

## **CLAUSE 4.6**

### **Height of Building**

**50 Condoover Street,  
North Balgowlah**

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**RESPONSIBLE FOR THIS REPORT:**

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## TABLE OF CONTENTS

<b>TABLE OF CONTENTS</b> .....	<b>3</b>
<b>1 Clause 4.6 exception for Height of Building</b> .....	<b>4</b>
1.1 Overview.....	4
<b>2 Site Analysis</b> .....	<b>5</b>
2.1 Site description.....	5
2.2 Images .....	6
<b>3 Assessment</b> .....	<b>14</b>
3.1 4.6 (3)(a) - compliance with the development standard is unreasonable or unnecessary in the circumstances .....	14
3.2 4.6 (3)(b) sufficient environmental planning grounds to justify contravening the development standard.....	15
3.2.1 Appropriate location and no inappropriate impacts .....	15
3.2.2 Steeply sloping topography and a design that minimises its exceedance .....	15
3.2.3 Conservation of identified, natural, environmental features .....	15
3.2.4 The proposal is of good design and satisfies the relevant objectives of the Environmental Planning and Assessment Act.....	16
3.3 4.6 (4)(a)(ii) - the public interest .....	17
3.3.1 Objectives of the Development Standard.....	17
3.3.2 Objectives of the zone.....	21
3.4 Secretary’s considerations .....	22
3.5 Conclusion .....	22

# 1 Clause 4.6 exception for Height of Building

## 1.1 Overview

Clause 4.6 of the Warringah LEP 2011 is applicable to the proposal and provides a mechanism to allow an exception to a development standard.

The proposal exceeds LEP Clause 4.3 'Height of Building' (building height), which is a development standard, and an exception is sought.

The building height applicable to the site is 8.5m. The proposed development of the dwelling house on approved Lot 1 exceeds the 8.5m building height standard.

The proposal adopts a method of calculating building height established in the Commissioner's judgment in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582.

In summary:

- The proposed building height is variable and extends upto 9.135m above the existing ground level.
- The proposed building height represents an exception ranging from approximately 0.63m up to 0.68m.
- The proposed exception occurs in two locations:
  - The first location is at Level 4. At this point there is a 6.5m<sup>2</sup> area that is above the 8.5m plane. The exceedance is upto 635mm over a length 2.490m.
  - The second location is the roof over level 3 Balcony. There is a 9.6m<sup>2</sup> area above the 8.5m height plane. 683mm over a length of 0.84m [minimal breach]

Figures 1 and 2 in section 2.2 below shows the location, nature, and extent of the proposed development's building height exception.

## 2 Site Analysis

### 2.1 Site description

The site is located at 50 Condover Street, North Balgowlah. The site is legally described as lot 4 in deposited plan 30205. The site has an area of 847m<sup>2</sup> (as per survey) and is irregular in shape with access to two streets, Condover St to the north east and Kimo St to the south west.

The site is irregular in shape with frontage to Condover Street of 8.32m (cul-de-sac and existing vehicle access point), the rear boundary to Kimo Street is 13.715m. The northern side boundary measures 47.195m and the southern side boundary 36.55m and 25.3m.

The land contains a one and two storey brick and timber dwelling house with tile roof.

The topography slopes away from Kimo Street to Condover Street with a cross fall and level difference of approximately 15.6m between the rear and the front boundaries (approx. RL56 at the Kimo Street frontage down to RL40.4 at the Condover Street boundary).

