



Clause 4.6 Variation Request

Clause 4.3A – Height of buildings
(additional provision)

40-56 Ourimbah Road, Mosman (SSD-
119133490)

Submitted to Department of Planning,
Housing and Infrastructure
on behalf of The Trustee for Ourimbah
Developments Trust

GYDE

Acknowledgment of Country



Towards Harmony by Aboriginal Artist Adam Laws

Gyde Consulting acknowledges and pays respect to Aboriginal and Torres Strait Islander peoples past, present, Traditional Custodians and Elders of this nation and the cultural, spiritual and educational practices of Aboriginal and Torres Strait Islander people. We recognise the deep and ongoing connections to Country – the land, water and sky – and the memories, knowledge and diverse values of past and contemporary Aboriginal and Torres Strait communities.

Gyde is committed to learning from Aboriginal and Torres Strait Islander people in the work we do across the country.

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Project: Residential Flat Building with Infill Affordable Housing at 40-56 Ourimbah Road, Mosman

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1. Introduction

This request that has been prepared in accordance with Clause 4.6 of the *Mosman Local Environmental Plan 2012* (MLEP 2012) to justify a variation to Clause 4.3A of the MLEP 2012.

The request accompanies State Significant Development Application (SSDA) SSD-119133490 at 40-56 Ourimbah Road, Mosman and should be read in conjunction with the documents submitted in support of the SSD, including the Environmental Impact Statement (EIS) prepared by Gyde Consulting and the Architectural Plans prepared by Doroch Architects.

The proposed works involve the following:

- Demolition of existing development on the site and associated ancillary structures.
- Construction of a part 8-storey part 9-storey RFB comprising 63 residential apartments including 15% affordable housing dwellings, to be managed by a registered Community Housing Provider.
- Provision of communal open space and landscaped areas.
- Excavation for 2 basement levels with car parking and associated services.
- All associated works including site preparation, earthworks, drainage, infrastructure and removal of existing vegetation where required to facilitate the development.

The proposal gives effect to the low and mid-rise (LMR) housing provisions and the in-fill affordable housing (IAH) provisions of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). These provisions establish a permissible development envelope that substantially exceeds the development envelope permitted under the MLEP 2012.

Clause 4.3A of the MLEP 2012 prescribes a maximum wall height of 7.2m on land zoned R3 Medium Density Residential. The development application proposes a maximum wall height of 29.42m. The exceedance of the development standard prescribed by Clause 4.3A ranges between 18.09m and 22.2m when measured from ground level (existing).

The proposed variation arises from the inconsistency between Clause 4.3A of the MLEP 2012 and the provisions of the Housing SEPP.

The wall height control was established under the MLEP 2012 to facilitate a predominantly 2-storey built form at a maximum building height of 8.5m. In contrast, the Housing SEPP permits a building height of up to 28.6m on the site if the development includes in-fill affordable housing.

Notably, the Housing SEPP does not include a corresponding wall height control for development within the LMR housing or IAH provisions. As such, while Clause 4.3A applies to the site, it does not align with the scale and built form outcomes envisaged by the Housing SEPP. The proposed variation therefore arises from this misalignment in the planning framework, rather than from any attempt to achieve a development outcome beyond that contemplated by the prevailing statutory framework and is necessary to facilitate the housing outcomes intended by the Housing SEPP.

In this context, strict compliance with the wall height standard is unreasonable and unnecessary, as it would undermine the objectives of the Housing SEPP by constraining the ability to achieve a built form consistent with the permissible building height and density framework.

By exercising the flexibility sought in this Clause 4.6 request, a better environmental planning outcome is achieved as follows:

- The variation facilitates a built form outcome that is consistent with the scale and density outcomes envisaged by the Housing SEPP, notwithstanding the inconsistency with the legacy wall height control.

- The variation promotes the supply of housing, including affordable housing, in a well-located area consistent with the second objective of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the fourth principle of the Housing SEPP.
- The proposal achieves an appropriate built form outcome without giving rise to adverse impacts in terms of bulk, scale, or amenity.
- The variation promotes the seventh objective of the EP&A Act by enabling an efficient and well-resolved building design, including appropriate internal amenity, articulation and response to site conditions.
- Strict compliance with the wall height development standard would unnecessarily constrain the achievement of these outcomes and undermine the strategic intent of the Housing SEPP.

The objectives of Clause 4.6 are to provide flexibility in the application of development standards and to enable better planning outcomes in appropriate circumstances. The proposed variation is consistent with these objectives.

