



Land and Environment Court New South Wales

Medium Neutral Citation:

**Turramurra 88 Pty Ltd v Ku-ring-gai Council [2026]
NSWLEC 1229**

Hearing dates:

16-18 March 2026

Date of orders:

06 May 2026

Decision date:

06 May 2026

Jurisdiction:

Class 1

Before:

Horton C & Starr AC

Decision:

The Court orders that:

- (1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of development application eDA0180/25 in accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW).
- (2) The appeal is upheld.
- (3) Development application eDA0180/25 for the demolition of existing structures and construction of a residential flat building development comprising 85 apartments with basement car parking for 122 vehicles, consolidation of Lots 2 and 3 in DP 318518, associated civil works and landscape works at 3 and 3A Beaconsfield Parade, Lindfield is determined by the grant of development consent subject to conditions of consent at Annexure A.
- (4) The exhibits are returned except for Exhibits A, D, E, F and 10.

Catchwords:

DEVELOPMENT APPLICATION — residential apartment development — residential flat building in R4 High Density Residential zone — affordable housing — objectives of the Apartment Design Guide are considered — easement for stormwater — owners consent

Legislation Cited:

Architects Act 2003 (NSW), Sch 7
Biodiversity Conservation Act 2016 (NSW)

Environmental Planning and Assessment Act 1979 (NSW), ss 1.3, 8.7, 8.15

Land and Environment Court 1979 (NSW), ss 22, 39, 40

Environmental Planning and Assessment Regulation 2021 (NSW), ss 23, 29

Ku-ring-gai Local Environmental Plan 2015, cll 1.8A, 4.6, 5.21, 6.1, 6.3, 6.5, 6.6, 7.2

State Environmental Planning Policy (Biodiversity Conservation) 2021, Ch 6, ss 6.6, 6.7, 6.8, 6.9, 6.10

State Environmental Planning Policy (Housing) 2021, ss 8, 15A, 15B, 15C, 16, 17, 18, 19, 20, 21, 147, 148, 149, 155, 156, 158, 159, Ch 2, 4, 5, Sch 9, Div 1

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy (Sustainable Buildings) 2022, s 2.1

Cases Cited:

Canterbury-Bankstown Council v Hamptons Property Services Pty Ltd (2025) 264 LGERA 119; [2025] NSWLEC 41

Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582

Project Blue Sky Inc and Ors v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28

RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130

Saraswati v The Queen (1991) 172 CLR 21; [1991] HCA 21

Super Studio v Waverley Council (2004) 133 LGERA 363; [2004] NSWLEC 91

Truslan Dumaresq Development Pty Ltd v Ku-ring-gai Council [2022] NSWLEC 1169

Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

Texts Cited:

Department of Planning and Environment, Flood risk management manual (June 2023)

Ku-ring-gai Council, Ku-ring-gai Community Engagement Strategy / Community Participation Plan (2025)

Ku-ring-gai Development Control Plan (25 March 2024)

Category:

Principal judgment

Parties:

Turramurra 88 Pty Ltd (Applicant)

Ku-ring-gai Council (Respondent)

Representation:

Counsel:

H Grace (Applicant)

N Hammond (Respondent)

Solicitors:

Dentons (Applicant)

Sparke Helmore Lawyers (Respondent)

File Number(s): 2025/332481**Publication restriction:** Nil

JUDGMENT

- 1 **COMMISSIONER:** The land to the west of the shops on the Pacific Highway at Lindfield falls steeply along Beaconsfield Parade which provides access to, among other sites, a Council carpark behind. The carpark is accessed from Beaconsfield Parade via Drovers Way.
- 2 The site of the Council carpark is proposed for development known as the 'Lindfield Village Hub'. The form of development and certainty of the Lindfield Village Hub is an issue of dispute in this matter, but it is sufficient to identify its location and proximity to the site for now.
- 3 Development is proposed downhill from the Lindfield Village Hub site, on a site located on the corner of Beaconsfield Parade and Drivers Way known as 3 and 3A Beaconsfield Parade, Lindfield.
- 4 To this end, on 22 April 2025, the Applicant in these proceedings, Turramurra 88 Pty Ltd (Turramurra 88), lodged development application eDA0180/25 with Ku-ring-gai Council seeking consent for the demolition of existing structures and construction of 85

apartments within an 8 to 10 storey residential flat building over 3 to 4 levels of basement car parking and associated civil works (including bulk earthworks, stormwater management and construction of on-site detention facilities).

- 5 The DA was notified in accordance with the Ku-ring-gai Council Community Participation Plan in May and June 2025, in response to which public submissions were received.
- 6 As the DA was not otherwise determined, Turramurra 88 appealed its deemed refusal on 29 August 2025 under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), and the Sydney North Planning Panel formally refused the DA on 15 October 2025.
- 7 The Court granted Turramurra 88 leave to amend its DA on 12 February 2026, after which the Council elected to notify the amended proposal for a further period between 26 February 2026 and 11 March 2026, in response to which no submissions were received.
- 8 On the eve of the hearing, Turramurra 88 sought to once again to amend the DA by Notice of Motion that was not opposed by the Council, subject to time being granted for Council's experts to fully appreciate the amendments that were summarised by Counsel for Turramurra 88 and further elaborated on in the schedule of amendments accompanying the annexures to the Notice of Motion.
- 9 The affidavit of Ms Jodie Wauchope dated 13 March 2026, read without objection from the Council, deposes that the amendments result from joint conferencing between the relevant experts and are likely to have the effect of narrowing if not resolving issues in dispute.
- 10 The Court granted Turramurra 88 leave to rely on amended plans and approved the amending of the DA, exercising the power of the Court under s 39 of the *Land and Environment Court Act 1979* (NSW) subject to Turramurra 88 paying the Council's costs thrown away as a result of the amendments contained in the annexures, as agreed or assessed, in accordance with s 8.15(3) of the EPA Act.
- 11 The Council sought, and was granted, an adjournment to permit experts to confer on the amended development application after which the issues that remain in dispute were described in somewhat different terms by the parties, and so are distilled by the Court as follows:
 - (1) Inadequate lot width;
 - (2) Excessive height;
 - (3) Failure to comply with the Apartment Design Guide; and
 - (4) Use of Council land for easement

Inadequate Lot width

- 12 The site comprises 2 lots that are proposed to be consolidated, legally described as Lots 2 and 3 in DP 318518. Together, the two lots have an area of 3,066.3m².
- 13 The geometry of the site is somewhat wedge-shaped, with a depth of 89.160m, a rear boundary width of 38.08m and, most relevantly, a frontage to Beaconsfield Parade measuring 22.71m.
- 14 The Council contends the proposal is inconsistent with the provisions at cl 6.6(2)(b) of the Ku-ring-gai Local Environmental Plan 2015 (KLEP) as a minimum of 30m is nominated for a site with an area greater than 1,800m².
- 15 The Council contends that the non-compliance results in unreasonable amenity impacts to future development of the neighbouring site at 5, 5A and 7 Beaconsfield Parade about which more will be said.
- 16 It is helpful at this point to set out the provisions of cl 6.6 of the KLEP:

6.6 Requirements for multi dwelling housing and residential flat buildings

(1) The objectives of this clause are—

(a) to provide site requirements for development for the purposes of multi dwelling housing and residential flat buildings so as to provide for the orderly and economic development of residential land while maintaining the local character, and

(b) to ensure that lot sizes and dimensions of medium and high density residential sites allow for generous landscaped areas and setbacks to ensure the amenity of adjoining properties and to support the desired future character of these areas.

(2) Despite any other provision of this Plan, development consent must not be granted for the erection of multi dwelling housing or a residential flat building on a lot in a residential zone unless the lot has an area of at least 1,200 square metres and minimum dimensions (width and depth) of at least—

...

(b) if the area of the land is 1,800 square metres or more—30 metres.

...

- 17 The land does not answer the description of land excluded from the provision, and the parties agree the control applies.
- 18 That said, Turramurra 88 submits firstly that the proposed development complies with cl 6.6 because development for which consent is sought is of dimensions that measure a width and depth of at least 30m x 30m which is an appropriate method of measuring width and depth for the purposes of the control.
- 19 Next, Turramurra 88 identifies an inconsistency between the control at cl 6.6 of the KLEP and the requirement at s 159 of State Environmental Planning Policy (Housing) 2021 (Housing SEPP) which also contains a minimum lot width control of 21m, with which the site complies.
- 20 Section 159 of the Housing SEPP is in the following terms:

159 Minimum lot width

Development consent must not be granted to development for the purposes of residential flat buildings, independent living units or shop top housing on a lot in a Transport Oriented Development Area, unless the lot is at least 21m wide at the front

building line.

- 21 Turramurra 88 also submits that the provisions at s 158 of the Housing SEPP are also relevant as it is impossible to untangle the dual controls of lot size and width contained in cl 6.6 of the KLEP. Section 158 is in the following terms:

158 Exception to minimum lot size

(1) This section applies if another environmental planning instrument applying to the land specifies a minimum lot size for development for the purposes of residential flat buildings or shop top housing (a **minimum lot size restriction**).

(2) Development consent may be granted to development for the purposes of residential flat buildings or shop top housing on land in a Transport Oriented Development Area, despite a minimum lot size restriction.

- 22 The entanglement of lot width and lot size is further elaborated in written submissions to argue the area of a lot is a function of its minimum dimensions. That is, a minimum lot width of 30m x 30m required by cl 6.6(2)(b) results in a lot size of 900m² so that the minimum lot width operates as a minimum lot size control. By extension, the exception granted to lot size at s 158 of the Housing SEPP must also extend to the minimum lot width control by virtue of this entanglement.

