

7 July 2022



Re: Clause 4.6 Variation to Clause 4.3 of Woollahra Local Environmental Plan 2014 (LEP)

The Site: 18 Olphert Avenue, Vaucluse

I have been instructed by the Applicant to provide a written request pursuant to clause 4.6(3) of the LEP seeking to justify a contravention of clause 4.3 of the LEP (Height Of Buildings).

This is a revised clause 4.6 variation request following: (i) receipt of a letter dated 19 November 2021 from Colin Biggers & Paisley Lawyers (CBP) addressed to the project architect,¹ (ii) attendance at the section 34AA conference under the *Land and Environment Court Act 1979* and (iii) the preparation of **Revision H** of the Architectural Plans which contain amendments as a result of matters discussed in the section 34AA conference.

The first part of this written request assumes that the height of building contravention is as measured by myself, namely 519mm above the maximum building height in the LEP of 9.5m above Ground Level (Existing) (GLE).

The second part assumes that the height of building contravention is as measured by Colin Biggers & Paisley, namely 1.04m above the maximum building height in the LEP of 9.5m above Ground Level (Existing) (GLE).

I rely upon:

1. The architectural plans (**Revision H**) and other supporting documents in the Revision D Bundle lodged with the replacement application.
2. PS 18-003 – Department of Planning and Environment (Revokes PS17-006 (December 2017))
3. Varying Development Standards: A Guide August 2011 - NSW Department of Planning & Infrastructure.
4. Guidance provided by judgments of the Land & Environment Court (the Court) detailed by the methodology (**Annexure 1**).
5. Engineering Opinion Flooding Impacts (**Annexure 2**).
6. Colin Biggers & Paisley Lawyers letter 19 November 2021 (**Annexure 6**). I include **Annexure 8** (a plan) for completeness.
7. Plan_DA1.5 Rev E_4.6 Plan_DA 436.20_18 Olphert Avenue VAUCLUSE (**Annexure 7**).

The Site

A description of the site is set out in the original Statement of Environmental Effects and within the Statement of Facts and Contentions in the class 1 proceedings.

¹ The letter was prepared on behalf of the owners of 18 Olphert Avenue, Vaucluse and, relevantly, contains Attachment A (schedule) and Attachment C (a review of drawing DA1.5 Clause 4.6 Application prepared by Atelier SJB). The letter from CBP forms **Annexure 6**.

Relevantly, this is a steep site that falls from RL61.15m AHD (SW) front boundary to 50.42m AHD at the top of the northern boundary retaining wall. This is a 10.73m fall to the rear. The steepest fall from front to rear occurs from just within the front boundary otherwise the contours are consistently distributed. There is a dip (sag) across the frontage.

Overall approach

Whether the height of building contravention is as measured by myself, namely 519mm above the maximum building height above Ground Level (Existing) (GLE), or is as measured by Colin Biggers & Paisley, namely 1.04m above the maximum building height above GLE, this clause 4.6 request seeks to demonstrate that:

1. compliance with the development standard is **unreasonable or unnecessary**² in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)),
2. there are **sufficient environmental planning grounds** to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).
3. the proposed development will be in the public interest because it is **consistent** with the **objectives of the standard** in question (cl 4.6(4)(a)(ii)), and
4. the proposed development will be in the public interest because it is **consistent** with the **objectives of the zone** (cl 4.6(4)(a)(ii)).

Methodology

The methodology applied within this clause 4.6 written request is set out in **Annexure 1**.

The Facts (assuming that the height of building exceedance is 519mm above the maximum building height in the LEP of 9.5m above Ground Level (Existing) (GLE).

1. What is the name of the environmental planning instrument that applies to the land?

Woollahra Local Environmental Plan 2014 (LEP)

2. What is the zoning of the land?

Zone R2 – Low Density Residential

3. What are the objectives of the zone?

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

² *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (Wehbe) [42-51] – 5 Tests but not exclusive tests

- *To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.*
- *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

4. What is the development standard being varied?

Height of Building (HOB)

5. Under what clause is the development standard listed in the environmental planning instrument?

*Clause 4.3 – Height of Buildings (**HOB**)*

6. Is the standard expressly excluded from operation of Clause 4.6?

Clause 4.3 is not identified as being expressly excluded from the operation of clause 4.6 as it is not identified in clause 4.6(6) or (8).

7. What are the objectives of the development standard?

- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,*
- (b) to establish a transition in scale between zones to protect local amenity,*
- (c) to minimise the loss of solar access to existing buildings and open space,*
- (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.*

8. What is the numeric value of the development standard for **HOB** in the environmental planning instrument?

9.5m above Ground Level (Existing) (GLE)

9. What is proposed numeric value of the development standard in the development application?

10.019m (519mm exception) – Applying the Applicant's Interpretation Figure 1

In this regard, I refer to the architectural drawing that details the building height overlayed upon the detailed survey which demonstrates the height exceedance proposed. (Drawing DA 1.5). The element of the building which will exceed the HOB development standard is the roof overhang in the north east corner of the building and shown in shades of green in Figure 1 as extracted from DA 1.5. The height exceedance varies from 119mm to 519mm over the height limit, with the maximum height exceedance being 519mm.

In my opinion **the correct maximum HOB is as shown in Figure 1** above based on the building height definition in the Dictionary to the LEP:

“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”**

As **ground level (existing)** vertically below the eastern planter box is a known level within the subfloor (RL56.53m), as measured from the survey, that level is an accurate measurement of ground level existing.

In *Nicola v Waverley Council* [2020] NSWLEC 1599 (**Nicola**), an existing slab made the determination of the “ground level (existing)” (which was arguably hidden underneath the slab) a difficult task. Despite the Council arguing that the use of the extrapolation method was not appropriate as the site had not been completely built out (as in *Bettar and Stamford*), the Commissioner held at paragraph [37] that the extrapolation method should be applied **in that case**, the approach being:

“not inconsistent with the principle applied in Bettar and Stamford Properties, which by necessity had to rely on the footpath levels outside the property boundaries because the buildings, in those cases, occupied the whole of their respective sites. In the subject development proposal the known ground levels identified are also outside the building and also closest to its exterior walls. The fact they are located within the site’s property boundaries, , as opposed to outside the boundaries and on the footpath, does not derogate from the key selection criteria of closest immediate proximity.”

<p>In my opinion, where GL(E) is known, directly below (vertically below) a proposed building element, that level should be adopted in preference to interpolation of the heights.</p>

10. What is the percentage variation (between the proposal and the environmental planning instrument)?

Maximum 5.463% - Applying GL(E) shown in Figure 1

Submission

As part of this variation request, I have undertaken a detailed assessment with regard to the relevant statutory tests contained within clause 4.6 of the LEP as well as having regard to relevant case law.

The relevant tests contained within clause 4.6 of the LEP are extracted below:

- (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.*
- (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 objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Planning Secretary has been obtained.*

1. These tests have been identified, and a response to each provided below.
2. Compliance with the development standard is unreasonable or unnecessary³ in the circumstances of the case (clause 4.6(3)(a)) on the following basis:
 - a. the objectives of the development standard are achieved notwithstanding non-compliance with the standard as detailed above: **1st Wehbe** test at [42] and [43].

Response: The objectives of the development standard have been satisfied as detailed below and this is sufficient to justify why compliance with the development standard is unreasonable or unnecessary in the circumstance of this case.

³ *Wehbe v Pittwater Council* [2007] NSWLEC 827 LGERA 446; (*Wehbe*) [42-51] – 5 Tests but not exclusive tests.

- b. the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: **2nd Wehbe** test at [45].

Response: This is not relied upon in the present circumstances as the objectives of the development standard are relevant to the proposed development.

- c. the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: **3rd Wehbe** test at [46].

Response: I do not press this test.

- d. the development standard has been virtually abandoned or destroyed: **4th Wehbe** test at [46].

Response: I do not press this test.

- e. the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: **5th Wehbe** at [48].

Response: This test is not pressed.

