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14 July 2025

LEP Clause 4.6 exception request

Limited development on foreshore area [LEP cl 6.10] - proposed inclined passenger lift

11 Seaforth Crescent, Seaforth

1 Introduction

This is a written request for an exception to the development standard made pursuant to clause 4.6 of the LEP. It accompanies the development application for a new dwelling house at the subject property.

The proposal seeks an exception to LEP Clause 6.10 “Limited development on foreshore area”, which is a development standard.

The *foreshore area* and *foreshore building line* are terms defined within clause 6.10 of the LEP and copied below in Section 2. The foreshore area applicable to the rear of site is shown below.

The proposed inclined passenger lift [inclinator] is a form of development to which clause 6.10 applies, that is, it is not specifically listed within the exclusions within 6.10(2)(c). It may, subject to Council forming its opinion satisfy the provisions of 6.10(2)(b) and be the appropriate ‘erection of a building in the foreshore area having regard to the character and features of the foreshore area described in the DA.

The proposed inclinator comprises a lift, on a steel track, 4.3m to 5.2m from the south western side boundary with 2 stops linking the upper level [RL17.15] of the rear of the site to the land’s waterway interface [RL 4.80, including the approved boat shed and slip]. This includes (but is not necessarily limited to) installation of concrete piers, steel track, motor, 2 landings comprising 2 steel frame platforms, and a passenger car.

Two viewing platforms are shown on the landscape plan [Figure 5], 1 partially, and the other entirely, within the foreshore area. These provide two resting and viewing opportunities for pedestrians traversing the slope via the access path. They generally form part of the access path and will be integrated within the landscape. These are appropriately defined as *recreation facility (outdoor)* and a form of development covered by 6.10(2)(c).

The *foreshore area* is shown within figures 1, 2, and 4 below and on the architectural plans. It’s estimated that the *foreshore area* is approximately 325 square metres. Approximately 11.58m of the proposed inclinator is located with the foreshore area (Figure 2) and occupies an area of approximately 3.4 square metres or 1.2% of the *foreshore area*.

2 Site and location description

The site is located 11 Seaforth Crescent, Seaforth. It is legally described as Lot 16 in Deposited Plan 4889 and has an area of 1,846m².

The lot is steep, irregular in shape, and has water frontage to Middle Harbour. The land displays a significant level difference of approx. 43m, from RL 45.9 near the north eastern corner of the lot down to RL 2.6 near the south eastern corner of the lot.

There are views generally in a southerly direction towards Middle and Sydney Harbour and their foreshores from the site and the elevated hill side location.

The location is built-up containing a diverse mix of residential housing forms. There are a mix of property frontages to the street with garages, carports, and car parking areas with nil or minimal street setbacks. There is no consistent front setback. There is no consistency of materials or roof forms.

There are views generally in a southerly direction towards Middle and Sydney Harbour and their foreshores from the elevated hill side location.

The location is built-up containing a diverse mix of residential housing forms as evident within the photographs herein.

There is a diverse mix of property frontages to the street with garages, carports, and car parking areas with nil or minimal street setbacks. There are no consistent front setbacks. There is no consistency of materials or roof forms.

No significant change to the character is foreshadowed by the planning controls. Therefore, the existing character is a relevant consideration in guiding the assessment of the proposed built form.

On 21 October 2022, DA2022/0047 approved demolition works and construction of boat shed and boat ramp at the lots water frontage. The consent remains enforceable.

The figures on the following pages depict the character of the property and its existing development.

