

Clause 4.6 Variation Request

Section 16(3) of the State Environmental Planning Policy (Housing) 2021

Residential Flat Building with Infill Affordable Housing at 40-56 Ourimbah Road, Mosman (SSD-119133490)

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

9 July 2026

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.

This report was prepared by:

Approver: Stephen Kerr – Executive Director

Author: Parisa Sheikhi – Associate

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

Report Version: Final

This report was reviewed by: Yvonne Kanti – Associate Director

Disclaimer

This report has been prepared by Gyde Consulting with input from a number of other expert consultants (if relevant). To the best of our knowledge, the information contained herein is neither false nor misleading and the contents are based on information and facts that were correct at the time of writing. Gyde Consulting accepts no responsibility or liability for any errors, omissions or resultant consequences including any loss or damage arising from reliance in information in this publication.

Copyright © Gyde Consulting
ABN 58 133 501 774

All Rights Reserved. No material may be reproduced without prior permission.

Contents

1.	Introduction.....	1
2.	Standard to be Varied	3
3.	Extent of Variation.....	5
4.	Unreasonable or Unnecessary.....	7
4.1	The objectives of the development standard are achieved notwithstanding non-compliance with the standard.....	7
4.2	The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.	11
4.3	The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.	11
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.	11
4.5	The zoning of the land is unreasonable or inappropriate.....	11
5.	Sufficient Environmental Planning Grounds.....	12
	Overshadowing	13
	Massing and Built Form	15
6.	Conclusion	17

Figures

	Towards Harmony by Aboriginal Artist Adam Laws	2
Figure 1	Walking distance to Spit Junction Town Centre (Source: Gyde Consulting)	3
Figure 2	Extent of the height variation from highest point of the building (Source: Doroch Architects and Gyde Consulting Markups).....	5
Figure 3	Height plane diagram (Source: Doroch Architects).....	6
Figure 4	Height breach when viewed from western elevation (Source: Doroch Architects and Gyde Consulting Markups)	6
Figure 5	Ourimbah Townscape, site outlined in red (Source: MDCP 2012)	9
Figure 6	View locations (Source: Archimages 3D).....	10
Figure 7	Distribution of building volume relative to the maximum building height plane (Source: Doroch Architects).....	15
Figure 8	Proposed setbacks up to Level 4 (Source: Doroch Architects and Gyde Consulting Markups)	16
Figure 9	Proposed setbacks from Level 4 and above (Source: Doroch Architects and Gyde Consulting Markups)	16

Tables

Table 1	Consistency with Section 15A and Objectives of Section 16(3) of the Housing SEPP	7
Table 2	Consistency with the Aim of Chapter 6, set out in Section 162 of the Housing SEPP	8
Table 3	Consistency with Clause 4.3 Objectives of the MLEP 2012	8
Table 4	Extracts of the shadow diagrams within existing context (Source: Doroch Architects)	14

1. Introduction

This request has been prepared in accordance with Clause 4.6 of the *Mosman Local Environmental Plan 2012 (MLEP 2012)* to justify a variation to the maximum building height provided by Section 16(3) of *State Environmental Planning Policy (Housing) 2021 (Housing SEPP)*. The request accompanies a State Significant Development Application (SSDA) SSD-119133490 at 40-56 Ourimbah Road, Mosman (the site).

This request 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 development application seeks approval for 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 adopts a combined application of the low- and mid-rise (LMR) housing provisions and the in-fill affordable housing (IAH) provisions under the Housing SEPP to establish the development envelope for height of building (HoB) and floor space ratio (FSR).

The development standard being varied is the maximum HoB standard of 28.6m established by Section 16(3).

The proposed development has a maximum building height of 31.64m, resulting in a variation of 3.04m (10.6%) when measured from the highest point of the building to existing ground level directly below, consistent with the definition of building height under the Housing SEPP.

The height exceedance primarily relates to rooftop elements, including lift overruns, stair access structures, mechanical plant and services, the photovoltaic (PV) system and associated screening, and limited areas of private open space located towards the western portion of the rooftop. A minor component of the westernmost dwelling on Level 9 also contributes to the variation; however, the exceedance is confined to the upper portion of the dwelling, including the ceiling and roof parapet above.

The variation is largely a consequence of the site's approximately 6-metre fall across the frontage, rather than any increase in building bulk or floor space. This results in a limited number of upper-level and rooftop elements exceeding the height standard when measured from existing ground level.

The proposal complies with the applicable FSR development standard. The height variation does not facilitate additional residential floor space beyond that envisaged by the planning controls and is principally attributable to the provision of necessary rooftop infrastructure, the architectural resolution of the uppermost level, and the site's topography.

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances.

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 decisions in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

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

- The proposal delivers 63 dwellings, including 12 affordable housing dwellings managed by a registered CHP, directly supporting the objectives of the Housing SEPP and State housing supply objectives.
- The proposal remains compliant with the maximum permissible FSR, demonstrating that the variation does not result in excessive development yield or building bulk beyond that anticipated by the planning framework.
- The development has been designed with increased setbacks to the western interface, resulting in a narrower building footprint than could otherwise be achieved under a compliant building envelope. This approach improves building separation, landscaping opportunities, communal open space outcomes and the overall presentation of the development within its setting.
- The variation allows the building form to respond appropriately to the site's sloping topography and the operation of the inclined height plane, rather than requiring a broader or less efficient built form outcome to achieve strict numerical compliance.
- Detailed assessment demonstrates that the variation gives rise to only minor and localised impacts, with no unreasonable adverse consequences in terms of visual bulk, overshadowing, view sharing, privacy or heritage significance when compared with a compliant development.

It is therefore considered appropriate in the circumstances of this application to vary the HoB development standard.

2. Standard to be Varied

The standard that is proposed to be varied is the maximum HoB provided by Section 16(3) of the Housing SEPP as follows:

“16 Affordable housing requirements for additional floor space ratio

(1) *The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the development on the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).*

(2) *The minimum affordable housing component, which must be at least 10%, is calculated as follows—*

$$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{(\text{as a percentage})} \div 2$$

(3) *If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the development on the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).”*

As set out in subsection (3), the maximum HoB is derived as a function of the additional FSR (expressed as a percentage) permitted under subsection (1), in combination with the base maximum HoB applicable to the land.