- f. In circumstances where there are no significant adverse impacts resulting from the height exceedance, it is unreasonable and unnecessary to require strict compliance with the development standard.
- g. The burden placed on the future residents of the development (by requiring strict compliance with the development standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]). Removing the roof element to ensure compliance with the height of building development standard would have a severe deleterious effect on the design, the shading and solar access and be antipathetic to sections 1.3(b) & (g) of the EPA Act.
- h. If strict compliance with the standard was required, it would undermine important statutory objectives that are relevant to the consideration of this matter, namely:

The Act

- i. Section 1.3(b) of the Act: '[T]o facilitate ecologically sustainable development by integrating relevant economic, environmental, and social considerations in decision-making about environmental planning and assessment (bold added)'.

Response: The curved eave overhang, which results in the HOB exceedance, has been skilfully designed to ensure that winter sun is captured, and summer sun excluded from the house; this passive solar design is an integral part of the ESD outcomes for the house and to ensure BASIX compliance.

The purpose of this element of the building also extends to providing shade to an evaporative cooling design as detailed by the plans.

- ii. Section 1.3(g) of the Act: '[T]o promote the proper construction and maintenance of buildings'.

Response: The eave overhanging has been skilfully designed to provide weatherproofing to the building.

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

- iii. Clause 25 : the maintenance, protection, and enhancement of the scenic quality of foreshores and waterways are as follows—
 - (a) the scale, form, design, and siting of any building should be based on an analysis of—
 - (i) the land on which it is to be erected, and
 - (ii) the adjoining land, and
 - (iii) the likely future character of the locality,
 - (b) development should maintain, protect, and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores, and tributaries,
 - (c) the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores. (bold added)'.

Response: The design is a high quality response to the achievement of these objectives and the element of the roof exceeding the HOB is an important element in this design. I note in this version of the clause 4.6 that Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 has been repealed and replaced with similar provisions within Chapter 10 of State Environmental Planning Policy (Biodiversity and Conservation) 2021. By reference to both clause 10.23 and 10.24 the proposed HOB is consistent with the objectives relating to both scenic quality and views.

The LEP

- iv. The zone objectives are addressed below in support of the environmental planning justification.

<p>For the reasons given above, compliance with the development standard is unreasonable or unnecessary in the circumstances of this case.</p>

3. The "environmental planning grounds"⁴ relied upon are sufficient to justify contravening the development standard (clause 4.6(3)(b)) as set out below. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the HOB development standard, not on the development as a whole.

- a. **The site topography** – The site falls steeply from the road frontage and the elements of the building exceeding the HOB are primarily point encroachments above the HOB for eaves providing shade to the house and safe access to high amenity roof top POS, consistent with the development approved at No.16. This is a steep site that falls from RL61.15m AHD (SW) front boundary to 50.42m AHD at the top of the northern boundary retaining wall. This is a 10.73m fall to the rear. The height exceedance represents a small point encroachment caused by the steepness of the site.
- b. **Accessibility** - The floor level seeks to address the road frontage levels to provide level access. This sets the top floor level at RL 61m AHD and dictates the HOB outcomes. This is consistent with the requirements of the DCP in particular 3.5.1 Streetscape character Control 9 *"The building addresses the street and provides opportunities for casual surveillance. At least one habitable room window overlooks the street"*. Lowering the floor level at the top level and dropping it below street level to ensure compliance with the HOB development standard is antipathetic to the DCP control and out of context with the two adjoining houses at No.16 and No.20.
- c. **Overland flows** – The designed floor level seeks to prevent stormwater entering the building. This is addressed by (**Annexure 2**) Engineers Statement Flooding Effects where in the engineer states:

"During large storm events Olphert Avenue is subject to significant overland flows that fall towards the sag point located adjacent to 22 Olphert Avenue. This has the potential, during critical storm events, to encroach onto the property frontage of 18 Olphert Avenue. As a result, lowering the proposed living room level by 519mm, as suggested by Woollahra Council, may increase the potential flood risk of the property.

The proposal to retain the living room level at 61.00m AHD is envisaged to provide greater flood risk protection to habitable floor areas and therefore support the proposal to retain the proposed living room at this level."
- d. **Context** – There are no amenity impacts associated with the modest footprint of the eaves element shown in Figure 1 exceeding the HOB by a maximum of 519mm (5.46%).
- e. **Amenity** - The design of the eaves element which contravenes the HOB development standard will provide better amenity outcome for future occupants as detailed above with the eaves element providing necessary shade to the primary living and private open space areas.

⁴ *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26] and *"that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act"*.

f. **Better outcomes for neighbours** - The building design with the height of building exceedance provides a better outcome eliminating direct line of sight views to and within No.16 (with the 9m and 12m sight line distances under the DCP) reducing the amenity impacts of the existing dwelling which are currently severe for No.16. In particular, the design will provide better aural and visual privacy outcomes than the existing house as detailed by the sight line diagrams and detailed in Revision H.

g. **The height of building exceedance is consistent with the following objects of the Act:**

(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,

Response: The quality of the design and the ESD outcomes deliver a better environmental outcome and the element exceeding the HOB is a critical design element provided for this purposes as well as architectural form.

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

Response: The element exceeding the HOB is a critical design element providing improved ESD outcomes.

(c) ...

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

Response: Without repeating in too much further detail what is stated above, the element exceeding the HOB is a critical element that delivers good design, ESD and amenity.

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

Response: Without repeating in too much further detail what is stated above, the eaves element is critical to the proper construction and maintenance of the house, in particular the achievement of BASIX compliance and excellent amenity for future occupants.

<p>There are “sufficient environmental planning grounds” to justify contravening the development standard.</p>

4. The proposed development will be in the public interest because it is consistent with the objectives of the development standard (clause 4.6(4)(a)(ii)) on the following basis:

‘(a) to establish building heights that are consistent with the *desired future character* of the neighbourhood,’

Response: There have been numerous significant judgements (**Annexure 1**) that deal with *desired future character*.

Applying the approach of Robson J in **Abrams**⁵ prior consents on the same site or in the locality 'may be instructive for the purpose of an 'abandonment' argument or in informing the desired character or future streetscape of a locality'.

In this case the latter applies. This has been reinforced by O'Neil C in **Big Property** and **HPG**, in particular held that the desired future character of an area is not determined solely by the development standards that control building envelopes for the area. These cases provide guidance and flexibility in terms of how to properly assess the '*desired future character*' of an area.

16 Olphert Avenue, Vaucluse

The most relevant contemporary development consent granted by Council within the immediate vicinity (visual catchment) is that supported by **Annexure 3** - Clause 4.6 Written Request Height Non-Compliance - DA2019 510 1 - 16 Olphert Avenue VAUCLUSE, by Tony Moody.

This proposal including the clause 4.6 exception to the HOB was reported to the LPP (**Annexure 4** - WLPP-Public-Agenda-3-Dec-2020) and approved (**Annexure 5** - WLPP-Public-Minutes-3-Dec-2020).

After three (3) replacement applications, the assessment report and the panel ultimately granted development consent to a 490mm or 5.2% departure from the 9.5m control.

The report's summary states:

"The height, scale, bulk and design of the proposal are consistent with the desired future character objectives and would result in an appropriate streetscape outcome in the Vaucluse East Residential Precinct."

There is quantitatively and qualitatively no material difference between the extent of the HOB exceedance approved at No.16 and as proposed at No.18.

The houses at No.16 and No.18 are so similar in overall height, scale, bulk, and design outcomes that one should reach the same view that this proposal is consistent with the desired future character objectives and result in an appropriate streetscape outcome in the Vaucluse East Residential Precinct.

Whilst each DA must be considered upon its own merits, there should be consistency in HOB and floor area outcomes and this proposal is consistent with the immediate western neighbour at No.16 as well as with the existing dwelling house at No.20.

⁵ *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85, Robson J, (**Abrams**)

'(b) to establish a transition in scale between zones to protect local amenity,'

Response: Not applicable - the site is not on a zone boundary.

'(c) to minimise the loss of solar access to existing buildings and open space,'

Response: The element exceeding the HOB and the development as a whole does not contribute to any loss of solar access to existing buildings or open space.