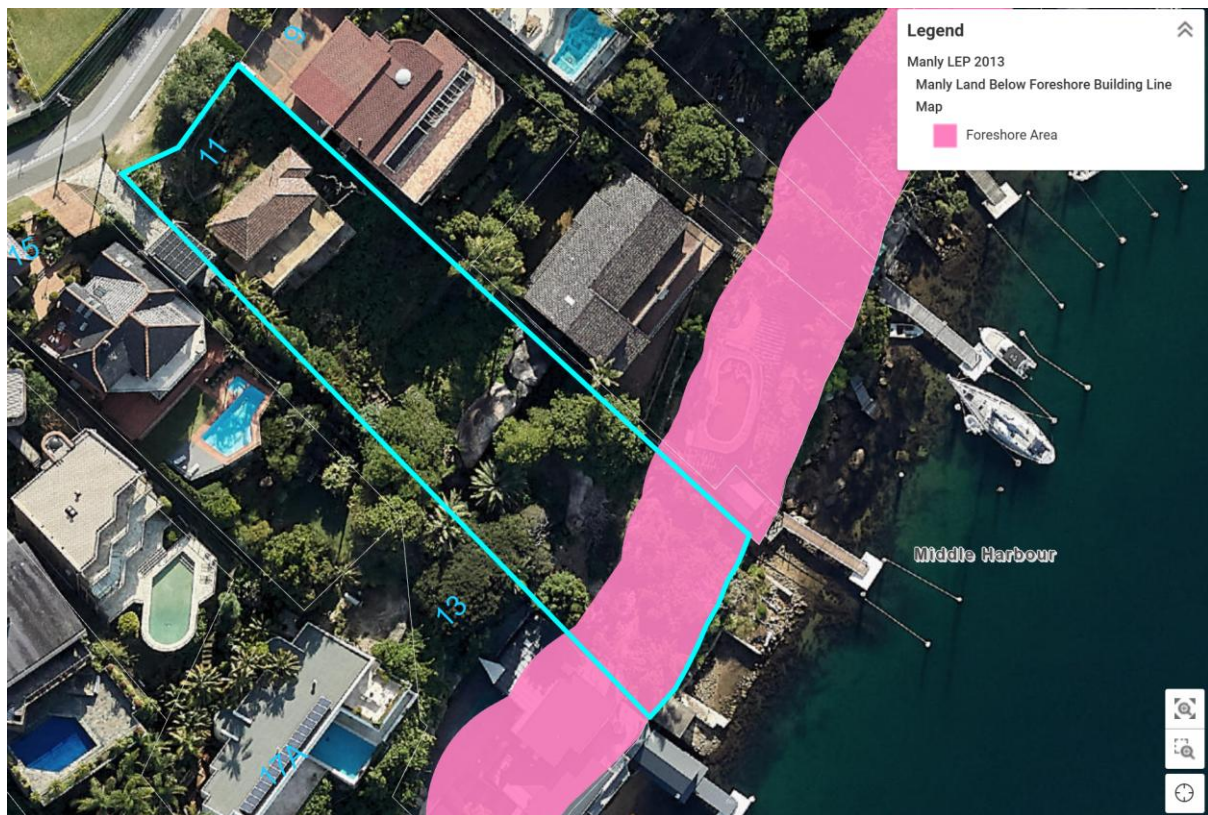


Figure 1 – the property and the designated foreshore area

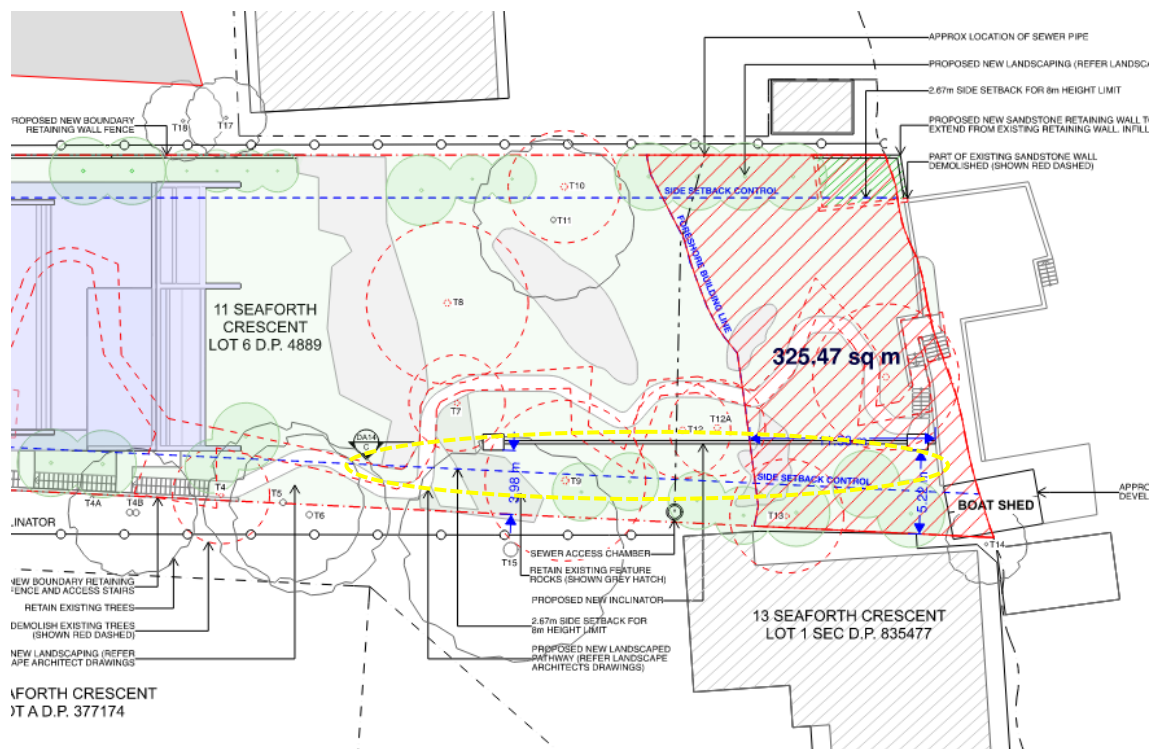


Figure 2 – the exception relates to approx. 11.58m of the Inclinator that is within the foreshore area