Given the proposal provides affordable housing equivalent to 15% of the GFA, it qualifies for an additional FSR of 30% under subsection (1).

For the purposes of subsection (3), the relevant base ‘maximum permissible building height’ is that prescribed by Section 180 of the Housing SEPP. As shown in **Figure 1**, the site is located within 400m walking distance of the Spit Junction Town Centre and therefore identified as being within the LMR housing inner area.

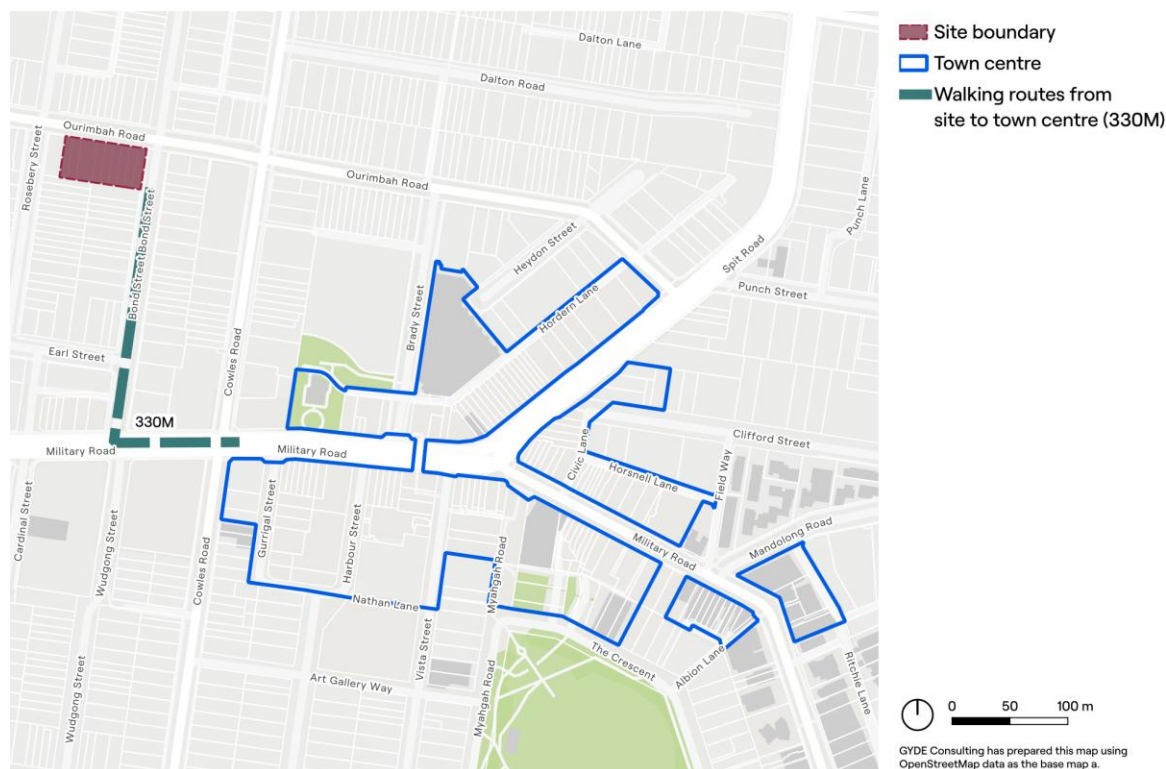


Figure 1 Walking distance to Spit Junction Town Centre (Source: Gyde Consulting)

Pursuant to Chapter 6, Division 2, Section 180 of the Housing SEPP, the LMR provisions permit a maximum HoB of 22m and FSR of 2.2:1. In addition, the proposal relies on the IAH provisions under Chapter 6, Part 2, Division 1, Section 18(2) of the Housing SEPP. The development includes the provision of at least 15% of the GFA as affordable housing and, on that basis, seeks to utilise the additional 30% building height and FSR, resulting in a maximum permissible HoB of 28.6m and FSR of 2.86:1

3. Extent of Variation

The height variation arises from a combination of the site's east-west fall (approximately 6.2m), the need to provide a compliant basement access arrangement from the lowest point of the site, and the provision of rooftop elements necessary for the operation of the development, including lift overruns, stair access, mechanical plant, photovoltaic infrastructure and associated screening. These factors result in a limited portion of the uppermost building intersecting the prescribed height plane despite the proposal remaining compliant with the maximum permissible FSR.

The proposal seeks consent for a development that exceeds the maximum building height development standard of 28.6m. The maximum building height of the proposed development is 31.64m when measured from existing ground level directly below the highest point of the building, resulting in a numerical exceedance of 3.04m (10.6%), occurring where the building intersects the height plane towards the western portion of the site. Refer to **Figure 2**.