This request has been prepared having regard to the Department of Planning and Environment's *Guidelines to Varying Development Standards* (November 2023) and various recent decision in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

2. Standard to be Varied

The standard that is proposed to be varied is Clause 4.3A, which prescribes a maximum wall height of 7.2m on land zoned R3 where a maximum building height of 8.5m applies.

“4.3A Height of buildings (additional provisions)

(4) A building on land to which this clause applies must not have a wall height, at any point of the building (other than at a chimney, gable end or dormer window), that exceeds 7.2 metres.”

The development standard to be varied is not excluded from the operation of Clause 4.6 of the MLEP 2012.

3. Extent of Variation

The proposal seeks consent for a development that exceeds the maximum 7.2m wall height development standard under Clause 4.3A of the MLEP 2012. The proposed wall height ranges from 18.09m at its minimum to 22.2m at its maximum when measured from ground level (existing), as illustrated in **Figure 1** to **Figure 2**. The variation is not uniform across the site and is influenced by the site's sloping topography, with greater exceedance occurring towards the lower (western) portion of the site.

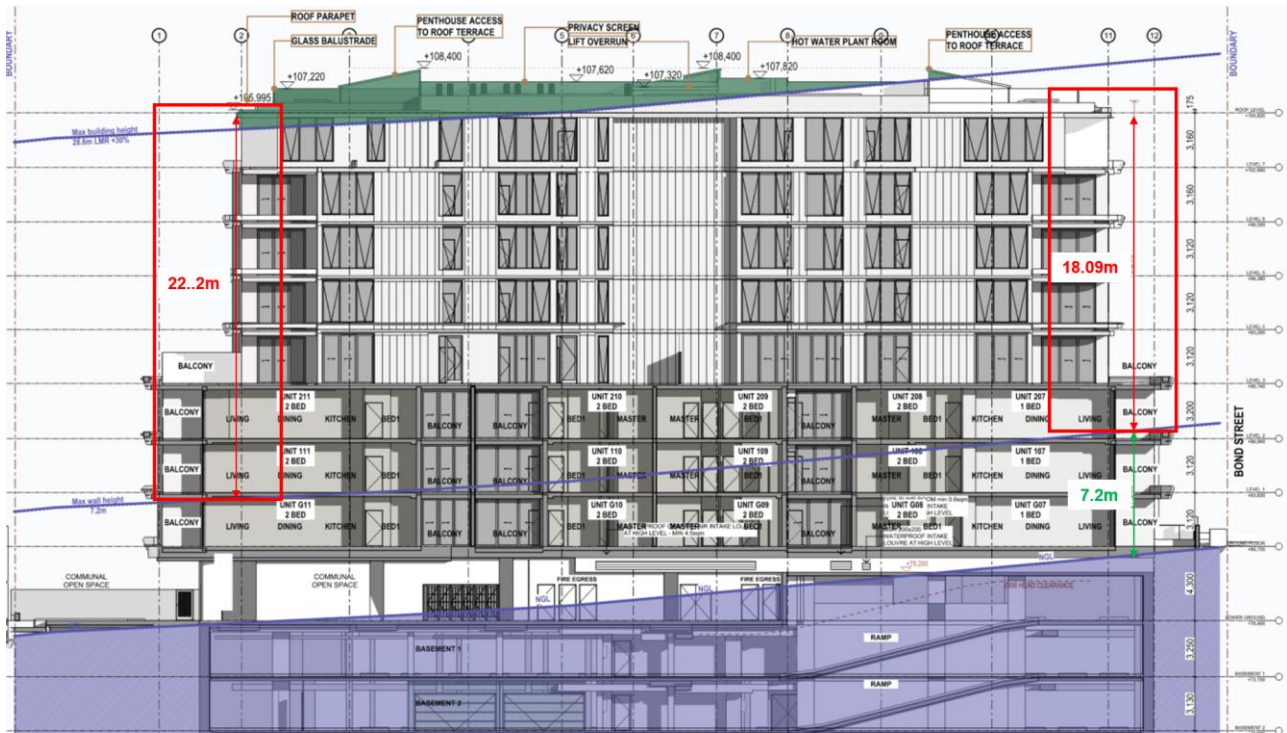


Figure 1 Wall height exceedance – Long section facing north (Source: Doroch Architects and Gyde Consulting Markups)



Figure 2 Wall height diagram (Source: Doroch Architects)