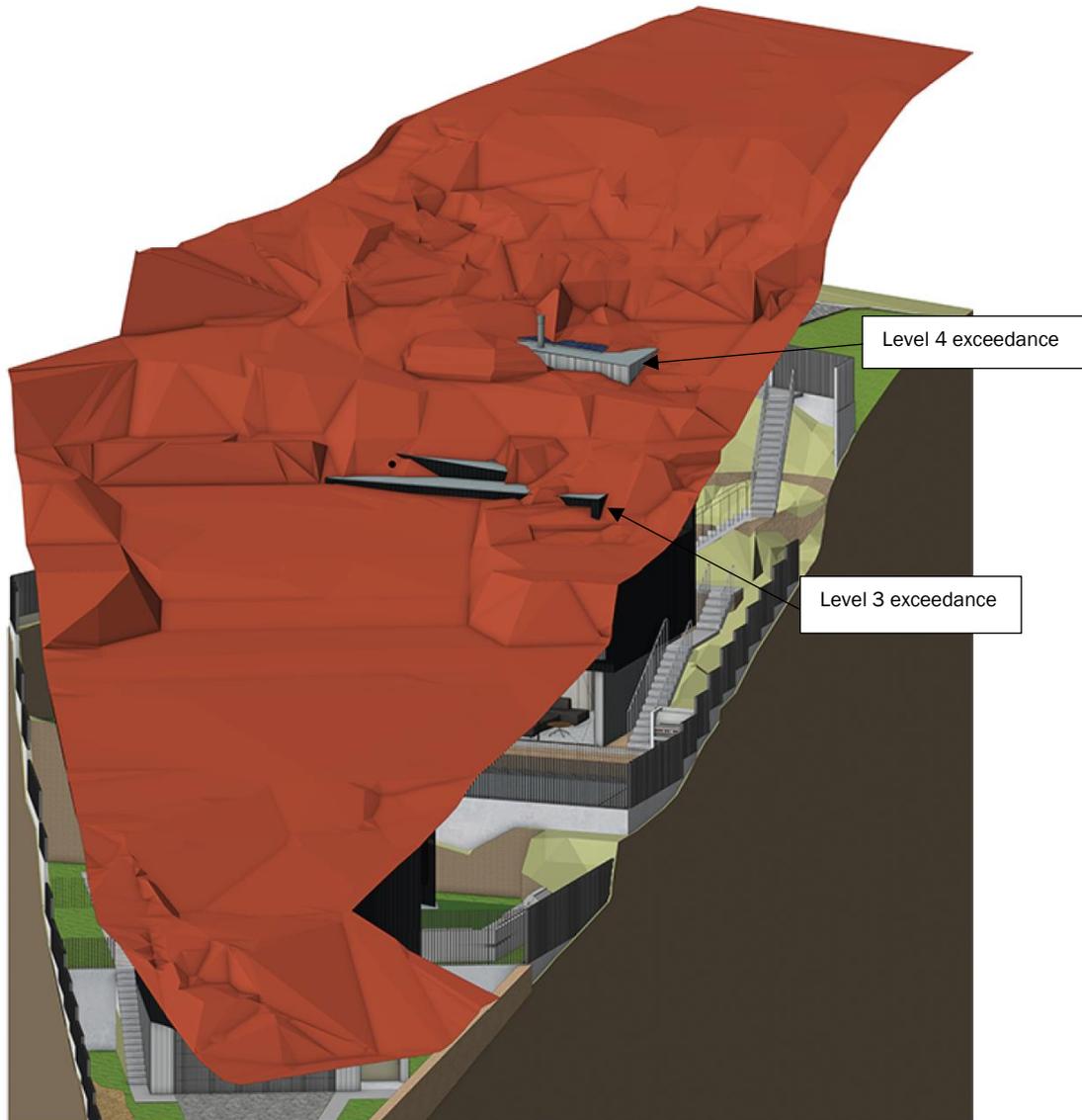
The site is located near the cul-de-sac at the northern end of Condover St where the subdivision pattern is irregular, there are angular boundaries and variable setbacks.

The site is opposite Condover Reserve, which is a relatively large area of recreational space. Furthermore, a large bushland reserve extends to the north containing Manly Dam; in recreational terms it comprises walking and mountain biking trails and offers visual amenity to the site.

The streetscape character is varied with a mix of building and housing types and scales and variable front setbacks. Surrounding development comprises a mix of detached residential dwellings, dual occupancies, and a duplex on various sized and shaped allotments. Development is of varying heights and scales comprising 1 to 3 storeys influenced by the sloping and undulating topography.

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

## 2.2 Images



**Figure 1 - building height plane 'blanket' and the proposed building showing the location and extent of elements exceeding 8.5m building height plane**