Figure 3 – rear elevation of the proposed development and inclinator

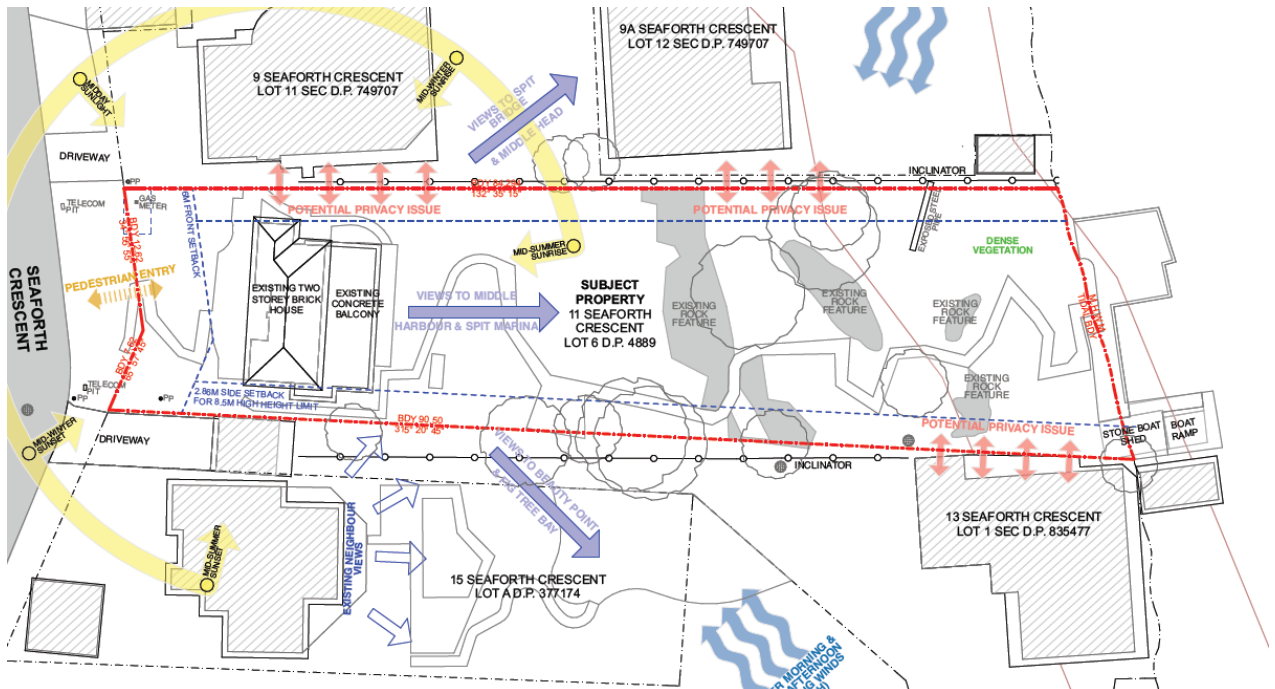


Figure 4 – site analysis plan showing existing development footprint

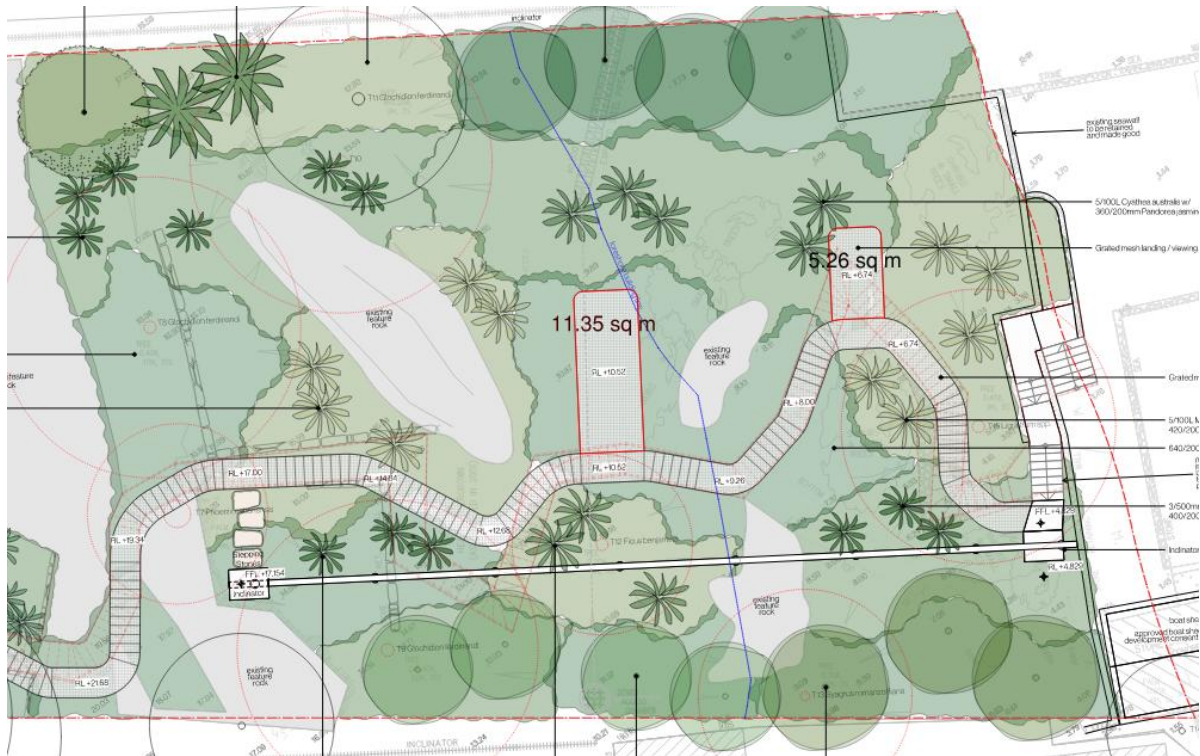


Figure 5 – proposed landscape plan showing access path, inclinator and 2 viewing platforms

