.

Comment

Noted.

Previous Departures from the development standard

While it is difficult to argue abandonment of a standard, the following table provides a sample of approvals obtained for installations either partially or fully below the Foreshore Building Line to provide access to the Mean High Water Mark boundary.

A LIST OF PRIOR CONSENTS

D.A.	Date of Consent	Nature of Consent	Property Address
2020/1225	14/01/2021	Partially (8m) below FSBL – 3.5m inside MHW	98 Prince Alfred Parade, Newport
2018/1540	10/01/2019	Fully (23m) below FSBL – 0.5m inside MHW	21 'Lameroo' The Portions, Lovett Bay
2018/0923	07/09/2018	Partially (12m) Below FSBL - 2m inside MHW	48 Bona Crescent, Morning Bay.
N0194/15	19/06/2015	Partially (13m) Below FSBL - 5m inside MHW	111 Richard Road, Scotland Island
	2016	Partially (11m) below FSBL – 3.5m inside MHW	108 Prince Alfred Parade, Newport
NSWLEC1334	4/08/2008	Partially (11m) below FSBL - 3.5 inside MHW	205 Riverview Road, Clareville
N0175/10	12/08/2010	Part Below FSBL	10 Sturdee Lane, Elvina Bay
BC0005/12	20/02/2012	Part Below FSBL	12 Sturdee Lane, Elvina Bay
N0427/11	17/12/2012	Part Below FSBL	2A Wirringulla Ave, Elvina Bay
2016/0360	06/07/2016	Part Below FSBL	56 Cowan Drive, Cottage Point
N0358/15	20/10/2015	Part Below FSBL	24 Paradise Avenue, Avalon

There are numerous Inclinator that have been approved on properties on the Western side of Prince Alfred Parade.

Comment

The applications referred to above are historical applications, the consideration of which was based on no superseded information where such structures constituted waterway access stairs. As such, it is not considered that historical approvals based on now superseded information can be used as an environmental planning ground to justify variation.

Furthermore, the Clause 4.6 variation request acknowledges that the development standard has not been abandoned.

1. Other Considerations to Support the Request

(i) Northern Beaches Council Disability Inclusion Access Plan

Northern Beaches Council is committed to creating and enabling access and inclusion for all people in the community. While the action plan focuses on community facilities, the principle should extend to

enabling access within private property. The Inclinator will provide equitable access for the owners of the land, their visitors including any person with a disability or impaired mobility.

While a set of stairs can provide access to the waterfront of the land, the level difference between the pool terrace (R.L.10.7) and the terrace at the waterfront of the property (R.L.1.7) is 9 metres and 10 metres to the line of Mean High Water. It would be impossible for a visitor with a physical disability to access the waterfront and make the orderly use of the land for maintenance purposes extremely difficult.

Comment

As acknowledged in the above comment, the disability inclusion access plan does not extend to residential properties.

It is acknowledged that once on the inclinator, travel between 2 points would be equitable for all levels of mobility. However, and notwithstanding that, where access to and from the inclinator platforms is not in accordance with AS1428.1, it is considered that the true effectiveness of the inclinator is thwarted, as the success of the inclinator is only achieved where it is truly accessible from and to all parts of the site. No information or detail has been provided by the applicant which demonstrates how and in what capacity the inclinator is accessible for AS1428.1.

(ii) Construction of the Inclinator.

The Inclinator construction will consist of 3 foundations within the foreshore area being constructed on concrete foundations at 400mm diameter on 600mm square pads. This represents a total of approximately 1.1 square metres of foundations. The rail is a 150mm square steel section. Hence, a very minimal development footprint.

The Inclinator is to be constructed adjacent to the existing Inclinator within property No.108 Prince Alfred Parade which is set at a similar setback to the common property boundary.

Refusal of the Request to accept a variance to the development standard to allow construction below the mapped Foreshore Building Line will impact the viability of proceeding with the installation. Inclinator is generally installed on steep sites to allow more efficient and equitable access between a car parking area at street frontage and a dwelling or from a dwelling to the waterfront or a property or a combination of both.

Comment

The above statements are circumstantial and factual and do not amount to environmental planning grounds. It is considered that the simplicity of the construction is an irrelevant consideration and that a DA is conceptual to the extent that it does not approve a particular construction method, rather is limited to a design to which prescribed construction detail is forthcoming.

Conclusion

It is accepted that the re-casted Clause 4.6 variation request is an improvement over that lodged with the DA. However, and despite the improvements to the document, it fails to establish environmental planning grounds that are of sufficient scope to warrant variation to the development standard.

The fundamental discord is that the development standards purposed is restrictive and that the environmental planning grounds advanced by the applicant either promote the benefits of the inclinator or are not supported by detailed evidence as to why the inclinator is necessary (as is the case in building maintenance).

It is acknowledged that the specialist referrals support the proposed development, finding that it has no impact on the terrestrial environment of the site and surrounds. However as discussed earlier, this is a

requirement of development irrespective of its location and situation and that other controls regulate those impacts.

It is considered that on balance, there are not sufficient environmental planning grounds to warrant variation to the development standard and that the development should be refused.

Recommendation

That the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council, as the consent authority REFUSE Development Consent to Development Application No. 2024/0113 for the demolition works and construction of an inclinator on land at Lot 25 DP 13457, 106 Prince Alfred Parade, Newport, for the reasons outlined below.

- 1. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.6 Exceptions to development standards of the Pittwater Local Environmental Plan 2014.**

Particulars:

The environmental planning grounds advanced by the applicant within the written Clause 4.6 variation request, including in relation to the factual circumstances of the proposal's acceptable impacts and benefits of the proposal, are not deemed sufficient to justify the variation. As such, it is considered that the development cannot be found to have sufficient environmental planning grounds to justify contravening the development standard. It is considered that compliance with the development standard is reasonable and necessary in the circumstances.

- 2. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 7.8 Limited development on foreshore area of the Pittwater Local Environmental Plan 2014.**

Particulars:

Inclinator is not permitted development within the foreshore area. Further the development is inconsistent with the objective of the Pittwater Local Environmental Plan 2014 in clause 7.8 (1) (a) Limited development on foreshore area, namely, to ensure that development in the foreshore area will not affect the significance and amenity of the area.