'(d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,'

Response:

Views

The design of the dwelling enables the retention of panoramic harbour views from the neighbouring properties. Any impacts on views are considered negligible and relate to views across a side boundary. The element exceeding the HOB does not contribute to any loss of views.

Loss of Privacy

The design incorporates features to address acoustic and visual privacy. These include the provision of a full height wall to the eastern elevation of the POS at the living room level which terminates in alignment with the northwest corner of the existing dwelling on No. 20 Olphert Avenue, the installation of a privacy screen in the first quadrant of the POS, an additional 1m setback for the roof terrace balustrade to address lines of sight and addition of structure planting depths to maintain non-trafficable balcony areas to address lines of sight. The element exceeding the HOB does not contribute to any loss of privacy

Overshadowing

The development as a whole does not lead to any contravention of the overshadowing controls. The element exceeding the HOB does not contribute to any overshadowing.

Visual intrusion⁶

The design contains a curved architectural roof feature and critical ESD element of the design of the building as a whole, ensuring shade in summer and solar access in winter to the proposed house.

It is a roof overhang (eave), and does not add to the perceived visual bulk.

It is a recessive element, that adds to the articulation of the building, it is set

⁶ "The Macquarie Dictionary defines "intrusion" as the act of intruding and intrude as to thrust or bring in without reason, permission, or welcome. A visual intrusion must be an unwelcome form which intrudes into the available outlook. It would appear to me that a new building of itself will not necessarily be a visual intrusion. There must be something unwelcome about it. It could be the form of the building itself, or it could be its relationship to the viewer and what lies beyond." *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [79].

well back from the side boundary with No.20 Olphert Avenue. It will be barely visible from the streetscape and has no impact upon the amenity of No.16. The element exceeding the HOB does not contribute to any visual intrusion.

- '(e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.'

Response: The proposal will maintain existing public domain views from Olphert Avenue through the view corridor between No.16 and No.18.

5. The proposed development will be in the public interest because it is consistent with the objectives of the zone (clause 4.6(4)(a)(ii)) on the following basis:

- a. 'To provide for the housing needs of the community within a low density residential environment.

Response: The proposal is the lowest density development permissible in the R2 zone, being a single dwelling house.

- b. 'To enable other land uses that provide facilities or services to meet the day to day needs of residents'.

Response: Not applicable – residential dwelling proposed.

- c. 'To provide for development that is compatible with the character and amenity of the surrounding neighbourhood..'

Response: The height, shape bulk and scale are compatible with the existing and desired future character (as there is no FSR under the LEP), and the quality of the design is compatible with the amenity of the surrounding neighbourhood. The amenity impacts are discussed in more detail below.

- d. 'To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.'

Response: The design is consistent with the existing and desired future character having regard to more contemporary consents granted within the immediate vicinity (visual catchment) including, 16 Olphert Avenue (No.16) the adjoining western neighbour.

- e. **The development as a whole is consistent with the following aims of the LEP:**

- (b) to promote the management, development, conservation, and economic use of property,

Response: The proposal is not excessive in its bulk or scale complying with the floorplate control under the LEP.

- (e) to facilitate opportunities, in suitable locations, for diversity in dwelling density and type,

Response: The house contributes to the very limited range of development permissible in the R2 zone. It does not seek to

increase the residential density and is consistent with the zone objectives.

(h) to minimise and manage stormwater and flooding impacts,

Response: The property is not flood affected but is susceptible to overland flows as detailed by (**Annexure 2**). One purpose of the height of building designed by the architect is to ensure that the primary living level is not below the road level for the purpose of limiting overland flow impacts in addition to ensure that the man entry property addresses the streetscape.

(j) to promote a high standard of design in the private and public domain,

Response: This is a high quality bespoke design by an architect that will deliver a high standard of design. The element exceeding the HOB in an integral part of the high standard of this design for ESD and architectural design reasons.

(l) to ensure development achieves the desired future character of the area,

Response: This has been addressed previously, having regard in particular to the recent approvals in the locality and specifically the approval at No.16 Olphert Avenue. Quantitatively and qualitatively, the proposal will achieve the desired future character of the area consistent with contemporary consents in Olphert Avenue, including No.16 and No.12 further to the west.

(m) to minimise excavation and manage impacts.

Response: Lowering the building would have a negative impact increasing the extent of excavation with no demonstrable amenity benefits for the neighbours, and it would adversely impact the future amenity of the occupants of No.16 in a way disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant element.

- f. There are no adverse amenity impacts upon the neighbours as a result of the exception sought, the deletion of the eave above 9.5m would adversely impact future occupants, architectural quality, BASIX and ESD outcomes.
- g. The proposal is consistent with zone and development standards objectives of LEP as detailed above.
- h. The proposal is consistent with Harbour SREP, as detailed above noting that it will be barely visible from Sydney Harbour blending within hundreds of house in this locality.

- i. The existing site levels have been modified by cut and fill, with apparent cut under the area exceeding the HOB.

The proposal is therefore consistent with the development standard objectives and the zone objectives.

- 6. The concurrence of the Secretary of the Department can be assumed under clause 4.6(4)(b). This is because:
 - a. Concurrence may be assumed by written notice given to the consent authority (as per clause 64(1) of the *Environmental Planning and Assessment Regulation 2000*).
 - b. Such written notice was given by means of planning circular PS 18-003 'Variations to development standards' dated 21 February 2018 and the later circular of the same name PS 20-002.
 - c. In the event of a class 1 appeal the Land and Environment Court (Court) has all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal based upon a rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision having regard to the Land and Environment Court Act 1979 (Court Act) or any other relevant Act, and any instrument made under any such Act, the circumstances of the case and the public interest and these requirements are in addition to and not in derogation from any other functions of the Court, *ibid* section 39 of the Court Act. In any event (when considering the factors set out in clause 4.6(5)). In the Court exercising its discretion on appeal the Court can be satisfied that:
 - i. the contravention of the development standard does not raise any matter of significance for State or regional environmental planning, and
 - ii. there is public benefit in ensuring the proposal is consistent with the aims and objects of the Act and the LEP as detailed by the detailed submission providing sufficient environmental planning justification above and that this outweighs the benefit of maintaining the development standard in the circumstances of this case.

See: PS 20-002 and PS 18-003 – Department of Planning and Environment (Revokes PS17-006 (December 2017)).

Clause 4.6 written request assuming that the height of building contravention is as measured by the representatives of the neighbours, namely a maximum building height of 10.54m, being 1.04m in height above the maximum building height in the LEP of 9.5m above Ground Level (Existing) (GLE) and that there are 2 other (lower) HOB exceedances identified by the neighbours.

This next part of the written request is submitted as an alternative and assumes that the height of building contravention is as measured by the representatives of the neighbours, namely a maximum building height of **10.54m, being 1.04m in height** above the maximum building height in the LEP of 9.5m above Ground Level (Existing) (GLE) (and 2 other lower HOB contraventions).

Overall approach

This next part of the clause 4.6 request also seeks to demonstrate that:

1. compliance with the development standard is **unreasonable or unnecessary**⁷ in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)),
2. there are **sufficient environmental planning grounds** to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).
3. the proposed development will be in the public interest because it is **consistent** with the **objectives of the standard** in question (cl 4.6(4)(a)(ii)), and
4. the proposed development will be in the public interest because it is **consistent** with the **objectives of the zone** (cl 4.6(4)(a)(ii)).

The Facts (assuming that the height of building contravention is 1.04m)

1. What is the name of the environmental planning instrument that applies to the land?

Woollahra Local Environmental Plan 2014 (LEP)

2. What is the zoning of the land?

Zone R2 – Low Density Residential

3. What are the objectives of the zone?

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.*

⁷ *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (Wehbe) [42-51] – 5 Tests but not exclusive tests

- *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

4. What is the development standard being varied?

Height of Building (HOB)

5. Under what clause is the development standard listed in the environmental planning instrument?

Clause 4.3 – Height of Buildings (HOB)

6. Is the standard expressly excluded from operation of Clause 4.6?

Clause 4.3 is not identified as being expressly excluded from the operation of clause 4.6 as it is not identified in clause 4.6(6) or (8).