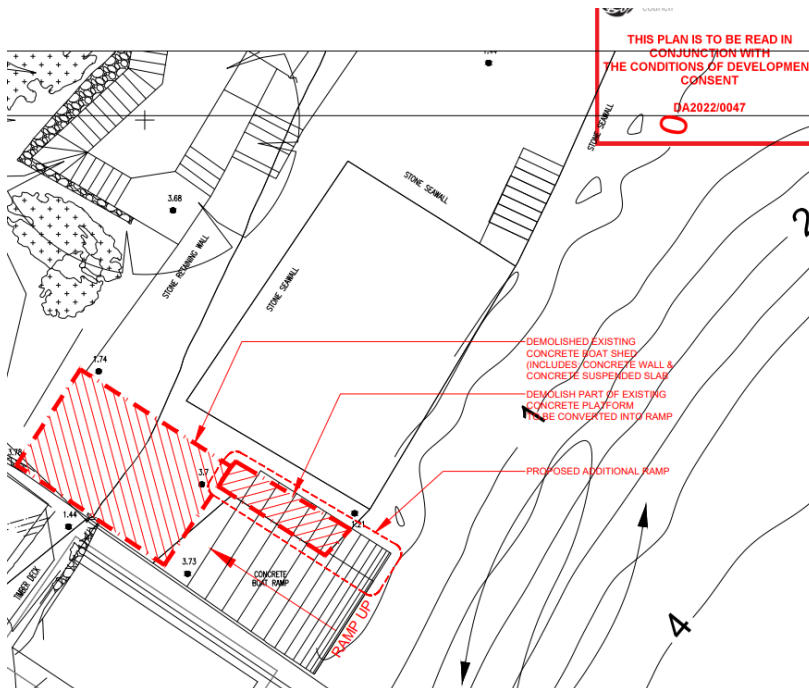


Figure 6 – development approved in DA2022/0047 at the site's water frontage

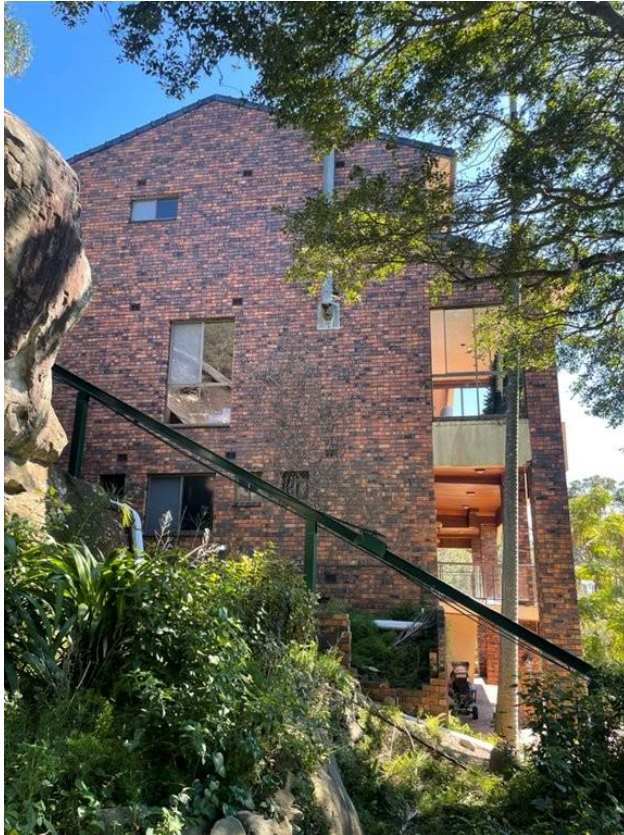


Figure 7 – dwelling house and