- 23 The lot does not have a minimum dimension of 30m as is required by cl 6.6 of the KLEP. Instead, the lot has a minimum dimension of 22.71m. This occurs at the Beaconsfield Parade frontage.

- 24 The lot is, however, at least 21m wide at the front building line, and so complies with s 159 of the Housing SEPP. The lot width, when measured at the front building line, marked on architectural plan A 1005, is 25.4m.

- 25 The term “building line” is defined in the Dictionary of the KLEP as follows:

building line or **setback** means the horizontal distance between the property boundary or other stated boundary (measured at 90 degrees from the boundary) and—

- (a) a building wall, or
 - (b) the outside face of any balcony, deck or the like, or
 - (c) the supporting posts of a carport or verandah roof,
- whichever distance is the shortest.

- 26 “Building line” is also defined in the glossary of the Apartment Design Guide (ADG) as follows:

Building line the predominant line formed by the main external face of the building. Balconies or bay window projections may or may not be included depending on desired streetscape

- 27 It is only in the event of the Court finding against Turramurra 88 on these submissions that a written request in respect of the lot width is relied upon.

- 28 The Court does not accept the position put by Turramurra 88 in written submissions in closing (AWS) that the provision at cl 6.6(2)(b) “only requires that the lot be able to accommodate an inscribed square that is 30 metres wide by 30 metres deep” (AWS, par 13(a)), because that is not what the provision requires. Instead, when the context and purpose of the provision is properly understood, the objectives of the clause are first “(a) to provide site requirements...” and second “(b) to ensure that lot sizes and

dimensions of medium and high density residential sites...". The objectives of the clause are directed to the characteristics of site requirements and of lot sizes and dimensions.

- 29 The operative provision at subcl (2) is worded such that "...development consent must not be granted for the erection of multi dwelling housing or a residential flat building on a lot in a residential zone unless the lot has...".
- 30 The provision is in respect of *a lot* (emphasis added) in a residential zone. The object of the provision is in respect of a lot for which consent must not be granted unless *the lot* (emphasis added) has minimum dimensions of at least 30m.
- 31 Turramurra 88 argues that the text of the provision uses the term 'dimensions' as distinct from 'boundaries' which is widely used elsewhere in the KLEP and that different language in a legal document ordinarily conveys different meaning. However, the Court understands the term 'dimensions' to be, along with area, an *indicia* of the lot. Nowhere in the provision is there reference to the dimensions of development – be it an "inscribed square" or other shape.
- 32 Next, the Court does not accept the submission put by Turramurra 88 at [22] that the exception to lot size requirements at s 158 of the Housing SEPP serves also to set aside the lot width provision. The first reason for this is found in Turramurra 88's own written submissions that acknowledge s 158 likely only prevails in the event of inconsistency with the requirement at cl 6.6 of the KLEP for lot size, as distinct to lot width. The second reason is that the Court does not then read the provision, as it is put by Turramurra 88, that a minimum width and depth of 30m necessarily results in an area of 900m² but merely that the minimum dimension of a site, be it in width or in depth, is to be no less than 30m. A site with a minimum width and depth greater than 30m clearly results in a lot size of greater than 900m². Section 158 of the Housing SEPP does not serve as an exception to the lot width control.
- 33 However, there does appear to be an inconsistency between cl 6.6 of the KLEP and s 159 of the Housing SEPP.
- 34 The Court's starting point is to assume the controls at cl 6.6 of the KLEP and s 159 of the Housing SEPP are capable of sensible operation (*Saraswati v The Queen* (1991) 172 CLR 21; [1991] HCA 21) (*Saraswati*) and are to be construed so that its terms give

effect to harmonious goals when the context and purpose of the instruments are properly understood (*Project Blue Sky Inc and Ors v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28) at [70]).

35 As such, the question with which the Court grapples is whether the controls at cl 6.6(2) (b) of the KLEP and s 159 of the Housing SEPP have different but not inconsistent domains of operation: *Canterbury-Bankstown Council v Hamptons Property Services Pty Ltd* [2025] NSWLEC 41 at [48].

36 The two provisions deal with minimum lot width. Clause 6.6(2)(b) applies a minimum dimension to a lot, be it width or depth, of 30m. Section 159 prescribes a minimum lot width at the front building line on any lot of at least 21m.

37 It is possible for the two controls to be met. A lot with a minimum dimension of 30m, whether in width or depth, and presumably at any point along its length or width can be said to be at least 21m wide at the front building line.

38 However, that consistency is only achieved if the dimension at the front building line is 30m, which is a dimension that is no less than, and so at least, 21m.

39 If the lot is less than 30m wide at the front building line, or at any other point along its length, the lot does not have a minimum width or depth of 30m. An inconsistency arises, and s 8 of the Housing SEPP provides that the terms of s 159 prevails so that the proposed development is permissible as the lot width at the front building line is 25.4m, being at least 21m.

40 In the event we are incorrect in our view as to the inconsistency, the Court turns its attention to the cl 4.6 request on lot width prepared by prepared in accordance with cl 4.6 of the KLEP by Vaughan Milligan Development Consulting dated March 2026 (Width Variation Request).

41 In summary, the Width Variation Request states that:

- (1) The site does not meet the minimum 30m dimension (depth and width) for a residential flat building under cl 6.6 of the KLEP, for sites of more than 1,800m².
- (2) While not meeting the lot width standard for the first 16.7m north of the Beaconsfield Parade boundary, approximately 81.3% of the site complies with the standard, expanding to 38.08m at the rear northern boundary. The depth of the lot is 89.16m.

42 Notwithstanding the above non-compliance, Turrumurra 88 asserts the width of 24.5m at the front building line exceeds the minimum 21m lot width control required by s 159 of the Housing SEPP.

43 The Width Variation Request relies on what is commonly known as the first 'Wehbe way' to argue that compliance with the Lot Width standard is unreasonable or unnecessary in the circumstances of this case because the objectives of the standard at [16] are achieved notwithstanding non-compliance with the standard.

44 The First objective is achieved when reference is had to the architectural plans that

demonstrate the site is capable of accommodating development that generally complies with Council's controls and amenity standards so that the result is a built form compatible with its setting and with suitable setbacks to property boundaries.

- 45 The development is said to be consistent with the second objective by once again achieving Council's built form controls such as Floor Space Ratio (FSR), boundary setbacks and deep soil area to produce a bulk and scale that supports the desired future character of the immediate area. Where compliance is not achieved, that non-compliance is with certain objectives of the ADG that do not result in adverse impacts on adjoining sites, or are capable of remedy by screening to safeguard privacy.
- 46 However, the Council contests this and the evidence of the urban design experts centres on three aspects of amenity that the Council submits are not achieved and so does result in development that is consistent with the desired future character required by the second objective of the standard. Those aspects of amenity include solar access, natural cross ventilation and building separation.
- 47 By way of background to those aspects of amenity, as the application relates to residential apartment development, s 29 of the Environmental Planning and Assessment Regulation 2021 (NSW) (EPA Regulation) requires a statement to be prepared by a qualified designer, defined in the Dictionary at Sch 7 as a person registered as an architect in accordance with the Architects Act 2003 (NSW).
- 48 The statement is required by s 29 of the EPA Regulation to verify matters that are relevant to those matters that must be taken into consideration when determining a development application for residential apartment development, at s 147 of the Housing SEPP.
- 49 The statement prepared by Mr Mohammed ChehelNabi dated March 2026 (Arch Reg No 7057) (Exhibit F, Tab H) is consistent with the requirements at s 29 of the EPA Regulation and so permits the Court to take into consideration those matters at ss 147, 148 and 149 of the Housing SEPP.
- 50 For completeness, the Court notes the Council's advice that a design review panel of a kind cited at s 147(1)(c) is not constituted in the Ku-ring-gai local government area.
- 51 However, the Court also notes the design statement prepared by Mr ChehelNabi asserts that the proposed development complies with the design quality principles at Sch 9 of the Housing SEPP and certain objectives of the ADG.
- 52 The Council contends otherwise. In particular, the Council relies on the evidence of Dr Michael Zanardo to argue that when regard is had to the design principles for residential apartment development set out in Sch 9 of the Housing SEPP, the following principles are not achieved:
- 1 Context and neighbourhood character
 - 2 Built form and scale
 - ...
 - 4 Sustainability

...

6 Amenity

...

8 Housing diversity and social interaction

53 More specifically, the urban design experts contest three of the objectives in the ADG in respect of amenity, namely:

- (1) Solar access at objective 4A-1 of the ADG;
- (2) Cross Ventilation at objective 4B-3 of the ADG; and
- (3) Visual privacy at objective 3F-1 of the ADG.

54 At the outset, the Council draws the Court's attention to a definition of 'amenity' found in the glossary of the ADG that is relevant to the evidence of the urban design experts:

Amenity the 'liveability', comfort or quality of a place which makes it pleasant and agreeable to be in for individuals and the community. Amenity is important in the public, communal and private domains and includes the enjoyment of sunlight, views, privacy and quiet. It also includes protection from pollution and odours.

Solar access

55 The experts are largely agreed that the impact of the proposal on solar access to future developments at 5, 5A and 7 Beaconsfield Parade is acceptable. This is based on a reference scheme prepared for the site by Turramurra 88 appended to the joint expert report of the urban designers at Annexure B, but in respect of which the Court understands a development application designated as State Significant Development (SSD) is also under assessment.