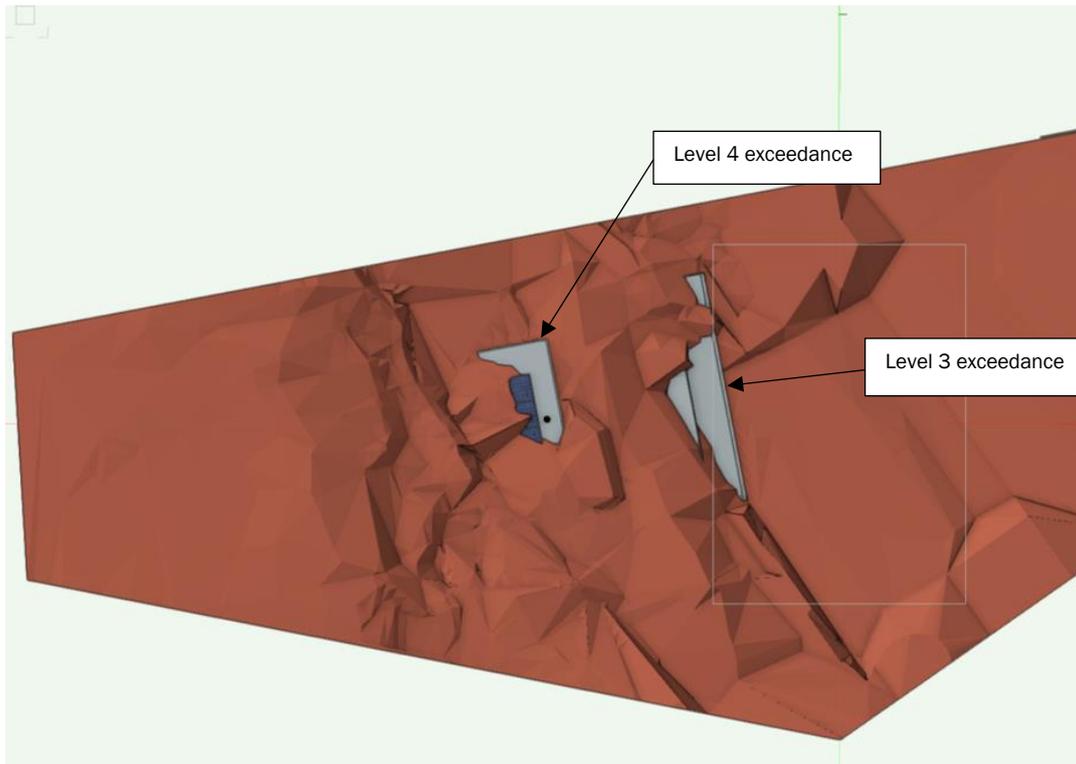


Figure 2 - location and extent of the building that exceeds the 8.5 building height plane

