

## Clause 4.6 Variation

**Standard:** Clause 4.3 - Height of Buildings

**EPI:** Manly LEP 2013

**Proposal:** Proposed Alterations and Additions

**Property:** 88 Bower Street, Manly

**Prepared by:** Joseph Vescio

**Date:** 23 June, 2021





# 1 Introduction

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## 1.1 Background

The Proposal is described in detail in Section 3 of the Statement of Environmental Effects (SEE) and generally comprises:

- Major alterations and additions to existing dwelling comprising partial demolition of the dwelling and alterations and additions to the existing dwelling;
- Construction of spa pool, landscaping and drainage.

The Proposal exceeds the 8.5m maximum Height of Buildings (HOB) development standard under cl4.3 of the MLEP 2013, having a maximum building height of 9.69m (corner of upper level roof over terrace) utilising the second method of assessment (outlined in this Submission).

Notwithstanding the contravention of the development standard, the proposal is considered to be consistent with the objectives of the development standard and the objectives of the zone within which the development is to be carried out. There are sufficient environmental planning grounds to justify the contravention in this instance including a lack of adverse amenity impacts and positive social and economic considerations as a result of the development.

This written request has been prepared to provide a detailed assessment in accordance with the statutory requirements of cl4.6 so that the consent authority can exercise its power to grant development consent, notwithstanding the contravention to the HOB development standard.

## 1.2 Material Relied Upon

This Variation Request has been prepared based on the Architectural Drawings prepared by *Squillace Architects*, dated 18 June 2021.

This Variation Request should be read in conjunction with the detailed environmental planning assessments contained in the DA documentation submitted with the DA and documents appended thereto.

## 2 The Relevant LEP Provisions

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### 2.1 Manly Local Environmental Plan 2013

#### 2.1.1 Clauses 2.2-2.3 – Zoning and Permissibility

Clause 2.2 and the Land Zoning Map of the LEP provide that the entire Site is zoned E4 Environmental Living and the Land Use Table in Part 2 of the LEP specifies the objectives of this zone as follows:

- *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 protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

The proposed land use is defined as a dwelling house which is permissible with development consent in the E4 Zone pursuant to the MLEP 2013. It is noted that part of the site (Lot 1) is zoned RE1 Public Recreation. There are no structures (including the pool and landscaping) within the RE1 zoned area. The provisions of this zone have no bearing on the clause 4.6 variation.

#### 2.1.2 Clause 4.3 – Height of Buildings (HOB)

Clause 4.3 of the MLEP 2013 sets out the HOB development standard as follows:

*(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The Height of Buildings Map designates a maximum 8.5m height limit for the Site (see Figure 1).

## 2 The Relevant LEP Provisions

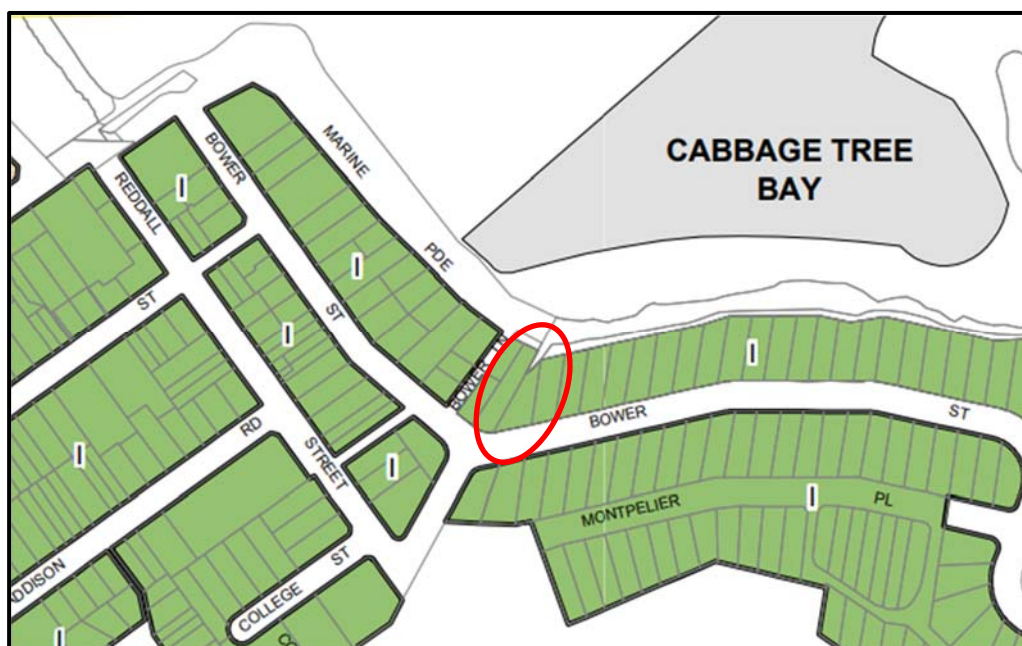


Figure 1: Extract of MLEP 2013 Map (HOB\_006, "I" = 8.5m)

The MLEP 2013 Dictionary contains the following definitions:

**Height of Buildings Map** means the Manly Local Environmental Plan 2013 Height of Buildings Map.

**building height (or height of building) means:**

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

### 2.1.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of the LEP states the objectives of the clause 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.