The extent of the variation is a direct consequence of the misalignment of the wall height provisions under MLEP 2012 and the applicable LMR housing and IAH provisions under the Housing SEPP, which establish a maximum building height of 22m under the LMR housing provisions. As the proposal, provides 15% affordable housing, it is also eligible to utilise the 30% height uplift available under IAH provisions, resulting in a maximum permissible building height of 28.6m. In contrast, the 7.2m wall height control under the MLEP 2012 reflects a built form outcome more consistent with a 2-storey development with a pitched roof form

We note that **Figure 1** illustrates that the proposed development exceeds the maximum building height permitted under Section 16(3) of the Housing SEPP by approximately 3.04m. However, this variation, which is predominately a result of the site's sloping topography, is not the subject of the present Clause 4.6 request and is addressed separately in the accompanying Clause 4.6 request relating to the building height standard. Refer to **Appendix 4** for further information.

The variation sought under this request relates solely to the wall height control under Clause 4.3A of the MLEP 2012. Importantly, the proposed development would exceed the prescribed wall height control irrespective of any variation sought to the Housing SEPP building height standard, given the inherent inconsistency between the wall height control and the development outcomes envisaged by the Housing SEPP.

4. Unreasonable or Unnecessary

In this section, it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case, as required by Clause 4.6(3)(a) of the MLEP 2012.

The Court held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*).

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objectives would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granted consents departing from the standard hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy Clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]).

Nonetheless, we have considered each of the ways as follows.

4.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (First Test under *Wehbe*).

Table 1 Consistency with objectives of Clause 4.3A

Objective	Demonstration
4.3A Height of buildings (additional provisions)	
1A. The objectives of this clause are as follows –	
<i>(a) To provide for view sharing</i>	The proposal will not result in any material loss of public or private views. The site is not located within a foreshore or identified view corridor and is situated within a highly urbanised context where significant views are limited. Notwithstanding the numerical exceedance of the wall height standard, the building has been designed with appropriate setbacks and articulation, consistent with the LMR housing and IAH provisions and Apartment Design Guide (ADG) requirements, which assists in maintaining reasonable view sharing where available.
<i>(b) To minimise the adverse effects of the bulk and scale of buildings</i>	The proposed development, and future surrounding development, is a substantially different type of development than the one contemplated by the wall height control. Nonetheless, the proposal has been designed to minimise perceived bulk and scale through articulation, modulation of the façade, and appropriate setbacks. Upper levels are recessed and the built form is broken down through architectural treatment, reducing visual mass.

Objective	Demonstration
	The proposal also incorporates building separations and setbacks that generally exceed the minimum requirements of the ADG, particularly at the upper levels. These increased setbacks substantially reduce the perceived bulk and scale of the development and assist in maintaining visual separation between buildings. Furthermore, the site is located within an area identified for increased residential density under both the Housing SEPP and the draft Mosman Masterplan, where a transition to larger scale residential development is anticipated.
(c) To encourage 2-storey buildings consistent with the desired future character of the area	This objective reflects the historical planning framework under the MLEP 2012, which envisaged predominantly 2-storey development. However, the Housing SEPP now establishes a different planning context for the site, permitting building heights of up to 28.6m under the LMR housing and IAH provisions. The proposal is consistent with this emerging planning framework, which anticipates increased density and building scale in well-located areas. The variation to the wall height standard does not undermine the desired future character, but rather reflects the transition envisaged under the LMR housing and IAH provisions.

As demonstrated above, the proposal satisfies the relevant objective of Clause 4.3A notwithstanding the variation. The non-compliance arises from the interaction between the MLEP 2012 wall height control, the Housing SEPP provisions and does not result in any adverse planning or environmental outcomes.

While not strictly in accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], where each of the objectives were relevant to the development proposal, we would say that the proposal achieves the relevant objective and therefore, compliance with the Height of buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met on this way alone.

4.2 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The wall height standard in Clause 4.3A of the MLEP 2012 is intended to operate in conjunction with the building height controls under the MLEP 2012, reflecting a predominantly low-scale, two-storey built form. However, in this instance, the applicable building height controls are derived from the Housing SEPP, which permits a significantly greater building height for sites within the LMR housing inner area.

As a result, there is a clear disconnect between the wall height standard under the MLEP 2012 and the built form outcomes facilitated by the prevailing SEPP provisions. While Clause 4.3A technically remains applicable in the absence of a corresponding wall height control in the Housing SEPP, its underlying intent is not aligned with the scale of development now anticipated for the site.