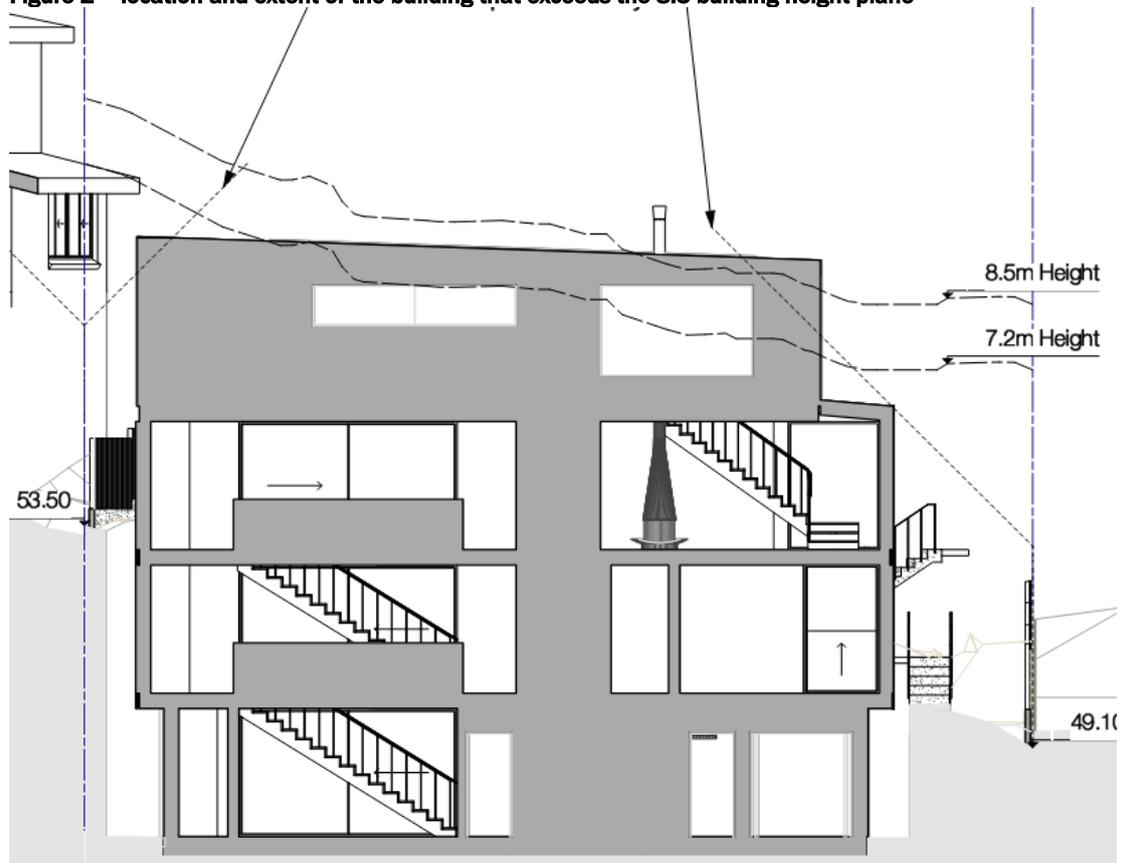


Figure 3 - section P-07 from the architectural plans



Figure 4 – footprint of the proposed dwelling house (level 1)



Figure 5 – the proposed building height exceedance will not be perceptible to a casual observer from Kimo Street (source: computer generated image from architectural plans).



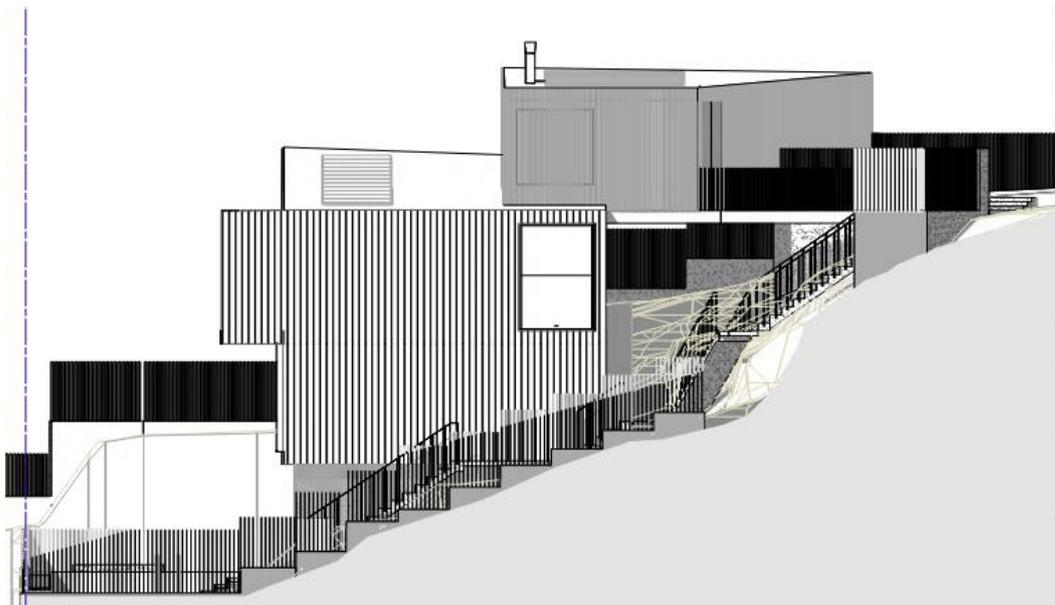
**Figure 6 – the proposed building height exceedance relates to the upper level (and the balcony roof off level 3) which is set back further from the boundaries (side and rear) and is of a different material. It will therefore be visually recessive when viewed from downslope areas (source: computer generated image from architectural plans).**



**Figure 7 – the treed character of the site's Kimo Street frontage**



**Figure 8 – Image of the proposed development as viewed from the adjoining residential land to the south**



**Figure 9 – excerpt for northern elevation. The proposal involves a terraced building form responsive to the sloping topography**