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action") (see Section 4.7), Preston CJ ruled that there is no provision that requires the applicant to demonstrate compliance with these objectives for the consent authority to be satisfied that the development achieves these objectives. Furthermore, neither cl4.6(3) nor cl4.6(4) expressly or impliedly requires that development that contravenes a

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development standard “*achieve better outcomes for and from development*”.

Accordingly, the remaining subclauses of cl4.6 provide the operable provisions and preconditions which must be satisfied before a consent authority may grant development consent to a development that contravenes a development standard imposed by an environmental planning instrument.

Clause 4.6(2) provides that:

- (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.*

The HOB development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted.

Clause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

- (3) *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.*

The proposed development does not comply with the HOB development standard pursuant to cl4.3 of the MLEP 2013. However, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed in Section 5.2.1.

In addition, there are considered to be sufficient environmental planning grounds to justify contravening the development standard as detailed in Section 5.2.2.

Clause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) *the consent authority is satisfied that:*
    - (i) *the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the*

## 2 The Relevant LEP Provisions

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*objectives for development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Secretary has been obtained.*

Sections 5.2 and 5.3 of this written request address the matters required under cl4.6(4)(a) of the LEP and Section 5.4 addresses cl4.6(4)(b).

Clause 4.6(5) provides that:

*(5) In deciding whether to grant concurrence, the Secretary must consider:*

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Section 5.5 of this written request addresses the matters required under cl4.6(5) of the LEP.

Clauses 4.6(6) and (8) are not relevant to the proposed development and cl4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

### 3 The Nature of the Variation

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The proposal seeks a variation to maximum permissible height limit. In this case there are two possible methods to calculate and define the height of the building given the circumstances of the site, the proposal and the merit assessment of the proposed building height. In this regard, it is noted that the site contains a substantial dwelling of which much of the underlying fabric is to be retained and which has been excavated and accommodated by the modification of the steeply sloping site.

The first building height method is based on the on the RL's of the existing floor areas (as built); the second method is extrapolated across the site based on the natural ground level at the boundaries of the site (refer *Bettar v Sydney City Council*). Council confirmed, in the Pre-lodgment Minutes of 21<sup>st</sup> January 2021, that the height of the development could adopt the natural ground levels of the site at the boundaries in order to calculate the building height line across the site. For completeness an assessment against both methods is provided.

#### **i) Height from ground level (existing)**

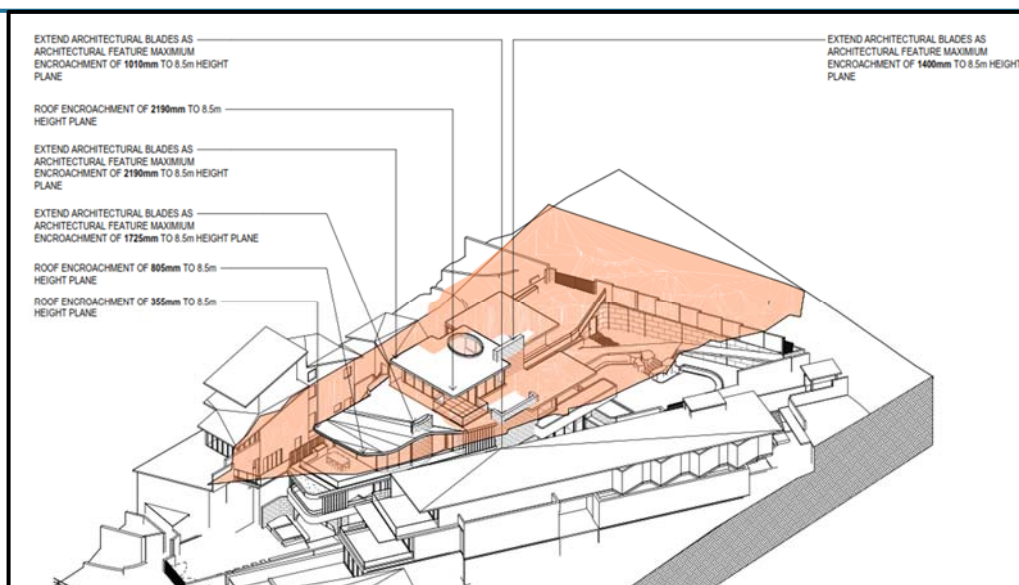
In response to the definition of building height in the Manly LEP 2013, the height of the building would be measured from the ground level (existing) to the highest point of the building or from the RL of the building to the highest point of the building. In this case the building would be taken from the RL of the lower ground level floor level (ie RL 3.80m AHD).

Figure 2 shows the area of building height compliance shaded orange and the area of non-compliance as white. Figure 3 shows the cross section of the building showing the retained floors and walls in black and new floors and walls in grey. Figure 4 shows the height of the building from various locations, when measured from RL 3.8m AHD.