In this context, the objectives of the standard are of limited relevance to the assessment of the proposal, and strict compliance would not facilitate a built form consistent with the prevailing planning framework.

Compliance with the Height of buildings development standard is demonstrated to be unreasonable or unnecessary in this way also.

4.3 The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.

The objectives of Clause 4.3A are framed around the prevailing 2-storey built form historically envisaged for Mosman under the MLEP 2012. In that context, the wall height control operates effectively for low-scale

residential development, such as dwelling houses, where compliance would support the intended character and built form outcomes.

However, the current planning framework applicable to the subject site has fundamentally changed with the introduction of the LMR housing and IAH provisions under the Housing SEPP, which facilitate significantly greater building heights and densities. In this context, strict compliance with the wall height objectives is unreasonable, as they are not aligned with the scale and form of development now anticipated for the site.

Accordingly, applying these objectives rigidly would not achieve their intended purpose, but would instead constrain the delivery of a built form that is otherwise consistent with the prevailing planning controls.

4.4 The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.

Given the recent introduction of the LMR housing and IAH provisions under the Housing SEPP, there are limited examples of developments relying on these provisions where variations to the wall height standard have been assessed.

Notwithstanding, a review of Council's development application records indicates that variations to the wall height standard have been supported in other contexts. For example, development consent was recently granted to DA8.2025.60 for a residential flat building with a wall height of approximately 9.9m, representing a variation of 37.5% to the standard. There are also instances of dwelling houses within the locality exceeding the prescribed wall height control.

These approvals demonstrate that the wall height development standard is not applied in an absolute or inflexible manner, and that variations may be supported where the resulting built form is appropriate and does not give rise to adverse impacts.

While this does not suggest that the standard has been abandoned, it indicates that strict compliance is not essential in all circumstances. In this case, given the interaction between the MLEP 2012 controls and the Housing SEPP provisions, together with the site's topography and the design response, it is considered that compliance with the development standard is unreasonable and unnecessary.

4.5 The zoning of the land is unreasonable or inappropriate.

The zoning of the land is not reasonable and appropriate and, therefore, is not relied upon.

4.6 The development standard has been made redundant by the rezoning of the land.

The Court observed that there are possibly more than 5 ways, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. *See Wehbe v Pittwater Council [2007] NSWLEC 827 (Wehbe)*.

We would argue in the circumstances of this application that the development standard established under the MLEP 2012 has been made redundant by the effective rezoning of the land given effect under the Housing SEPP, and as a result strict adherence to the development standard is both unreasonable and unnecessary.

5. Sufficient Environmental Planning Grounds

In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*, Preston CJ observed that in order for there to be ‘sufficient’ environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, Plain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the departure of the wall height development standard are as follows:

Objects of the EP&A Act

The proposed development is consistent with the relevant Objects of the Act, including:

(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,

The proposed wall height variation supports the delivery of a well-designed residential development by enabling an efficient building form that responds to the site’s constraints and the applicable LMR housing and IAH provisions under the Housing SEPP. The variation facilitates appropriate internal amenity outcomes and the integration of building elements without increasing the overall building footprint or giving rise to adverse impacts.

In this context, the proposal contributes to the delivery of additional housing, including affordable housing, in a highly accessible location, consistent with the intent of the Housing SEPP. The development represents a high-quality and sustainable outcome that is appropriate for the evolving character of the locality.

(b) To promote the supply, delivery and maintenance of housing, including affordable housing

The proposal contributes to the delivery of additional housing supply, including the provision of 15% affordable housing in accordance with the incentive provisions of the Housing SEPP. The variation facilitates the delivery of the residential accommodation envisaged under the Housing SEPP, including the provision of affordable housing. Strict compliance with the 7.2m wall height control would significantly constrain the amount of residential floor space capable of being delivered on the site and would undermine the housing outcomes anticipated under the LMR housing and IAH provisions.

In this context, the variation facilitates the orderly delivery of both market and affordable housing on a well-located site, consistent with the objectives of the Housing SEPP and the broader intent of this object of the Act.

(c) to promote productivity through the development and management of the State and its resources,

The proposal represents an orderly and efficient redevelopment of the site for an appropriate medium-density residential use, consistent with the LMR housing and IAH provisions under the Housing SEPP. The variation to the wall height standard facilitates a well-resolved building form without compromising amenity or resulting in adverse impacts. In this context, the development supports the economic and efficient use of land within a highly accessible location.