**Figure 12 – 52 Condover Street has a 3 storey presentation to the streetscape**



**Figure 13 – 3 storey character of 17 Kimo Street as viewed from the subject site**

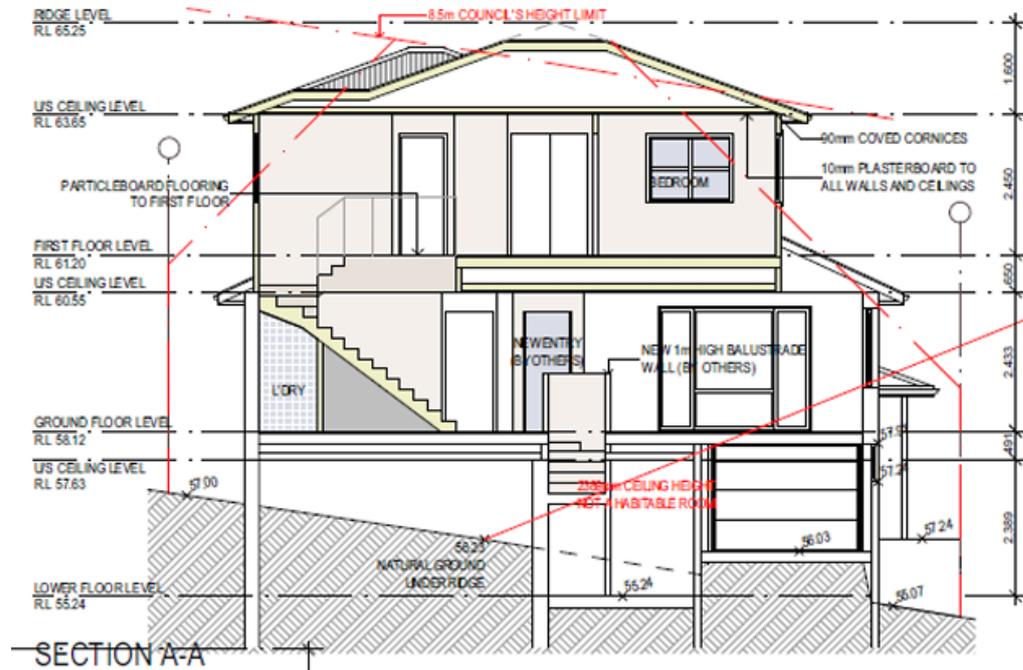


Figure 14 – 17 Kimo Street DA2020/0039 for alterations and additions to the dwelling house. Excerpt of plan section from the accompanying cl 4.6 exception request for building height showing building height (LEP) and side boundary envelope (DCP) exceedances



Figure 15 – computer generated image of the view of the subject site from Condoover Street

## 3 Assessment

### 3.1 4.6 (3)(a) - compliance with the development standard is unreasonable or unnecessary in the circumstances

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

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

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

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

The objectives of the height standard are addressed within section 3.3.1 below. In summary, the proposed height exception does not threaten the proposal's ability:

- to achieve a height and scale that is compatible with the height, scale and form of surrounding residential development.
- to achieve a terraced building form which reflects the slope and undulations of the topography.
- to achieve a development that is compatible with the scenic quality of the local area which includes the adjacent street and longer distance views of the hillside from the north and east.
- to achieve a presentation that is not visually intrusive, that does not result in inappropriate view disruption, and satisfies privacy and solar access controls.
- to achieve a residential development that is compatible with its setting that will enhance the built form and landscape quality on the site to the benefit the adjoining streetscape and nearby land.

## **3.2 4.6 (3)(b) sufficient environmental planning grounds to justify contravening the development standard**

In accordance with 4.6 (3)(b) there are sufficient environmental planning grounds to justify the exception to the development standard. The environmental planning grounds in support of the exception are described below.

### **3.2.1 *Appropriate location and no inappropriate impacts***

The proposed building height exceedance is relatively minor in extent, in a location that has a small visual catchment and no inappropriate adverse visual or amenity impacts on neighbouring land.

### **3.2.2 *Steeply sloping topography and a design that minimises its exceedance***

The sloping topography, in the location of the site where the exceedance occurs, makes strict numerical compliance difficult to achieve. The high exceedance results from needing set back from the street and to retain the rock outcrop and to achieve a compliant ceiling height for the stair. Notwithstanding, the proposed design minimises the extent of the exceedance and its impacts noting that:

- The proposed dwelling house is positioned at the base of an existing slope/bench (exposed rock shelf) in the topography clear of natural features.
- The proposed building height exceedance at level 4 is set back further from the boundaries (side and rear) and is of a different material. Its rear setback is increased from 6m to 11.25m. Its footprint is approx. 72m<sup>2</sup>, significantly less (69%) than the area of the lower levels 1 to 3 below which are approx. 105m<sup>2</sup>. This component of the building will therefore be visually recessive when viewed from downslope areas.
- The building design modulates its building form (terraced, reduced area, and increased setbacks to the upper levels) which avoids inappropriate bulk or shading impacts onto adjoining land (figures 5, 6, 8, 9).
- The proposal provides a contemporary and low-profile roof design which minimises its overall building height.
- The proposed exceedance achieves appropriate spatial separation to the neighbouring properties.