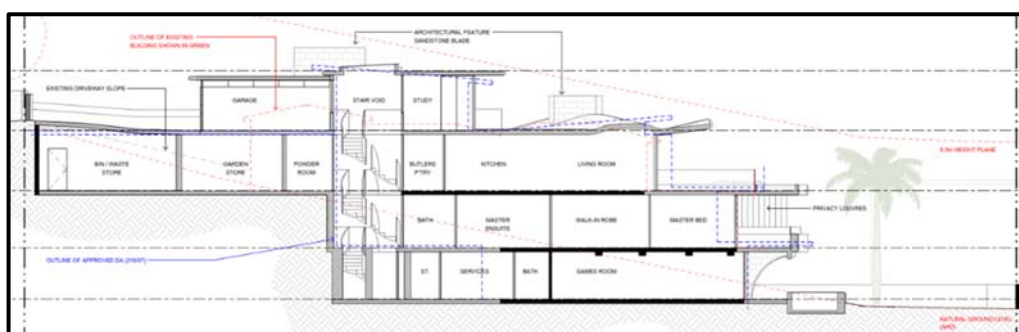
The maximum height occurs at the front of the stairwell structure, measuring **11.81m** above the lower ground floor level of RL3.8m AHD. The front of the upper terrace roof is 11.48m above the existing lower ground slab (RL3.8m AHD) immediately below the edge of the terrace roof. The front of the living room measures 8.85m above the existing lower ground floor slab, noting that the red dotted outline of the existing dwelling shows a similar height at this point of the building and setback from the Marine Parade frontage.

A blade wall above the upper-level library is an architectural feature only and is not directly above the existing or proposed lower ground floor slab.

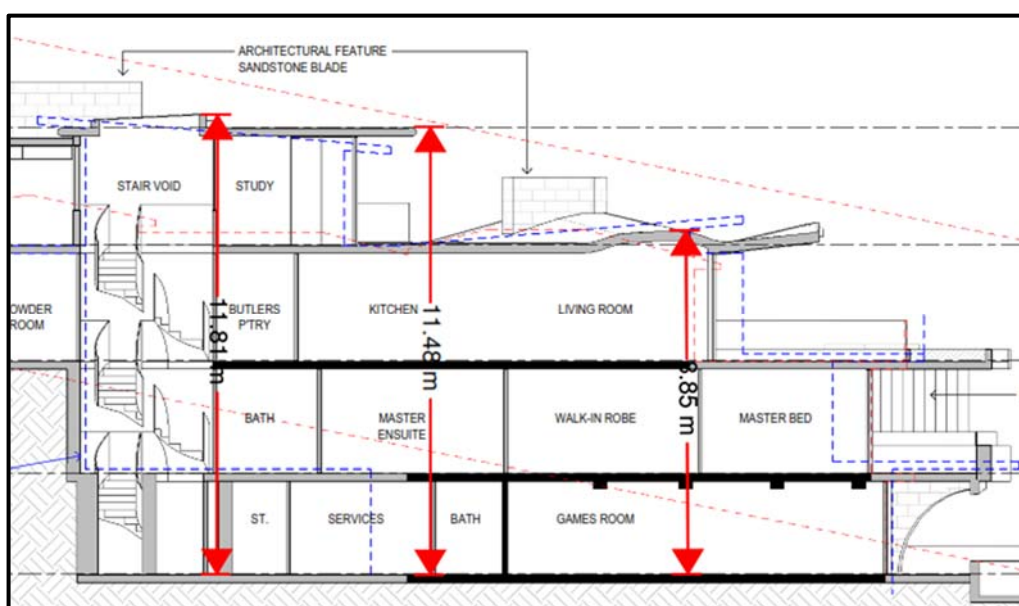
### 3 The Nature of the Variation



**Figure 2: Building Height Plane diagram using existing ground level (RL3.8m AHD – floor level of lower ground floor level)**



**Figure 3: Section plan of the development showing the existing floors and walls in black and new floors and walls in grey**



**Figure 4: Extract Section plan (Dwg DA-301/P4) of the development with measurements to existing ground levels (ie RL 3.8m AHD of lower ground floor)**

