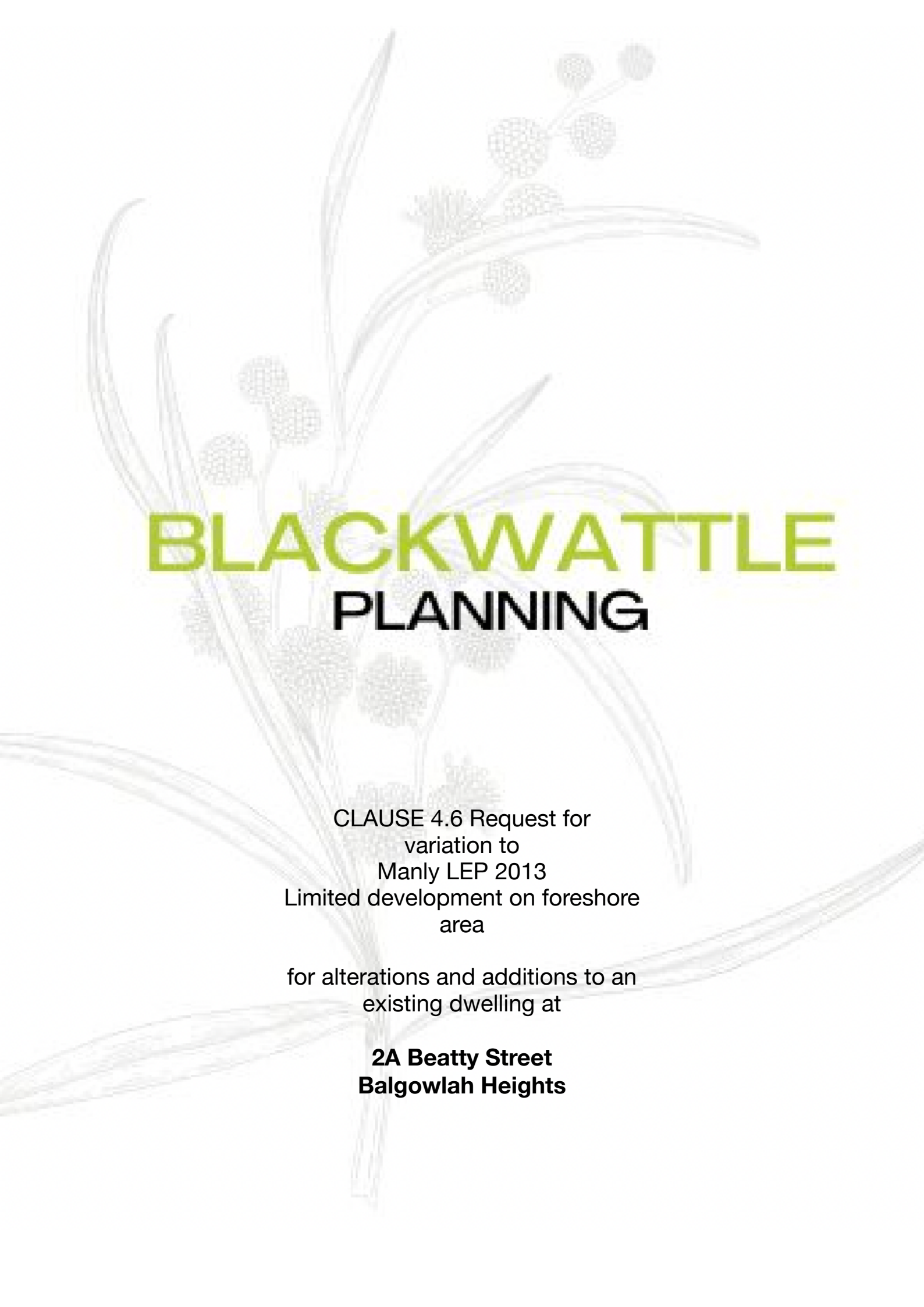




BLACKWATTLE **PLANNING**

CLAUSE 4.6 Request for
variation to
Manly LEP 2013
Limited development on foreshore
area

for alterations and additions to an
existing dwelling at

2A Beatty Street
Balgowlah Heights

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1.0 Introduction

This Clause 4.6 Request for Variation to the Limited development on foreshore area development standard under Manly Local Environmental Plan 2013 (MLEP 2013) is prepared by Blackwattle Planning on behalf of the land owners. The request is provided to support a Development Application for alterations and additions to an existing dwelling at 2A Beatty Street Balgowlah Heights submitted to Northern Beaches Council.