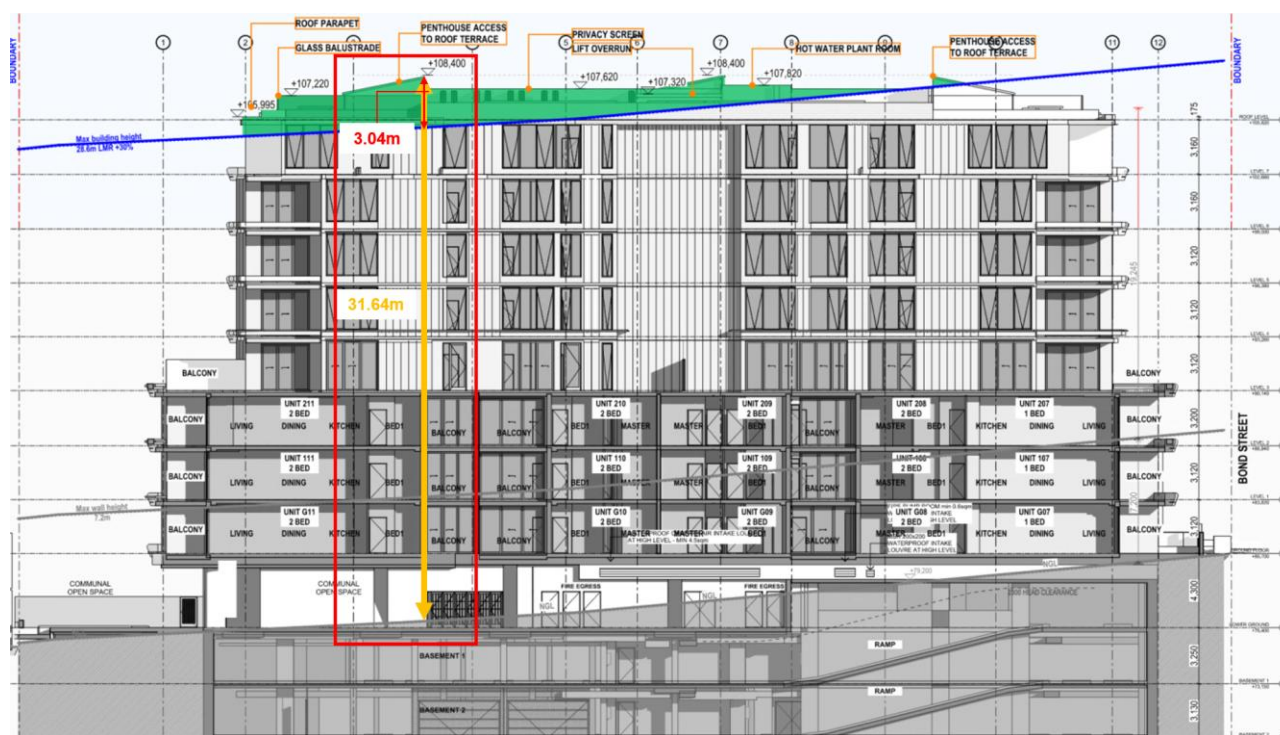


Figure 2 Extent of the height variation from highest point of the building (Source: Doroch Architects and Gyde Consulting Markups)

As illustrated in the height plane diagram at **Figure 3**, the extent of non-compliance varies across the site. The exceedance is primarily associated with the roof access stair and rooftop elements, however, limited portions of the uppermost residential level also extend above the height plane, including approximately 1.6m (5.6%) at the north-western corner and 1.4m (4.9%) at the south-western corner of the building. Refer to **Figure 4**.

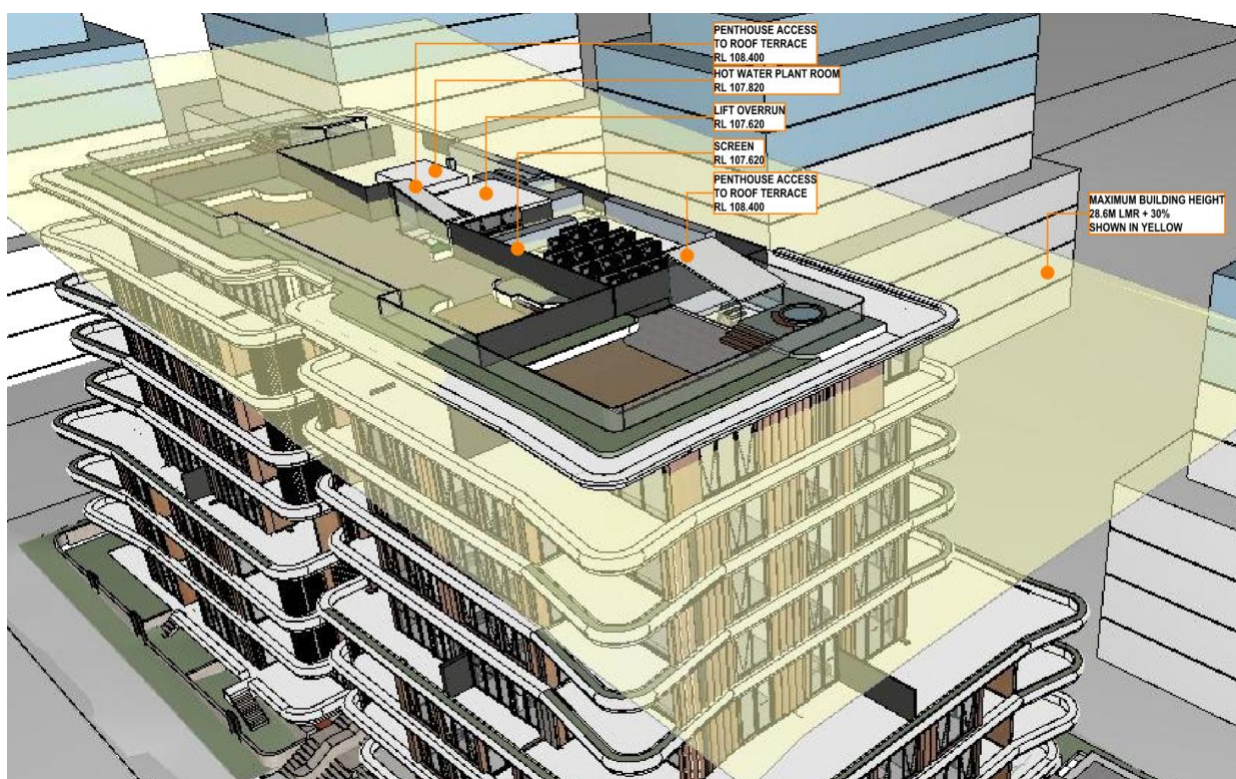


Figure 3 Height plane diagram (Source: Doroch Architects)