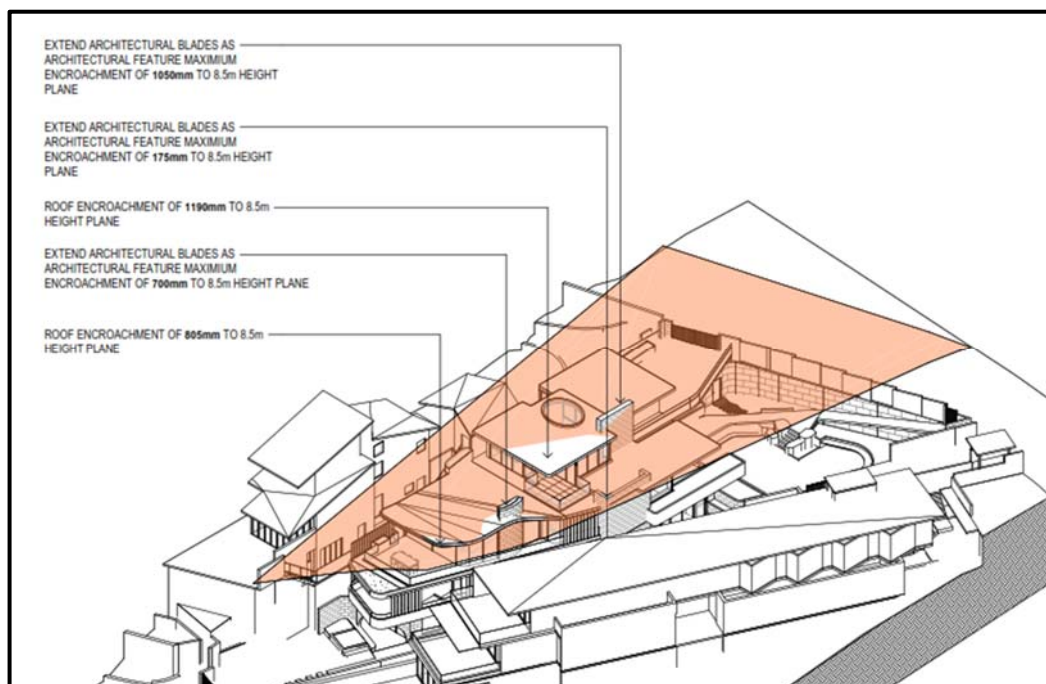
### 3 The Nature of the Variation

The above shows that the proposal exceeds the 8.5m building height development standard relative to the modified existing ground level. The maximum variation equates to **3.31m or 38.9%**.

#### ii) Height from natural ground levels

The second method adopted for the merit assessment of the height of building relies on averaging/assuming the natural fall of the site in comparison to adjoining sites and ignoring the man-made improvement to the adjoining site or the site itself. This is consistent with the method adopted by the Land & Environment Court in *Bettar v City of Sydney Council* In this case, Council confirmed, within the Pre-lodgment Minutes of 21<sup>st</sup> January 2021, that the height of the development could adopt the natural ground levels of the site at the boundaries.

Figure 5 below shows the building height plan diagram using this measurement method.



**Figure 5: Extract of height plane diagram – showing one corner of the upper-level terrace exceeding the 8.5m height control (the blade wall are architectural features only)**

### 3 The Nature of the Variation

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Using the natural ground levels across the site the maximum building height occurs at the front corner of the upper-level terrace – a maximum height of 9.69m, the roof near the chimney and roof over the front terrace with height of 9.31m. The maximum variation is **1190mm**, or a **14% variation** to the 8.5m height control.

In accordance with Council's written advice, the specific circumstance of this case and in our opinion, this is the most appropriate and reasonable method to be adopted. The alternate method would result in a potential absurdity if the levels were raised and floor levels elevated and set as the base ground level line.

The variation sought is up to a maximum height of 9.69m and a variation of **1190mm**, adopting the second assessment method – natural ground level across the site.

## 4 Case Law

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### 4.1 Introduction

The proposed variation to the development standard has been considered in light of the evolving methodology and “tests” established by the NSW Land & Environment Court (the Court) and the following subsections provide a brief summary of key Judgments in regard to variations under the former SEPP 1 and cl4.6 of the SILEP.

### 4.2 *Winten Developments Pty Ltd v North Sydney Council* [2001]

Through the Judgment in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46 (“Winten”) the Court established a ‘5-part test’ for considering whether strict compliance with a development standard is unreasonable or unnecessary in a particular case. The elements of this test can be summarised as:

- Is the planning control a development standard?
- What is the underlying object or purpose of the standard?
- Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the *Environmental Planning & Assessment Act 1979*?
- Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?
- Is the objection well founded?

The 1<sup>st</sup> ‘test’ continues to be relevant and is a precondition for the application of cl4.6 – see Section 5.1.

The 2<sup>nd</sup> ‘test’ is required to be demonstrated under cl4.6(4)(a)(ii) – see Section 5.2.1.

The 3<sup>rd</sup> ‘test’ was specific to cl3 of SEPP 1 and has not been transferred to cl4.6 of the SILEP. Notwithstanding, in Initial Action (see below), Preston CJ indicated that it is reasonable to infer that “environmental planning grounds” as stated in under cl4.6(3)(b), means grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s1.3 of the EP&A Act – see Section 5.2.2.

The 4<sup>th</sup> ‘test’ is required to be demonstrated under cl4.6(3)(a) - see Section 5.1.

The 5<sup>th</sup> ‘test’ is analogous to cl4.6(4)(a) – see Section 5.3.

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### 4.3 *Wehbe v Pittwater Council [2007]*

The 5-part test under *Winten* was later supplemented by the Judgment in *Wehbe v Pittwater Council [2007] LEC 827* (“*Wehbe*”) where Chief Justice Preston expressed the view that there are 5 different ways in which an objection to a development standard may be assessed as being well founded and that approval of the objection may be consistent with the aims of SEPP 1. These included:

1. Notwithstanding the non-compliance, is the proposal consistent with the relevant environmental or planning objectives?
2. Is the underlying objective or purpose of the development standard not relevant to the development with the consequence that compliance is unnecessary?
3. Would the underlying objective or purpose of the development standard be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable?
4. Has the development standard been virtually abandoned or destroyed by the consent authority’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable?
5. Is the zoning of the particular land unreasonable or inappropriate such that the development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and therefore, compliance with the standard would be unreasonable or unnecessary?