7. What are the objectives of the development standard?

- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,*
- (b) to establish a transition in scale between zones to protect local amenity,*
- (c) to minimise the loss of solar access to existing buildings and open space,*
- (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.*

8. What is the numeric value of the development standard for **HOB** in the environmental planning instrument?

9.5m above Ground Level (Existing) (GLE)

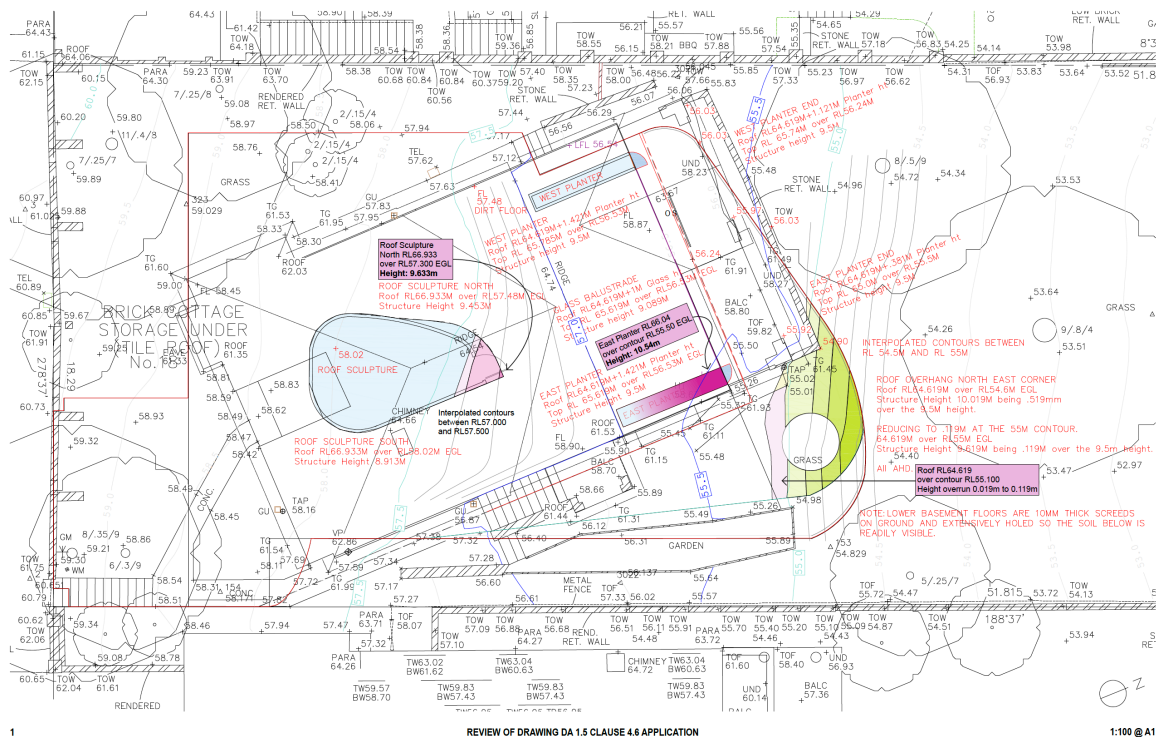
9. What is proposed numeric value of the development standard in the development application?

Maximum height of 10.54m (1.04m exception) – Applying the Neighbour's Interpretation (Attachment C) Figure 2 below

For the reasons set out below I do not agree with the Neighbour's interpretation of Ground Level (Existing) and I do not agree that the height of the building contravenes the development standard by a height of 1.04m.

Nevertheless this part of the cl 4.6 written request is made upon the assumption that the maximum height of the building exceeds the HOB development standard by a height of 1.04m as contended for by the neighbours and that there are 2 other lower height exceedances identified by the neighbours.

Attachment C



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Figure 2 - Extract Attachment C CBP Letter (Annexure 6)

The CPB letter claims that the maximum HOB is 10.54m (1.04m height exceedance). This is based upon two assumptions discussed below.

On 9 June 2022 at the commencement of the section 34AA and site inspection, the Owner and Architect from No.16 showed me a plan. I took a photograph of the plan.

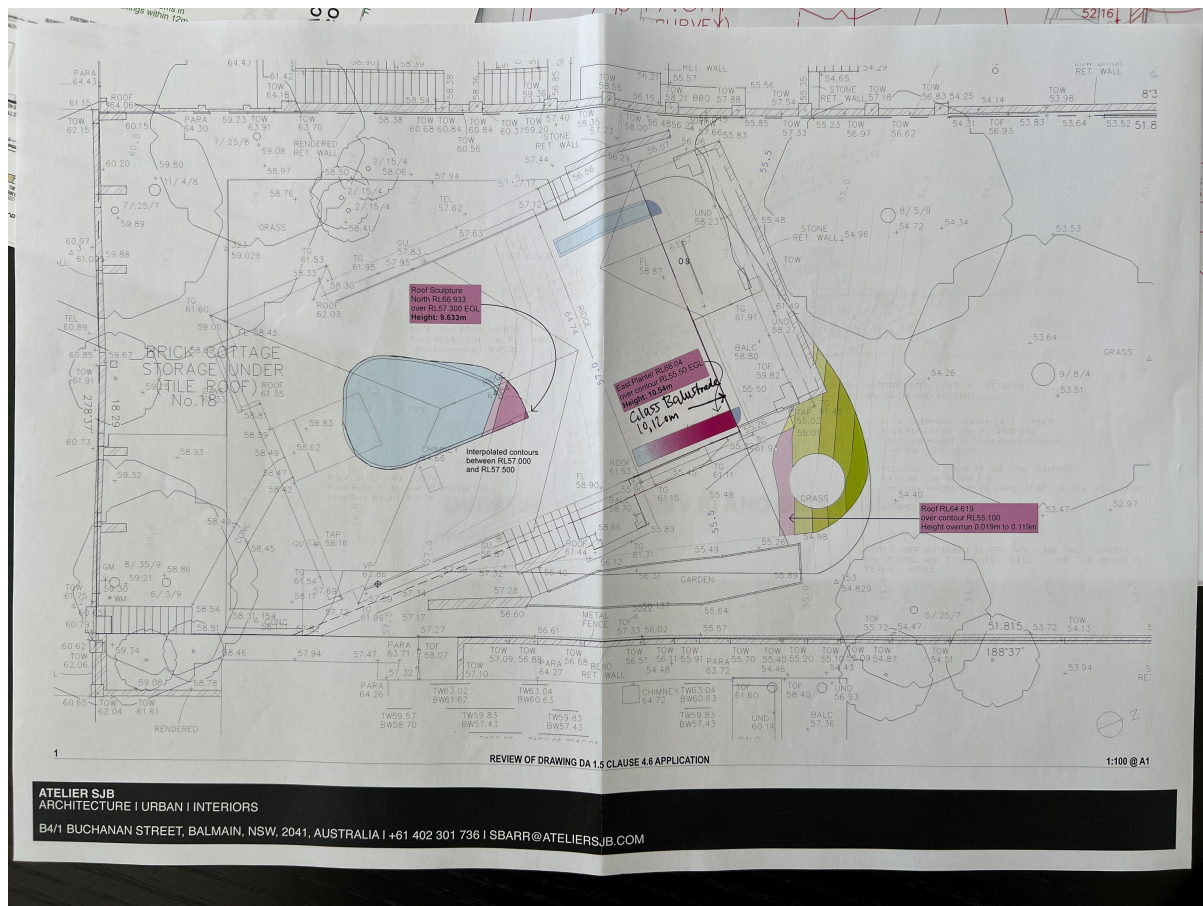


Figure 3 - Plan shown by Owner & Architect from No.16 - 9 June 2022 (**Annexure 8**)

The CBP Assumptions

CBP assume that the height exceedance at its greatest is a height of 1.04m, at a location above the eastern planter box.

Firstly, Figs 2 & 3 rely upon interpolation between RL's outside the building footprint whereas the height of building shown in my primary cl 4.6 written request (updated to **Revision H** of the plans but with no change in HOB) is based upon a surveyed spot RL beneath the existing house,

Secondly, CBP assumes that the eastern planters RL is RL66.04m whereas the RL is 65.619m as shown in the Architectural Plans.