The Development Application is for alterations and additions to the existing dwelling including the construction of an inclined passenger lift.

Through this document it is demonstrated that compliance with the Limited development on foreshore area Development Standard of MLEP 2013 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 standards.

2.0 Manly LEP 2013

No. 2A Beatty Street (the site) falls within the area to which MLEP 2013 applies, contains an existing dwelling and boatshed and has an area of 1292sqm. The site is a battle axe lot situated on the northern side of Beatty Street and falls from south to north over its length.

Its northern boundary adjoins in part land zoned RE1 Public recreation (which is waterfront reserve). The western side of the northern boundary adjoins land forming the waterfront portion of No. 2 Beatty Street.

The stepping of the northern boundary results in a lot configuration where direct access from 2A Beatty Street to the waterfront reserve is only available via the eastern half of the site.

Existing stairs down the western half of the site continue over the waterfront portion of No. 2 Beatty Street and provide physical access to the foreshore for No.s 2 and 4 Beatty Street.

Access to the subject site from Beatty Street is via a right of carriageway over No. 2 Beatty Street. The eastern boundary of the site adjoins the Sydney Harbour National Park.

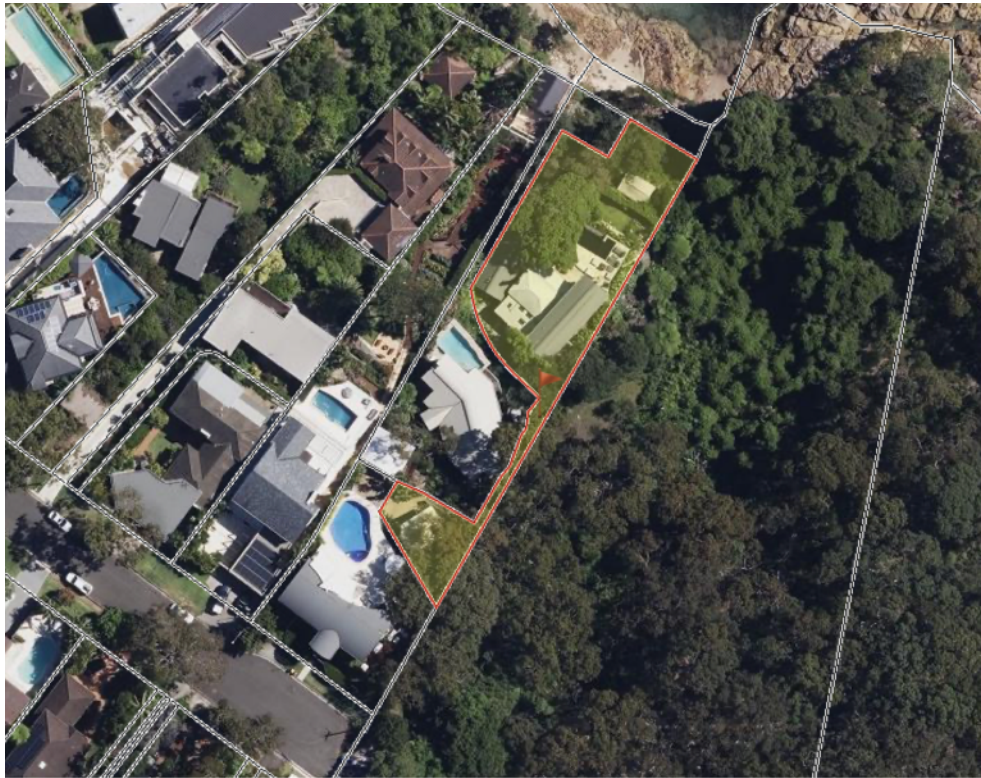


Figure 1: Aerial view showing location of 2, 4, and 2A Beatty Street.

Source: Apple Maps

Under **Clause 2.2** of MLEP 2013, the site is zoned C3 Environmental Management. See Figure 2 below. Dwelling houses are permitted with consent. The proposal for alterations and additions to a dwelling ie, an inclinor is permissible with consent in the C3 Zone.