### 4.4 *Four2Five Pty Ltd v Ashfield Council [2015]*

In the Judgment of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (“*Four2Five*”) Pearson C expanded on the earlier Judgments of *Winten* and *Wehbe*, indicating that whilst consistency with zoning and standard objectives of the development standard is addressed specifically in cl4.6(4)(a)(ii), there remains an onus of also demonstrating that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary. Furthermore, that the environmental planning grounds must be particular to the circumstances of the proposed development rather than public benefits that could reasonably arise from a similar development on other land.

The environmental planning grounds that support the proposed variation development standard in this circumstance are detailed in the main body of this Statement and summarised in Section 5.2.2 of this variation request.

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### 4.5 **Randwick City Council v Micaul Holdings Pty Ltd [2016]**

In *Randwick City Council v Micaul Holdings Pty Ltd [2016]* NSWLEC 7 ('Micaul') Preston CJ made it clear that development consent cannot be granted for a development that contravenes a development standard unless the consent authority:

- (a) has considered a written cl 4.6 objection seeking to vary the development standard as required by cl4.6(3) of the SILEP;
- (b) is satisfied that the cl4.6 objections adequately addressed the matters required to be demonstrated by cl4.6(3) (as required by cl4.6(4)(a)(i));
- (c) is satisfied that the development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out as required by cl4.6(4)(a)(ii).

In addition, Preston CJ elucidated that the consent authority does not have to be directly satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case – only that it be indirectly satisfied that the applicant's written request adequately addresses the matters in cl4.6(3) that compliance with the development standard is unreasonable or unnecessary.

Furthermore, Preston CJ confirmed that an established means of demonstrating that compliance with a development standard is unreasonable or unnecessary is to establish that a development would not cause environmental harm and is consistent with the objectives of the development standard.

### 4.6 **Moskovich v Waverley Council [2016]**

Providing further guidance on the interpretation of cl4.6 compared to its predecessor SEPP 1, the Judgment in *Moskovich v Waverley Council [2016]* NSWLEC 1015 ('Moskovich') outlines that cl4.6(3)(a) is similar to cl 6 of SEPP 1 and the ways of establishing that contravention of a development standard is well founded expressed in *Wehbe* (e.g. "achieving" the objectives of the development standard) are equally appropriate for the consideration of cl4.6(3)(a).

However, cl4.6(4)(a)(ii) has different wording to SEPP 1 and requires the consent authority to be satisfied that the proposed development is in the public interest because it is "consistent" with objectives of the development standard and objectives for the zone rather than "achieving" the objectives. Consequently, the considerations of cl4.6(3)(a) and cl4.6(4)(a)(ii) are different with the achievement test being more onerous and requiring

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justification in ‘ways’ such as those expressed in *Wehbe*.

Accordingly, whilst the Judgments in *Winten* and *Wehbe* related to variation requests under SEPP 1, the methodology and reasoning expressed in those Judgments continues to be the accepted basis upon which to assess variation requests pursuant to cl 4.6 with minor areas of differing interpretation.

### 4.7 Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (‘Initial Action’), Preston CJ indicated that cl4.6 does not directly or indirectly establish a test that a non-compliant development should have a neutral or beneficial effect relative to a compliant development. For example, a building that exceeds a development standard that has adverse amenity impacts should not be assessed on the basis of whether a complying development will have no adverse impacts. Rather, the non-compliance should be assessed with regard to whether the impacts are reasonable in the context of achieving consistency with the objectives of the zone and the objectives of the development standard.

Further, Preston CJ ruled that cl4.6 does not directly or indirectly establish a “test” that a development which contravenes a development standard results in a “*better environmental planning outcome*” relative to a development that complies with the development standard. In fact, there is no provision in SILEP that gives substantive effect to the objectives of cl4.6 stated in cl4.6(1)(a) and (b). That is to say, neither cl4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “*achieve better outcomes for and from development*”.

Furthermore, Preston CJ ruled that it is incorrect to hold that the lack of adverse amenity impacts on adjoining properties is not a sufficient ground justifying the development contravening the standard, when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts.

### 4.8 Summary of the Case Law Methodology and Tests

The collective methodology and tests described above has been applied to the assessment at Section 5 and can be summarised in the following steps:

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1. Step 1 - Is the planning control that the applicant seeks to contravene a development standard?
2. Step 2 - Is the consent authority satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required by cl 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. Step 3 - Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out?
4. Step 4 - Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Step 5 - Where the consent authority is the Court, has the Court considered the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

## 5 Assessment of the Variation

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### 5.1 Step 1 - Is the planning control a development standard?

This question is the 1<sup>st</sup> 'test' in Winten. The HOB control in cl4.3 of the MLEP 2013 is a development standard, defined in Section 1.4 of the EP&A Act as follows:

*“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*

*(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point.*

The development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted pursuant to cl4.6.