Based on these assumptions, CBP allege that there is a height exceedance of 1.04m above the eastern planter, a height exceedance of between 0.019m-0.119m at the roof overhang and a 133mm above maximum HOB at a location near the roof sculpture. To this extent the CPB letter has provided additional contours in Figure 2 that shows the "Roof Sculpture" exceeding the 9.5m HOB by 133mm.

The CBP assumptions explains the difference in height levels between the height exceedance assumed in my primary cl 4.6 written request and Figure 2. It should be noted that **Revision H** of the architectural drawings contain no change in RL or HOB proposed.

Figure 3 - Plan shown by Owner & Architect from No.16 - 9 June 2022 (Annexure 8) is the same as that in the previous version of this clause 4.6 but for the hand written note shown upon the plan.

In my opinion **the correct maximum HOB is as shown in Figure 1** being:

"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"**

As **ground level (existing)** vertically below the eastern planter box is a known level within the subfloor (RL56.53m), that is the most accurate measurement and interpolation is not required in that circumstance.

It would appear that the CPB approach has sought to apply *Nicola v Waverley Council* [2020] NSWLEC 1599 ('**Nicola**'), being an example of where the *Bettar* extrapolation method can be applied to levels contained within the site, the subject of the development application.

In **Nicola**, an existing slab made the determination of the "ground level (existing)" (which was arguably hidden underneath the slab) a difficult task. Despite the Council arguing that the use of the extrapolation method was not appropriate as the site had not been completely built out (as in *Bettar* and *Stamford*), the Commissioner held at paragraph [37] that the extrapolation method should be applied **in that case**, the approach being:

"not inconsistent with the principle applied in Bettar and Stamford Properties, which by necessity had to rely on the footpath levels outside the property boundaries because the buildings, in those cases, occupied the whole of their respective sites. In the subject development proposal the known ground levels identified are also outside the building and also closest to its exterior walls. The fact they are located within the site's property boundaries, , as opposed to outside the boundaries and on the footpath, does not derogate from the key selection criteria of closest immediate proximity."

In my opinion, where GL(E) is known, directly below (vertically below) a proposed building element, that level should be adopted in preference to interpolation.

Nevertheless, as explained above, this part of the cl 4.6 written request assumes that the neighbour's interpretation of the height exceedance is correct and that the maximum height exceedance is 1.04 m above the HOB development standard which sets a maximum building height of 9.5m and that there are two other lower height exceedances as asserted by CBP in Figures 2 & 3.

10. What is the percentage variation (between the proposal and the environmental planning instrument)?

Maximum 10.94% – Applying the Neighbour's Interpretation of GL(E) Figure 2 & Figure 3

Submission

As part of this variation request, I have undertaken a detailed assessment with regard to the relevant statutory tests contained within clause 4.6 of the LEP as well as having regard to relevant case law.

The relevant tests contained within clause 4.6 of the LEP are extracted below:

- (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.*
- (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 objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) the concurrence of the Planning Secretary has been obtained.*

1. These tests have been identified, and a response to each provided below.
2. Compliance with the development standard is unreasonable or unnecessary⁸ in the circumstances of the case (clause 4.6(3)(a)) on the following basis:
 - a. the objectives of the development standard are achieved notwithstanding non-compliance with the standard as detailed above: **1st Wehbe** test at [42] and [43].

Response: The objectives of the development standard have been satisfied as detailed below and this is sufficient to justify why compliance with the development standard is unreasonable or unnecessary in the circumstance of this case.

⁸ *Wehbe v Pittwater Council* [2007] NSWLEC 827 LGERA 446; (*Wehbe*) [42-51] – 5 Tests but not exclusive tests.

- b. the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: **2nd Wehbe** test at [45].

Response: This is not relied upon in the present circumstances as the objectives of the development standard are relevant to the proposed development.

- c. the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: **3rd Wehbe** test at [46].

Response: I do not press this test.

- d. the development standard has been virtually abandoned or destroyed: **4th Wehbe** test at [46].

Response: This test is not pressed.

- e. the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: **5th Wehbe** at [48].

Response: This test is not pressed.

- f. In circumstances where there are no significant adverse impacts resulting from the height exceedances, it is unreasonable and unnecessary to require strict compliance with the development standard.
- g. The burden placed on the future residents of the development (by requiring strict compliance with the development standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]). Removing the roof elements to ensure compliance with the height of building development standard would have a severe deleterious effect on the design, the shading and solar access and be antipathetic to sections 1.3(b) & (g) of the EPA Act.
- h. If strict compliance with the standard was required, it would undermine important statutory objectives that are relevant to the consideration of this matter, namely:

The Act

- i. Section 1.3(b) of the Act: '[T]o facilitate ecologically sustainable development by integrating relevant economic, environmental, and social considerations in decision-making about environmental planning and assessment (bold added)'.

Response: The curved eave overhang, which results in the HOB exceedance, has been skilfully designed to ensure that winter sun is captured, and summer sun excluded from the house; this passive solar design is an integral part of the ESD outcomes for the house and to ensure BASIX compliance. The purpose of this element of the building also extends to providing shade to an evaporative cooling design as detailed by the plans.

The roof top sculpture has been designed to weather proof the building and the planter area is required to eliminated direct lines of sight and maintain privacy to neighbours. These are addressed below.

- ii. Section 1.3(g) of the Act: '[T]o promote the proper construction and maintenance of buildings'.

Response: The eave overhanging, the roof top planter and the element of the roof top sculpture providing access and egress to the elevated private open space, has been skilfully designed to provide weatherproofing to the building and allowing roof access of maintenance including maintenance of solar panels.

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

- iii. Clause 25 : the maintenance, protection, and enhancement of the scenic quality of foreshores and waterways are as follows—
 - (a) the scale, form, design, and siting of any building should be based on an analysis of—
 - (i) the land on which it is to be erected, and
 - (ii) the adjoining land, and
 - (iii) the likely future character of the locality,
 - (b) development should maintain, protect, and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores, and tributaries,
 - (c) the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores. (bold added)'.

Response: The design is a high quality response to the achievement of these objectives and the elements of the roof exceeding the HOB is an important element in this design. I note in this version of the clause 4.6 that Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 has been repealed and replaced with similar provisions within Chapter 10 of State Environmental Planning Policy (Biodiversity and Conservation) 2021. By reference to both clause 10.23 and 10.24 the proposed HOB is consistent with the objectives relating to both scenic quality and views.

The LEP

- iv. The zone objectives are addressed below in support of the environmental planning justification.

Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case.

3. The "environmental planning grounds"⁹ relied upon are sufficient to justify contravening the development standard (clause 4.6(3)(b)) as set out below. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the HOB development standard, not on the development as a whole.

- a. **The site topography** – The site falls steeply from the road frontage and the elements of the building exceeding the HOB are primarily point encroachments above the HOB for eaves providing shade to the house and safe access to high amenity roof top POS, consistent with the development approved at No.16. This is a steep site that falls from RL61.15m AHD (SW) front boundary to 50.42m AHD at the top of the northern boundary retaining wall. This is a 10.73m fall to the rear. The height exceedances represent small point encroachment caused by the steepness of the site.
- b. **Accessibility** - The floor level seeks to address the road frontage levels to provide level access. This sets the top floor level at RL 61m AHD and dictates the HOB outcomes. This is consistent with the requirements of the DCP in particular 3.5.1 Streetscape character Control 9 *"The building addresses the street and provides opportunities for casual surveillance. At least one habitable room window overlooks the street"*. Lowering the floor level at the top level and dropping it below street level to ensure compliance with the HOB development standard is antipathetic to the DCP control and out of context with the two adjoining houses at No.16 and No.20.
- c. **Overland flows** – The designed floor level seeks to prevent stormwater entering the building. This is addressed by (**Annexure 2**) Engineers Statement Flooding Effects where in the engineer states:

"During large storm events Olphert Avenue is subject to significant overland flows that fall towards the sag point located adjacent to 22 Olphert Avenue. This has the potential, during critical storm events, to encroach onto the property frontage of 18 Olphert Avenue. As a result, lowering the proposed living room level by 519mm, as suggested by Woollahra Council, may increase the potential flood risk of the property.