### **3.2.3 *Conservation of identified, natural, environmental features***

The sloping topography, in the location of the site where the exceedance occurs, makes strict numerical compliance difficult to achieve. Furthermore, the land's identified, natural, environmental features limit the flexibility in which the proposed dwelling house can be located on the site.

The proposed dwelling house results in different degrees of excavation. Of principal importance, the large fig tree in the south western corner of the site and the rock features sought to be conserved by Consent DA2021/1334 (for land subdivision) are not impacted by the proposed dwelling house.

The footprint of the proposed dwelling house closely reflects the indicative dwelling house area within approved Lot 1, regulated by condition 19 of Consent DA2021/1334. The

proposed building will be constructed 'safe of hazards' and clear of the land's identified, natural environmental features.

### **3.2.4 The proposal is of good design and satisfies the relevant objectives of the Environmental Planning and Assessment Act**

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

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

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

**In response to (c)**, the proposal will facilitate the orderly and economic use and development of the land, compatible with DA2021/1334 (which approved subdivision of the land), in a manner that satisfies the applicable planning considerations because it will facilitate the development of two individual lots, renewal of the land/dwelling, additional housing, in a highly desirable location, designed to satisfy contemporary living needs, and meet building sustainability (BASIX) requirements.

**In response to (g)**, the proposal results in a residential development that will promote good design and amenity of the built environment and increased landscaped planting at the site's street edges.

A positive streetscape outcome is achieved for the land through street setbacks that are compatible with the adjoining developments, the provision of a single vehicle driveway off each street frontage, deep soil areas, and planting around the proposed buildings.

### 3.3 4.6 (4)(a)(ii) - the public interest

#### 3.3.1 Objectives of the Development Standard

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

**(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,**

**In response:**

The objective seeks for the design to respond to its context, which in this case, comprises a mix of residential buildings on undulating topography, rather than just adhere to the numerical standard which typically, does not relate to the specific heights of buildings in a location or nuances of a site (Big Property Pty Ltd v Randwick City Council [2021]).

52 Condoover Street presents as a 3 storey building when viewed from Condoover Street (figure 12). 17 Kimo Street is a significantly elevated/ prominent 2 storey development (figure 13). With reference to figures 3, 5 and 6, it is evident that the proposed building height is lower than the adjacent building located at 17 Kimo Street.

The adjacent buildings are at different heights / levels, higher to the south (17 Kimo Street), lower to the north (52 Condoover Street), on different topography. There is no consistent pattern of development in terms of the location, alignment, and topography upon which adjoining developments are located. Noting this character, the proposed building height is compatible with the irregular pattern and mixed built form character within the local area.

For these reasons it is assessed that the proposed building form is appropriate in ensuring that its height and scale will be *'compatible with surrounding and nearby development'*.

**(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,**

Relevant to *visual impact*, Objective (b) of the building height development standard states:

***'(b) to minimise ... visual impact'***

**In response:**

The proposed building height exception minimises its visual impact from the locations that it may be seen noting:

- The site and the proposed building height has a small visual catchment.
- The proposed building height exception is located at the rear of levels 3 and 4. As a result the exception is setback, and is single storey, when viewed from Kimo Street. The upper level is approx. 2.5m above the street level (noting the upper roof level is RL 59.3 and the street level is approx. 56.8). The exceedance therefore minimises its visual impact when viewed from Kimo Street.
- The proposed building height exception is significantly setback from Condoover Street by approx. 35m to 39m. It will be obscured from the streetscape by the proposed dwelling house on lot 2. It will be significantly lower in height than the street trees that form a

visual backdrop to the site when viewed from the north and east (figure 15). The exceedance therefore minimises its visual impact when viewed from Condover Street.

- The proposal involves a terraced building form responsive to the sloping topography Figure 9. The proposed building height exceedance relates to the rear 'edges' of the upper levels (figures 1 and 2) which are set back further from the boundaries (side and rear) and of a different material. Level four's rear setback is increased from 6m to 11.25m. Its footprint is approx. 72m<sup>2</sup>, significantly less (69%) than the area of the lower levels 1 to 3 below which are approx. 105m<sup>2</sup>. Level 4 of the building will therefore be visually recessive when viewed from downslope areas, which are to the north (e.g. 52 Condover Street), the south (e.g. 48 Condover Street) and to the east (e.g. approved lot 2). The roof of the level 3 balcony is a minor building element that does not contribute to the bulk and scale of the proposed dwelling house. When viewed from properties to the south at 17 Kimo Street and 48 Condover Street, the building height exceedance will be imperceptible and therefore the proposed building height minimises its visual impact when viewed from these properties (figure 8). The building height exceedance therefore minimises its visual impact when viewed from adjoining residential properties.