inclinator character at 9 Seaforth Cres adjacent to the north east

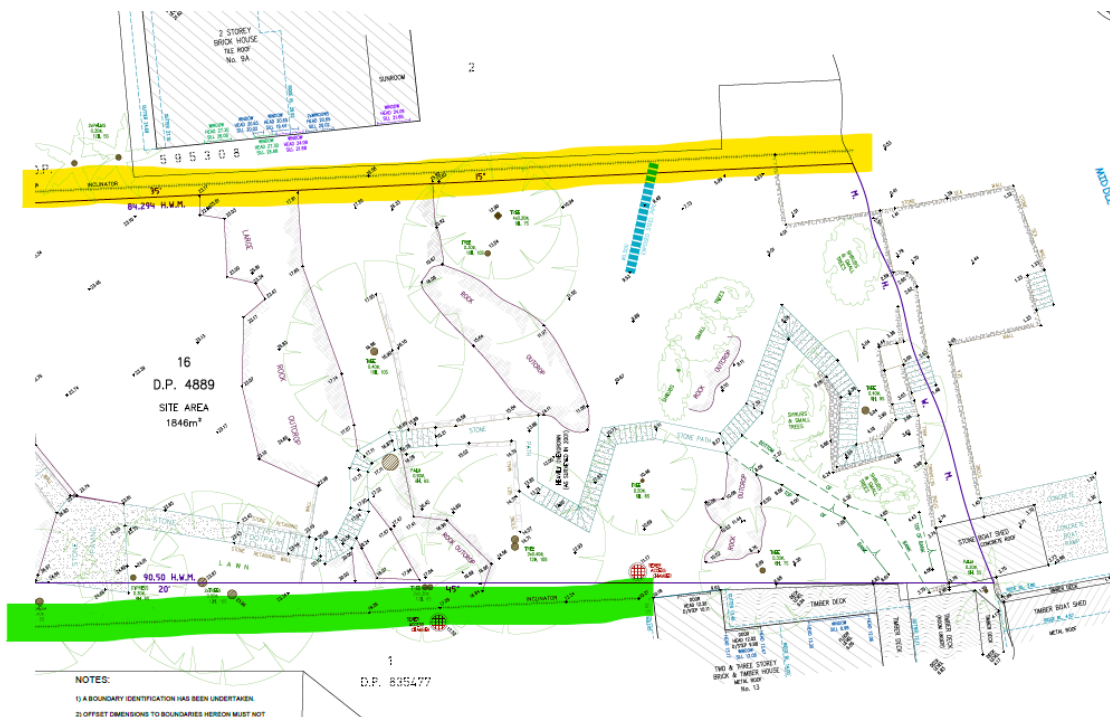


Figure 8 – the adjacent dwelling houses are developed with Inclinator as shown above