56 Instead, the focus of the contention in respect of solar access is the effect of the Lindfield Village Hub cited briefly at [2] on the apartments in the development proposed for the subject site.

57 Relevantly, a maximum building height standard of 61m and a FSR of 4.5:1 applies to the Lindfield Village Hub site.

58 Dr Zanardo agrees that no masterplan has been prepared for the site owned by the Council, and no development control plan has been developed. There is no development application, no timeline for the preparation of the same nor any provisions within the Ku-ring-gai Development Control Plan (KDCP) to guide the preparation of a masterplan for the site. The guidance provided at Part 14E of the KDCP was not prepared under the current controls and so cannot be relied on.

59 In this scenario, Turramurra 88 submits that the concept plan for the Lindfield Village Hub (LVH Concept Plan) prepared by the applicant's architect, Architecture Urbaneia, is a reasonable application of the controls on the site.

60 Mr Vishal Lahkia, urban design expert on behalf of Turramurra 88, argues that the LVH Concept Plan, amended following advice from the Council, has sought to apply relevant controls reasonably, so that the height of the development steps down the site to the

south, the tower footprint is reduced, four storeys of non-residential use is assumed and the FSR is marginally below the maximum permitted. Following amendment, the LVH Concept Plan has reduced overshadowing on the proposed development.

- 61 Furthermore, the LVH Concept Plan has opted for a more limited allocation of non-residential uses such as a supermarket on one level below ground, rather than two and that lowering of such uses into additional excavation has been resisted. Such decisions have improved solar access to 3 apartments on the subject site, leaving a shortfall of 1.5 apartments from the 70% of apartments sought by Objective 4A-1 of the ADG to have such sunlight.
- 62 The underlying challenge for Turramurra 88, according to Mr Lakhia, is to locate development of 61m or 18 storeys in height, and a FSR of 4.5:1 that is positioned to the north of the site, and on higher ground, in a manner that best responds to the essential constraint posed by the resulting bulk and shadow.
- 63 Dr Zanardo's evidence is that even when it may be assumed Turramurra 88 has applied those controls on the site in the most advantageous of ways to this proposal, the impact is that fewer than 70% of apartments in the subject development receive a minimum of 2 hours direct sunlight between 9 am and 3 pm at mid-winter in living rooms and private open spaces.
- 64 Rather than the 70% of apartments receiving the duration of sunlight required by the design criteria at Objective 4A-1 of the ADG, only 68% of apartments receive the required sunlight if the form and layout of the Lindfield Village Hub envisaged by Turramurra 88 is assumed.
- 65 At the same time, the LVH Concept Plan is deficient in two ways, according to Dr Zanardo:
- (1) First, the footprint of the tower to the north of the Lindfield Village Hub site is up to 1,750m², and up to 30m deep which he considers an overly large tower footprint likely to accommodate 10 apartments per floor on upper levels and as many as 14 apartments on lower levels of the tower, if an average unit size of 90m² is assumed. This is in excess of the design criteria at Objective 4F-1 of the ADG which states the maximum number of apartments off a circulation core on a single level is eight.
 - (2) Second, this assumes four levels of non-residential use is over and above the number of storeys likely to be dedicated to such a use. If not taken up for this purpose, excessive gross floor area would be allocated in less desirable locations of the development.
- 66 Given these deficiencies, Dr Zanardo considers it likely that GFA would be distributed differently to that assumed in the LVH Concept Plan.
- 67 The issue is that the ADG defines solar access as 'the ability to continue to receive direct sunlight without obstruction from other buildings or impediments, not including trees'. According to Dr Zanardo, the words "continue to" requires sunlight to be

received by the proposal into the future.

68 The contest is over whether the proposed development has optimised the number of apartments receiving sunlight to habitable rooms, primary windows and private open space, required in order to achieve the objective at 4A-1 of the ADG.

69 The definitions that are relevant to the evidence on solar access as found in the glossary of the ADG as follows:

Daylight consists of both skylight (diffuse light from the sky) and sunlight (direct beam radiation from the sun). Daylight changes with the time of day, season and weather conditions

Solar access is the ability of a building to continue to receive direct sunlight without obstruction from other buildings or impediments, not including trees

...

Sunlight direct beam radiation from the sun

70 Turramurra 88 disputes the assertion put by the Council that the LVH Concept Plan is a 'best case scenario' that is advantageous to the proposed development. The LVH Concept Plan applies the maximum height and virtually the maximum FSR to a site that may not be the case in some future development that is realised differently to that assumed by the LVH Concept Plan. As such, Turramurra 88 considers the LVH Concept Plan to be a 'worst case scenario'.

71 In closing, Turramurra 88 submits that the savings provision at cl 1.8A of the KLEP saves the effect of the amended height and FSR on the LVH site, such that the Court must determine this matter as if the KLEP, as amended November 2025, had not commenced.

72 While not contested by the Council, it matters not. It is commonly held that the Council car park is proposed for redevelopment and that no masterplan, reference scheme or other proposition currently exists to inform development in the locality. The area is undergoing significant change. Absent a masterplan or reference scheme for such a large site, located as it is on higher ground, any development other than low rise development will overshadow development on lower ground to the west to some degree during morning hours.

73 The assumptions made in developing the LVH Concept Plan are not unreasonable, and the massing arranged on the LVH site is not without logic. Taller forms are located to the north-east, closest to the Pacific Highway and where morning shadow will fall first on the LVH Site, mitigating the effect on development to the west.

74 The size of the tower footprint is not dissimilar to the area of the proposed development at Level 3, when regard is had to the GFA calculations (Dwg No. A 2000/1), that we note is served by two circulation cores and so answers concerns held by Dr Zanardo at [65(1)].

75 Next, the Court accepts Mr Lahkia's observation at [61] that the LVH Concept Plan has not opted to maximise non-residential floor space below ground, and while respectful of Dr Zanardo's experience, the Court is not provided with the basis of the assertion at

[65(2)] that the non-residential floor space is excessive.

- 76 Finally, as the land is in Council ownership, it is reasonable to expect that further strategic planning and procurement pathways required to develop the LVH site will have regard to the opportunities and likely impacts of development on the site in its locality.
- 77 Whether or not the solar access to the subject development would be improved by achieving a compliant lot width frontage was not the focus of the expert evidence. It may be that development located further to the west may achieve greater compliance with the criteria at Objective 4A-1 of the ADG. However, in our view a Lot width frontage that complies with the standard would not ‘make the difference’. Furthermore, the Court is tasked to consider the development the subject of the development application and not some hypothetical development. Having considered the evidence of the experts, we find solar access provision to the development acceptable, and not at odds with the desired future character of the area. Instead, we note it is consistent with the desired future character when certain assumptions, reasonably made in our view, are made as to the LVH site.

Cross ventilation

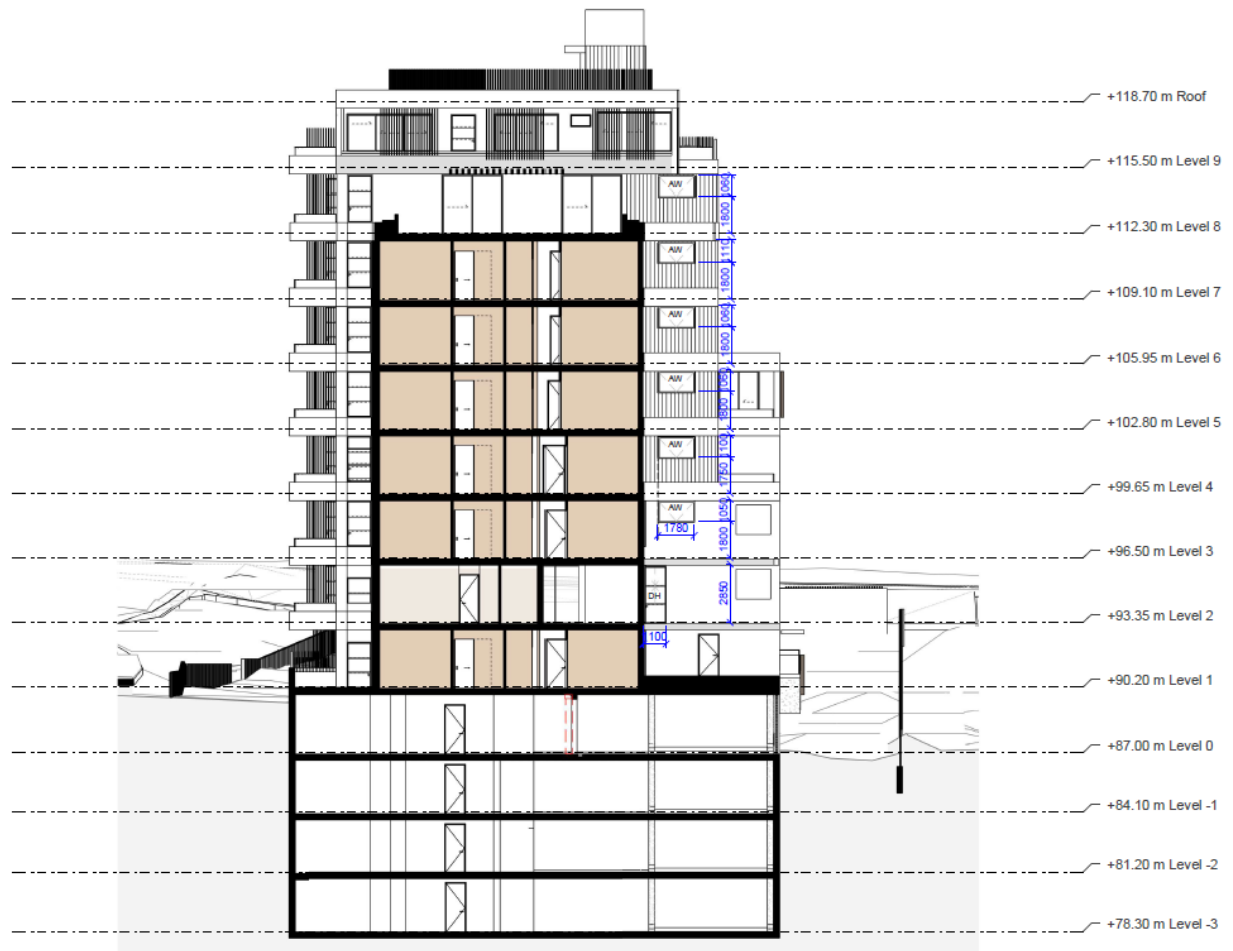
- 78 The dispute in respect of cross ventilation initially centred on whether certain apartments are properly considered ‘corner apartments’ as defined by the ADG and whether those apartments may be counted towards the total number of apartments that achieve Objective 4B-3 of the ADG, that provides:
- The number of apartments with natural cross ventilation is maximised to create a comfortable indoor environment for residents
- 79 The design criteria in support of Objective 4B-3 provides, relevantly, that at least 60% of apartments should be naturally cross ventilated in the first nine storeys of the building.
- 80 Following joint conferencing, the disagreement between the urban design experts focused on whether nine apartments may be considered to be cross-ventilated. Those apartments are: B106, B206, A204, A305, B306, A405, A505, A604 and A704.
- 81 In particular, the experts are apart on whether those apartments located at the “generous building indentation” to the west of the proposed development may be properly considered ‘corner apartments’, defined in the glossary of the ADG as follows:

Corner apartment cross ventilating apartments on one level with aspects at least 90 degrees apart. Corner apartments are commonly located on the outermost corners of buildings

- 82 Mr Lakhia relies on a number of design measures applied to those apartments listed above, including minimising the depth of habitable rooms, operable windows that have an area greater than 5% of the floor area and internal layouts that minimise obstructions to airflow. A total of around 65% of the proposed apartments are identified by Turramurra 88 as achieving the objective at 4B-3 of the ADG.
- 83 Dr Zanardo regards those measures as more relevant to achieving Objective 4B-1 of the ADG, which provides guidance on natural ventilation, as distinct from natural cross ventilation. As it is put by Dr Zanardo, the difference might be thought of where cross ventilation encompasses a sensation of 'flowing' air movement over the human body to create a comfortable indoor environment for residents, natural ventilation is no more than fresh air through an open window.
- 84 Those apartments nominated by Dr Zanardo lack the necessary differential between positive and negative air pressure required to generate the air flow to achieve the definition of natural cross ventilation in the glossary of the ADG, which is in the following terms:
- Natural cross ventilation** natural ventilation which allows air to flow between positive pressure on the windward side of the building to the negative pressure on the leeward side of the building providing a greater degree of comfort and amenity for occupants. The connection between these windows must provide a clear, unobstructed air flow path. For an apartment to be considered cross ventilated, the majority of the primary living space and n-1 bedrooms (where n is the number of bedrooms) should be on a ventilation path
- 85 As the indentation to the west of the proposal is exposed to the same orientation as the primary façade of the apartments that face west, Dr Zanardo believes there is inadequate variation in air pressure to those two facades of the apartments at [80] to generate the necessary differential in air pressure, other than when a southerly breeze is blowing.
- 86 Dr Zanardo compares the differential likely at this corner condition to the differential likely to be generated by the vortices at an apartment located at the outermost corner where the likelihood of achieving a windward and leeward side is greater, and so the deferential in air pressure necessary to generate natural cross ventilation is also greater.
- 87 Turramurra 88 relies on a desktop study (Exhibit F, Tab J) and letter from ESD Scientific to support its assertion that 64.7% of apartments are cross ventilated.
- 88 The Council initially submitted prejudice at the late tender of an expert report for which leave had not been granted. However, on the final day of the hearing, the Council tendered a report prepared by Mr Che Wall of FLUX consultants dated 17 March 2026

refuting the findings made by ESD Scientific, and concluding that the apartments located adjacent to the indentation of the proposed development function in a similar manner than a single aspect apartment.

- 89 In the Court's weighing of the evidence, we note air movement is 3 dimensional, as is the impact of a large residential flat building in its context. Apartment A704 is the first apartment below the roof terrace at Level 8, which acts as a 'notch' between Tower A and Tower B. As such, we understand apartment A704 may benefit not only from southerly and westerly air movement but from easterly air movement through the 'notch' and into the upper stratum of the indentation that is likely to act as a leeward side when such winds prevail. Accordingly, while this aspect of the built form was not dealt by the wind experts, the Court's own view is that Apartment A704 may experience natural cross ventilation in such a scenario.
- 90 We also note the indentation has a width to depth ratio of between 2:1 and 3:1 that is considered by the design criteria at Objective 4B-2 sufficient to ensure effective air circulation and avoid trapped smells.
- 91 We also consider apartment A405, while unlikely to achieve natural cross ventilation for the reasons argued by Dr Zanardo, to be adequately designed to benefit from sufficient air exchange to create a comfortable indoor environment for residents by virtue of the generous window and door openings to an external balcony of 35m² in size, narrow layout of apartments and openings on more than one orientation. In making this observation, we do not suggest Apartment A405 achieves natural cross ventilation, but enjoys generous access to natural ventilation to achieve the objective at 4B-1.
- 92 Finally, we note the window openings in apartments A305, A405, A505, A604, and A704, while not initially depicted in the architectural plans, are shown on Dwg No. A2330 (Exhibit J), re-produced below, with dimensions of 1760mm wide x 1060mm in height. By any standard, this is a large window that is shown operable as a top hung, or awning, window.



93 As at [77], the Court has considered whether compliance with the Lot Width standard would result in a greater number of apartments achieving natural cross ventilation. In our view a Lot width frontage that complies with the standard would not 'make the difference'. Having considered the evidence of the experts, we find the number of apartments receiving cross ventilation in the development acceptable, and not at odds with the desired future character of the area.

Building separation

- 94 The Council also contends that the proposal fails to provide adequate building separation to neighbouring sites at 5, 5A and 7 Beaconsfield Parade, imposing unacceptable bulk into western setbacks that do not afford the visual privacy sought by Objective 3F-1 of the ADG.
- 95 As the second objective of the Lot Width standard considers “generous landscaped areas and setbacks” to be an aspect of ensuring the amenity of adjoining properties, it is relevant to consider this aspect of amenity within the context of the Lot Width Request.
- 96 The primary issue in dispute is that part of the development that is setback from the western boundary and northern boundary by 6m, and not 9m, when reference is made to the relevant table in the design criteria under Objective 3F-1.
- 97 At the outset of the oral evidence of the urban design experts, Dr Zanardo helpfully prepared a summary document (Exhibit 13) identifying those particular openings said not to afford the visual privacy desired between sites.
- 98 At issue is how storeys are counted. The difference between the experts is whether the basement carpark that protrudes from below ground should be counted as a storey, the relevance of which is the separation distance required by the design criteria at Objective 3F-1 of the ADG.
- 99 The design criteria at Objective 3F-1 of the ADG provides for building separation according to the following stepped formula:

Building height	Habitable rooms and balconies	Non-habitable rooms
Up to 12m (4 storeys)	6m	3m
Up to 25m (5-8 storeys)	9m	4.5m
over 25m (9+ storeys)	12m	6m

- 100 Mr Lahkia discounts areas of the basement carpark that protrude above ground by more than 1m due to the steep topography of the site and by virtue of those levels being ‘non-habitable’, and from where no visual privacy impacts result.
- 101 Dr Zanardo prefers to rely on the definition of ‘basement’ contained in the KLEP which limits such an area to no more than 1m above ground level. The protrusion above ground to the west and north are marked by Dr Zanardo on p 32 of the joint report ranging from 2.1m to 2.8m above ground level to the west, and between 1.5m and

2.1m to the north.

- 102 Dr Zanardo has particular concerns at the overlooking possible to the west from openings in apartments B305, B306, B705, noting that where proposed screens provide privacy, they also tend to obstruct views and so diminish the amenity for occupants of those spaces unless angled to allow a sightline. In closing submissions, Turramurra 88 propose that these privacy screens be so angled which we understand resolves Dr Zanardo's concerns.
- 103 Where openings to apartment B305 are likewise directed to the boundary with 5, 5A and 7 Beaconsfield Parade, the majority are from bedrooms or a kitchen. A balcony to apartment B306 also directly addresses the same boundary. On the architectural plans prepared by Architecture Urbaneia, this balcony addresses a void or courtyard that separates the two primary forms of the development assumed by Turramurra 88 on that site.
- 104 The Court notes the assumptions for development on 5, 5A and 7 Beaconsfield Parade are no more than that notwithstanding consent granted by the Court in Truslan that has been superceded by the SSD proposed on the site.
- 105 The plans for the SSD on 5, 5A and 7 Beaconsfield are not in evidence and so the Court recognises the precise form of development on that adjoining site is unknown at this time. However, we accept that development on the site may well include a central indentation, gap or landscape relief in a form assumed by the conceptual footprint shown on the architectural plans, and which allows those openings at B306 to likely address such an indentation, gap or landscape relief.
- 106 Dr Zanardo acknowledges that tree canopy is retained within the western setback to assist with screening to afford privacy, but also observes the Court's long held view that landscaping cannot be relied on for that purpose.
- 107 Similarly, Dr Zanardo notes the addition of planters to the perimeter of north-facing balconies in apartments B403, B404, B405 and B703, B704 and B705 does not make acceptable a departure from the separation required by the design criteria at [99]. Once again, the difference between the experts on the protrusion above ground of the lower levels means Dr Zanardo considers those apartments shown on the Level 7 plan facing north to be properly considered Level 9, to which a 12m setback should apply.
- 108 According to Dr Zanardo, references to building separation distances that are shared equitably between neighbouring sites originates from earlier references in the Residential Flat Design Code, superceded by the ADG, that assumed sites subject to redevelopment would achieve the required setback notwithstanding a prior non-conformance.
- 109 The building separation is, in part, a function of the subject site being not so much 'first in, best dressed' as is put by the Council in respect of solar access. Rather, as the subject site is bounded to the west and the north by development for which consent has

been granted, and to the east by the LVH Concept Plan, it may be more a case of 'last cab off the rank'.