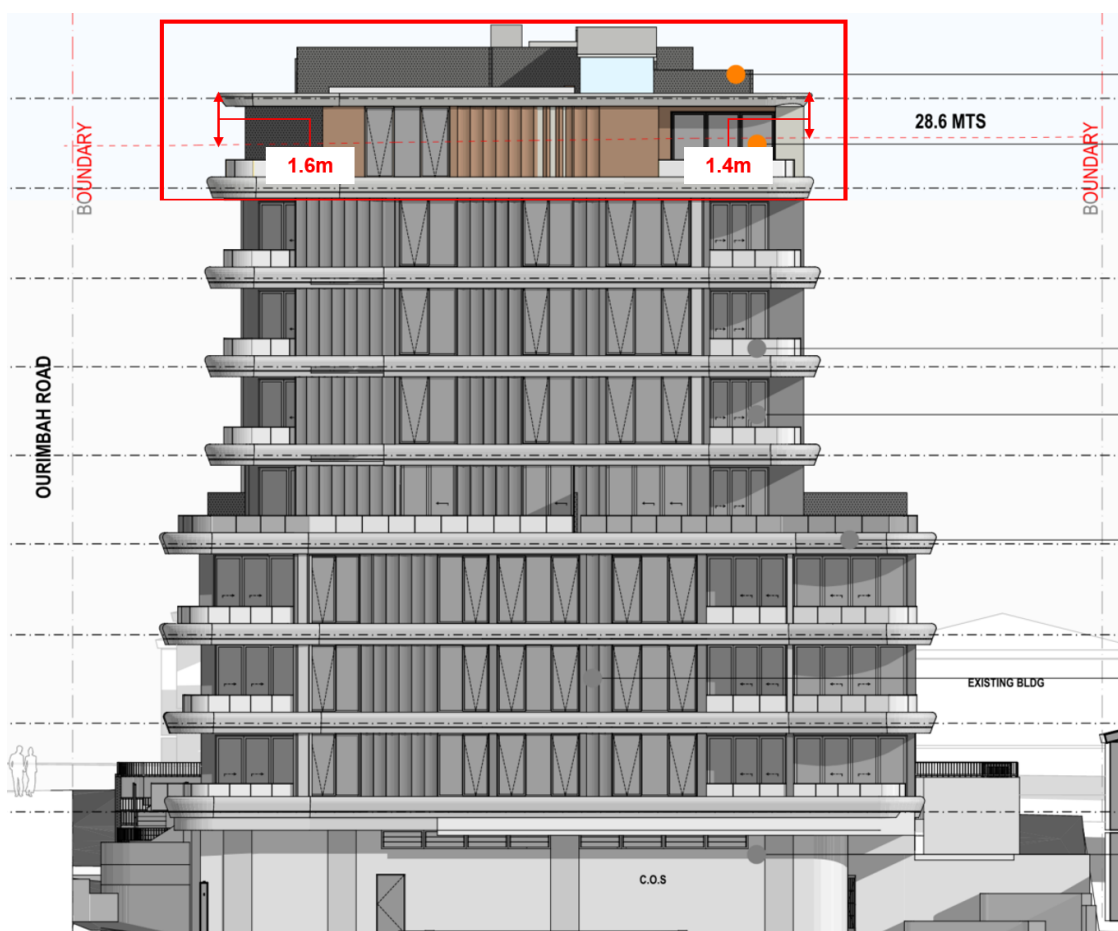


Figure 4 Height breach when viewed from western elevation (Source: Doroch Architects and Gyde Consulting Markups)

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 tables considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (First Test under *Wehbe*). The objectives of Section 16(3) of **Table 1**.

For completeness, this request also considers the objectives relevant to the underlying LMR base height control, from which the 30% height bonus and overall maximum permissible building height are derived. Section 180 of the Housing SEPP does not contain specific objectives. Accordingly, regard has been given to the broader aim of Chapter 6, set out in Section 162 of the Housing SEPP, which is to encourage LMR housing in areas that are well located with regard to goods, services and public transport. This is addressed in **Table 2**.

While the height objectives in the MLEP 2012 do not directly apply to the Housing SEPP standard being varied, they provide a useful reference for the underlying planning principles that typically inform building height controls. **Table 3** addresses the achievement of the objectives Clause 4.3 of the MLEP 2012.

Table 1 Consistency with Section 15A and Objectives of Section 16(3) of the Housing SEPP

Objective	Demonstration
15A Objective of division	
<i>The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.</i>	The proposal directly supports the objective of this division by providing 15% of the total GFA as affordable housing, equating to 1,105.16m ² (15.2%) of affordable housing floor space across 12 dwellings. Importantly, despite the proposed variation to the building height development standard, the proposal remains compliant with the

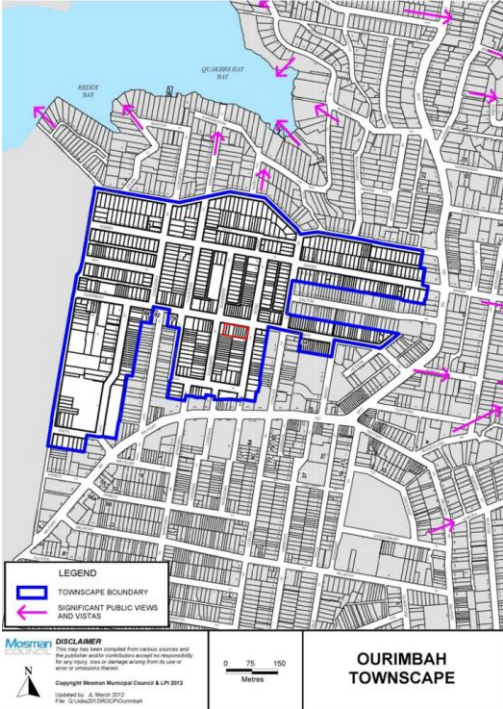
Objective	Demonstration
	maximum permissible FSR and provides an FSR of 2.859:1, which is within the maximum FSR permitted under the Housing SEPP. The affordable housing component comprises a mix of one, two and three-bedroom apartments, providing housing opportunities for a range of household types and income groups. The affordable housing dwellings are located on a single level within the development and are designed to achieve a high standard of residential amenity consistent with the market housing component. The affordable housing component will be managed by EchoRealty, a registered Community Housing Provider, ensuring the ongoing delivery and management of affordable housing in accordance with the requirements of the Housing SEPP. The proposal will deliver a meaningful supply of affordable housing in a highly accessible location and is therefore consistent with the objective of facilitating new in-fill affordable housing. The variation will facilitate the delivery of new in-fill affordable housing and therefore achieves the objective of this control.

Table 2 Consistency with the Aim of Chapter 6, set out in Section 162 of the Housing SEPP

Aim	Demonstration
132 Aim of chapter	
<i>The aim of this chapter is to encourage the development of low and mid rise housing in areas that are well located with regard to goods, services and public transport.</i>	The proposal directly supports the aim of Chapter 6 by delivering additional housing, including 12 affordable housing dwellings, within approximately 330m walking distance of the Spit Junction Town Centre. The site has access to public transport, employment opportunities, retail services and community infrastructure and is specifically identified by the Housing SEPP as suitable for LMR housing. The proposal therefore achieves this objective by increasing the supply of mid rise housing in a place that is well located with regard to goods, services and public transport.