The proposal to retain the living room level at 61.00m AHD is envisaged to provide greater flood risk protection to habitable floor areas and therefore support the proposal to retain the proposed living room at this level."

- d. **Context** – There are no amenity impacts associated with the modest footprint of the eaves element shown in Figure 1 exceeding the HOB by a maximum of 1.04 m and by the exceedances identified by CBP at the other locations on the roof. The centrally and recessively located roof terrace and roof terrace access via the roof sculpture and stairwell has

⁹ *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26] and *"that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act"*.

been specifically located and oriented to preserve views to Sydney Harbour from neighbours on the southern side of Olphert Avenue.

- e. **Amenity** - The design of the eaves element which contravenes the HOB development standard will provide better amenity outcome for future occupants as detailed above with the eaves element providing necessary shade to the primary living and private open space areas. Likewise, the planter element exceeding that HOB has been provided to improve amenity outcomes for neighbours eliminating direct line of sight views. The roof sculpture and associated access to the roof terraces has been purposefully oriented to preserve views for neighbours and is a recessive element, these elements breaching the HOB make no contribution to disruption of views, loss of privacy, overshadowing or visual intrusion.
- f. **Better outcomes for neighbours** - The building design with the height of building exceedances (including the exceedance of the eaves, the roof planter and roof sculpture) provides a better outcome eliminating direct line of sight views to and within No.16 and No.20 (with the 9m and 12m sight line distances under the DCP) reducing the amenity impacts of the existing dwelling which are currently severe for No.16. In particular, the design will provide better aural and visual privacy outcomes than the existing house, as detailed by the sight line diagrams and detailed in Revision H.
- g. **The height of building exceedance is consistent with the following objects of the Act:**

- (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,

Response: The quality of the design and the ESD outcomes deliver a better environmental outcome and the element exceeding the HOB is a critical design element provided for this purposes as well as architectural form. The additional elements purported to exceed the HOB being the roof top planter and roof sculpture (weather proof access to the roof) are recessive elements designed to preserve Sydney Harbour views for the neighbours on the southern side of Olphert Avenue. The element exceeding the HOB do contribute to disruption of views, loss of privacy, overshadowing or visual intrusion.

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

Response: The element exceeding the HOB is a critical design element providing improved ESD outcomes. The eaves is part of a purposeful passive solar design. The access to the roof serves not only for the amenity of future occupants but also serves as access for cleaning and maintenance of a large array of solar panels.

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

Response: Without repeating in too much further detail what is stated above, the element exceeding the HOB is a critical element that delivers good design, ESD and amenity.

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

Response: Without repeating in too much further detail what is stated above, the eaves element is critical to the proper construction and maintenance of the house, in particular the achievement of BASIX compliance and excellent amenity for future occupants as well as maintenance of a large array of solar panels.

There are “sufficient environmental planning grounds” to justify contravening the development standard.

4. The proposed development will be in the public interest because it is consistent with the objectives of the development standard (clause 4.6(4)(a)(ii)) on the following basis:

‘(a) to establish building heights that are consistent with the *desired future character* of the neighbourhood,’

Response: There have been numerous significant judgements (**Annexure 1**) that deal with *desired future character*.

Applying the approach of Robson J in **Abrams**¹⁰ prior consents on the same site or in the locality ‘may be instructive for the purpose of an ‘abandonment’ argument or in informing the desired character or future streetscape of a locality’.

In this case the latter applies. This has been reinforced by O’Neil C in **Big Property** and **HPG**, in particular held that the desired future character of an area is not determined solely by the development standards that control building envelopes for the area. These cases provide guidance and flexibility in terms of how to properly assess the ‘*desired future character*’ of an area.

16 Olphert Avenue, Vaocluse

The most relevant contemporary development consent granted by Council within the immediate vicinity (visual catchment) is that supported by **Annexure 3** - Clause 4.6 Written Request Height Non-Compliance - DA2019 510 1 - 16 Olphert Avenue VAUCLUSE, by Tony Moody.

This proposal including the clause 4.6 exception to the HOB was reported to the LPP (**Annexure 4** - WLPP-Public-Agenda-3-Dec-2020) and approved (**Annexure 5** - WLPP-Public-Minutes-3-Dec-2020).

¹⁰ *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85, Robson J, (**Abrams**)

After three (3) replacement applications, the assessment report and the panel ultimately granted development consent to a 490mm or 5.2% departure from the 9.5m control.

The report's summary states:

"The height, scale, bulk and design of the proposal are consistent with the desired future character objectives and would result in an appropriate streetscape outcome in the Vaucluse East Residential Precinct."

There is quantitatively and qualitatively no material difference between the extent of the HOB exceedance approved at No.16 and as proposed at No.18.

The houses at No.16 and No.18 are so similar in overall height, scale, bulk, and design outcomes that one should reach the same view that this proposal is consistent with the desired future character objectives and result in an appropriate streetscape outcome in the Vaucluse East Residential Precinct.

Whilst each DA must be considered upon its own merits, there should be consistency in HOB and floor area outcomes and this proposal is consistent with the immediate western neighbour at No.16 as well as with the existing dwelling house at No.20.

'(b) to establish a transition in scale between zones to protect local amenity,'

Response: Not applicable - the site is not on a zone boundary.

'(c) to minimise the loss of solar access to existing buildings and open space,'

Response: The element exceeding the HOB and the development as a whole does not contribute to any loss of solar access to existing buildings or open space.

'(d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,'

Response:

Views

The design of the dwelling enables the retention of panoramic harbour views from the neighbouring properties. Any impacts on views are considered negligible and relate to views across a side boundary. The element exceeding the HOB does not contribute to any loss of views.

Loss of Privacy

The design incorporates features to address acoustic and visual privacy. These include the provision of a full height wall to the eastern elevation of the POS at the living room level which terminates in alignment with the northwest corner of the existing dwelling on No. 20 Olphert Avenue, the

installation of a privacy screen in the first quadrant of the POS, an additional 1m setback for the roof terrace balustrade to address lines of sight and addition of structure planting depths to maintain non-trafficable balcony areas to address lines of sight. The elements exceeding the HOB do not contribute to any loss of privacy

Overshadowing

The development as a whole does not lead to any contravention of the overshadowing controls. The element exceeding the HOB does not contribute to any overshadowing. Neither do the other elements identified by CBP, namely the roof sculpture area or the planter.

Visual intrusion¹¹

The design contains a curved architectural roof feature and critical ESD element of the design of the building as a whole, ensuring shade in summer and solar access in winter to the proposed house.

It is a roof overhang (eave), and does not add to the perceived visual bulk.

It is a recessive element, that adds to the articulation of the building, it is set well back from the side boundary with No.20 Olphert Avenue. It will be barely visible from the streetscape and has no impact upon the amenity of No.16. The element exceeding the HOB does not contribute to any visual intrusion.

‘(e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.’

Response: The proposal will maintain existing public domain views from Olphert Avenue through the view corridor between No.16 and No.18.

5. The proposed development will be in the public interest because it is consistent with the objectives of the zone (clause 4.6(4)(a)(ii)) on the following basis:

a. ‘To provide for the housing needs of the community within a low density residential environment.

Response: The proposal is the lowest density development permissible in the R2 zone, being a single dwelling house.

b. ‘To enable other land uses that provide facilities or services to meet the day to day needs of residents’.

Response: Not applicable – residential dwelling proposed.

c. ‘To provide for development that is compatible with the character and amenity of the surrounding neighbourhood..’

¹¹ “The Macquarie Dictionary defines “intrusion” as the act of intruding and intrude as to thrust or bring in without reason, permission, or welcome. A visual intrusion must be an unwelcome form which intrudes into the available outlook. It would appear to me that a new building of itself will not necessarily be a visual intrusion. There must be something unwelcome about it. It could be the form of the building itself, or it could be its relationship to the viewer and what lies beyond.” *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [79].