- 110 There is no doubt, and it is not disputed, that this precinct is undergoing transition. While the precise boundaries of the precinct are not defined in the evidence, the Court is required by s 20 of the Housing SEPP to consider the desired future character of the precinct. Section 20 relevantly provides:

20 Design requirements

...

(3) Development consent must not be granted to development under this division unless the consent authority has considered whether the design of the residential development is compatible with—

...

(b) for precincts undergoing transition—the desired future character of the precinct.

- 111 Turramurra 88 asserts that this has been addressed by designing the form of Building A to have a 4 storey podium, with a tower above set back, such that the extent of setback encroachment is limited, and not without mitigation including privacy and landscape screening.
- 112 While the basement parking does protrude above the natural ground line of the site, by up to more than 4m, (Dwg No. 1503), the Court considers the primary task to be not so much a question of defining storeys, but of considering the environmental impacts of the height and building separation proposed at the levels of the proposal.
- 113 The object of Objective 3F-1 of the ADG is, in part, to achieve reasonable levels of external and internal visual privacy. The separation distances are expected to be equitably shared between neighbouring sites.
- 114 The architectural plans show the separation distances are equitably shared, with a 6m setback shown either side of the boundary shared with the SSD site up to and including Level 3, and a 9m setback for Levels 4-8.
- 115 The Court agrees with Dr Zanardo's observation that if privacy screens, proposed by Turramurra 88, to openings in apartments B305, B306, B705, were angled towards Beaconsfield Parade, they would provide screening without obstructing views or diminishing amenity of occupants to those apartments.
- 116 That said, where openings are to bedrooms, the Court regards privacy to be an outcome that is likely to be sought mutually and so is likely to self-regulate. Where openings are located at 90 degrees to the orientation of the kitchen workspaces, overlooking is unlikely to be the primary interest of the occupant.
- 117 Furthermore, the Court does not understand Turramurra 88 to rely on the planning principle in *Super Studio v Waverley Council* [2004] NSWLEC 91 for privacy to be achieved by use of landscape to apartments B403, B404, B405 and B703, B704 and

B705, but to merely propose integrated planter boxes to mitigate for the mutual benefit of future occupants of the subject development, and those in the development at 12-16 Bent Street.

- 118 Finally, the Court accepts that the balcony to B306 is to a one bedroom apartment that, subject to the final arrangement of built form on 5-7 Beaconsfield Parade, may look into some form of increased setback and is considered acceptable.
- 119 The Court does not find the building separation to impose such privacy impacts to warrant refusal, and proposes to adopt the condition of consent in respect of privacy screening to those apartments of greatest concern to the Council.
- 120 When those aspects of amenity are considered, the Court accepts that the development is sufficiently consistent with the desired future character of the area to satisfy the Court that Turramurra 88 has demonstrated that compliance with the numerical lot width standard is unreasonable or unnecessary.
- 121 The area is undoubtedly undergoing a rapid transition to higher residential density. It is an area in which development is in various stages of conception. This includes potential or proposed development to the east on the LVH Site, the site to the north at 12-16 Bent Street, and the SSD site to the west. All are, in the absence of time made available for strategic planning or master planning of the area prior to the significant changes to the planning regime, proceeding on the basis of development to each site individually. In the case of the subject development, the Court finds the subject development consistent with the desired future character, in accordance with s 20 of the Housing SEPP, and consistent with the aims at s 150 of the Housing SEPP.
- 122 As such, we are satisfied that strict compliance with the development standard is unreasonable or unnecessary in accordance with cl 4.6(3)(a) of the KLEP because the proposal is consistent with the objectives of the standard, notwithstanding the non-compliance.
- 123 Next, the Width Variation Request advances the following environmental planning grounds to justify the contravention of the Lot Width standard:
- (1) The width of the site is adequate to support development of a bulk and scale anticipated by the R4 zone, is consistent with the prevailing development pattern, and is compatible with the Beaconsfield Parade streetscape. As such,

this is orderly and economic use of the land, consistent with s 1.3(c) of the EPA Act, and it promotes good design that enhances the residential amenity of the area, consistent with s 1.3(g) of the EPA Act.

- (2) The scale and character of the development is compatible with the desired future high density character of the area that is characterised by the Council's own TOD scheme and the uplift provisions that seek to maximise affordable housing in the locality.

- 124 While most if not all of the grounds advanced by the Width Variation Request are general propositions that seek to do no more than promote the development as a whole, the Court accepts that the width of the subject site is affected by the alignment of Drovers Way to the east – a point made in describing the nature of the breach on p 3 of the Width Variation Request. Whether the alignment is determined by the large White Mahogany known as Tree 58 located at a kink in Drovers Way, or it has been planted at that kink in Drovers Way at a later date, the combination of the tree and the alignment of Drovers Way unquestionably serves to fix the Lot width at the precise location of the non-compliance. When coupled with the constraint of the LVH site to the east, and the SSD development proposed to the west, we consider this to be an environmental planning ground sufficient to justify the contravention. In short, the site is constrained either side so that the width of the lot fronting Beaconsfield Parade does not comply with the standard.
- 125 We are satisfied that there are sufficient environmental planning grounds to justify contravention of the development standard for the reasons set out in the written request, namely that the proposal is consistent with the R4 high density zoning and the emerging character of an identified TOD area, and for the reason to be derived from p 3 of the Width Variation Request at [124].
- 126 We note here that the town planning experts, Ms Asmaa Rabiee for the Respondent; and Mr Vaughan Milligan for Turramurra 88, agree that the terms of the Lot Width Request are acceptable and that there are sufficient environmental planning grounds to justify the contravention of the standard at cl 6.6(2)(b) of the KLEP.
- 127 For the reasons set out above, we are satisfied that Turramurra 88 has demonstrated those matters at cl 4.6(3) of the KLEP and so the Lot Width Request should be upheld.

Building height is exceeded

- 128 The Council also contends that the proposal exceeds the maximum building height permitted under s 16 of Housing SEPP and the provisions of s 155 of the Housing SEPP. Furthermore, that a written request prepared by Vaughan Milligan Development Consulting and dated March 2026 (the Height Request) in support of the variation is

unsatisfactory as it fails to demonstrate that strict compliance with the standard is unreasonable or unnecessary in the circumstances of the case. Nor does it provide sufficient environmental planning grounds to justify the contravention.

129 As the building height controls derive from a number of sources, it is relevant to set these out before turning to the terms of the Height Request.

130 The site is identified in the KLEP as R4 High Density Residential, in which residential flat buildings are permitted with consent where consistent with the objectives of the R4 zone. These objectives are:

- To provide for the housing needs of the community within a high density residential environment.
- To provide a variety of housing types within a high density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for high density residential housing close to public transport, services and employment opportunities.

131 The site is also identified on the “Transport Oriented Development Sites Map” (TOD Sites Map), contained within the KLEP (Housing) (Map Amendment No.1). As a result, the provisions of Ch 5 of the Housing SEPP apply to the development.

132 Next, on 13 June 2025, the NSW Government opted to discontinue the pathway that had been available to development for Transport Oriented Development State Significant Development (TOD SSD). Those applications already in the ‘TOD SSD’ pathway at that time were saved so that the provisions of the former TOD Controls continue to apply.

133 Finally, while yet further environmental planning instruments have since commenced since this time, it is commonly held that the relevant savings provisions serve to stay their effect on the application before the Court.

134 The upshot of all this is that when the controls found in the KLEP and Chs 2, 4 and 5 of the Housing SEPP are read together, the relevant standards are as those set out below.

135 Firstly, as the site is located on the TOD Sites Map (Exhibit 12, Tab 10), s 155(2) of the Housing SEPP provides for a height of 22m where development is for the purposes of a residential flat building.

136 However, as the proposed development comprises a component of affordable housing, provisions at ss 15A-21 of the Housing SEPP apply to development that is permitted with consent under Ch 5 (s 15C (1)(a)), as is the case here, and where an affordable housing component of at least 10% is proposed (s 15C(1)(b)) and finally where the

development is carried out on land within an accessible area, where, according to the Dictionary of the Housing SEPP, *accessible area* (emphasis added) means land within 800m walking distance of a public entrance to a railway station (s 15C(1)(c)(i)).

- 137 The proposal contains 18 affordable housing units that Turramurra 88 rely on to comprise an area greater than 15% of the total gross floor area of the development. Accordingly, an additional 30% building height, and FSR for that matter, is permitted by s 16 of the Housing SEPP which is in the following terms:

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).

...