Table 3 Consistency with Clause 4.3 Objectives of the MLEP 2012

Objective	Response
Clause 4.3 Height of buildings	
<i>1. The objectives of this clause are as follows –</i>	
<i>(a) for development on land in Zone R2 Low Density Residential, Zone R3 Medium Density Residential or Zone C4 Environmental Living—</i>	
<i>(i) To share public and private views</i>	A Visual Impact Analysis (Appendix 41) has been prepared in support of the proposal and assesses the visibility of the development from key public viewpoints within the locality. The site is located within the Ourimbah Townscape area identified by the <i>Mosman Development Control Plan 2012</i> (MDCP 2012). As shown in Figure 5, the MDCP 2012 identifies a number of significant public views and vistas throughout the townscape. However, none of these identified view corridors traverse the site or rely upon views being maintained across the site.

Objective	Response
	 Figure 5 Ourimbah Townscape, site outlined in red (Source: MDCP 2012) The proposed development will therefore not obstruct or diminish any identified public views or vistas. In addition, the portion of the building that exceeds the maximum building height standard is confined to the uppermost levels of the development and does not occupy a position that would interrupt any mapped public view corridor. In relation to private views, the Visual Impact Analysis, Design Report (Appendix 41) and Design Verification Statement (Appendix 10) conclude that the site does not occupy a position that would result in significant impacts on established view corridors. The building incorporates upper-level recesses, articulation and appropriate setbacks which reduce the perceived scale of the development and assist in maintaining view sharing opportunities from surrounding properties. Accordingly, the proposal is consistent with the objective of facilitating the sharing of public and private views notwithstanding the proposed variation to the building height development standard. <i>(ii) To minimise the visual impact of buildings, particularly when viewed from the harbour and surrounding foreshores</i> The site is not located adjacent to Sydney Harbour or any foreshore reserve and does not form part of a prominent harbour frontage. Accordingly, the visual impacts of the proposal are principally experienced within the local streetscape rather than from the harbour or surrounding foreshores. A Visual Impact Analysis has been prepared to assess the visibility of the proposal from representative viewpoints as follows:

Objective	Response
	 Figure 6 View locations (Source: Archimages 3D) The assessment demonstrates that the development will be viewed in the context of an established urban environment comprising residential development, mature street trees and existing built form. The photomontages show that the proposed development presents as a coherent and well-articulated building form, with upper levels recessed behind lower levels and a high degree of façade articulation. The variation to the building height standard is confined to the uppermost portion of the building and is not visually distinguishable as a separate element when viewed from the public domain. Instead, it is read as part of the overall architectural composition of the building. Importantly, the proposal is located within an area identified for increased residential density under the Housing SEPP and within a locality where the draft Mosman Masterplan contemplates buildings of between 5 and 8 storeys. In this context, the proposal is consistent with the emerging scale and character anticipated for the area. Accordingly, notwithstanding the proposed variation, the proposal achieves the objective of minimising visual impacts by presenting as a well-articulated built form with recessed upper levels, generous landscaping and a height variation that is confined to the uppermost elements of the building and is not visually prominent from the public domain. Furthermore, the proposal will not adversely affect views from Sydney Harbour or surrounding foreshores. <i>(iii) To ensure buildings are compatible with the desired future character of the area in terms of building height and roof form</i> The desired future character of the locality is informed by the LMR housing and IAH provisions under the Housing SEPP and the emerging strategic direction set out in the draft Mosman Masterplan. Both planning frameworks identify the site as suitable for increased residential density and building heights compared with the historic development pattern of the area. The Housing SEPP specifically identifies the locality as suitable for increased residential density and building heights, permitting a maximum building height of 22m and, where affordable housing is provided, up to 28.6m. The proposal has been designed in accordance with this planning framework and reflects the scale of development contemplated by these provisions. Importantly, the draft Mosman Masterplan identifies the site for future residential uplift under both masterplan options currently being considered by Council. Under

Objective	Response
	either option, the site is identified as appropriate for development within a height range of approximately 5 to 8 storeys. This demonstrates that both Council and the NSW Government recognise the site as suitable for a significantly greater scale of development than that envisaged under the historic MLEP 2012 controls. The proposed development is consistent with, and representative of, this emerging future character. The building incorporates a contemporary architectural form with recessed upper levels, articulated facades and a predominantly flat roof form, reflecting the design approach typically adopted for modern apartment buildings. The building height variation is confined to the uppermost portion of the development and does not alter the overall perception of the building's height, scale or roof form when viewed from the surrounding locality. Accordingly, notwithstanding the proposed variation, the development is compatible with the desired future character of the area in terms of building height and roof form.
(iv) <i>To minimise the adverse effects of bulk and scale of buildings</i>	The proposal minimises the adverse effects of bulk and scale through increased setbacks, a slender building form, substantial landscaping opportunities and the provision of generous separation to adjoining properties. The building footprint has been reduced compared to what could otherwise be achieved, resulting in improved deep soil planting, communal open space and solar access outcomes. The variation is confined to the uppermost portion of the building and does not result in unreasonable impacts in terms of visual bulk, privacy or overshadowing. Detailed assessment of these matters is provided in Section 5 of this request.

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], 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 underlying objective or purpose is relevant to the development and, therefore, is not relied upon.

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

Strict compliance with the development standard would undermine the objective of the control by unnecessarily constraining the provision of affordable housing on the site.

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.

The standard has not been abandoned by the Council in this case, and so this reason is not relied upon.

4.5 The zoning of the land is unreasonable or inappropriate.

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

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 relied upon to justify the departure from the height of buildings 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 building height variation supports the delivery of a high-quality residential development that responds appropriately to the site's topography and the planning framework established by the LMR housing and IAH provisions of the Housing SEPP. The variation enables the integration of essential rooftop building elements, including lift overruns, stair access, mechanical plant, photovoltaic infrastructure and associated screening, without increasing the development's floor space or overall development intensity.

The proposal delivers a well-resolved architectural outcome that responds to the site's physical constraints whilst facilitating additional housing, including affordable housing, in a highly accessible location. In this context, the variation contributes to the orderly development of the site and represents an appropriate planning outcome consistent with the objectives of the Housing SEPP.