For these reasons it is assessed that the proposed building height exception is appropriate in minimising its visual impact.

Relevant to view sharing, Objective (b) of the building height development standard states:

***'(b) to minimise ... disruption of views'***

**In response:**

Bushland and district views are available from the location to the north and east of the site.

The proposed dwelling house adopts a site-specific building form. As previously detailed, the proposed upper level has increased setbacks from the side and rear boundaries, is reduced in area, minimises its height with a low-profile roof, and is single storey when viewed from Kimo Street.

Given the sloping topography, the siting of the proposed development, and the elevated position of nearby development to the south and west, the proposal is not anticipated to inappropriately impede established views from surrounding residential properties or any public vantage points.

It is concluded the development satisfies the principles established by the Land and Environment Court of NSW in the matter of *Tenacity consulting v Warringah [2004] NSWLEC 140*. It is noted that access has not been gained to nearby properties in assessing this aspect; this may be undertaken when the DA is publicly exhibited to neighbouring properties.

For the above reasons, the proposed development is assessed to be of good design that minimises its disruption of views.

Relevant to privacy, Objective (b) of the building height development standard states:

***'(b) to minimise ... loss of privacy'***

**In response:**

The building height exception relates to a portion of the north eastern sections of the proposed dwelling house. These aspects are appropriately designed to address privacy

considerations. The following features of the design and its relationship with adjoining land are noted:

- Appropriate side building setbacks are provided noting the significant setbacks proposed where the site is on similar (or higher) levels to the adjacent land to the north, (52 Conover Street) with lesser side setbacks to the south where the design is excavated into the topography.
- The rear private open space within the property is appropriately separated by the level change proposed between the sites, boundary fencing, and landscape planting proposed near the common rear boundary between approved lots 1 and 2.
- No upper floor balconies or terraces are relied upon to achieve the minimum private open space requirements. The proposed balcony at level 3 is sufficiently elevated to look-out and over the proposed private open spaces within approved lot 2 which is positioned at RL 43.690, approximately 9.3 metres below the proposed balcony level (RL 53.03). Furthermore, there are appropriate landscaping treatments including retaining walls fencing and planting to limit / prevent sightlines between these spaces.
- No large upper floor balconies or terraces of a size that would allow for the congregation of people are adjacent to sensitive living areas within the neighbouring properties.
- Side boundary facing window openings are limited and appropriate in terms of their function (the rooms that they serve), location, sill height, and extent.

For these reasons, it is assessed that the proposed building height exception is appropriate in minimising any loss of privacy to neighbouring properties.

Relevant to overshadowing, Objective (b) states:

***'(b) to minimise ... loss of solar access'***

**In response:**

Being located towards the northern side of the site combined with increased setbacks to the northern side, the exceedance minimises its shading impacts on the neighbouring properties.

The proposed dwelling house is designed to be cut into a north facing, undulating, slope of land, and as a result, the length of shadows cast to the south are minimised by the slope.

The adjoining properties are dwelling houses; therefore, consideration is given to DCP controls D2 (Private Open Space) and D6 (Access to Sunlight). These require two hours of solar access to be maintained to 30 square metres of private open space for a 3-bedroom dwelling house.

Shadow diagrams depicting the shadows from the proposed dwelling house accompany the proposal.

The site and the adjoining properties have a north east / south west orientation. As a result, shadow diagrams demonstrate that shade will be relatively evenly shared between the rear yard (in the morning) of 17 Kimo Street and the rear yard of the adjacent property at 48 Conover Street (in the afternoon). This provides a relatively even distribution of shade, consistent with the local development pattern.

In accordance with Clause D6 of the DCP, the sunlight available to the private open space of adjoining the dwelling houses will not be impacted by more than 3 hours between 9am and 3pm on 22 June and the provisions of the control are satisfied.

The proposed building therefore satisfies the planning controls relating to solar access and the proposed building height exception minimises the loss of solar access.