Response: The height, shape bulk and scale are compatible with the existing and desired future character (as there is no FSR under the LEP), and the quality of the design is compatible with the amenity of the surrounding neighbourhood. The amenity impacts are discussed in more detail below.

- d. 'To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.'

Response: The design is consistent with the existing and desired future character having regard to more contemporary consents granted within the immediate vicinity (visual catchment) including, 16 Olphert Avenue (No.16) the adjoining western neighbour.

e. The development as a whole is consistent with the following aims of the LEP:

- (b) to promote the management, development, conservation, and economic use of property,

Response: The proposal is not excessive in its bulk or scale complying with the floorplate control under the LEP.

- (e) to facilitate opportunities, in suitable locations, for diversity in dwelling density and type,

Response: The house contributes to the very limited range of development permissible in the R2 zone. It does not seek to increase the residential density and is consistent with the zone objectives.

- (h) to minimise and manage stormwater and flooding impacts,

Response: The property is not flood affected but is susceptible to overland flows as detailed by (**Annexure 2**). One purpose of the height of building designed by the architect is to ensure that the primary living level is not below the road level for the purpose of limiting overland flow impacts in addition to ensure that the man entry property addresses the streetscape.

- (j) to promote a high standard of design in the private and public domain,

Response: This is a high quality bespoke design by an architect that will deliver a high standard of design. The element exceeding the HOB in an integral part of the high standard of this design for ESD and architectural design reasons.

- (l) to ensure development achieves the desired future character of the area,

Response: This has been addressed previously, having regard in particular to the recent approvals in the locality and specifically the approval at No.16 Olphert Avenue. Quantitatively and qualitatively, the proposal will achieve the

desired future character of the area consistent with contemporary consents in Olphert Avenue, including No.16 and No.12 further to the west.

(m) to minimise excavation and manage impacts.

Response: Lowering the building would have a negative impact increasing the extent of excavation with no demonstrable amenity benefits for the neighbours, and it would adversely impact the future amenity of the occupants of No.16 in a way disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant element.

- f. There are no adverse amenity impacts upon the neighbours as a result of the exception sought, the deletion of the eave above 9.5m would adversely impact future occupants, architectural quality, BASIX and ESD outcomes.
- g. The proposal is consistent with zone and development standards objectives of LEP as detailed above.
- h. The proposal is consistent with Harbour SREP, as detailed above noting that it will be barely visible from Sydney Harbour blending within hundreds of house in this locality.
- i. The existing site levels have been modified by cut and fill, with apparent cut under the area exceeding the HOB.

<p>The proposal is therefore consistent with the development standard objectives and the zone objectives.</p>
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6. The concurrence of the Secretary of the Department can be assumed under clause 4.6(4)(b). This is because:
- a. Concurrence may be assumed by written notice given to the consent authority (as per clause 64(1) of the *Environmental Planning and Assessment Regulation 2000*).
 - b. Such written notice was given by means of planning circular PS 18-003 'Variations to development standards' dated 21 February 2018 and the later circular of the same name PS 20-002.
 - c. In the event of a class 1 appeal the Land and Environment Court (Court) has all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal based upon a rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision having regard to the Land and Environment Court Act 1979 (Court Act) or any other relevant Act, and any instrument made under any such Act, the circumstances of the case and the public interest and these requirements are in addition to and not in derogation from any other functions of the Court, *ibid* section 39 of the Court Act. In any event (when considering the factors set out in clause 4.6(5)). In the Court exercising its discretion on appeal the Court can be satisfied that:
 - i. the contravention of the development standard does not raise any matter of significance for State or regional environmental planning, and
 - ii. there is public benefit in ensuring the proposal is consistent with the aims and objects of the Act and the LEP as detailed by the detailed submission providing sufficient environmental planning justification above and that this outweighs the benefit of maintaining the development standard in the circumstances of this case.

See: PS 20-002 and PS 18-003 – Department of Planning and Environment (Revokes PS17-006 (December 2017)).

Overall Conclusion

Whether the height of building exceedance is 519mm (as measured by myself) or a maximum of 1.04m (as measured by Colin Biggers & Paisley), and whether there are 3 exceedances of the height standard, this written clause 4.6(3) justifies:

1. that compliance with the development standard is **unreasonable or unnecessary** in the circumstances of the case (clause 4.6(3)(a)).
2. **That there are sufficient environmental planning grounds** to justify contravening the development standard (clause 4.6(3)(b)).
3. that the contraventions of the HOB development standard are in the **public interest** because it is consistent¹² with the objectives of the development standard and the objectives of the zone (clause 4.6(4)(a)(ii)), as detailed above.
4. The Council continues to have **assumed concurrence**. The Court on appeal have assumed concurrence. (clause 4.6(4)(b)).

The proposal is consistent with the existing and desired future character. The proposed development is compatible with the bulk, scale, streetscape, and existing character of the locality.

The development is in the public interest because it is consistent¹³ with the objectives of the development standard and the objectives of the zone (clause 4.6(4)(a)(ii)), as detailed above.



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¹² *Moskovich v Waverley Council* [2016] NSWLEC 1015 at 53.

¹³ *Moskovich v Waverley Council* [2016] NSWLEC 1015 at 53.

Annexure 1 – Clause 4.6 Methodology

Guidance as to the proper clause 4.6 methodology is provided by judgments of the Land & Environment Court (LEC) and Court of Appeal (NSWCA) detailed by the methodology below, including:

- a. *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, (**SJD**) an appeal under s 56A of the Land and Environment Court Act 1979 ("the Court Act") with respect to *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (**SJD**)
- b. *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, (**RebelMH**)
- c. *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 (**Baron**)
- d. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (**Al Maha**)
- e. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*) an appeal under s 56A of the Land and Environment Court Act 1979 ("the Court Act") with respect to *Initial Action Pty Ltd v Woollahra Council* [2017] NSWLEC 1734
- f. *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712 (**Gejo**)
- g. *Randwick City Council v Micaul Holdings Pty Ltd* 225 LGERA 94; [2016] NSWLEC 7 (**Micaul**)
- h. *Moskovich v Waverley Council* [2016] NSWLEC 1015 (**Moskovich**)
- i. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 (**Four2Five**)
- j. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 (**Four2Five**)
- k. *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (**Webhe**)
- l. *Ricola Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1047 (**Ricola**)
- m. *Big Property Pty Ltd v Randwick City Council* [2021] (*Big Property*)
- n. *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] (**HPG**)
- o. *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85, Robson J, (**Abrams**)
- p. *Ricola Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1047 (**Ricola**)

With respect to the guidance provided by the Courts above, there was apparent tension between the approach adopted by *Al Maha* and *Initial Action*. *RebelMH* and Baron further clarified the requirements for clause 4.6 requests and sought to unify the approaches in *Initial Action* and *Al Maha*.

It now appears settled, at [51] in *RebelMH* that:

“... in order for a consent authority to be satisfied that an applicant’s written request has “adequately addressed” the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).”

Arising from *Initial Action*, In the second class 1 appeal in *Initial Action Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1097 decided 12 March 2019.

Further the recent judgement in *Big Property Pty Ltd v Randwick City Council* [2021] (**Big Property**), and *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] (**HPG**), both provide guidance and flexibility in terms of how to properly assess the ‘**desired future character**’ of an area.

This clause 4.6 submission specifically responds to the above guidance of the LEC and demonstrates it is also the public interest to support the exception.

The Objectives of Clause 4.6

The objective of Clause 4.6(1) of the LEP 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.

Preston CJ clarified the correct approach to the consideration of clause 4.6 requests including that clause 4.6 does not require that a development that contravenes a development standard must have a *neutral or better* environmental planning outcome than one that does not. (*Initial Action*)

In *Al Maha*:

21. “A consideration of legal error should start by identifying the criterion as to which the Commissioner was to be satisfied. On a literal reading, subcl (4)(a)(i) merely required that she be satisfied that the applicant had taken two steps, namely, that it had, first, made a written request to be excused compliance with the development standard and, secondly, “adequately addressed” the matters set out in subcl (3). On that (narrow) reading, the Commissioner did not need to form any view herself about the justification for failing to comply with the development standard.
22. The alternative reading is that the matters would not be “adequately” addressed unless they in fact justified the non-conformity. In other words, the

Commissioner had to be satisfied that there were proper planning grounds to warrant the grant of consent, and that the contravention was justified.