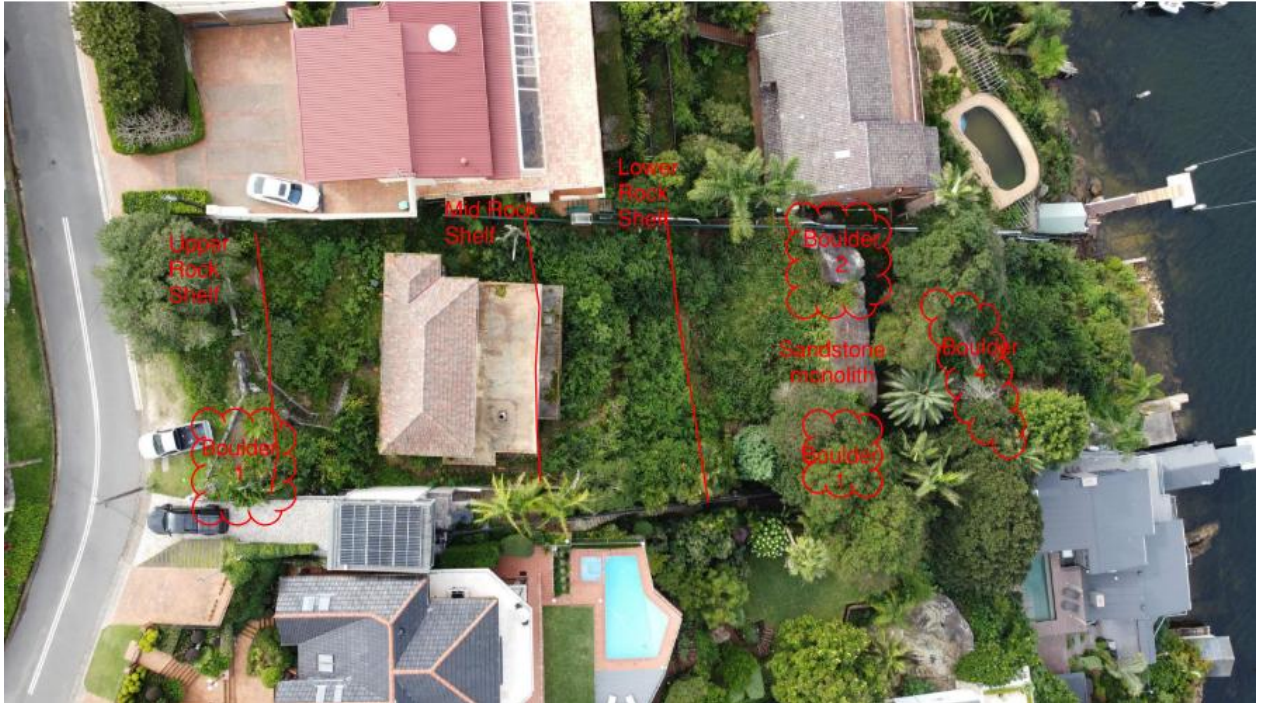


Figure 9 – aerial image of the site, adjacent land and the location of rock features on the property [source: geotechnical assessment report]

3 Key statutory considerations

3.1 LEP Clause 4.6

Key aspects of LEP Clause 4.6 are repeated below:

“(1) The objectives of this clause are 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.*

(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.

(3) Development consent must not be granted to 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 the contravention of the development standard”.*

3.2 LEP Clause 6.10 Limited development on foreshore area

LEP Clause 6.10 is repeated below:

6.10 Limited development on foreshore area

- (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.*
- (2) Development consent must not be granted to 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,*
 - (b) the erection of a building in the foreshore area, if the levels, depth or other exceptional features of the site make it appropriate to do so,*
 - (c) boat sheds, sea retaining walls, wharves, slipways, jetties, waterway access stairs, swimming pools, fences, cycleways, walking trails, picnic facilities or other recreation facilities (outdoors).*
- (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*
 - (b) the appearance of any proposed structure, from both the waterway and adjacent foreshore areas, will be compatible with the surrounding area, and*
 - (c) the development will not cause environmental harm such as—*
 - (i) pollution or siltation of the waterway, or*
 - (ii) an adverse effect on surrounding uses, marine habitat, wetland areas, fauna and flora habitats, or*
 - (iii) an adverse effect on drainage patterns, and*
 - (d) the development will not cause congestion or generate conflict between people using open space areas or the waterway, and*
 - (e) opportunities to provide continuous public access along the foreshore and to the waterway will not be compromised, and*
 - (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*
 - (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*
 - (h) sea level rise or change of flooding patterns as a result of climate change has been considered.*
- (4) In satisfying itself about a matter mentioned in subclause (3) (e), the consent authority must give consideration to the following—*
 - (a) continuous public access to and along the foreshore through or adjacent to the proposed development,*

- (b) public access to link with existing or proposed open space,*
- (c) public access to be secured by appropriate covenants, agreements or other instruments registered on the title to land,*
- (d) public access to be located above mean high water mark,*
- (e) reinforcing the foreshore character and respect for existing environmental conditions.*

(5) In this clause—

foreshore area means the land between the foreshore building line and the mean high water mark of the nearest natural waterbody.

foreshore building line means the line shown as the foreshore building line on the Foreshore Building Line Map.

3.3 Objectives of the Environmental Planning and Assessment Act

The objectives of the Act, under section 1.3, are as follows:

- (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,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

Clause 4.6 exception to a development standard

4 4.6 (3)(a) - compliance with the development standard is unreasonable or unnecessary in the circumstances

Having regard for the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, and in accordance with 4.6 (3)(a), compliance with the development standard is unreasonable or unnecessary in the circumstances of the case because the objectives of the standard are satisfied.

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 may be well founded. The first possible way is relevant to the subject matter and is repeated below:

1st 'The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.'

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable'.

As required by clause 4.6(3), the following is a submission to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify the contravention of the standard.