### 5.2 Step 2 – Pursuant to cl4.6(4)(a), is the consent authority satisfied that the written request adequately addresses the matters in Clause 4.6(3)?

#### 5.2.1 Clause 4.6(3)(a) – compliance is unreasonable or unnecessary in the circumstances of the case

To demonstrate that compliance with the height of buildings development standard is unreasonable or unnecessary, this written request relies upon:

1. The 2<sup>nd</sup> 'test' in Winten and the 1<sup>st</sup> and 2<sup>nd</sup> 'ways' in Wehbe – i.e. the underlying objectives or purpose of the standard is satisfied or the objectives are not relevant; and
2. The 4<sup>th</sup> 'way' in Wehbe - the development standard has been virtually abandoned or destroyed by the consent authority's own actions.

These aspects are discussed in the following paragraphs.

#### **The underlying objectives or purpose of the standard**

Clause 4.3(1) of the MLEP 2013 states the objectives of the HOB development standard as follows:

*(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

*(b) to control the bulk and scale of buildings,*

*(c) to minimise disruption to the following:*

*(i) views to nearby residential development from public spaces (including the harbour and foreshores),*

*(ii) views from nearby residential development to public spaces (including the harbour and foreshores),*

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- (iii) views between public spaces (including the harbour and foreshores),*
- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

**Objective (a)** *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

The proposal is considered to achieve this objective as the proposal provides for a visually interesting roof form that reflects the topographic landscape and in particular the coastal setting. The overall height of the building is consistent with the adjoining building to the north and whilst subservient to the prevailing scale and height of other buildings in the vicinity is still capable of being deemed consistent.

The two main areas of non-compliance are roofs above open air terraces that assist in providing articulation, and weather protection. The other areas of non-compliance are architectural blade walls that provide architectural interest and relief.

A height plane analysis has been included in the architectural plans (extract below) which identifies those areas exceeding the 8.5m height limit. The areas of non-compliance are minor and the resultant dwelling is a more articulated and modulated built form that is reflective of the existing and desired future streetscape and views from the public realm along Marine Parade and from Bower Street. It is considered that the proposal is compatible in terms of height with the adjoining and surrounding development it is considered that the proposal achieves this objective.

**Objective (b)** *is to control the bulk and scale of buildings.*

The proposed alterations and additions have been appropriately designed to incorporate articulation and modulation with the non-complying elements located where potential impacts are minimized and which not contribute to an identifiable excess or unreasonable bulk or scale within the context of the building, the site and surrounds. These elements will not be prominent when viewed from the adjoining properties or the public domain given the topography of the site and their particular siting within the built form. The proposed additions incorporate balconies, terraces and varied setbacks, with skillful use of the material and colour composition and palette. All these assists in minimizing bulk and scale. The resultant

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bulk and scale of the development is less than other residences along Bower Street and is therefore considered to be compatible with the existing surrounding development.

**Objective (c)** *to minimise disruption to the following:*

- (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
- (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*

In relation to views currently enjoyed from the surrounding properties the proposal have been designed to ensure appropriate view sharing. This has been achieved by the following:

- The areas of the height non-compliance with the proposal are not located where primary views from nearby residences occur.
- The non-complying elements of the building are a result of the steep topography of the site and the architectural design features to enhance the external appearance of the residence which have a positive impact on the view from nearby residences. Given the significant slope from Bower Street towards Marine Parade it is not expected that the proposed areas of exceedance will obstruct any significant views from Bower Street.
- Views to Cabbage Tree Bay are generally well maintained.
- The location of the site, topography and considered design ensures that the proposal will not obstruct any views from or to Cabbage Tree Bay or the Marine Parade foreshore or public domain .

**Objective (d)** *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

Shadow diagrams have been prepared and submitted with this application. The proposed alterations and additions do not result in any undue additional overshadowing of the habitable rooms or private open spaces of adjacent dwellings and the proposal is designed to maximise solar access whilst maintaining sunlight to the public open space particularly along Marine Parade.

**Objective (e)** *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

The proposed alterations and additions are generally contained within the existing footprint of the existing residence and whilst some vegetation is to be removed, it is well compensated

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by additional landscaping such that the overall landscaping of the site is improved from a qualitative perspective.

No alteration to the existing topography has any external impact particularly in terms of visual impact when viewed from surrounding land uses.

A Terrestrial Biodiversity Report and '5-part Test' for the Long-nosed Bandicoot is submitted with the DA package.

This objective is achieved as the proposed building works do not unduly intrude on the vegetated area of the site and the new plantings will not conflict with surrounding landuses.

Accordingly, it follows that the proposed development is in the public interest because it is consistent with the objectives of the FSR development standard under the MLEP 2013 and the objectives of the E4 Environmental Living Zone under the MLEP 2013.

### 5.2.2 **Clause 4.6(3)(b) – There are sufficient environmental planning grounds to justify contravening the development standard**

As set out in Four2Five, when a development standard is sought to be varied, there is an onus on the Applicant to demonstrate that there are “*sufficient environmental planning grounds*” such that compliance with the development standard is unreasonable or unnecessary and these environmental planning grounds must be particular to the circumstances of the proposed development rather than grounds that could reasonably apply a similar development on any other land.