23. The second reading is attractive for three reasons. First, in its terms, it gives work to the evaluative requirement implicit in the need to be satisfied that certain matters have been “adequately” addressed. Secondly, this is not a gateway provision prior to public consultation or further assessment; it is a criterion for the ultimate grant of consent¹⁴. Thirdly, the narrow approach fails to give separate work to subcl (3) and (4). Thus, subcl (3) requires the consent authority to have “considered” the written request and identifies the necessary evaluative elements to be satisfied. That is, to comply with subcl (3), the request must demonstrate that compliance with the development standard is “unreasonable or unnecessary” and that “there are sufficient environmental planning grounds to justify” the contravention. It would give no work to subcl (4) to simply require the Commissioner to be satisfied that the demonstration required under subcl (3) had occurred. The additional step is that the request satisfied the Commissioner that it should be granted.
24. However, it is not necessary to resolve this issue in this case, because it should be accepted that the Commissioner did not form either state of satisfaction. Further, it is not appropriate to determine the issue in the absence of submissions as to the purpose and extent of the departures of the language of cl 4.6 from its predecessor, State Environmental Planning Policy No 1—Development Standards, cl 7 and 8.”

The Court of Appeal decision in *RebelMH* and Preston CJ's decision in *Baron* support *Al Maha* and Initial Action. *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712 (at [27-29]), suggested the following approach:

27. Clause 4.6 of the CLEP 2012 [a standard instrument LEP] allows development standards to be applied flexibly in certain circumstances. In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, Preston CJ found that in applying the provisions of cl 4.6, the power to allow an exception to a development standard can be exercised where the Commissioner is satisfied that:
1. the proposed development will be consistent¹⁵ with the objectives of the zone (cl 4.6(4)(a)(ii)) (at [7]),
 2. the proposed development will be consistent¹⁶ with the objectives of the standard in question (cl 4.6(4)(a)(ii)) (at [7]),

¹⁴ Compare s.75H(2) (repealed in 2011) using a similar criterion with respect to an environmental assessment prior to public release.

¹⁵ *Moskovich v Waverley Council* [2016] NSWLEC 1015 at 53:

53. The threshold of “**consistency**” is different to that of “**achievement**”. The term “consistent” has been considered in judgements of the Court in relation to zone objectives and has been interpreted to mean “**compatible**” or “**capable of existing together in harmony**” (*Dem Gillespies v Warringah Council* (2002) 124 LGERA 147; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190) or “**not being antipathetic**” (*Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21). Whichever interpretation is adopted the test of “**consistency**” is less onerous than that of “**achievement**”.

¹⁶ *Ibid* [3].

3. the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary¹⁷ in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) (at [38]), and
4. the written request adequately demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)) (at [38]).

[underlining added]

28. Clause 4.6(4)(a)(ii) presumes that if the proposed development is consistent [emphasis added] with the objectives of the zone and of the standard (i.e. meets (1) and (2) above), then it is in the public interest. I also note that nothing in cl 4.6 requires the consistency with the objectives to be established in or by the written request.
29. Further, in outlining (3) and (4) above, regarding the requirements for the written request, Preston CJ stated that the Court need not be directly satisfied that compliance is unreasonable or unnecessary and sufficient environmental planning grounds exist, but rather "only indirectly by being satisfied that the applicant's written request has adequately addressed" those matters.

We note that the above observation at [29] has been further clarified by *RebelMH* and *Baron*.

The most recent guidance of the LEC arises from *SJD* where Preston CJ held:

46. "... the provisions of a development control plan cannot be used to interpret the provisions of a local environmental plan unless the provisions of the local environmental plan expressly refer to the provisions of the development control plan for that purpose. ..."

47. "The fact that the principal purpose of a development control plan is to provide guidance on certain matters referred to in s 3.42(1) of the EPA Act does not make it permissible to construe the provisions of a local environmental plan by reference to a development control plan.

49. " So understood, the Commissioner did not err on a question of law by not construing the "desired future character" in the objectives of the height and development standards in cl 4.3 and cl 4.4 and the objective of the B2 zone of WLEP by reference to the desired future character provisions of WDCP."

As at the date of writing this clause 4.6 submission I note that Woollahra Municipal Council have not resolved to make any amendments to the LEP to expressly refer to the provisions of the development control plan for the purpose of "desired future character" under the LEP.

¹⁷ Ibid Wehbe [42-51] and noting that in Initial Action [22] "These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way."

Therefore, this clause 4.6 will limit itself to the express objectives of the zone and development standard.

I note that Clay AC, in **SJD DB2 Pty Ltd v Woollahra Municipal Council** [2020] NSWLEC 1112, accepted the Applicant's position and found that the adjacent buildings which also exceeded the height controls should be considered when determining desired future character. Importantly, the Commissioner found that it is possible to meet the objectives of the height and FSR controls even if there is a breach of those controls. Commissioner Clay also clearly supported the use of clause 4.6 requests and said as follows:

"It should be noted cl4.6 of WLEP is as much a part of WLEP as the clauses with development standards. Planning is not, other than orderly, simply because there is reliance on cl 4.6 for an appropriate planning outcome."

In **In Abrams v The Council of the City of Sydney (No 2)** [2018] NSWLEC 85, Robson J, (**Abrams**) on appeal, concluded that the previous development consents were relevant instruments to be considered for the purpose of s 39(4) of the *Land and Environment Court Act 1979*.

Robson J held that prior consents on the same site or in the locality 'may be instructive for the purpose of an 'abandonment' argument or in informing the desired character or future streetscape of a locality'. In this case the latter applies.

In the **Big Property** case Commissioner O'Neil **held that the desired future character of an area is not determined solely by the development standards that control building envelopes for the area**. Commissioner O'Neil specifically referenced **SJD** and further held:

"The presumption that the development standards that control building envelopes determine the desired future character of an area is based upon a false notion that those building envelopes represent, or are derived from, a fixed three-dimensional masterplan of building envelopes for the area and the realisation of that masterplan will achieve the desired urban character. Although development standards for building envelopes are mostly based on comprehensive studies and strategic plans, they are frequently generic, as demonstrated by the large areas of a single colour representing a single standard on Local Environmental Plan maps, and they reflect the zoning map. As generic standards, they do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. Nor can they account for provisions under other EPLs that incentivise particular development with GFA bonuses or other mechanisms that intensify development. All these factors push the ultimate contest for evaluating and determining a building envelope for a specific use on a site to the development application stage. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality" [at44]"

In the more recent **HPG** case Commissioner O'Neil held

"The desired future character of the locality can be evaluated by reference to matters other than the development standards that determine the building envelope for the site, including the existing development that forms the built

context of the site (Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115 (SJD DB2) at [54]). The desired future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (SJD DB2 at [62]-[63]). Development standards that determine building envelopes can only contribute to shaping the character of the locality (SJD DB2 at [53]-[54] and [59]-[60])."

It was again also important that 'desired future character' was not defined in the LEP itself. Indeed, the Council sought to define the 'desired future character' by reference not even to a DCP, but to the 'Mosman Local Housing Strategy', a document which the Court noted 'postdates' the LEP, and could not therefore be relied upon to define terms used in the LEP.

In **Ricola**, and directly relevant to Woollahra's LEP the Court focused upon a breach of HOB and the HOB objective to "minimise impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion".

The question therefore is whether the elements breaching the HOB results in any real disruption of views, loss of privacy, overshadowing or visual intrusion.

The above clause 4.6 addresses the element that exceed the HOB and the real impacts of those elements upon disruption of views, loss of privacy, overshadowing or visual intrusion. As these element are recessive and an open eave overhang there is no real disruption of views, loss of privacy, overshadowing or visual intrusion created by the elements exceeding the HOB as detailed by **Figures 1 or 2**.

Finally, the consent authority retains a very broad discretion under clause 4.6 and there are no numerical limits placed upon the dispensing power, either by clause 4.6 or by the interpretation of clause 4.6 by the Courts.