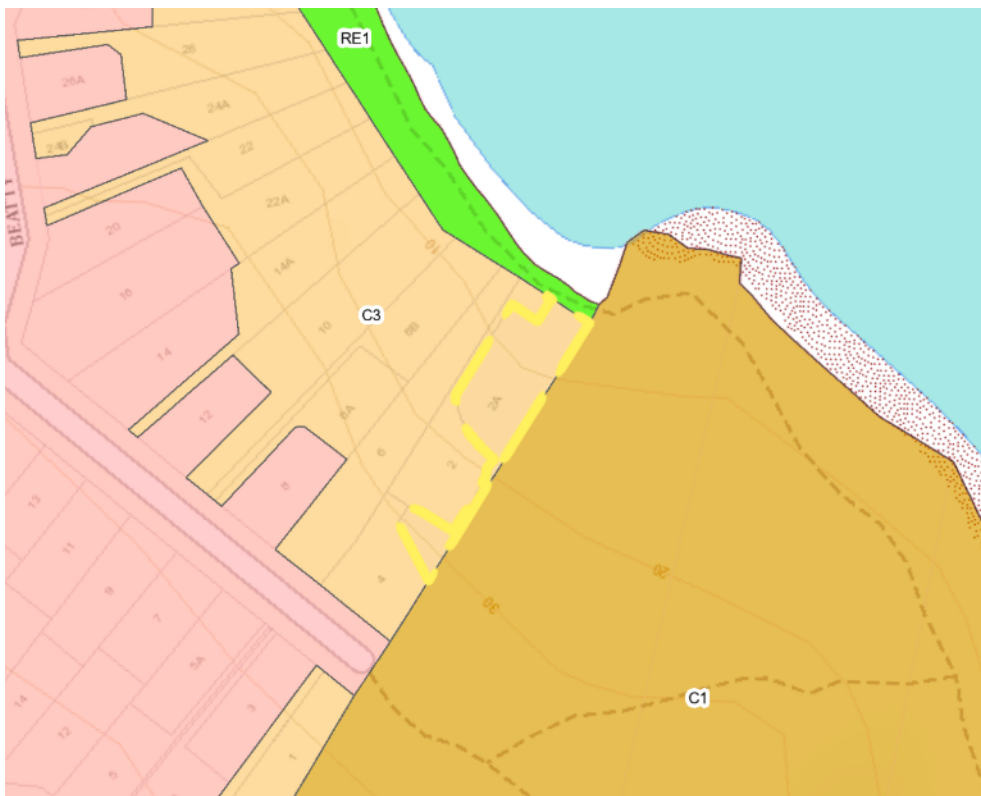


Figure 2: The site outlined yellow indicating zone C3 Environmental Management

Source: NSW Planning Spatial Viewer

Clause 6.10 of MLEP 2013 restricts development within the foreshore area on the site which is shown on the map at Figure 2 below. Clause 6.10 is a development standard.

Figure 3: The site outlined in yellow on map showing the foreshore area in pink.

Clause 4.6 of MLEP 2013 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.

This written request seeks a variation to Clause 6.10 Limited development on foreshore area development standard in MLEP 2013. MLEP 2013 defines **foreshore area** as follows:

The proposed inclinor construction extends into the foreshore area by a linear 6.2m. A small portion of Landing 3 and all of Landing 4 are also proposed in the foreshore area. Figure 3 below demonstrates the extent of structures east of the foreshore building line (in magenta).