(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 proposed variation facilitates the delivery of the residential accommodation envisaged under the Housing SEPP whilst maintaining compliance with the maximum permissible FSR. Strict compliance with the 28.6m height standard would result in a less efficient and less coherent architectural outcome without delivering any corresponding environmental benefit.

(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 proposed variation facilitates a well-resolved architectural outcome that responds to the site's topography whilst maintaining a high level of residential amenity.

The building incorporates articulated façades, recessed upper levels, substantial landscaping and generous setbacks to reduce perceived bulk and scale. Importantly, the height variation is confined to the uppermost portions of the building, comprising lift overruns, rooftop access, plant, photovoltaic infrastructure and associated screening, which are not visually prominent from the surrounding public domain.

The proposal has also been designed to achieve compliance with the Apartment Design Guide, provide appropriate communal open space, building separation and landscaping outcomes, and maintain a maximum FSR consistent with the Housing SEPP. Accordingly, the variation facilitates a high-quality built form outcome consistent with the design objectives of the prevailing planning framework.

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 building 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

Overshadowing

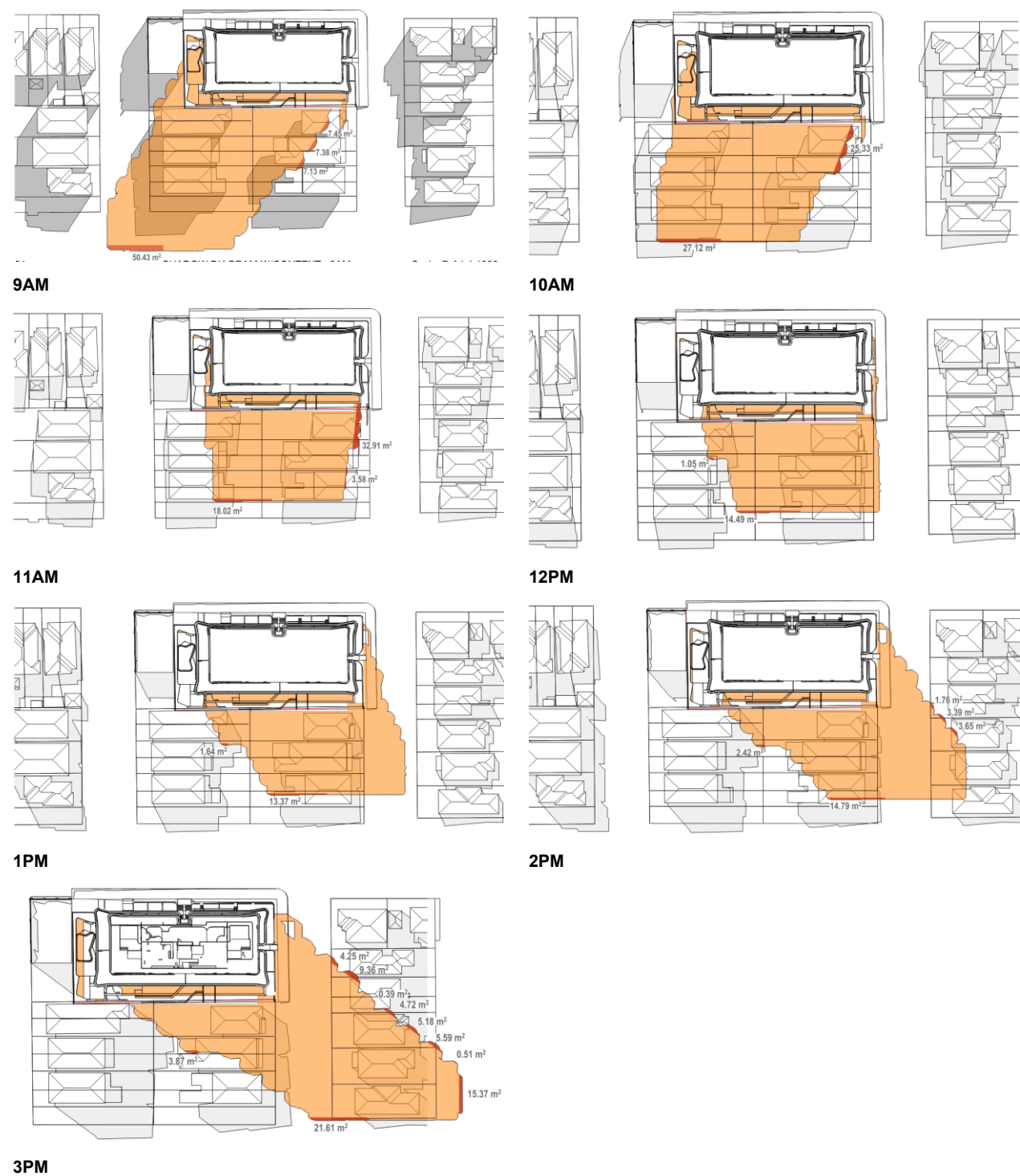
Shadow diagrams prepared for the proposal demonstrate that the additional overshadowing attributable solely to the height variation is minor. The additional shadow generated by the portions of the building that extend above the maximum building height plane is illustrated in **Table 4** and is shown separately from the shadow cast by a compliant building envelope.

The analysis demonstrates that the additional shadow attributable solely to the height variation ranges from 15.01m² to 72.39m² throughout the day on 21 June. The greatest extent of additional shadow occurs at 9am (72.39m²) and again at 3pm (70.87m²), when shadows are naturally longest, while the additional shadow reduces significantly during the middle of the day to approximately 15–26m² between 12pm and 2pm, as summarised in the table below.

Time	Additional Shadow
9am	72.39m ²
10am	52.45m ²
11am	54.51m ²
12pm	15.54m ²
1pm	15.01m ²
2pm	26.01m ²
3pm	70.87m ²

Importantly, the majority of the additional shadow falls upon the roofs of adjoining dwellings and areas already affected by shadow from the compliant building envelope. Where additional shadow extends beyond roof areas, it is limited in extent and does not result in any material reduction in solar access to primary private open space areas or principal living room windows beyond what would reasonably be anticipated from a compliant development. Refer to **Table 4** for an extract of the proposed shadow diagrams.

Table 4 Extracts of the shadow diagrams within existing context (Source: Doroch Architects)



The limited extent of the additional shadow cast as a result of the height exceedance is reflective of the nature of the variation, which is confined to the uppermost portions of the building. As discussed previously, the majority of the building remains within, or below, the maximum permissible height plane, with the variation concentrated toward the western side of the site where the height plane intersects the building due to the site's topography.