- 138 Relatedly, s 156 of the Housing SEPP also deals with the provision of affordable housing in a residential flat building located within a TOD Area. Subsection (2) requires that not less than 2% of the GFA of the building to be nominated for affordable housing, to be managed by a registered community housing provider. Subsections 3 and 4 also relevantly provide:

(3) A requirement under a provision of another chapter of this policy, another environmental planning instrument or a planning agreement that requires the development to provide more affordable housing prevails over this section.

(4) Affordable housing provided as part of the development because of a requirement under another chapter of this policy, another environmental planning instrument or a planning agreement is not counted towards the affordable housing required under this section.

- 139 Whether or not the minimum affordable housing component is provided was initially a matter of some contention between the parties, however on the basis of amended GFA plans tendered on the final day of the hearing, and incorporated into Exhibit F, the

planning experts agree the affordable housing component achieves 15% of the GFA of the proposed development, being an area greater than that required by s 156, and so benefits from the bonus in the Housing SEPP.

140 We note here that no contention arises that the affordable housing component will be used for other than affordable housing for at least 15 years, and be managed by a registered housing provider, and conditions are agreed as the means by which the Court can be so satisfied.

141 Finally, when an additional 30% height is added to the height permitted by s 155(2) of the Housing SEPP, the parties agree a height standard of 28.6m applies to the proposed development.

142 As the proposed development has a maximum height of 34.21m, it does not comply with the relevant height of buildings standard.

143 It is the responsibility of the applicant to demonstrate that the matters in cl 4.6(3) have been addressed such that the Court, in exercising the function of the consent authority, may form the requisite opinions of satisfaction (per *Initial Action* at [15] and [25]). Additionally, and for the reasons shown in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [51], the Court, in exercising the functions of the consent authority, must “in fact” be satisfied of the above matters.

144 In *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (*Wehbe*) at [42]-[51], and also in *Initial Action* [17]-[21], Preston CJ outlined the following five non-exhaustive ways that may be used to demonstrate compliance with the development standard is unreasonable or unnecessary.

145 In addressing the ‘unreasonable or unnecessary test’ at cl 4.6(3)(a) of the KLEP, the Height Request asserts that, absent express objectives for the height controls at ss 16 and 155 of the Housing SEPP, the objective at s 15A of the Housing SEPP is relevant as follows:

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.

146 The Height Request:

- (1) Adopts the first way in *Wehbe* to argue the objectives of the development standard, identified as both the objective at s 15A of the Housing SEPP and the aims of Ch 5 of the Housing SEPP are achieved notwithstanding the non-compliance with the numerical standard.
- (2) Adopts the third *Wehbe* way to argue the objective’s purpose would be thwarted by compliance, rendering compliance with it unreasonable.

147 In advancing the first *Wehbe* way, the Height Request argues that the exceedance results from the site’s sloping nature and tapering shape, together with the provision of communal open space located on the rooftop. The height breach is limited to the lift

over-run and other rooftop structures that serve to support communal open space to all residents inclusive of in-fill affordable housing units and so is consistent with the objective at s 15A of the Housing SEPP.

- 148 The Height Request also states that while the development exceeds the height standard, the proposal complies with the floor space ratio permitted on the site, that we understand to infer development is of a size and scale that is in accordance with the provisions regulating bulk or density. Similarly, the Height Request asserts that the exceedance of height optimises the provision of affordable housing in accordance with the objective at s 15A set out at [145].
- 149 As the applicable height standard derives from ss 16 and 155 of the Housing SEPP, the Height Request also accepts the aims of Ch 5 of the Housing SEPP, found at s 150, are relevant. Those aims are:
- (a) to increase housing density within 400m of existing and planned public transport,
 - (b) to deliver mid-rise residential flat buildings, seniors housing in the form of independent living units and shop top housing around rail and metro stations that—
 - (i) are well designed, and
 - (ii) are of appropriate bulk and scale, and
 - (iii) provide amenity and liveability,
 - (c) to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community.
- 150 In respect of the first objective at s 150 of the Housing SEPP, the Height Request states that the development provides 85 dwellings, including 19 affordable dwellings within 400m of Lindfield Railway Station, served by the T1 and T9 rail services, as well as functioning as an interchange for multiple bus services. We note here that for reasons

related to those at [139], Dwg No. A2000/3 (Exhibit F, Tab Aiv), written submissions in closing from both parties, and agreed without prejudice conditions of consent confirm 18 affordable dwellings are proposed.

- 151 The exceedance of the height standard is moderated by the stepping of the development at the upper levels and the exceedance that remains permits a modest increase in dwelling supply including accessible and affordable dwelling close to public transport.
- 152 In respect of the objectives set out under subs 150(b) of the Housing SEPP, the Height Request asserts the development:
- (1) Responds to site-specific conditions and respects local content and the emerging character of new residential apartment development so that it is compatible in height, bulk and scale with existing development and future planning direction including the LVH Concept Plan.
 - (2) Is consistent with the housing density envisaged by Council's own TOD sites map.
 - (3) Incorporates high-quality landscape design including native vegetation of all sizes, including large canopy trees, to increase amenity for future occupants of the development and those neighbours on surrounding sites.
 - (4) Maximises residential amenity and safety in a variety of apartment sizes, utilises architectural modulation and a varied external materials palette to create appropriate articulation and setbacks.
- 153 The Court observes that issues of bulk and scale and amenity are also the subject of expert evidence considered by the Court at [46]-[121] that appears relevant here. The conclusion at [121] is adopted here also. In particular, we note the contribution to height made by the areas of basement car parking that protrude above the existing ground level.
- 154 While the Court at [112] considered the protrusion of the basement carparking to be properly a matter of privacy and not height exceedance, in considering the Height Request, that protrusion is a relevant matter to the extent it contributes to the height exceedance.
- 155 The solar analysis prepared by the architect is said by the Height Request to demonstrate no significant difference in impact between the proposed and a complying scheme and that no other impacts warrant strict compliance.
- 156 When regard is had to the solar analysis comparing the proposed envelope with a complying envelope, the Court agrees that the proposal improves, in part, the solar access to private open space shown in the SSD Concept Plan from the impact of development that complies with the relevant height standard by virtue of the 'notch'

previously identified at [89], through which sunlight is able to fall on the eastern face not otherwise evident in a complying envelope. The improvement is apparent from 10am onwards, and is within the vicinity of the protrusion at [112].

157 Relevantly, at par 9.1 of the joint report prepared by the urban design experts, it is agreed that the lift overruns will not contribute unreasonably to overshadowing.

158 The Height Request also advances the Third Wehbe way to argue the aim of providing affordable housing would be thwarted if strict adherence with the height standard is required without diminishing the impact of the development on the streetscape or neighbouring properties. In advancing its position, the Height Request asserts there to be no requirement for affordable dwellings to be confined to that part of the development that exceeds the height standard, but that one outcome of requiring strict compliance would be the relocation of the rooftop communal open space. Doing so would have the effect of reducing floor space on the site, and likely impede the provision of affordable dwellings.

159 We are satisfied that compliance with the height standard is unreasonable or unnecessary when the evidence before the Court is considered. For the reasons above at [147]-[157], we are satisfied that the relevant objectives of the standard are satisfied, notwithstanding the non-compliance.

160 Next, the Height Request advances several environmental planning grounds that it asserts are sufficient to justify the contravention of the height standard, including:

- (1) The proposal is consistent with the objectives of Division 1, s 15A, of the Housing SEPP as it provides for in-fill affordable housing. In doing so, the Height Request asserts that the increased height provides greater amenity to the proposal.
- (2) The proposed architectural design is consistent with the changing character of the area, responding to the bulk and scale of existing and emerging residential flat buildings within an identified TOD area, and in particular to adjacent sites at 12-16 Bent Street and 9-21 Beaconsfield Parade so that the orderly and economic use of the land is promoted, pursuant to s 1.3(c) of the EPA Act.
- (3) The proposal's design will provide amenity to both residents and to the neighbourhood, pursuant to objective 1.3(g) of the EPA Act. In linking the height exceedance to the provision of resident amenity, the Height Request claims consistency with the height and scale controls of the Housing SEPP.
- (4) The non-compliant building elements consist of lift access that enables all residents to access the communal rooftop open space. Given the location of the exceedance on the rooftop and at the centre of the building, it is limited in visibility as well as overlooking. It is sufficiently minor as to avoid adverse amenity impacts on solar access and natural ventilation. For neighbouring

properties, the exceedance is not likely to give rise to unacceptable privacy impacts, given the shielding effect of the lift location and its distance from the western boundary.

- (5) The visual presentation of the proposed development is not offensive, jarring or unsympathetic to its location, but is instead compatible with its context.

- 161 While a number of the grounds summarised above do no more than promote the development as a whole, the planning experts agree, at par 49 of the joint report (Exhibit 7) that the maximum exceedance is due in part to a localised excavation on the site that contributes to the exceedance.
- 162 The localised excavation was identified by the parties at the onsite view, and appears in red on a survey marked Exhibit C, located towards the centre of the site, and within the footprint of the existing building so that it is not readily visible.
- 163 The prior excavation of the site within the footprint of the existing building distorts the height plane when overlaid on the site and compared to the general topography of the site. As in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, at [74], this can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of the KLEP. The localised excavation does not fully explain the exceedance but is an aspect of it.
- 164 To the extent the Height Request asserts the impact of the built form exceeding the height standard does not impose unreasonable impacts on adjoining sites, we note the planning experts defer to the urban design experts on this point. The urban design experts agree at par 9.1 of the joint report that the contribution made by those apartments on level 9 to bulk and environmental impact is marginal, and the lift overruns will not contribute unreasonably to overshadowing.
- 165 So understood, the Court is satisfied that there are sufficient environmental planning grounds to justify the contravention of the height standard, and that Turramurra 88 has adequately demonstrated those matters to be demonstrated at cl 4.6 (3) of the KLEP such that the variation of the height standard should be upheld.