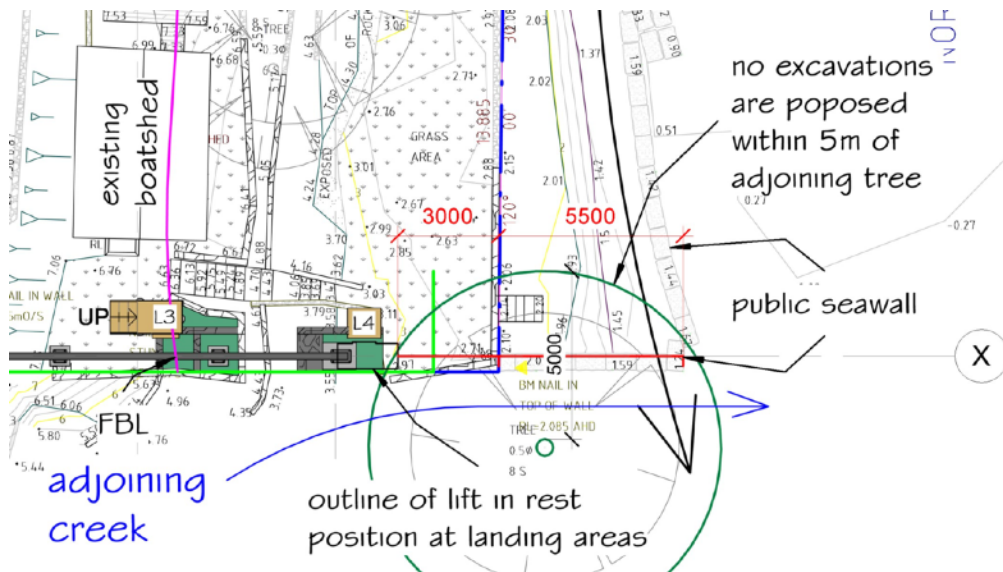


Figure 3: Extent of work proposed seaward of the foreshore building line.

Source: Peter Downes Designs



Figure 4: Location of proposed inclinator rail and landings

Source: Peter Downes Designs. Photo taken from public waterfront reserve

4.0 **Clause 4.6 Exceptions to Development standard**

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 MLEP 2013. 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 MLEP 2013 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 establish that *the objectives of the development standard are achieved notwithstanding non-compliance with the standard*. This request relies on this pathway.

The Limited development on foreshore area development standard has a single objective which is set out below, together with a discussion of how the objective is met by the proposal, notwithstanding the variation to the standard.

4.2.1

(1) The objective of this clause is 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:

Foreshore processes

The northern most end of the proposed inclinator and landing is set back least 3m from the northern boundary of the site. The retaining wall which defines the site's northern boundary is a minimum of 2.8m further seaward of the proposed lift and retains a grassed area and the remains of a former garden below the boatshed. Further towards the water, another stone retaining wall 8.5m away from the rail car defines the boundary of the RE1 zoned public land directly adjoining the foreshore area. (See Figure 3 above)

The natural foreshore processes of North Harbour are generally contained well below these two retaining walls, and with an added set back of 2.8m, the proposed inclinator will have no impact upon the foreshore. In the worst possible storm event, it is possible that water will reach the northern extremity of the inclinator, however the minimal structure and elevated rail will have no substantive consequence for the land or associated structures under these conditions.

The inclined lift shall be founded on solid rock and is a high strength / low surface area structure and as such it does not incur an unacceptable risk level of damage during storm events or future tidal inundation due to sea level rise. As is a common practice where inclined lifts are located below the EPL, the lower portion of the lift and base structure which is located below the EPL will be designed and certified by appropriately qualified engineers to withstand estuarine hazards.

The vertical height above and horizontal distance of the structure from the foreshore, together with the retaining walls already between it and the foreshore, will ensure no additional or adverse impact upon the sensitive foreshore area occurs as a result of the development.

Significance and amenity

The inclinator and its landings are restricted to within the already disturbed, retained, and grassed area of the land below the foreshore building line. By blending into the vegetated context, and by maintaining a height as close to ground level as possible, the landings and rail will remain unobtrusive in the landscape. An existing stone stack currently forming a retaining wall will be removed to allow for the inclinator, and this will improve the presentation of the site from the public domain.

Overall, the significance or amenity of the area as viewed from the public domain will not be adversely affected. No impacts upon the heritage item arise as a result of the works, and the land in the immediate vicinity will benefit from greater maintenance as ease of access improves.

4.2.2 Conclusion under Clause 4.6 (3)(a)

We conclude that as the proposed development meets the objectives of the Limited development on foreshore area development standard as outlined above, 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 proposed works which exceeds the development standard is a 6.2m length of the proposed inclinator rail and Landings L3 and L4 at the eastern most end of the rail. The environmental planning grounds that justify the exceedance of the development standard are as follows:

Fall of the land and access through the site

- The nature of the topography at 2A Beatty Street is the primary reason for the proposed inclinator. In the location of the rail, the land falls 44% (1:2.3) or 22 degrees towards the northern boundary. There is currently no direct stair access from the dwelling to the boundary where the reserve and foreshore are accessed. The newly proposed inclinator offers a direct physical connection down the steep site to the point where the reserve and foreshore are accessed without excessive excavation.