It is also relevant that the site and surrounding locality are subject to LMR housing and IAH provisions of the Housing SEPP, which contemplate a significantly greater scale of development than currently present within

the area. This strategic direction is reinforced by Mosman Council's draft Masterplan, which identifies the subject site and surrounding land for residential uplift under both masterplan options and contemplates buildings generally ranging between 5 and 8 storeys in height on the site.

Future context shadow modelling prepared for the proposal demonstrates that the overshadowing outcomes generated by the development are consistent with those reasonably anticipated under both the Housing SEPP and Council's emerging strategic vision for the locality. In this regard, the additional shadow attributable to the height variation does not represent an unusual or unexpected outcome when assessed against the scale and density of development now envisaged for the area. Refer to the Architectural Plans (**Appendix 8**) for the future context shadow diagrams.

Accordingly, the variation does not give rise to any unreasonable overshadowing impacts and does not materially alter the environmental outcomes that would occur under a compliant building envelope. The overshadowing impacts attributable to the variation are minor, localised and acceptable in the context of the development permitted under the Housing SEPP.

Massing and Built Form

The proposed variation does not result in an unreasonable increase in the bulk or scale of the development and is instead a consequence of the interaction between the building form and the site's topography.

The site falls approximately 6.2m from east to west. As a result, while the eastern portion of the building remains comfortably below the maximum permissible building height, the horizontal height plane intersects portions of the uppermost level towards the western side of the site. The exceedance is therefore not uniform across the building and is concentrated within a limited portion of the upper building form. The topography is a unique feature of the site and an environmental planning ground to justify the departure from the development standard and the western (downhill) end of the site.

As illustrated in **Figure 7**, approximately 630m² (60.6%) of the roof area remains below the maximum building height plane, compared with approximately 410m² (39.4%) above it. A volumetric analysis prepared by the project architect further demonstrates that approximately 657m³ of potential building volume remains below the prescribed height plane, compared with approximately 523m³ above it. Accordingly, the volume of building below the height plane exceeds the volume above it.

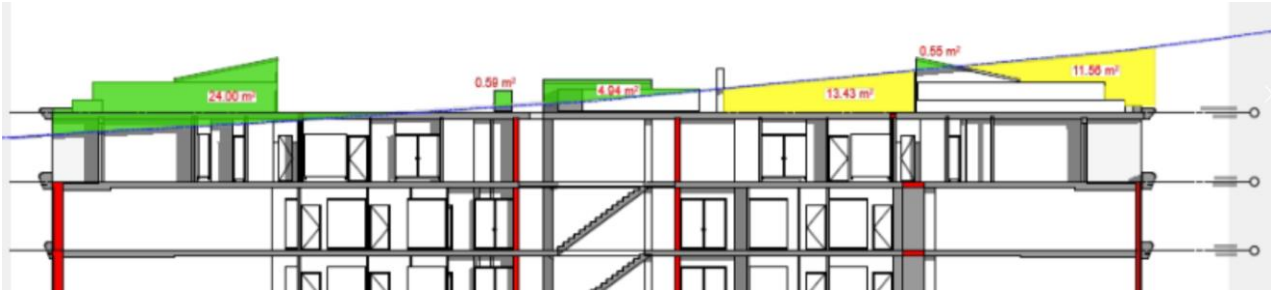


Figure 7 Distribution of building volume relative to the maximum building height plane (Source: Doroch Architects)

The proposal remains compliant with the maximum permissible FSR under the Housing SEPP. Accordingly, the variation does not result in development intensity beyond that anticipated by the applicable planning controls but instead arises from the interaction of the prescribed height plane with the building form on the sloping site.

As illustrated in **Figure 8** and **Figure 9**, the proposal has not sought to maximise the width of the building envelope that could otherwise be achieved. Instead, the development provides significantly increased setbacks to the western interface and generous separation to adjoining development.

Interface	Required Setback	Proposed Setback
West (up to Level 4)	6m	7.3m - 7.8m

West (above Level 4) 9m 12.5m - 12.8m

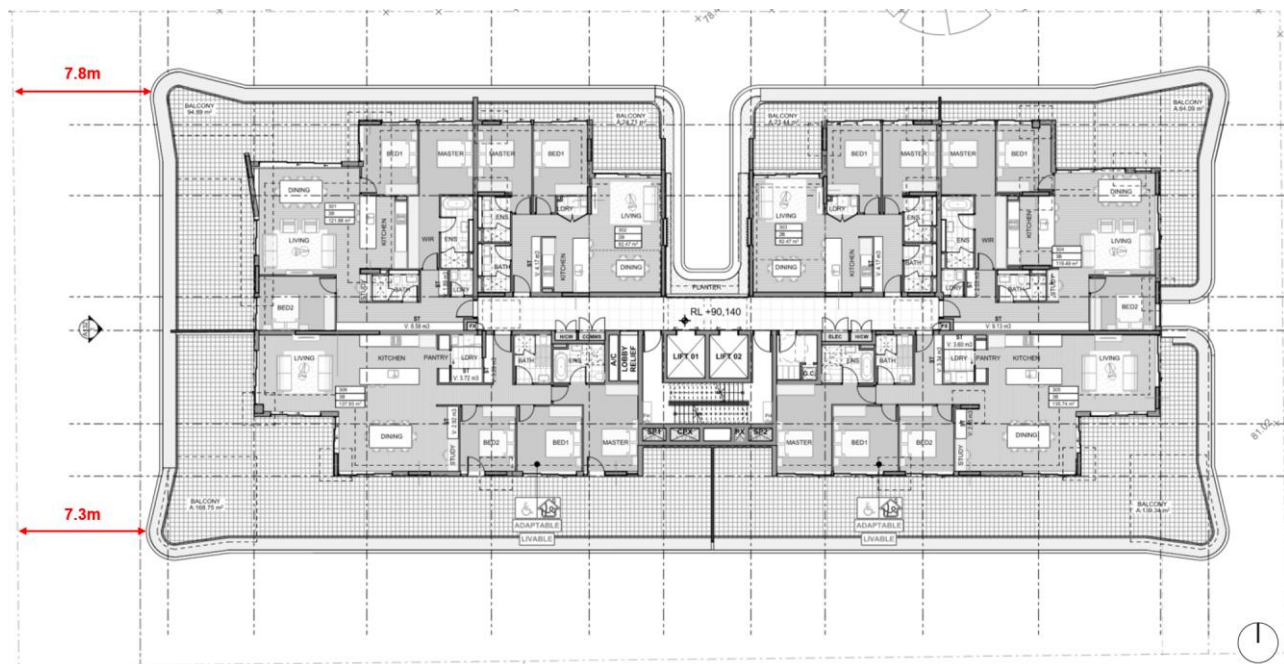


Figure 8 Proposed setbacks up to Level 4 (Source: Doroch Architects and Gyde Consulting Markups)