The site-specific environmental planning grounds that support the proposed variation to the height of building development standard in this circumstance include:

- It should be noted that the permitted gross floor area is distributed on the upper levels as the existing lower ground floor although contributing to, and creating the noncompliance, is all flood liable and practically unusable due to regular inundation. With future sea level rise, the use of this area will ultimately be sterilized which is prejudicial to the proponent’s reasonable expectations and “entitlements” of gross floor area. The area cannot be modified to provide the requisite habitable accommodation due to the need to raise the floor level which is prohibited by the minimal ceiling heights and hence the floor space is distributed on upper levels creating the tension with the height standard.

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- Demolition and erection of a new building will set a higher baseline as Council allows for the height standard to be set by the flood planning level.
- The irregular shape of the land combined with the significant slope of the land from Bower Street to Marine Parade create a site that is difficult for design and layout of adequate floor levels taking into account the existing layout and amenity of adjoining properties and constraints of the existing building;
- The proposed height exceedances do not apply to all of the building; the large majority of the building complies with and is well below the development standard;
- The areas of non-compliance comprise three architectural blade features and two roof areas over open-air terraces, rather than areas of additional indoor living areas or habitable rooms all of which have positive effects in terms of amenity and design integrity;
- The non-compliant areas of the development are located on the eastern side of the building, where there is no overshadowing impacts as a result of the variations;
- The proposed alterations and additions have been designed to utilize the existing structure of the building, extend the undercroft area, consolidate the upper living areas, vehicle access to the site and storage. Clause 4.4.2 of the Manly DCP promotes the retention and adaptation of existing buildings rather than their demolition.
- In this situation the encroaching elements are important contributors to a positive design form which actually assists in creating a quality aesthetic and assists in minimising visual impacts when viewed from street and public realm areas.
- The height of the building is an important design consideration to remedy the existing anomalous situation whereby the existing building appears dwarfed by the scale of surrounding development.
- Removal of the non-compliant elements will have no material external benefit but conversely particularly in regard to the roof element, would be a deleterious impact on the amenity of the occupants in terms of weatherproofing and solar control.

In addition, Preston CJ clarified in *Micaul and Initial Action*, that sufficient environmental planning grounds may also include demonstrating a lack of adverse amenity impacts.

As outlined in Section 5.2.1, there is considered to be a lack of adverse amenity impacts arising from the proposal as it will not result in adverse overshadowing, overlooking or unreasonable loss of views to adjoining properties.

## 5 Assessment of the Variation

### 5.3 Step 3 - Pursuant to cl4.6(4)(b), is the consent authority satisfied that the development will be in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone?

As outlined in Section 5.2.1, the Proposal achieves and is therefore consistent with the relevant objectives of the height of buildings development standard.

However, the consent authority must also be satisfied that the development will be consistent with the objectives of the E4 Environmental Living Zone which are expressed in the Land Use Table to cl2.3 of the LEP as follows:

- *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 protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

The Proposal is consistent with the objectives of the E4 Zone for the following reasons:

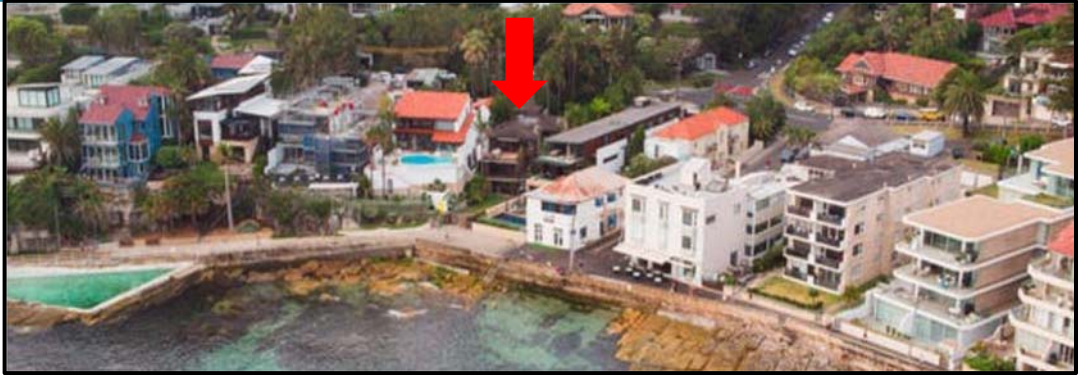
**First objective** *is to provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

The proposal is for alterations and additions to a single dwelling which is low impact and maintains the low-density residential environment and the objective is achieved.

**Second objective** *is to ensure that residential development does not have an adverse effect on those values.*

The proposal, including the height variations, will not have adverse impacts on the landscape values of the coastal location of the site when viewed from Bower Street, Marine Parade or Cabbage Tree Bay. The proposal remains subordinate to the view of residential development along the coastline due to its large setback to Marine Parade and the protrusion of other more prominent residences along Marine Parade. This is demonstrated in the aerial photo of part of the Marine Parade coastline in Figures 6 & 7 below. This objective is achieved.