(g) to promote good design, amenity and the proper construction and maintenance of built environments, including the protection of the health and safety of the occupants of buildings,

The development has been designed to respond to the intended future character of the area as envisaged by the LMR housing and IAH provisions. Notwithstanding the wall height variation, the proposal exceeds the minimum building separation requirements of the ADG in several locations, particularly at the upper levels, assisting in reducing visual bulk, preserving outlook and maintaining residential amenity, as outlined in the accompanying EIS.

When assessed against the planning framework established by the Housing SEPP, the proposed built form represents an appropriate scale and form of development for the site and does not result in any adverse impacts on the amenity of the surrounding area. Strict compliance with the wall height control would unreasonably constrain the design and limit the ability to achieve a coherent and well-resolved built form consistent with the prevailing planning controls.

Desired Future Character of the Locality

The site is located within an area undergoing transition as a result of the LMR housing provisions, which facilitate increased residential density in well-located areas. This is reinforced by the draft Mosman Masterplan currently being prepared by Council. Importantly, the site is identified for residential uplift under both Masterplan options and is contemplated as accommodating buildings within the 5–8 storey range. This demonstrates that Council itself recognises the site as appropriate for a significantly greater scale of development than envisaged under the historic MLEP 2012 controls and broadly consistent with the scale proposed by the development.

In this context, the proposed variation to the wall height control does not prejudice the achievement of the desired future character. Rather, it enables a built form that aligns with the scale and density envisaged under the Housing SEPP, while allowing for a more coherent and well-resolved building design through appropriate massing and articulation.

Environmental Impacts

When assessing potential environmental impacts arising from the variation, it is relevant that the Housing SEPP establishes the prevailing planning framework for the site, including permitting a significantly greater building height than that envisaged under the MLEP 2012. The proposed wall height exceedance is consistent with the scale of development anticipated under the LMR housing and IAH provisions.

While the proposal results in a greater level of impact than a development complying with the 7.2m wall height control, those impacts are consistent with the scale and density outcomes anticipated under the LMR housing and IAH provision and have been appropriately mitigated through setbacks, articulation, landscaping and building separation.

In this context, the variation facilitates an appropriate built form outcome that is consistent with the intent of the prevailing planning controls, while avoiding any unreasonable impacts on surrounding properties. The proposed development has been carefully designed to reduce perceived bulk and scale at the upper levels through a combination of substantial setbacks and articulation. These design measures create a podium-and-tower form, with the podium establishing the predominant wall height and street wall presentation, thereby reducing the visual prominence of the upper levels and ensuring a built form outcome that responds appropriately to its context.

For completeness, we note that the size of the variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council [2016] NSWLEC 1216 at [85]*.

In short, Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for variations to be approved in the right circumstances.

6. Conclusion

This request to vary the wall height development standard is made pursuant to Clause 4.6 of the MLEP 2012 and demonstrates that:

- The prescribed wall height control was formulated within a planning framework that anticipated a substantially lower-density form of development and therefore does not appropriately reflect the scale of development now encouraged under the LMR provisions.
- The wall height standard under the MLEP 2012 is primarily derived from a built form context characterised by two-storey development, where a lower wall height outcome was consistent with the intended character and density of the area at that time.
- The current planning framework applying to the site supports greater residential density and building height. In response, the proposed development has been carefully designed to mitigate perceptions of bulk and scale through significant upper-level setbacks, building articulation, and a clearly expressed podium element. These design responses ensure that the podium establishes the dominant street wall presentation while reducing the visual prominence of the upper levels.

In considering the acceptability of the proposed wall height exceedance, it is necessary to have regard to the prevailing planning framework under Chapter 6 of the Housing SEPP. The objectives of Clause 4.3A of the MLEP 2012 are primarily directed toward a 2-storey built form, which reflects the historical development pattern of the area. However, the LMR housing and IAH provisions now establish a different planning context, facilitating increased building height and density in well-located areas such as the subject site.

In this context, strict application of the wall height control does not align with the scale and form of development anticipated under the Housing SEPP. The proposal is consistent with the intent of these provisions and achieves a well-resolved built form that responds appropriately to the site and its surroundings.

While the proposal results in a greater building envelope than would occur under strict compliance with the wall height control, the resulting impacts are reflective of the development scale anticipated under the LMR housing and IAH provision and are appropriately managed through the design response adopted for the site.

Accordingly, it is appropriate to exercise the flexibility afforded by Clause 4.6 in this instance.