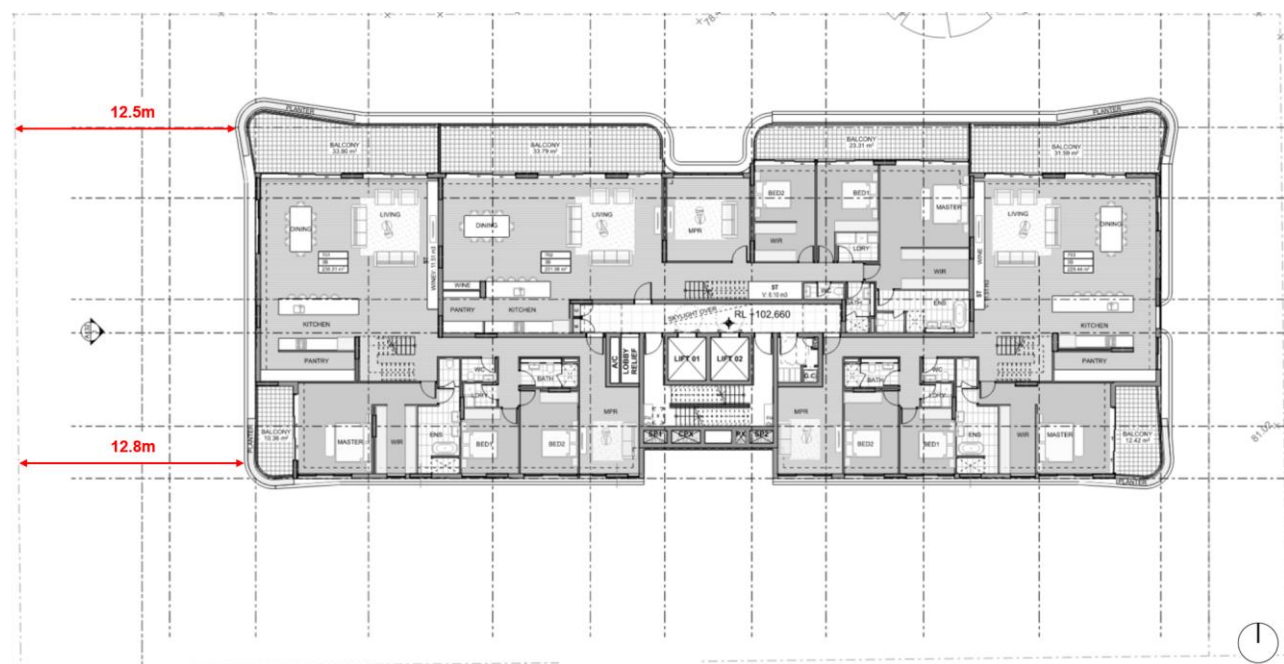


Figure 9 Proposed setbacks from Level 4 and above (Source: Doroch Architects and Gyde Consulting Markups)

These increased setbacks reduce the overall width and bulk of the building, whilst creating additional opportunities for deep soil planting, landscaping, communal open space and improved separation from adjoining development. The resulting building form is therefore more slender than a compliant envelope that sought to maximise the available building footprint.

In this regard, the proposed variation facilitates good design as sought by object (g) of the EP&A Act.

While a limited portion of the westernmost Level 9 dwelling extends above the prescribed height plane, the variation is confined to the upper section of the dwelling and does not create an additional storey or

additional development yield. The substantial majority of the dwelling's habitable floor area remains below the maximum building height plane. The affected area is also located behind increased western setbacks of approximately 12.5m–12.8m, substantially exceeding the applicable separation requirements and reducing any potential impacts relating to privacy, visual bulk or heritage setting.

The rooftop private open space areas associated with the variation are oriented predominantly toward the north and incorporate landscaped perimeter buffers. These areas are set well back from adjoining properties and are screened by planter beds and landscaping, reducing opportunities for overlooking and minimising potential privacy impacts. As a result, the rooftop areas do not generate unreasonable amenity impacts beyond those expected under a compliant building envelope.

In these circumstances, the variation reflects a redistribution of building mass across a sloping site rather than a material increase in the overall bulk and scale of the development. The proposal therefore does not result in adverse massing impacts beyond those reasonably anticipated by the planning framework applying to the site.

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 Clause 4.6 variation request demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development. The proposal remains compliant with the maximum permissible FSR and the variation arises principally from the interaction of the prescribed building height plane with the site's approximately 6.36m east-to-west fall. The exceedance is concentrated within the uppermost portion of the building and reflects a redistribution of building mass across the site rather than an increase in development intensity or yield.
- There are sufficient environmental planning grounds to justify the contravention. The variation does not result in any unreasonable environmental or amenity impacts when compared with a compliant building envelope. Additional overshadowing is minor and localised. The variation does not result in any unreasonable impacts on public or private views, visual privacy or the character of the locality. The proposal achieves the objectives of the development standard. The built form responds appropriately to the site's topography, minimises adverse bulk and scale impacts through a narrower building footprint and increased setbacks, maintains reasonable solar access outcomes, and presents a scale and form that is consistent with the future character envisaged by both the Housing SEPP and Mosman Council's emerging strategic planning framework.
- The proposal supports the delivery of additional housing, including 12 affordable housing dwellings representing 15% of the development's GFA, in a highly accessible location close to the Spit Junction Town Centre, public transport and services. The variation facilitates this outcome without giving rise to adverse environmental impacts and is consistent with the objectives of the Housing SEPP to increase housing supply and affordability in well-located urban areas.

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.