Stormwater

- 166 In the circumstances of this matter, the primary issue with stormwater is not the disposal of water from the subject site, but the carriage of water upstream from the site, being stormwater from the Council carpark.
- 167 Currently, stormwater drainage from the Council carpark traverses the subject site, passing through the root zone of a large mature Fig Tree, identified in the Arboricultural Impact Assessment (Exhibit 6) as T43, on its path to the west.
- 168 It is commonly held that the existing drainage does not have the required capacity and cannot be retained as-is. Turramurra 88 propose to intercept the existing drainage at the kerb and gutter at the western edge of the Council carpark, and to re-route the

drainage line to the north where it is clear of the proposed building footprint, before re-connecting to Council's drainage network at a pit to the west of the subject site.

- 169 The Court was assisted in considering the issues in respect of stormwater by the evidence of Mr Bruce Kenny on behalf of the Applicant and Mr Ross Guerrera on behalf of the Council. The experts conferred in the preparation of two joint expert reports; an initial joint report filed with the Court on 6 March 2026 (Exhibit 3) and a supplementary joint report filed 13 March 2026 (Exhibit 4)
- 170 The experts reached agreement on all aspects in dispute between the parties, including agreement on the following:
- (1) The existing 'pre development' scenario involves stormwater concentration and overflow at an existing pit identified at the onsite view, with the result being overland flow into the subject site quantified as 216 L/s for the 1% AEP, and 141 L/s for the 5% AEP.
 - (2) The drainage system now proposed for the site, described in general terms above at [168], results in a post-development scenario quantified as 60 L/s for the 1% AEP, and 0 L/s in the 5% AEP storm events.
 - (3) The existing overland flow into the site, described at [170(1)], is not deemed to be flooding so that the provisions of cl 5.21 of the KLEP dealing with flood planning would apply to the development. Instead, when reference is had to the NSW Government Flood Risk Management Manual, the overland flow into the site at the existing pit is more properly described as surcharge.
 - (4) The Stormwater Plans prepared by Hydracor conform to the water quality, streamflow and volumetric run-off requirements of the KDCP so that water sensitive urban design principles are incorporated into the design of the development, in accordance with cl 6.5(2)(a) of the KLEP, and that when the stormwater management system is considered as a whole, it will not impose any adverse impacts on the land to which the development is to be carried out or on adjoining properties, which includes the land owned by Council (cl 6.5(2)(c)) and finally avoiding adverse impact on the root zone of T43 is consistent with the requirement at cl 6.5(2)(d) of the KLEP to avoid, mitigate or minimise such impacts.
- 171 We note here that, on the basis of the Stormwater Plans and the agreement above, the Court is satisfied of those matters at cl 6.5(2) of the KLEP.
- 172 The site is also located within the Sydney Harbour Catchment area. As such, Ch 6 of State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) applies.
- 173 In respect of s 6.6 of the Biodiversity SEPP, we have considered those matters at s 6.6(1), and, for reasons stated below, we are satisfied that the stormwater drainage system will result in the quality of water entering Sydney harbour catchment being as

close as possible to neutral or beneficial, and the minimise the impact of water flow on Sydney harbour:

- (1) Roof water and collected surface and subsurface flows from the proposed development will be collected in a 40,000L pump out tank that is then directed to a combined onsite retention and onsite detention tank with a capacity of 86m³, proposed to be located below the basement carpark ramp.
- (2) MUSIC modelling on Dwg No. SW 13 and SW 14 of the Stormwater Plans demonstrates that the operation of pollutant traps and filtration will have a beneficial effect on the water quality entering the relevant catchment.

- 174 For identical reasons we have also considered those matters at ss 6.7 and 6.8 of the Biodiversity SEPP, and we are satisfied there will be no direct, indirect or cumulative impact on terrestrial, aquatic or migratory animals or vegetation to a minimum, and no adverse impact on aquatic reserves, or in terms of erosion, or flooding.
- 175 Neither will the proposed development have an impact on recreational land uses or access to public land, in terms set out in s 6.9 of the Biodiversity SEPP. Accordingly, we also accept and are satisfied that consulting with each of the adjacent or downstream local government areas is not required in accordance with s 6.10 of the Biodiversity SEPP.

An easement is sought

- 176 A feature of the stormwater drainage system proposed by Turramurra 88 at [168] is a deviation in the stormwater drainage required to remain clear of T43.
- 177 The deviation requires works in the adjoining Council carpark. Furthermore, in order to retain existing trees to the northern boundary adjoining 12-16 Bent Street, the drainage line is to be ‘micro-tunnelled’, a process we understand to be distinct from ‘underboring’.
- 178 For this to be achieved, a “launch pit” is required in the Council carpark, and another at the terminating end of that line.
- 179 It is commonly held that Owner’s consent has not been provided as required by s 23(1) of the EPA Regulation. According to Council, this is because the proposal is unsatisfactory given its reliance on Drovers Way, an undedicated future road, for access and easements.
- 180 Turramurra 88 acknowledges that an easement is required, not for the carriage of stormwater from the site, but for stormwater drainage infrastructure necessary to carry stormwater from Councils land, and into the subject site at a location agreed by the stormwater experts as the preferred path.
- 181 Turramurra 88 seeks for the Court to grant owners consent on behalf of the Council, exercising its powers under s 39(2) of the LEC Act, but that no more than this is necessary for the grant of consent.
- 182 Consent to undertake works on Council’s land, and any easement for the stormwater, can be a matter appropriately deferred in the conditions of consent.
- 183 As in *Truslan Dumaresq Development Pty Ltd v Ku-ring-gai Council* [2022] NSWLEC 1169 (*Truslan*), at [26], Turramurra 88 acknowledges but does not propose that the matter could be adjourned for this purpose, subject to Class 3 proceedings under s 40(1)(b) of the LEC Act. Instead, Turramurra 88 submits that resort to this avenue would only be appropriate if there is such uncertainty that the Court is not satisfied that development consent can be granted without the easement.
- 184 We note here that the decision in *Truslan* relates to the neighbouring site to the subject site at 5-7 Beaconsfield Parade, with the distinction here being that the land over which an easement is required is not private land, but land owned by the Council.
- 185 On the basis of consensus between the parties’ engineers that the likely environmental impacts of the easement for stormwater disposal on the site and adjoining properties are understood and that those impacts are satisfactory, it is the view of the Court that the imposition of the deferred commencement condition proposed is appropriate and

satisfactorily resolves the question of the easement in a manner consistent with the overriding purpose of the Court to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

- 186 For completeness, the deferred commencement condition requires Turramurra 88 to obtain all necessary approvals including Council's agreement as the owner of the land, prior to undertaking any work to construct the drainage works on Council's land.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 187 The Court is required to consider whether the land is contaminated in accordance with s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Hazards SEPP).
- 188 Turramurra 88 relies on a Preliminary Site Investigation prepared by GSNE Services dated 18 March 2026 (the PSI) that identifies potential areas and contaminants of concern, a preliminary conceptual site model and identification of data gaps.
- 189 The contaminants likely to be present on the site are, according to the conclusions of the PSI, likely to be of low significance to human and environmental receptors. The PSI concludes that a Detailed Site Investigation is warranted following the removal of the existing buildings and other structures on the site, after which the site is likely to be able to be made suitable.
- 190 On the basis of the conclusions and recommendations contained in Section 7 of the PSI, and the agreed conditions of consent that deal with unexpected finds, we are satisfied the site can be made suitable for the purpose for which development is proposed to be carried out.

State Environmental Planning Policy (Sustainable Buildings) 2022.

- 191 The application is accompanied by a BASIX certificate for 85 apartments dwellings (Cert No. 1787315M_02 dated 13 March 2026) prepared by Gradwell Consulting in accordance with State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable Buildings SEPP).
- 192 Embodied emissions are quantified in the BASIX Certificate, such that the Court can be satisfied that the embodied emissions attributable to the proposed development have been quantified in accordance with s 2.1(5) of the Sustainable Buildings SEPP.

Other jurisdictional preconditions to the grant of consent

- 193 The site is identified on the relevant Acid Sulfate Soils Map at cl 6.1(2) of the KLEP being class 5 acid sulfate soils (ASS), however, the site is not within 500m of another class of ASS and the works are not likely to lower the water table below 1m Australian Height Datum on adjacent Class 1, 2, 3 or 4 land and acid sulfate soils management is not required.
- 194 The development proposes excavation for the purpose of basement parking. A Geotechnical Investigation Report prepared by Green Geotechnics dated 28 February 2025 (Geotechnical Report) considers groundwater, excavation retention, foundation design and drainage following six boreholes drilled on the site to a depth of between 2.3m and 11.52m. The Geotechnical Report contains further recommendations, compliance with which we note is a requirement of Condition 72.
- 195 As stated earlier, the Stormwater Plans propose to address drainage patterns on the site, including to resolve overland flow ingress into the site, and Landscape Plans prepared by Site Image (Exhibit F, Tab C), when read in conjunction with the architectural plans, depict an extent of earthworks on the site that are unlikely to result in adverse off-site impacts. On the basis of those preceding documents, we consider those matters at cl 7.2(3) of the KLEP in respect of earthworks to be satisfactorily addressed.
- 196 It is relevant to note here that the Geotechnical Report cited in the without prejudice conditions of consent agreed between the parties is designated Revision B. It is in fact Revision C and references have been corrected by the Court at Condition 1 and Condition 72 accordingly.
- 197 While the Court was not assisted by detailed submissions on the issue, Council's internal referral (Exhibit 11, Tab 20) identifies that the site contains landscape consistent with plant community type 3136 Blue Gum High Forest (BGHF), a critically endangered ecological community under the Biodiversity Conservation Act 2016 (NSW). A Biodiversity Impact Assessment Report supports the development application, however it is commonly held that as no BGHF is proposed for removal, the requirement for a BDAR is not triggered. This is also relevant to cl 6.3 Biodiversity Protection in the KLEP as no native vegetation is proposed for removal from land mapped Terrestrial Biodiversity.