Whilst stairs leading to the terraced area exist on the western side of the of the site, they are numerous (over 60), winding, and narrow. These stairs on the site join with stairs closer to the foreshore which are on neighbouring private land, leading to the small beach and rocky foreshore area. Private maintenance of the stairs leading from the dwelling to the lower levels of the site is only possible for the top part of the stair access. The remaining stairs are on neighbouring land at No. 2 Beatty Street.

Additionally, accessing these stairs from the property requires either internal access through the house, or access through the balcony and pool area. For all of these reasons, the stairs are not suitable as a means of access to the foreshore, particularly in relation to maintenance and property management including for the transfer of equipment and building maintenance materials. Accessing the lower levels of the site requires an inclinator to safely traverse the 30m from the primary entrance of the dwelling.

Maintenance of Heritage Item

- The boatshed located at the north eastern end of the site, partly within the foreshore area, includes a stone chimney which is part of the heritage listing on the site. Additionally, the stone walls located in proximity to the foreshore on the site are also part of the heritage values of the site.

Maintenance of these structures requires a reasonable access arrangement currently not available via the western stone stairs which, given their steep fall and hairpin corners, are not suitable for the conveying of property maintenance equipment. The proposed inclinator will permit direct access to both the foreshore and to the boatshed, with the ability to transfer equipment for maintenance and any recreational boating equipment.

No impact on visual character of foreshore area or adjoining National Park

- The privately held foreshore area within the immediate vicinity of the site is a mix of the natural form of the land, vegetation, and built structures. The built structures include terraced areas with stone retaining walls, stairs, fences, and boat sheds. The proposed inclinator and landings will be unobtrusive, low to the ground and set back from the boundary such that the overall view of the site will remain predominantly of lawn, vegetation, and the transition to the natural state of the rocky foreshore.

No adverse impact upon the character of the area as viewed from either the foreshore area itself, waterfront reserve, or National Park will arise. In comparison with adjoining sites, the foreshore and the heritage item are not compromised by the proposed inclinator, which will be finished in medium to dark colours to assist its blending into the natural context.

4.3.1 Objects of the Environmental Planning and Assessment Act

In demonstrating sufficient environmental planning grounds, it is noted that the contravention of the limited development on foreshore standard in this case fulfils the following objects of the Environmental Planning and Assessment Act 1979:

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

and,

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

Permitting substantially improved access to the northern parts of the site will promote greater amenity generally as the ability to use and maintain the site and the heritage item on it is also improved. The design will be unobtrusive in its context which is visually sensitive due to the proximity to the scenic area and to the heritage values of the site.

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

The improved access provided by the proposed inclinators is likely to extend the economic life of the existing structures, including those with heritage values, and allow maintenance and improvement of areas on the site adjoining the National Park and foreshore area. Activities such as weed removal and native planting will be facilitated, and an increased understanding of the sensitive natural environment is a likely consequence of the improved access.

4.3.2 Conclusion under Clause 4.6(3)(b)

In our opinion the above environmental planning grounds are sufficient to justify the exceedance of the Limited development on foreshore area development standard.

- 4.4 Clause 4.6(4) requires the consent authority to keep a record of its assessment carried out under subclause (3).

Noted.

- 4.5 Clause 4.6(6) requires that Development consent not be granted under this clause for a subdivision of land in certain zones

Not applicable. No subdivision proposed.

- 4.6 Clause 4.6(8) does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

No development standards for complying development will be contravened

(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,

SEPP (Building Sustainability Index: BASIX) 2004 is not applicable.

(c) clause 5.4,

The development does not include any of the uses referred to in Clause 5.4

(caa) clause 5.5,

This Clause is not adopted under MLEP 2013

(ca) clause 6.15,

Not Applicable. Tourist and Visitor accommodation is not proposed.

(cb) a development standard on land to which clause 6.19 applies.

Not Applicable. The land is not part of St Patrick's Estate which is the subject of Clause 6.19.

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 6.10 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,

Following this, the consent authority can be satisfied that it is appropriate to apply the flexibility permitted under Clause 4.6 of MLEP 2013 to vary the Limited development on foreshore area development standard of MLEP 2013 to the extent proposed.

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