## 5 Assessment of the Variation



*Figure 6: View of residential development along Marine Parade*



*Figure 7: Views of existing and proposed residence from Marine Parade*

**Third objective** is to protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.

The proposal will not impact on tree canopies along the coastline or impact on the scenic qualities of the Marine Parade and Cabbage Tree Bay areas. The existing brown exterior is outdated and will benefit from the proposed modernisation of the external appearance, balconies and materials proposed. The residence will add to the attractiveness of the foreshore by improving the dated façade when viewed from the public domain. This objective is achieved.

**Fourth objective** is to ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.

The application includes a Terrestrial Biodiversity Report, stormwater management plan, Geotech report and arborist report which confirm that the proposal does not have a negative impact on geological features, bushland or vegetation.

This objective is achieved.

## 5 Assessment of the Variation

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***Fifth objective** is to encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*

The application is accompanied by landscape plans that provide for the retention of any existing natural outcrops of the site, including those towards Marine Parade. The new plantings within the Marine Parade setback are to soften the backdrop of the large blank wall of the adjoining residence and swimming pool structure without imposing on views to Cabbage Tree Bay from the subject site. This objective is achieved.

***Sixth objective** is to ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

The details of the proposal, as presented in the architectural plan set, demonstrate that the proposed height, bulk and scale of the building is consistent with the surrounding development. Figure 3 above shows that the existing dwelling is recessive and subordinate in bulk and scale to other development along the Marine Parade foreshore. The height of the proposal marginally exceeds the allowable height limit for minor parts of the roof and balcony structures but this does not add to the overall bulk of the building. The height plane diagram (see Figure 2) demonstrates that the majority of the building footprint is fully height compliant. The variation is predominantly due to the slope of the site. This objective is achieved.

Accordingly, it follows that the proposed development is in the public interest because it is consistent with the objectives of the HOB development standard under the MLEP 2013 and the objectives of the E4 Environmental Living Zone under the MLEP 2013.

### 5.4 Step 4 - Clause 4.6(4)(b) – The Concurrence of the Secretary has been obtained

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the SILEP or SEPP 1 subject to certain conditions.

As MLEP 2013 adopts cl4.6 of the SILEP and the conditions of the Notice are not relevant in this instance, the consent authority for the Proposal may assume concurrence in respect of the variation requested to the HOB development standard under the LEP.

## 5 Assessment of the Variation

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In addition, the Court has power to grant development consent to the proposed development even though it contravenes the HOB development standard, without obtaining or assuming the concurrence of the Secretary by reason of s39(6) of the *Land and Environment Court Act 1979* (the Court Act).

### 5.5 Step 5 - Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, cl4.6(5) of the LEP provides that in deciding whether to grant concurrence, the Secretary must consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Furthermore, in Initial Action, Preston CJ clarified that, notwithstanding the Court's powers under s39(6) of the Court Act, the Court should still consider the matters in cl4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

Accordingly, the proposed contravention of the HOB development standard has been considered in light of cl4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed development for this particular Site and this design is not directly transferrable to any other site in the immediate locality, wider region or the State and the scale of the proposed development does not trigger any requirement for a higher level of assessment;
- As indicated in Section 5.3, the proposed contravention of the development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. Accordingly, there would be no significant public benefit in maintaining the development standard in this instance; and
- It is considered that there are no other matters of relevance that need to be taken into consideration by the Court.

## 6 Conclusion

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The proposed development contravenes the Height of Building development standard under cl4.3 of Manly LEP 2013.

The height of building control under cl4.3 of the MLEP is a development standard and is not excluded from the application of cl4.6.

This written request to vary the development standard has been prepared in accordance with cl4.6(3) of the LEP and demonstrates that strict compliance with the development standard is unreasonable and unnecessary for the following reasons:

- Notwithstanding the contravention of the development standard, the proposed development is consistent with the relevant objectives of the development standard pursuant to cl4.3 of the MLEP 2013 and is consistent with the relevant objectives of the E4 Environmental Living Zone and therefore, the proposed development is in the public interest;
- Notwithstanding the contravention of the development standard, the proposed dwelling will not result in significant adverse environmental harm in that the environmental amenity of neighbouring properties will be preserved and adverse impacts on the amenity of the locality will be minimised to a reasonable level;

In addition, this written request outlines sufficient environmental planning grounds to justify the contravention of the HOB development standard including a lack of adverse environmental amenity impacts.

Accordingly, this written request can be relied upon by the consent authority in accordance with cl4.6(4) of the LEP.

The consent authority can assume the concurrence of the Secretary pursuant to the Notice issued on 21 February 2018. Alternatively, the Court can use its powers under s39(6) of the Court Act and be satisfied that contravention of the development standard doesn't raise any matter of significance for State or regional environmental planning, there is no public benefit of maintaining the development standard and there are no other relevant matters required to be taken into consideration.

## 6 Conclusion

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Accordingly, the consent authority can exercise its power pursuant to cl4.6(2) to grant development consent to the proposed development notwithstanding the contravention of the development standard.

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