Public submissions

- 198 In addition to the public submissions contained in Council's bundle, two public submissions were received in response to the notification at [7]. In broad terms, the submissions oppose state government initiatives that are described as "blunt, top down, 'one size fits all'" that results in "many residents feel a sense of 'grief'" at the significant and irreversible change to their neighbourhood.
- 199 Those aspects of the submissions not otherwise addressed above are addressed as follows:
- (1) The Court has considered the issue of site isolation to 5a Beaconsfield Parade in the past (*Truslan*, at [55]-[60]), and is again advised by the parties in this case that the SSD development cited at [55] assumes the amalgamation of 5A into the adjoining site at 5 and 7 Beaconsfield Parade.
 - (2) A submission notes the close proximity of the Frances Street Conservation Area and the location of local heritage items. The site is not identified within a heritage conservation area, and no contention is raised in respect of heritage conservation. The Council considers the revised colours and materials of the development acceptable and to impose no adverse impact on its surrounds due to this.
 - (3) In respect of traffic, parking and transport, the Council's internal referral (Exhibit 11, Tab 23) notes the future proposal for a signalised intersection at the junction of Beaconsfield Parade and the Pacific Highway to improve the local road network.
 - (4) The risk of bushfire is raised, without reference to a particular concern or requirement requiring regard to be had by the Court, or the Council for that matter.
- 200 Having considered the public submissions made in this matter, the Court is satisfied that the matters relevant to the development the subject of the development application are adequately addressed and do not warrant the refusal of the development application.

Conditions are disputed

- 201 At the conclusion of the hearing, the Court directed parties to confer further on without prejudice conditions of consent, in the event the Court was minded to grant consent to the proposal. For the reasons set out in this decision, the Court is so minded.
- 202 The conditions are agreed, but for conditions seeking to defer commencement of the operation of the consent by changes to vehicle access and to hours of construction.
- 203 The condition Council seeks to impose as a deferred commencement condition in respect of vehicle access does not appear to arise as a matter of expert evidence, nor can its origins be explained by reference to the Amended Statement of Facts and

Contentions.

- 204 The Council seeks a vehicular access point with a minimum width of 6.1m and an appropriate sightline for vehicles, presumably exiting the basement to Beaconsfield Parade. Architectural drawing Dwg A.1005 appears to depict this arrangement.
- 205 The Council also seeks to defer commencement of the consent pending the relocation of nine (9) visitor bicycle parking facilities to the ground floor level outside the main lobby, where they are directly accessible from street level.
- 206 While this may have the effect of increasing the area of hardstand in the front setback and so alters the proportion of softscape proposed in the front setback to Beaconsfield Parade, which may be a concern of the Council's, it is not a reason in our view to defer the commencement of the consent. Rather we regard such a requirement, if it is to be imposed on the development, to be suited to Schedule B of the conditions, where Turramurra 88 propose the condition to be located.
- 207 Next, the Council seeks to impose conditions on the hours, and nature of work said to be identical to those imposed on development in the area. The proposed terms of a condition require demolition and/or excavation using machinery of any kind to be limited to between 7am and 5pm Monday to Friday, with a respite break of 45 minutes between 12pm and 1pm. No demolition and/or excavation using machinery of any kind is to occur on Saturdays, Sundays or public holidays.
- 208 The Court agrees with the submission of Turramurra 88 that mandating a cessation of work at a particular time may be ill-suited to the practicalities of work being undertaken on the site. The Court is aware that construction commonly includes such breaks during the day for a variety of reasons including morning tea, lunch break, meetings, deliveries and the like. Absent particular circumstances, it is not the place of the Court to mandate the time at which such breaks will be observed.
- 209 Turning our attention to the particular question of work permitted on a Saturday, Turramurra 88 submits it is unreasonable and unrealistic to prohibit work on Saturdays as it will only extend the construction timeframe and increase costs.
- 210 However, the Court does not read the proposed terms issued by Council as a prohibition on work on Saturdays. Rather, the terms proposed by Council on a Saturday are twofold:
- (1) For work to occur between the hours of 8am and 12pm, and
 - (2) That no demolition and/or excavation using machinery of any kind is to occur on a Saturday.
- 211 The terms said by the Council to be imposed on adjacent development permit rock breaking, rock hammering, sheet piling, pile driving and similar activities on certain hours during weekdays, and between 9am to 12pm, Saturday.
- 212 As such the Council would appear to propose conditions that are not identical but more onerous than the sites to which it refers. While excavation using machinery to rock

break, rock hammer, drive piles and the like is permitted on adjacent sites on Saturday between 9am and 12pm, the Council proposes that no such activity be permitted on the subject site between 8am and 12pm on a Saturday.

- 213 Likewise, the hours during which demolition, construction work and deliveries of building material and equipment are permitted also appear at odds with the terms of conditions said by the Council it seeks to match. While the Council seeks to limit those hours to 7am to 5pm Monday to Friday and 8am to 12pm Saturday on the subject site, the hours during which such work is permitted on adjacent sites is said by the Council to be between 7am and 6pm, Monday to Friday; and between 8am and 1pm, Saturdays.
- 214 It would appear that the Council proposes to reduce the hours during which demolition, construction work and deliveries of building material and equipment are permitted on this site by 6 hours each week when compared to adjacent sites, amounting to 24 hours over a 4 week period. This reduction is not explained.
- 215 As has been observed by the Court earlier, the area is undergoing rapid transition. The site is bounded by sites where development has been approved, and the site does not adjoin residential homes.
- 216 The Court does not understand there to be reasons for a shortening of the duration of work during weekdays, nor the limits imposed on a Saturday beyond those said to be imposed on adjacent sites.
- 217 As such, the Court imposes the following terms at Condition 65, which we understand to be consistent with the terms of recent development consent in the area, and to be reasonable and appropriate:

Demolition, construction work and deliveries of building material and equipment must not take place outside the hours of 7.00am to 6.00pm Monday to Friday and 8.00am to 1.00pm Saturday. No work and no deliveries are to take place on Sundays and public holidays.

Demolition and/or excavation using machinery of any kind must be limited to between 7.00am and 6.00pm Monday to Friday.

Rock breaking, rock hammering, sheet piling, pile driving and similar activities may only be carried out between the following hours:

- (a) 9am to 12pm, Monday to Friday;
- (b) 2pm to 5pm Monday to Friday; and
- (c) 9am to 12pm, Saturday.

Where it is necessary for works to occur outside of these hours (ie placement of concrete for large floor areas on large residential/commercial developments or where building processes require the use of oversized trucks and/or cranes that are restricted by Transport for NSW (TfNSW) from travelling during daylight hours to deliver, erect or remove machinery, tower cranes, pre-cast panels, beams, tanks or service equipment to or from the site), approval for such activities will be subject to the issue of an "outside of hours works permit" from Council as well as notification of the surrounding properties likely to be affected by the proposed works.

Failure to obtain a permit to work outside of the approved hours will result in regulatory action.

Privacy screening to the west

- 218 As stated at [102], Dr Zanardo's concerns at the impact on internal amenity for those occupants of west-facing apartments by privacy screens shown on elevations appears moderated or addressed in the event those screens are angled outward from the building to provide a sightline for occupants within.
- 219 While the Court's understanding is that the angle should favour a sightline to Beaconsfield Parade, when regard is had to the sun view diagrams, the Court relies on its own expertise to note that an angle favouring the north of the site would achieve the same degree of privacy between the subject site and 5-7 Beaconsfield Parade, while affording greater solar access to those apartments so screened. As solar access is an issue in dispute, such an orientation would appear to admit sunlight into the screened apartments between 2:45pm-3:45pm, provide the amenity sought by Dr Zanardo and not compromise the privacy for which the screens are intended.
- 220 The final form of the agreed conditions of consent do not address the position agreed at [102]. However, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters may be avoided (s 22 of the LEC Act), the Court imposes a condition of consent in the following terms:

Condition 3A. Privacy screens shown fitted to those windows and terrace openings on Elevation Southwest at Dwg No A.1603 Revision H are angled 30 degrees from the façade of the cladding adjacent to the opening.

Orders

- 221 The Court orders that:
- (1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of development application eDA0180/25 in accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW).
 - (2) The appeal is upheld.
 - (3) Development application eDA0180/25 for the demolition of existing structures and construction of a residential flat building development comprising 85 apartments with basement car parking for 122 vehicles, consolidation of Lots 2 and 3 in DP 318518, associated civil works and landscape works at 3 and 3A Beaconsfield Parade, Lindfield is determined by the grant of development consent subject to conditions of consent at Annexure A.
 - (4) The exhibits are returned except for Exhibits A, D, E, F and 10.

T Horton

Commissioner of the Court

A Starr

Acting Commissioner of the Court

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Decision last updated: 06 May 2026