The objective of the standard is repeated and responded to below.

5 Objectives of the Development Standard

In accordance with 4.6 (4)(a)(ii) the proposed development will be in the public interest because it is consistent with the objective the standard which is repeated and responded to below:

"(1) to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area".

Response –

Natural foreshore processes

The term “natural foreshore processes” is not defined by the LEP but can reasonably be interpreted to relate to the land / water interface such as wave action, tidal inundation, erosion, riparian zones, landscaping, physical stability, etc. that foreshore areas may be exposed to.

An arboriculture report accompanies and supports the development application. The report finds that the proposed development will not result in any inappropriate or extensive removal of significant vegetation and is appropriate for the site subject to recommended mitigation measures.

No significant earthworks or land remodelling is proposed within the Foreshore Area.

The proposed inclinator is located to avoid any impact on the sites large exposed natural rock features. A geotechnical report accompanies and supports the development application. The report finds that the proposed development is appropriate for the site subject to recommended mitigation measures. These may form conditions of development consent.

The proposed development is accompanied and supported by a stormwater management plan. Stormwater will be discharged in a controlled manner and will avoid inappropriate adverse impacts on adjoining land.

Landscape design and planting is incorporated in the DA as documented within the accompanying landscape plan. Planting is proposed that will result in enhancement of vegetation within the property's foreshore area.

The proposed landscaping will ensure that the proposed structures integrate with the landscaped foreshore character of the site and that the proposed development will make a positive contribution to the amenity of the local area.

The proposed inclinator will not inappropriately impact upon the *significance of the land*

The LEP does not identify or characterise the significance of the site's foreshore area, in particular, there is nothing specific to the site to suggest that the foreshore area has particular historic, scientific, cultural, social, archaeological or architectural, natural or aesthetic significance. The scientific reports that accompany the DA confirm that the proposed development will not inappropriately impact upon the significance of the land.

The proposed inclinator will not inappropriately impact upon the *amenity of the area*

The inclinator is a minor element noting the relatively small footprint, nature, scale and character. It is significantly shorter in length than the inclinators located on the adjoining properties. In the context of the large site area and the proposed development, the proposed inclinator will be visually insignificant when viewed from the water and surrounding land.

The proposed inclinator is appropriately setback from the side boundaries being approx. 3.98m to 5.2m from the nearest south western side boundary.

The proposed inclinator will not be inappropriately elevated and follows the slope of the land [figure 6].

The appearance of the proposed inclinator, will be compatible with the surrounding area noting the following characteristics:

- The hillside character of the area is assessed as achieving a visual dominance of landscape elements over buildings on the site at its foreshore frontage.
- The proposed built form will be viewed within the existing hillside character which will form a dominant backdrop to the proposed structures.
- The proposed inclinator is appropriate within the context of the existing development on land adjoining the site. The location, height, materials, and extent are compatible with other similar foreshore structures on the adjacent land (figure 8) including inclinators. Therefore, the proposed inclinator will not be seen as visually offensive, unexpected, or jarring when viewed from the waterway or adjacent foreshore areas.
- The landscaped character of the site's foreshore area will not be inappropriately altered by the proposal.

Council can be satisfied that the proposed development will not adversely impact the amenity of the area.

The proposed development will positively impact upon the amenity of the land by providing an appropriate foreshore development within a foreshore setting.