***(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,***

The proposed development is within an established urban area that is characterised by low density development; it is not adjacent to coastal land. Bushland is visible to the north east (figures 10 and 11).

The proposed development will minimise any adverse impact on the scenic quality of local environment (context of the site), noting:

- The exceedance, being setback approx. 35m to 39m from the existing Condoover Street boundary and being visually screened from by the proposed dwelling house on approved Lot 2, minimises its visual impact when viewed from Condoover Street (figure 15) and public open space (including bushland to the north and east).
- The proposed exceedance will be beneath the existing tree canopy level that is established at the site's Kimo street frontage (figure 7) and this vegetation will complement the proposal as a development viewed within a landscaped setting.

The proposed development relates appropriately to the site topography.

The proposed exceedance is modest in extent and area. It is isolated to a part of the site that will be obscured from various available viewing locations.

The proposed building adopts a terraced form with smaller floor plate at level 4.

When viewed from bushland to the north/east the building height exception will be significantly lower than the dwelling house at 17 Kimo Street and other dwellings in Kimo Street that are on higher topography.

The design addresses the noncompliance by incorporating a low profile roof, inset upper level, terracing the Level 3 and 4 floor plates and a distinctive change in building materials. Such design features achieve variation in form and materials to building mass; provides visual interest to the rear building element; and enhances the presentation of the built form.

The proposed building height is compatible with the heights of hillside developments in the local area which range from approximately 2 to 3 storeys.

It is assessed that the proposed building height exception is appropriate in minimising any adverse impact of development on the scenic quality of Warringah's coastal and bush environments.

***(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.***

The proposal is assessed as being consistent with objective (d) noting that:

In terms of its visual impact, when viewed from areas to the north east of the site, including bushland and the public open space (Figures 10 and 11), the proposed development manages its visual impact by:

- A design that incorporates a low-profile roof, inset and reduced area of the upper level, terracing the Level 3 and 4 floor plates and a distinctive change in building materials.

Such design features achieve variation in form and materials, variation to the building mass; provides visual interest to the rear building element; and enhances the presentation of the built form.

- being compatible with the pattern of development within the local hillside context. The local area of mixed residential development character comprising developments ranging from approximately 2 to 3 storeys (and more) when viewed from downslope areas to the north and east.

In terms of its visual impact when viewed from Kimo Street:

- The proposed building height exception is located at the rear of the upper level of the proposed development. The major proportion of the proposed dwelling is positioned below the street level. The proposed development will present as single storey to Kimo Street compatible with the adjacent developments on Kimo Street. For these reasons, the proposed building height exception will be imperceivable from the Kimo Street.

In terms of its visual impact when viewed from Condover Street:

- The exceedance, being setback approx. 35m to 39m from the existing Condover Street boundary and being visually screened from by the proposed dwelling house on approved Lot 2, 'manages' its visual impact when viewed from Condover Street (figure 15).
- The proposed exceedance will be beneath the existing tree canopy level that is established at the site's Kimo street frontage (figures 6 and 7) and this vegetation will complement the proposal as a development viewed within a landscaped setting.

For these reasons the proposed development is assessed as having an appropriate visual impact of when viewed from public places such as parks, reserves, and roads.

### **3.3.2 Objectives of the zone**

The proposed development will be in the public interest because it is consistent with the objectives for development within the R2 Low Density Residential zone under the Warringah Local Environmental Plan 2011 in which the development is proposed to be carried out. The zone objectives are repeated and responded to below.

*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 ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah*

In response, the proposal is consistent with the zone objectives in that it:

- will provide for the housing needs of the community in a highly suitable location.
- will provide for improved housing on the site to meet contemporary needs.
- will provide residential development in a manner that is respectful of, compatible with, and not disruptive to, the character of the local development context.
- the proposal will maintain a landscaped setting to the land.
- the proposal will be in harmony with the natural environment of Warringah.

### **3.4 Secretary's considerations**

With regards to the Secretary's considerations the proposed variation of the development standard:

- Does not raise any matter of significance for State or regional environmental planning consistent with 4.6 (5)(a).
- The public benefit is not served by maintaining the development standard consistent with 4.6 (5)(b).

### **3.5 Conclusion**

The variation proposed to the *Height of Building* development standard has been appropriately acknowledged and the circumstances assessed, having regard to the objectives of the control. In conclusion, Council can be satisfied that:

- this written request has adequately addressed the matters required to be addressed by cl 4.6(3) and
- that the proposed development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4),

The proposal should be granted development consent.