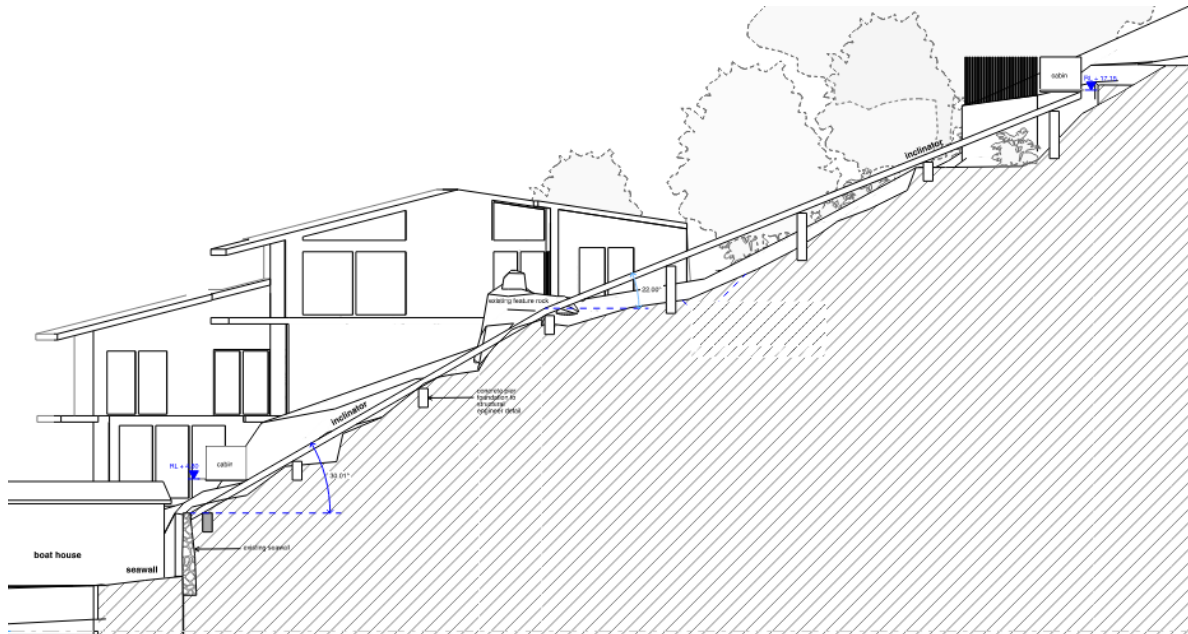


Figure 10 – The proposed inclinator will not be inappropriately elevated and is significantly setback by approx. 3.98m to 5.2m from the south western side boundary

6 Clause 4.6 (3)(b) sufficient environmental planning grounds to justify contravening the development standard

In accordance with 4.6 (3)(b) there are sufficient environmental planning grounds to justify contravening the development standard given that: These planning grounds include –

Orderly, equitable and safe pedestrian access

The site is characterised by steep topography. There is a level difference of approximately 43m between the front and rear of the site.

The current pedestrian access between the site and the waterway is unsafe and inadequate.

The proposed dwelling house includes a passenger lift within it Connecting the garage / entry level to the games level [RL 31.1]. The inclinator will provide an effective means of pedestrian access for the lower section of the site including the approved boat shed and slip, from level RL17.15 to RL 4.80,

The proposed inclinator will provide for the orderly development and use of the site that is safe and meets the physical needs of all users. The proposed inclinator will be complimentary to the approved boat shed and jetty structures, that together, form a suite or waterway access provisions to serve the property.

Conservation of the existing natural features

The proposed inclinator will preserve the existing vegetation and natural land features including trees, the natural topography, and rock outcrops. Therefore, the proposed development will

preserve the natural visual presentation of the site when viewed from the foreshore and waterway.

Not visually intrusive

The proposed inclinor is of minimal size, scale, bulk, and footprint. It will not be visually inappropriate or intrusive when viewed from the waterway or adjoining land.

No alternative location outside of the foreshore area

There is no means of providing mechanical access provision between the dwelling house and the foreshore outside of the designated foreshore area.

Compatible with similar access related structures on nearby land

As demonstrated by figures within section 2 of this submission, the proposed inclinor is a form of development that will be compatible with similar waterway access structures on nearby land. For example, the adjoining properties at 9A and 13 Seaforth Crescent are developed with various structures within the foreshore area including inclinors (figure 8).

Appropriate building and physical and characteristics of the site

Having regard to 6.10(2)(b) and the physical characteristics of the site, previously described, the proposed inclinor is assessed as being an appropriate *'erection of a building in the foreshore area, if the levels, depth or other exceptional features of the site make it appropriate to do so'*.

6.1 Consistent with the objectives of the Act

Having regard to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the proposal is consistent with the following objectives at under Section 1.3 of the Environmental Planning and Assessment Act 1979 (the Act):

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

(g) to promote good design and amenity of the built environment, through consistent streetscape alignment and increased landscaping at the street edge.

In response to (c), the proposal will facilitate the orderly and economic use and development of waterfront land by improving pedestrian access between the site and the waterway is unsafe and inadequate. The inclinor is complimentary to the existing / approved waterway access structures, and appropriately located for a waterfront property, compatible with similar development on nearby land.

In response to (g), the proposal results in a residential development that will promote good design and amenity of the built environment by providing a built form and landscaped foreshore interface. The proposed inclinor is responsive to the site's environmental conditions, compatible with adjacent and nearby waterfront properties, and will be seen within the existing hillside character which will form a dominant backdrop to the proposed structure.

For these reasons there are sufficient environmental planning grounds to justify the exception to the development standard.

7 Conclusion:

The exception proposed to the development standard has been acknowledged and the circumstances assessed, having regard to the provisions of LEP clause 4.6 and the relevant case law.

Council can be satisfied that this submission has demonstrated the matters required by cl 4.6(3) and that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances; and
- there are sufficient environmental planning grounds to justify the contravention of the development standard.

Therefore, the exception should be granted development consent.

Michael Haynes

Director - BBF Town Planners